



State Insurance Regulatory Authority

Workers Compensation

Merit Review Service

FINDINGS AND RECOMMENDATIONS ON MERIT REVIEW BY THE AUTHORITY

Worker:

Insurer:

Date of Review:

Date of Injury:

Claim Number:

Our Reference:

FINDINGS ON REVIEW

1. The following are findings made by the State Insurance Regulatory Authority (the Authority) on review.
2. The Worker has current work capacity as defined by section 32A of the *Workers Compensation Act 1987* (the 1987 Act).
3. Work as a Sales Representative and Dispatch Clerk constitute suitable employment for the Worker.

RECOMMENDATION BASED ON FINDINGS

4. Section 44BB(3)(e) of the 1987 Act allows the Authority to make recommendations based on its findings which are binding on the Insurer.
5. The Authority does not make a recommendation for the reasons below.

BACKGROUND

6. The Worker was employed as a Machine Operator when, over a number of years, he noticed the gradual onset of lumbar spine symptoms in the course of his employment.
7. The Worker made a claim for compensation and has been in receipt of weekly payments of compensation from the Insurer.
8. The Insurer made a number of work capacity decisions, the combined effect of which was to reduce the Worker's entitlement to weekly payments of compensation to \$24, under section 37 of the 1987 Act.
9. At the Worker's request the Insurer undertook an internal review in this matter and made a decision, ultimately arriving at the same conclusion as the work capacity decision.
10. The Worker has made an application for merit review which 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

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 2016* (the Regulation).
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 for this review are the Worker’s application for merit review and the Insurer’s reply form, the documents listed in and attached to those forms, and any further information that has been supplied to the Authority by the Worker and the Insurer.

SUBMISSIONS

15. In the application for merit review, and in further submissions, the Worker makes the following submissions:
 - The severity of his back pain is what led to his dismissal from his previous job.
 - Since his dismissal he has been unable to find a suitable job, the pain has not improved and has also affected his hip bone.
 - Due to long hours of standing and heavy lifting at his previous job, long periods of standing make him dizzy and weak.
 - He has not been able to find a job due to his situation and his age.
 - He has been frustrated, and stress has caused him to have a quick temper attitude, and lack of sleep has affected his memory and given him terrible nightmares. He cannot eat or sleep.
 - He cannot sit down for long without a pillow behind his back.
 - He cannot hold his neck for long while reading the computer.
 - Bending to wash his legs is one of his problems, as is driving and reversing.
 - Looking for a suitable job has been extremely stressful. He completed a work trial but due to pain and his short term memory his time there was short.
 - His current case officer and him have been looking for a suitable job without success.
 - He has also been referred to a psychiatrist for appointments weekly, and also has physiotherapy.
16. In its reply the Insurer submits:
 - The Worker’s nominated treating doctor (NTD) has certified him as having capacity to work 8 hours per day, 5 days per week, with restrictions on lifting and carrying up to 15kg, and sitting and standing tolerance requiring a 5 minute break every 30 minutes.
 - The NTD approved the roles of Dispatch Clerk and Sales Representative as suitable.

- The vocational option of Retail Assistant was found to be the most suitable employment given the Worker’s level of education, and on the basis that on the job training is provided. No lifting over 5kg is required. The Worker has the ability to earn \$21 per hour in this role.
- The Worker’s entitlement to weekly payments of compensation was calculated under section 37(3).
- The issues raised by the Worker were addressed at the time of the internal review decision.
- The Insurer has used the information from the nominated treating doctor, independent medical examiners, and vocational information in reaching its decision.

REASONS

Nature of merit review

17. 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 are most correct and preferable.
18. I note that it is only those decisions that the Worker chooses to refer for review by the Authority, in accordance with section 44BB of the 1987 Act, that the Authority has jurisdiction to review. the Worker has referred the following work capacity decisions of the Insurer for review by the Authority:
 - A decision about his current work capacity; and
 - A decision about what constitutes suitable employment for him.
19. Therefore, these findings and recommendations will be confined to a merit review of only these decisions made by the Insurer.

Current work capacity and suitable employment

20. In order to review the Insurer’s decision about the Worker’s current work capacity I am to have regard to the definition under section 32A of the Act, which defines “current work capacity” and “no 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

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
21. The Worker was employed as a Machine Operator. Over the course of many years he experienced a gradual onset of lumbar spine symptoms. After noting an increase in pain he reported the injury.
22. The issue for me to consider is how the injury impacts upon the Worker’s capacity for employment.
23. The medical information before me is sparse. There is a letter from the Worker’s psychologist, an update report from his physiotherapist, and WorkCover NSW Certificates of Capacity (Certificates of Capacity) signed by the NTD. I also have before me a functional capacity evaluation report

produced by the occupational rehab provider that comments specifically on the Worker's capacity for employment and his functional tolerances.

24. In addition, I have a brief report from a treating specialist, indicating that the Worker underwent a guided bilateral L4/5 and L5/S1 Facet joint injection at the request of the NTD. It is noted that the Worker experienced mild relief of symptoms, and that the presence of disc bulging indicated the possibility of discogenic low back pain.
25. The psychologist confirms in his letter to the Insurer that the Worker has been receiving psychological therapy. The psychologist opines that although the Worker has been improving, the proposed reduction to his weekly payments of compensation would increase his psychological stress and possibly his symptoms of depression.
26. The report from the physiotherapist simply notes that the Worker presented with a decreased range of motion in his low back, thoracic spine, hips and legs compared with his presentation when discharged from the physiotherapy program. A further 8-12 weeks of physiotherapy is recommended.
27. The functional capacity evaluation report concludes that the Worker is not suited to returning to his pre-injury duties due to the weight of lifting, pushing and pulling, but is suited to work in other "medium jobs" up to his pre-injury hours per week. The report commented that the Worker had a limited tolerance for kneeling, squatting and stooping, and could lift up to 18.2 kg at waist height.
28. The Certificates of Capacity before me date have been completed by the NTD. The NTD records a diagnosis of Lumbar Spine spondylosis/disc degeneration. The Certificates have been largely consistent throughout this period, certifying the Worker with capacity for some type of employment for 8 hours per day, 5 days per week. The Worker's functional tolerances are noted as follows:
 - Lifting carrying capacity of up to 10kg occasionally (reduced from up to 15kg as listed on Certificate dated 4 October 2016);
 - Sitting tolerance 5 minute break every 30 minutes;
 - Standing tolerance 5 minute break every 30 minutes.
29. Given that the NTD is the Worker's nominated treating doctor, who has had the benefit of seeing him consistently since the date of injury I consider that he is in the best position to determine his capacity. While I note the Worker's submissions about the extent of his injury and the symptoms he is experiencing, there is no medical information before me to suggest that these symptoms are limiting his capacity to work. There is no information before me to suggest that the NTD's findings in regards to the Worker's capacity for employment and his functional tolerances are not appropriate. The information contained within the functional capacity evaluation report also supports the findings of the NTD. As such I accept that the Worker has a capacity for some type of employment for 8 hours per day, 5 days per week, with the tolerances indicated by the NTD.

Suitable employment

30. There is no dispute before me with respect to the Insurer's decision 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 as a Machine Operator. Accordingly, I will proceed on the basis 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.
31. In order to determine whether the Worker has current work capacity, I am required to consider whether he can 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 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. The Insurer found that the roles of Dispatch Clerk and Sales Representative were suitable employment options for the Worker. Both of these roles were approved as suitable employment options by the NTD, with the NTD noting that the Sales Representative role should not involve prolonged driving of greater than one hour.
33. The Insurer relies on the labour market analysis produced by the occupational rehab provider. That report also proposed the role of Forklift Driver as suitable for the Worker, however I note that the NTD did not approve that role. Having considered the functional requirements of the role may be outside the Worker's tolerance, and in particular noting that the NTD has not approved the role as suitable, I do not consider the role of Forklift Driver as a suitable role for the Worker.
34. There is also a vocational assessment report before me, also produced by the occupational rehab provider, which also proposed the same roles as suitable for the Worker and contains information in respect of the Worker's vocational skills and experience.
35. The vocational assessment report notes the Worker had worked since 1994 as a Machine Operator, Trainer, and Leading Hand Assistant. His employment was terminated and the Worker has not worked since then.
36. The occupational rehab provider contacted employers in respect of the roles it proposed as suitable for the Worker. I will consider the roles of Dispatch Clerk and Sales Representative in detail.

Dispatch Clerk

37. The vocational assessment report states that the duties of the role include identifying items and containers of incoming and outgoing shipments and verifying them against consignment records, arranging internal distribution of goods received, and examining shipping documents and verifying cargo to be released.
38. The physical demands of the role conform with the functional tolerances indicated on the Worker's Certificates. There is sitting continuously with standing and walking occasionally and there is occasional lifting up to 10kg. No formal qualifications are required for the role.

39. The two employers contacted by the occupational rehab provider confirmed the requirements of the role consistent with the general duties detailed in the report.
40. I note that the Insurer arranged for the Worker to undertake a basic computer skills course which he has completed, and that computer literacy would assist in this role. The Worker has experience working in a warehouse environment which would be transferrable to this role. On the job training is also provided.
41. On the information before me it appears that this role is suitable for the Worker given his work experience and functional tolerances.

Sales Representative

42. The vocational assessment report states that the duties of this role include promoting and selling a company's goods and services; acquiring and updating knowledge of employers' and competitors' goods and services and market conditions, quoting prices and credit terms, recording orders and arranging deliveries, and following up clients and ensuring satisfaction with goods and services and resolving any problems.
43. The general physical demands of the role are noted to include standing and walking frequently, continuous sitting, climbing stairs occasionally, reaching and continuous typing and use of fine motor skills for computer work.
44. The functional requirements of the role are within the Worker's tolerances. No formal qualifications were required for the role. Basic computer skills were required, and I note that the Worker's computer training should assist.
45. Although the Worker has not specifically had sales experience I note that no such experience is required, and that he otherwise possesses skills that are transferrable to this role, including communication skills, and leadership and training skills.
46. On the information before me it appears that this role is suitable for the Worker given his work experience and functional tolerances.

Findings on current work capacity and suitable employment

47. On balance, the information before me supports that having regard to the nature of the Worker's incapacity, his age, education, skills, work experience, and information as to occupational rehabilitation that has been provided, and having regard to the balance of matters contained in the definition of suitable employment, he is able to return to work in suitable employment. I am satisfied that employment as a Dispatch Clerk and Sales Representative is suitable employment for the Worker.
48. The Worker submits that he has been looking for a job without success and he has not been able to find a job due to his situation and age. I accept that the Worker has faced difficulties however the legislation provides that whether the work or employment is available, is generally available in the employment market, and the worker's place of residence are not matters for my consideration. I simply need to be satisfied that a role exists. It is clear that the roles of Dispatch Clerk and Sales Representative do exist, evidenced by the occupational rehab provider's conversations with employers in respect of the roles. I note that the Worker turning 61 this year. The occupational rehab provider, in identifying suitable employment for the Worker, acknowledged that the worker is of a mature age and sought to identify roles appropriate to his age group. There is no information before me to suggest that his age is a barrier to securing employment in the roles proposed as suitable.
49. While I also accept that the Worker has experienced stress, frustration and lack of sleep as a result of his situation, I have no information before me to suggest that his capacity to work 8 hours per day, 5 days per week, has been impaired.

50. On the information before me I find that the Worker has current work capacity. The roles of Dispatch Clerk and Sales Representative are employment in work for which the Worker is suited.
51. As I have arrived at the same conclusion as the Insurer regarding the Worker's current work capacity and suitable employment, I have made no recommendations under section 44BB(3)(e) of the 1987 Act.

Merit Review Service
Delegate of the State Insurance Regulatory Authority