



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 the findings of the Authority on review.
2. The Worker has current work capacity.
3. The Worker does not meet the special requirements in accordance with section 38(3) of the *Workers Compensation Act 1987* (the 1987 Act).

RECOMMENDATION BASED ON FINDINGS

4. As the findings of the Authority are the same as those of the Insurer, there is no recommendation in this matter.

BACKGROUND

5. The Worker injured his back while working as a process worker.
6. The Worker had some time off work following his injury and returned to work undertaking modified suitable duties for four hours per day, five days per week. This work continued until 2007. At this time suitable duties were withdrawn by the employer.
7. The Worker has not worked since 2007. The Insurer has made previous work capacity decisions and found that the Worker had no entitlement to weekly payments. These decisions have been confirmed at internal review and merit review but were subsequently determined to be invalid at procedural review by WIRO.
8. The Insurer made a series of work capacity decisions. The Insurer determined that the Worker had no entitlement to weekly payments of compensation. This was communicated to the Worker.
9. The Worker applied for an internal review of the decision. The Insurer conducted the internal review and made the same finding as the initial decision maker. The outcome of the internal review was sent to the Worker in the form approved by the Authority.
10. The Authority received the application for merit review. The application has been accepted.

LEGISLATION

11. 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);
12. Section 43 of the 1987 Act describes a “work capacity decision”.
13. Section 44BB of the 1987 Act provides for merit review of a work capacity decision of the Insurer, by the Authority.

INFORMATION CONSIDERED

14. I have considered all of the information that was provided by the parties in relation to the Worker’s application for merit review. I have only referred to the information that is most relevant to my findings, in my reasons that are set out below.

SUBMISSIONS

15. In the application for merit review, the Worker has requested a review of the following work capacity decisions of the Insurer:
 - His current work capacity.
16. The Worker’s submissions in support of his application for merit review are summarised as follows:
 - He provides a history of his interactions with the Insurer relating to the work capacity decisions.
 - His work related injury consists of disc prolapses at L2/3, L4/5, L5/S1, bilateral carpal tunnel syndrome and hand synovitis. He also has neck pain at the level C3/4, C4/5 and C5/6.
 - He lost his pre-injury employment and has tried his best to be able to return to suitable employment with light duties.
 - He has had support from a rehabilitation services provider at three different times.
 - He has had responses from employers where he has applied for jobs. The employers have indicated that he does not have the required fitness to complete the duties that are required.
 - He requested further assistance from the rehabilitation services provider. This was given to him. There is a closure report from the provider.
 - He continues to look for employment and sends job seeking logs to his case manager each week.
 - He was told by a representative of the rehabilitation services provider that he did not have the functional capacity to work in retail.
 - He is not able to do the amount of work specified by his nominated treating doctor (NTD) on his certificate of capacity. He has raised this issue with the NTD but the NTD has not changed the certification.
 - The Insurer did not specify the functional requirements of the role of a light process worker in the original work capacity decision letter or in the internal review notice.

- He has been attending English speaking classes as he was advised that his English was below average in 2015. His English has been slowly improving over time.
- He takes a number of medications on a daily basis. Some of these are required for a heart condition that is not related to his work injury.
- He has ongoing abdominal pain but the cause of this has not been determined. He feels that the pain killers that he takes may have contributed to the pain that he has in the abdomen.
- The work related injury causes him to suffer chronic pain. He has been referred for and received treatment for this pain. The treatment has not helped his pain levels.
- He lost his voice in 2016 for a period of 4 weeks. The treating doctor believed that this may have been caused by stress.
- He believes that he has suffered a work related injury that has caused problems of stress, mental breakdown, panic attacks and his negative emotions.
- He always co-operates with the Insurer to find suitable employment.
- He still has dependent children in his care and they are very important to him. Since he has been injured he has been less able to be involved in their daily lives and to provide financial support for their needs.

17. In reply, the Insurer submits:

- The Worker's certificate of capacity issued by the NTD states that he has partial capacity for 5 hours of work per day, 4 days per week with a 5kg lifting restriction, sitting/standing tolerance of 20 minutes and is required to take breaks at will.
- It accepts that this has been the Worker's capacity for work since 19 June 2006.
- The Worker has advised that he has been suffering from a number of non-compensable medical conditions which have been evident for some years. Despite these conditions the NTD has maintained the Worker's capacity for work as being 20 hours per week with restrictions.
- The rehabilitation services provider completed a vocational assessment report in which it identified three options that it deemed to be suitable employment. These options were light process worker, light packer and light product assembler.
- All of these options were identified in line with the Worker's functional capacity.
- The position of light process worker was also deemed to be suitable employment in the previous merit review findings.
- The Insurer also provides a summary of the reasons for the work capacity decision.

Reasons

Nature of merit review

18. A merit review is a review of the work capacity decision of the Insurer. It involves considering all of the information that has been provided to me.
19. I will then make findings and may make recommendations about the work capacity decision that have been referred for review.
20. The review is not a review of the Insurer's procedures in making the work capacity decision and/or internal review decision.
21. I am required to consider all of the information that has been provided and make findings and recommendations that are most correct and preferable.

Current work capacity

22. The Worker has requested a merit review of the Insurer's decision in relation to his current work capacity.
23. When reviewing the Worker's current work capacity, I must make my findings in accordance with the definition under section 32A of the 1987 Act.
24. "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
25. **Capacity for employment.** I have been provided with various medical information about the Worker's capacity for employment.
26. **Certificates of capacity.** I have reviewed certificates of capacity for the Worker for a period. For this period, the Worker's NTD has certified that he has capacity for some type of employment for five hours per day, five days per week, where the employment is consistent with the Worker's abilities as follows:
 - Lifting/carrying 5kg
 - Sitting tolerance of 20 minutes
 - Standing tolerance of 20 minutes
 - Pushing/pulling ability 5kg
 - Bending/twisting/squatting should be non-repetitive
 - Driving ability of up to 20 minutes
27. There is a note that the Worker should be able to take a break at will.
28. **Other medical reports.** An occupational physician conducted an independent medical examination. The occupational physician did not comment directly on the Worker's capacity for work but noted that "*there was significant symptom magnification and self-limitation of range of movement*".
29. The remaining medical documents that have been provided to me are more than 10 years old and I have not found them to be of assistance in determining the Worker's current work capacity.
30. **Findings as to capacity for employment.** I acknowledge that the Worker does not agree with the certification of his capacity for employment by his NTD. The Worker has raised the issue with the NTD who has not altered the certification.
31. I am persuaded by the opinion of the NTD, who has treated him for at least three years, that the Worker has capacity for employment for four hours per day, five days per week, in employment that is consistent with his abilities set out at paragraph 26.
32. Having found that the Worker has capacity for some type of employment, the definition of "current work capacity" requires that I consider whether the Worker is able to return to work in suitable employment.

Suitable employment

33. "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.*

34. **Overview of education, skills and work experience.** The Worker completed his education to a year 10 equivalent level. He immigrated to Australia in 1989 and has not completed any formal education since then.
35. Since arriving in Australia the Worker worked as a factory worker and machine operator until he ceased employment with his pre-injury employer in 2007.
36. The Worker has been provided with occupational rehabilitation services to assist him with job seeking skills. The most recent services were provided by the rehabilitation services provider.
37. **Suitable employment options.** The rehabilitation services provider prepared a labour market analysis report. The report sets out information relating to the role of a process worker.
38. The rehabilitation services provider contacted three employers of process workers to determine the requirements of the role within their workplaces.
39. The first employer had employees whose role was to pick and pack cosmetics, the second employer required employees to work on an assembly line with lighting parts and the third employer required employees to use a bread slicing machine and to shrink wrap baked items.
40. Each of the employers contacted indicated that work was undertaken at bench height and that employees were provided with stools so that they were able to move between sitting and standing at will. I am satisfied that the Worker would not be required to sit or stand for periods of more than 20 minutes with these employers.
41. Two employers indicated that lifting weights of up to 5kg was required while the third employer indicated that there was a maximum lifting requirement of 3kg. These requirements are consistent with the Worker's abilities.
42. Bending and twisting may be required from time to time but was not considered a significant part of any of the roles.
43. The NTD has also signed a document, indicating that he approved of the role of a light process worker for the Worker. A brief description of the role has been included for the NTD's reference and I am satisfied that the description is consistent with the roles reviewed by the rehabilitation services provider for the purpose of preparing the labour market analysis report. I have found this opinion to be particularly persuasive when considering the nature of the Worker's incapacity in relation to the role of a process worker.
44. The employers required candidates who are able to speak basic English. Two of the employers indicated that they had some concerns as to whether the Worker's English skills would be sufficient for the role. The third employer did not consider that the Worker's limited English would be a barrier to employment.

45. All of the employers considered that The Worker's previous work experience was relevant to employment at their workplace.
46. All three employers considered that the Worker's previous employment had provided him with the necessary skills and experience that would be required for the role of a process worker and each employer offered work on a part-time basis for 20 hours per week.
47. Having considered the matters set out in the definition of suitable employment in relation to the Worker's particular circumstances, I am satisfied that the role of a process worker is suitable employment for him.
48. It is important to acknowledge that the Worker has other medical conditions that are not connected with his work related injury. I have no doubt that these conditions place additional restrictions on the Worker's actual capacity for employment and that it may seem artificial to separate any incapacity arising from these conditions when assessing suitable employment.
49. While I understand the Worker's concerns, I am required to consider only the incapacity that arises from the Worker's workplace injury when I determine whether he is able to return to work in suitable employment.
50. **Current work capacity findings.** For the reasons set out above, I find that the Worker has current work capacity 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)

51. There is no dispute that the Worker's entitlement to weekly payments of compensation falls after the second entitlement period and is to be determined in accordance with section 38 of the 1987 Act.
52. Section 38 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 they meet the following special requirements:
53. Section 38(3) of the 1987 Act is 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.*
54. To continue to receive weekly payments of compensation after the second entitlement period, the Worker must satisfy each of the criteria set out above.
55. The information that has been provided to me is that the Worker has not returned to work. He is therefore not working for a period of not less than 15 hours per week and is not in receipt of current weekly earnings of at least \$183.
56. The Worker therefore does not meet the special requirements for continuation of weekly payments after the second entitlement period.