



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 is able to earn \$556.14 per week in suitable employment as an inquiry clerk/customer service officer from 7 October 2016 to 26 January 2017.
4. The Worker is able to earn \$460.00 per week in suitable employment as an inquiry clerk/customer service officer from 27 January 2017 to 27 February 2017.

RECOMMENDATIONS BASED ON FINDINGS

5. The following recommendations are binding on the Insurer and must be given effect to by the Insurer under section 44BB(3)(g) of the 1987 Act.
6. The Worker is entitled to weekly payments of compensation under section 37(3) of the 1987 Act in the amount of \$0.00 from 16 January 2017 to 26 January 2017.
7. The Worker is entitled to weekly payments of compensation under section 37(3) of the 1987 Act in the amount of \$59.28 from 27 January 2017 to 27 February 2017.

BACKGROUND

8. The Worker has been receiving weekly payments of compensation for an incapacity for work resulting from an injury. She reported pain in her neck, shoulders and arms after lifting a client while working as an assistant nurse.
9. The Insurer made a work capacity decision to reduce the amount of the Worker's weekly payments of compensation to \$0.00 from 16 January 2017 on the basis that:
 - The Worker had current work capacity.
 - The Worker was able to earn \$620.21 a week in suitable employment as a

community/support worker.

- The amount of the Worker's pre-injury average weekly earnings was \$649.10.
10. The Worker referred that decision for internal review by the Insurer. The Insurer affirmed its original decision.
 11. The application for merit review was received by the Authority. It was made within time and in the approved form.

LEGISLATION

12. The legislative framework governing work capacity decisions and reviews is contained in the:
 - *Workers Compensation Act 1987* (the 1987 Act)
 - *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act)
 - *Workers Compensation Regulation 2016* (the Regulation)
13. Section 43 of the 1987 Act describes a "work capacity decision".
14. Section 44BB of the 1987 Act provides for merit review of a work capacity decision of an insurer by the Authority.

DOCUMENTS CONSIDERED

15. 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 between the Worker and the Insurer.

SUBMISSIONS

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

REASONS

Nature of merit review

17. This is a merit review of the Insurer's decision to reduce the amount of the Worker's weekly payments of compensation to \$0.00. The Authority must consider the available 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

18. The Worker's duties with her pre-injury employer were withdrawn. She has not returned to work since then. She submits that she is on strong pain medication which has lots of side effects. She is experiencing poor eyesight, mood swings, anxiety, frustration and her last blood test results show that she now has liver problems. She submits that she is "not properly rehabilitated to go back to work".
19. The nominated treating doctor (NTD) issued a certificate of capacity to certify that the

Worker had capacity for some type of employment for "normal" hours per day, five days per week with:

- Lifting/carrying capacity less than 5kg
- Standing tolerance less than 60 minutes (rest five minutes every 60 minutes)
- Bending/twisting/squatting ability "no repetitive movement"
- Driving ability up to 30 minutes

20. The Worker's "ordinary hours of work" in her pre-injury employment were a total of 24.18 hours a week. This is based on a calculating pre-injury average weekly earnings form completed by her employer. That information is closely consistent what is stated in a functional capacity evaluation report: "The Worker reported at the time of the injury she was employed as a Health Support Worker casually for approximately 25 hours per week". I therefore understand that the NTD certified that the Worker had capacity for "normal" hours of 24.18 per week.
21. The above certification was maintained in subsequent certificates of capacity up to 27 January 2017. However, in the certificate of capacity dated 27 January 2017, the NTD certified that the Worker had capacity for some type of employment for four hours a day, five days a week from 27 January 2017 to 27 February 2017. The NTD indicated the same limits on the Worker's lifting, carrying, standing, bending, twisting, squatting and driving ability as before.
22. The NTD has set out the Worker's treatment (including medication intake) in the management plan section of each certificate of capacity. While I acknowledge the Worker's submissions about the effect of her medication, it is apparent that the NTD's opinion on work capacity was given with the Worker's medication intake in mind.
23. A physiotherapist assessed the Worker's functional capacity for work. In the functional capacity evaluation report, the physiotherapist stated that the Worker had capacity to:
 - Work in sitting, standing, kneeling and stooping positions with only occasional postural breaks as required
 - Work in squatting positions with frequent postural breaks as required
 - Work in reaching forward postures to mid ranges only for periods of less than 3 minutes
 - Ability to complete keying tasks at a rate of 10 words per minute
 - Ability to complete activities requiring walking on an occasional basis
 - Ability to complete tasks requiring stair use
 - Ability to manual handle 3.5kg from floor to waist heights and 6.7kg to waist heights
 - Ability to unilaterally carry 3kg in either hand over 8 metres
 - Able to complete "Light" work job roles up to her pre-injury hours per week
 - Suitable for vocational options of inquiries clerk, medical receptionist and community support worker (with modifications to assist driving).
24. The NTD approved inquiry clerk/customer service officer, medical receptionist, community/support worker as suitable for the Worker.
25. There are reports from the treating rehabilitation and pain physician to the NTD noting in the October report that the Worker's "injury was on the neck and both shoulders, worse on the left". The treating rehabilitation and pain physician stated that the Worker "presented with gradual worsening with pain extending distally in the upper limbs but also involving the knees and ankles". It stated, "I believe she requires a structured multi-disciplinary pain management

programme, without which I do not expect any further progress". The treating rehabilitation and pain physician did not specifically address the Worker's work capacity in either report.

26. In a report, the treating orthopaedic surgeon stated:

[The Worker] is nine months post injury to both shoulders. She has been performing a conditioning program over the last six weeks. She is lifting 3 to 5kg. She has been reviewed by a pain specialist. There has been no significant change to her pain medication after recent review. The pain specialist has recommended the involvement of a pain psychologist. I support this as this should assist in rationalising her medication which is making her sleepy and drowsy. I expect that this will be a very slow process in the coming three to six months to wean off her current strong analgesics.

27. I consider that the NTD's opinion holds the most weight. The nominated treating doctor has qualifications and experience to assess the Worker's capacity for work. The NTD has given precise information in the certificates of capacity about the Worker's functional abilities. It is also apparent from the way the various sections of the certificates of capacity have been completed that the NTD has been mindful of the Worker's medication use in assessing her work capacity.

28. The NTD's assessment is preferred over physiotherapist's assessment because the NTD is a qualified doctor and has had the benefit of regular reviews of the Worker as the nominated treating doctor. The NTD's certificates of capacity generally reflect the opinions of the treating pain specialist and the treating orthopaedic surgeon. However, the certificates of capacity directly address the issue of the Worker's work capacity while the reports from the treating pain specialist and the treating orthopaedic surgeon do not.

29. Section 32A of the 1987 Act defines "current work capacity" and "no current work capacity":

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

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

30. The NTD has put limits on the Worker's ability to lift, carry, bend, twist and squat. The NTD has not certified that the Worker is fit for pre-injury duties. The NTD's opinion supports that the Worker has a present inability arising from an injury such that she is not able to return to her pre-injury employment as an assistant nurse which involved some physically demanding duties in the personal care of elderly and disabled clients.

31. The key issue is if the Worker able to return to work in "suitable employment" as defined in section 32A of the 1987 Act as:

Suitable employment, in relation to a worker, means employment in work for which the worker is currently suited:

(a) having regard to:

(i) the nature of the worker's incapacity and the details provided in medical information including, but not limited to, any certificate of capacity supplied by the worker (under section 44B), and

(ii) the worker's age, education, skills and work experience, and

(iii) any plan or document prepared as part of the return to work planning process, including an injury management plan under Chapter 3 of the 1998 Act, and

(iv) any occupational rehabilitation services that are being, or have been, provided to or for the worker, and

(v) such other matters as the WorkCover Guidelines may specify, and

(b) regardless of:

(i) whether the work or the employment is available, and

- (ii) *whether the work or the employment is of a type or nature that is generally available in the employment market, and*
- (iii) *the nature of the worker's pre-injury employment, and*
- (iv) *the worker's place of residence.*

32. A vocational assessment report was prepared by a rehabilitation consultant. Employment as an inquiry clerk/customer service officer, medical receptionist, and community/support worker were identified as suitable return to work options for the Worker.
33. The Worker is age 59. She completed Year 12 High School overseas. Since arriving in Australia, she completed various Certificate level qualifications. Her highest level of qualification is a Certificate III in Nursing Assistant-Aged Care Work. She holds a driver's licence and a senior first aid certificate. She worked as a personal care assistant. Before that she worked as a sales assistant/store manager. She has a variety of skills from this work experience which are listed in the vocational assessment report. She does not have difficulty with the English language and is reported to have basic computer skills.
34. The vocational assessment report outlines that employment as an inquiry clerk/customer service officer involves answering inquiries, providing information, recording information, referring complex inquiries to the correct people, using computer network systems and communication systems such as a public address and paging systems. The vocational assessment report gives examples of the work within this broad employment category from customer service, to inquiry clerks at the cinema, to a role at an electrical supply company. There is no formal education required for this type of employment. Skills and experience in written and verbal communication, customer service and basic computer use are more weighty factors.
35. This type of employment is stated to involve lifting up to 2kg frequently, opportunities to alternate between sitting and standing, no repetitive bending, twisting or squatting and no driving. That is plausible given the job description indicates that tasks are essentially completed by exchanges of written and verbal information rather than physical exertion. When compared against the limits on the Worker's function certified by the NTD, the physical demands of these jobs are suitable having regard to the nature of the Worker's incapacity. That view has added weight because the NTD specifically approved this role as functionally suitable for the Worker.
36. The rehabilitation consultant stated that "the Worker is not required to participate in retraining as she possesses relevant skills and experience as per her employment history". That opinion is consistent with the Worker having extensive work experience in sales and face-to-face customer service. The Worker has also shown the ability to complete a number of tertiary qualifications which supports that she has cognitive skills suitable for the relatively simple tasks required of an inquiry clerk/customer service officer employment. Her basic computer skills are reportedly suitable for jobs in this area of employment.
37. Having had regard to the balance of matters under the definition of "suitable employment" I consider that the weight of information supports that inquiry clerk/customer service officer is employment in work for which the Worker is currently suited.
38. A medical receptionist greets and welcomes people, manages various appointments and bookings, answers inquiries, provides information, responds and resolves complaints, receives and distributes mail and maintains the reception area. Employers contacted generally wanted skills and work experience that the Worker does not currently have. One employer wanted "experience in various medical software applications would be ideal or someone with a medical background". Another wanted someone "with experience in answering phones would be ideal or someone with a medical receptionist background". Another reported that "the applicant must have medical receptionist experience or someone with medical/health training was mandated".

39. The indication that workers should have skill and experience in medical software applications and medical reception is consistent with this type of employment being a specialised sub-set of receptionist employment. The Worker's healthcare related education, skills and work experience is in assistant in nursing and more aligned with the personal care of clients rather than clerical duties. Her computer skills are basic and she lacks skill and experience in medical software applications. At age 59, she has no work experience as a receptionist.
40. I am not persuaded that employment as a medical receptionist is employment in work for which the Worker is currently suited.
41. The job description of a community support worker indicates that it is clerical in nature. However, the vocational assessment report does state that the employment is rated as "sedentary to light" in physical demand and that "the rehabilitation provider notes that physical demands can vary between employers and recommends that each role be considered on a case by case basis".
42. The employer contact information supports that this work has tasks involving potentially significant physical exertion. For example, employers consistently reported that the role includes helping clients to grocery shop. It was suggested that lifting would not exceed 5kg. However, that is not persuasive given the vague description of the task as "accompanying clients to community centres, grocery shopping and on errands" or "taking clients to appointments and accompanying them to grocery stores or running errands". There is no meaningful detail about what is involved in a grocery shop and the level of responsibility the community/support worker has in helping a client grocery shop. Taking "grocery shopping" on its ordinary meaning informed by everyday experience, it is something that involves buying things such as food and household items which are usually carried or lifted at some point by handheld bags. If a community/support worker is required to help lift and/or carry groceries (which based on the limited information appears to be the case) it is unrealistic to say that it would not involve weights of 5kg or more.
43. The NTD did approve this employment as suitable for the Worker. However, it is evident that the NTD was not given some important details by the rehabilitation provider for this type of employment when they sought the NTD's approval. The job was presented as "sedentary" in physical demand to the NTD and not "sedentary to light" as described in the vocational assessment report. There is also no mention of the more physically demanding tasks in the job description provided such as a grocery shopping. In those circumstances, the NTD's approval of community/support worker employment as suitable for the Worker does not hold weight.
44. I am not persuaded that employment as a community/support worker is employment in work for which the Worker is currently suited having regard to the nature of her incapacity.
45. Having found inquiry clerk/customer service officer to be "suitable employment" for the Worker I find that she has "current work capacity" that is 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.

The relevant entitlement period

46. The Insurer has submitted that the Worker has been paid 29 weeks of weekly payments of compensation. The Insurer has provided a documented schedule of weekly payments made to the Worker which supports that the Worker has been paid between 14-130 weeks of weekly payments. The Worker is in the "second entitlement period" as defined by section 32A of the 1987 Act and her weekly payments of compensation are calculated under section 37 of the 1987 Act.

47. The Worker is not currently working. In the weeks that she has not returned to work during the second entitlement period her weekly payments of compensation are calculated under section 37(3) of the 1987 Act:

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 weekly payments

48. The factors to determine the rate of weekly payments payable to the Worker are set out in section 35 of the 1987 Act.
49. "AWE" means the worker's pre-injury average weekly earnings. The Insurer decided that the amount of the Worker's pre-injury average weekly earnings was \$649.10. The Worker has not referred that decision for review by the Authority in her application for merit review and has not made any submission on that issue. As there is no dispute on that issue, the review will proceed on the basis that the amount of the Worker's pre-injury average weekly earnings are \$649.10.
50. "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.
51. The Worker is not currently working so she does not have "current weekly earnings" under section 44I of the 1987 Act.
52. The Insurer's decision that the Worker is able to earn \$25.65 per hour in suitable employment was based on community/support worker constituting suitable employment for the Worker. However, only employment as an inquiry clerk/customer service officer has been found to be suitable employment for the Worker on merit review. Therefore, the Insurer's decision about the amount the Worker is able to earn in suitable employment cannot stand.
53. The vocational assessment report states that the average weekly earnings for an inquiry clerk/customer service officer are \$1,050.00 per 38 hour week. That gives an average hourly rate of $\$1,050.00 \div 38 = \27.63 . The three employers in the employment market contacted as part of the vocational assessment report gave hourly pay rates of \$28.01, \$23.00 and \$20.65.
54. The Worker's recent work experience has been as a personal carer. Employment as an inquiry clerk/customer service officer therefore marks a shift into a different type of employment. I therefore consider it unlikely that she would immediately be able to earn an average hourly rate of pay as an inquiry clerk/customer service officer. Indeed, the average hourly rate would be higher than the Worker's pre-injury employment hourly rate of \$24.82. However, the Worker has extensive work experience in sales and direct face-to-face customer service so it is likely that she is able to earn more than the lowest entry level wage as an inquiry clerk/customer service officer.
55. On balance, the preferable finding is that the Worker is able to earn \$23.00 per hour in suitable employment as an inquiry clerk/customer service officer. That is the amount reported by the employer contact that is between the average hourly rate of pay and the lowest rate reported.
56. The Worker was certified by the NTD as having capacity to work her "normal" 24.18 hours a

week until 27 January 2017. Therefore, from the date of the Insurer's work capacity decision, the Worker was able to earn $\$23.00 \times 24.18 = \556.14 per week in suitable employment.

57. From 27 January 2017 to 27 February 2017 the Worker has been certified by the NTD as having capacity to work four hours a day, five days a week. Therefore, during that period the Worker is calculated to be able to earn $\$23.00 \times 20 = \460.00 per week in suitable employment.
58. The value of "E" is then substituted accordingly.
59. "D" is the value of any non-pecuniary benefits provided to the Worker by an employer. It must be \$0.00 in this case because the Worker is not currently working.
60. "MAX" means the maximum weekly compensation amount. It is not applicable in this case because the formula $(AWE \times 80\%) - (E + D)$ results in the lesser rate of compensation under section 37(3) of the 1987 Act.
61. The Insurer decided that the amount of the Worker's weekly payments of compensation would be reduced to \$0.00 from 16 January 2017.
62. The Authority recommends that the rate of compensation payable to the Worker from 16 January 2016 to 26 January 2017 under section 37(3) of the 1987 Act is as follows:
$$(AWE \times 80\%) - (E + D)$$
$$= (\$649.10 \times 80\%) - (\$556.14 + \$0.00)$$
$$= \$519.28 - \$556.14$$
$$= \$0.00$$
63. The Authority also recommends that the rate of compensation payable to the Worker from 27 January 2017 to 17 February 2017 under section 37(3) of the 1987 Act is as follows:
$$(AWE \times 80\%) - (E + D)$$
$$= (\$649.10 \times 80\%) - (\$460.00 + \$0.00)$$
$$= \$519.28 - \$460.00$$
$$= \$59.28$$
64. The Insurer is required to make a "review decision" to give effect to the above recommendations. In effect, the review decision will affirm the Insurer's original decision from 16 January 2017 to 26 January 2017 and then determine that the Worker is entitled to weekly payments of compensation in the amount of \$59.28 from 27 January 2017 to 27 February 2017.
65. It follows that as the current certificate of capacity only covers the period to 27 February 2017, the Worker's entitlement to weekly payments during the second entitlement period after 27 February 2017 will need to be assessed by the Insurer as new information about her work becomes available.