



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 under section 44BB(3)(e) of the *Workers Compensation Act 1987* (the 1987 Act).
2. The Worker has current work capacity.
3. The Worker does not meet the special requirements under section 38(3) of the 1987 Act to be entitled to weekly payments of compensation after the second entitlement period.

RECOMMENDATIONS BASED ON FINDINGS

4. The Authority may make binding recommendations to the Insurer based on the findings of this merit review under section 44BB(3)(e) of the 1987 Act.
5. No recommendations are made for the reasons below.

BACKGROUND

6. The Worker has been receiving weekly payments of compensation for incapacity for work resulting from an upper back and neck injury. She was injured in a motor vehicle accident on her way to work.
7. The Insurer made a work capacity decision to discontinue the Worker's weekly payments of compensation on the basis that she had current work capacity and did not meet the special requirements under section 38(3) of the 1987 Act to be entitled to weekly payments after the second entitlement period.
8. The Worker referred that decision for internal review by the Insurer. The Insurer affirmed its original decision.
9. The application for merit review was received by the Authority. The Worker has stated in her application that she received notice of the internal review decision. The Authority accepts the application was made within time under section 44BB(3)(a) of the 1987 Act. It was also made in the approved form.

LEGISLATION

10. 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)
11. Section 43 of the 1987 Act describes a "work capacity decision".
12. Section 44BB of the 1987 Act provides for merit review of a work capacity decision of an insurer by the Authority.

DOCUMENTS

13. 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 by the Worker and the Insurer.

SUBMISSIONS

14. The Worker's submissions in her application for merit review and the Insurer's reply have been considered. The submissions are addressed in the reasons below where necessary.

REASONS

Nature of merit review

15. This is a merit review of the Insurer's work capacity decision to discontinue the Worker's weekly payments of compensation on the basis that she has current work capacity and does not meet the special requirements to be entitled to weekly payments after the second entitlement period. The Authority must consider all of the information substantively on its merit and make findings that are most correct and preferable. It is not a review of the Insurer's procedures in making the work capacity decision.

Current work capacity

16. The Worker's entitlement to weekly payments of compensation after the second entitlement period depends on if she has "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

17. The Worker submits that her "condition has deteriorated since the accident". She submits that the employment identified by the Insurer is not suitable "as I am risking a further deterioration and causing more pain to my injuries. Prolonged sitting or standing increases my pain and then I am unable to be productive or be able to perform in roles the insurer has identified". The Worker's pre-injury employment ended in 2002. She returned to irregular casual work as a "mystery shopper". She continues to do this work intermittently. For example, the Worker declared in a certificate of capacity that she did "mystery shop" work and earned \$19.00 each time.
18. An orthopaedic surgeon examined the Worker for the Insurer. In the report, the orthopaedic surgeon stated "the Worker has no ongoing work incapacity as a result of a work journey injury which has now resolved". However, that opinion goes to the issue of liability for weekly

payments of compensation which is not in issue here. The Insurer has accepted that there is a liability for weekly payments of compensation under section 33 of the 1987 Act. The Insurer has made a work capacity decision about the Worker's current work capacity to assess her entitlement to weekly payments of compensation after the second entitlement period under section 38 of the 1987 Act. The orthopaedic surgeon's opinion is contrary to the accepted facts in this case.

19. An exercise physiologist conducted a functional capacity evaluation with the rehabilitation services provider. The exercise physiologist assessed that the Worker was fit to perform part-time hours (20 hours per week) in "sedentary" physical work, a category described in the report. The exercise physiologist suggested the following specific restrictions should be considered for the Worker when assessing suitable employment for her:

- Lifting/carrying up to 5kg at waist height, 3kg to shoulder and up to 2kg above shoulder height.
- Nil lifting from floor.
- Avoid repetitive/sustained forward or overhead reaching activities.
- Avoid static seated activities for longer than 30 minutes prior to adopting postural adjustment (provided ergonomic seating is available).
- Standing limit to up to 30 minutes every hour, with regular postural adjustment to be encouraged.
- Avoid squatting, kneeling, crouching or stooping — hence avoidance of work below waist height.

20. An injury management consultant examined the Worker for the Insurer. In the report, the injury management consultant set out his examination findings and explained how and why he considered that the Worker had more functional ability than what was revealed on formal physical examination. On work capacity, the injury management consultant stated:

...She is in my view fit for full time work that is 8 hours/day, 5 days/week of suitable duties. In terms of a physical restriction, it is my view that the worker has significantly limited her present capacity. The inconsistencies during the examination as well as the significant change in range of movement from the view between formal observation and informal observation is consistent with this.

It should be emphasised that at this point I am not proposing that the worker is consciously "malingering", I am simply pointing out there is a substantial disparity between the workers [sic] presentation when informally observed and that when formally examined. Based on this, it is my view that the workers [sic] level of function is greater than what was presented to myself.

It remains however that she has sustained injuries to an extent that has been accepted as being work related and the effects of this appear to continue.

It is therefore not possible to state that she can do work in an unrestricted manner. The worker should be fit to lift at least 7.5kg with the load kept close to her trunk. The worker should change position every 20 minutes to avoid static posture. She should also work between waist and shoulder height. This will avoid any inappropriate spinal posture.

21. The nominated treating doctor (NTD) issued a certificate of capacity. The NTD certified that the Worker had "neck back leg pain" and capacity to work in some type of employment for four hours a day, five days a week and a driving ability of "½ hr only". That certification was in place until 10 August 2016. At that point, the NTD reduced the Worker's certified capacity to four hours a day, three days a week with a driving limit of "½ hr driving". The most recent certificate of capacity maintains that certification up to 28 February 2017.

22. The NTD wrote to the Insurer:

The Worker now suffers from chronic pain which is exacerbated by long periods of standing or sitting.

The Worker would not be able to return to full time suitable duties however should be able to return to 20 hours of suitable duties in a role similar to that of a receptionist with a stand/sit desk so she would avoid static posture.

I feel before the Worker returns to regular employment I would like more investigations and a referral to a neurosurgeon/orthopaedic surgeon to rule out any underlying pathology.

23. The NTD wrote to the Insurer:

As advised previously the Worker would not be able to manage a job in the fast paced environment of a call centre. The Worker could not talk on the telephone and type at the same time and her back pain requires her to have a 5 minute break to stretch every 25 minutes.

It was advised that the Worker would only suit a job as a receptionist and she would require a desk that can be converted from sitting to standing from time to time.

24. There is no dispute between the Worker and the Insurer that she is unable to return to her pre-injury employment as a fulltime insurance claims consultant due to her injury. The critical issue is if she is able to return to work in "suitable employment" as defined by 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 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.

25. Employment as a receptionist, accounts clerk and call centre operator was suggested as suitable for the Worker in the rehabilitation services provider's vocational assessment report.

26. The duties and functional requirements of employment as a receptionist are set out in the vocational assessment report. Essentially, it is a sedentary job and involves telephone use and computer work and other general office duties. Employees have the opportunity to stand and walk about the office to do various office duties (photocopying, scanning and the like), greeting and welcoming visitors, maintaining the reception area, and sending and receiving mail.

27. The nature of the Worker's incapacity limits her ability to lift, carry, reach, sit, stand, squat, kneel, crouch, stoop and drive. The vocational assessment report stated that "The vast majority of advertised receptionists are sedentary in nature and allow workers to alter their posture

between sitting and standing as required" and "No lifting or adopting strenuous postures is typically involved". That is consistent with the job description given the nature and variety of the duties described. It is likely that the sedentary physical demand of employment in a part-time receptionist job is suitable for the Worker based on the information contained in the vocational assessment report.

28. Adding weight to that view is the NTD's opinion that "the Worker would not be able to manage a job in the fast paced environment of a call centre...The Worker would only suit a job as a receptionist and she would require a desk that can be converted from sitting to standing from time to time". Also, the exercise physiologist assessed that employment as a receptionist was of sedentary physical demand and was "physically appropriate for the Worker to perform at the current time". The exercise physiologist only recommended a sit-stand workstation for employment as a call centre operator because "there is little opportunity to alternate from seated posture due to the desk bound nature of this work".
29. The key issue is whether the work allows the Worker to alternate posture given her limited sitting and standing tolerance of 20-30 minutes at a time. A sit-stand desk is one way to achieve postural change and some workplaces may well allow for that. However, the information in the vocational assessment report supports that employment as a receptionist allows for opportunities to alternate posture even without a sit-stand desk because it is not a fast-paced work environment and there are a variety of duties involving changes of posture to complete.
30. The Worker is 47 years of age. She completed Year 12 High School. She completed a small business computer applications/typing certificate. The vocational assessment report stated that "the Worker advised that she is able to send emails, including attachments, and uses Microsoft Word at times. She reported having good typing skills and being able to use social media websites, use Seek job seeking website, and internet search engines". Her other assessed transferrable skills are listed in the vocational assessment report. She has had work experience as a mystery shopper which reportedly involves:
 - Logging into company website and identifying suitable mystery shopping actions that require completion
 - Attending businesses and assessing customer service experience
 - Completes multiple choice questionnaires to report on experience in engaging with the business
31. She also worked as a claims consultant for 14 years (albeit ending in 2002) which involved:
 - Sorting mail
 - Answering inbound calls
 - Attending to customers attending in person
 - Gathering claim information
 - Dealing with home claims and motor vehicle claims
 - Undertook investigatory interviews with claimants
 - Managing claims once lodged
 - Supervising responsibilities
 - Training colleagues
32. The vocational assessment report stated that "Most receptionist roles also involve an administration component, with keyboard use required to varying degrees for either/both data entry or writing correspondence". Further "clerical tasks such as filing, distributing correspondence, sending faxes and photocopying are also often required". Also "Prior

experience is not typically required". The report concluded that the Worker was a "suitable candidate for the role of a receptionist in relation to her existing skills and experience". That conclusion is consistent with the Worker's skills and work experience in computer use and clerical duties. It supports that the Worker is currently suited to employment in work as a receptionist having regard to her age, education, skills and work experience.

33. The Worker has been provided with occupational rehabilitation services from the rehabilitation services provider to prepare for return to work generally. She has completed various training modules on workplace preparation and job seeking. A work trial was arranged for the Worker as an administrative assistant. A workplace assessment report-work trial was prepared to investigate and assess the suitability of the proposed workplace. The work required the Worker to do telephone duties, computer duties, managing invoices and scanning various documents, managing petty cash, and collecting mail. The duties were assessed as suitable for the Worker. However, a closure report confirmed that "due to the payment cease date" (apparently an earlier work capacity decision to discontinue weekly payments) the work trial "did not start". It is unclear why this was a valid reason for not starting the work trial. Nevertheless, the occupational rehabilitation services provided to or for the Worker are but one factor to consider. While it is unfortunate that the Worker did not have the opportunity to participate in this work trial the other information available supports that her existing skills and experience are suitable for employment as a receptionist.
34. The balance of relevant factors supports that employment as a receptionist is employment in work for which the Worker is currently suited and therefore "suitable employment".
35. The Worker has "current work capacity" being a present inability arising from an injury such that she is not able to return to her pre-injury employment but is able to return to work in suitable employment.

Special requirements for continuation of weekly payments after second entitlement period

36. The Worker has received weekly payments of compensation since 2000. A schedule of payments provided by the Insurer shows that she has been paid more than 130 weeks of weekly payments. The Worker is after the "second entitlement period" as defined by section 32A of the 1987 Act and her ongoing entitlement to weekly payments of compensation is subject to meeting special requirements under section 38 of the 1987 Act.
37. A worker with "current work capacity" is only entitled to weekly payments of compensation after the second entitlement period if special requirements 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.*
 - (3A) *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 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.*
38. There is no submission (and the available information does not support) that the Worker is a "worker with high needs" as defined by section 32A of the 1987 Act. In those circumstances, the Worker must meet the special requirements under section 38(3) of the 1987 Act to

be entitled to weekly payments of compensation after the second entitlement period.

39. The Worker has not shown that she has returned to work for a period of not less than 15 hours per week and is in receipt of current weekly earnings of at least \$183 per week (as currently indexed). The information related to her employment as a mystery shopper does not support that she has been working the required hours or in receipt of the required current weekly earnings. The Worker has not met the special requirements under section 38(3)(b) of the 1987 Act and is therefore not entitled to weekly payments of compensation after the second entitlement period.
40. In those circumstances, no recommendation is necessary. The Insurer's work capacity decision to discontinue the Worker's weekly payments stands.

Merit Review Service
Delegate of the State Insurance Regulatory Authority