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**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 as defined by section 32A of the *Workers Compensation Act 1987* (the 1987 Act).
3. Employment as a Call Centre Representative or Data Entry Officer is suitable employment for the Worker.
4. The Worker is able to earn \$600 per week in suitable employment.

**RECOMMENDATION BASED ON FINDINGS**

5. The following recommendation made by the Authority is binding on the Insurer and must be given effect by the Insurer under section 44BB(3)(g) of the 1987 Act.
6. The Insurer is to calculate the rate of weekly payments of compensation payable to the Worker under section 37 of the 1987 Act in accordance with my findings above.

**BACKGROUND**

7. The Worker was employed as a labourer and storeman when he injured his right shoulder, thoracic spine, and ribs in the course of his employment.
8. The Worker made a claim for compensation and has been in receipt of weekly payments of compensation from the Insurer.
9. 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 \$NIL under section 37 of the 1987 Act.
10. 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 .
11. 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

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 the Insurer, by the Authority.

## DOCUMENTS CONSIDERED

15. 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 all further information that has been supplied to the Authority by the Worker and the Insurer.

## SUBMISSIONS

16. In the application for merit review, and in further submissions, the Worker makes the following submissions:
  - The labour market analysis that the Insurer relies on is completely inaccurate. He did the same search as mentioned in the report and came up with only 259 in the Sydney region.
  - The decision should be changed to reflect a more accurate per hour amount as there is no employer willing to pay \$26 per hour as stated in the Internal Review decision. He has worked in data entry in previous employment and a more accurate amount would be \$22 per hour. He knows he cannot earn the amount per hour that the Insurer is suggesting.
  - The Insurer's decisions have been based on the reports of the insurer's independent medical examiner (IME), who he has only seen once over a year ago. The insurer's IME is biased and has the Insurer's interests at heart, not the injured worker. All of the insurer's IME's reports have been negative and degrading to him, and he takes offence at what has been written.
  - He has been completing a work trial for the last 4 weeks and this has resulted in more pain than before the trial. He cannot sit for long periods and the constant moving of the mouse and typing on the keyboard causes considerable pain in his shoulder and back. He will be having his specialist examine him again as he does not believe he can continue working as a data entry clerk due to the pain it causes.
  - In further submissions the Worker states that the work trial went well, however the constant sitting and using a keyboard and mouse has irritated his right shoulder/shoulder blade area. He does not think he could do this work on a full time basis. However, working 8 hours per day, 3 days per week has been okay, with time spent away from the keyboard and mouse giving his shoulder time to calm down and not be as sore.
  - After the work trial he was offered a position with Employer 2 in a data entry/call centre role. The title and duties are unknown however it is likely to be a lot of computer operating and data management. The rate of pay offered was \$18.00 per hour as a trainee, which is well below the \$26.00 per hour that the Insurer relied on in its work capacity decision.

- He requests that the Authority ask the Insurer to extend his claim for reimbursement of lost wages for another 3 months. This includes travel expenses as it is further away than his previous job. The job with Employer 2 was offered in accordance with the hours identified in the Certificates of Capacity.
- He is still receiving limited physiotherapy treatment due to the Insurer not approving his specialist's recommendation for treatment of the shoulder injury. If he could receive the recommended treatment he could do this work as he has previously, but at this time he still feels a lot of pain in his shoulder with constant use. He will see his specialist soon.

17. In its reply the Insurer submits:

- The rehab provider 1 completed a Labour Market Analysis and provided a report. They contacted three employers in respect of Data Entry Officer positions, and were advised of hourly rates of \$25-\$26.
- The Insurer issued a section 74 Declinature Notice in respect of the Worker's request for treatment, based on insurer's IME's findings. The Worker has been advised that he can make an Application for Review of Declinature or seek legal advice in respect of the declinature.
- The nominated treating doctor (NTD) continues to certify the Worker for partial capacity for 24 hours per week as evident by the most current Certificate. This has been the Worker's accepted capacity.
- The NTD was of the opinion that the work trial was suitable for the Worker, and provided approval.
- The Insurer has not been advised of any future specialist appointments.
- The Worker has been in receipt of weekly benefits for 76 weeks, placing him in the second entitlement period. The Worker is not currently working, and has the ability to earn \$624 per week. As such his entitlement to weekly benefits is to be calculated as follows:

PIAWE x 80% - E +D

\$746.76 x 80% - \$624.00

= \$0

- The Worker's entitlement to weekly benefits will be reduced to \$0.

## REASONS

### Nature of merit review

18. 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.
19. 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;

- A decision about what constitutes suitable employment for him; and
  - A decision about the amount he is able to earn in suitable employment
20. Therefore, these findings and recommendations will be confined to a merit review of only these decisions made by the Insurer.
21. I note the Worker's submissions in respect of his request that the Insurer approve his treatment; however this is outside the jurisdiction of the Authority in reviewing the Insurer's work capacity decision.

### **Current work capacity and suitable employment**

22. Section 32A of the 1987 Act 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*
23. The Worker was employed and placed at Employer 1 where he worked as a Labourer and Storeman on a casual basis. He was unloading boxes of cheese weighing 12kg, and transferring them to shelves. There was no one to assist the Worker, which was the usual practice, and after trying to move the boxes himself he felt pain in his upper back. He completed his shift despite the pain. The following morning he woke up with pain in his right ribs, right shoulder, and upper back. He attended work that day and reported the incident, and attended his GP afterwards.
24. The Worker was subsequently placed on light duties which he performed for 3 months, but aggravated his injury during that time. The Worker has also suffered a secondary psychological injury following on from the injury.
25. The issue for me to consider is how the injuries impact upon the Worker's capacity for employment. I consider that the medical information before me supports that the Worker has capacity for employment 8 hours per day, 3 days per week. I note that the Worker agrees this to be a reasonable estimation of his capacity. I will address the medical evidence before me below.
26. The Worker was seen by the insurer's IME, Orthopaedic Surgeon. In his report he opined that he could see no evidence of a specific injury and that in his view The Worker could return to his usual duties. The insurer's IME provided two further file reviews, though he did not see the Worker again. In his report he commented that the Worker is fit to return to work in his normal duties.
27. The Worker's IME, Orthopaedic and Spinal Surgeon, has seen the Worker on a number of occasions. In his report he diagnosed the Worker as likely to have sustained a soft tissue trauma to his thoracic spine, and commented that investigations indicated that the Worker has mild Scheuermann's disease. He requested a bone scan.
28. In his later report he states that the bone scan revealed fractured right third, fourth and fifth ribs. At this time he found him unfit for work until the results of a scan looking at bone mineral density could be reviewed.
29. The Worker's IME's report notes that the Worker's return to work will take more than three months. In his most recent report before me, the Worker's IME notes that the Worker continues to have severe posterior right shoulder pain radiating down into the superior part of his shoulder and down the proximal arm. He also has pain around the rib fractures. He notes the Worker has also been diagnosed with osteoporosis.

30. The WorkCover NSW Certificates before me are dated from 16 June 2015 through to 7 November 2016. The earliest Certificate before me was completed by a former treating doctor, however thereafter the Worker engaged the NTD as his nominated treating doctor, and the NTD has completed all other Certificates. The most recent Certificate indicates a capacity for work for 8 hours per day, 3 days per week and this has been the Worker's certified capacity. Prior to this time, the Worker was found to have capacity for work 6 hours per day, 5 days per week.
31. The NTD diagnosed the Worker with a "thoracic spine strain with disc protrusion; R) 3/4/5 ribs fractures; adjustment disorder with depression". The only restriction on his capacity is in relation to lifting/carrying, with a recommendation of less than 8kg. Prior to this the Worker was limited to up to 5kg lifting/carrying capacity, a sitting tolerance of up to 30 minutes, and advised to avoid repetitive pushing and pulling.
32. The NTD has seen the Worker most consistently since his injury. His assessment is the most contemporaneous, and for those reasons I consider his opinion in respect of the Worker's capacity for work to be the most reliable. On that basis, I find that the Worker has capacity for some type of employment for 8 hours per day, 3 days per week, with a lifting/carrying capacity of less than 8kg.
33. 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 labourer and storeman. 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.

#### Suitable employment

34. 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 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 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.

35. In its work capacity decision the Insurer found that the role of call centre representative was suitable employment for the Worker. In its internal review decision the Insurer came to a

different conclusion, finding that the role of Data Entry Officer is work for which the Worker is currently suited.

36. The information before me indicates that after a period of not working the Worker has completed a work trial as a Data Entry Officer with Employer 2, and that he has since been offered an ongoing position with the company. It is unclear on the information before me whether or not the Worker has accepted that position. I will consider each of the roles proposed as suitable for the Worker by the Insurer.

#### Call Centre Representative

37. In its work capacity decision the Insurer found that this role was suitable for the Worker, relying on the vocational assessment report issued by the rehab provider 2. The report states that the duties of the role include answering enquiries regarding an organisation's products and services by providing information on the products, issuing relevant forms and information, responding to enquiries, recording information about inquiries and complaints, referring complex enquiries to expert advisors and accessing and operating computer systems.
38. The physical demands of the role conform to the functional tolerances indicated on the Worker's Certificates. The representative is in a seated position 6-8 hours per day, with the ability to stand and stretch while on the phone. There is no lifting required. A minimum of 1-2 years previous experience in the role is desirable and excellent communication and high end customer service skills were required.
39. The employers contacted by the rehab provider 2 confirmed the requirements of the role, and indicated that the Worker would be a suitable candidate.
40. The NTD initially approved this role as suitable for the Worker on a 15-20 hour per week basis, however has since indicated he does not approve of the role on the basis that the Worker does not have the experience necessary to complete the role. I note however that the NTD's expertise lies in the Worker's functional capacity to perform the role, and that he does not provide any reasons in this regard why the role would not be suitable.
41. On the information before me it appears that this role is suitable for the Worker given his experience in computer based roles. However it appears that the Insurer has abandoned its finding that this role is suitable, having instead directed its rehabilitation efforts towards the role of Data Entry Officer by arranging a work trial in this role. I note that it is the role of Data Entry Officer that is proposed in the Insurer's internal review decision, and that the Worker has indicated that the work trial was a success.

#### Data Entry Officer

42. The rehab provider 2 arranged for the Worker to undertake a work trial as a Data Entry Officer. This work trial was approved by the NTD. Subsequently the Insurer engaged the rehab provider 1 to undertake a Labour Market Analysis and a report was issued detailing the findings. On the basis of those findings the Insurer now submits that this role is suitable for the Worker.
43. The report states that the duties of the role include entering data and codes required to process information; retrieving, confirming and updating data in storage and keeping records of data input; transcribing information; and preparing reports, letters and similar material for publication.
44. The physical demands of the role conform to the functional tolerances indicated on the Worker's Certificates. The officer is predominately seated at a desk and working on a computer, with the ability to alternate between sitting, standing and walking as needed. There is no lifting required for the role. Generally at least one year of relevant experience is required in the absence of formal qualifications.

45. The Worker submits that his work trial went well. He does not appear to dispute that this role is suitable employment for him.
46. The rehab provider 1 contacted three employers in respect of positions they were offering in the role of Data Entry Officer. All employers confirmed the requirements of the role and indicated that the Worker would be a suitable candidate. Across the employers it was indicated that 1-2 years' experience was desirable, in addition to computer skills, and communication and customer service skills.
47. The Worker has throughout his working life been employed in a variety of positions, including data entry type roles. In the periods 2000-2004, 2004-2009, and 2012-2014 he was employed in data entry positions in which he entered information into a computer. In my view it is clear that the Worker has sufficient computer skills to undertake a data entry position. I also note that the Worker has worked in customer service roles, including as a store manager, and as such clearly possesses customer service and communication skills. Furthermore, the Worker has successfully completed a work trial in a data entry role, and has himself indicated that the trial went well. Based on these considerations I accept that the role of Data Entry Officer is suitable employment for the Worker.

#### **Findings on current work capacity and suitable employment**

48. I am satisfied that employment as a Call Centre Representative or Data Entry Office is suitable employment for the Worker.
49. I find that the Worker has current work capacity.

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

50. In its work capacity decision the Insurer found that the Worker could earn \$25 per hour as a Call Centre Representative, while in its internal review decision the Insurer found he could earn \$26 per hour as a Data Entry Officer. The Worker submits that no employer is willing to pay the rate of \$26 per hour and that a rate of \$22 per hour may be more realistic. He also submits that he has been offered employment following his work trial at a rate of \$18 per hour as a trainee.
51. Giving consideration to the fact that the Insurer has directed its rehabilitation efforts to the role of Data Entry Officer it is this role I consider most suitable for the Worker, and I consider it appropriate to consider the Worker's ability to earn in this role. I note in any event that on the information before me the average earnings in this role, and that of Call Centre Representative, are similar.
52. The Worker's submission that \$22 is a more realistic rate of pay for a Data Entry Officer is not persuasive. He has not provided me with any information to support this assertion. The Insurer has accepted the rate of \$26 per hour based on findings within the Labour Market Analysis report in which three employers were canvassed and advised of their rates of pay. The information from the three different employers is closely consistent and I do not consider it unrealistic that the Worker is able to earn \$25.00 an hour having regard to his age, education, skills and work experience. Particularly as he has direct work experience in data entry and appears well skilled in computer use.
53. I note that the Worker has indicated that he has been offered a Data Entry Officer type role at a rate of \$18 per hour, which he notes is as a trainee. He advises that the exact title and duties of this role have not been confirmed. It is not therefore clear whether this is a Data Entry Officer role, and whether the rate of pay can be considered to reflect his ability to earn in such a role. It is however apparent that this role is being offered as a trainee role. Given the Worker's experience it would be likely that he could obtain a role as a Data Entry Officer beyond the

trainee level. While it is unclear if the Worker has accepted the position with Employer 2, and whether he is therefore currently earning \$18 per hour, there is a distinction between actual current weekly earnings and his ability to earn in suitable employment. I am required to consider the Worker's ability to earn in suitable employment, and while he may have been offered \$18 per hour, it is my view that he has the ability to earn at least \$25 per hour in suitable employment.

On balance, and considering the Worker's age, education, skills and work experience, and noting that he has relevant experience but has not worked in a similar role recently, I consider it likely that the lower level of pay is appropriate. In my view, the rate of \$25 per hour represents the amount that the Worker is likely to earn in suitable employment as a Data Entry Officer.

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

54. I note it is common ground that the Worker has received between 14 and 130 weeks of weekly payments of compensation, and that it is not disputed that the Worker's claim falls to be determined under section 37 of the 1987 Act:

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

(a)  $(AWE \times 95\%) - (E + D)$ , or

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

*whichever is the lesser.*

(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.*

55. There is no information before me to confirm that the Worker is working. Whether section 37(2) or (3) applies in a particular week will depend on if the Worker has returned to work for not less than 15 hours in a week. That is a matter for the Insurer when it calculates weekly payments of compensation payable to the Worker under section 37 of the 1987 Act.

#### **Calculation of entitlement**

56. The Insurer is to calculate weekly payments of compensation payable to the Worker under section 37 of the Act in accordance with my reasons above, where "E" is \$600 (being \$25 over 24 hours per week). I note that the other factors that make up the rate of weekly payments have not been referred to the Authority for review and I make no finding about them.

**Merit Review Service**  
**Delegate of the State Insurance Regulatory Authority**