



FINDINGS AND RECOMMENDATIONS ON MERIT REVIEW BY THE AUTHORITY

Worker:

Insurer:

Date of Review:

Date of Injury:

Claim Number:

Our Reference:

FINDINGS ON REVIEW

1. The following are findings made by the State Insurance Regulatory Authority (the Authority) on review.
2. The Worker is able to return to work in suitable employment.
3. The vocational options of Industrial Property Analyst, Asset/Property Manager and Valuer are suitable employment for the Worker.
4. The Worker has current work capacity.
5. The Worker is able to earn \$2,000.00 per week in suitable employment as a Valuer.

RECOMMENDATIONS BASED ON FINDINGS

6. The following recommendations 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).
7. The Authority makes no recommendations for the reasons below.

BACKGROUND

8. The Worker was participating in a work-based touch rugby game during his lunch hour when he twisted his left knee. He recounted feeling a "pop" with immediate pain which shot through his left knee. At the time, the Worker was employed as an Industrial Property Analyst at Employer 1.
9. The Worker is no longer employed at Employer 1.
10. The Insurer accepted liability and commenced weekly payments of compensation to the Worker.
11. The Insurer made a number of work capacity decisions. The outcome of these decisions was the reduction of the Worker's weekly payments of compensation to \$502.80 under section 36(2) of the 1987 Act.

12. The Worker applied for an internal review, which was conducted by the Insurer on. The internal review applied section 37(3) of the 1987 Act and further reduced the Worker's weekly payments of compensation to \$0.00.
13. The application for merit review was received by the Authority. The application has been lodged in the form approved by the Authority and made within 30 days, as is required under section 44(3)(a) of the 1987 Act.

LEGISLATION AND GUIDELINES

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

INFORMATION CONSIDERED

17. The documents I have considered are those listed in, and attached to, the application, the Insurer's reply and the further information detailed below.
18. The following further information has been provided to the Authority and exchanged between the parties:
 - Email from The Worker's representative confirming that the work capacity decision sought to be reviewed is the Insurer's decision on "suitable employment".
 - Email from the Insurer with various documents attached as requested by the Authority.

SUBMISSIONS

19. In the application for merit review, the Worker, through his legal representative, submits: "The insurer has not identified suitable employment in accordance with section 43 or 54 of the WC act. The insurer has merely relied on the Worker's pre-injury employment as being suitable."
20. In reply, the Insurer disagrees with the Worker's submission as follows:
 - The Insurer engaged the services of the rehab provider to complete a vocational assessment which, under section 32A of the 1987 Act, identified the following suitable employment options:
 - Industrial Property Analyst (\$1,540.00 based on 40 hour week)
 - Asset/Property Manager (\$1,064.80 based on 40 hour week)
 - Valuer (\$2,200.00 based on 40 hour week)
 - The rehab provider contacted three employers for each of the above employment options with all 9 employers confirming that the Worker possesses the required qualifications for each role; he meets the functional requirements; and he has the transferable skills and work experience to be an excellent candidate for the positions.

- The Insurer refers to the reasons in its internal review decision to reduce the Worker's weekly payments of compensation to \$0.00.
- Dr P (nominated treating specialist), in a recent progress report, stated that the Worker was healing well.
- Dr G (nominated treating doctor) advised that the Worker was approaching maximum medical improvement and should be at pre-injury duties certification in 4-6 weeks from the date of the medical case conference.

REASONS

Nature of merit review

21. This matter involves a merit review of the work capacity decision of the Insurer in accordance with section 44BB(1)(b) of the 1987 Act. The review is not a review of the Insurer's procedures in making the work capacity decision and/or internal review decision. The review requires that I consider all of the information before me substantively on its merits and make findings and recommendations that, in light of the information before me, are most correct and preferable.
22. Noting the Worker's submissions, I consider that he has referred the following decision/s to the Authority for review:
 - A decision about what constitutes suitable employment for a worker (section 43(1)(b)).
23. This merit review will confine itself to consideration of the above.

Work capacity and suitable employment

24. 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

25. "No current work capacity" is defined in section 32A of the 1987 Act as:

no current work capacity, in relation to a worker, means a present inability arising from an injury such that the worker is not able to return to work, either in the worker's pre-injury employment or in suitable employment

26. The rehab provider in an "interim progress report" advised that the Worker's employment with Employer 1 (pre-injury employer) was terminated. This is confirmed in a letter from Employer 1 which states that the Worker's employment was terminated.
27. Although the reasons for the termination of the Worker's employment was as a result of the employer's opinion of unsatisfactory performance on the part of the Worker and not due to his work related injury, in the circumstances, it is unlikely in my view that the Worker will return to his pre-injury employment in the foreseeable future. I am therefore satisfied that the Worker is not able to return to work in his pre-injury employment.
28. In the work capacity decision (and internal review decision) the Insurer relied on the WorkCover NSW Certificates of Capacity of Dr G, who is the nominated treating doctor of the Worker. As the Worker has not requested that this decision be reviewed I will use the findings of Dr G when assessing "suitable employment" for the Worker as defined in section 32A.
29. In the latest certificate before me, Dr G states that the Worker is fit to "trial pre-injury duties".

30. In an earlier certificate (and the certificate relied upon by the Insurer in its internal review), Dr G found that the Worker had capacity to work in some type of employment for 8 hours per day, 5 days per week with the following functional tolerances:
- Lifting/carrying 10kg
 - Sitting pre-injury
 - Standing 20 min before resting
 - Other/comments home and desk office based duties only
31. The rehab provider conducted a vocational assessment and provided a vocational assessment report. The report identified the following employment options:
- Industrial Property Analyst
 - Asset/Property Manager
 - Valuer
32. In relation to the Worker's submission that the Insurer has merely relied on the Worker's pre-injury employment as being suitable, this is not apparent from the information provided in the rehab provider's vocational assessment report. I acknowledge that one of the proposed employment options includes the title of the Worker's pre-injury role however this does not, in my view, necessarily indicate that the Worker cannot be suited to the role of Industrial Property Analyst at another place of employment.
33. The rehab provider has also suggested other employment options in the form of Asset/Property Manager and Valuer which goes against the submission that the Insurer has only relied on the Worker's pre-injury employment.
34. These are the extent of the Worker's submissions. I note that there are no particular submissions from the Worker that argue against the proposed employment options of Industrial Property Analyst, Asset/Property Manager and Valuer as stated in the vocational assessment report. Notwithstanding this, I have assessed these employment options below.
35. Turning to the vocational assessment report, the rehab provider has provided a detailed account of the Worker's employment history. The Worker was employed in a range of clerical/office administrative roles before securing an Accounts Assistant role with Employer 2 in London, UK. Here he assisted accountants in compiling funding requests for head leases, collecting revenue from tenants, reconciling VAT records and operating a property management system. The Worker was internally promoted to a Graduate Surveyor role where he carried out valuations, rent reviews and lease renewals. He was again internally promoted to a Senior Surveyor where he undertook commercial valuations, contributed to client relationships and assisted colleagues in achieving their tasks and meeting deadlines. Following yet another internal promotion to Manager, he engaged customers and provided them with high quality valuation reports, including sales and leasing comparable evidence, maintained budgets and quality assurance.
36. He commenced his pre-injury role of Industrial Property Analyst at another company, Employer 1. As noted above, the Worker's employment was terminated, approximately 6 months later, and he has not worked since.
37. In this role the Worker was responsible for:
- Preparation of property level tenancy schedules.
 - Financial modelling including lease analysis, cash flow forecasting IRR calculations, valuations variance and NPV deal comparisons.
 - Tracking market data such as comparable rents, cap rates, discount rates, incentives, landvalues.
 - Preparation of analysis and one page summaries for internal Director's asset valuations.

- Provide financial modelling/analytical assistance to the capital transactions team relating to due diligence.
 - Maintenance of property database to be used for fund and group quarterly statistics requirements .
38. From my reading of the role descriptions of Industrial Property Analyst, Asset/Property Manager and Valuer contained in the rehab provider's vocational assessment report, I note that the duties closely align with the duties performed by the Worker over the course of his work history to date. The Worker has been heavily involved in providing advice to customers in all matters pertaining to property valuation, financing, leasing and management. He is also experienced in analysing market data, conducting financial modelling and utilising tools such as a property forecasting system to assist with reporting to both external and internal stakeholders. In addition, employer contacts from the rehab provider have provided information on the "usual duties" of the roles which typically include duties that the Worker has performed over the course of his work history to date. I am therefore satisfied that the Worker has the requisite work experience to be suited to all three roles.
39. The Worker also has the necessary qualifications for all three roles in my view, having attained a Bachelor of Commerce and a Postgraduate Diploma of Estate Management. He holds a number of current licences.
40. The rehab provider reported that the Worker has advanced knowledge and competencies in a range of Microsoft Office programs, including Word, PowerPoint, Outlook and Excel. He also has an advanced level of competency when utilising the Internet.
41. From the Worker's qualifications and work experience, the rehab provider identified a plethora of transferrable skills as detailed on page 8 of its vocational assessment report. Many of these skills relate to the proposed employment options such as: knowledge of the real estate industry; knowledge of property value; ability to complete and conduct property valuations; and ability to liaise with a variety of stakeholders in the property industry – tenants/council/investors/legal advisors. The Worker also possesses some general transferable skills relevant to the industry such as the ability to network, strong customer service, ability to conduct analyses, meeting deadlines and office clerical skills. I am satisfied that the Worker has the requisite skills to be suited to all three roles.
42. In relation to the physical requirements of the roles, I note that Dr G did not state any functional tolerances in the latest WorkCover NSW Certificate of Capacity. In any event, the rehab provider does not describe any movements that would exceed the Worker's functional tolerances as stated in the earlier certificate. For example, there is no lifting above 10kgs and any standing or walking is only required within an office environment that is only required when moving around the office area. Dr G also provided his approval for all three roles by way of a signed document. I am satisfied that all three roles are within the Worker's functional tolerances.
43. I note that occupational rehabilitation services do not appear to have been provided to the Worker (although an action plan was created). However this is not required in my view as the Worker advised the rehab provider that he has the ability to complete online job applications or by face-to-face interaction. He also advised that he possesses a range of job seeking skills as provided on page 26 of vocational assessment report.
44. Accordingly, having had regard to the balance of the factors under section the definition of suitable employment in section 32A of the 1987 Act, I find that employment as an Industrial Property Analyst, Asset/Property Manager and Valuer constitutes suitable employment for the Worker.

45. I find that the Worker has a present inability arising from an injury such that he is not able to return to work in his pre-injury employment but is able to return to work in suitable employment. I find that the Worker has current work capacity in accordance with the definition in section 32A of the 1987 Act.

Entitlement periods for ongoing weekly payments

46. 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.
47. The Insurer's reply to the application for merit review states that the Worker has received a total of 20 weeks of weekly payments.
48. At the time of this merit review decision, I find that the Worker's entitlement to weekly payments of compensation currently falls in the second entitlement period (weeks 14-130) and is to be calculated in accordance with section 37(3) 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

49. "AWE" means the worker's pre-injury average weekly earnings. In its internal review decision, the Insurer calculated this figure to be \$2,283.11 gross per week. The Worker does not dispute this figure.
50. Accordingly I find that the amount of \$2,283.11 will be used as The Worker's "AWE" for the purposes of the above formula under section 37(3) of the 1987 Act.
51. "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 workers current weekly earnings.
52. It is not in dispute that the Worker has the capacity to work 8 hours per day, 5 days per week with various functional tolerances as a result of the injury to his left knee. I have found the roles of Industrial Property Analyst, Asset/Property Manager and Valuer to be suitable employment for the Worker.

53. From the employers contacted by the rehab provider, I note that the role of Valuer appears to attract the highest salary. However, the rehab provider's reference to Job Outlook (2016) regarding the average weekly wage does not refer to the role of Valuer. It erroneously refers to the role of Industrial Property Analyst. I therefore cannot rely on the information from Job Outlook (2016) in my assessment of the amount the Worker is able to earn in the role of Valuer.
54. The employer contacts stated that the average hourly rate of pay for a Valuer is \$55.00 (Employer 3), \$45.00 (Employer 4) and \$50.00 (Employer 5). Although the Worker's pre-injury employment was not as a Valuer, given that his recent employment history includes experience as a Valuer and other property/asset valuation roles, I am of the view that the likely amount the Worker is able to earn in the role of Valuer would be the average of the three amounts provided by the employer contacts.
55. Therefore, I find the Worker's ability to earn in suitable employment to be \$50.00 per hour or \$2,000.00 per week based on a 40 hour week. This figure will represent the Worker's earnings after the injury (or "E") as he is not presently working.
56. "D" is the amount of any non-pecuniary benefits which in the Worker's case is nil.
57. In accordance with section 37(3) of the 1987 Act:
- $$\begin{aligned} & \$2,283.11 \times 80\% - \$2,000.00 \\ & = \$1,826.49 - \$2,000.00 \\ & = \$0.00. \end{aligned}$$
58. I therefore find that the Worker is entitled to weekly payments of compensation in the amount of \$0.00.
59. I have ultimately reached the same conclusions as the Insurer. A recommendation to the Insurer is therefore not necessary. The work capacity decision to discontinue the Worker's weekly payments of compensation stands.

Merit Review Service

Delegate of the State Insurance Regulatory Authority

