



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

1. The Worker has current work capacity.
2. The Worker is not entitled to weekly payments of compensation because he does not meet the requirements under section 38(3) of the *Workers Compensation Act 1987* (the 1987 Act).

RECOMMENDATIONS

3. The Authority may make a binding recommendation to the Insurer based on the findings of this merit review. No recommendation is made in this case for the reasons below.

BACKGROUND

4. The Worker was employed as a machine operator. He stepped down off a platform at work, twisted his ankle, fell and landed on his right shoulder. He has received weekly payments of compensation for his incapacity for work resulting from that injury. His pre-injury employment was terminated. He is not currently working.
5. The Insurer decided to discontinue the Worker's weekly payments of compensation on the basis that he had current work capacity and did not meet the requirements under section 38(3) of the 1987 Act for ongoing weekly payments.
6. The Worker referred that decision for internal review by the Insurer. The Insurer affirmed its decision.
7. The Worker applied for merit review by the Authority. The application was made within time and in the approved form.

LEGISLATION

8. 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)
9. Section 43 of the 1987 Act describes a 'work capacity decision'. Section 44BB of the 1987 Act allows an injured worker to refer a work capacity decision for merit review by the Authority. The Authority is to notify the insurer and the worker of the findings of the review and may make recommendations to the insurer based on those findings: section 44BB(3)(e) of the 1987 Act. Recommendations are binding and must be given effect to by the insurer: section 44BB(3)(g) of the 1987 Act.

DOCUMENTS CONSIDERED

10. The documents 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 Worker and the Insurer.

SUBMISSIONS

11. In summary, the Worker submits:
- The functional and earning capacity assessment resulted in excessive pain in the following days and weeks and a 'humiliating realisation by me that I was not able to perform certain simple tasks for any length of time'.
 - His treating doctor encourages him to be optimistic and he visits the treating doctor with 'the same attitude'. Some days are 'better than others' and 'I try to attend [the treating doctor's] practice on these better days'. He has mood swings and dark thoughts and is unwilling to socialise. He has not received help for this and believes he was trying to push himself to be optimistic and trying to do his best.
 - He believes his recent 'mini stroke' is due to his diminished strength, ability to cope with challenging thoughts combined with the apprehension and anxiety experienced while chasing a late payment from the Insurer.
 - The treating doctor has referred him for a review with a neurosurgeon which was approved by the Insurer. He had his appointment and sent a request for further scans to the Insurer. The Insurer has not yet responded. His weekly payments should not be discontinued while he is currently being reviewed by the neurosurgeon and 'outcomes are uncertain'.
 - The Insurer decided that he is not able to return to his pre-injury employment as a machine operator but is able to return to work in suitable employment as a machine operator. He submits that 'seems ambiguous and provides uncertainty to the remaining suitable employment positions provided'.
12. In summary, the Insurer submits in reply:
- The Worker has capacity to work as certified by the treating doctor.

- The Worker has the necessary functional and vocational capability to return to work in suitable employment as a machine operator, product assembler and clerk-purchasing and logistics.
- The Worker's weekly payments of compensation must be discontinued because he does not meet the requirements under section 38(3) of the 1987 Act.

REASONS

Nature of merit review

13. This is a merit review of the work capacity decision to discontinue the Worker's weekly payments of compensation on the basis that he has current work capacity and does not meet the requirements under section 38 of the 1987 Act to be entitled to ongoing weekly payments.
14. I must consider the information before me on its merit and make findings that are most correct and preferable.

Current work capacity

15. The Worker's entitlement to weekly payments of compensation depends on if he has 'current work capacity' or 'no current work capacity' as defined by section 32A of the 1987 Act:

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

16. Most of the medical information before me addresses the Worker's past inabilities arising from his injury. Reports from 2013 and 2014 have been lodged with this application. In my view, these reports are too dated for assessing the extent of the Worker's present inability arising from his injury. I prefer the more recent information, specifically, the recent certificates of capacity issued by the treating doctor.
17. The Worker's physical abilities were tested. The specific results of the various tests are detailed in the report, which concluded that the Worker 'exhibits the potential for some form of suitable employment' which 'could be discussed with his Nominated Treating Doctor'. The findings were used for an earning capacity assessment report.
18. The treating doctor certified that the Worker had capacity for some type of employment for six hours a day, five days a week with:
 - lifting/carrying capacity 5kg
 - sitting tolerance unlimited
 - standing tolerance unlimited
 - pushing/pulling ability 10kg

- avoid repetitive tilting of the head
19. The treating doctor noted that the factors delaying recovery were 'exacerbated pain in right shoulder and right foot following the assessment'. The treating doctor's opinion was unchanged in the next certificate of capacity.
 20. The Worker had a CT scan of his brain. The indication for this scan was 'acute onset short term memory loss'. The radiologist stated in the report:

No abnormal post contrast enhancement occurred. No cause for the patient's symptoms identified. If symptoms do not settle with conservative management an MRI scan could be considered for further evaluation.
 21. The Worker submits that the report is 'confirming memory loss'. However, the report does not confirm that he has memory loss. The radiologist could not find a cause for the Worker's reported symptoms based on the CT scan. The report neither confirms nor denies that the Worker has memory loss.
 22. The Worker also submits that he had excessive pain following the functional and earning capacity assessments. This submission is supported by the opinion of the treating doctor. The treating doctor specifically stated that the factors delaying recovery were 'exacerbated pain in right shoulder and right foot following the assessment'. The functional capacity assessment was done with an earning capacity assessment. Both assessments informed the earning capacity assessment report. In my view, the treating doctor was referring to the combined effects of both assessments which culminated in the final report. I conclude that the treating doctor has taken into account the effects of those assessments on the Worker's condition in assessing work capacity.
 23. I also acknowledge the Worker's submission that the treating doctor encourages him to be optimistic and that he presents to the treating doctor accordingly. Further, the Worker submits that he has mood swings, dark thoughts and an unwillingness to socialise for which he has not received help. I have taken these submissions into account. However, I ultimately accept the treating doctor's opinion about the Worker's work capacity. The treating doctor has given a medical opinion based on his professional education, training, skills and experience as a qualified doctor who is also the Worker's treating doctor. In my view, the treating doctor's opinion holds decisive weight in this case.
 24. I acknowledge the Worker's submission that his weekly payments should continue while he is awaiting a review by his treating neurosurgeon. However, there is adequate medical information currently available to determine the issue. The treating doctor's opinion is reliable and I accept it.
 25. I find that the Worker has a present inability arising from an injury such that he is able to return to work for six hours a day, five days a week within the following limits:
 - lifting/carrying capacity 5kg
 - sitting tolerance unlimited
 - standing tolerance unlimited
 - pushing/pulling ability 10kg

- avoid repetitive tilting of the head
26. The treating doctor has not certified that the Worker is fit to return to his pre-injury duties. I accept that the Worker has a present inability arising from an injury such that he is not able to return to his pre-injury employment. The main issue is whether the Worker is able to return to work in suitable employment.

Suitable employment

27. The term '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 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.*

28. A number of reports have been prepared as part of the return to work planning to suggest return to work options for the Worker. Relevantly, an earning capacity assessment report suggested employment as a machine operator, product assembler or clerk- purchasing and logistics as suitable.
29. For the reasons to follow, I am persuaded that employment as a clerk- purchasing and logistics constitutes suitable employment for the Worker.
30. As described in the report, the role is not physically demanding. The duties listed do not appear to involve lifting, carrying, pushing, pulling or repetitive tilting of the head to any extent that would contravene the treating doctor's certified limits on the Worker's work capacity. Fortifying that view is the treating doctor's unconditional approval of it as suitable for the Worker.
31. Further, information in the report from employers contacted supports that items to be lifted, carried, pushed or pull weigh 5kg or less. That is plausible given the nature of the

job is a clerical one. It is consistent with the example job advertisement provided in the report which supports that the work requires skills in time management, multi-tasking, prioritising work, good communication and organisation and strong administrative skills with proficiency in Microsoft Office. There is no indication in the advertisement that the work involves significant physical exertion.

32. I am persuaded that at least part-time employment as a clerk- purchasing and logistics is suited to the nature of the Worker's incapacity.
33. The Worker is 60 years of age. He obtained the Higher School Certificate. He holds a Bachelor of Agriculture. He has completed various training and education courses. These courses were done as part of the occupational rehabilitation services provided to the Worker. The Worker has shown a consistent pattern of employment which showcases a diversity of skill.
34. The Worker's transferrable skills are set out in full in the earning capacity assessment report.
35. The Worker is clearly well educated. He has shown a cognitive capacity to complete tertiary studies which adds weight to the view that he has the mental skill to do clerical work. Further, he has previously shown the skill to do this type of work in the past. For example, the Worker's work experience as a hospitality services manager involved, among other things:
 - Undertaking, planning, coordination and administration of catering, laundry and housekeeping departments
 - Perform all return to work coordinator responsibilities and relevant administration
 - Oversee inventory management and procurement
 - Interview and recruitment of all staff and complete relevant paper work
 - Monitor services budgets and manage costs
 - Review staff rosters and analyse work practices
36. The Worker's work as a vocational educational teacher involved, among other things:
 - Identifying individual needs and provide feedback as required
 - Liaising with students, staff, management, department heads, and stock control officers
 - Responding to student enquiries
 - Completing administration tasks including reporting and completing assessments
37. The Worker's work as a catering manager included, among other things:
 - Undertaking planning, coordination and administration of catering services
 - Creating and monitoring budgets
 - Stock management and procurement
 - Develop and document, implement and monitor the policies and procedures

within the catering department

- Liaise with suppliers and representatives via phone and email, update the data base with relevant details
38. Overall, the Worker's age, education, skills and work experience support the view that he is a mature and well educated worker who is competently skilled in clerical work. His work experience supports that he has an attention to detail and good communication, organisation and administration skills.
39. The report stated that the Worker has 'intermediate' computer skills and he is 'able to use one software package such as MS Word, perform intermediate word processing & data entry functions'. Further, it stated on that the Worker 'confirmed that he owned a computer and is able to use MS Word, Email, and internet' and that he did computer based tasks when employed as a hospitality and catering manager and when he completed his courses. I am satisfied that the Worker has a suitable level of computer skill to work as a purchasing and logistics clerk.
40. The earnings capacity assessment report stated:
- [The Worker] has performed procurement work as part of his previous employment [and] demonstrated this [*sic*, these] skills for 5 years as a Hospitality and Catering Manager and through stock management duties as a Chef. The Worker confirmed he possesses the competencies to undertake the tasks of this role.
41. I am persuaded that the Worker's age, education, skills and work experience are currently suited to employment as a clerk- purchasing and logistics.
42. Having had regard to the relevant factors set out in the definition of 'suitable employment' I am persuaded that employment as a clerk – purchasing and logistics is employment in work for which the Worker is currently suited.
43. 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 as a clerk- purchasing and logistics.
44. I find that the Worker has 'current work capacity' as defined by section 32A of the 1987 Act.

Weekly payments after second entitlement period (after week 130)

45. There is no dispute before me that the Worker has received more than 130 weeks of weekly payments of compensation and is after the 'second entitlement period' as defined by section 32A of the 1987 Act. I assess his entitlement to compensation on that basis.
46. The Worker is only entitled to weekly payments of compensation after the second entitlement period if special requirements under section 38 of the 1987 Act 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.*
47. The information before me does not support that the Worker is a 'worker with high needs' as defined by section 32A of the 1987 Act. I proceed on the basis that he is a worker other than a worker with high needs and must meet the requirements under section 38(3) of the 1987 Act to be entitled to ongoing weekly payments of compensation.
48. The Worker is not currently working. He has not returned to work for at least 15 hours per week and is not in receipt of any current weekly earnings. He does not meet the requirements under section 38(3)(b) of the 1987 Act. He is therefore not entitled to weekly payments of compensation.
49. This is the same outcome as the Insurer's work capacity decision. It is unnecessary for the Authority to make any recommendation to the Insurer. The work capacity decision stands.

Merit Review Service
Delegate of the State Insurance Regulatory Authority