



# 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 is not entitled to ongoing weekly payments of compensation because she does not meet the special requirements under section 38(3) of the *Workers Compensation Act 1987* (the 1987 Act).

#### RECOMMENDATIONS BASED ON FINDINGS

5. The Authority may make binding recommendations to the Insurer based on the findings of its review under section 44BB(3)(e) of the 1987 Act.
6. The Authority does not make any recommendations for the reasons below.

#### BACKGROUND

7. The Worker worked as a Room Attendant/Housekeeper at a Hotel. She was employed by the employer.
8. The Worker experienced a gradual increase of pain and symptoms in the left and right knees, lower back, neck and right and left shoulders.
9. After some time off to treat her injuries, the Worker returned to work and continued working with the Employer on restricted duties until her termination. Based on the information before me, the Worker has not worked in paid employment since that date.
10. There is a previous merit review which found that the Worker had no current work capacity and was entitled to weekly payments of compensation.
11. The Insurer made a work capacity decision to reduce the amount of the Worker's weekly payments of compensation to \$0.00 under section 38(7) of the 1987 Act.

12. The Worker referred the work capacity decision for internal review by the Insurer. The Insurer made its internal review decision. The Insurer decided to discontinue the Worker's weekly payments of compensation because she did not meet the special requirements under section 38(3) of the 1987 Act to be entitled to ongoing weekly payments.
13. The application for merit review was received by the Authority. I am satisfied that the application for merit review has been made within time under section 44BB(3)(a) of the 1987 Act. It was made in the form approved by the Authority.

## **LEGISLATION**

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

## **DOCUMENTS CONSIDERED**

17. The documents I have considered for this review are the application for merit review and the Insurer's reply form, the documents listed in and attached to those forms, and any further information provided to the Authority and exchanged between the parties.
18. I have also considered a number of documents attached to an email from the Insurer. These documents included:
  - a number of certificates of capacity by Dr H referred to in the reply form; and
    - a copy of a Medical Assessment Certificate report from Dr B.

## **SUBMISSIONS**

19. In summary, the Worker submits in her application for merit review that:
  - the decision not to recommence weekly payments should be reviewed in accordance with the medical certificate of Dr H;
  - her weekly payments to recommence in accordance with the medical certificate of Dr H;
  - pain in left knee and shoulder has worsened;
  - she may require further surgery for right knee plus pain management treatment;
  - none of the above treatment has been provided by the Insurer;
  - her knowledge of English is very limited as she is from a non-English speaking background;
  - her non-English speaking background makes it difficult to talk to prospective employers without an interpreter; and

- the suitable employment of jobs suggested of Process Worker and Product Assembler are not suitable for her as she would require a drivers licence and to do heavy lifting.

20. In reply, the Insurer submits in summary :

- in regard to the Worker's submission that pain in left knee and shoulder has worsened, according to twelve months of medical certificates from Dr H, there has been no change to the Worker's capacity;
- in regard to the Worker's English ability impacting on her return to work, this has been considered by the Insurer when identifying suitable employment;
- in regard to the location of suitable employment for the Worker, many of the roles identified in the labour market assessment are accessible by public transport ;and
- the Worker does not meet the criteria for continued payments under section 38 of the 1987 Act and the work capacity decision has confirmed that there is no entitlement to weekly payments.

## **REASONS**

### **Nature of merit review**

21. This is a merit review under section 44BB(1)(b) of the 1987 Act of a work capacity decision of an insurer. It is not a review of an insurer's procedures in making a work capacity 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**

22. I turn now to review the circumstances of the injury, the Worker's medical history relevant to the injury and her ongoing capacity for employment.
23. The Worker is currently 52 years of age.
24. The Worker completed school to the equivalent to Year 10 level in Bangladesh. She then migrated to Australia. The Worker reported that she worked with the employer as a Room Attendant/Housekeeper from this time.
25. The Worker was working as a Room Attendant/Housekeeper at the Hotel, when she was injured.

### *Medica/Information*

26. I will first summarise and consider the medical information about the Worker.
27. In this review I am required to consider the Worker's current capacity for employment and her ability to work in suitable employment. This requires me to focus on the more recent medical evidence.
28. A number of NSW WorkCover certificates of capacity were issued by the Worker's treating doctor Dr H.
29. The most recent certificate from Dr H assessed that the Worker has capacity for some type of employment for 5 hours a day 4 days a week. Dr H's diagnosis of the Worker's injury includes: "[bilateral] knee pain, right knee more worsen, right shoulder pain, Lower back pain and exacerbation of neck pain".

30. Dr H specified restrictions of:
- Lifting/carrying 3kg
  - Sitting tolerance was not specified
  - Standing up to 30 minutes
  - Pushing/pulling was not specified
  - No squatting and bending
31. Dr H has also issued a number of other WorkCover NSW certificates of capacity for 2016. These certificates are in similar terms to the most recent certificate. I have taken these certificates into consideration in my assessment of the Worker's medical condition and fitness for work.
32. In a report, Dr D, Neurosurgeon, examined the Worker and prepared a medical report. In his report, Dr D noted that the Worker reported that she experienced pain in: both knees, both shoulders, lower back and neck. The Worker reported that she cannot sit or stand for long periods and that she takes several types of pain medication. She cannot cook, clean or do the housework. The Worker reported that she has trouble sleeping because of neck pain. The Worker enjoys shopping, reading and watching television.
33. In his report Dr D refers to several medical reports which pre-date the reported date of injury. These medical reports show: impingement in the right shoulder; spondylotic changes and disc bulging at the C5/6 and C6/7 levels of the spine; and early osteoarthritis in both knees.
34. During his examination of the Worker, Dr D noted non-organic weakness in both upper limbs and give way weakness in the lower limbs. Dr D also noted that on examination the Worker displayed restricted shoulder movements that were inconsistent with her ability to get her dress off over her head and to replace it at the end of the examination. Dr D wrote that the Worker's work duties may have aggravated some pre-existing degenerative changes in her cervical and lumbar spine "... but constitutional degenerative change is the main contributing factor, compounded by significant non-organic behaviour." Dr D wrote that he did not believe that the Worker's employment with the employer was a substantial contributing factor to her cervical spine or right shoulder symptoms. There appears to be a significant non-organic element to her right shoulder complaints.
35. In relation to the Worker's current capacity for employment, Dr D wrote :
- "Her current presentation would suggest that she is not fit to undertake any employment....She should be able to undertake 3 to 4 hours of light duties per day with a 2kg- 3kg lifting restriction ... There is no reason why she should not return to similar hours and duties to those she was undertaking at the time her employment was terminated...Provided she was restricted to light lifting and carrying, I would see no reason why she could not undertake the vocational options identified in the report from Rehabilitation Services. She demonstrates significant abnormal illness behavior and self-limits her activities. I suspect psychological issues are the major factor preventing her from achieving her fitness for work goal. "*
36. In a report, Dr R, Orthopedic Surgeon, examined the Worker and prepared a medical report. On examination Dr R noted that the Worker was able to get dressed without any apparent difficulty, displaying much greater range of shoulder movement. Dr R found that the Worker had: cervical spondylosis, right rotator cuff impingement and a partial thickness tear as well as bilateral knee arthritis. Dr R found

that the cervical pathology is entirely pre-existing, the right shoulder is not pre-existing and problems with the knees are largely constitutional and pre-existing in a medical sense. The Worker's employment at the employer had aggravated the condition of both her knees. Dr R wrote that in his opinion the Worker is:

*"...fit for normal hours where there is no work above chest height, no forceful repetitive use either arm and where she does not have to negotiate stairs, squat or kneel. There should be an 8 kilo lifting limit and she needs to be able to get up and move around every half an hour... The suitable employment was that of a Process Worker, Product Assembler or Packer. I would consider all these employment options to be reasonable bearing in mind they cover a very wide variety of task so the duties would need to fit in the stipulated parameters above."*

37. There is a Medical Assessment Certificate (MAC) from Dr B. That MAC found the total percentage combined value Whole Person Impairment for the Worker is 8%. Dr B notes that the Worker reported to him that she first experienced pain in her right shoulder in 2007. The Worker reported developing severe pain in her left knee in 2011. Dr B is of the opinion that the Worker's *"... physical problems are overshadowed by a great degree of illness behaviour."*
38. Consistent with the recommendations of the treating doctor Dr H and the opinions of Dr D and Dr R, I am satisfied that the Worker has capacity for some type of employment for 5 hours a day, 4 days per week within the restrictions specified by Dr H.

#### Findings on Medical Information

39. I note the Worker's submissions that her capacity to work is very limited because of her non-English speaking background, lack of drivers licence and inability to do heavy lifting at work. However, based on the certificates and other recent medical reports referred to above, I am satisfied that the Worker has the medical capability for 5 hours a day, 4 days per week in a job that takes into account Dr H's certified restrictions in her most recent certificate.

#### Current Work Capacity

40. I now turn to consider whether the Worker has "current work capacity" or "no current work capacity".
41. Section 32A of the 1987 Act defines "current work capacity" and "no current work capacity":
- 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*
42. To make a finding on the Worker's current work capacity under section 32A of the 1987 Act, I am required to consider whether she can return to work in her *pre-injury employment* or in *suitable employment*.

#### Pre-injury employment

43. In her certificates, Dr H has not certified the Worker as fit for pre-injury duties. In view of the Worker's pre-injury duties as a Room Attendant/Housekeeper, and having regard to her current restrictions as noted in the certificates of capacity from Dr H, I am satisfied that

the Worker has a present inability arising from an injury such that she is not able to return to her pre-injury employment as a Room Attendant/Housekeeper.

44. I therefore accept that the Worker has a present inability arising from an injury such that she is not able to return to her pre-injury employment.

#### Suitable employment

45. To determine if the Worker has current work capacity, I must consider if she is able to return to work in "suitable employment".

46. Suitable employment is defined in section 32A of the 1987 Act:

**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 rehab provider 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.

47. A Earning Capacity Assessment Report was prepared by Ms S from rehab provider 2. The report identified three suitable employment options for the Worker of Process Worker, Product Assembler or Packer.

#### Suitable employment- Process Worker

48. The rehab provider 2 report described the typical critical functional demands of a Process Worker as "varying". Process workers assemble components and perform production line operations. The rehab provider 2 report referred to labour market research that identified a number of sedentary process worker roles which involve no lifting above 2.5 kg, limited lowered tasks, with the opportunity to take short rest breaks as required. The rehab provider 2 report said the physical demands of this role fit with the Worker's identified capacity as there are roles that do not require the Worker to lift over 2.5 kg or engage in continuous lower/ground work, as well as roles that offer the flexibility to alternate posture if required.
49. The rehab provider 2 report stated that the Worker had the relevant transferrable skills from previous employment that could be transferred to work as a Process Worker.
50. For reasons that follow, I am satisfied that the Worker is suited to the role of a Process Worker when having regard to the nature of her incapacity, transferrable skills and the medical information detailed above.

#### Suitable employment- Product Assembler

51. The rehab provider 2 report described the typical critical functional demands of a Product Assembler put together components and subassemblies that go into production of metal products, electrical and other articles. The rehab provider 2 report referred to labour market research that identified a number of Product Assembler roles which require either sitting or standing at a table or standing at a waist height bench assembling products. Employer contacts confirm there are jobs which involve lifting no more than 2.5 kg, limited lowered/ground work tasks and the flexibility to have short rest breaks if required. The rehab provider 2 report said the physical demands of this role fit with the Worker's identified capacity as there are roles that do not require the Worker to lift over 2.5 kg or engage in continuous lower/ground work, as well as roles that offer the flexibility to alternate posture if required.
52. The rehab provider 2 report stated that the Worker had the relevant transferrable skills from previous employment and background in the hospitality industry that could be transferred to work as a Product Assembler.
53. For reasons that follow, I am satisfied that the Worker is suited to the role of a Product Assembler when having regard to the nature of her incapacity, transferrable skills and the medical information detailed above.

#### Suitable employment- Packer

54. The rehab provider 2 report described the typical critical functional demands of a Packer fulfil orders placed with companies, gather items and pack them in preparation for transport. The rehab provider 2 report referred to labour market research that the Worker's experience in working in a team environment and working on routine tasks would be highly regarded. The rehab provider 2 report identified a number of sedentary packer roles which involve no lifting above 2.5 kg, limited lowered tasks, with the opportunity to take short rest breaks as required. The rehab provider 2 report said the physical demands of this role fit with the Worker's identified capacity as there are roles that do not require the Worker to lift over 2.5 kg or engage in continuous lower/ground work, as well as roles that offer the flexibility to alternate posture if required.
55. The rehab provider 2 report stated that the Worker had the relevant transferrable skills from previous employment that could be transferred to work as a Packer.
56. For reasons that follow, I am satisfied that the Worker is not suited to the role of a Packer when having regard to the nature of her incapacity, transferrable skills and the medical information.
57. I note in a report Dr H has approved two of the three options suggested in the rehab provider 2 report as suitable vocational options for the Worker. The two options approved were: Process Worker and Product Assembler. Dr H noted in his response that the Worker could work in these two jobs for unrestricted hours per week. Dr H did not approve of the Packer option with the notation: "*Repetitive tasks are not suitable for her*".

#### Findings on suitable employment and current work capacity

58. I am satisfied that the two suggested employment options for the Worker of Process Worker or Product Assembler, are suitable for the Worker having regard to the nature of her incapacity, age, education, skills and work experience. I note Dr H's restrictions on sitting and standing tolerances that the Worker be allowed to stand for not more than 30 minutes. I note that some of the proposed roles in the rehab provider 2 report have the ability to change posture. I am further satisfied that the Worker is already well suited to employment as either a Process Worker or Product Assembler without further return to work planning or occupational rehabilitation services.

59. Based on Dr H's report, I am not satisfied that the third suggested employment option of Packer is suitable employment for the Worker.
60. I am persuaded that employment as either a Process Worker or a Product Assembler is employment in work for which the Worker is currently suited and therefore "suitable employment".
61. I find that the Worker has a present inability arising from an injury such that she is not able to return to her pre-injury employment as a Room Attendant/Housekeeper but is able to return to work in suitable employment.
62. I find that the Worker has "current work capacity" as defined by section 32A of the 1987 Act.

#### **Entitlement periods for ongoing weekly payments**

63. The following provisions of the 1987 Act provide the basis for determination and calculation of The 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.

#### Finding on Entitlement Period

64. In the reply to the Worker's application for merit review, the Insurer indicated that 183 weeks of weekly payments of compensation has been paid. I am therefore satisfied that the Worker has received more than 130 weeks of weekly payments of compensation.
65. Accordingly, her 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**

66. 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(3) or (3A) 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 \$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.*

67. As I have found that the Worker has current work capacity and that she has received greater than 130 weeks of weekly payments, her entitlement to further weekly payments must be determined in accordance with section 38 of the 1987 Act.
68. The Worker is entitled to weekly payments of compensation only if she meets all three special requirements provided in section 38(3) of the 1987 Act unless she is a "worker with high needs" as defined in section 32A of the 1987 Act.
69. I note the Medical Assessment Certificate (MAC) from Dr B which found the total percentage combined value Whole Person Impairment for the Worker is 8%.
70. The Worker has not submitted or provided any information contrary to the Insurer's comments above. Therefore 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.
71. In order for the Worker to continue to be eligible to receive weekly payments of compensation, she must meet all of the requirements set out in section 38(3) of the 1987 Act.
72. As the Worker is an existing recipient of weekly payments and there is no evidence that the Insurer notified her of the notice requirement in section 38(3)(a) of the 1987 Act, I am satisfied pursuant to the *Workers Compensation Regulation 2016*, that section 38(3)(a) of the 1987 Act is fulfilled.
73. The Worker is currently not working. In order to fulfill the requirements of section 38(3)(b) of the 1987 Act, the Worker must have returned to work for not less than 15 hours per week and she must earn at least \$155 per week. The Worker has not returned to work for at least 15 hours per week and is not in receipt of current weekly earnings of at least \$155 per week. Accordingly, the Worker does not meet the requirements in section 38(3)(b) of the 1987 Act. (I note that the amount required to be earned in section 38(3)(b) is currently indexed at \$183 per week).
74. In relation to the third requirement in section 38(3)(c) of the 1987 Act, I am not satisfied that the Worker is, and is likely to continue indefinitely to be, incapable of undertaking further additional employment or work that would increase her current weekly earnings. I note that the Worker is currently not working but the medical and vocational evidence is that she is capable of some work. The factors that I have taken into account in reaching this conclusion include the certificates of capacity from Dr H; the report from Dr D; and the rehab provider 2 report.
75. The legal test under section 38(3)(c) of the 1987 Act requires me to be satisfied that the Worker is likely to continue indefinitely to be incapable of undertaking further additional employment or work that would increase her current weekly earnings. Based on the evidence in the reports I have referred to above, I am satisfied that the Worker could successfully work as a Process Worker or Product Assembler.
76. Accordingly, I am not satisfied that the Worker is incapable of undertaking further additional employment or work that would increase her current weekly earnings. Therefore she does not satisfy the requirements of section 38(3)(c) of the 1987 Act.

#### *Findings on Entitlement to Payment of Weekly Compensation*

77. The Worker does not meet the special requirements for continuation of weekly payments after the second entitlement period (after 130 weeks) under section 38(3) of the 1987 Act.
78. I therefore find that in accordance with section 38 of the 1987 Act, the Worker has no entitlement to weekly payments of compensation.

79. As the Insurer has already reached a similar finding on internal review I do not consider any recommendation to the Insurer is necessary in this case.

**Merit Review Service**

**Delegate of the State Insurance Regulatory Authority**

