WiRO
WorkCover independent review office

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RECOMMENDATION FOLLOWING AN APPLICATION FOR REVIEW OF THE INSURER'S WORK CAPACITY DECISION PURSUANT TO SECTION 44(1)(c) OF THE *WORKERS COMPENSATION ACT* 1987.

1. The injured worker (the applicant) seeks procedural review of a work capacity decision made by a licensed scheme agent of the Workers Compensation Nominal Insurer (the Insurer).

2. The applicant suffered psychological injury while working as a Compliance Auditor/Fraud Control Officer with an insurance company. Despite not being a frank injury, there is a notional injury date of 10 May 2010, which is accepted by the Insurer. There is no dispute about the injury having occurred in the course of employment.

3. The applicant was paid weekly benefits for all relevant periods and therefore was an existing recipient of weekly payments of compensation immediately prior to 1 October 2012. The applicant engages in the practice of writing fiction, some of which is occasionally published. This is done at home in his own time and he is only paid for such work as appears in print. The Insurer describes this as "working as a writer," a characterisation which is at best tenuous. It is clear the applicant does not have steady (or any) employment, nor does he work set hours or have a salary.

4. On 19 June 2013 the Insurer advised the applicant in writing of a work capacity decision which had been made on that date. He was advised that his entitlement to ongoing weekly payments of workers compensation would be terminated since he was found to have no entitlement under section 38 of the *Workers Compensation Act* 1987 (1987 Act). He was told the following things:

- He was assessed as having the capacity to work as a technical writer.[1]

- Despite the applicant's complete lack of qualifications for the role of technical writer, this role was identified as "suitable employment."

- The earning s for this work exceeded the transitional rate applicable to existing recipients of weekly payments.

[1] Despite having never worked as an employed writer, nor having any technical qualifications such as a science degree, the latter being a minimum requirement for the position.

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- The relevant entitlement periods in the legislation were clearly and correctly explained.
- It was noted that the applicant was "not currently working greater than 15 hours per week."[2]
- "As you have been paid 141.6 weeks of compensation, your claim now falls under the special requirements for continuation of weekly benefits under section 38. This is defined in section 38(3)(b) of the Act. Under this Act, workers must meet special requirements in order to continue receiving weekly benefits. A worker must be assessed as having a partial incapacity for work and is working[3] more than 15 hours, in order to continue to receive on-going weekly benefits. Based on this, you[4] entitlement will be reduced to $0."
- "Please note that your weekly benefits will remain the same until 25 September 2013 whereby your entitlement will reduce to $0 based on your current capacity, your ability to earn in suitable employment, and the number of weeks of weekly compensation you have received."

5. In the letter advising of the work capacity decision, no reference was made to the impact this decision would have on the applicant's entitlement to medical and related treatment expenses, nor was there any reference to section 59A(2) or (3). Further, while the letter advised that the decision was made "[f]ollowing an assessment of all available evidence," it did not disclose the date (or dates) on which this assessment occurred.

6. On 2 August 2013 the Insurer wrote to the applicant advising that an Internal Review had upheld the original decision. This letter repeated the omissions referred to in paragraph 5 above concerning medical benefits and the date of the first work capacity assessment.

[2] This conflicts with a submission from the Insurer to the merit reviewer, which represented that the applicant "has been writing from home for the last 12 months and working in excess of 15 hours." (See Merit Review decision at paragraph 21, third bullet point on page 4.)
[3] *sic*
[4] *sic*

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7. The applicant applied to the WorkCover Authority for a Merit Review of the Insurer's decision, which application was apparently received on 13 August 2013. In a recommendation dated 17 October 2013 the Merit Reviewer upheld the original decision of the insurer. The Merit Reviewer found that the applicant has no entitlement to weekly benefits in accordance with section 38 of the 1987 Act.

8. On 23 October 2013, the applicant requested the Independent Review Officer to undertake a review of the decision of the Insurer pursuant to Section 44(1)(c) of the 1987 Act. I am satisfied that the applicant has made that application within the time provided by that section and on the correct form.

The Applicant's Stated Grounds for Procedural Review

9. The applicant's grounds for pursuing procedural review are many and voluminous. Almost all of them go to the merits of his case and accordingly cannot be considered in the course of procedural review. The applicant also has an opinion of the merit review service which could be fairly styled as pejorative. Since my role is not concerned with the merit review of the work capacity decision, it is irrelevant for current purposes. There appear to be two grounds identified by the applicant which are fatal to the Insurer's position:

(i) The medical opinion in the case (from both sides) has always been that one thing the applicant can never do is return to his former employer. The Insurer even submitted the following on merit review:

- .[The applicant] cannot return to his previous employer due to the nature of his injury.[5]

(ii) The stated qualifications for the role of technical writer are beyond the applicant's training and experience. The applicant quotes a job description which clearly sets out the requirements for the position:

- Understand information design

[5] Merit Review at paragraph 21, page 3.

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- Understand information architecture
- Understand training material development, illustration and graphic design, website design and management, user interfaces and business analysis
- An associate's or bachelor's degree in science or technology is required
- A background in Journalism or similar writing field is helpful
- The person should be familiar with Photoshop and Illustrator

Submissions by the Insurer

10. The Insurer made no submissions in response to the application.

Legislation

11. Section 44(1)(c) of the 1987 Act limits the scope of procedural review to a review only of:

> the insurer's procedures in making the work capacity decision and not of any judg[e]ment or discretion exercised by the insurer in making the decision.[6]

Therefore while it remains the case that no discretion is unreviewable,[7] the Insurer's discretion when making a work capacity decision appears only to be reviewable in the course of merit review or Judicial review.

The procedures to be followed by the Insurer are set out in *WorkCover Work Capacity Guidelines* and *WorkCover Review Guidelines*.[8] Both sets of *Guidelines* are said to be delegated legislation and therefore must be complied with in order for a work capacity decision to be validly made. Given the overall beneficial nature of the 1987 Act and the serious consequences to workers if decisions are made incorrectly,

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[6] Judgement is misspelt in the Act as "judgment."
[7] See *Padfield v Minister of Agriculture, Fisheries and Food.* [1968] AC 997
[8] A short-hand name for *Guidelines for Work Capacity Decision Internal Reviews by Insurers and Merit Reviews by the Authority.*

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strict compliance with the *Guidelines* is required.

Process of the Insurer

13. The decision reached by the Insurer was certainly within the range of available decisions, and was upheld by the merit review service. The applicant has been paid for more than 130 weeks, and therefore section 38 is the applicable section of the Act to calculate entitlement. Being an existing recipient of weekly payments immediately prior to 1 October 2012, the applicant is subject to the transitional rate in Schedule 6, Part 19H, clause 2 of the 1987 Act. However, such considerations are of no interest on procedural review where the main relevant consideration is not *why* a decision is made, but *how* it is made.[9]

My Reasons:

14. The applicant's stated grounds for seeking procedural review can be dealt with using the numbering in paragraph 9 (i)-(ii) above:

(i) Since the applicant cannot on any view of the medical evidence ever be expected to return to his former employer, he asks the entirely reasonable question of why it is that the Insurer has a series of Injury Management Plans (IMP) which have returning to that very employer as the main goal. This must be in breach of at least two of the *Work Capacity Guidelines*, being 5.1[10] and 2.4, the latter of which says in full:

- 2.4 Work capacity assessments should be tailored to the worker. An understanding of the worker's circumstances and their injury ensures the right approach at the right time.

(ii) The "suitable employment" identified by the Insurer is in breach of the same *Guidelines* for the same reasons. The writing of fiction is nothing like what is required of a technical writer, as is obvious from a

[9] For a related discussion of the distinction see *Minister for Immigration and Citizenship v Li* (2013) 297 ALR 225 per Gageler, J at 253.
[10] "ensuring that the insurer meets their responsibility of establishing and supporting an injury management plan ***tailored to the worker's injury*** as set out in Chapter 3 of the1998 Act"(emphasis added)

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perusal of the qualifications set out at paragraph 9(ii) above. Even the Insurer shrinks from asserting that the applicant has a degree in science. Tolstoy himself might have struggled with "information architecture," not to mention Photoshop and Illustrator.

15. The Insurer made no submissions about compliance with the relevant statutory provisions and *Guidelines*.

Since procedural review requires a scrutiny of the decision-making processes of the Insurer, including an examination of compliance with legislation and *Guidelines*, rather than a consideration of submissions made by either party, the review process may proceed despite the absence of relevant submissions from either party. Any demonstrable error[11] on the part of the Insurer may invalidate the decision.

16. There are in my view several breaches of the *Guidelines* in addition to those appearing in paragraph 14 above which either individually or taken together are sufficient to invalidate the work capacity decision made by the Insurer.

- The work capacity decision letter made no reference to the impact of the decision on the applicant's entitlement to medical and related treatment expenses.

- The same can be said of the letter advising the outcome of internal review.

- Neither letter referred to section 59A(2) and (3).

- Collectively this constitutes four errors on the part of the Insurer, since each instance of failure to explain the impact of the decision and reference the legislation is duplicated.

- The relevant *Guideline* is 5.4.2 which requires the Insurer to:

    - Reference the relevant legislation

[11] For a recent examination of "demonstrable error" see *New South Wales Police Force v Registrar of the Workers Compensation Commission of New South Wales* [2013] NSWSC 1792 (11 December 2013) at paragraphs 39-56.

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  - State the impact of the decision on the worker in terms of their entitlement to weekly payments, entitlement to medical and related treatment expenses and return to ork obligation.

- These breaches are in addition to the breaches already identified at paragraph 14 (i) and (ii) of *Guidelines* 5.1 and 2.4.

17. Under the legislation the Insurer can make an assessment of the applicant's work capacity and then a decision about that work capacity, but they must comply with the legislation, the Regulation and the *Guidelines* in order to produce a procedurally correct result. In the current instance there has been more than one breach of the *Guidelines* which are to be treated as delegated legislation. Accordingly the work capacity decision must be found to be invalid.

My Recommendation:

18. For the reasons set out above I recommend that the Insurer undertake another work capacity assessment and, if it arises, make another work capacity decision, according to the *Guidelines* as gazetted by the Authority and according to the relevant legislation.

19. Since the applicant was an existing recipient as at 1 October 2012, he remains entitled to receive his pre-transition rate of weekly benefits until such time as he is validly transitioned under the Act. This cannot happen until a valid notice under section 54 is issued. Accordingly he remains entitled to his former weekly payments until he is validly transitioned and a section 54 notice issues and the relevant period of notice therein has expired.

20. Because the review process does not operate as a stay of the original decision, the applicant has not received weekly payments since 25 September 2013. Therefore it cannot be said that he "is receiving" compensation. This means that clause 21 of schedule 8 to the *Workers Compensation Regulation* 2010 cannot apply. It follows that he may be restored to the correct pre-transition amount forthwith and back-dated to

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25 September 2013, since there is no need for the effluxion of any notice period.[12]

21. Noting the binding nature of these recommendations[13] I recommend that the Insurer takes my views into account, and I recommend that the Insurer immediately gives effect to them.

Wayne Cooper
Delegate of the WorkCover Independent Review Officer
13 December 2013

[12] To the extent that clause 21 of schedule 8 of the *Regulation* conflicts with section 9 ("A worker ... shall receive compensation") section 33 ("compensation... shall include a weekly ***during the incapacity***") and section 38(2) ("A worker ... is entitled to compensation"), it is *ultra vires.*
[13] See section 44(3)(h) of the 1987 Act – recommendations made by the Independent Review Officer are binding on the insurer and the Authority.