

**State Insurance Regulatory Authority**  
**Workers Compensation**  
**Merit Review Service**

**FINDINGS AND RECOMMENDATIONS ON MERIT REVIEW BY THE AUTHORITY**

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**Worker:**

**Insurer:**

**Date of Review:**

**Date of Injury:**

**Claim Number:**

**Our Reference:**

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**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 work capacity decision.
2. The Worker has current work capacity of 8 hours per day, 5 days per week.
3. The Worker is able to return to work in suitable employment in the roles of marketing specialist/manager, sales/advertising manager and recruitment consultant.
4. The Worker is able to earn \$1,562 per week in suitable employment.

**RECOMMENDATION BASED ON FINDINGS**

5. Pursuant to section 44BB(3)(e) of the 1987 Act, the Authority may make binding recommendations to an Insurer based on the findings of its review.
6. The Authority does not make any recommendations to the Insurer for the reasons below.

**BACKGROUND**

7. The Worker was injured in a motor vehicle accident. At the time she was employed as a marketing specialist.
8. The Insurer made a work capacity decision reducing the Worker's entitlement to weekly payments of compensation to \$438.00 per week under section 37 of the 1987 Act. This decision was provided to the Worker under letter dated that day.
9. The Insurer undertook an internal review in this matter and made a decision, sent to the Worker by post.
10. The application for merit review was received by the Authority. The application has been made within 30 days after the Worker received notice of the internal review, as is required under section 44BB(3)(a) of the 1987 Act. The application has been lodged in the form approved by the Authority.

## LEGISLATION AND GUIDELINES

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 2010* (the Regulation);
- *Guidelines for work capacity decision Internal Reviews by Insurers and Merit Reviews by the Authority* applicable from 11 October 2013 (the Review Guidelines); and the
- *WorkCover Work Capacity Guidelines* as amended (the Work Capacity Guidelines).

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.

## DOCUMENTS CONSIDERED

14. The documents I have considered are those listed in, and attached to, the application and the Insurer's reply together with further documents received from the Insurer, a report of Dr O and a further WorkCover NSW- certificate of capacity received from the Worker.

15. 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

16. In the application for merit review, the Worker submits:

- She wants a continuation of physiotherapy and a further medical assessment by qualified professionals in line with recognized and peer reviewed medical methods and treatment.
- She requires a gradual return to work appropriate to her actual capacity together with an ergonomically appropriate workplace to be provided.
- Employment options and her earning capacity need to be reassessed according to her physical and psychological capacity.
- Alternative and/or additional treatment options to be considered such as hydrotherapy.
- The Insurer should address RPL requirements, i.e. accreditation by Australian Marketing Institute.
- Roles relevant to her skills, education and experience to be considered, not the role of purchasing and supply logistics clerk as continuously suggested by the Insurer.
- The diagnosis and treatment plan of psychiatrist Dr C must be considered in the assessment of her work capacity. Approval by Insurer to be provided for ongoing treatment.
- A second opinion should be obtained of the crania sacral therapy and assessment of the scientific basis of this treatment.
- She is not ok. She experiences physical and psychological problems daily. Her back, neck and shoulders hurt. Her headaches and migraines have both increased and she never had them with such frequency before. She regularly experiences visual distortions which she never had

before. She has sleeping problems. Her mood is depressed and her motivation and drive have left her. She is on antidepressant medication now. Before she had the accident, she was an energetic, positive and hard-working person who loved life. Everything has changed now. She is not herself any more.

- The report and diagnosis from neurologist Dr S was not taken into consideration by the Insurer in their internal review, despite the fact that it was sent and received by all parties involved.
- The Insurer did not give approval for follow up treatment by psychiatrist Dr C despite his recommendation, due to the Insurer stalling.
- Nothing was done with the direction by her general practitioner for an ergonomically appropriate workplace to be provided by the Insurer, despite the fact that she started working from home at the start of her employment and the Insurer sending a consultant out to do an assessment and she recommended an ergonomic desk chair.
- The crania sacral therapy proved to be ineffective and it lacks scientific basis. The fact that it was performed by a physiotherapist does not make the treatment less of a pseudoscience and does not allow the physiotherapist to opine outside her area of expertise.
- Her psychological injury was caused by the accident and the traumatic situation following the collision and it was the cause of her contract not being extended. The other driver was extremely aggressive and she had to stand in front of his revving 5,853 kg truck to stop him from leaving the scene. When he got out of his truck he was so aggressive that bystanders had to step in to keep him away from her. She witnessed the truck driver ripping the rear bumper off her car in white rage while he was yelling at her. It was not a 'standard' accident, it was a traumatic event. Losing her job did not help her recovery and worsened her psychological injury. The argument that her psychological injury was entirely caused by her losing her job goes against all the psychological reports including that of the IME.

17. In reply, the Insurer submits:

- In relation to concerns raised by the Worker regarding treatment concerns for her physical injury, the Insurer notes that the work capacity decision is a decision about the Worker's current work capacity, what constitutes suitable employment for the Worker, the amount the Worker is able to earn in suitable employment and the amount of the Worker's PIAWE. The Insurer will continue to approve reasonable and necessary treatment expenses as defined by section 60 of the 1987 Act. The treatment concerns regarding the physical injury raised by the Worker have been forwarded to her case manager to review.
- In relation to treatment concerns regarding the Worker's alleged psychological injury the Insurer notes that the Worker's alleged psychological injury was disputed.
- Physiotherapy treatment for the Worker's physical injury was tapered off as per the report by the physiotherapist Ms N, ongoing physiotherapy was to address the migraines through craniosacral therapy.
- Dr S, nominated treating specialist, diagnosed the Worker with post-traumatic status migrainosus as per his report. The Insurer notes that the Worker's capacity was not discussed in that report.
- The evidence on file suggests that the alleged psychological injury was as a result of the Worker's cessation of her employment contract with the Employer and not as a result of the accident. As such, the alleged psychological injury is subject to a section 74 notice issued.

- In relation to the Worker's occupational rehabilitation concerns, based on the reports of Dr K (occupational physician) and Dr G (psychiatrist), the Worker is considered to have capacity for full hours, thus the identified employment options have been selected in line with the documented capacity of the two specialists. Specifically, the work capacity decision relies on the role of sales advertising manager, which has been approved by the nominated treating doctor, Dr B.
  - The Insurer notes that the Worker asserts that she has no experience as a purchasing and supply logistics clerk, for the purpose of the work capacity decision, the Insurer relied on the role of sales and advertising manager and not a purchasing and supply logistics clerk.
  - The Worker requests that the Insurer address her desire to undertake recognition of prior learning accreditation, however, based on the vocational assessment by the Rehab Provider this type of accreditation is not required for employment in the selected suitable employment option.
  - The Worker has requested an ergonomic workplace; the Rehab Provider is engaged to support return to work and is able to conduct reasonably necessary assessment of the workplace when the Worker obtains employment.
  - The Insurer notes the psychological component of the Worker's claim has been declined. The Insurer notes that the Worker stated on her application for merit review that she would be sending additional attachments to support her application. To date, no further information has been received.
  - The Insurer contends that in making the work capacity decision, and again on internal review, the Insurer has used the available information from the Worker's nominated treating doctor, independent medical examiners and vocational information.
18. The Worker confirmed that she accepted the calculation of her pre-injury average weekly earnings of \$2,500 and that she is not currently working.
19. The Worker objected to the Insurer being allowed to submit the report of Dr O after the deadline for documentation had expired. In this respect, I note the Insurer has forwarded to the Authority a copy of the letter to the Worker advising of the appointment with Dr O and a copy of the email from the Insurer to the Worker indicating the Worker's advice that she would not be able to attend that appointment. A new appointment was arranged. The Insurer referred the Worker to Dr O following the service by the Worker of Dr S's report. In those circumstances, and in line with the principles of procedural fairness, the Authority allowed time for the service of that report. The Worker has not made any further submissions regarding Dr O's report.

## **REASONS**

### **Nature of merit review**

20. This matter involves a merit review of the work capacity decision of an insurer in accordance with section 44BB(1)(b) of the 1987 Act. The review is not a review of an 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.
21. The Worker has made submissions regarding the handling of her workers compensation claim. These are not matters which can be addressed on merit review of the work capacity decision and internal review decision.

22. The Worker requested the Authority to stay the application for merit review pending an outcome of an application she is to make in the Workers Compensation Commission regarding her psychological injury claim. The Authority is not able to stay the application for merit review for such a long period of time whilst awaiting the outcome of a claim to be the subject of an application in the Commission. The Worker may request the Insurer to make a new work capacity decision should she obtain further information relevant to her work capacity.

#### Current work capacity and suitable employment

23. The Worker was injured in a motor vehicle accident. The insurer accepted liability for her physical injuries but denied the claim for her psychological claim. The Worker returned to work following the accident on modified hours and duties. She ceased work when her contract was not renewed. The Worker has not returned to work since.
24. The issue for me is how the injuries impact upon the Worker's capacity for employment.
25. 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*

26. 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*

27. In undertaking this review, I will consider the information before me and assess if, and to what extent, the Worker has "current work capacity" or "no current work capacity" as defined and set out above.

#### Certificates of capacity

28. The Worker first attended upon Dr B a few days following on from the accident. Dr B has diagnosed the Worker with "whiplash type injury to neck- Mild concussion. Has developed secondary reactive Anxiety/Depression".
29. Before me are a number of WorkCover NSW – certificates of capacity issued by Dr B. They have varied on the number of hours and tolerances in relation to capacity.
30. The most recent certificate issued by Dr B certified the Worker with capacity for some type of employment between 5 July 2016 and 2 August 2016 for 3 hours per day, 5 days per week with the following recommendations on capacity:

Lifting/carrying	10 kg
Sitting tolerance:	60 mins frequent breaks
Standing tolerance:	45 mins frequent breaks
Pushing/pulling ability:	nil capacity
Bending/twisting/squatting ability:	nil capacity
Driving ability:	60 mins, automatic transmission
Other:	needs access to ergonomically appropriate work station

31. Between 22 March 2016 and 19 May 2016, the certificates were in the same terms regarding the Worker's capacity, certifying her with capacity for some type of employment for 3 hours per day, 5 days per week. In a certificate dated 20 June 2016, Dr B certified the Worker with capacity for some type of employment for 2 hours per day, 5 days per week. In each of these certificates, Dr B made the following recommendations on capacity:

Lifting/carrying	10 kg
Sitting tolerance:	30 mins frequent breaks
Standing tolerance:	30 mins frequent breaks
Pushing/pulling ability:	nil capacity
Bending/twisting/squatting ability:	nil capacity
Driving ability:	30 mins, automatic transmission
Other:	needs access to ergonomically appropriate work station

32. The certificates also indicate that Dr B has referred the Worker to a number of medical professionals following on from the motor vehicle accident.
33. Certificates of capacity dated from 10 December 2015, to the 3 February 2016 stated the Worker had no current capacity for any type of employment. I note the certificate of 19 January 2016 is the first to note a diagnosis of "Has developed secondary reactive Anxiety/Depression".
34. Prior to the diagnosis of anxiety and depression, and following from the motor vehicle accident, Dr B provided a number of certificates of capacity. In a certificate of capacity for the period 15 September 2015 to 5 October 2015, Dr B certified the Worker with capacity for some type of employment for 6 hours per day, 5 days per week with recommendations regarding her capacity. On 1 and 14 October 2015, he again certified the Worker with capacity for some type of employment for 4 hours per day, 5 days per week with recommendations regarding her capacity. On 22 October 2015, the certificate of capacity certified the Worker with capacity for some type of employment for 6 hours per day, 5 days per week. The certificate of capacity dated 30 October 2015, certified the Worker with capacity for some type of employment for 8 hours per day, 5 days per week with recommendations regarding her capacity. The diagnosis of injury in these certificates of capacity was "whiplash type injury to neck- Mild concussion".
35. I note Dr B has continued to make recommendations regarding the Worker's ability to lift/carry, sit, stand, push/pull, bend/twist/squat and driving.
36. Ms F of the Rehab Provider provided a vocational assessment report. In that report she notes her discussions with Dr B. Dr B advised Ms F in a case conference that given the Worker's reported symptoms, it is unlikely that she can sustain long work hours due to her headaches and migraines. Dr B wished to refer the Worker to Dr A, rheumatologist. He has, since that time, referred her to Dr S.

### ***Medical reports***

#### ***Physical injuries***

37. Dr A, rheumatologist, provided a report. He noted that x-rays of the Worker's cervical and thoracic spine are normal and there is no underlying spinal pathology that he can see. He believed she would benefit from strengthening exercises and a swimming programme. In a letter to the Insurer, Dr A noted that the Worker failed to attend 3 appointments.
38. Dr K, occupational physician, provided reports. Dr K noted in his report that the Worker had been certified as fully fit for work with some physical restrictions until she stated "she suffered a mental breakdown". She has been certified unfit for work since that time on psychological grounds. Dr K opined that based on the history of the incident, the lack of pathology on investigation findings to date and the normal physical examination on assessment, the Worker is physically fit to work in her pre-injury role and duties without restriction.
39. Dr B obtained an MRI of the Worker's spine from Dr L. Dr L stated that there was "no acute traumatic abnormality in the spine identified".

40. Dr B referred the Worker to Dr S, neurologist and neurophysiologist. Dr S provided a report. Dr S noted that the Worker had a whole spine MRI which was normal and noted that his neurological examination of the Worker was normal. Dr S opined that the Worker has developed post-traumatic status migrainosus. He stated this was a common sequelum of head or neck trauma in a patient with previous migraine, particularly where there is associated psychological distress as with the Worker. He recommended that the Worker continue with her current medication and encouraged her to continue outdoor exercise and undertake weekly formal relaxations classes, even meditational yoga. He did not comment on her current work capacity.
41. Ms A, physiotherapist, provided a report. Ms P noted that after one session, the Worker no longer had any articular or biomechanical dysfunctions, thus no remaining evidence of a car accident injury. She noted that there were some cranial restrictions but they related to trauma from several years before and not from her accident.
42. Dr O, neurologist, provided a report. Dr O stated that he agreed with Dr S that the Worker has developed a post-traumatic extracranial vascular type headache, but he believed it would gradually settle especially with the long term effectiveness of the anti-depressants she is currently taking. He opined that the Worker's ongoing symptoms are more likely to be psychological in nature rather than due to any underlying neurological abnormality. He believed that from a neurological point of view, the Worker was capable of returning to her pre-injury employment as any aggravation from the motor vehicle accident had resolved. He noted that the Worker was able to return to her pre- injury work with restrictions after the accident and he believed that she should be able to return to her pre-injury work without any restrictions as there is no neurological abnormality. He believed her ongoing symptoms relate to her background of migraine and psychological factors rather than to the effects of the minor motor vehicle accident.

***Psychological/psychiatric claim***

43. Ms B, psychologist, in her report and counselling management plan, stated that the Worker suffered from depression (mild), anxiety (severe) and stress symptoms (severe) following on from her motor vehicle accident. Ms B reported that the Worker's "major concerns (given the end of her contract) relate to her future career especially given that she is the sole family income earner. She is also concerned about damage that may have occurred to her professional reputation due to problems with the product she was promoting which she stated that the host management had not attempted to resolve".
44. Dr G, psychiatrist, provided 2 reports.  
In his report, Dr G stated that:  

"The fact that she has ongoing pain and discomfort, tires easily, suffers from sleep disturbance and an element of depression, is suggestive that her adjustment disorder has been substantially contributed to by the motor vehicle accident and therefore, her employment."
45. He further went on to state that:  

"From a psychiatric viewpoint, I do not believe that her current adjustment disorder would prevent her from working in alternative employment if she is successful in gaining a position. She would be fit for pre-injury hours and duties if she was still employed by her employer."
46. Dr G opined there is no reason why the Worker could not work in any vocational area consistent with her education and experience. From a psychiatric perspective she is able to perform the roles identified as suitable vocational options.

47. Dr C, psychiatrist, provided a report. In that report he stated that:

"The Worker presents with Major Depressive Disorder and comorbid with this she has a Generalised Anxiety Disorder. I suspect that this has emerged in the context of a significant trauma from the motor vehicle accident. The subsequent physical consequences of the motor vehicle accident have had an impact on her self-esteem. Most profound however has been the loss of her work role which previously was an immense source of her identity. This has been a significant transitional phase for the Worker and she needs psychiatric and psychological support to help her through this time."

#### *Discussion and findings*

48. Following the motor vehicle accident, the Worker had returned to her pre-injury employment on restricted hours and duties until her contract was not renewed. Prior to the Worker being referred to Ms B for a psychological assessment and referral for the investigation of her migraines, Dr B had certified the Worker as having capacity for some type of employment for 8 hours per day, 5 days per week with recommendations on capacity. Dr B had prior to that certified the Worker with varying hours between 4 to 6 hours, 5 days per week from the time of the accident.
49. The certificate of capacity of 10 December 2015 is the first certificate where the Worker is certified to "no current work capacity". In the notes of that certificate, Dr B indicates that the Worker is developing "significant somatic symptoms". The certificate of 14 December 2015 notes the referral to Ms B. The most recent certificates indicate that Dr B is of the view that the Worker should continue with a staged return to work due to excessive fatigue and migraine frequency and this is supported by Dr C. I note the certificate of capacity dated 19 January 2016 is the first to indicate that the Worker is suffering from daily headaches and weekly migraines.
50. In relation to the physical symptoms following on from injury, the reports from Dr K and Ms P state that the Worker has capacity to return to some type of employment for 8 hours per day, 5 days per week being full-time employment. However, since those reports, the Worker was referred to Dr S regarding the frequency of her migraines. Dr S has commented on the Worker developing post-traumatic status migrainosus. He also noted that her neurological examination was normal. Dr O has opined that the Worker has no neurological abnormality and should be able to return to work without any restrictions. He is of the view that the Worker's ongoing symptoms are more likely to be psychological in nature rather than due to any underlying neurological abnormality.
51. Dr C provided a diagnosis of the Worker's psychological condition as Major Depressive Disorder and comorbid with this she has a Generalised Anxiety Disorder. However, Dr C did not specifically comment on her fitness to return to work. Dr George was of the view that the Worker was fit to return to work full time in employment for which she has the necessary education and experience.
52. The weight of the medical information before me is that the Worker is able to return to some type of employment. Prior to the Worker being referred for a psychological investigation, Dr B had certified the Worker with capacity for some type of employment with varying hours between 4 hours per day, 5 days per week to 6 hours per day, 5 days per week until the upgrade, to 8 hours per day, 5 days per week. The other medical opinions are:
- Dr A found no underlying spinal pathology on the special investigations;
  - Dr L reported on the MRI scan that there was no acute traumatic abnormality of the spine;

- Dr K opined that the Worker could return to work for full-time hours in her pre-injury role without restrictions;
- Ms A found that the Worker no longer had articular or biomechanical dysfunctions;
- Dr O opined that from a neurological perspective the Worker was fit to return to her pre-injury duties as any aggravation from the accident had resolved; and
- Dr S's neurological examination of the Worker was normal and he diagnosed post-traumatic status migrainosus. He did not comment on the Worker's current capacity for work;
- Dr G believed the Worker was fit for pre-injury hours and duties; and
- Dr C and Ms B did not comment on the Worker's ability to return to work and both noted issues regarding both the motor vehicle accident and the Worker's self-esteem.

53. Doing the best I can on the information before *me*, I am persuaded that the weight of medical opinion is that the Worker has the capacity for some type of employment 8 hours per day, 5 days per week.

54. As at March this year, Dr B still had concerns as to the ongoing symptoms of the Worker's physical restrictions and ordered an MRI scan and referred her to Dr S for an assessment. In his most recent certificate of capacity, Dr B was still of the view that the Worker would benefit from treatment to restore her fitness and mobility. I also note the Insurer's submissions regarding continued assessment from the Rehab Provider regarding a workplace assessment when the Worker returns to work. I accept Dr B's recommendations in regard to specific areas of capacity as stated in the certificate, being:

Lifting/carrying	10 kg
Sitting tolerance:	60 mins frequent breaks
Standing tolerance:	45 mins frequent breaks
Pushing/pulling ability:	nil capacity
Bending/twisting/squatting ability:	nil capacity
Driving ability:	60 mins, automatic transmission

55. I therefore accept that the Worker has a current work capacity for the purposes of section 32A of the 1987 Act of 8 hours per day, 5 days per week with the restrictions set out above.

56. In light of the definitions as set out above, to assess the Worker's current work capacity, I need to consider the question of whether or not she has the ability to return to work in suitable employment.

### ***Suitable employment***

57. In order to determine whether the Worker has current work capacity, I am required to consider whether the Worker is able to return to work in "suitable employment". 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 448), 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 Workers Compensation 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.*

58. Ms F of the Rehab Provider provided a return to work progress report. That report noted that the Rehab Provider had commenced to provide ongoing job seeking assistance to the Worker. The Worker had an interview for a project management position which she had obtained by a personal network.

59. Ms F provided a vocational assessment report. The report set out the Worker's pre-injury employment as:

2000-2013	Various roles (administrative, recruitment, account management and sales, legal & HR support)/fixed term contracts with various organisations
2009/2013	Owner operator food marketing Freelance
2014	Recruiter/various boutique agencies Marketing
2015	specialist/the Employer

60. The Worker has tertiary qualifications with a Master of Communication and Bachelor of Business Administration. I note that the Worker's pre-injury employment was as a marketing specialist.

61. In relation to transferrable skills, the Worker has diverse work experience in sales, account management, administration, executive, legal, HR support and recruitment. She also has experience in event organisation and small business operation.

62. The vocational report notes the roles of marketing specialist/manager, sales/advertising manager and recruiter/recruitment consultant as suitable employment options for the Worker. I note that Dr B provided an approval for these vocations.

63. The Worker's pre-injury employment contract was terminated.

***Marketing specialist/manager***

64. The position description states that the duties to be undertaken include planning, developing and organising advertising policies and campaigns to support sales objectives; advising executives and clients on advertising strategies and campaigns; coordinating production of advertising campaigns; analysing data regarding consumer patterns and preferences; interpreting and predicting current and future consumer trends; researching potential demand and market characteristics for new goods and services; and supporting business growth and development through the preparation and execution of marketing objectives, policies and programs.

65. Physical demands of the position are stated to be mostly sedentary with the requirement of frequent to constant sitting in offices or meetings, occasionally stands, walks and moves, lifting/carrying, pulling, stretching and twisting are not a significant component of the job, occasional driving of cars and mental skills require a high level of cognitive functioning.

66. The Rehab Provider contacted 3 employers who each advised that the Worker's qualifications and experience would be relevant but success in the position depended on the Worker's experience in the particular type of product campaign. They also confirmed the sedentary nature of the position and that the functional requirements were in line with the Worker's capacity.
67. There are no age related considerations in relation to the position of marketing specialist/manager. I do not consider the Worker's age would prevent her from undertaking the role. In any event, I consider that given the Worker's work experience in this field she has the necessary skills and work experience to be suited to the role. I note her pre-injury employment was as a marketing specialist.
68. Suitable employment must be determined by reference to what the worker is functionally capable of doing, having regard to the worker's inability arising from injury. It must be employment for which the worker is currently suited.
69. I have found that the Worker has current work capacity of 8 hours per day, 5 days per week with recommendations of lifting/carrying 10 kg, 60 minutes sitting tolerance, 45 minutes standing tolerance, nil capacity for pushing/pulling and bending/twisting/squatting and driving ability of 60 minutes.
70. The position is noted to be of a sedentary demand with frequent to constant sitting in offices or in meetings. The Worker is currently certified as having capacity to sit for up to 60 minutes and stand for up to 45 minutes. There is no significant lifting, carrying or pulling involved in the position. Occasionally driving a vehicle may be required to undertake visits. These requirements are all within the recommendations on capacity made by Dr B and accepted by me in relation to her current work capacity.
71. I am satisfied that the position of marketing specialist/manager is suitable employment for the Worker for the purposes of section 32A of the 1987 Act.

#### *Sales/advertising manager*

72. I refer to the Worker's submissions regarding the position of "purchasing and supply logistics clerk" and note that under the heading "sales/advertising manager" in the internal review, the Insurer has referred to the position as "purchasing and supply Logistics clerk" in the first paragraph, however, later it refers to the correct position description of "sales/advertising manager". In my view, the first reference is an error.
73. The position description noted that the duties include formulating and implementing policies and plans for advertising, public relations, sales and marketing in consultation with other managers; directing the development of initiatives for new products, marketing and advertising campaigns; organising and controlling sales activities; directing merchandising methods and distribution policy; directing sales methods and arrangements by setting prices and credit arrangements.
74. The physical requirements are similar to that of marketing specialist/manager. The position is noted to be frequent to constant sitting in offices and/or meetings and occasionally stands and walks to attend meetings. Lifting, carrying or pulling is not a significant component of the position. Occasional driving of motor vehicles may be required.
75. The Rehab Provider contacted 3 employers who each advised that the Worker's qualifications and experience would be relevant to the positions they were currently advertising. They also advised the position was predominantly sedentary and the physical requirements were consistent with the Worker's functional capacity.
76. There are no age related factors in relation to the position of marketing specialist/manager. I do not consider the Worker's age would prevent her from undertaking the role. I consider that given

the Worker's work experience in this type of work she has the necessary skills and experience to be suited to the role.

77. I accept that the Worker has the experience, skill and qualifications to undertake this role noting her past experience in sales and advertising positions.
78. I am satisfied that the position of sales/advertising manager is suitable employment for the Worker for the purposes of section 32A of the 1987 Act.

#### ***Recruitment consultant***

79. The vocational report indicates that the duties of this position may include the following tasks: arranging advertising for job vacancies, interviewing and testing applicants and selection of staff; maintaining personnel records; providing advice and information to management on workplace relations policies and procedures; arranging for staff induction; receiving and recording job vacancy information; providing information on current job vacancies; undertaking negotiations on terms and conditions of employment; and developing, planning and formulating enterprise agreements and contracts.
80. The physical requirements of the position are noted to be sedentary with frequent sitting in offices or at meetings; occasionally stands; frequently walks and moves from office to office; lifting, carrying, pulling, bending, squatting, stretching or twisting are not significant components of the position; driving is not a significant component. The mental skills necessary include a high level of cognitive functioning.
81. The physical requirements are similar to that of marketing specialist/manager and sales/advertising manager. For the same reasons, I find the position of recruitment consultant to be within the Worker's recommendations on capacity.
82. There are no age related considerations for this position. The Worker has experience in the position of recruitment consultant. I therefore accept that the Worker has the experience, skill and qualifications to undertake this role noting her past experience as recruitment consultant. Further, the 3 employers contacting by the Rehab Provider indicated that the Worker's prior experience as a recruitment consultant would be highly relevant and made her suitable for the position advertised. They also confirmed the position is within the Worker's functional capacity.
83. I am satisfied that the position of recruitment consultant is suitable employment for the Worker for the purposes of section 32A of the 1987 Act.

#### **Findings**

84. I am satisfied that the Worker is able to return to work in suitable employment in each of the roles identified being marketing specialist/manager; sales/advertising manager and recruitment consultant.
85. Accordingly, I find that the Worker has the ability return to work in suitable employment for the purposes of section 32A of the 1987 Act.
86. I am satisfied that the Worker has current work capacity as defined by section 32A of the 1987 Act.

#### **Entitlement periods for ongoing weekly payments**

87. 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.
88. The Insurer's reply stated that the Worker has received 33 weeks of weekly payments of compensation up to the time of the lodgment of the reply. The Worker has made no submissions contrary to that submission.
89. I therefore find that the Worker's entitlement to weekly payments of compensation currently falls in the second entitlement period and is to be calculated in accordance with section 37 of the 1987 Act, as follows:

*{3} The weekly payment of compensation to which an injured worker who has current work capacity and has returned to work for less than 15 hours per week (or who has not returned to work) is entitled during the second entitlement period is to be at the rate of:*

*(a)  $(AWE \times 80\%) - (E + D)$ , or*

*(b)  $MAX - (E + D)$ ,*

*whichever is the lesser.*

#### **Calculation of entitlement**

90. "AWE" means the worker's pre-injury average weekly earnings.
91. The vocational assessment report indicates that following in relation to the suitable employment options:
- Marketing specialist/manager: \$1,286 per week
  - Sales/advertising manager: \$1,562.00 per week
  - Recruitment consultant: \$1,250.00 per week
92. "E" is described in section 35 of the 1987 Act as:
- E* means the amount to be taken into account as the worker's earnings after the injury, calculated as whichever of the following is the greater amount:
- (a) the amount the worker is able to earn in suitable employment,
  - (b) the worker's current weekly earnings.
93. Section 35 of the 1987 Act provides that "E" means the amount to be taken into account as the worker's earnings after the injury, calculated as whichever is the greater of the amounts.
94. As the Worker is not currently working and her currently weekly earnings as defined by section 441 of the 1987 Act, are nil.
95. There is no dispute between the Worker and the Insurer that the Worker's pre-injury average weekly earnings were calculated at \$2,500 per week. I make no findings on this issue.
96. "D" is the amount of any non-pecuniary benefits which is nil.
97. Therefore, I find the value "E" to be \$1,562.00 per week being the amount The Worker is able to earn in suitable employment as a sales/advertising manager.

98. Given that the outcome of my review does not differ from the outcome of the Insurer's decisions, it is not necessary that I make any recommendations to the Insurer.

**Merit Review Service**

**Delegate of the State Insurance Regulatory Authority**