



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 State Insurance Regulatory Authority (the Authority) finds:
 - (a) The Worker has “current work capacity” as defined in section 32A of the *Workers Compensation Act 1987* (the 1987 Act).
 - (b) The Worker has the ability to return to work in “suitable employment” as defined in section 32A of the 1987 Act.
 - (c) The vocational options of clinical manager and rehabilitation consultant/case manager are suitable employment in relation to the Worker.
 - (d) The Worker has the ability to earn \$1,678.08 in suitable employment.

RECOMMENDATION BASED ON FINDINGS

2. The Authority makes the following recommendation which is binding on the Insurer:
 - (a) The Insurer is to determine the Worker’s entitlement to weekly payments of compensation in accordance with my findings under section 37(3) of the 1987 Act.

BACKGROUND

3. The Worker suffered an injury being bilateral medial wrist pain whilst working as a physiotherapist.
4. The Worker is 38 years of age.
5. The Insurer made a number of work capacity decisions, reducing the Worker’s entitlement to weekly payments of compensation to nil under section 37 of the 1987 Act.
6. The Insurer undertook an internal review in this matter and made a decision, affirming the original work capacity decision.

7. The application for merit review was received by the Authority. The application was made within 30 days after the Worker received notice of the internal review. The application has been lodged in the form approved by the Authority.

LEGISLATION

8. 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), and
 - *Workers Compensation Regulation 2016* (the Regulation).
9. Section 43 of the 1987 Act describes a “work capacity decision”.
10. Section 44BB of the 1987 Act provides for merit review of a work capacity decision of the Insurer, by the Authority.

INFORMATION CONSIDERED

11. I have considered all of the information that was provided by the parties in relation to the Worker’s application for merit review.
12. I am satisfied that both parties have had the opportunity to respond to the other party’s submissions and that the information provided has been exchanged between the parties.

SUBMISSIONS

13. In the application for merit review, the Worker submits:
 - The Insurer has not identified suitable employment.
 - He has no work capacity.
14. In reply, the Insurer submits:
 - At the time of the internal review, the most recent WorkCover certificate of capacity certified the Worker as having the capacity for employment for 8 hours per day, 5 days per week with restrictions.
 - It relies on the internal review decision and submits that the Worker has the necessary functional and vocational capability to work as a rehabilitation consultant/case manager and clinical manager. It submits that rehabilitation consultant/case manager and clinical manager are suitable employment within the meaning of section 32A of the 1987 Act.
 - The Worker has received 46 weeks of weekly payments of compensation and therefore section 37 applies.
 - At the time of the internal review decision, the Worker was assessed under section 37(3) of the 1987 Act as he had current work capacity and had not returned to work in suitable employment for more than 15 hours a week.
 - Pursuant to section 35(1) of the 1987 Act, the highest amount the Worker can earn is \$1,766.40 per week.

- It acknowledges the Worker's submissions that no suitable employment options have been identified and he has no capacity for work. Further, the Worker has submitted a medical report from the nominated treating doctor which notes that he is medically unfit for work from 7 July 2017 until 6 August 2017 and a medical statement from the nominated treating doctor noting that the roles of rehabilitation consultant/case manager and clinical manager are not suitable employment options for him. It submits that the nominated treating doctor has not provided a WorkCover certificate of capacity. The Worker's current certificate of capacity states that he has full-time capacity. Further, it relies on paragraphs [22]-[40] of the internal review decision which notes that the roles of a rehabilitation consultant/case manager and clinical manager are suitable employment options for the Worker.
15. The Worker's legal representatives advised that the surgery he had on 7 July 2017 does not relate to his injury and that his surgery means he is unfit for work during his rehabilitation period only. This was expected to be until 8 August 2017, but may need to be extended by one week due to minor complications to his surgery. He expects to return to his previous work capacity at that time.

REASONS

Nature of merit review

16. This matter involves a merit review of the work capacity decisions of the Insurer in accordance with section 44BB(1)(b) of the 1987 Act.
17. The review is not a review of the Insurer's procedures in making the work capacity decision and/or internal review decision.
18. I am required to consider all of the information that has been provided and make findings and recommendations that are most correct and preferable.

Current work capacity and suitable employment

19. The issue for me is how the injuries impact upon the Worker's capacity for employment and his ability to earn in suitable employment.
20. 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*
21. In undertaking this review, I will consider the information before me and assess if, and to what extent, the Worker has "current work capacity" or "no current work capacity" as defined and set out above.

Certificates of capacity

22. The Worker's nominated treating doctor has issued a number of WorkCover certificates of capacity. The two most recent certificates of capacity dated 2 June and 30 June 2017 are in the same terms. The nominated treating doctor has certified the Worker with capacity for some type of employment 8 hours per day, 5 days per week with the following recommendations:

Lifting/carrying capacity: up to 4kg limit

- Other: avoid pronation/supination. Minimal hands-on work
23. The certificate of capacity dated 5 May 2017, certifies the Worker with capacity for some type of employment 8 hours a day, 5 days per week with the following recommendations:
- Lifting/carrying capacity: up to 3kg limit
- Other: avoid pronation/supination. Minimal hands-on work
24. The certificate of capacity dated 6 April 2017 is in similar terms, but notes that the Worker is allowed to do light ward work from 4 hours per day on 3 non-consecutive days per week.
25. The certificates of capacity dated 17 February 2017 and 16 March 2017 are in the same terms. They certify The Worker with capacity for some type of employment 8 hours per day, 5 days per week with the following recommendations:
- Lifting/carrying capacity: up to 2kg limit
- Other: Minimal hands-on work
26. The certificate of capacity dated 31 January 2017 states that the Worker has no current work capacity for any employment between 31 January and 7 February 2017.
27. The nominated treating doctor has provided a medical certificate dated 19 June 2017 stating that the Worker is medically unfit for work from 7 July 2017 until 6 August 2017 inclusive due to a planned operation. As noted in the submissions, this surgery does not arise as a result of the work injury the subject of the work capacity decision.

Medical reports

28. The hand and wrist surgeon, provided a report dated 6 September 2016 and noted that there is quite marked ECU tendinosis, with a long segment of swelling over the ulnar head. The hand and wrist surgeon stated that it is likely to take quite a few months for things to resolve, and as the Worker's work is all manual, he does not feel there are any light duties available. He recommended repeat steroid injections.
29. The Radiologist 1 has provided reports dated 10 November 2016 and 18 May 2017, noting that the Worker underwent ultrasound guided injections left wrist. The Radiologist 1's report of 1 September 2016 notes the Worker underwent an ultrasound guided injection of the right wrist.
30. The Radiologist 2 provided a report dated 2 September 2016, stating that the MRI of the right wrist shows a long segment of predominantly non-acute ECU tendinosis associated with tenosynovitis and a partial longitudinal intrasubstance split tear and dorsal scapholunate and volar radiocarpal ganglia.
31. The specialist musculoskeletal physiotherapist provided 2 reports dated 22 March 2017 and 29 March 2017. These reports note that a defined course of further physiotherapy remains reasonably necessary and that the Worker requires education regarding the principles of pacing and graded activity with respect to activities of daily living and occupational duties. However, the specialist musculoskeletal physiotherapist was of the opinion that acupuncture and massage therapy were not reasonably necessary.
32. The clinical psychologist has provided a report dated 30 March 2017, stating that the Worker is working hard to manage his physical and mental health, and a return to work as quickly as possible. She also notes a deterioration in the Worker's mental health as a direct result of the pressure placed on him to speed up his recovery, when he is doing all that he can. Reportedly this is causing a level of hopelessness in the Worker.
33. The registered psychologist provided a report on 7 June 2017, and was of the view that the Worker could return to perform suitable duties for 8 hours per day, 5 days per

week. She believed the Worker required a motivation strategy and 4 sessions of psychological treatment.

Discussion and findings

34. After considering the medical information, I accept that the Worker has capacity for some type of employment 8 hours per day, 5 days per week with the restriction of lifting/carrying up to 4kg and to avoid pronation/supination and to undertake minimal hands-on work as stated in the two most recent certificates of capacity.
35. The nominated treating doctor has been reviewing the Worker since the injury and has referred him to specialists as well as liaising with the rehabilitation providers. He has also been adjusting the Worker's certificates as his condition has changed. There is nothing inconsistent in his certificates with the other medical information before me.
36. I find that the Worker has capacity for some type of employment 8 hours per day, 5 days per week with the restriction of lifting/carrying up to 4kg and to avoid pronation/supination and to undertake minimal hands-on work.
37. I note that the nominated treating doctor has provided a non-WorkCover certificate, stating that the Worker is unfit for work between 7 July 2017 and 6 August 2017 due to a planned surgery. That surgery does not arise as a result of the injury to the Worker on 20 June 2016 and therefore is not a consideration in relation to his current work capacity.

Pre-injury employment

38. There is no issue before the Authority in respect to the Worker being unable to return to work in his pre-injury employment. In the absence of any dispute on this point, I accept that the Worker is unable to return to work in his pre-injury employment.

Suitable employment

39. In order to determine whether the Worker has current work capacity, I am required to consider whether he is able to 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 Workers Compensation 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.

40. The Worker is not currently working.
41. I note that the Worker has provided a document dated 19 July 2016 noting the positions are certified as unsuitable by the nominated treating doctor. The nominated treating doctor has provided a further medical approval document dated 17 February 2017.
42. There are two vocational assessment reports in the information before me prepared by the rehab provider. They are dated 19 September 2016 and 5 December 2016. Each of the reports refers to the role of physiotherapist however the Insurer has stated in its decisions that during the work trial in the role of a physiotherapist, the Worker suffered an aggravation of his symptoms. Having reviewed the work trial documentation and the medical information including the certificates of capacity certifying that the Worker should not undertake "hands-on work", the whole of the information before me including the fact that the Worker underwent an ultrasound guided injections left wrist in May 2017 which was after the nominated treating doctor provided a medical approval for the position on 17 February 2017, supports the view that the role of physiotherapist is not employment for which the Worker is currently suited and therefore is not suitable employment as defined in section 32A of the 1987 Act.
43. The report of 19 September 2016 records that the Worker completed a Bachelor of Applied Science (Physiotherapy) in 2001. In 2014 he undertook a Certificate III in Outdoor Guiding. The Worker has an overall competency and intermediate skills in Microsoft Word and Outlook but not in Microsoft Excel and PowerPoint.
44. The Worker's work history from February 2002 to the date of injury has been mostly as a physiotherapist, including being a practice manager with his pre-injury employer. He has also had casual work in retail sales and casual work undertaking volunteer work whilst recovering from a period of illness.
45. Four vocations were identified being physiotherapist (which I have found not to be suitable employment for the Worker), sales representative (educator/promotions/medical/healthcare or outdoors sector), clinical manager and case manager. These positions have been reviewed in the 5 December 2016 report.

Sales representative (medical/healthcare/outdoor industries)

46. The tasks include promoting and selling the company's goods and services; acquiring and updating knowledge of employer's and competitors' goods and services and market conditions; using directories and other sources to compile lists of prospective business clients; visiting clients and retail outlets to establish selling opportunities; quoting prices and credit terms, recording orders and arranging deliveries; following up clients and ensuring satisfaction with goods and services and resolving any problems; monitoring clients' changing needs and competitor activity and reporting on these developments to sales and marketing management; preparing sales reports; and maintaining and submitting records of business expenses incurred.
47. The rehab provider made three employer contacts. All three contacts noted that their positions were sedentary and light with no manual handling as the position required selling products, and information could be loaded onto a tablet.
48. Having read the responses from the employer contacts, I accept that the position is within the Worker's functional abilities and that it has been approved by the nominated treating doctor on 17 February 2017.
49. I note that each of these roles are sales representative roles which require market research, compiling lists of prospective clients, visiting clients and retail outlets to establish selling opportunities, quoting prices and credit terms, following up client, monitoring client changing needs and competitor activity.

50. The Worker's sales assistant history is working one day per week at a store working with the team and undertaking customer service and sourcing stock from suppliers and other stores. Whilst I accept that the Worker has experience in the allied health area as a physiotherapist and this may be relevant experience to this position, the role of a sales representative selling medical, healthcare or outdoor industries, requires a far more senior level of customer service and sales experience than that which the Worker possesses. It requires market research skills and the ability to monitor the changing needs and competitor activity, which are not aspects of the Worker's work history. The Worker's experience is working as a sales assistant in a store.
51. The information before me does not support that the Worker has the necessary education, skills and work experience to be currently suited to the position of sales representative (medical/healthcare/outdoor industries).
52. I find that the position of sales representative (medical/healthcare/outdoor industries) is not suitable employment for the Worker as defined in section 32A of the 1987 Act.

Clinical manager

53. The position is described as providing overall direction and management for the service, facility, organisation or centre; developing, implementing and monitoring procedures, policies and standards for medical, nursing, allied health and administrative staff; coordinating and administering health and welfare programs and clinical services; monitoring and evaluating resources devoted to health, welfare, recreation, housing, employment, training and other community facilities and centres; controlling administrative operations such as budget planning, report preparation, expenditure on supplies, equipment and services; liaising with other health and welfare providers, boards and funding bodies to discuss areas of health and welfare service cooperation and coordination; advising government bodies about measures to improve health and welfare services and facilities; representing the organisation in negotiations, and at conventions, seminars, public hearings and forums; and controlling selection, training and supervision of staff.
54. The rehab provider made three employer contacts. Each employer contact noted that their roles are sedentary being administrative, analysing medical reports and undertaking case management and that the Worker's restrictions on avoiding twisting of the wrists and lifting up to 5kg can be accommodated by the nature of the work.
55. The roles are described by the contacts to include contributing to the management of the weekly case allocation process; providing operational, caseload and statistical reporting to the executive; researching and analysing health data to support the development of projects; assisting in project planning and the drafting of papers and reports; and supporting medical and rehabilitation teams.
56. The rehab provider discussed the Worker's occupational history of being a physiotherapist for 16 years and working in hospital settings as well as being a practice manager who assessed and treated patients, and designed programs and provided reports. The employers were of the view that the Worker would be highly suited for the role.
57. Having read the information contained in both vocational reports, the medical information and the medical approval by the nominated treating doctor on 17 February 2017, I accept that the position of clinical manager is within the Worker's functional capabilities. The role is sedentary, with some computer work, but does not require the Worker to undertake hands-on work with patients and there is no lifting/carrying which is outside the Worker's restriction.
58. The Worker holds a Bachelor of Applied Science (Physiotherapy) and has worked as a physiotherapist for 16 years, 7 of which with the pre-injury employer included practice management. Based on the information before me regarding the Worker's experience in

designing treatment programs for patients, treating patients with a wide variety of issues, liaising with medical and rehabilitation professionals as well as his practice management experience including mentoring/training student physiotherapists, I believe he has the necessary education, skills and work experience to undertake the role of clinical manager. Further, there are no age related considerations for the positions.

59. I find that the position of clinical manager is suitable employment for the Worker as defined by section 32A of the 1987 Act.

Rehabilitation consultant/case manager (may be grouped under Welfare, Recreation and Community Arts Worker)

60. The three employer contacts for a rehabilitation consultant/case manager advised that the role was for a physiotherapist, exercise physiologist or occupational therapist to assess injuries, analyse and develop plans for physical upgrades, and undertake report writing. The role requires the worker to instruct a client to adopt specific postures for the purpose of objectively measuring functional capacities and does not require the worker to undertake any manipulation or twisting of the wrists. The worker would also be required to liaise with doctors and rehabilitation specialists for the purpose of determining a client's functional capacity.
61. The employer contacts confirmed there is no lifting required in the role and the worker would not be required to twist his/her wrists in the role and there was no lifting/carrying or manipulation undertaken by the consultant.
62. Having reviewed the information contained in both vocational reports, I accept that the role is within the Worker's functional tolerances.
63. The Worker's career has been as a physiotherapist for 16 years, including a 7 year period of being a practice manager. He has worked with clients undertaking assessments, designing treatment programs and liaised with medical professional, case workers and worker's compensation rehabilitation services. Given this work history and that the role requires a worker with a physiotherapy, exercise physiology or occupational therapy background, I accept that the Worker has the necessary education, skills and work experience to undertake the role as a rehabilitation consultant/case manager. Further, there are no age related considerations for the position.
64. I find that the role of rehabilitation consultant/case manager is suitable employment for the Worker as defined by section 32A of the 1987 Act.

Current work capacity

65. As The Worker is not able to return to work in his pre-injury employment, and I have found that he is able to return to work in suitable employment, I therefore find that the Worker has current work capacity pursuant to section 32A of the 1987 Act.

Pre-injury average weekly earnings (PIAWE)

66. The Worker does not dispute the amount arrived at by the Insurer for his PIAWE and accepts the figure of \$1,700.00.
67. I will proceed on this basis.

Entitlement periods for ongoing weekly payments

68. 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.
69. The Insurer, in its reply to an application for merit review, indicated that the Worker has received 46 weeks of weekly payments of compensation.
70. I therefore find that the Worker’s entitlement to weekly payments of compensation currently falls in the second entitlement period and is to be calculated in accordance with section 37 of the 1987 Act.
71. The Worker has current work capacity. Section 37(3) of the 1987 Act provides the basis upon which his entitlement to weekly payments of compensation is to be calculated, 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

72. “AWE” means the worker’s pre-injury average weekly earnings (PIAWE).
73. The Worker’s PIAWE is \$1,700.00 and this matter is not in dispute.
74. “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.
75. “D” is the amount of any non-pecuniary benefits which is nil.

Ability to earn in suitable employment

76. I have found the vocations of clinical manager and rehabilitation consultant/case manager to be suitable employment options for the Worker.
77. The employer contacts in the most recent vocational assessment report dated 5 December 2016 indicate the following hourly rates for the positions:
- Clinical manager:** \$42.00, \$45.50 and \$45.00 with the industry average being \$44.16.
- Rehabilitation consultant/case manager:** \$32.50, \$33.00 and \$35.00 with an industry average of \$33.50.
78. Although the Worker has experience as a physiotherapist and practice manager, I believe the best reflection of what he is able to earn in each of these positions is the industry average as it

would be a new vocation for him and employers would need to weigh his ability and experience in this role with that of other applicants.

79. As the amount of the clinical manager has the highest industry average rate of \$44.16 per hour, I find the amount of \$44.16 per hour is the amount the Worker is able to earn in suitable employment.
80. I therefore find the Worker's ability to earn in suitable employment to be \$44.16 per hour for 38 hours per week (being the industry standard), being \$1,678.08 per week.
81. The Insurer is to calculate the Worker's entitlement to weekly payments of compensation in accordance with my findings.

Merit Review Service
Delegate of the State Insurance Regulatory Authority