

**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.
2. The Worker is able to return to work in suitable employment.
3. The Worker has current work capacity.
4. The Worker does not satisfy the special requirements under section 38 of the *Workers Compensation Act 1987* (the 1987 Act) for the continuation of weekly payments of compensation.

**RECOMMENDATIONS BASED ON FINDINGS**

5. Under section 44BB(3)(g) of the 1987 Act, the Authority may make binding recommendations to the Insurer based on the findings of the review.
6. The Authority makes no recommendations for the reasons below.

**BACKGROUND**

7. The Worker was employed as a Process Worker with Employer 1. He sustained a lower back injury as a result of pulling a 40 kilogram bucket.
8. The Insurer accepted liability and the Worker has been in receipt of weekly payments of compensation.
9. The Insurer conducted a work capacity assessment and made a work capacity decision, ceasing the Worker's entitlement to weekly payments of compensation pursuant to section 38 of the 1987 Act.
10. The Insurer undertook an internal review in this matter and made a decision. The internal review maintained the decision to cease the Worker's entitlement to weekly payments.

11. The application for merit review was received by the Authority. The application has been lodged in the form approved by the Authority and made within 30 days, as required under section 44BB(3)(a) of the 1987 Act.

## **LEGISLATION AND GUIDELINES**

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.

## **INFORMATION CONSIDERED**

15. The documents I have considered in undertaking this review are those listed in, and attached to the application for merit review, the Insurer's reply and any further information provided by, and exchanged between the parties.

## **SUBMISSIONS**

16. In the application for merit review, The Worker has provided submissions which may be summarised as follows:
  - He attended an independent medical examination with Dr M, however no report has been provided to him.
  - The employment options of Light Process Worker, Light Packer and Light Product Assembler "do not describe how and where is the position of production will be lifting/carrying/pushing and where it will be placed after that, and do not describe about bending/twisting/squatting repetitive or no repetitive while completing the duties..."
  - The internal review refers to an employer contact however the Worker was never referred to this contact for an interview or was provided with on the job training.
  - The Insurer had agreed over the phone to discuss the possibility of arranging a work trial.
  - He has been assessed as having the capacity to return to suitable employment however has not received workplace rehabilitation or vocational counselling (for anxiety over his weekly payments ceasing).
  - He is an injured worker and needs his workers compensation payments for his daily living and dependent children.
17. The Worker provided additional submissions. From my interpretation of his submissions, it appears the Worker is unsure of which rehabilitation report the Insurer has relied upon when making its internal review decision. The Worker also says he is unsure which employment option the rehab provider will help him with and, despite the job seeking assistance provided, he is still without employment. Furthermore, his nominated treating doctor did not change their opinion regarding capacity for work.

18. In reply, the Insurer submits:

- The Worker's capacity for work is as per the WorkCover NSW Certificates of Capacity issued by Dr N.
- The employment options of Light Process Worker, Light Packer, Light Product Assembler are all in line with the Worker's functional capacity, noting the 5kg lifting restriction and the ability to alternate between sitting and standing.
- A copy of the medical report from Dr M was provided to the Worker.
- The rehab provider have provided the Worker with rehabilitation assistance such as one on one job seeking sessions and the Worker has the skills to apply for suitable employment roles.
- The rehab provider has also provided the Worker with vocational counselling to assist with overcoming anxiety about the cessation of his weekly payments.
- The Worker has recently been referred back to the rehab provider to provide him with continuing support in seeking alternative employment. A short work trial leading up to the cessation of weekly benefits has been suggested which will provide the Worker with the confidence and experience to continue with his job seeking efforts.

## **REASONS**

### **Nature of merit review**

19. This matter involves a merit review of the work capacity decision of the Insurer in accordance with section 44BB(1)(b) of the 1987 Act.
20. The review is not a review of the 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.

### **Current work capacity and suitable employment**

21. I have WorkCover NSW Certificates of Capacity from Dr N who is the Worker's nominated treating doctor. The certificates indicate that Dr N's opinion in relation to the Worker's capacity for work has remained unchanged.
22. In the latest certificate, Dr N indicates that the Worker has capacity for some type of employment for 5 hours per day, 4 days per week with the following functional tolerances:
  - Lifting/carrying 5kg
  - Pushing/pulling 5kg
  - Bending/twisting/squatting not repetitive
  - Driving 20min
23. Dr N also stated in the certificate that the Worker had reached "maximum capacity" and "need break at will".

24. I also have before me a report from occupational physician Dr M. The Worker reported low back pain which radiated down through both legs and into his feet. There was increased symptoms with movement, with sitting and when standing. The Worker also report neck pain which radiates into both shoulders and down his arms, with some numbness. The neck pain was made worse with movement. Dr M found the Worker to have reached maximum medical improvement and assessed whole person impairment at 7%. No opinion was expressed with respect to work capacity.
25. I consider Dr N to have a detailed understanding of the progression and treatment of the Worker's symptoms, having treated him since the work injury. Dr N has also periodically considered the Worker's work capacity and has detailed his findings in WorkCover NSW Certificates of Capacity issued. I am therefore satisfied that Dr N would be well placed to provide an opinion on the Worker's work capacity.
26. Accordingly, I find that the Worker has capacity for some type of employment for 5 hours per day, 4 days per week with the functional tolerances as detailed above in paragraphs 22 and 23.
27. 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*
28. "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*
29. There is no dispute that the Worker is unable to return to his pre-injury employment. I am therefore required to consider whether the Worker is able to return to work in suitable employment in order to determine whether he has "current work capacity" or "no current work capacity". 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.*

30. The rehab provider conducted a vocational assessment and provided a vocational assessment report which identified the role of Light Process Worker as suitable employment for the Worker.
31. More recently, the rehab provider provided a labour market analysis report which identified the role of Process Worker as suitable employment for the Worker.
32. The role of Process Worker is described as having "light to medium" physical requirements. In "Appendix 2" which was attached to the labour market analysis report, "light" work includes the exertion of up to 4.5 kilograms of force frequently or a negligible amount of force constantly to move objects. "Medium" work includes exerting 4.5 kilograms to 11 kilograms of force frequently, or greater than negligible up to 4.5 kilograms of force constantly to move objects.
33. From the labour market analysis conducted by the rehab provider, there are Process Worker (or Light Process Worker) roles that do not require lifting or pushing/pulling of 5kg with many roles such as Employer 2, Employer 3 and Employer 4 requiring 3kgs or less. These roles also do not require, or have measures (such as utilising a sit/stand stool) to minimise bending/twisting/squatting and employees are able to alternate between sitting and standing. All three employers specified that there were roles for part-time hours, 20 hours per week.
34. I note that Dr N was provided with a list of duties that a worker may need to perform in the role of Light Process Worker and, approved the role as being functionally suitable for the Worker to work 20 hours per week.
35. I also acknowledge the Worker's submissions, particularly with respect to his concerns regarding lifting requirements of a Process Worker role and whether any bending/twisting/squatting will be repetitive. While the employer's contacted by the rehab provider do not specify exactly where the items lifted will be placed, I am satisfied the need for any lifting or carrying will not exceed 5kgs for the reasons provided above. In relation to bending/twisting/squatting, I note that many employers have stated these movements are not required at all.
36. I understand that the Worker may be apprehensive about returning to a Process Worker role, having previously injured himself in a role with a similar job title. However, as I have discussed above, the rehab provider have identified Process Worker roles that do not require any frequent bending or the lifting of heavy metal objects.
37. I am therefore satisfied that the Worker has the functional capacity to be suited to the role of Process Worker having had regard to the nature of his incapacity.
38. In relation to whether the role is vocationally suitable to the Worker, I note that the Worker has worked in a factory environment. The duties he completed at Employer 5, Employer 6 and Employer 1 are identical or similar to the core duties of a Process Worker as described by the rehab provider. I acknowledge that it has been some 10 years since the Worker has been employed in any form of process/factory work, however the information contained in the vocational assessment report and labour market analysis report states that the Worker does not require any formal retraining.
39. I am therefore satisfied that the Worker has the skills and work experience to be currently suited to the role of Process Worker.
40. In relation to the Worker's age, I note that there is nothing in the information before me that suggests the Worker's age, would be a barrier to his suitability to the role of Process Worker. As discussed above, his nominated treating doctor has approved the role as being functionally suitable to the Worker.

41. In relation to occupational rehabilitation services, I note in the rehab provider closure reports that the Worker has been provided with a Vocational Assistance Program and Vocational Counselling. I am satisfied the Worker has been provided with occupational rehabilitation services to enable him to independently obtain employment as a Process Worker.
42. I am sympathetic towards the Worker regarding his unsuccessful attempts in securing employment as a Process Worker as illustrated by the job seeking logs provided. However the Insurer in my view has provided him with occupational rehabilitation services (through the rehab provider) and there is no requirement for the Insurer to find the Worker actual employment under the 1987 Act. While I note that the Insurer has agreed to provide the Worker with further rehabilitation services up until the cessation of weekly payments, it will ultimately be a matter for the Worker to apply for and secure employment.
43. Accordingly, having had regard to the balance of the factors under the definition of suitable employment in section 32A of the 1987 Act, I find that employment as Process Worker constitutes suitable employment for the Worker.
44. I find that the Worker has a present inability arising from an injury such that he is not able to return to work in his pre-injury employment but is able to return to work in suitable employment. I find that the Worker has current work capacity in accordance with the definition in section 32A of the 1987 Act.

#### Entitlement periods for ongoing weekly payments

45. 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.
46. The Insurer states on page 1 of their reply to the application for merit review that the Worker has received 622 weeks of weekly payments of compensation. In light of this information, I find that the Worker's entitlement to weekly payments of compensation 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)

47. 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*

48. This definition requires that at least one of parts (a), (b), or (c) of the definition be met by the worker.
49. The Insurer has indicated in its work capacity decision that the Worker has been assessed as likely to have less than 10% permanent impairment. I note that a Certificate of Determination from the Workers Compensation Commission determined the Worker's permanent impairment to be 7%. More recently, Dr M also provided an assessment of 7% in a report.
50. I note that the Worker has not referred the Insurer's decision that he is not a "worker with high needs" for review by the Authority. Accordingly, 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.
51. As The Worker falls after the second period, for him to be entitled to weekly payments he must satisfy the special requirements provided in section 38{3} 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 \$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.*
52. I have found above that the Worker has current work capacity. In order to meet the requirement in section 38{3}{b} of the 1987 Act, the Worker needs to have returned to work for a period not less than 15 hours per week and earning at least \$183 per week (as indexed). As the Worker has not returned to work for a period of not less than 15 hours per week and in receipt of current weekly earnings of at least \$183 per week, he does not satisfy section 38(3)(b) of the 1987 Act.
53. Accordingly, I find the Worker does not meet the special requirements for the continuation of weekly payments of compensation after the second entitlement period pursuant to section 38 of the 1987 Act.
54. I have ultimately reached the same conclusions as the Insurer. A recommendation to the Insurer is therefore not necessary. The work capacity decision to discontinue the Worker's weekly payments of compensation stands.

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

