



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 findings are made by the State Insurance Regulatory Authority (the Authority) under section 44BB(3)(e) of the *Workers Compensation Act 1987*(the 1987 Act).
2. The Worker has current work capacity.
3. The amount of his pre-injury average weekly earnings is equal to the transitional amount, currently \$1,014.40.
4. The amount of his current weekly earnings is \$1,186.11.
5. The Worker is entitled to weekly payments of compensation at the rate of \$0.00 under section 38(7) of the 1987 Act.

RECOMMENDATIONS BASED ON FINDINGS

6. The Authority may make a binding recommendation to the Insurer based on the findings of this merit review under section 44BB(3)(e) of the 1987 Act.
7. No recommendation is made for the reasons below.

BACKGROUND

8. The Worker has been receiving weekly payments of compensation for an incapacity for work resulting from an injury. The Insurer made a work capacity decision to reduce the amount of his weekly payments to \$0.00 under section 38(7) of the 1987 Act on the basis that:
 - He has current work capacity.
 - His pre-injury average weekly earnings are \$1,014.40.
 - His current weekly earnings are \$1,186.11.
9. The Worker referred that decision for internal review by the Insurer. The Insurer affirmed its original decision.

10. The application for merit review was received by the Authority. It was made within time and in the approved form.

LEGISLATION

11. 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)
12. Section 43 of the 1987 Act describes a "work capacity decision".
13. Section 44BB of the 1987 Act provides for merit review of a work capacity decision of an insurer by the Authority.

DOCUMENTS CONSIDERED

14. The documents considered for this review are the application for merit review and the Insurer's reply form, the documents listed in and attached to those forms, and any further information provided to the Authority and exchanged between the Worker and the Insurer.

SUBMISSIONS

15. The Worker submits:
 - The work capacity decision should be changed to allow ongoing payment to him as he does not get the opportunity to work overtime as his pre-injury role allowed. The decision is unfair.
 - He has made every effort to return to suitable work and he is performing suitable duties to the best he can. He was unable to return to his pre-injury role and was re-deployed to an alternate role. He believes this represents the full extent of his work capacity.
 - He has not seen or been provided with the reports of the work capacity assessors referred to in the work capacity decision. This is procedurally unfair and he would like to see their reports to be able to comment on them as appropriate. To the extent the reports are relied upon, it is unfair they are not provided to him.
 - He notes that he has not met with the work capacity assessors in person other than the one consultation he had with her at the request of her employer.
 - He has not had his whole person impairment assessed since 2008 and does not accept that the level of impairment he had in 2008 reflects his current level of impairment.
16. The Insurer submits:
 - Before his injury, the Worker was employed as a fulltime truck driver. He was unable to safely return to his pre-injury duties due to his injury. Following suitable recovery and rehabilitation, a role as a tractor mower operator was mooted as suitable. A workplace assessment was done on 20 December 2007. With approval from the Worker's doctor he was trialed in that position. After successful trial he was redeployed to that fulltime position on 7 July 2008.

- The Worker has been working in this position now for more than eight years and eight months. His current weekly earnings are \$1,186.11 gross. A work capacity decision was made to reduce his weekly payments to \$0.00 under section 38(7) of the 1987 Act.
- The Worker has made a good effort to return and maintain work. It accepts that the Worker does not have the same opportunity to earn overtime. However, it is not able to take that into account. His pre-injury average weekly earnings are determined using the transitional amount.
- Copies of the work capacity assessment report were served on the Worker. There are electronic, date-stamped records in support. It rejects the submission that the reports were not made available to the Worker.
- The Worker only saw the work capacity assessors once each time. However, this is correct procedure.
- It does not seek to assess the degree of whole person impairment. The Worker was assessed in 2008 and settled compensation for whole person impairment. He has not sought medical treatment for his injury since that time, complained of any deterioration in his condition or provided medical evidence to that effect. There is no evidence available to support that the Worker is a worker with high or highest needs.
- It has acted properly and based its decision on evidence and with procedural fairness.

REASONS

Nature of merit review

17. This is a merit review of the Insurer's decision to reduce the amount of the weekly payments of compensation payable to the Worker to \$0.00. The Authority must consider all of the available information substantively on its merit and make findings that are most correct and preferable. It is not a review of the Insurer's procedures in making the work capacity decision.

Current work capacity

18. The Worker submits that he was unable to return to his pre-injury role and was redeployed to an alternate role which he says "represents the full extent of my work capacity".
19. The Worker is working as a fulltime tractor mower operator with his pre-injury employer. Reports from the General Practitioner and the Occupational Physician in 2008 supported that this employment was suitable for the Worker if he was able to exercise care for some of the more physically demanding duties. Both endorsed permanent redeployment in the job if a work trial was successful. The Worker was trialled in the job for eight weeks and then formally employed on 8 July 2008. The work capacity assessor physically examined the Worker. The work capacity assessor considered that "Clinical assessment of this worker was consistent with the view that he was capable of undertaking the below mentioned suitable vocational options [plant operator, truck driver and courier) for 30 hours weekly".
20. The Worker has been assessed and compensated for 7% whole person impairment to his right shoulder as a result of the injury. I acknowledge his submission that he does not believe this reflects his current level of impairment. However, he has not provided further information in support of that submission such as an updated assessment of his whole person impairment by a trained medical assessor.

21. A worksite assessment report by the rehabilitation provider considered that the duties of a tractor mower operator were not suitable for the Worker. However, the weight of information including the Worker's own submissions about the extent of his work capacity, the significant length of time that he has engaged in the employment and the details in the medical information persuade me that it is "suitable employment" as defined by section 32A of the 1987 Act.
22. I find that the Worker has "current work capacity" under section 32A of the 1987 Act. That is a present inability arising from an injury such that he is not able to return to his pre-injury employment but is able to return to work in suitable employment.

Entitlement to weekly payments of compensation

23. There is no dispute that the Worker has been paid more than 130 weeks of weekly payments and is after the "second entitlement period" as defined by section 32A of the 1987 Act. The Insurer's schedule of weekly payments also supports that this is the case. The Worker's entitlement to ongoing weekly payments of compensation must be assessed under section 38 of the 1987 Act.
24. The Insurer accepts that the Worker meets the special requirements under section 38 of the 1987 Act to be entitled to ongoing weekly payments. I will proceed on that basis. The critical issue in this case is the amount of weekly payments payable to the Worker under section 38(7) of the 1987 Act:

The weekly payment of compensation to which an injured worker who has current work capacity is entitled under this section after the second entitlement period is to be at the rate of:

(a) $(AWE \times 80\%) - (E + D)$, or

(b) $MAX - (E + D)$,

whichever is the lesser.

Factors to determine rate of weekly payments

25. The factors to determine the rate of weekly payments of compensation are set out in section 35 of the 1987 Act.
26. "**AWE**" means the worker's pre-injury average weekly earnings. The Insurer has indicated in its reply form that the Worker is an "existing recipient of weekly payments". The Insurer's schedule of weekly payments supports that the Worker was in receipt of weekly payments immediately before the commencement of the weekly payments amendments on 1 October 2012. It shows that the Worker received a weekly payment of \$153.12 for the period 28 September 2012 to 5 October 2012. I am persuaded that he is an "existing recipient of weekly payments" as defined by Clause 1, Division 1, Part 19H of Schedule 6 of the 1987 Act.
27. As an existing recipient of weekly payments, the Worker's pre-injury average weekly earnings are deemed to be equal to the "transitional amount" under Clause 9(3), Division 2, Part 19H of Schedule 6 of the 1987 Act. Currently, the transitional amount is \$1,014.40.
28. I acknowledge the Worker's submission that he does not get the opportunity to work overtime as his pre-injury role allowed. However, this cannot be taken into account in the calculation of his weekly payments of compensation. The legislation has deemed an amount for his pre-injury average weekly earnings which must be applied.
29. "**E**" means the amount to be taken into account as the worker's earnings after the injury, calculated as whichever of the following is the greater amount:
 - (a) the amount the worker is able to earn in suitable employment,

(b) the worker's current weekly earnings.

30. "Current weekly earnings" are defined in section 441 of the 1987 Act. The Worker's pay slips support that his base rate of pay is calculated on the basis of ordinary hours worked. He is employed for 35 ordinary hours of work a week at an hourly rate of \$33.88886. This equates to earnings of $35 \times \$33.88886 = \$1,186.11$. I find this to be the amount of his current weekly earnings under section 441(a) of the 1987 Act. It is unnecessary in this case to consider the amount the Worker is able to earn in suitable employment.
31. "**D**" is the value of any non-pecuniary benefits which is \$0.00 in this case.
32. "**MAX**" is not relevant in this case because $(AWE \times 80\%) - (E + D)$ results in the lesser rate.
33. The rate of weekly payments of compensation payable to the Worker under section 38(7) of the 1987 Act is:
- $$\begin{aligned} & (AWE \times 80\%) - (E + D) \\ &= (\$1,014.40 \times 80\%) - (\$1,186.11 + \$0.00) \\ &= \$811.52 - \$1,186.11 \\ &= \$0.00 \end{aligned}$$
34. This is the same amount calculated by the Insurer. No recommendation to the Insurer is necessary and its work capacity decision stands.

Merit Review Service
Delegate of the State Insurance Regulatory Authority