



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 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 Truck Driver. He injured his right wrist and shoulder whilst releasing the lever on the back of a truck he was driving.
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 submits:
- He asks that his weekly payments continue until he finds a suitable job.
 - He is frustrated and disappointed with the system.
 - He feels harassed by the Insurer which is causing him stress and anxiety.
 - The Insurer does not seem to be taking his ongoing problems seriously and is not providing him with updates regarding his requests for treatment.
 - The Insurer is not approving requests for:
 - Left shoulder surgery
 - Left elbow ultrasound and pain management
 - Right wrist therapy.
 - He feels his condition is worsening and he is still in pain which makes it even harder to find suitable employment.
17. In reply, the Insurer submits:
- The Worker has capacity for 6 hours per day, 4 days per week with the restrictions as specified in the most recent WorkCover NSW Certificate of Capacity.
 - The Worker has the necessary functional and vocational capability to work as a Courier/Delivery Driver which is considered suitable employment for him.
 - The Worker is not a worker with high needs.

- The Worker has received 390 weeks of weekly payments and therefore section 38 of the 1987 Act applies.
- As suitable employment has been identified and the Worker is not currently working, he does not satisfy the requirements of section 38(3)(b) of the 1987 Act.
- Accordingly, the Worker's weekly entitlements are discontinued.

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. The Worker has made submissions regarding the Insurer's decision to decline approval for various treatment requests. I note that decisions regarding "reasonable and necessary treatment" can be the subject of a medical dispute under Part 7 of Chapter 7 of the 1998 Act and are not work capacity decisions. They cannot be considered in this merit review.
20. In addition, I note that the Insurer issued a notice pursuant to section 74 of the 1998 Act denying liability for the Worker's claim for "consequential" injuries to his left shoulder and left elbow. As this decision can be the subject of a medical dispute, it is not a work capacity decision and accordingly the injuries to the left shoulder and left elbow cannot be considered in this merit review.
21. The Worker has also raised communication issues between himself and the Insurer. As these relate to the Insurer's internal procedures they cannot be considered in this merit review.
22. And finally, although the Worker has not provided any specific submissions regarding the employment options found to be "suitable employment" by the Insurer, he has nevertheless indicated on the application form that he would like his current work capacity reviewed. This, being a merit review, requires that I examine this aspect of the Insurer's work capacity decision in the reasons below.

Current work capacity and suitable employment

23. 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

24. "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

25. I note that the Worker's inability to return to work in his pre-injury employment as a Truck Driver is not in dispute. The Worker however, in my view, has capacity to return to some type of employment that is consistent with the opinion expressed by his nominated treating doctor (NTD) in the WorkCover NSW Certificate of Capacity.

transferrable skills. It notes that the Worker has been a Truck Driver from 2005 up until his injury. It also identified the role of Delivery Driver as suitable employment for the Worker.

33. Although the Worker does not currently have capacity to drive heavy vehicles or buses, he holds a current Class C Driver's Licence which is a requirement for the role of Delivery Driver. The duties of a Delivery Driver are, on my reading, almost identical to that of a Truck Driver. Given The Worker's extensive employment history as a Truck Driver, I am satisfied he would possess the requisite skills and experience to be currently suited to the role of Delivery Driver.
34. In relation to the Worker's functional limitations, I acknowledge his submissions that he continues to suffer from pain and this makes it more difficult for him to find suitable employment. However, the NTD has certified yhe Worker to have the capacity to work in employment driving light vehicles or mini buses, provided he adhere to a 5kg (up to chest height) lifting restriction and to avoid elevating his arms above chest height. Employers contacted by the rehabilitation provider indicate that light lifting of up to 5kgs may be required with a trolley provided for items weighing heavier than 5kg. In addition, being a driving role, there will be extensive sitting and driving requirements. I note that there is nothing in the duties performed or from what was specified by employer contacts to suggest there is any work requiring elevation of arms above chest height.
35. I am satisfied that the Worker has the functional capacity to be suited to the role of Delivery Driver having had regard to the nature of his incapacity.
36. In relation to occupational rehabilitation services, I note that following the vocational assessment, the rehabilitation provider provided job seeking strategies and job seeking assistance to the Worker. A job seeking program was discussed with the Worker and although the Worker was noted to rely on the rehabilitation consultant to search for jobs, I am satisfied he has been provided with the job seeking modules to enable him to independently job seek. I have a copy of the Worker's "record of applications" made to various employers to illustrate that he has the capacity to independently apply for positions advertised.
37. 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 Delivery Driver constitutes suitable employment for the Worker.
38. 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

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 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.

40. The Insurer states on page 1 of their reply to the application for merit review that the Worker has received 390 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)

41. 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*
42. This definition requires that at least one of parts (a), (b), or (c) of the definition be met by the worker.
43. 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. In any event, I note that the Insurer has indicated in its work capacity decision that the Worker has been assessed as likely to have less than 20% permanent impairment. I note that a Certificate of Determination from the Workers Compensation Commission determined, by consent, that the Worker's permanent impairment was 11%. More recently, an approved medical specialist provided an assessment of permanent impairment of 14%.
44. 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.
45. 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.*
46. 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.

47. 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.
48. 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