



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.
2. Work as a Car Park Attendant constitutes suitable employment for the Worker.
3. The Worker has current work capacity.
4. The Worker is not a worker with high needs.
5. The Worker does not meet the special requirements under section 38(3) of the *Workers Compensation Act 1987* (the 1987 Act) for continuation of weekly payments of compensation after the second entitlement period.

RECOMMENDATION BASED ON FINDINGS

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

BACKGROUND

8. The Worker was working as a Process Worker when she sustained injuries to both of her elbows in the course of her employment.
9. The Worker was unable to do her normal duties following her injuries. Her employer indicated that it was not able to offer her suitable duties after a period of time, and her employment was terminated. The Worker has not returned to paid employment since this time.
10. As part of a return to work program, the Worker participated in a work trial as a Sales Assistant in a clothing store.
11. The Insurer made previous work capacity decisions in relation to the Worker. The Insurer determined that the Worker had no entitlement to weekly payments of compensation in accordance with section 38(3) of the 1987 Act. Subsequent internal review and merit review decisions determined the same outcome.
12. The Worker applied to WIRO for a procedural review of the Insurer's decisions. WIRO found that the

Insurer had made a procedural error when making the work capacity decisions and set them aside.

13. The Insurer made a further series of work capacity decisions. These decisions included determinations that the Worker:
 - Had current work capacity.
 - Had suitable employment options available to her.
 - Was not a worker with high needs.
 - Did not meet the special requirements under section 38(3) of the 1987 Act for continuation of weekly payments after the second entitlement period.
14. The outcome of the work capacity decisions was sent to the Worker in a letter.
15. The Insurer conducted an internal review of the work capacity decisions and came to the same conclusion, that is, the Worker had no entitlement to weekly payments of compensation. The outcome of the internal review was communicated to the Worker via a letter.
16. 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

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.

INFORMATION CONSIDERED

20. The information I have considered are those listed in, and attached to, the application and the Insurer's reply and any other information provided by the parties since the application for merit review, which I am satisfied has been exchanged between the parties.

SUBMISSIONS

21. In the application for merit review, the Worker's legal representative has requested a review of the following work capacity decisions of the Insurer:
 - The Worker's current work capacity
 - Suitable employment for the Worker
 - The Worker's status as a worker with high needs
 - The Worker's entitlement to weekly payments of compensation in accordance with section 38 of the 1987 Act
22. In the application for merit review, the Worker, via her legal representative, submits:
 - The Worker sustained injuries to her right elbow, left shoulder, neck and sexual organs as a result of the nature and conditions of her employment as a Process Worker.

- The Worker later sustained a right trigger thumb during her work trial.
- The Insurer has determined that the Worker has a current work capacity for suitable employment for 38 hours per week. Three vocational options are identified in the labour market report from a rehab provider. These are: Sales Assistant, Customer Service Officer and Car Park Attendant.
- A further suitable employment option of Teachers' Aide is identified in the Labour Market report. The internal review decision deems that Sales Assistant, Car Park Attendant and Teachers' Aide are suitable, whereas Customer Service Officer is not regarded as suitable.
- The WorkCover NSW certificate of capacity (certificate of capacity) from the Worker's nominated treating doctor (NTD) includes restrictions on sitting (tolerance of 30 minutes), standing (tolerance of 30 minutes), pushing/pulling (avoid bending/twisting/squatting (repetitive shoulder movements to be avoided) and no driving ability.
- The Insurer notes that the duties of Sales Assistants require frequent standing and walking, occasional sitting, occasional stretching, bending, twisting, squatting, crouching and rare driving.
- In the short period that the Worker undertook a work trial as a Sales Assistant, she sustained further injuries. This has been denied by the Insurer. Given the history, the role cannot be considered as suitable employment for the Worker.
- In relation to the vocational option of Car Park Attendant, frequent standing and walking, occasional sitting, frequent stretching and twisting and rare driving are required. In particular, one of the likely duties is to move cars within parking areas. The restrictions noted in the certificate of capacity are inherently inconsistent with the requirements of Sales Assistant and Car Park Attendant respectively, such that these vocational options cannot be considered as suitable employment.
- The Insurer refers to The Worker's English competency throughout the internal review decision. The Worker instructs that she has extreme difficulty with understanding and communicating in English, which has been communicated to the Insurer on numerous occasions, including in her application for internal review in relation to a work capacity decision.
- One of the skills required for the role of a Teachers' Aide is the ability to read and write in English. The Worker disputes that she has the necessary language skills to undertake this role, which includes reading and comprehension skills to independently job seek. She does not hold a basic level of English skills and this role is beyond her capabilities.
- The NTD highlights this point as he notes that the role would be suitable for the Worker "provided that she obtains the necessary language skills". Furthermore, the Worker required assistance from the rehab provider and an interpreter in order to complete tests of Working with Children Check and Child Protection Training and Anaphylaxis Training.
- Regarding the dispute over whether the Worker understood customer requests during her work trial, the worker's view should be preferred over the Work Trial Closure Report. It is pertinent to note that the rehab providers have

continuously made errors in relation to the Worker's preferred language.
- In relation to whether the Worker is "high needs", the Insurer has considered the Medical Assessment Certificate of an approved medical specialist (AMS). The Insurer has failed to consider the subsequent medical report of the insurer's independent medical specialist, which

they have in their possession.

- The insurer's independent medical specialist was requested by the Insurer to assess the Worker's permanent impairment in accordance with section 65 of the Workers Compensation Act 1987. This was undertaken subsequent to the AMS's assessment. The Worker was assessed as having a permanent impairment on 19% as a result of her upper limb injuries, and an impairment of 24% when her neck injuries are also taken into account.
- The insurer's independent medical specialist's report appears not to have been considered in making the work capacity decision. Had the report been considered, the Insurer would find that the Worker is a worker with high needs. Alternatively, if it is not accepted that the Worker is a high needs worker, the independent medical specialist's assessment of permanent impairment is greater than 10%, and it would follow that section 59A(2)(b) applies rather than section 59A(2)(a).

23. In reply, the Insurer submits:

- On 7 February 2002, the Worker injured her right elbow whilst working as a Process Worker.
- At the time of the internal review decision (IRD), the Worker was certified by the NTD as being fit for suitable duties but not for pre-injury duties, for 7.6 hours per day, 5 days per week with restrictions. It relies on paragraphs 19 to 24 of the IRD.
- The roles of Sales Assistant, Car Park Attendant and Teachers' Aide constitute suitable employment for the Worker with consideration given to her age, education, skills, experience, functional ability and vocational capabilities pursuant to section 32A of the 1987 Act. It relies on paragraphs 29 to 52 of the IRD.
- The Worker has current work capacity as defined by section 32A of the 1987 Act.
- The Worker has received weekly benefits beyond 130 weeks and is to be assessed for ongoing entitlement to weekly payments under section 38 of the 1987 Act.
- The Worker is not a worker with high needs and section 38(3A) of the 1987 Act does not apply.
- The Worker meets the requirements under section 38(3)(a) of the 1987 Act by virtue of the *Workers Compensation Regulation 2016*, schedule 8, part 1, clause 16(1).
- The Worker has been assessed with current work capacity and is not currently working at least 15 hours per week and is not earning at least \$183 per week. The Worker does not meet the special requirements under section 38(3)(b) of the 1987 Act.
- The Worker's weekly payments of compensation are discontinued on the above basis.
- With respect to the other submissions:
 - i. For the reasons outlined in the IRD, it considers that the roles of Sales Assistant, Car Park Attendant and Teachers' Aide are suitable employment for the Worker.
 - ii. It relies on the Medical Assessment Certificate of the AMS who assessed the Worker as having 6% WPI. Although it does not accept the assessment of the insurer's independent medical specialist, it notes that his assessment as to permanent impairment of the upper limbs is 19% and this remains below the threshold to be considered a worker with high needs.

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. 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.

25. The Worker's legal representative has made submissions in relation to her entitlement to payments of compensation under section 59A of the 1987 Act. Section 59A of the 1987 Act is part of Division 3 of the 1987 Act and relates to compensation for medical, hospital and rehabilitation expenses. Decisions in relation to these expenses are not work capacity decisions in accordance with section 43(1) of the 1987 Act and the Authority has no jurisdiction in such matters. The submissions will therefore not be further addressed in these reasons.

Current work capacity

26. The Worker's legal representatives have requested a review of the Insurer's decision in relation to her current work capacity. In determining the Worker's current work capacity, I am required to refer to the definition that is set out in the 1987 Act.

27. "Current work capacity" and "no current work capacity" are defined in section 32A of the 1987 Act 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, 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

28. I acknowledge that various submissions have been made in relation to medical opinions that have been provided by medical practitioners. Other than certificates of capacity, issued by the NTD, there is no information that has been provided to me that refers to an examination of the Worker in the past 12 months.
29. The NTD has been the Worker's NTD since at least 2009. I am confident that the NTD has had the benefit of any specialist reports on the Worker's condition and that he has had the advantage of ongoing and regular review of the Worker over a long period. I am satisfied that the NTD is in an excellent position to provide his informed medical opinion as to the Worker's current capacity for employment.
30. For the period from at least 4 August 2016 to date, the NTD has indicated that the Worker has the capacity for some type of employment for 7.6 hours per *day*, 5 days per week. the NTD has stipulated that any such employment must be consistent with the following functional tolerances for the Worker:

Lifting/carrying capacity	2kg
Sitting tolerance	30 minutes
Standing tolerance	30 minutes
Pushing/pulling ability	Avoid
Bending/twisting/squatting ability	Avoid repetitive upper limb movements
Driving ability	Avoid any overhead work
Other	Avoid repetitive upper limb movements, avoid repetitive right thumb movement

31. The Worker's legal representative has indicated that they consider the comments in the sections of the certificate of capacity relating to "bending/twisting/squatting ability" and "driving ability" to apply to those particular sections.
32. Although I agree that this is how a certificate of capacity would normally be interpreted, it is very clear that the comments next to these activities do not relate to the activities themselves, but that they are additional comments on the Worker's functional capacity that stand alone. The reference to upper limb movements is consistent with injury to both elbows. It is also captured in the "Other" section in the certificate.
33. I also note that the NTD has recorded restrictions in relation to the Worker's right thumb. Liability for the injury to the Worker's thumb has been declined under section 74 of the 1998 Act. Accordingly I am not permitted to consider any incapacity arising from this injury when assessing suitable employment for the Worker.
34. I therefore find that the Worker has capacity for some type of employment for 7.6 hours per day, 5 days per week in employment that is consistent with the following functional tolerances:

Lifting/carrying capacity	2kg
Sitting tolerance	30 minutes
Standing tolerance	30 minutes
Pushing/pulling ability	Avoid
Upper limb movements	Avoid repetitive upper limb movements
Overhead work	Avoid any overhead work
Other	Avoid repetitive upper limb movements.

Suitable employment

35. The Worker's legal representative has requested a merit review of the Insurer's determination as to suitable employment for the Worker. In assessing the suitable employment options proposed by the Insurer, I am to refer to the definition set out in the 1987 Act.
36. "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.

37. The Worker was born in China. She migrated with her family to Vietnam as a child where she completed her education to a year 10 level. Following this the family relocated to Hong Kong. The Worker worked as an Office Clerk in Hong Kong and later migrated to Australia in 1985. Between 1987 and 2003 the Worker worked as a Process Worker.
38. In a report prepared by a rehab consultant, the rehab consultant indicated that the Worker had rated her own English skills in speaking, reading, writing and listening as being below average.
39. I am aware that the Worker is not satisfied with this report which has errors which, among other things, indicates that her preferred language is Mandarin when it is in fact Cantonese. I have taken this into consideration when reading the report.
40. I have been provided with various reports in relation to the Worker's return to work. There is a Labour Market Report that had been provided to me, which was prepared by the rehab provider. This report suggests three suitable employment options for the Worker, being:
- Sales Assistant
 - Customer Service Officer
 - Car Park Attendant
41. I have commenced with an assessment of the role of a Car Park Attendant in accordance with the definition of suitable employment under section 32A of the 1987 Act. My reasons for doing so will be outlined below.

Car Park Attendant

42. For the Worker to return to work in suitable employment, she must be able to engage in work for which she is currently suited when having regard to a range of particular factors. The Worker's legal representative has made a number of submissions to support the assertion that the role of a Car Park Attendant is not suitable employment for the Worker. These submissions include:
- "In relation to the vocational option of Car Park Attendant, frequent standing and walking, occasional sitting, frequent stretching and twisting and rare driving are required. In particular, one of the likely duties is to move cars within parking areas. The restrictions noted in the certificate of capacity are inherently inconsistent with the requirements of Sales Assistant and Car Park Attendant respectively, such that these vocational options cannot be considered as suitable employment."*
43. I have taken from this submission that the Worker's legal representative considers that she is unable to move cars as part of her employment as a consequence of her injury. I am also of the understanding that the legal representative considers that stretching and twisting are not within the Worker's functional tolerances.
44. As set out above, I consider this interpretation of the Worker's current certificate of capacity to be incorrect. I have not found that the NTD has indicated that the Worker has any incapacity in relation to driving, bending or twisting.
45. I also note that the legal representative has referred to a generic assessment of roles of Car Park Attendants. Although these assessments are often of assistance in understanding the nature of a particular role, these considerations are, in my view, outweighed by information that indicates that there is actual employment within a role classification that is consistent with the functional tolerances of an injured worker.
46. The rehab provider contacted three employers of Car Park Attendants to ascertain the functional requirements of the role. Each of the employers indicated that the role required an individual to "sit, stand and walk throughout the day". No lifting or overhead work was required in any of the roles

and only one of the three employers required Car Park Attendants to move cars. Movements of the arm were not repetitive according to the employers.

47. I have considered whether the Worker would be able to move between sitting and standing in accordance with her functional tolerances. I am satisfied on the information that has been provided that this would be possible.
48. The Worker is able to work on a full time basis and employers have indicated that work as a Car Park Attendant may be done on such a basis.
49. I am satisfied that the role of a Car Park Attendant is suitable employment for the Worker having regard to the nature of her incapacity.
50. Suitable employment must also be work to which a worker is suited when having regard to their age, education, skills and work experience.
51. I do not consider that there is anything to indicate that the Worker's age would be a barrier to employment as a Car Park Attendant. There are no educational requirements indicated by the employers contacted.
52. Each of the employers has indicated very similar skill requirements, these are:
 - Guarding cars
 - Operating boom gates
 - Providing customer service and speaking with authorities.
53. I am aware that the Worker has limited English skills and I accept that her spoken and written English skills are below average. I have also considered the submission that the Worker's English is not as strong as the Vocational Program Closure report may suggest.
54. Regardless of this, the Worker was able to complete the work trial for a period of six weeks. According to the closure report prepared at the end of the work trial, the Worker had a sufficient level of English to follow the instructions of her host employer and to greet customers. I also note that the Worker was employed for 16 years in Australia prior to sustaining her injury. While I am aware that the work was repetitive, it must still have involved communication with co-workers and supervisors and the ability to understand and follow instructions.
55. I am satisfied that the Worker's skills in English are of a sufficient level that she could greet car park users, understand if they indicated experiencing a problem and to contact a supervisor if required. I therefore find that the Worker has the necessary skills to undertake the role of a Car Park Attendant.
56. In making my findings above, I have had reference to the documentation that has been provided to me regarding return to work planning and occupational rehabilitation services that have been provided to the Worker.
57. I find that work as a Car Park Attendant is suitable employment for the Worker.
58. I therefore find that the Worker has current work capacity in accordance with the definition under section 32A of the 1987 Act.
59. In light of my findings below, it has not been necessary for me to assess whether the other roles proposed for the Worker are also suitable employment in accordance with the definition under section 32A of the 1987 Act.

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

60. There is no dispute between the Worker and the Insurer that her entitlement falls after the second

entitlement period and is to be assessed in accordance with section 38 of the 1987 Act.

61. I have found that the Worker has current work capacity, her entitlement is therefore to be assessed in accordance with section 38(3) of the 1987 Act.
62. Section 38(3) of the 1987 Act provides that an entitlement to weekly payments after the second entitlement period is only available to a worker with current work capacity 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.*

Worker with high needs

63. "Worker with high needs" is defined in section 32A of the 1987 Act 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*

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%, and includes a worker with highest needs.*

64. The Worker's level of permanent impairment was assessed for the purpose of Division 4 of the 1987 Act by the AMS. The AMS found that the Worker had 6% whole person impairment (WPI) in relation to her injuries.
65. The Worker was assessed by the insurer's independent medical specialist. the independent medical specialist offered two different assessments of the Worker's WPI. In relation to her upper limbs only, the insurer's independent medical specialist found that the Worker had 19% WPI and 24% WPI when considering a further injury to the Worker's neck.
66. The Insurer has confirmed that no claim for injury to the Worker's cervical spine has been accepted by

them and I am satisfied that the assessment of 19% WPI relates to the injuries for which the Insurer has accepted liability.

67. I am therefore satisfied that regardless of whether the assessment of the AMS or the insurer's independent medical specialist is used, the Worker is not a worker with high needs in accordance with the definition under (a) above.
68. The definition at item (b) does not apply as the Worker's permanent impairment has been assessed.
69. The Insurer has clearly indicated that it does not consider that the Worker has permanent impairment of greater than 20% therefore the definition at item (c) does not apply.
70. I find that the Worker is not a worker with high needs in accordance with the definition under section 32A of the 1987 Act.

Assessment in accordance with the requirements under section 38(3) of the 1987 Act

71. There is no dispute that the Worker meets the criteria under section 38(3)(a) of the 1987 Act for continuation of weekly payments of compensation.
72. The Worker is presently not employed. She has therefore not returned to work for a period of not less than 15 hours per week and is not in receipt of current weekly earnings of at least \$183.
73. My finding in relation to section 38(3)(b) renders any assessment as to section 38(3)(c) unnecessary.
74. The Worker does not meet the special requirements under section 38(3) of the 1987 Act for continuation of weekly payments after the second entitlement period.
75. I therefore find that the Worker has no entitlement to weekly payments of compensation.

**MERIT REVIEW SERVICE
DELEGATE OF THE STATE INSURANCE REGULATORY AUTHORITY**