



---

**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 and are to the basis for the Insurer's review decision.
2. The Worker has a present inability arising from an injury such that he is not able to return to his pre-injury employment but is able to return to work in suitable employment as defined in section 32A of the *Workers Compensation Act 1987* (the 1987 Act).
3. The Worker has "current work capacity".
4. The Worker is able to earn \$268.44 per week in suitable employment.
5. Section 37(3) of the 1987 Act is to be applied to determine the amount of the Worker's weekly compensation payments.

**RECOMMENDATION BASED ON FINDINGS**

6. Under section 44BB(3)(g) of the 1987 Act the Authority may make binding recommendations to an insurer based on the findings of its review.
7. The Insurer is to calculate and pay the Worker weekly payments of compensation under section 37(3) of the 1987 Act having regard to my findings above.

**BACKGROUND**

8. The Worker sustained an injury to his back during the course of his employment as a cleaner.
9. His employment was terminated. He is currently not working.
10. The Insurer accepted liability for the injury. The Worker has received weekly payments of compensation for incapacity resulting from that injury.
11. In its work capacity decision, the Insurer calculated the Worker's entitlement to weekly payments of compensation to be \$33.92. The Insurer decided that:
  - The Worker has the capacity to work 12 hours per week
  - The Worker has not returned to work
  - The roles of Process Worker (light) and Car Park Attendant are suitable employment roles for the Worker
  - The Worker is able to earn \$288.00 gross per week as a Car Park Attendant

- The Worker's PIAWE is \$402.40 per week
  - The Worker's claim falls to be determined by section 37 of the 1987 Act.
12. The Worker referred the Insurer's decision for internal review. The Insurer affirmed in its internal review that the Worker's weekly payments were to be calculated at \$33.92 per week.
13. The Worker made an application for merit review to the Authority. The application for merit review was received by the Authority. The application has been made within time under section 44BB(3)(a) of the 1987 Act.

## 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 the Insurer, by the Authority.

## DOCUMENTS CONSIDERED

17. The documents I have considered for this review are the Worker's 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.

## SUBMISSIONS

18. In the application for merit review, the Worker submits:
- Process worker (light) and Car Park attendant are not suitable employment roles.
  - There has been no change in capacity since the SIRA merit review decision.
  - The applicant relies on previous submissions from that review. These include that:
    - The Worker is not able to work more than 12 hours per week.
    - The Worker is unable to perform the duties of the identified roles.
    - The Worker's whole person impairment has not been finalised and therefore the Insurer's decision is premature.
19. In reply, the Insurer submits:
- It accepts certificates of capacity issued by the treating specialist with restrictions of lifting/carrying 5 kgs, sitting and standing 30 minutes, pushing/pulling 5 kgs.
  - The Worker has received 107 weeks of compensation.
  - It has disputed liability for left hip injury and issued a section 74 notice. To date the Insurer is yet to receive a request for review of the declination.
  - His claim for compensable injuries to the left shoulder and back remain accepted.
  - The Insurer acknowledges that that the Worker has a concurrent claim with another insurer.

## REASONS

### Nature of merit review and Jurisdiction

20. 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.
21. 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.
22. I am required to conduct a review of the work capacity decisions of the Insurer the worker has referred for review under section 44BB of the 1987 Act.
23. The Worker indicates in the application for merit that he seeks review of the following decisions:
  - His current work capacity (section 43(1)(a) of the 1987 Act)
  - The Insurer's decisions about what constitutes suitable employment for him (section 43(1)(b) of the 1987 Act)
  - The Insurer's decision about the amount he is able to earn in suitable employment (section 43(1)(c) of the 1987 Act)
  - The Insurer's decision to reduce his entitlement to weekly compensation (section 43(1)(f)).
24. There is no dispute before me about the Worker's pre-injury average weekly earnings, that the Worker is not able to return to his pre-injury employment, or that his entitlement falls to be determined under section 37 of the 1987 Act. I proceed on this basis.
25. I note that the Insurer has issued a section 74 notice, declining liability for the claimed injury to the left hip. That decision is a decision that is not amenable to review by the Authority. Accordingly, this review will be confined to consideration of The Worker's capacity for employment in relation to the injury in respect of which the Insurer has accepted liability, being the left shoulder and back.
26. Whilst I note that The Worker has made submissions concerning the previous merit review conducted by a delegate of the Authority, it should be noted that I am neither bound by findings of law or fact made by the delegate in the previous review.

### Current work capacity

27. Section 32A of the 1987 Act defines "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*
28. The Worker was cleaning a warehouse and was sweeping the floor with a broom. A forklift driving forward evidently did not see him and he was struck on the left shoulder falling to the ground. He last worked in suitable duties.
29. At this point I note that there are reports before me that have been helpful in coming to an understanding of the Worker's capacity for employment. However, this is a review of the Worker's *current* work capacity, and the reports which date back to 2015 and prior, are in my view too dated to be of utility in reviewing the Worker's current work capacity. For this reason I will refer to the more recent medical evidence now before me.
30. The injury management consultant conducted a file review and discussed the Worker's capacity with the treating specialist. It was agreed that the Worker would be fit for suitable duties at more than 12 hours per week and the treating doctor agreed to update the Worker's capacity to 20 hours per week.

31. The Worker was assessed with 12% WPI in respect of the injuries for which the Insurer has accepted liability.
32. Despite the file review of the injury management consultant, the treating specialist has continued to certify the Worker to have capacity to work 4 hours per day, 3 days per week with lifting/carrying/pushing/pulling up to 5 kilograms, and sitting/standing limit of 30 minutes. The most recent certificate of capacity before me is dated 5 May 2017, for the period 20 May 2017 to 20 August 2017.
33. Whilst I note the opinion of the injury management consultant, I prefer the opinion of the treating specialist, who has treated the Worker's injury and as the treating doctor is in a good position to understand the nature of the Worker's capacity for employment. Further, the Worker has not worked for a significant period of time and the more conservative and recent assessment of the treating doctor, is in my view preferable.
34. I therefore find that the Worker has the capacity to work 4 hours per day, 3 days per week with lifting/carrying/pushing/pulling ability up to 5 kilograms, and sitting/standing limit of 30 minutes.

#### Pre-injury employment

35. At the time of his injury, the Worker was employed as a cleaner. The medical evidence, including the work capacity decision of the Insurer supports that he is not able to return to his pre-injury employment and this does not appear to be in dispute in any event.

#### Suitable employment

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 44B), 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. In a labour market analysis dated 31 March 2017, the roles of **Light Process Worker** and **Car Park Attendant** are identified as suitable employment.
38. The role of **Light Process Worker** involves working on a production line or in a warehouse to assemble components that compose a range of products and equipment. Often workers are required to pack, wrap, assemble and label various light weight products.

39. In the labour market analysis report, a number of employers in the labour market were contacted regarding light process worker roles in their respective organisations. A number of examples of “entry level” roles are described.
40. One employer advised that the core tasks of such a role in that organisation include opening envelopes, performing repair duties on documents (sticky taping, flattening) to ensure the documents could be scanned into a computer, and then scanning the documents using a scanning machine. The role is a primarily seated role but a worker could perform in either a seated or standing position, as they prefer, and change posture when needed. The documents weigh less than 2 kilograms and pushing and pulling are not required.
41. Another role described in the labour market analysis report involves assembling circuit boards and the maximum amount lifted was a box of circuit boards weighing 2 kilograms. A different role described involves packing cosmetics and soaps into gift boxes on customer orders, for Lush Cosmetics. The majority of products were 240 grams or less.
42. Each role described was able to be performed on a casual basis, commensurate with the Worker’s capacity to work three four hour shifts per week, of twelve hours per week. Each role described, from a functional perspective is commensurate with the Worker’s capacity to work with a lifting/carrying/pushing/pulling up to 5 kilograms, and sitting/standing limit of 30 minutes, noting the Worker was able to change posture as required in each role.
43. The injury management consultant reported that “the vocational options were discussed (with the treating specialist) and it was agreed the option of forklift driver may be somewhat problematic but the option of process worker and carpark attendant would be appropriate”. This confirms that the role of a Light Process Worker is suitable from a functional perspective.
44. I note the Worker’s age of 56 years, and note that that he has a limited educational background. He left school in year 8, and has a forklift ticket and driving licence with no other qualifications. However, there are no formal educational requirements for the role identified.
45. The Worker has a varied work history performing varied manual labour roles and in fact, between 2010 and 2012 he worked as a process worker on a casual basis through an employment agency. He worked on automated chains, labelled goods, wrapped goods and moved goods with a forklift.
46. This is significant, as the Worker has direct experience in the role now described as suitable employment. The information before me supports that he possesses skills including manual dexterity and the ability to work in a process environment. This further supports that the identified role is employment in which the Worker is “currently” suited.
47. A rehabilitation closure report indicates the Worker has been provided occupational rehabilitation assistance. A vocational assessment was completed, he commenced a job seeking program and on 9 March 2016 completed a job search education program.
48. Whilst I note the Worker’s submission that he is unable to perform the duties of the identified role, this is not in my view supported by the evidence now before me. Further, whilst I note the Worker’s submission that there has been no change in capacity since the SIRA merit review decision, that decision turned on the fact that there was no evidence that there existed employment for a worker with capacity to work 12 hours per week. The Insurer has now provided such evidence.
49. Having regard to the nature of the Worker’s incapacity, his age, skills, experience, work history, the occupational rehabilitation assistance provided, and the balance of matters referred to in the definition of suitable employment, I find that the role of a Light Process Worker is suitable employment for him.
50. The role of a **Car Park Attendant** involves directing drivers to parking positions and collecting fees from customers, ensuring cars are safe from theft and damage as well as providing customer service. Duties include accepting payments from customers at a booth, performing light cleaning duties, cash handling and eftpos payment processing.

51. Whilst from a functional perspective, the role appears to be suitable for the Worker, it is questionable in my view whether he currently possesses the skills to undertake this role. He has been primarily engaged in dispatch, process, cleaning and other manual labour work. I cannot see that he has had exposure to dealing with customers or handling cash.
52. However, it is not necessary to determine the issue to finality. I have already found the role of Light Process Worker to be suitable employment for him. Even if the Car Park Attendant role were suitable employment for him, he has no experience in such a role and at best would be entry level in that role, and in my view, the award rate would be appropriate due to his lack of skills and experience relevant to such a role. For reasons that I will provide below, his ability to earn in the role of a Light Process Worker, having regard to his skills and experience, exceeds what he would be able to earn as a Car Park Attendant and accordingly, there is no need to determine whether the role of Car Park Attendant is suitable employment for him.
53. Having regard to the Worker's age, his work history, skills, and any occupational rehabilitation services that are being, or have been, provided to or for the Worker, and having regard to the balance of matters in the definition of suitable employment, I am satisfied that the role of Light Process Worker is suitable employment for him.

#### **Entitlement period for weekly payments**

54. 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");
  - 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.
55. The Insurer's reply form indicates that the Worker has received 107 weeks of weekly payments, and there is no dispute about this. This currently places him in the "second entitlement period" as defined in section 32A of the 1987 Act.
56. The Worker is currently not working, so section 37(3) is to be applied to determine his rate of weekly payments.

#### **Calculation of entitlement**

57. Section 35 of the 1987 Act sets out the factors to determine the rate of weekly payments:

**AWE** means the worker's pre-injury average weekly earnings. The Insurer determined the Worker's AWE is currently \$1280.00 and this has not been disputed.

**D** is the value of any non-pecuniary benefits. There is no information or dispute about this before me.

**MAX** means the maximum weekly compensation amount. The maximum weekly compensation amount "MAX" does not apply in this case because the rate of  $(AWE \times 95\%) - (E + D)$  results in a lesser calculation.

**E** means the amount to be taken into account as the worker's earnings after the injury, calculated as whichever of the following is the greater amount:

  - (a) the amount the worker is able to earn in suitable employment,
  - (b) the workers current weekly earnings.

Ability to earn in suitable employment

58. The labour market analysis indicates that for a 12-hour week, the Worker is able to earn \$268.44 in the role of a Light Process Worker.
59. This amount is based upon labour market information sourced on an hourly rate of \$22.37 per hour. Whilst I note that there is a range from the award rate of \$17.70 to as much as \$23.76 per hour in a role that in my view, the Worker has the skills and functional capacity to perform, I accept the rehabilitation provider's view that that the average rate for labour market sources contacted (being \$22.37 per hour) is appropriate, when one has regard to the Worker's prior experience in such a role, and his current skills and experience to which I have referred.
60. I find that the Worker is able to earn \$268.44 per week in suitable employment. As I have indicated, this amount exceeds the entry level or award amount that in my view, the Worker would be able to earn in a role as a Car Park attendant.
61. The Insurer is to calculate the Worker's weekly compensation payments having regard to my findings above.

**Merit Review Service  
State Insurance Regulatory Authority**