

**State Insurance Regulatory Authority**  
**Workers Compensation**  
**Merit Review Service**

**FINDINGS AND RECOMMENDATIONS ON MERIT REVIEW BY THE AUTHORITY**

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**Worker:**

**Insurer:**

**Date of Review:**

**Date of Injury:**

**Claim Number:**

**Our Reference:**

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**FINDINGS ON REVIEW**

1. The following are findings made by the State Insurance Regulatory Authority (the Authority) on review and are to be the basis for the Insurer's work capacity decision.
2. The Worker has current work capacity.
3. The Worker is able to return to work in suitable employment in the role of a customer service assistant.
4. The Worker's entitlement to weekly payments of compensation falls after the second entitlement period under section 38 of the *Workers Compensation Act 1987* ("the 1987 Act").
5. The Worker does not meet the special requirements for continuation of weekly payments of compensation after the second entitlement period (after week 130) in accordance with section 38(3) of the 1987 Act.

**RECOMMENDATION BASED ON FINDINGS**

6. Pursuant to section 44BB(3)(e) of the 1987 Act, the Authority may make binding recommendations to an Insurer based on the findings of its review.
7. The Authority does not make any recommendations to the Insurer for the reasons below.

**BACKGROUND**

8. The Worker suffered an injury while working as a canteen assistant with Employer 1. The Worker and the Insurer entered into an agreement pursuant to section 66A of the 1987 Act. That agreement notes the Worker and the Insurer agreed that the Worker had a 6 per cent whole person impairment in 2006. In 2016, she received compensation for a further loss of 12 per cent whole person impairment. It is agreed the Worker now has an 18 per cent whole person impairment.
9. The Insurer made a work capacity decision reducing the Worker's entitlement to weekly payments of compensation to \$288.52 per week under section 38 of the 1987 Act. This decision was provided to the Worker.

10. The Insurer undertook an internal review and made a decision. That decision ceased the Worker's entitlement to weekly payments of compensation under section 38 of the 1987 Act.
11. The application for merit review was received by the Authority. The application has been made within 30 days after the Worker received notice of the internal review, as is required under section 44BB(3)(a) of the 1987 Act. The application has been lodged in the form approved by the Authority.

## **LEGISLATION**

12. The legislative framework governing work capacity decisions and reviews is contained in the:
  - *Workers Compensation Act 1987* (the 1987 Act);
  - *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act), and
  - *Workers Compensation Regulation 2010* (the Regulation).
13. Section 43 of the 1987 Act describes a "work capacity decision".
14. Section 44BB of the 1987 Act provides for merit review of a work capacity decision of the Insurer, by the Authority.

## **DOCUMENTS CONSIDERED**

15. The documents I have considered are those listed in, and attached to, the application and the Insurer's reply and the further information received from the Worker and the Insurer.
16. I am satisfied that both parties have had the opportunity to respond to the other party's submissions and that the information provided has been exchanged between the parties.

## **SUBMISSIONS**

17. In the application for merit review, the Worker submits:
  - She has worked since 2008 at Employer 2 doing customer service.
  - She has participated in two work experience placements as a sales assistant. She was not suitable for either position due to the weight she would be required to lift which was more than what her doctor had recommended and what she was capable of lifting.
  - She does not sell anything working for Employer 2. She provides customer service only. She informs people what is available and if they wish to leave their details with her, she passes those onto the showroom consultants. She continues to have constant pain and discomfort on the left side of her neck and left shoulder and she is starting to experience stinging at the base of her neck and skull and on the left side of her neck which she experienced before procedures with a pain management specialist.
  - The Worker has made submissions regarding work health and safety issues with her pre- injury employer and in relation to a functional assessment with Rehab Provider 1. She has also made submissions regarding the history of her symptoms and attendances upon rehabilitation services.
  - She continues to suffer headaches. She struggles with tightness on the left side of her neck, pain in the top of her left shoulder, pins and needles in her left hand (when laying down) through to her little finger. Stinging is coming back to the base of her skull and neck and

tenderness and pins and needles around her left lumbar area due to a bulging disk. She is unable to drive her manual car due to severe pain in her left arm, shoulder and neck. She relies on her husband to drive her to her job with Employer 2.

18. The Worker made further submission. Those submissions relate to the history of her symptoms and work trials. She continues to attend physiotherapy to do a strengthening program. This is done on a one-on-one basis to be tailored to her coping with each exercise. This is a work-in-progress and the physiotherapist is working on exercises to allow her to drive her car. She relies on her husband to drive her but he suffers from vertigo and is having more attacks. She can only drive his car using her right arm.
19. The Worker made the following further submissions:
  - She had a workplace assessment at Employer 2 stand. This was done while she performed her regular customer service tasks. This was all deemed suitable for her to continue. She was then told this was classified as being a sales assistant.
  - Over several years she had work experience with other employers but was unable to take up any employment with these due to being unable to lift the required weights.
  - She wishes to have a review of the sales assistant position.
  - She is still unable to lift or carry anything over 5 kg. Her neck becomes so tight if she has to have a few kilos to lift. It locks up and she is unable to concentrate and her thoughts become clouded.
  - She is able to continue with her position at Employer 2 because it is so flexible for her to move around to loosen her neck and back.
  - The canteen at Employer 3 was not a safe environment to work in and she still suffers from her injuries.
20. The Worker made further submissions to the Authority. These submissions relate to her injury and return to work with her pre-injury employer.
21. The Worker made further submissions to the Authority. These mostly relate to her injury and return to work with her pre-injury employer. She also advises that she has tried to secure more hours of work with her current employer, Employer 2, and works any additional hours that are available when another staff member is away.
22. The Worker supplied additional information to the Authority being correspondence in 2005 and WorkCover Certificates in 2005 and a copy of her diary entries for 2005.
23. The Insurer stated in its reply that it has no submissions at this time.
24. The Authority requested the most recent payslips for the Worker. The Insurer provided a payslip.
25. The Worker forwarded a further payslip and a further WorkCover NSW- certificate of capacity.

## **REASONS**

### **Nature of merit review**

26. This matter involves a merit review of the work capacity decision of an insurer in accordance with section 44BB(1)(b) of the 1987 Act. The review is not a review of an insurer's procedures in making the work capacity decision and/or internal review decision. The review requires that I

consider all of the information before me substantively on its merits and make findings and recommendations that, in light of the information before me, are most correct and preferable.

27. Noting the Worker's submissions above and the Worker's response to the Authority's email asking her to confirm which decisions she has referred for consideration by the Authority, I consider that she has referred the following decisions to the Authority for review:

- a decision about what constitutes suitable employment for a worker (section 43(1)(b));
- a decision about the amount the worker is able to earn in suitable employment (section 43(1)(c)), and
- any other decision of an insurer that affects a worker's entitlement to weekly payments of compensation, including a decision to suspend, discontinue or reduce the amount of the weekly payments of compensation payable to a worker on the basis of any decision referred to in paragraphs (a)-(e) (section 43(1)(f)).

#### Suitable employment

28. The Worker suffered an injury whilst working as a canteen assistant. She continued to work at the canteen until she had an operation on her left shoulder. The parties accept that she has been assessed with a whole person impairment of 18 per cent.

29. The issue for me is how the injuries impact upon the Worker's capacity for employment.

30. Section 32A of the 1987 Act defines "current work capacity" as:

*current work capacity, in relation to a worker, means a present inability arising from an injury such that the worker is not able to return to his or her pre-injury employment but is able to return to work in suitable employment*

31. "No current work capacity" is defined in section 32A of the 1987 Act as:

*no current work capacity, in relation to a worker, means a present inability arising from an injury such that the worker is not able to return to work, either in the worker's pre-injury employment or in suitable employment*

32. The Insurer has accepted that the Worker's current work capacity and recommendations on capacity are as set out in the latest WorkCover NSW – certificate of capacity issued by Dr H. The Worker has not referred that decision to the Authority for review. Dr H certified the Worker as having capacity for some type of employment for 8 hours per day, 3 days per week with the following recommendations on capacity:

Lifting/carrying capacity	2.5 kg
Sitting tolerance	1hr
Standing tolerance	0.5hr
Pushing/pulling ability	avoid
Bending/twisting/squatting ability	avoid

33. Dr H provided a further certificate of capacity. It is essentially in the same terms as previous certificates, however, the lifting and carrying capacity is 5 kg and there is nothing indicated for a standing tolerance.

34. I note the additional medical information before me states that in June 2016, Dr H referred the Worker to Dr T regarding the Worker's ongoing problems with her

cervical radiculopathy. Dr T sought approval from the Insurer for a left- sided greater occipital nerve injection and pulse radiofrequency treatment, a left-sided medical branch block testing from C2 to C4 and a left-sided C4 to C8 medial branch block test. Dr T also reported to Dr H. The current certificate of capacity from Dr H certifies the Worker with capacity.

35. There is no dispute before me with respect to the Insurer's decision that the Worker is unable to return to her pre-injury employment, and that decision has not been referred to the Authority.

36. Suitable employment is defined in section 32A of the 1987 Act as:

*Suitable employment, in relation to a worker, means employment in work for which the worker is currently suited:*

*(a) having regard to:*

- (i) the nature of the worker's incapacity and the details provided in medical information including, but not limited to, any certificate of capacity supplied by the worker (under section 448), and*
- (ii) the worker's age, education, skills and work experience, and*
- (iii) any plan or document prepared as part of the return to work planning process, including an injury management plan under Chapter 3 of the 1998 Act, and*
- (iv) any occupational rehabilitation services that are being, or have been, provided to or for the worker, and*
- (v) such other matters as the Workers Compensation Guidelines may specify, and*

*(b) regardless of:*

- (i) whether the work or the employment is available, and*
- {ii} whether the work or the employment is of a type or nature that is generally available in the employment market, and*
- (iii) the nature of the worker's pre-injury employment, and*
- (iv) the worker's place of residence.*

37. The Worker is currently working as a customer service assistant at Employer 2. She has been employed in that position since 2008.

38. Ms L, senior consultant and occupational therapist, from Rehab Provider 2 provided a workplace assessment report. Dr T attended upon the Worker's place of employment with Employer 2 at the sales stand in order to undertake a workplace assessment.

39. The physical environment of the workplace were stated to be:

- Employer 2 sales stand is a portable/pop up stand located in the general traffic flow area at specific shopping centres.
- The Worker has a chair, desk and display stands which she uses to complete her role as a sales consultant.
- The sales stand is open to the general public at various shopping centres and the Worker reported she is able to leave the stand as required to use the amenities or purchase food.
- The Worker reported the stand is transported at night to a different location and the only set up she is required to complete is placing small display stands on the table for potential customers.

40. The report states the sales stand is rotated between different shopping centres with trip times ranging from 30 to 60 minutes. The Worker is unable to drive to those locations and relies on her husband to transport her to and from work.
41. Ms M from Rehab Provider 2 undertook a case conference with Dr H and the Worker and noted that Dr H had reviewed the workplace assessment report and had discussed the physical demands of the role in relation to the Worker's current capacity for work. Dr H advised the role as a casual sales assistant is suitable employment and all parties endorsed the agenda.
42. The Worker submits that she is able to continue with her position at Employer 2 because it is so flexible for her to move around to loosen her neck and back.
43. The Worker has been employed as a customer service assistant with Employer 2 for 8 years. She has submitted that she is able to continue in that position because it provides the flexibility she requires to be able to undertake employment. Further, noting Dr H's recommendations on the Worker's capacity, his review of the workplace assessment and his comments in the case conference with Ms M from Rehab Provider 2, I am satisfied that her current role as a customer service assistant is suitable employment having regard to the nature of her incapacity and the information provided in the medical information before me.
44. On balance, and taking into account that the Worker has been employed as a customer service assistant with Employer 2 for 8 years, and having regard to the nature of the Worker's incapacity, her skills, work experience, and noting the balance of matters referred to in section 32A of the 1987 Act, I am satisfied that the role of customer service assistant is suitable employment for her.
45. I find that the Worker has "current work capacity" pursuant to section 32A of the 1987 Act.

#### Existing recipient of weekly payments

46. An "existing recipient of weekly payments" is defined in clause 1, Part 19H, Schedule 6 of the 1987 Act as:

*existing recipient of weekly payments means an injured worker who is in receipt of weekly payments of compensation immediately before the commencement of the weekly payments amendments.*

47. The Insurer has advised that the Worker is an existing recipient of weekly payments as she was in receipt of weekly payments of compensation immediately before the commencement of the weekly payments amendments. Therefore the weekly payments amendments as provided in Division 2, Part 19H, Schedule 6 of the 1987 Act apply to the Worker's entitlement to weekly payments of compensation.

#### Entitlement periods for ongoing weekly payments

48. The following provisions of the 1987 Act provide the basis for determination and calculation of a worker's weekly payments entitlement:
  - a. Weekly payments in the first 13 weeks are to be determined in accordance with section 36 of the 1987 Act ("the first entitlement period");
  - b. Weekly payments in weeks 14-130 are to be determined in accordance with section 37 of the 1987 Act ("the second entitlement period"); and
  - c. Weekly payments after the second entitlement period (after week 130) are to be determined in accordance with subsections 38(6) or (7), but only if the special

requirements for continuation of weekly payments after the second entitlement period are met in accordance with section 38 of the 1987 Act.

49. The Insurer's reply stated that the Worker has received 572 weeks of weekly payments of compensation up to the date of lodging the reply.
50. No dispute has been referred to the Authority that the Worker's entitlement to weekly payments of compensation currently falls after the second entitlement period and is to be calculated in accordance with section 38 of the 1987 Act.

Special requirements for continuation of weekly payments after second entitlement period (after week 130)

51. Section 38 of the 1987 Act provides that an entitlement to weekly payments after the second entitlement period is only available if special requirements are met as follows:
  - (2) *A worker who is assessed by the Insurer as having no current work capacity and likely to continue indefinitely to have no current work capacity is entitled to compensation after the second entitlement period.*
  - (3) *A worker (other than a worker with high needs) who is assessed by the insurer as having current work capacity is entitled to compensation after the second entitlement period only if:*
    - (a) *the worker has applied to the insurer in writing (in the form approved by the Authority) no earlier than 52 weeks before the end of the second entitlement period for continuation of weekly payments after the second entitlement period, and*
    - (b) *the worker has returned to work (whether in self-employment or other employment) for a period of not less than 15 hours per week and is in receipt of current weekly earnings (or current weekly earnings together with a deductible amount) of at least \$183 per week, and*
    - (c) *the worker is assessed by the insurer as being, and as likely to continue indefinitely to be, incapable of undertaking further additional employment or work that would increase the worker's current weekly earnings.*
  - (3A) *A worker with high needs who is assessed by the insurer as having current work capacity is entitled to compensation after the second entitlement period only if the worker has applied to the insurer in writing (in the form approved by the Authority) no earlier than 52 weeks before the end of the second entitlement period for continuation of weekly payments after the second entitlement period.*
52. A "worker with high needs" is defined in section 32A of the 1987 Act must be met, as follows:

*worker with high needs* means a worker whose injury has resulted in permanent impairment and:

  - (a) *the degree of permanent impairment has been assessed for the purposes of Division 4 to be more than 20%, or*
  - (b) *an assessment of the degree of permanent impairment is pending and has not been made because an approved medical specialist has declined to make the assessment on the basis that maximum medical improvement has not been reached and the degree of permanent impairment is not fully ascertainable, or*
  - (c) *the insurer is satisfied that the degree of permanent impairment is likely to be more than 20%*

*and includes a worker with the highest needs*
53. To satisfy the requirements of being a "worker with high needs" as set out in section 32A, at least one of sub-sections (a), (b), or (c) of the definition must be met by the worker.
54. A decision as to whether the worker is a "worker with high needs", is a work capacity decision under section 43(1)(f) of the 1987 Act.

55. The Worker and the Insurer have entered into an agreement pursuant to section 66A of the 1987 Act that the Worker has an 18 per cent whole person impairment. There is no evidence before me that an Approved Medical Specialist (AMS) has made an assessment of the Worker of more than 20% whole person impairment.
56. I am not satisfied that sub-section (a) of the definition is met.
57. In relation to sub-section (b) of the definition, there is no information before me an assessment of whole person impairment is pending which has not been made because an AMS has declined to make such an assessment on the basis that The Worker's condition has not reached maximum medical improvement, or the degree of permanent impairment is not fully ascertainable.
58. I am not satisfied that sub-section (b) of the definition is met.
59. Finally, the Insurer is not satisfied that the degree of permanent impairment is likely to be more than 20 per cent.
60. Accordingly, I am not satisfied, on the information before *me*, that the Worker is "a worker with high needs" pursuant to section 32A of the 1987 Act, as she does not meet the criteria in the definition. Therefore the requirements of section 38(3) of the 1987 Act apply in this matter.
61. With respect to sub-section 38(3)(a), I note that this sub-section does not apply to an existing recipient of weekly payments for the purposes of clause 16 schedule 8 of the Regulation.
62. With respect to sub-section 38(3)(b), Ms H is currently working as a casual customer service assistant with varied hours and pay per week. The Insurer has determined that the Worker is not currently working 15 hours per week.
63. Sub-section 38(3)(b) requires that the worker has returned to work for a period of not less than 15 hours per week and is in receipt of current weekly earnings of at least \$183 per week. The Worker must meet both tests in the sub-section.
64. The Worker works varying hours of work each week. In order to determine the amount of hours per week, I have reviewed her hours of work over the last 12 week period. Below is a list of the Worker's payslips for the period 19 May 2016 to 10 August 2016:

	Week	Hours	Rate	Total	Total Hours
1	19 May 2016 to 25 May 2016	13	\$23.35	\$303.55	13
2	26 May 2016 to 1 June 2016	13	\$23.35	\$303.55	13
3	2 June 2016 to 8 June 2016	6.5	\$23.35	\$151.78	12.5
		6	\$37.04	\$222.24	
4	9 June 2016 to 15 June 2016	13	\$23.35	\$303.55	19
		6	\$37.04	\$222.24	
5	16 June 2016 to 22 June 2016	5	\$23.35	\$116.75	5
6	23 June 2016 to 29 June 2016	8	\$23.35	\$186.80	14
		6	\$37.04	\$222.24	
7	30 June 2016 to 6 July 2016	13	\$23.35	\$303.55	14
		1	\$31.83	\$31.83	
8	7 July 2016 to 13 July 2016	8	\$24.05	\$192.40	16
		6	\$38.15	\$228.90	
		2	\$32.78	\$65.56	
9	14 July 2016 to 20 July 2016	8	\$24.05	\$192.40	9
		1	\$32.78	\$32.78	
10	21 July 2016 to 27 July 2016	8	\$24.05	\$192.40	14
		6	\$38.15	\$228.90	

11	28 July 2016 to 3 August 2016	13	\$24.05	\$312.65	
		6	\$38.15	\$228.90	19
12	4 August 2016 to 10 August 2016	11	\$24.05	\$264.55	
		6	\$38.15	\$228.90	
	The Worker has handwritten that she worked an additional 2 hours	2	\$24.05	\$48.10	19
Total					167.5

65. I accept the Worker's submission that she has sought additional work from her current employer and works additional hours when they are available. That is indicated in the varying hours which she has worked over the last 12 weeks. However, as indicated from the Worker's payslips, she has only worked 15 or more hours on 4 occasions in that last 12 weeks. In my opinion, the Worker does not regularly work the required hours of 15 or more hours per week to satisfy the requirement prescribed by sub-section 38(3)(b) of the 1987 Act.
66. I am not satisfied that sub-section 38(3)(b) is met.
67. Sub-section 38(3)(c) requires me to assess whether the Worker is "likely to continue indefinitely to be, incapable of undertaking further additional employment or work that would increase [the Worker's] current weekly earnings". Pursuant to sub-section 38(3)(c), the Worker is required to undertake suitable employment to her maximum capacity each week. The Worker has a current work capacity as certified by Dr H of 8 hours per day, 3 days per week, being a total of 24 hours per week. This decision on the Worker's capacity was not referred to the Authority for review.
68. Although I accept that the Worker has asked her employer for additional hours and works additional hours that are offered to her, as shown in the payslips, she does not work 24 hours per week. That is what she is required to work pursuant to the decision on her work capacity.
69. I am not satisfied that sub-section 38(3)(c) is met.
70. The Worker does not meet the special requirements for continuation of weekly payments under section 38(3) of the 1987 Act. In accordance with that section, the Worker has no entitlement to a continuation of weekly payments.
71. Given that the outcome of my review does not differ from the outcome of the Insurer's internal review decision, it is not necessary that I make any recommendations to the Insurer.

**Merit Review Service**  
**Delegate of the State Insurance Regulatory Authority**

