



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 and are to be the basis for the Insurer's review decision.
2. From 12 November 2013 to 26 March 2014, the Worker had a present inability arising from an injury such that he was not able to return to work either in his pre-injury employment, or in suitable employment.
3. From 12 November 2013 to 26 March 2014, the Worker had no current work capacity.

RECOMMENDATION BASED ON FINDINGS

4. The following recommendation made by the Authority is binding on the Insurer and must be given effect to by the Insurer in accordance with section 44BB(3)(g) of the *Workers Compensation Act 1987* ("the 1987 Act").
5. The Worker was entitled to weekly payments of compensation in the amount of \$879.79 for the period 12 November 2013 to 26 March 2014 in accordance with section 37(1) of the 1987 Act.

BACKGROUND

6. The Worker injured his left shoulder and back in the course of his employment as a Night Shift Packer/Loader.
7. The Worker's employment was terminated in September 2013. He has not returned to employment to date.
8. The Worker has been in receipt of weekly payments of compensation from the Insurer.
9. The Worker's claim was initially managed by a different Insurer. The different insurer made a number of work capacity decisions. It determined that the Worker had the ability to work 8 hours per day, 5 days per week in three roles identified as suitable employment and determined the Worker's ability to earn in suitable employment as \$890.52. The amount of the Worker's pre-injury average weekly earnings ("PIAWE") had previously been determined to be \$1,099.74. The Worker's entitlement to weekly payments of compensation was reduced to \$0.00 as a result of the work capacity decisions.

10. The different insurer issued a notice under section 74 of the 1987 Act declining ongoing liability for weekly payments of compensation and medical expenses in relation to the Worker's injuries. The different insurer undertook an internal review and maintained its decision to decline liability.
11. The different insurer issued a further section 74 notice in much the same terms as the original section 74 notice, declining ongoing liability.
12. The Workers Compensation Commission issued a Certificate of Determination - Consent Orders, awarding 10% whole person impairment and discontinuing the claim otherwise.
13. The Worker applied for an internal review of the Insurer's work capacity decisions. The Insurer responded, stating that they are unable to conduct an internal review of the work capacity decisions "...made prior to the section 74 decline notice being issued".
14. The Worker made an application for merit review by the Authority. The application has been made in the form approved by the Authority and is accepted by the Authority under section 44BB(3)(b) of the 1987 Act.

LEGISLATION

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

DOCUMENTS CONSIDERED

18. The documents I have considered in this review are those listed in, and attached to, the application for merit review, the Insurer's reply and any further information provided by the parties.
19. I am satisfied that both parties have had the opportunity to respond to the other party's submissions and that the information provided has been exchanged between the parties.

SUBMISSIONS

20. In the application for merit review, the Worker makes the following submissions:
 - He is only aware of one work capacity decision made by the different insurer who was his Insurer at the time.
 - His impairment is also under question due to the fact that the level of his injuries as it appears through electronic imaging should not be downgraded to 10%.
 - His "physical look" will help tell the truth of the impact of his injury, by observing his movements. He cannot run in any circumstances due to back problems that are radiating to his left leg and his toes as well as his shoulder from carrying any heavy things.
 - The work capacity decision should be changed simply because the decision makers did not take into consideration the investigations about his back injury that the nominated treating doctor (NTD) ordered (X-ray and CT scan).

- His manager rejected the "validity" of his injury on the basis that the NTD did not put information in her report but in her notes it can be seen that I told her about my back injury at the same time as my left shoulder and she sent me for a CT scan afterwards.
- The work capacity decision should be changed to allow him "to get to the other part of the river". He has been left without treatment for 5 years.
- Returning to work is not applicable for someone like him now due to the fact that no factory in Australia "is allocated for those who have physical injuries after their employers sack them because they have no use for them...".
- "My shoulder, back, neck, injuries should not allow me for now [sic]".

21. In reply, the Insurer makes the following submissions:

- The Insurer communicated to the Worker that it was unable to proceed with the internal review as his claim had been declined.
- As such the Insurer was not able to carry out a review of the work capacity decision made prior to the section 74 liability decision being made.

REASONS

Nature of merit review

22. 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.
23. The review is not a review of the Insurer's processes in making the work capacity decision and/or the 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.
24. In respect to the Worker's submissions regarding whole person impairment, I note that decisions concerning matters that may be subject to a medical dispute are not work capacity decisions under section 43 of the 1987 Act. These matters are beyond the scope of a merit review and accordingly, not addressed below.

Jurisdiction

25. The Worker's application for merit review is in respect to the Insurer's work capacity decision.
26. As outlined above, the Insurer disputed liability for the Worker's claim through a notice issued in accordance with section 74 of the 1998 Act and a further notice. The Insurer declined ongoing liability for weekly payments of compensation and medical expenses in respect of the Worker's injury from the date of the notices. The Insurer relied on a number of provisions under the 1987 Act including section 33.
27. Section 43(2) of the 1987 act provides that a decision to dispute liability for weekly payments of compensation is not a work capacity decision. Such a decision is therefore not amenable to review by the Authority.
28. In light of the section 74 notices, the Authority does not have jurisdiction to make findings and recommendations in relation to the Worker's capacity for work from 27 March 2014 as the Insurer has disputed liability for the claim from that date. I am however satisfied that the Authority has jurisdiction to review the Worker's capacity for work for the period from the date of the work capacity decision, to and including 26 March 2014.
29. Disputes regarding liability may be referred to the Workers Compensation Commission if they are not able to be resolved with the Insurer.

Current work capacity and suitable employment

30. The Worker injured his left shoulder and back while working as a Night Shift Packer/Loader. The injuries have been associated with lifting heavy tubs weighing up to 30kg in this role and stacking the tubs on shelves.
31. The Worker has not returned to work since September 2013 when his employment was terminated.
32. He has been treated with physiotherapy, cortisone injection, medication and gym based programs.
33. In the early parts of the period under review, 12 November 2013 to 26 March 2014, the NTD was the Worker's nominated treating doctor. Shortly before this period, the NTD completed a return facsimile from a rehabilitation service provider. He indicated that the Worker was "fit to work" in the roles of Packer, Process Worker and Checkout Operator.
34. An independent medical examination report of an Orthopaedic Surgeon refers to an ultrasound of the Worker's left shoulder. The ultrasound was reportedly normal.
35. I do not have any medical certificates before me for the earlier part of the period under review however a vocational assessment report prepared by the rehabilitation service provider refers to the current WorkCover medical certificate at that time. The certificate reportedly indicated that the Worker had capacity to work suitable duties from 18 October 2013 to 13 December 2013. Specifically, it certified 8 hours per day, 5 days per week with the following restrictions:
 - No heavy lifting of the left arm
 - No pushing or pulling with left shoulder/arm
 - Avoid lots of bending
 - Other: No work with left shoulder above the horizontal, no reaching to higher level, work only at horizontal, suitable duties as per rehab consultant plan, can be assessed for new jobs.
36. A Workers Compensation Commission Medical Assessment Certificate ("MAC") also refers to the ultrasound of the Worker's left shoulder and notes that it did not show any abnormalities. The MAC also refers to a report from the NTD. I do not have a copy of this report before me however the NTD was reportedly of the view that the Worker's left shoulder bursitis had "recovered" and he was able to return to pre-injury duties.
37. The Worker makes submissions that the work capacity decision should be changed because his back injury was not taken into account. Indeed, the medical certificate outlined above is only in respect to the Worker's left shoulder. His back injury is not referred to in the rehabilitation service provider's report.
38. An MRI of the Worker's lower back was performed following an X-ray and CT scan. The MAC and the Orthopaedic Surgeon's report refers to these investigations. It is reported that the MRI showed a broad-based central disc protrusion at L4/S. In terms of radiculopathy, the Orthopaedic Surgeon reported "possibly some irritation of the left L4 nerve root" and the MAC reports "no obvious neurological involvement".
39. The only other medical information before me is three WorkCover NSW certificates of capacity issued by a GP. These certificates refer to both the Worker's left shoulder and back injury and certify the Worker with no current work capacity.
40. While the MAC and the Orthopaedic Surgeon's report refer to both the injury to the Worker's left shoulder and back, they do not provide an opinion as to the Worker's capacity for work.
41. The injury to the Worker's back is an injury accepted by the Insurer. The only medical information that considers this injury along with the left shoulder and provides an opinion as to

capacity for work is the GP's certificates. In the absence of any information to the contrary, I accept the Worker did not have any capacity for work in the period under review, that is from 12 November 2013 to 26 March 2014.

42. Section 32A of the 1987 Act defines "no current work capacity" 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.

43. As I have found that the Worker did not have capacity for any type of work from 12 November 2013 to 26 March 2014, it follows that he had a present inability arising from an injury such that he was not able to return to work, either in his pre-injury employment or in suitable employment during that period.

44. I find that the Worker had no current work capacity from 12 November 2013 to 26 March 2014 in accordance with the definition in section 32A of the 1987 Act.

Entitlement periods for ongoing weekly payments

45. 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.

46. The Insurer indicates in its reply that the Worker has received 33 weeks of weekly payments of compensation. A list of payments provided by the Insurer indicates that the Worker had received more than 13 weeks of compensation at the time of the period under review, 12 November 2013 to 26 March 2014.

47. The Worker's entitlement to weekly payments of compensation between 12 November 2013 and 26 March 2014 fell in the second entitlement period. In these weeks, his entitlement is to be calculated in accordance with section 37 of the 1987 Act, as follows:

Section 37

(1) *The weekly payment of compensation to which an injured worker who has no current work capacity is entitled during the second entitlement period is to be at the rate of:*

- (a) $(AWE \times 80\%) - D$, or
 - (b) $MAX - D$,
- whichever is the lesser.

48. In the above formulas "MAX" means the maximum weekly compensation amount, which is referred to in section 34(1) of the 1987 Act.

49. "D" is the amount of any non-pecuniary benefits which I am satisfied in this instance is nil.

50. In order to determine "AWE", the Worker's pre-injury average weekly earnings must be determined. The Insurer has determined the Worker's PIAWE to be \$1,099.74. This amount will be used as the Worker's "AWE" for the purposes of the above formula.

51. Applying the formula in section 37(1)(a) of the 1987 Act, the Worker's entitlement to weekly payments of compensation is calculated as follows:

$$(\$1,099.74 \times 80\%) - \$0.00$$

$$= \$879.79$$

52. I find that the Worker is entitled to weekly payments of compensation in the amount of \$879.79 for the period 12 November 2013 to 26 March 2014.

Merit Review Service
Delegate of the WorkCover Authority of NSW