



State Insurance Regulatory Authority

Workers Compensation

Merit Review Service

FINDINGS AND RECOMMENDATIONS ON MERIT REVIEW BY THE AUTHORITY

Worker:

Insurer:

Date of Review:

Date of Injury:

Claim Number:

Our Reference:

FINDINGS ON REVIEW

1. The following are findings made by the State Insurance Regulatory Authority (the Authority) on review.
2. The Worker has the ability to return to work in "suitable employment" as defined in section 32A of the *Workers Compensation Act 1987* (the 1987 Act).
3. The Worker has "current work capacity" as defined in section 32A of the 1987 Act.
4. The Worker does not meet the special requirements under section 38(3) of the 1987 Act for continuation of weekly payments of compensation after the second entitlement period.

RECOMMENDATION BASED ON FINDINGS

5. Under section 44BB(3)(e) of the 1987 Act the Authority may make binding recommendations to an insurer based on findings of its review.
6. The Authority does not make a recommendation for the reasons below.

BACKGROUND

7. The Worker sustained an injury to his left shoulder while employed as a Tyre Fitter. On the information before me the Worker reported gradual onset of bilateral elbow pain over a period of 4 or 5 months. He consulted his General Practitioner and was diagnosed with bilateral epicondylitis and was referred for physiotherapy. The Worker ceased employment.
8. The Worker has not return to work since injury and is currently not working.
9. The Insurer made a work capacity decision that the Worker has current work capacity but does not meet the special requirements for continuation of weekly payments after the second entitlement period. It was determined that the Worker has capacity for some type of employment for 25 hours per week and that he has the ability to return to work in suitable employment as a Sales Assistant. The Insurer found that the Worker's degree of Whole Person Impairment is not likely to be greater than 20% Whole Person Impairment.

On the basis that he is not working, the Insurer determined that the Worker does not satisfy the requirements of section 38(3) of the 1987 Act and that his entitlement to weekly payments of compensation is to cease from 10 October 2016.

10. The Worker referred that decision for internal review by the Insurer. The Insurer made a decision that the Worker has current work capacity but is currently not working. The Insurer determined that the Worker has capacity for some type of employment for 25 hours per week and has the ability to return to work as a Sales Assistant and affirmed the decision to cease his entitlement to weekly payments of compensation under section 38(3) of the 1987 Act.
11. The Worker made an application for merit review of the Insurer's work capacity decision. The Authority accepted the Worker's application for merit review pursuant to section 44BB(3)(b) of the 1987 Act.

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)
 - *Workers Compensation Regulation 2016* (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 in undertaking this review are the Worker's application for merit review and the Insurer's reply form, the documents listed in and attached to those forms, and further information provided to the Authority and exchanged between the parties.

SUBMISSIONS

16. In the application for merit review, the Worker requests "reinstatement of weekly payments". He states that the Insurer has not "put me back into paid employment nor has rehabilitated for work fitness". The Worker submits that he is still in pain and unfit to work and that "Workcover, the insurer and my lawyer have conspired to have my Workcover terminated".
17. In reply, the Insurer submits that the Worker has capacity for 25 hours of work per week in suitable employment role of Sales Assistant.

REASONS

Nature of merit review

18. This is a merit review under section 44BB(1)(b) of the 1987 Act of a work capacity decision of an insurer.

19. The nature of this review is not a review of the Insurer's procedures and processes in undertaking the work capacity or internal review decisions. This review is a merit review, which 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.

Current work capacity

20. 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

21. "No current work capacity" is also 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

22. I have before me WorkCover NSW certificates of capacity issued by the Worker's nominated treating doctor (NTD). The most recent certificates of capacity certify the Worker as having capacity for some type of employment for 3-5 hours per day, 5 days per week. The certificates of capacity note the Worker's functional capacity as "according to the vocational assessment report".
23. The Worker's functional capabilities are noted by the rehabilitation provider in a functional capacity evaluation report to include a sitting capacity for 30 minutes; reduced tolerance in walking, stair climbing, forward reaching and kneeling; lifting capacity of 11.5kg (waist to waist height) and 10.5kg (floor to waist height); unable to complete lifting waist to shoulder height and bilateral carry capacity of 6.5kg. The same functional capabilities are noted in the Insurer's work capacity and internal review decisions.
24. Although I note the Worker's submissions that he is still in pain and unfit for work, he has been certified as having capacity for some type of employment with restrictions on hours of work and functional capabilities as far back as November 2015.
25. In light of the Worker's certificates of capacity and in absence of medical opinion to the contrary, I find that the Worker has capacity for some type of employment for 3-5 hours per day, 5 days per week with functional limitation as noted above.

Pre-injury employment

26. There is no dispute before me with respect to the Insurer's decision that the Worker is unable to return to his pre-injury employment. Accordingly, I will proceed on the basis that the Worker has a present inability arising from injury such that he is not able to return to work in her pre-injury employment as a Tyre Fitter.

Suitable employment

27. "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 WorkCover 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.*

28. The Worker has been referred to the rehabilitation provider for provision of occupational rehabilitation services. I have before me a vocational assessment report and a labour market research report. Both reports provide that the roles of Sales Assistant and Car Park Attendant are suitable employment options for the Worker.
29. The vocational assessment report provides that the Worker left High School after year 10 and has not undertaken any further training or qualifications since. The Worker's employment history is noted to include his employment as a Tyre Fitter. Prior to 2003, the Worker worked as Tyre Fitter. The Worker also worked as a Solar Plastering and Roof Insulator for various employers.
30. The report provides that the rehabilitation provider administered the Wilde Range Achievement Test (WART-4) the scores of which indicate that the Worker's literacy skills will not impact on him undertaking further training, but that he has limited numeracy skills and that the identified suitable employment options have been restricted in line with his limited numeracy skills.
31. The Worker's transferable skills are noted to include skills such as customer service, communication skills, cash handling, sales skills, computer skills and basic administrative skills. Further, the report indicates that the Worker has no difficulty reading and writing in English and regularly uses the Internet, email and Microsoft Office Applications.
32. In considering the role of Car Park Attendant, the rehabilitation provider's labour market research report provides that the role is sedentary to light in nature. Lifting, pulling or carrying are not significant part of the role. Driving is not a typical requirement. The role requires constant sitting or standing at the sales counter and requires occasional walks around the car park assisting customers. I note that in considering the role's tasks and functional demands, the NTD has provided approval for the Worker to return to the role of Car Park Attendant.
33. Having regard to the nature of the Worker's incapacity and in light of the physical demands of the role and the NTD's approval, I am satisfied that the Worker has the functional capabilities to return to work in suitable employment as a Car Park Attendant for 3-5 hours per day, 5 days per week.
34. The rehabilitation provider's labour market research report provides that there are no specific skills or training required for the role of Car Park Attendant. There is no required minimum level of education but average to lower average level of English competency is required to perform the role.
35. Employer contacts reveal that the role is available on a full time, part time and casual basis. The skills and experience required are as noted in the report and the Worker's age

would not be a barrier in him obtaining the role.

36. I note that the Worker has been provided with occupational rehabilitation services and that he currently has a resume to send to potential employers.
37. In light of the above and in considering the definition of "suitable employment" as provided in section 32A of the 1987 Act, I am satisfied that the Worker has the ability to return to work in suitable employment as a Car Park Attendant. Therefore he has "current work capacity" as defined in section 32A of the 1987 Act.
38. In light of my findings below, I have not considered it necessary to deal with the other suitable employment options as identified by the rehabilitation provider.

Entitlement periods for ongoing weekly payments

39. 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 under section 36 of the 1987 Act ("the first entitlement period")
 - b. Weekly payments in weeks 14-130 are to be determined under section 37 of the 1987 Act ("the second entitlement period")
 - c. Weekly payments after the second entitlement period (after week 130) are to be determined under subsections 38(6) or (7), but only if the special requirements for continuation of weekly payments after the second entitlement period are met under section 38 of the 1987 Act.
40. The Insurer, in their reply to the Worker's application for merit review, indicate that the Worker had received 709 weeks of weekly payments of compensation. 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

41. A worker with "current work capacity" is only entitled to weekly payments of compensation under section 38 of the 1987 Act if special requirements are met as follows:
 - (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 \$155 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.*
42. As the Worker has "current work capacity" as defined in section 32A of the 1987 Act, he

is therefore entitled to weekly payments of compensation only if he meets all three special requirements provided in section 38(3) of the 1987 Act unless he is a "worker with high needs" as defined in section 32A of the 1987 Act.

43. Section 32A of the 1987 Act defines a worker with high needs as:

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*

Note. Paragraph (b) no longer applies once the degree of permanent impairment has been assessed.

- (c) *the insurer is satisfied that the degree of permanent impairment is likely to be more than 20%, and includes a worker with highest needs.*

44. The Insurer's work capacity decision and internal review decision indicate that the Insurer is not satisfied that the Worker's degree of permanent impairment is likely to be more than 20%. Accordingly, the Insurer has determined that the Worker is not a worker with high needs as defined.
45. I have before me a Medical Assessment Certificate which assesses the Worker's degree of whole person impairment as 0%. On the basis of the information before me and in absence of any information to the contrary, I will proceed on the basis that the Worker is not a "worker with high needs" as defined in section 32A of the 1987 Act and therefore section 38(3A) is not applicable in his case.
46. On the information before me, the Worker is currently not working. Given that the Worker is assessed as having current work capacity, but has not returned to work for a period of not less than 15 hours per week and is not in receipt of current weekly earnings of at least \$183 (as indexed) per week, he does not meet the requirements of section 38(3)(b) of the 1987 Act to be entitled to compensation after the second entitlement period.
47. As I have arrived at the same conclusion as the Insurer regarding the Worker's entitlement to weekly payments of compensation, I have made no recommendations under section 44BB(3)(e) of the 1987 Act.

Merit Review Service
Delegate of the State Insurance Regulatory Authority