



## State Insurance Regulatory Authority

Workers Compensation

Merit Review Service

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### 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 Machine Operator with Employer 1. He slipped and fell and a machine came down over his left hand amputating the tips of his left middle finger and fourth (ring) finger. The Worker also injured his left wrist in the fall.
8. The Worker has had four operations to his left hand and continues to suffer from pain, numbness and pins and needles in his left middle finger and fourth (ring) finger. He also has pain and stiffness in his left wrist.
9. The Insurer accepted liability and the Worker has been in receipt of weekly payments of compensation.
10. 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.

11. 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.
12. 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

13. 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).
14. Section 43 of the 1987 Act describes a "work capacity decision".
15. Section 44BB of the 1987 Act provides for merit review of a work capacity decision of the Insurer, by the Authority.

#### INFORMATION CONSIDERED

16. 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

17. In the application for merit review, the Worker, through his legal representative, submits:
  - He has undergone numerous surgical procedures:
  - He engaged in a work trial for a few months following surgery, however Dr J reported that he had neuromas in his fingers which impacted on his return to work.
  - Dr J also reported that "his neuroma pain persists of his left middle and ring fingers of which I am unable to do anything about."
  - Dr W reported a reduction of left wrist rotation of about 50% compared with the right and reduced sensation to the left middle and ring fingers. Dr W diagnosed amputation of the middle and ring fingers with neuroma formation.
  - He has significant loss of range of movement in both his wrists, both hands and sensory loss as detailed in the Medical Assessment Certificate of Approved Medical Specialist Dr H.
  - He is not suitable for the role of Light Packer as it requires constant, fast and repetitive manual movements of the hands.

18. In reply, the Insurer submits:

- The Worker has capacity to work 30 hours per week with the restrictions as stated in the WorkCover NSW Certificate of Capacity issued by Dr L.
- The role of Light Packer is suitable employment for the Worker having had regard to his transferable skills and work experience.
- Dr L reviewed the job options of Assembler, Process Worker and Light Packer and agreed that the Worker could perform these jobs for 6 hours a day, 5 days a week.
- The Worker underwent a work trial with Employer 2 for 6 hours a day, 5 days a week thereby demonstrating that he has the capacity to undertake the requirements of this type of work for 30 hours per week.

## 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 note that the Worker's inability to return to work in his pre-injury employment as a Machine Operator is not in dispute.
22. The Worker however, in my view, has capacity to return to some type of employment.
23. I note that the Worker has provided submissions regarding the surgical procedures he has undergone and his current symptoms. However, apart from the certificates of Dr L, there is little information regarding the Worker's current capacity for work.
24. Dr E saw the Worker and found that the tips of digits 3 and 4 were associated with a sensation of numbness rather than pain, although it was accepted that there was some pain. Dr E also found no signs of neuroma. With respect to the left wrist, Dr E found persisting restriction of movement and pain. On work capacity, Dr E stated that "with rehabilitation assistance and assessment he should be able to return to modified work at least **part-time**".

25. Dr D was of the view that in relation to the injuries to the Worker's fingers, he was fit to perform pre-injury duties on a full time basis. Dr D stated that the Worker's current restrictions related to his "non-compensable condition involving his left wrist", 5 months post-surgery. I do not have any information before me to suggest that the Insurer has denied liability for the left wrist injury. I have therefore included the left wrist in my considerations regarding the Worker's current capacity for work. Since Dr D has discounted the left wrist in his findings on fitness for work, I have given very little weight to Dr D's opinion.
26. The other medical reports before me do not comment on work capacity.
27. Having treated the Worker on a number of occasions with recent updates, I am satisfied Dr L would be well placed to provide an accurate opinion on the Worker's current capacity for work. I note also that Dr L's findings are consistent with Dr E's earlier view that the Worker should be able to return to modified work at least part time.
28. I therefore find on the basis of Dr L's WorkCover NSW Certificate of Capacity, namely that the Worker has capacity for some type of employment for 6 hours a day, 5 days per week with the following restrictions:
- |   |                         |                                    |
|---|-------------------------|------------------------------------|
| a | <b>Lifting/carrying</b> | lifting up to 10kgs with left hand |
|   | • Pushing/pulling       | up to 10kgs with left arm          |
|   | • <b>Driving</b>        | up to 30mins                       |
29. 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 assessment under Chapter 3 of the 1999 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 completed a vocational assessment and provided a report. A vocational assessment review was conducted which was accompanied with a report. In both reports, it was recommended that the Worker pursue vocational options of Assembler, Light Packer and Process Worker.
31. I note that the Worker worked as a Machine Operator which included duties associated with picking and packing. Before this, he was employed as a

Packer for a soft drink company where he picked and packed soft drink cans in an assembly line environment.

32. More recently, the Worker participated in a work trial where he obtained skills in the role of Process Worker and Packer. In a work trial completion report, it was reported that the Worker performed duties associated with placing cardboard wads into bottle lids, stacking plastic cups, removing and replacing lids on bottles and packing bottles into boxes or bags. He was able to constantly lift less than 1kg with occasional lifting of boxes weighing up to 10kg. Although it was reported that the Worker experienced a change in symptoms in his left middle finger, Dr L maintained the Worker's capacity for work and the Worker was able to complete 6 hours per day, 5 days per week for the entire work trial.
33. In the report, the Rehab Provider provides a description of the role of Light Packer and Process Worker. I note that both roles involve similar duties to what the Worker has performed in the past such as picking and packing of products for transport, adjusting machine operation and general warehouse cleaning. Businesses contacted by the Rehab Provider stated that previous packing, labourer, process work or warehouse type experience was preferred and that part time positions (30 hours per week) were available.
34. Given the Worker's extensive experience in his previous roles as Machine Operator and Packer, I am satisfied he has the transferrable skills to be suited to the roles of Light Packer and Process Worker, as recommended by the Rehab Provider.
35. I note that there are considerable submissions from the Worker regarding his persisting symptoms in his left wrist and fingers which impact on his return to work. However for the roles of Light Packer and Process Worker, the physical requirements are described as "Light" with employer contacts confirming that there would be no lifting or pushing/pulling of more than 3kg. This is well within the Worker's current functional tolerance of 10kgs. There is also no requirement to drive.
36. I have also considered the Worker's submission that the role of Light Packer requires "constant, fast and repetitive manual movement of the hands". I note that there is nothing in the WorkCover NSW Certificate of Capacity to indicate that the Worker does not have capacity for repetitive work using the hands. Therefore, I consider them to be within the Worker's functional capacity.
37. Dr L was provided with a list of duties for both roles and provided approval for 6 hours per day, 5 days per week which I note is consistent with the Worker's current capacity for work. The approval from Dr L further adds weight to the roles being functionally suitable to the Worker in my view.
38. I am satisfied that the Worker has the functional capacity to be suited to the roles Process Worker and Light Packer having had regard to the nature of his incapacity.

In relation to occupational rehabilitation services, in a progress update report from the Rehab Provider I note that the Worker has completed "Career Enhancement Modules" which comprised of: Resume 101; Cover letter 101; Interviewing Skills 101; Injury Disclosure; Job Seeking Methods; Employment Marketing 101; WorkCover Incentive Programs; How to handle rejection and Preparing for your career.

42. It was also reported that the Worker regularly attended one on one job seeking sessions and provided the Rehab Provider with weekly independent job seeking logs averaging 10 job applications per week.
43. I am satisfied the Worker has been provided with the occupational rehabilitation services to enable him to independently job seek.

44. 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 Light Packer and Process Worker constitutes suitable employment for the Worker.
45. 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

46. 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.
47. The Insurer states on page 10 of their reply to the application for merit review that the Worker has received 138 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)

48. A "worker with high needs" is defined in section 32A of the 1987 Act must be met, as follows:

*worker with high 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*
  - (!J) *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*
49. This definition requires that at least one of parts (a), (b), or (c) of the definition be met by the worker.
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. 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. This was based on the assessments of Dr E and Dr W . I also note that Dr H issued a Workers Compensation Commission Medical Assessment Certificate which assessed the Worker's degree of permanent impairment as 14%.

51. 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.
52. 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.*
53. 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.
54. 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.
55. 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 from 5 February 2017 stands.

Other

57. Recently, the Worker's daughter informed the rehab provider that the Worker has been diagnosed with Stage 4 stomach cancer and has approximately 12 months to live. The Worker subsequently informed the Rehab Provider that he would like to continue living as normally as possible with job seeking appointments and interviews to continue to be sourced.
58. While I have reached the same conclusion as the Insurer in relation to the Worker's current work capacity for his compensable injuries, it is hoped the Insurer will take into account the Worker's wishes in light of his very serious health issues when making a decision on the timing of the cessation of the occupational rehabilitation assistance that is currently provided to the Worker.