



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 a present inability arising from an injury such that he is not able to return to his pre-injury employment.
3. The Worker is able to return to work in suitable employment.
4. The Worker has current work capacity.
5. The Worker does not satisfy the special requirements for continuation of weekly payments of compensation after the second entitlement period pursuant to section 38(3) of the *Workers Compensation Act 1987* ("the 1987 Act").

RECOMMENDATIONS BASED ON FINDINGS

6. In accordance with section 44BB(3)(e) of the 1987 Act, the Authority may make recommendations based on its findings that are binding on the Insurer.
7. The Authority makes no recommendation in this matter for the reasons below.

BACKGROUND

8. The Worker sustained an injury to his lower back, left leg, left shoulder and left ankle in the course of his employment as a newspaper delivery driver.
9. The Worker's employment ceased on 25 January 2007. He has not returned to employment to date.
10. The Worker has been in receipt of weekly payments of compensation from the Insurer.
11. The Insurer made a number of work capacity decisions. The Insurer determined that the Worker has the capacity to work 25 hours per week, identified a number of roles as suitable employment, determined that he was not a worker with high needs and that

he did not meet the requirements under section 38(3) of the 1987 Act for an ongoing entitlement to weekly payments of compensation.

12. The Worker applied for an internal review of the Insurer's work capacity decisions. The Insurer conducted an internal review. The Insurer made similar decisions, resulting in the same outcome in a letter to the Worker.
13. The Worker made an application for merit review by the Authority. The application was received by the Authority. The Worker advised that he had not received the Insurer's decision on internal review.
14. The Insurer's decision on internal review was resent to the Worker. The Worker confirmed that he had received the decision. Following review of the Insurer's internal review, the Worker made further submissions to the Authority in an attachment to an email.
15. The Worker indicated in the email that he wished to proceed with his application for merit review and set out further grounds for review. I am satisfied that it contains the necessary information to be an application in the form approved by the Authority.
16. The Worker's application for merit review by the Authority received has been made within 30 days after The Worker received notice of the internal review, as required under section 44BB(3)(a) of the 1987 Act.

LEGISLATION

17. 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").
18. Section 43 of the 1987 Act describes a 'work capacity decision'.
19. Section 44BB of the 1987 Act provides for merit review of a work capacity decision of the Insurer, by the Authority.

DOCUMENTS CONSIDERED

20. The documents I have considered in this review are those listed in, and attached to, the application for merit review, the Insurer's reply and any further information provided by the parties.
21. 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

22. I have read and considered the Worker's submissions in the application for merit review and the further submissions made in an attachment to an email. I have also read and considered the Insurer's submissions in reply.
23. I have addressed the submissions in my reasons below where relevant.

REASONS

Nature of merit review

24. 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.
25. 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

26. The Worker sustained an injury to his lower back, when he twisted while holding approximately 10kg of newspapers that he was loading onto a truck. He experienced a sudden onset of severe pain in his back. The Worker was working as a newspaper delivery driver at the time.
27. The Worker did not return to work for 6 months following his injury and following this time returned on suitable duties and reduced hours of 9 hours per week. He continued to work suitable duties until his employment was terminated.
28. The Worker subsequently also obtained injuries to his left leg, left shoulder and left ankle while being treated for his initial injury. The Insurer confirmed in an email that these were accepted injuries.
29. The Worker has been treated conservatively. He has been reviewed by a number of neurologists and has been treated with physiotherapy, hydrotherapy, gym based exercise programs, pain management, pilates and cortico-steroid injections. He has reported limited benefit from these treatments.
30. With the exception of a work trial undertaken, the Worker has not returned to work to date.
31. There is a report from an Orthopaedic Surgeon before me. While I have found this report useful in providing a background to the Worker's injury, I consider it to be relatively dated for the purpose of reviewing the Worker's current work capacity and have not found information relevant in this respect as the report focuses mainly on a dispute in relation to whole person impairment.
32. The Worker underwent a functional assessment, administered by an Occupational Therapist. The Occupational Therapist outlined her findings in a report. She assessed that the Worker was capable of performing 'Medium Work' with the following physical demands:
 - Reduced capacity to perform tasks whilst sitting up to 45 minutes
 - Reduced capacity to perform tasks whilst reaching overhead
 - Reduced capacity to perform tasks whilst climbing stairs
 - Reduced capacity to perform tasks whilst squatting
 - Reduced capacity to perform tasks whilst standing up to 30 minutes
 - Unlimited tolerance to perform tasks whilst reaching forward
 - Unlimited tolerance to perform tasks kneeling with right knee
 - Unlimited tolerance to perform tasks walking up to 3 to 4 hours
 - Unlimited tolerance to lift up to 12kilograms floor to waist height

- Unlimited tolerance to lift up to 12 kilograms waist to shoulder height
 - Unlimited tolerance to lift up to 14.5 kilograms bench to bench height
 - Unlimited tolerance to lift up to 10 kilograms unilaterally with left hand
 - Unlimited tolerance to lift up to 11 kilograms unilaterally with right hand
33. There are a number of return facsimile from the Worker's former nominated treating doctor (NTD) before me in which she indicates approval for the roles of sales representative, customer service officer and shelf filler/stock replenishment as suitable roles for the Worker to work in.
34. The Worker's current NTD has issued the recent WorkCover NSW – certificates of capacity before me. The certificates together date back to mid-2014 and were previously issued by the former NTD. The Worker is consistently certified as having capacity to work 5 hours per day, 5 days per week, within physical capabilities, on all of the certificates before me.
35. In the most recent certificate and covering the period up to 1 January 2017, the Worker's physical capabilities are outlined as follows:
- Lifting/carrying capacity: 15 kg
 - Sitting tolerance: 45 minutes static
 - Standing tolerance: 30 minutes standing
 - Pushing/pulling ability: as tolerated
 - Bending/twisting/squatting ability: as tolerated, but avoid repetition
 - Driving ability: ok
36. When assessing the Worker's capacity for work, I note that the medical information before me in relation to his physical capabilities is relatively consistent. The certificates of capacity are also the only information which addresses hours of work. On the information before me, I am satisfied the certificates of capacity are an accurate reflection of the Worker's capacity for work.
37. I find that the Worker has capacity to work in accordance with the certificate of capacity.
38. In order to determine whether the Worker has current work capacity, I am required to determine whether he is able to return to work in suitable employment.
39. Section 32A of the 1987 Act defines "current work capacity" and "no current work capacity".
- "Current work capacity" is defined 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.*
- "No current work capacity" is defined 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.*
40. There is no dispute between the parties in respect to the Worker being unable to return to his pre-injury employment as a newspaper delivery driver. On this basis, and having regard to the nature of that role particularly in relation to heavy lifting, I am satisfied that the Worker has a present inability arising from an injury such that he is not able to return to his pre-injury employment.
41. To determine whether the Worker has current work capacity, I am required to consider whether he is able to return to work in "suitable employment".

42. 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.

43. The Worker is 50 years of age. He completed his school education to a Year 10 level, obtaining his School Certificate. He obtained a certificate in Hospitality.

44. The Worker's employment history is outlined in a vocational assessment report and a labour market report. He was employed as a builders labourer with different employers, a concrete cutter and core hole driller with different employers and a delivery driver.

45. The Worker has not returned to work since his injury however did undertake a 4 month work trial as a customer service officer/storeperson/receiving and despatch clerk.

46. Both the vocational assessment and labour market report identify a number of roles as suitable return to work options for the Worker. The vocational assessment report is prepared by rehabilitation provider and identifies the role of driver amongst those roles.

47. The tasks that may be involved in work as a driver reportedly include:

- Using mobile computer systems and radio networks to log into waiting passenger information
- Picking up passengers at designated locations or when hailed
- Checking passenger destinations and determining most appropriate route
- Transporting passengers to desired destinations

48. The vocational assessment report outlines the physical work demands of the role as including 'constant' sitting; 'frequent' moving; 'occasional' walking; and 'rare' lifting, bending, squatting and kneeling.

49. Considering the nature of the duties noted above and the physical demands of the role, I am satisfied that the Worker is able to undertake the duties of the role within his physical capabilities. I note that the current NTD has not placed any restrictions on the Worker's driving ability in his certificates of capacity and has certified this to be "ok".
50. The current NTD has placed a 45 minute restriction in relation to "static" sitting and the Worker makes a number submissions in relation to driving roles not being suitable for this reason, however the information before me indicates that the Worker would have the ability to change postures after 45 minutes in this role given that there is 'frequent' moving and 'occasional' walking involved in the role. Three employers who have driving positions were contacted who all advised that the Worker would be a potential candidate for their roles. One particular employer advised that the courtesy bus driving trips were no longer than 30 minutes long allowing for a change in posture.
51. I am satisfied that work as a driver is suited to the Worker when having regard to the nature of his incapacity.
52. In respect to the Worker's education, work experience and skills, I note that the employers contacted indicated that a Class C Drivers License is required which the Worker appears to have. The Worker also has approximately 5 years' experience in delivery driving from his pre-injury employment including driving a forklift.
53. The Worker also makes a number of submissions in relation to having no experience "using mobile computer systems and radio networks to log into waiting passenger information" and the other duties of the role and not having the "appropriate driver authority qualification". I have considered the Worker's submissions however such a qualification does not appear to be required on the information before me. Further while the Worker may not have experience using mobile computer systems, his computer skills are assessed as being at a 'beginner' level in the labour market report. I am satisfied that the Worker has the ability to use simple computerised systems similar to navigation systems.
54. I have also had regard to the Worker's submissions in relation to his age, "limited education" and time out of the workforce. I do not consider the Worker's age or education level would be an impediment to obtaining and working in driving roles. I acknowledge that the Worker has been out of the workforce for approximately 17 years however note that he has received significant return to work assistance from the Insurer including in job seeking, interview skills, injury disclosure and placement in a 4 months work trial.
55. Having regard to the balance of the factors in the definition of suitable employment under section 32A of the 1987 Act, I am satisfied that the Worker is able to return to work in suitable employment as a driver.
56. 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 therefore find that the Worker has current work capacity in accordance with the definition in section 32A of the 1987 Act.

Existing recipient of weekly payments

57. 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.

58. The Insurer has confirmed in their reply to the application for merit review that the Worker was in receipt of weekly payments of compensation immediately before 1

October 2012. On this basis, I am satisfied that the Worker was in receipt of weekly payments immediately before the commencement of the weekly payments amendments and that he is an existing recipient of weekly payments. The weekly payments amendments as provided in Division 2, Part 19H, Schedule 6 of the 1987 Act therefore apply to the Worker's entitlement to weekly payments of compensation.

Entitlement periods for ongoing weekly payments

59. The Worker's ongoing entitlement to weekly payments is to be determined in accordance with the relevant entitlement period that is applicable at the time of review. 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 ("the post second entitlement period").
60. The Insurer indicates in their reply to the Worker's application that the Worker had been in receipt of 933 weeks of weekly payments of compensation. I am satisfied that the Worker's entitlement to weekly payments of compensation currently falls after the second entitlement period and is to be determined in accordance with section 38 of the 1987 Act.

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

61. A worker with 'current work capacity' is entitled to weekly payments of compensation after the second entitlement period 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.*
62. Either section 38(3) or section 38(3A) of the 1987 Act apply depending on whether the Worker is a 'worker with high needs'. The Insurer determined both in its work capacity decision and internal review that Mr Baxter is not a worker with high needs within the definition under

section 32A of the 1987 Act. The information before me does not indicate that the Worker's degree of whole person impairment is 20% or more or that he meets any of the other requirements to satisfy the definition of 'worker with high needs' under section 32A of the 1987 Act. I am satisfied that the Worker is not a 'worker with high needs'.

63. I am satisfied that section 38(3) of the 1987 Act therefore applies in the Worker's case.
64. Section 38(3)(b) of the 1987 Act requires a worker (other than a worker with high needs) to have returned to work for not less than 15 hours per week and earn at least \$183.00 (as indexed) per week in order to satisfy the special requirements under this section. The Worker is currently not working and therefore does not satisfy these requirements.
65. I find that the Worker does not satisfy the special requirements for continuation of weekly payments of compensation after the second entitlement period under section 38(3) of the 1987 Act.
66. The Worker is not entitled to weekly payments of compensation. As this is ultimately the same outcome as the Insurer's work capacity decision, no recommendation to the Insurer is required.

Merit Review Service
Delegate of the State Insurance Regulatory Authority