



# 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.
2. The Worker has current work capacity.
3. Work as a Warehouse Supervisor and Dispatch Clerk constitute suitable employment for the Worker.
4. The Worker is able to earn \$1,160 per week in suitable employment.
5. The Worker's entitlement to weekly payments of compensation under section 37 of the *Workers Compensation Act 1987* (the 1987 Act) is nil.

### RECOMMENDATION BASED ON FINDINGS

6. In accordance with section 44BB(3)(g) of the 1987 Act, the Authority is able to make recommendations based on its findings that are binding on the Insurer.
7. The Authority makes no recommendations in this matter for the reasons outlined below.

### BACKGROUND

8. The Worker sustained an injury to his left hip while he was employed as a Storeman.
9. The Worker fractured his hip in a fall just outside his workplace. He was transferred to hospital where he underwent surgery.
10. The Insurer made a series of work capacity decisions in relation to the Worker. These decisions included:
  - The Worker had current work capacity
  - The Worker had the ability to return to work in suitable employment
  - The amount that the Worker was able to earn in suitable employment
  - The Worker's pre-injury average weekly earnings
  - A calculation of the Worker's entitlement to weekly payments of compensation

11. The outcome of the work capacity decisions was sent to the Worker by way of a letter.
12. The Worker applied for an internal review of the work capacity decisions. The Insurer conducted the review. The outcome of the review was the same for the Worker, that is, that his entitlement to weekly payments of compensation is nil.
13. The internal review decision was communicated to the Worker by way of a letter.
14. 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**

15. The legislative framework governing work capacity decisions and reviews is contained in the:
  - *Workers Compensation Act 1987* (the 1987 Act);
  - *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act);
  - *Workers Compensation Regulation 2016* (the Regulation);
16. Section 43 of the 1987 Act describes a “work capacity decision”.
17. Section 44BB of the 1987 Act provides for merit review of a work capacity decision of the Insurer, by the Authority.

## **INFORMATION CONSIDERED**

18. The information I have considered are those listed in, and attached to, the application and the Insurer’s reply and any other information provided by the parties since the application for merit review, which I am satisfied has been exchanged between the parties.

## **SUBMISSIONS**

19. In his application for merit review, the Worker’s legal representative has requested a review of the following work capacity decisions of the Insurer:
  - Indexation of the Worker’s pre-injury average weekly earnings (PIAWE)
  - The Insurer’s findings as to suitable employment for the Worker
  - The Insurer’s calculation of the Worker’s entitlement to weekly payments of compensation
20. In the application for merit review, the Worker’s legal representative submits:
  - The indexation of the Worker’s PIAWE is not explained in detail and is erroneous.
  - The documents that have been relied on in making the work capacity decisions contain a large number of reports from the rehab provider. This organisation was appointed to provide the Worker with support in finding suitable employment.
  - Following extensive assessments, the rehab provider determined that the Worker could undertake suitable employment as a Logistics Clerk, Inventory and Supply Co-ordinator and a Delivery Driver (light).
  - The Worker’s pre-injury duties were identified with his active participation and input and a functional capacity evaluation was undertaken.

- The Worker was put forward for an interview for a work trial as a Process Worker/Spare Parts Interpreter. With reference to this work trial, it was determined that the Worker “effectively sabotaged this work opportunity”.
- They believe that the Worker was entitled to ask questions about the position that he was to undertake and query the duties that he would need to perform. If the duties described were outside of his certified restrictions, pointing that out to a host employer was well within his entitlements. The Worker should not be asked to undertake duties that may increase the risk of further injury.
- Rather than find that the Worker sabotaged the work trial, it would be more appropriate to find that the job identified by the rehab provider was, in fact, not suitable.
- It was similarly proposed by the rehab provider that the Worker should undertake a work trial as a Logistics Co-ordinator. The Worker disagrees with the report from the rehab provider as to what occurred at the work trial interview. He is preparing a statement addressing that. This will be submitted as soon as it is available.
- It is the Worker’s position that the Logistics Co-ordinator role was inherently unsuitable and that he was entitled to discuss the proposed duties and his capacity with the host employer.
- It is telling that the work capacity decision does not find that the positions of Process Worker/Spare Parts Interpreter and Logistics Co-ordinator are suitable employment.
- Instead the work capacity decision identified occupations of Purchasing Officer, Dispatch Clerk and Warehouse Administrator as suitable occupations. It was determined that the Worker has the capacity to earn \$1,367 per week as a Purchasing Officer in suitable employment.
- The work capacity decision lists a large number of duties for each of these occupations. However, as can be seen from the actual work trial interviews with proposed employers, the expected duties for one occupation does not reflect the actual duties undertaken by a worker in a particular position. That is, the listed duties do not reflect the actual duties.
- If it is the Insurer’s position that the positions of Process Worker/Spare Parts Interpreter and logistics co-ordinator fall within the suitable duties occupations of Purchasing Officer, Dispatch Clerk and Warehouse Administrator, then it is submitted that the actual demands and requirements of these positions demonstrate that they are not in fact suitable.
- Any work which is said to be suitable for an injured worker must be “real” work in an identifiable job (*Wollongong Nursing Home Pty Limited v Dewar* [2014] NSWCCPD 55 (para 51-60)).
- The Insurer is erroneous in determining that the occupations of Purchasing Officer, Dispatch Clerk and Warehouse Administrator are suitable occupations. The current work capacity decisions should be rescinded and new work capacity decisions should be issued.

21. In reply, the Insurer submits:

- At the time of the internal review, the most recent WorkCover NSW – certificate of capacity (certificate of capacity) certified the Worker as being fit for suitable duties but not pre-injury duties, for 8 hours per day, 5 days per week with restrictions.
- It relies on its internal review decision. the Worker has the necessary functional and vocational capability to work as a Dispatch Clerk, Purchasing Officer and Warehouse

Administrator. These roles are suitable employment in accordance with the meaning of section 32A of the 1987 Act.

- The Worker has received 96 weeks of weekly payments of weekly payments of compensation and therefore section 37 of the 1987 Act applies.
  - At the time of the internal review decision, the Worker was assessed under section 37(3) of the 1987 Act and his weekly payments were reduced to nil.
22. The Worker's legal representative provided a statement prepared by the Worker in relation to his version of the events that occurred at the work trial meeting. I confirm that I have carefully read this document.
23. The information was provided to the Insurer. The Insurer was asked to make any further submissions within 24 hours. No further submissions have been made.

## **REASONS**

### **Nature of merit review**

24. 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.
25. The review is not a review of the Insurer's procedures in making the work capacity decision and/or internal review decision.
26. 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.
27. The jurisdiction of the Authority to conduct a merit review of a work capacity decision of the Insurer, is given under section 44BB(b) of the 1987 Act. The Authority may review a work capacity decision of the Insurer "but not until the dispute has been the subject of internal review by the insurer".
28. The Worker's legal representative has referred a dispute in relation to the Insurer's indexation of the Worker's PIAWE. The information before me is that this matter has not been referred to the Insurer for internal review. It is therefore outside of the jurisdiction of the Authority to conduct a merit review at this time.
29. The Worker's legal representative was provided with this information by the Authority by telephone.

### **Current work capacity**

30. The Insurer found that the Worker has current capacity for some type of employment for 8 hours per day, 5 days per week, where that employment is within the following functional tolerances:
- Lifting up to 20kg while in a seated position
  - Lifting up to 10kg from a 45 degree squat
  - No repetitive lifting of more than 5 times an hour
  - No carrying of 10kg for more than 30 seconds
31. The Worker has not referred the decision of the Insurer in relation to his functional tolerances for merit review. The Authority contacted the Worker's legal representative to provide an opportunity to clarify whether the matter was intended to be referred to the Authority. No response was received and I have proceeded on this basis.

32. In order to determine the Worker's entitlement to weekly payments of compensation, I am required to determine whether he has current work capacity.
33. "Current work capacity" and "no current work capacity" are defined in section 32A of the 1987 Act 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*
- 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*
34. The Worker has referred the Insurer's findings as to suitable employment for merit review by the Authority. My reasons and findings in relation to suitable employment are set out below.

### **Suitable employment**

35. "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 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.*
36. The Worker is 48 years old. He came to Australia in 2001 to complete a Master of Business Administration. The Worker settled in Australia where he worked for his pre-injury employer as a Storeman.
37. The Worker has been assisted in his job seeking efforts by the rehab provider (an occupational rehabilitation services provider). A rehab specialist of the rehab provider prepared an earning capacity assessment report. The rehab specialist identified three roles that she considered to be suitable employment options for the Worker. These were:
- Warehouse Administrator
  - Dispatch Clerk
  - Purchasing Officer

38. I will review each of these roles in accordance with the definition of suitable employment under section 32A of the 1987 Act.

#### Warehouse Administrator

39. In her report, the rehab specialist has provided a list of generic tasks that may be associated with the role of a Warehouse Administrator. The Worker's legal representative has raised concerns that these generic descriptions do not correspond with actual employment within the labour market.
40. I consider that the Worker's legal representative has raised a valid concern based on the Worker's reported experience at his two work trial interviews. I have therefore based my analysis of the physical and skills requirements for the role on those detailed by employer contacts.
41. The rehab specialist contacted three employers of Warehouse Administrators. The employers contacted indicated that the role of a Warehouse Administrator could be completed while remaining within the Worker's functional tolerances as set out at paragraph 30 above. One employer indicated that the role was mainly office based and that this allowed employees in this position to move between sitting and standing as required.
42. The skills that were generally required across each of the employers were as follows:
- Experience working within warehouse environments
  - Strong communication skills
  - Basic computer skills
  - Ability to work in a team and independently
43. Other skills specific to one or other of the roles included:
- Previous experience with barcoding (desirable)
  - Ability to work with databases
  - Good time management
  - Ability to multi-task
  - Customer service skills
44. The Worker has experience working in a warehouse environment through his employment as a Storeperson for approximately 9 years.
45. The Worker has completed a Master of Business Administration. I am satisfied that he required good English language communication skills, including written and verbal communication, for this undertaking.
46. The Worker worked as a Purchasing Manager with multi-national organisations. He used a computer to develop and verify purchasing reports and control inventory. The Worker also indicated to the rehab specialist that he was able to use a number of the MS Office products.
47. The Worker has managed small teams of people and has been part of a team when working as a Storeperson. I am satisfied that he has the ability to work as part of a team as well as independently.
48. Having read the descriptions of the Worker's positions, I am satisfied that he held positions of responsibility and that within these positions he was required to multi-task, demonstrate good time management skills and to work with databases for recording and analysing information.
49. I consider that many of the above skills were also required for the completion of the Worker's studies and for work as a Storeperson.
50. The earning capacity report also details that the Worker has some customer service skills which were gained through the completion of a franchisee training course.

51. I am satisfied on balance that the Worker has the necessary skills required to undertake the role of a Warehouse Manager, taking into account his education and work experience.
52. I have considered whether the Worker's age presents any barrier to employment as a Warehouse Manager and have found no information that supports that it is.
53. Having considered the information set out above and taking into account the extensive involvement of an occupational rehabilitation services provider in the Worker's return to work efforts, I find that the role of a Warehouse Administrator is suitable employment for the Worker within the definition under section 32A of the 1987 Act.

#### Dispatch Clerk

54. The rehab specialist contacted three employers of Dispatch Clerks. Two of the three employers indicated that a forklift licence was required for the role. I note that the Worker had a forklift licence at the time that the earning capacity assessment report was prepared. As I do not have any information to indicate whether the Worker's licence is current, I have not considered these roles and have based my assessment on the description of the requirements of a Dispatch Clerk role with an employer who did not require candidates to hold such a licence.
55. One of the above employers also indicated that carrying of weights up to 15kg was required and I note that this requirement is outside of the Worker's functional tolerances.
56. The employer contact indicated that the role of a Dispatch Clerk required candidates to be able to lift up to 10kg. The role does not require pushing or pulling and lifting is not required more than 5 times per hour.
57. The contact indicated that the skills required for the role were:
  - Previous warehouse experience
  - Basic computer skills
  - Ability to work in a team environment
  - Good communication skills
  - Ability to work with databases
58. I have previously set out my reasons for considering that the Worker has the skills that are set out above.
59. I am satisfied that there is employment as a Dispatch Clerk to which the Worker is suited that is consistent with the definition of suitable employment under the definition in section 32A of the 1987 Act.

#### Purchasing Officer

60. Three employers of Purchasing Officers were contacted for the purpose of preparing the earning capacity report. Each of the employers indicated that the functional requirements of the role were within the Worker's capacity. Two of the employers indicated that the maximum lifting requirement for the role was 5kg.
61. Each of the employers required experience in a similar role. I consider that a similar role requires that the role has been undertaken in the same jurisdiction or one with very similar laws and governance requirements. Although the Worker has considerable experience as a Purchasing Manager, the experience was gained in a very different jurisdiction and is now more than 10 years in the past. I consider that it is very likely that significant changes have occurred within this field in the past 10 years and that the Worker's experience as a Purchasing Manager 10 years ago would not be considered "experience" in a similar role for the purposes of recruitment as a Purchasing Officer today.
62. Having considered the matters above and the balance of matters referred to under the definition of suitable employment, I am not satisfied that the role of a Purchasing Officer is

suitable employment for the Worker in accordance with the definition under section 32A of the 1987 Act.

63. As I have found that the roles of Dispatch Clerk and Warehouse Administrator are suitable employment for the Worker, I find that he has current work capacity in accordance with the definition under section 32A of the 1987 Act.

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

64. The following provisions of the 1987 Act provide the basis for determination and calculation of a worker's weekly payments entitlement:

- Weekly payments in the first 13 weeks are to be determined in accordance with section 36 of the 1987 Act ("the first entitlement period");
- Weekly payments in weeks 14–130 are to be determined in accordance with section 37 of the 1987 Act ("the second entitlement period"); and
- 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.

65. There is no dispute between the Worker and the Insurer that his entitlement to weekly payments of compensation falls in the second entitlement period and that his weekly payments of compensation are to be calculated in accordance with section 37 of the 1987 Act.

66. Section 37(3) of the 1987 Act sets out the formula for the calculation of the entitlement to weekly payments of compensation for a worker who has current work capacity who has returned to work for less than 15 hours per week (or who has not returned to work).

*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:*

$$(a) \quad (AWE \times 80\%) - (E + D), \text{ or}$$

$$(b) \quad MAX - (E + D),$$

*whichever is the lesser.*

### **Calculation of entitlement**

67. "AWE" means the worker's pre-injury average weekly earnings.

68. "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:

- the amount the worker is able to earn in suitable employment,
- the workers current weekly earnings.

69. "D" is the amount of any non-pecuniary benefits.

### **AWE and D**

70. The Insurer has indicated that it has determined the Worker's AWE to be \$817. The Worker's legal representative has disputed this amount, however, for the reasons outlined previously, I am not able to conduct a review of the Worker's AWE and have proceeded with my calculations using the Insurer's findings from the internal review.

71. The information available to me indicates that D is nil in this case.

### **Ability to earn in suitable employment**

72. I have found that the Worker is able to work as a Warehouse Administrator and as a Dispatch Clerk.

Three hourly rates of pay are presented for this employment option, being \$30.36, \$29 and \$26.

73. The role of a Dispatch Clerk that I found to be suitable for the Worker paid an average of \$29 per hour.

74. As I found that the particular role of a Dispatch Clerk, which paid \$29 per hour was suitable for the Worker, I am satisfied that this is the hourly rate that he could earn in suitable employment.

75. I therefore calculate the Worker's ability to earn in suitable employment as follows:

$(8 \text{ hours} \times 5 \text{ days}) \times \$29$

$= 40 \times \$29$

$= \$1,160 \text{ per week}$

76. I find that the Worker is able to earn \$1,160 per week in suitable employment.

### **Current weekly earnings**

77. Current weekly earnings are defined in section 44I of the 1987 Act as follows:

*In this Act, current weekly earnings of a worker in relation to a week means:*

- *If the worker's base rate of pay is calculated on the basis of ordinary hours worked, the sum of the following amounts:*
  - *The worker's earnings calculated at that rate for the ordinary hours worked during that week,*
  - *Amounts paid or payable for overtime or shift allowances in respect of that week,*
  - *Amounts paid or payable as piece rates or commissions in respect of that week, or*
- *In any other case, the worker's actual earnings in respect of that week but not including any amount that is a base rate of pay exclusion unless it is:*
  - *Paid or payable for overtime or shift allowances in respect of that week, or*
  - *Paid or payable as piece rates or commissions in respect of that week.*

78. The Worker is not presently employed and therefore has no current weekly earnings.

79. The amount to be used in the place of E in the calculation of the Worker's entitlement to weekly payments of compensation is therefore \$1,040.

80. I therefore calculate the Worker's entitlement to weekly payments of compensation as follows:

$(\$817 \times 80\%) - \$1,160$

$= \$653.60 - \$1,160$

$= \$0 \text{ (rounded)}$

81. I find that the Worker's entitlement to weekly payments of compensation is nil.