



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 Worker has current work capacity in accordance with the definition under section 32A of the *Workers Compensation Act 1987* (the 1987 Act).
2. The Worker is able to return to work in suitable employment as an assembly worker.

RECOMMENDATION BASED ON FINDINGS

3. The Authority makes no recommendation in light of the findings set out above.

BACKGROUND

4. The Worker injured his back while working as a truck driver.
5. The Worker did not return to work following his injury and his employment was subsequently terminated.
6. The Insurer wrote to the Worker indicating that it had made a series of work capacity decisions that had resulted in a finding that the Worker would have no entitlement to weekly payments of compensation after he had been in receipt of weekly payments for 130 weeks. The decision was said to be made in accordance with section 38(3) of the 1987 Act.
7. At the time that the decision was made, the Worker had not received 130 weeks of weekly payments of compensation.
8. The Worker applied for an internal review of the work capacity decisions. The Insurer conducted the review and wrote to the Worker, informing him that the outcome was the same as the initial work capacity decisions.
9. The Authority received the application for merit review.

LEGISLATION

10. 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);

11. Section 43 of the 1987 Act describes a “work capacity decision”.
12. Section 44BB of the 1987 Act provides for merit review of a work capacity decision of the Insurer, by the Authority.

INFORMATION CONSIDERED

13. I have considered all of the information that was provided by the parties in relation to the Worker’s application for merit review. I have only referred to the information that is most relevant to my findings, in my reasons that are set out below.

SUBMISSIONS

14. In the application for merit review, the Worker’s legal representative has requested a review of the following work capacity decisions of the Insurer:
 - That he has current work capacity.
 - That he is able to return to work in suitable employment.
 - A decision about whether as a result of his injury, he is unable (without substantial risk of further injury) to engage in employment of a certain kind because of the nature of that employment.
15. In the application for merit review, the Worker’s legal representative submits:
 - The work capacity decision (WCD) states that the Worker can work in light product assembly. The employer contact stated that this role contains the following duty – *“the employer contact indicated walking up to 20 minutes around the warehouse to pick up supplies and assemble them.”*
 - The Worker stated in his request for internal review – *“The WCD is wrong. The employer contacted for an assembly line position stated that I would have to walk for up to 20 minutes at a time. The Worker’s orthopaedic specialist’s report states that I experience significant pain after walking 100 metres. I would therefore not be able to perform all of the duties required in this position as walking for 20 minutes would far exceed 100 metres.”*
 - The Worker received an internal review.
 - In the internal review the Insurer quotes the Worker’s most recent WorkCover certificate which does not stipulate the distance and duration the Worker can walk for.
 - The Worker’s orthopaedic specialist’s report provides the following work restriction *“... and the pain prevents him from walking for greater than 100 metres.”*
 - The Insurer’s internal review fails to consider and completely ignores the walking restriction by the Worker’s orthopaedic specialist.
 - The Insurer has no medical or expert evidence that contradicts the Worker’s orthopaedic specialist’s walking restriction.
 - The average walking speed of a human is 1.4m/s (Rose J, Ralson HJ, and Gamble JG. *Energetics of walking. In: Human Walking, 1994 p45-72*).
 - The proposed process worker position requires the worker to walk for 20 minutes which totals 1.68km.
 - The WCD does not specify how many times a worker must perform the task of *“walking up to 20 minutes around the warehouse to pick up supplies”*.
 - The Worker’s orthopaedic specialist restricts The Worker’s walking to a maximum of 100 metres.

- The insurer has provided no medical or expert evidence to refute this restriction.
- The proposed position requires the worker to walk up to 1.68km and does not specify how many times the worker may do this per day.
- The WCD is wrong.
- The workers capacity is nil and the WCD should be amended to reflect this.

16. In reply, the Insurer submits:

- The issues raised in the Worker's application for merit review have been noted.
- It maintains that the WCD that has been made is supported by the medical and rehabilitation information that has been obtained to undertake a WCD.

Reasons

Nature of merit review

17. This merit review is a review of the work capacity decisions that have been referred to the Authority on behalf of the Worker. It involves considering all of the information that has been provided to me.
18. I will then make findings and recommendations about the work capacity decisions that have been referred for review.
19. The review is not a review of the Insurer's procedures in making the work capacity decision and/or internal review decision.
20. I am required to consider all of the information that has been provided and make findings and recommendations that are most correct and preferable.
21. A merit review may only be conducted in relation to matters that have been referred to the Authority for review.
22. I have noted that the Insurer has conducted a review of the Worker's entitlement to weekly payments of compensation after the second entitlement period, in accordance with section 38 of the 1987 Act.
23. The Worker's entitlement to weekly payments of compensation fell in the second entitlement period at the time that the Insurer made the work capacity decisions. The Insurer prospectively applied provisions of the 1987 Act to the Worker which is incorrect.
24. As the matter has not been referred to the Authority, I have made no findings or recommendations, however, I draw the matter to the attention of the Worker and his legal representative, should they wish to have the matter rectified.

Current work capacity

25. The Worker's legal representative has requested a merit review of the Insurer's decision in relation to his current work capacity.
26. I have taken particular note of the submission in relation to the Worker's limited capacity for walking and will address this submission following my analysis of the information that has been provided to me.
27. **Definition.** When reviewing the Worker's current work capacity, I must make my findings in accordance with the definition under section 32A of the 1987 Act.

28. "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

29. **Summary of medical documents.** To assist me in determining the Worker's current work capacity, I have been provided with certificates of capacity, issued by the Worker's nominated treating doctor (NTD). The name of the NTD is not provided on these certificates. The signature, does look the same between the certificates and I have concluded that a single doctor assessed the Worker's capacity for employment in this period.

30. I also have two medico legal reports. The first report was prepared by the Worker's orthopaedic specialist and spinal surgeon. The second report was prepared by the Insurer's orthopaedic surgeon.

31. **Certificates of capacity.** The Worker's NTD has certified that he has capacity for some type of employment for four hours per day, five days per week in a role where he is able to comply with the following restrictions:

- Lifting/carrying up to 6kg
- Frequently lifting only 3kg
- Sitting for 20-30 minutes
- Standing for 20-30 minutes
- Minimal pushing and pulling
- No bending, twisting or squatting
- Driving up to 25 minutes

32. **The Worker's orthopaedic specialist.** The Worker's orthopaedic specialist examined the Worker. The Worker's legal representative claims that following the examination, the Worker's orthopaedic specialist stipulated that the Worker's walking should be restricted to 100 metres.

33. The paragraph that has been quoted by the Worker's legal representative is under the heading "activities of daily living". In this paragraph, the Worker's orthopaedic specialist sets out what appears to be the Worker's self- assessment of his physical capacity at the time of the examination.

34. I have concluded that, in the context of the paragraph in which it appears, the Worker's orthopaedic specialist has not exercised his own judgment and expressed his opinion as to the Worker's actual walking capacity but he has reported what the Worker told him.

35. In his report, the Worker's orthopaedic specialist provides an assessment of the Worker's whole person impairment from his injury and answers questions that were apparently provided to him by the Worker's legal representative. The Worker's orthopaedic specialist makes no reference in the report as to what he considers to be the Worker's actual capacity for employment.

36. I have, therefore, not relied on the Worker's orthopaedic specialist's report when determining the Worker's current work capacity.

37. **The Insurer's orthopaedic surgeon.** The Insurer's orthopaedic surgeon examined the Worker. In relation to the Worker's capacity for employment, the Insurer's orthopaedic surgeon stated that he thought that the following restrictions were appropriate "at most, light sedentary office based duties at approximately four hours a day, five days a week, and to be frequently reassessed with

the aim of increasing this. Other restrictions would be a 5kg weight restriction.”

38. **Findings as to capacity for employment.** The Insurer’s orthopaedic surgeon and the Worker’s NTD have consistent views of the Worker’s capacity for employment. I have placed particular weight on the opinion of the Worker’s NTD who has assessed him on multiple occasions and has therefore had the benefit of ongoing review.
39. I therefore find that the Worker has capacity for some type of employment, where that employment is consistent with the most recent certificate of capacity, the details of which are set out above at paragraph 31.
40. I am not persuaded that any medical practitioner has expressed the opinion that the Worker has a 100-metre walking restriction. I do however acknowledge that he experiences pain when walking distances of more than 100 metres at a time, and will take this into account when making findings as to suitable employment.

Suitable employment

41. The Worker’s legal representative has requested a review of the suitable employment options identified by the Insurer. When determining suitable employment for the Worker I must apply the definition under section 32A of the 1987 Act as follows:

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.*

42. **Overview of education, skills and work experience.** I have taken the information as to the Worker’s education, skills and work experience from a vocational assessment report. The report was prepared by an occupational rehabilitation service provider.
43. The Worker attended high school to year 11. I do not have his work history prior to 2002. From 2002 to the time of his injury, the Worker was driving for work, either as a courier or in transport of waste or fuel. In these roles, the Worker liaised with clients regarding delivery or collection times, completed paperwork in relation to his deliveries and collections and drove vehicles including vans and trucks. There is an extensive list of transferrable skills that is included on page 7 of the vocational assessment report.
44. The Worker’s reading and numeracy skills were tested for the purpose of the vocational assessment. These were both considered to be average.

45. **Suitable employment options.** Since the vocational assessment report was prepared, two further labour market analysis reports have been prepared in relation to identified suitable employment options for the Worker. I have relied on this report to make my findings.
46. The occupation rehabilitation service provider has identified two suitable employment options for the Worker. These are: assembly worker (light items) and process worker (light).
47. **Assembly worker** (light items). The occupational rehabilitation service provider contacted three employers of assembly workers for the purpose of preparing the labour market analysis. Each of the employers required slightly different tasks to be carried out and they worked with a variety of products between them.
48. The description of each of the roles with the three employers indicates that a low level of spoken English and literacy is required to complete the necessary tasks. It does not appear that any prior related work experience is required and there are no minimum education levels indicated by employers as being necessary. I am satisfied that the Worker could do the role of an assembly worker having regard to his education, skills and work experience.
49. Each of the employers contacted had slightly varying physical requirements for carrying out the role of an assembly worker within their organisation. Each of the employers indicated that employees were able to move between sitting and standing to carry out their work. There was no lifting of weights greater than 5kg required. The description of the tasks required did not include bending, twisting or squatting and there was no apparent pushing or pulling.
50. One of the employers indicated that they employ people on a casual basis and that employment could be offered for four hours per day, five days per week. Two of the employers simply indicated that they did not consider that the Worker's certified hours of work would pose a barrier to employment.
51. One of the three employers indicated that walking for periods of up to 20 minutes at a time may be required. The Worker's legal representative has submitted that this role would be unsuitable for the Worker who experiences significant pain when walking distances of greater than 100 metres. I would require more detailed information about the nature of the walking involved in this role, before making any findings about whether it is suitable employment for the Worker. Accordingly, I will refer to the remaining two roles which do not appear to have the same walking requirements.
52. In order for employment to be suitable employment for the Worker, it must be work for which he is currently suited when having regard to the factors set out in the definition under section 32A of the 1987 Act. Not all work in that category of employment must be suitable, there must however be work, in the labour market to which the Worker is suited when having regard to the definition.
53. I am satisfied that two out of the three roles set out in the labour market analysis report are suitable employment for the Worker. In making this finding, I have considered the information set out above as well as the occupational rehabilitation services that have been provided to the Worker to support him in his job seeking.
54. As I have found that there is work as an assembly worker that is suitable employment for the Worker, it has not been necessary for me to determine whether there is work as a process worker that would also be suitable.
55. **Findings.** The Worker is able to return to work in suitable employment and I therefore find that he has current work capacity in accordance with the definition under section 32A of the 1987 Act.