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 is the applicant for a review of a work capacity decision made by an employer licensed to operate as a self-insurer by the WorkCover Authority of NSW (Insurer).

2. The applicant suffered injury to her back on or about 17 July 2007 whilst in the course of her employment as a merchandise manager with the Insured.

3. As a result of not being able to return to her pre-injury duties the applicant's employment with the Insured was terminated on 29 October 2010.

4. The applicant returned to work on 5 February 2013 with the Insured as a supervisor performing 'suitable duties.'

5. The applicant is currently working 38 hours per week and earning approximately $795.70 per week. She 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.

6. On 29 April 2013 the Insurer advised the applicant in writing of a work capacity decision which had been made on that date. She was advised that her entitlement to ongoing weekly payments of workers compensation would be terminated since she was found to have no entitlement under *Section 38* of the *Workers Compensation Act* 1987 (the 1987 Act).

7. The applicant was advised that as she had received weekly payments of compensation for more than 130 weeks she was to be transitioned in accordance with *Section 38* of the 1987 Act which deals with weekly payment entitlements beyond 130 weeks.

8. Under *Section 38 (3)* the applicant was assessed as having a current work capacity. It was explained in the work capacity decision that the applicant's entitlement to weekly payments of compensation would be compared to the transitional rate of $938.30 per week, as this was the

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amount indexed in the 1987 Act and was the rate which applied to all claims made prior to 1 October 2012.

9. As the applicant had already received more than 130 weeks of weekly benefits her entitlements would be capped to 80% of the transitional rate which resulted in a calculation of $750.64 per week. The applicant is presently earning $795.70 per week.

10. It was explained in the work capacity decision that the applicant's present earnings were in excess of the transitional amount to which she was entitled to as a result of the legislative amendments to the 1987 Act.

11. Therefore the applicant had no entitlement to weekly payments of compensation pursuant to the provisions of *Section 38* of the 1987 Act.

12. The applicant was advised that her entitlements to medical and related expenses would continue in accordance with the provisions of *Sections 59A* and *60* of the1987 Act.[1]

13. The work capacity decision was dated 29 April 2013. The worker was advised that the reduction of her weekly payments would take effect in three months on 29 July 2013.

14. The applicant made an inquiry of the WorkCover Independent Review Office ("WIRO") as to the work capacity decision. It was noted by WIRO that the worker had not been given the appropriate notice period of three months and four working days given the work capacity decision was in writing and mailed to the applicant.

15. As a result of the inquiry from WIRO to the Insurer in respect of the notice provisions the Insurer withdrew the work capacity decision dated 29 April 2013.

16. The Insurer issued a new work capacity decision dated 20 May 2013 in the same terms as the previous decision. However, the decision was to take effect from 26 August 2013. This notice period included the appropriate number of days allowable for service of the decision by post.

[1] See paragraphs 28-34 *infra*.

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17. The applicant requested an internal review of the Insurer's decision on 14 June 2013. That review was responded to by the Insurer in writing on 14 July 2013. The review confirmed the original work capacity decision.

18. On 28 July 2013 the applicant made an application to the WorkCover Authority of New South Wales for a merit review of the Insurer's work capacity decision. That merit review application was received within the 30 day period. A WorkCover merit review was completed and a Statement of Reasons issued on 1 October 2013. The Merit Reviewer upheld the original decision of the insurer. The Merit Reviewer found that the applicant had no entitlement to weekly benefits in accordance with *section 38* of the 1987 Act.

19. 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

20. The applicant's grounds for seeking procedural review are as follows:

(i) The insurer has not given sufficient weight to medical evidence;
(ii) The applicant's present earnings are less than her pre-injury earnings as a result of the injury;
(iii) The decision is unfair and unjust;
(iv) The insurer failed to take into consideration the long term effect the applicant's injury has on her working capacity.

Submissions by the Insurer

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

Legislation

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

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> 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.

Therefore while it remains the case that no discretion is unreviewable,[2] 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*. 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, strict compliance with the *Guidelines* is required.

Process of the Insurer

23. 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 as a result *Section 38* is the applicable section of the 1987 Act to calculate her 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.[3]

My Reasons

24. The applicant's grounds for seeking procedural review can be dealt with using the numbering in paragraph 20 above.

[2] See *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.
[3] For a related and recent discussion of the distinction see *Minister for Immigration and Citizenship v Li* (2013) 297 ALR 225 per Gageler, J at 253.

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(i) The Insurer has relied upon the applicant's nominated treating doctor's WorkCover Certificates of Capacity when making the work capacity decision in respect of the hours and suitable duties the applicant is certified to perform. It is noted at *Guideline 3* of the *Work Capacity Guidelines* that the WorkCover Certificate of Capacity is one of the many sources of information used to help inform a tailored approach to injury management and return to work planning for each worker;

(ii) The actual earnings and pre-injury earnings of the applicant are not grounds for procedural review;

(iii) Whether a decision is fair or unjust is a decision for the merit review. WIRO is able to review whether the procedure taken by the insurer to reach its decision is correct;

(iv) The long term effect of the worker's injury on her capacity to earn is not a ground for procedural review.

25. The Insurer made no submissions about compliance with the relevant statutory provisions and guidelines.

26. 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 on the part of the Insurer may invalidate the decision.

27. There is in my view a breach of the *Guidelines* which is sufficient to invalidate the work capacity decision made by the Insurer. By "sufficient" I mean that there is a clear breach of the *Guidelines*, which are delegated legislation and expressed in subjunctive terms[4] and accordingly any failure to comply would come within the description of "demonstrable error."[5]

28. The work capacity decision refers to *Section 59A* and *Section 60* of the 1987 Act without explaining the impact the work capacity decision will

[4] For instance, *Guideline* 5.4.2 has a decalogue of requirements preceded by the word "must."
[5] "Demonstrable error" was recently discussed by the Court of Appeal in *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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have on the applicant's entitlements to compensation under those sections.

29. The work capacity decision, directed to the applicant, dated 20 May 2013 stated *'your entitlement to medical and related expenses will continue in accordance with the provisions of S59A and S60 of the Workers Compensation Act 1987 as amended.'*

30. The internal review notice directed to the applicant from the Insurer dated 14 July 2013 stated *'your entitlement to medical and related expenses will continue in accordance with the provisions of S59A of the Workers Compensation Act 1987 as amended*.'

31. Any reasonable worker reading these statements would feel assured that their ongoing medical and treatment expenses would continue to be paid in the future for as long as they were required.

32. Neither of these broad statements by the Insurer informed the applicant of the effect the work capacity decision would have on her entitlements to medical and treatment expenses.

33. *Guideline 5.4.2* of the *WorkCover Work Capacity Guidelines* requires that the work capacity decision notice must ***'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 work obligations.'* (emphasis added). The failure of the insurer to properly explain to the applicant the impact of the work capacity decision upon her ongoing entitlement to medical and related treatment expenses is not only in contravention of the *Guidelines*, it is a demonstrable error and the work capacity decision is therefore defective.

34. The Insurer failed to explain the impact the work capacity decision because it at no stage informed the applicant that her entitlement to medical and related treatment expenses will cease on and from 26 August 2014 in accordance with *S59A(2). A fortiori* the applicant was not made aware of the restorative provision in *S59A(3).*

Immediacy of entitlement

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35. A worker who has satisfied the provisions of the 1987 Act has an immediate entitlement to compensation. In *Speirs v Industrial Relations Commission (NSW)* (2011) 81 NSWLR 348 Giles, JA (Allsop, P and Hodgson JA agreeing) reviewed the various references to entitlement in the 1987 Act and arrived at the following conclusion [at paragraph 85]:

> [I]n my opinion 'entitled to' in the definition in s 240(2) of the [1987 Act] does not mean entitlement established by a determination of the Workers Compensation Commission or the District Court, or by decision of the Board. The entitlement is **a right subsisting in law** when there has been injury satisfying s 4 and s 9A of the [1987 Act]. It may be recognised and given effect without tribunal or court determinations, as will commonly be the case.

Since the immediate entitlement to compensation is a right subsisting in law, it is hard to see on what basis clause 21 of Schedule 8 to the *Workers Compensation Regulation* 2010 presumes to impose a three month "notice period" prior to a worker receiving an increase in payments to which they would otherwise be immediately entitled. By "otherwise" I mean that anyone other than an existing recipient is entitled to an increase in benefits without the preclusion period in clause 21. I note also that section 33 of the 1987 Act requires compensation to be paid "during the incapacity" rather than at some later date. There is no Henry VIII clause making reference to an amendment to section 33 of the 1987 Act and it follows that clause 21 must be *ultra vires* to the extent that it conflicts with the section.

My Recommendation

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

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Since the applicant was an existing recipient as at 1 October 2012, she remains entitled to receive her pre-transition rate of weekly benefits until such time as she is validly transitioned under the Act. This cannot happen until a valid notice under *Section 54* is issued. Accordingly she remains entitled to her former weekly payments until she is validly transitioned and a *Section 54* notice is issued and the relevant period of notice therein has expired. The applicant should have her payments restored as and from the date when payments ceased.

37. Noting the binding nature of these recommendations[6] 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
18 December 2013

[6] See section 44(3)(h) of the 1987 Act – recommendations made by the Independent Review Officer are binding on the Insurer and the Authority.