



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. The Worker is able to return to work in suitable employment as a Process Worker/Packer.
3. The Worker has current work capacity.
4. The Worker does not satisfy the special requirements under section 38 of the *Workers Compensation Act 1987* (the 1987 Act) for the continuation of weekly payments of compensation.

RECOMMENDATIONS BASED ON FINDINGS

5. Under section 44BB(3)(g) of the 1987 Act, the Authority may make binding recommendations to the Insurer based on the findings of the review.
6. The Authority makes no recommendations for the reasons below.

BACKGROUND

7. The Worker sustained an injury to her neck, shoulders and knees in the course of her employment as a Housekeeper.
8. The Insurer accepted liability and commenced weekly payments of compensation.
9. The Insurer made a number of work capacity decisions. The outcome of these decisions was the cessation of the Worker's entitlement to weekly payments of compensation under section 38(3) of the 1987 Act.
10. The Worker applied for an internal review. The outcome of the internal review decision was essentially the same as the original decision to cease the Worker's entitlement to weekly payments.

11. The application for merit review was received by the Authority. The application has been made within 30 days, as required under section 44BB(3)(a) of the 1987 Act.

LEGISLATION AND GUIDELINES

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

INFORMATION CONSIDERED

15. The information that I have considered in undertaking this review is the information attached to the application for merit review and the Insurer’s reply and any other information that has been supplied by the parties, which I am satisfied has been exchanged between them.

SUBMISSIONS

16. In the application for merit review, the Worker submits:
 - Her left knee and left shoulder pain have worsened.
 - She requires a right knee arthroscopy, physiotherapy and posterior capsular stretches.
 - She also requires pain management.
 - None of the above treatments have been provided despite the Insurer stating that she is entitled to medical expenses for up to 12 months/2 years.
 - Her knowledge of the English language is limited as she is from a non-English speaking background. She therefore does not have the capacity to talk to prospective employers without an interpreter.
 - She is not suited to the roles of Process Worker or Product Assembler as most of the employment opportunities for these roles are located outside of public transportation areas and she does not hold a current Driver’s License. The roles also require heavy lifting.
17. The Insurer’s submissions may be summarised as follows:
 - The roles of Process Worker and Product Assembler constitute suitable employment for the Worker. The roles have been approved by her nominated treating doctor.

- The Worker is no longer entitled to weekly payments because she does not meet the criteria under section 38 of the 1987 Act.

REASONS

Nature of merit review

18. 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.
19. 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.

Current work capacity and suitable employment

20. The nominated treating doctor (NTD) has consistently certified the Worker to have capacity for some type of employment for 5 hours/day, 4 days/week.
21. This capacity is subject to the following functional limitations:
 - Lifting/carrying 3kg
 - Standing up to 30 minutes
 - Walking up to 300 meters
 - Bending/twisting/squatting No squatting and bending
22. There are earlier reports from an orthopaedic surgeon and a neurosurgeon. Their respective opinions regarding the Worker's work capacity are as follows:
23. The orthopaedic surgeon stated:

"In my opinion this lady 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."
24. The neurosurgeon stated:

"Her current presentation would suggest that she is not fit to undertake any employment. In the presence of abnormal illness behaviour, it is difficult to know whether she is capable of undertaking any work at present. However, she was undertaking full time suitable duties at the hotel until her position was terminated in November 2014. She should be able to undertake 3 to 4 hours of light duties per day with a 2kg-3kg lifting restriction, the avoidance of repetitive neck and back movements and the avoidance of activities that require her to elevate her arms past shoulder height."
25. The information before me supports a finding that the Worker has capacity for some type of employment. As to what that capacity is, I prefer the opinion of the NTD given his long history of treating the Worker and the availability of various WorkCover NSW Certificates of Capacity.
26. The orthopaedic surgeon and the neurosurgeon provide additional detail in relation to the Worker's functional limitations, namely that the Worker should not engage in work above shoulder height and to

avoid repetitive neck, back and arm movements. I find it relevant to include these in addition to the functional limitations expressed by the NTD in his certificate.

27. I therefore find that the Worker has the capacity to work 5 hours/day, 4 days/week with the functional limitations expressed in the WorkCover NSW Certificate of capacity (see paragraph 21 above) and in the reports of the orthopaedic surgeon and the neurosurgeon.

28. I have also considered the Worker's submission regarding various treatments she may require. These are matters the Worker can raise with the Insurer. Her submissions and the opinions of the treating doctors do not, however, address current work capacity. It is evident from the notations on the WorkCover NSW Certificates of Capacity that the NTD was aware of the opinions of the treating doctors regarding treatment options, however the NTD remained of the view that the Worker has capacity to work in some type of employment.

29. Section 32A of the 1987 Act defines "current work capacity" 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*

30. "No current work capacity" is defined in section 32A of the 1987 Act as:

***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*

31. There is no dispute that the Worker is unable to return to her pre-injury employment as a Housekeeper with The Boulevard Hotel. I am therefore required to consider whether the Worker is able to return to work in suitable employment in order to determine whether she has "current work capacity" or "no current work capacity". 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.*

32. A rehabilitation provider provided a Labour Market Analysis report. This report identified the roles of Process Worker and Product Assembler as "suitable employment" for the Worker.

33. A Process Worker is described as a worker who “assembles components and performs production line operations and other manual duties in factories.”
34. Two employers were contacted regarding roles of Process Worker/Packer that were advertised on the open labour market.

Employer 1

35. Employer 1 stated that the role involves packing boxes of small coffee capsules for distribution. Each pack consists of between 10 to 100 coffee capsules, each weighing less than 20 grams each. The employer confirmed that there is no lifting or carrying beyond 3kg. The employer advised that standing is a predominate part of the role however there is flexibility to sit and to alternate postural positions. There is no squatting or bending requirements and walking is less than 300 meters at a time.
36. In relation to key skills and experience for the role, Employer 1 advised that previous warehouse experience would be considered favourable but was not essential. No experience or qualifications were needed. Employer 1 stated that although applicants with a good level of English were preferred, candidates who had basic English and who were able to understand basic instructions was acceptable.
37. Employer 1 advised they employ staff befitting the Worker’s capacity of 20 hours per week and the work location is in Alexandria, Sydney.

Employer 2

38. Employer 2 stated that the role involves packing, sorting and quality assurance of bottles, caps, cubes, triggers and jars. This includes checking individual caps and separating defected products, assembling flat pack boxes and packing individual products for distribution. The employer confirmed that there is no lifting or carrying beyond 3kg with the flexibility to alternate between sitting and standing postures as tolerated.
39. In relation to key skills and experience for the role, Employer 2 advised that the role was an entry level position and no qualifications or experience was necessary. Candidates needed to be able to work independently with minimal supervision and to follow set instructions. A low level of English was required and on the job training would be provided to new staff.
40. Employer 2 also advised they employ staff befitting the Worker’s capacity of 20 hours per week and the work location is in Wetherill Park.

Consideration

41. I find that the role of Process Worker/Packer to be within the Worker’s functional limitations. There is no lifting of greater than 3kg; standing is required but can be alternated with walking and sitting; and there are no bending or squatting requirements. The employer contacts did not indicate any overhead shoulder work or repetitive neck, back and arm movements.
42. I have considered the Worker’s concerns regarding heavy lifting for the role. The information before me however, does not suggest the requirement for any heavy lifting. The rehabilitation provider obtained detailed information from the two employer contacts who stated that the items (coffee capsules, bottles, caps, jars) are small and light and do not exceed 3kg. This information therefore supports a finding that any lifting or carrying will be within the Worker’s 3kg functional limitation.
43. I also note that the NTD was provided with a brief description of the tasks and physical demands of the role. The NTD approved that the role was suitable. As the NTD’s approval adds further weight that the role of Process Worker/Packer is suitable employment having regard to the nature of the Worker’s incapacity.

44. In relation to the Worker's skills and work experience, I have a job description of her pre-injury role as House keeper. In this role, the Worker was required to independently clean rooms and perform maintenance work to the high standards set by the hotel. She was also required to follow company policies/procedures (such as Occupational Health and Safety) when performing her work. She reported to the Supervisor and was to "maintain good/effective communication within the department".
45. The Worker's performance of her duties as Housekeeper demonstrates that she has the skills and experience to work independently with minimal supervision and to follow instructions. Such was a requirement specified by Employer 2 (above).
46. I note that the Worker has raised concerns regarding her level of English skills. While Employer 1 stated that candidates with good English was preferred, candidates with basic English who could understand basic instructions was acceptable. The Worker's ability to report to supervisors and follow company policies/procedures in her pre-injury role supports a finding that she has the requisite level of English to be suited to the role of Process Worker/Packer.
47. Further, I note that the rehabilitation provider has provided the Worker with considerable occupational rehabilitation services. The rehabilitation provider advised that the Worker attended 18 job seeking meetings and 12 job seeking sessions. She was provided with education and resources on resume and cover letter development, cold canvassing techniques, locating employment in the open and closed labour market and interview preparation.
48. The Worker also engaged in a 6 week job seeking refresher course which focused on independence in job seeking.
49. During the sessions, the rehabilitation provider stated that the Worker "demonstrated her ability to communicate with Employers in basic English to enquire about employment opportunities."
50. Therefore, while I acknowledge that the Worker was not born in Australia and does not come from an English speaking background, the information before me supports a finding that she would have the requisite level of English skills to be able to apply and interview for role of Process Worker/Packer and to also perform such a role in the open labour market.
51. Having had regard to the balance of the factors under section the definition of suitable employment in section 32A of the 1987 Act, I find that the role of Process Worker/Packer to be suitable employment for the Worker.
52. I find that the Worker has a present inability arising from an injury such that she is not able to return to work in her pre-injury employment but is able to return to work in suitable employment. I find that the Worker has current work capacity in accordance with the definition in section 32A of the 1987 Act.
53. It is not necessary that I determine whether the role of Product Assembler also constitutes suitable employment for the Worker, in light of my findings below.

Entitlement periods for ongoing weekly payments

54. The following provisions of the 1987 Act provide the basis for determination and calculation of a 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.
55. The Insurer states in its internal review decision that a total of 226 weeks of weekly payments of compensation has been paid to the Worker. In light of this information, I find that the Worker's entitlement to weekly payments of compensation is to be calculated in accordance with section 38 of the 1987 Act.

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

56. A "worker with high needs" is defined in section 32A of the 1987 Act must be met, 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*
 - (c) *the insurer is satisfied that the degree of permanent impairment is likely to be more than 20% and includes a worker with the highest needs*
57. This definition requires that at least one of parts (a), (b), or (c) of the definition be met by the worker.
58. The Insurer states in its internal review decision that it was not satisfied the Worker had a degree of permanent impairment that is likely to be more than 20%. The Insurer refers to an assessment made by an Approved Medical Specialist who assessed the Worker's cervical spine, right upper extremity and left lower extremity as having 8% whole person impairment.
59. Accordingly, 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.
60. As the Worker falls after the second period, for her to be entitled to weekly payments she must satisfy the special requirements provided in section 38(3) 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.*
61. I have found above that the Worker has current work capacity. In order to meet the requirement in section 38(3)(b) of the 1987 Act, the Worker needs to have returned to work for a period not less than 15 hours per week and earning at least \$183 per week (as indexed). As the Worker has not returned to work she does not satisfy section 38(3)(b) of the 1987 Act.

62. Accordingly, I find the Worker does not meet the special requirements for the continuation of weekly payments of compensation after the second entitlement period pursuant to section 38 of the 1987 Act.
63. I have ultimately reached the same conclusions as the Insurer. A recommendation to the Insurer is therefore not necessary. The work capacity decision to discontinue the Worker's weekly payments of compensation stands.

Merit Review Service
Delegate of the State Insurance Regulatory Authority