



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 Telemarketer.
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 lower back in the course of her employment as a Deli Assistant. The Worker was cleaning the floor and as she was straightening up, felt a sharp pain in her back. At the time, the Worker was working 25 hours per week.
8. The Worker is currently performing light duties in night-fill for her pre-injury employer.
9. The Insurer accepted liability and commenced weekly payments of compensation to the Worker.
10. 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.

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

LEGISLATION AND GUIDELINES

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

INFORMATION CONSIDERED

16. The documents I have considered in undertaking this review are those listed in, and attached to, the application for merit review, the Insurer's reply and any further information provided by, and exchanged between, the parties.

SUBMISSIONS

17. In the application for merit review, the Worker submits:
 - She requested that her hours be cut from 16 hours per week to 12 hours per week due to family reasons. Notwithstanding this, she has worked 16 hours per week on some weeks since August 2015.
 - Eleven months later, she was working 16 hours per week almost every week but the store manager cancelled her extra shifts due to a request from HR that she only be offered 12 hours per week.
 - A further four months later, she requested in writing that her hours be increased to 16 hours per week however the Employer are not offering more than 12 hours per week. She is currently pursuing this issue.
 - She cannot work as a Hotel Receptionist or as a Telemarketer as she does not speak English fluently. While she has been in Australia since 1989, her ability to speak English is mediocre.
 - She is unfit to work as a Telemarketer or Receptionist because she cannot sit or stand too long due to her injured back. She needs task rotation and no prospective employer would realistically employ her with these restrictions. She relies on the reports of the nominated treating doctor (NTD) and an MRI scan.
 - The earning capacity report is dated and does not reflect her current work capacity.
18. The Insurer's submissions in reply are lengthy but may be summarised as follows:

- The Worker is working less than 15 hours per week. An attached spread sheet shows that she has been working 12 hours per week.
- The Worker has the physical capacity and the necessary qualifications and transferrable skills to perform the roles of Hotel Receptionist and Telemarketer.

REASONS

Nature of merit review

19. 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.
20. The Worker has submitted that she is not "psychologically" suited to the proposed employment options of Telemarketer and Receptionist. I note that the Worker's claim for secondary psychological injury (as a result of her back injury) was formally denied by the Insurer in a notice issued under section 74 of the 1998 Act.
21. As this decision can be the subject of a medical dispute it cannot be considered as a work capacity decision – see section 43(2)(b) of the 1987 Act.
22. Therefore, in this merit review I cannot consider the impact of any psychological condition on the Worker's current work capacity.

Current work capacity and suitable employment

23. The most recent information that directly addresses the Worker's work capacity is contained in WorkCover NSW Certificates of Capacity issued by her NTD. The NTD certified the Worker to have capacity for some type of employment for 4 hours per day, 4 days per week.
24. This capacity was subject to the following functional tolerances:

• Lifting/carrying	10kg (maximum)
• Standing	as tolerated
• Pushing/pulling	10kg (maximum)
• Bending	reduced bending, as tolerated
• Other	service role only as per plan
25. A neurosurgeon, saw the Worker and felt that the Worker had significantly more capacity than 16 hours per week. He stated that the Worker "should be able to work for at least 25 hours a week and do suitable duties which do not involve frequent bending or lifting heavy objects.
26. In a supplementary report, the neurosurgeon stated that the Worker is physically capable of performing suitable employment on a full time basis.
27. A functional assessor thought that the Worker could work full time in jobs that did not place stress on her lower back.
28. The functional assessor also conducted an injury management consultation with the NTD. The NTD confirmed his opinion that the Worker was fit to work 16 hours per week and while an upgrade "should be possible at this time", the NTD preferred to review the Worker in person as he had not seen her for some time. The functional assessor stated that the Worker could work full time (38 hours per week) with the restrictions as stated by the NTD.
29. I prefer the opinion of the NTD as he is the treating doctor of the Worker and has reviewed

her on numerous occasions from the time of her injury. The NTD has also conducted the most recent review which I consider to be more relevant to the assessment of the Worker's current work capacity. Both the neurosurgeon and the functional assessor appear to have examined the Worker on only one or two occasions and although it was indicated at the injury management consultation that the NTD may provide an upgrade in capacity, this was not forthcoming in subsequent WorkCover NSW Certificates of Capacity.

30. I therefore find on the basis of the NTD's opinion, namely that the Worker has the capacity to work 4 hours per day, 4 days per week within the functional tolerances as stated above.

31. 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

32. "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

33. There is no dispute that the Worker is unable to return to her pre-injury employment as a Deli Assistant. 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.*

34. A vocational and earning capacity assessment report identified the following roles as “suitable employment” for the Worker:
- Telemarketer
 - Hotel Receptionist
 - Pizza Delivery Driver
35. The role of Telemarketer is described as “telephone existing and prospective customers to promote goods and services, and obtain sales or arrange sales visits”. The minimum educational requirement is Year 9 or 10 with “good” English speaking and listening and “average-upper range” for reading and writing.
36. The report also provided labour market research for the role of Telemarketer. Two employers with job advertisements in the labour market were contacted. The employers advised that candidates would need to have a good command of the English language including good verbal interpersonal communication skills. There was also mention of being fluent in English and to have an excellent phone manner. Basic level computer and technology skills were required.
37. The Worker is currently 45 years of age and arrived in Australia in 1989. She completed Year 12 of high school education overseas (Australian equivalent). She went on to complete a certificate in bookkeeping, a computer course and a Certificate III in Retail.
38. The vocational and earning capacity assessment report states that the Worker reported her English communication skills to be “good” as a result of completing an English language course and also by living and working in Australia. She did not report any communication difficulties at work. The report stated that the Worker “displayed good verbal communication skills in the interview” and anticipated that her written communication skills to be also good.
39. The Worker’s work experience include roles as a Housekeeping Supervisor, Customer Service Assistant, Checkout Operator, Administrative Assistant and her pre-injury role as a Deli Assistant.
40. I have considered the Worker’s submission that she does not speak fluent English. While I accept that English may not be the Worker’ first language, the information before me does not indicate that her English would be considered mediocre or less than fluent.
41. The Worker arrived in Australia in 1989. She involved herself in the Australian workforce for almost 20 years, with 16 of those years working as an Administrative Assistant. In this role she performed general administrative duties which included answering phones. Her other work experience was either in customer focused roles or in a supervisory capacity, with duties associated with dealing with staff or customers on a daily basis. In my view, given the length of time she has been in an English speaking country and her participation in roles that require daily face-to-face or phone communication with staff or customers, I am of the view that her English skills would be of a sufficient standard to be well suited to the role of Telemarketer.
42. The Worker’s work history also illustrates her experience with customer service, which was an aspect identified by the employer contacts to be advantageous for the role of Telemarketer. Her ability to use the Internet, email, Microsoft Word, Excel and Publisher demonstrate that she possesses the basic computer skills required of the role.
43. In terms of the physical requirements of the role, the tasks of a Telemarketer are mostly performed seated in an office based environment with the opportunity to stand and walk. The two employer contacts advised that it was possible for “frequent movement of posture” throughout the day. There are no lifting or bending requirements. The Worker’s NTD also signed off and approved the role. I am therefore satisfied the role is currently suited to the Worker having had regard to the nature of her incapacity.
44. Having considered the above matters and the balance of considerations in the definition of

suitable employment, I find that the role of Telemarketer is suitable employment for the Worker.

45. 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.
46. I note that it is not necessary that I determine whether the further options listed above in paragraph 34 also constitute suitable employment for the Worker, in light of my findings below.

Existing recipient of weekly payments

47. An “existing recipient of weekly payments” is defined in Division 1, Part 19H, Schedule 6 of the 1987 Act as:

existing recipient of weekly payments means an injured worker who is in receipt of weekly payments of compensation immediately before the commencement of the weekly payments amendments.

48. The Insurer confirms on page 1 of their reply to the application for merit review that the Worker was in receipt of weekly payments immediately before 1 October 2012.
49. On that basis, I find that the Worker is an existing recipient of weekly payments as she was in receipt of weekly payments of compensation immediately before the commencement of the weekly payments amendments on 1 October 2012. Therefore the weekly payments amendments as provided in Division 2, Part 19H, Schedule 6 of the 1987 Act apply to the Worker’s entitlement to weekly payments of compensation.

Entitlement periods for ongoing weekly payments

50. 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.
51. The Insurer states that the Worker has received 229 weeks of weekly payments of compensation. In light of this information, I find that the Worker’s entitlement to weekly payments of compensation falls after the second entitlement period and 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)

52. 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*

53. This definition requires that at least one of parts (a), (b), or (c) of the definition be met by the worker.
54. The Insurer has indicated in its internal review decision that it was not satisfied the Worker is a worker with high needs. The Worker does not dispute this finding and I do not have any information before me to contradict the Insurer's findings.
55. Accordingly, I accept that the Worker is not "a worker with high needs" pursuant to section 32A(a) of the 1987 Act, as she does not meet any of the criteria in (a), (b) or (c) of the definition. Section 38(3A) of the 1987 Act does not apply.
56. 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.*
57. I have a copy of the Worker's earnings history provided by her employer which includes a recent period. The Worker has been working (or on paid annual leave) for 12 hours per week during this period. She therefore does not satisfy section 38(3)(b) as this requires her to have returned to work for not less than 15 hours per week.
58. I understand that the Worker is presently pursuing her Store Manager in relation to her request to increase her working hours to 16 hours per week. Should this occur and the Worker is working to her current capacity of 16 hours per week, she may satisfy section 38(3)(b) and (c) to be entitled to weekly payments of compensation. In this regard, I note that the Insurer has requested the Worker provide "further supporting information once she commences working 15 hours or more per week" in its submissions in reply.
59. The Worker is also open to find other suitable employment in another workplace to supplement her current hours.
60. Accordingly, I find that 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.

61. 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