

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 and are to be the basis for the Insurer's work capacity decision.
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 ¹¹Current work capacity as defined in section 32A of the 1987 Act.
4. The Worker does not meet the special requirements for continuation of weekly payments after the second entitlement period (after week 130) in accordance with Section 38(3) of the 1987 Act.

RECOMMENDATIONS 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 was employed as a process worker with Employer 1 when he injured his left knee in the course of his employment.
8. The Worker made a claim for workers compensation and has been in receipt of weekly payments for 172 weeks.
9. The Insurer made a decision to cease the Worker's weekly payments of compensation for reasons including:
 - The Worker has current work capacity.
 - The Worker does not meet the special requirements for continuation of weekly payments after the second entitlement period (after week 130) in accordance with Section 38(3) of the 1987 Act.
10. The Worker referred the Insurer's decision for internal review. The Insurer arrived at the same outcome.

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);
- *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 for 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 that has been supplied to the Authority by the Worker and the Insurer.

SUBMISSIONS

16. In the application for merit review the Worker submits:

- That he meets the special requirements for continuation of weekly payments under section 38(3) of the Act because when the work capacity decision was issued he was working for a period of not less than 15 hours per week and was earning at least \$183 per week.
- There has been no change in his work capacity since the Insurer's previous decision which found that he had no current work capacity. His condition is still the same which is restricting his employment.
- He migrated to Australia from a non-English speaking country and has worked in the food industry for the past 15 years, as such it is difficult for him to find a job in the fields identified by the rehab provider, including administration and call centre work.
- It is unrealistic to expect him to work in a field in which he does not have a suitable skill set. This is evidenced by the fact that his three month contract was terminated after 10 weeks. Skill is required to work in suitable employment, and he does not possess the skills required.
- He has requested the Insurer to provide training/education or a job placement program but nothing has been provided to date.
- His payments should be reinstated and continue, and he should be provided with job training support or allowed to participate in a job placement program, and should be provided with medical treatment.
- His ability to support his family has been shattered and he is becoming frequently anxious as a result of his injury.

17. In reply, the Insurer submits:

- The Worker does not meet the provisions of section 38(3) of the Act.
- The Worker has capacity to work 40 hours per week in suitable employment.
- The roles of Call Centre Operator and Administration Assistant are suitable employment.
- The Worker has capacity to earn \$1032.00 per week in suitable employment.

REASONS

Nature of merit review

18. 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. 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.
19. I note that it is only those decisions that the Worker chooses to refer for review by the Authority, in accordance with section 44BB of the 1987 Act, that the Authority has jurisdiction to review. The Worker has referred the following work capacity decisions of the Insurer for review by the Authority:
- A decision about what constitutes suitable employment for him;
 - A decision to cease his entitlement to weekly payments of compensation.
20. Therefore, these findings and recommendations will be confined to a merit review of only these decisions made by the Insurer.
21. Further, the Insurer's decisions that are subject to this review became effective. Accordingly, any recommendations made by the Authority will apply to weekly payments of compensation.

Current work capacity and suitable employment

22. The Worker is currently 58 years of age.
23. The Worker was employed as a process worker when while lifting a bucket he felt a sudden pain in his left knee. He attended on his doctor that afternoon and was advised to rest. The Worker continued to experience pain and later reported the incident. The Worker was subsequently diagnosed with medial compartment osteoarthritis in his left knee.
24. The medical evidence before me is confined to the Work Cover NSW Certificates of Capacity; a Workers Compensation Commission Medical Assessment Certificate completed by Associate Professor J, and two brief reports from Dr G, Orthopaedic Surgeon.
25. In the Medical Assessment Certificate Associate Professor J notes:
- "Today, 2.5 years after the injury there is arthritic left knee pain and mechanical symptoms causing a moderate loss of function."*
26. Associate Professor J finds that the total knee replacement of the left knee as recommended by Dr G is reasonably necessary treatment arising from the injury.

27. Dr G comments that the Worker's medial compartment osteoarthritis is progressing both clinically and radiologically, and notes that a total knee replacement is the only operative option. Dr G comments:

"The Worker is reluctant to undergo a total knee replacement because of his age and he is happy to continue with discomfort albeit that it does significantly limit his activities. This is not an unreasonable decision but eventually I am sure he will get to the stage where he will elect to undergo a knee replacement for pain relief"

28. The Certificates of Capacity completed by Dr M, Nominated Treating Doctor (except for the most recent Certificate which was completed by Dr K) indicate that the Worker has capacity for some type of employment for 8 hours per day, 5 days per week. The only restriction on the Worker is lifting capacity up to 10kg. The Worker has consistently been certified as having capacity to work 8 hours per day, 5 days per week.
29. The Worker does not dispute that he has capacity to work 8 hours per day, 5 days per week. On that basis, and given the consistent finding in respect of his capacity, I am satisfied that the Worker has capacity to work 8 hours per day, 5 days per week.
30. In assessing whether the Worker has "current work capacity" or "no current work capacity", I am required to refer to the definitions under section 32 A of the 1987 Act:

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

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

31. In order to determine whether the Worker has current work capacity, I am required to consider whether he can return to work in his pre-injury employment and suitable employment.

Pre-injury employment

32. There is no dispute before me with respect to the Insurer's decision 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. I will proceed on that basis.

Suitable employment

33. **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.*

34. The Insurer determined that the roles of Call Centre Operator and Administration Assistant are suitable employment for the Worker. In its Internal Review Decision the Insurer maintained its decision that both roles are suitable. The Worker disputes that either role is suitable for him.
35. Rehab provider 1 provided the details of both roles, and the two employers it contacted in respect of each role, in its Vocational Assessment Report.

Call Centre Operator

36. The report describes the role as involving answering enquiries about products and services and promoting an organisation's goods and services. The tasks associated with this role include:
- Answer incoming calls and assist customers with their enquiries
 - Make outbound sales and research calls
 - Provide a high level of personalised customer service
 - Update databases with changes to the details and status of each customer
37. Arrange the distribution of products, information kits, or brochures to interested parties.
- The role is described as sedentary, with constant sitting and occasional standing.
38. Rehab provider 1 suggests that this role is suitable for the Worker because he has transferrable skills including computer skills, customer service skills, management skills, good verbal and written communication and reporting skills, inventory management, quality control and cash handling experience, is reliability and possesses attention to detail.
39. Rehab provider 1 contacted two employers in respect of the above role. The first employer, Employer 2, described the desired skills and experience for its position as including:
- Good communication skills
 - Accurate data entry
 - Strong customer service skills
 - Can do attitude and a high level of initiative and motivation
 - Call centre experience desirable
40. The report concludes that the Worker is suitable for the role as a he has good communication skills, previous customer service experience and data entry experience which are transferrable to this role.
41. The second employer contacted, Employer 3, described the desired skills and experience for its position as including:
- Excellent work ethic

Good time management/organisational skills

Good attendance record, punctuality and reliability

Experience in call centre work ideal but not essential

42. The report indicates that this job involves outbound calls to existing customers providing information on new products, objection handling, and a high level of customer service; it concludes that the Worker would be suitable as the employer advised that his customer service experience would be highly desirable in this role.
43. Both positions are full time roles, which accords with the Worker's capacity to work 8 hours per day, 5 days per week.
44. Dr M agreed that this role is suitable for the Worker after being provided with a list of the duties consistent with the description given in the report and with the tasks described by the employers contacted.
45. I am satisfied that there are no barriers to the Worker undertaking this role on a physical basis. The role is sedentary and involves no lifting in excess of 10kg, which is the only restriction on the Worker's capacity.
46. The Worker's objections to both roles being suitable are on the basis that he does not have a suitable skills set to fulfill the requirements of the role, which he says is evidenced by the fact that his employment with Employer 4 was terminated after 10 weeks. The Worker says that he has requested further training or education, or a job placement, but that the Insurer has not provided these things.
47. I have considered the Worker's employment history which includes his recent employment with Employer 4 as a customer service officer. While employed with Employer 4 the Worker provided assistance to internal and external customers; provided information about services offered; and performed data entry, amongst other tasks.
48. Prior to that the Worker worked with Employer 1 for 4 years as Productions Staff/Team Leader where he supervised a team of up to 6 staff by monitoring their work and communicating with them, and provided customised orders for customers amongst other things. Previous to that the Worker worked with Employer 5 for 15 years in the same role, and advises that he assisted in checking documents and communicating with internal customers and staff; provided assistance to stores to ensure customers' expectations were met; assisted with product related enquiries; and managed a team of 6 staff.
49. The Worker's resume lists his skills as including customer service skills, reporting skills, good verbal and written communication skills, that he is reliable and hardworking, and possesses attention to detail. The Worker indicates that his career objective is "a position within an administrative role that allows me to use my communication and interpersonal skills while taking on new challenges in a fast-paced, results driven environment".
50. Given the Worker's employment history and the skills he has gained with both Employer 1 and Employer 5, as well as in his role with Employer 4, it is my view that the role of Call Centre Operator would be suitable employment for him. The Worker has experience communicating with customers and staff, and providing information about services offered, and indicates that he has performed data entry in his role with Employer 1. Further, rehab provider 1 note that he self-rated his English speaking as above average, and his reading writing and receptive skills as average. While he does not possess call centre experience both employers contacted indicate that such experience was desirable, but not essential. In particular, Employer 3 confirmed the Worker's customer service skills would be highly desirable.

51. While I note the Worker's submissions that he does not have the skills to perform this role, he has not explained what aspects of the role he is incapable of. His experience suggests he has numerous transferrable skills sufficient to perform the role.
52. The Employer 4 Probation/Trial Period Review form, 6 weeks into the Worker's employment as a Customer Service officer with Employer 4, records the Worker as demonstrating "strong performance" in all categories of assessment, except for the category of working collaboratively with others, in which he showed "outstanding performance". There is no suggestion here that the Worker was not in possession of the skills necessary to complete the role.
53. Employer 4's letter to the Worker refers to "unacceptable performance throughout your probationary period". The termination letter sent to the Worker states "your performance has not been meeting organisational expectations". It is unclear however what specific aspects of the Worker's performance have led to his termination. I cannot infer that it is a lack of skills as this would be inconsistent with the Probation/Trial Period Review form. In the absence of details as to the specific circumstances of the Worker's termination from Employer 4 I am not satisfied that serves as evidence that he does not have the skills to perform such a role.
54. In any event, I note that the role with Employer 4 indicated 2 years Customer Service/Clerical background as a minimum amount of experience. Arguably, the Worker's work history does not suggest he has clerical experience as such, although he does have numerous skills that would assist him in performing clerical tasks. The employers contacted by rehab provider 1 in respect of the Call Centre Operator roles both indicated that experience was desirable, but not necessary.

Administration Assistant

55. The report describes the role as involving basic administration and clerical tasks. The tasks associated with the role include:
 - Liaises with other staff on the organisation's operational matters
 - Maintains confidential files and documents
 - Attends meetings and acts as secretary as required
 - Maintains appointment diaries and makes travel arrangements
 - Screens telephone calls and answers enquiries
 - Takes and transcribes dictation letters and other documents
 - May supervise clerical staff
56. The role is described as sedentary, with frequent sitting, and frequent standing and walking to attend meetings collect data and prepare mail.
57. Rehab provider 1 suggest that this role is suitable for the Worker because he has transferrable skills including computer skills, a drivers licence, accuracy and ability to complete tasks in a timely manner, ability to maintain a high level of confidentiality, and strong attention to detail.
58. Rehab provider 1 Injury management contacted two employers in respect of the above role. The first employer, Employer 6, described skills and experience required as including:
 - Knowledge of computers

Drivers licence

- Accuracy and ability to complete tasks in a timely manner
- Ability to maintain a high level of confidentiality
- Strong attention to detail

59. The report concludes that the Worker is suitable for the role as it conforms with his physical capabilities. It is noted that his customer service and managerial skills and a Masters in Business (Operations Management) also mean that this role presents as suitable employment.

60. The second employer contacted, Employer 7 described the desired skills and experiences as including:

Immaculate presentation skills

Excellent communication skills both verbal and written

Intermediate Microsoft Office skills

Customer service experience

61. It was noted that the role, titled Reception and Administration Assistant, involved managing a switchboard, meeting and greeting clients and staff, ad hoc administrative duties, and supporting sales staff. The report concludes that the Worker is suitable for the role because his previous work experience" was seen to be desirable by the Recruitment Consultant"

62. Both positions are full time roles, which accords with the Worker's capacity to work 8 hours per day, 5 days per week.

63. Dr M has also indicated that this role is suitable for the Worker after being provided with a list of the duties expected of an administration assistant.

64. I am satisfied that there are no barriers to the Worker undertaking this role on a physical basis. The role is sedentary and involves no lifting in excess of 10kg, which is the only restriction on the Worker's capacity.

65. The Worker's objections to both roles have been outlined.

66. I have considered the role description, the details provided in respect of the two positions considered, the skills required, and the Worker's work experience. In my view rehab provider 1 has not provided enough information about the specific skills required by the two employers it contacted for me to be satisfied that the role is suitable for the Worker. In respect of the role with Employer 6 there is some indication of the skills that the Worker would use in the position, but no details of the day to day requirements of the role itself. It is unclear from the report what the position actually entails and as such I am unable to evaluate whether the role can be considered as suitable employment for the Worker.

67. In respect of the position with Employer 7 I am not satisfied that there is sufficient information about the nature of the position for me to evaluate whether it is suitable. I note that the role includes reception duties, and that such duties are distinct from those included in the role of administration assistant. I am not satisfied that it has been demonstrated that this role is suitable employment for the Worker.

68. While I note in general it appears that the tasks required of an administration assistant suggest that the role may be suitable for the Worker I need to be satisfied that a real job exists that involves those tasks, and that the Worker can do those tasks. In this case there is not sufficient information before me to be satisfied that the position with Employer 6 is suitable employment. Further, I am not satisfied that the position with Employer 7, which includes reception duties, is suitable employment.

69. I note the Worker's submission that he has requested further training or education, or a job placement. It is clear that the Worker has had the benefit of assistance and reached a level of skill that the Insurer considered adequate for him to pursue employment independently. The Return to Work Progress Report indicates that the Worker completed a Workplace Preparation Program with Rehab provider 2. It appears that the Insurer had recommended that Rehab provider 2 cease its assistance to the Worker after he secured a position with Employer 4, however that assistance has since been reinstated. During the Workplace Preparation Program he was provided with job seeking assistance including resume training and development, cover letter development, assistance with applying and completing job applications, interview preparation, injury disclosure and a mock interview. Rehab provider 2 assisted the Worker in applying for a variety of administration roles. The report concludes that continued services from Rehab provider 2 will assist the Worker with his return to work.
70. On the information before me, the Worker has been provided with assistance to return to work, and that assistance has continued following his termination from Employer 4.

Finding on suitable employment

71. I am satisfied 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 he is able to return to work in suitable employment.
72. For the reasons set out above, and in light of the relevant considerations provided in the definition of suitable employment, I am satisfied that the role of Call Centre Operator is employment in work for which the Worker is currently suited.

Finding on current work capacity

73. The medical information before me supports that the Worker has physical capacity for work 8 hours per day, 5 days per week, and I am satisfied that it supports that he is able to return to work in "suitable employment" as defined by section 32A of the 1987 Act.
74. I find that the Worker has "current work capacity" as defined by section 32A of the 1987 Act.

Entitlement periods for ongoing weekly payments

75. 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.
76. The Insurer submits that the Worker has received 172 weeks of weekly payment since the date of injury. Therefore 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 Act.

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

77. I am satisfied that the Worker has "current work capacity". 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 \$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.

78. The Worker is 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.

79. Section 32 A defines a "worker with high needs" as:

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%,

80. There is no information before me to suggest that the Worker is a worker with high needs.

81. 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 earnings of at least \$183 per week, he does not meet the requirements of section 38{3}(b) of the 1987 Act.

82. While I note the Worker's submission that he was working at the time the Insurer made the work capacity decision, the decision did not come into effect until 3 October 2016. The Worker ceased employment with Employer 4 on 19 July 2016, a date prior to the decision becoming effective, and on the

information before me has not undertaken any further employment. Accordingly, the fact that the Worker was working at the time the decision was made is ultimately not relevant. What is relevant is that he was not working at the time the decision came into effect, and currently not working.

83. I have also noted the Worker's submission that his condition has not changed since the Insurer issued its previous work capacity decision. The Insurer has provided reasons for its work capacity decision which was the subject of internal review, and is now the subject of this review. While the reasons for the Insurer's previous work capacity decision are not entirely clear, in its current decision that is the subject of the review, and having considered the information before me I have arrived at the same conclusion.
84. 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

