



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.
3. The Worker is able to earn \$1,156.80 per week in suitable employment.

RECOMMENDATION BASED ON FINDINGS

4. No recommendation is made in relation to these findings.

BACKGROUND

5. The Worker injured his lower back in the course of his duties while working as a baggage handler in the domestic terminal.
6. The injury manifested itself in a gradual onset of pain after he returned to this role following a three or four year secondment in a desk-based job.
7. The Worker remained with his pre-injury employer until late 2016. His employment was terminated at this time.
8. The Insurer made a series of work capacity decisions that resulted in the Worker's entitlement to weekly payments of compensation being reduced to nil. The Worker was notified of the decisions by a letter dated that day.
9. The Worker applied for an internal review of the insurer's decisions. The Insurer conducted the review, affirming the original work capacity decisions.
10. The Authority received the Worker's application for merit review. The application has been accepted.

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.

INFORMATION CONSIDERED

14. 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

15. In the application for merit review and a subsequent email from the Worker’s legal representative, the Worker has requested a review of the following work capacity decisions of the Insurer:
 - His current work capacity.
 - Suitable employment options.
 - His ability to earn in suitable employment.
16. In the application for merit review, the Worker’s submissions may be summarised as follows:
 - The work capacity decision relies on an out dated WorkCover certification which cites restrictions that are different from the restrictions on his current certificate of capacity.
 - The work capacity decision does not attach any certificates of capacity but relies on them. The decision should therefore be set aside for non-compliance with procedural requirements.
 - His restrictions have changed in accordance with his current certificate of capacity and a physiotherapy report.
 - The work capacity decision does not take into consideration the new restrictions which include a significant reduction in lifting capacity and pushing/pulling and should therefore be set aside.
17. In reply, the Insurer submits:
 - The Worker has current work capacity as per the meaning given by section 32A of the 1987 Act.
 - He is able to work 38 hours per week in suitable employment as per the functional and vocational assessment.
 - There are suitable employment options identified to which the Worker is currently suited in accordance with section 32A of the 1987 Act.
 - The Worker’s entitlement to weekly compensation is to be calculated in accordance with section 37 of the 1987 Act because he has been in receipt of weekly payments of compensation for 91 weeks since the date of his injury.
 - The Worker can work in suitable employment as an administrator, clerk, customer service officer or in a call or contact centre.
 - The Worker does not have permanent impairment of more than 20% whole person impairment and therefore any entitlement is calculated in accordance with section 37 of the 1987 Act.
 - The Worker’s weekly benefits will be reduced to nil from 28 June 2017.

- The Worker is participating in a TAFE course for book keeping/accounting. This course goes for 20 hours per week and is 17 weeks in duration. The course will bolster the Worker's employment opportunities.

REASONS

Nature of merit review

18. A merit review is a review of the work capacity decision/s of the Insurer. It involves considering all of the information that has been provided to me.
19. I will then make findings and recommendations about the work capacity decision/s that have been referred for review.
20. I have noted the Worker's submissions in relation to the process of making and notifying the outcome of the work capacity decision. In particular that it should be "set aside" because of procedural deficiencies. This review is not a review of the Insurer's procedures in making the work capacity decision and/or internal review decision. I am therefore unable to address these submissions in this review.
21. I am required to consider all of the information that has been provided and make findings and recommendations that are most correct and preferable.

Powers of the Authority for conducting a merit review

22. I note that when requesting the internal review by the Insurer, the Worker did not request a review of its findings as to suitable employment.
23. Section 44BB(1)(b) of the 1987 Act states:
An injured worker may refer a work capacity decision of an insurer for review:
by the Authority (as a merit review of the decision) but not until the dispute has been the subject of internal review by the insurer.
24. Although the Worker did not refer the Insurer's findings as to suitable employment for review, the Insurer has reviewed the identified suitable employment options in the internal review decision and I have proceeded with the merit review of the disputed matter on this basis.

Current work capacity

25. The Worker has requested a review of the Insurer's findings as to his current work capacity. This requires me to make a finding in accordance with the definition under section 32A of the 1987 Act which defines 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
26. **Certificates of capacity.** There are three certificates of capacity issued by the Worker's nominated treating doctor (NTD) that have been provided to me. One of the certificates is now almost two years old. I have not relied on it for information as to the Worker's *current* capacity for employment.
27. The most recent certificates of capacity have been provided.
These documents certify that the Worker has capacity for some type of employment for eight hours per day, five days per week with the following physical restrictions:

- No lifting from ground, fit for lifting up to 5kg without bending.
 - Sitting as tolerated.
 - Standing as tolerated.
 - No pushing or pulling.
 - No bending or twisting of the spine.
 - Driving as tolerated.
28. **Other treatment providers.** The Worker's treating physiotherapist wrote to the NTD and indicated that the Worker had experienced an acute disc flare up for the past six weeks. He noted that the Worker had experienced radicular pain down his right leg and that there had been a particular loss of plantar flexion power in that leg.
29. The treating physiotherapist recommended an alteration to the Worker's certificate of capacity based on his symptoms. He indicated that he believed that the Worker should not undertake lifting and that he should stand and walk as tolerated until he could see a specialist.
30. All of the other medical information that has been provided to me is dated in 2015 or prior. This information has provided me with a background as to the Worker's injury and diagnosis but I have not found it to be of assistance in determining his *current* work capacity.
31. **Finding.** The NTD has been treating the Worker since at least 2015 and I am satisfied that he is well acquainted with the Worker's injury and his resulting incapacity. I believe that The NTD's certification of the Worker's capacity is also supported by the opinion of the treating physiotherapist.
32. I therefore find that the Worker has capacity for some type of employment for eight hours per day, five days per week in accordance with the restrictions that are set out above at paragraph 27.

Suitable employment

33. The Worker has requested a review of the suitable employment options that have been identified for him by the Insurer. In making my findings I am required to refer to the definition under section 32A of the 1987 Act.
34. It is important to note that when assessing suitable employment, I am required to have regard to actual work in the labour market.
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. **Overview of age, education, skills and work experience.** The Worker is 45 years old. An occupational rehabilitation services provider prepared a vocational assessment report on the Worker. The report details the Worker's working history from 2006.
37. Since 2006 the Worker has held roles as a recruitment supervisor, resources allocator for domestic baggage, leading hand baggage handler, resource coordinator, administration assistant and in customer service.
38. The Worker is currently completing a Certificate IV in Accounting/Book Keeping. He has enrolled in, but not completed, other courses since he finished year 12.
39. The Worker is able to use email and the internet. He has word processing and data entry skills and is able to use Microsoft Excel and Word. He has used a computer for creating rosters.
40. The occupational rehabilitation service provider identified the following roles as being suitable employment for the Worker:
- Warehouse administration – dispatching/receiving clerk.
 - General clerk/administration assistant.
 - Call or contact centre operator.
41. I will review each of the roles in order.
42. **Warehouse administrators.** The occupational rehabilitation service provider contacted three employers of warehouse administrators. The employers indicated that there was no "heavy manual handling required". The description of each of the roles involved desk based work using telephones and computers. The employers indicated that bending and twisting is not required and that people in this role can move between sitting and standing.
43. I am satisfied on the basis of the description of the activities involved in the roles that no lifting from ground level is required and that holding weights of greater than 5kg is not necessary to undertake a role with the employers who were contacted.
44. According to the vocational assessment report, the minimum education requirement for a warehouse administrator is year 10. The employers indicated that previous administration experience and customer service or experience in despatch and receipt, were desirable. The ability to use Microsoft Word and Excel, take telephone calls, respond to emails and conduct data entry were also required.
45. Having reviewed the Worker's work history, I am satisfied that he has the skills, education and work experience required to work as a warehouse administrator. The Worker has extensive experience in logistics (baggage handling) that I am satisfied is transferable to a different context. He has worked in customer service and has dealt with customers by phone and email and has also conducted data entry.
46. The Worker has been provided with job seeking assistance from an occupational rehabilitation services provider and I have also considered this information and return to work plans that have been provided to me.
47. I am satisfied that the role of a warehouse administrator is suitable employment in accordance with the definition under section 32A of the 1987 Act.
48. **General clerk.** Three employers were contacted for the purpose of determining the requirements of the role of a general clerk. The functional requirements are almost identical to

those of a warehouse administrator. A role as a general clerk is mainly desk based. It requires no apparent lifting or carrying. I am satisfied that it is a role to which the Worker is suited, having regard to the nature of his incapacity.

49. The first employer contacted was a district health service. The role involved work in patient records and included discharge analysis and assembly of inpatient records. The skills required appeared to be more technical in nature than those of a warehouse clerk and required “developed computer skills”. I am not satisfied on the information that has been presented about the Worker’s work experience and skills that he would be suited to this role.
50. The second employer contacted indicated that they required candidates with excellent written and verbal communication skills and the ability to multi-task. I am not satisfied on the description of the Worker’s work experience and skills that he would have the communication skills or appropriate work experience required for this type of employment.
51. The final employer contacted was a government agency. The role at this organisation was that of an administrative assistant.
52. The requirements of candidates for the role were previous experience performing administrative support or similar roles. The duties include general reception, data entry, filing and answering phones. The level of skill and experience described in this role was of a lower level than those of the previous two. I am satisfied that the Worker has the skills and work experience required to carry out this particular role as an administrative assistant.
53. **Call centre operator.** The description of each of the call centre operator roles is of a desk based job in which candidates may move between sitting and standing according to comfort. The description of duties indicates that the requirement to lift or carry weights of greater than 5kg is unlikely. I am satisfied that the Worker would be able to undertake work as a call centre operator when having regard to the nature of his incapacity.
54. The first employer contacted indicated that candidates would be required to undertake a variety of tasks including answering high volumes of inbound calls, making outbound calls, liaising with clients, handling purchase orders and carrying out other administrative tasks. Contact centre experience is considered desirable.
55. The administrative and customer service roles that the Worker has worked in do not appear to have been high volume roles. He has never worked in a call centre environment and does not appear to have worked within teams where a sustained fast pace has been required of him. I am not satisfied that the Worker is suited to such a role based on his skills and work experience.
56. The final role in relation to a call centre operator is that of an appointment setter. Candidates are required to phone potential clients to follow up on leads that have been provided. Good communication and basic computer skills are required.
57. The description of this position indicates that there is a single main task or process to be followed, that of contacting leads, recording the contact and setting appointments. I am satisfied that the role does not require a high degree of skill or experience in the area and that the Worker would be suited to this role when considering his skills and work experience. There are no particular educational requirements for this role.
58. **Findings.** I find that roles as a warehouse clerk, administration assistant and appointment maker are suitable employment for the Worker.
59. I therefore find that the Worker has current work capacity in accordance with section 32A of the 1987 Act.

Ability to earn in suitable employment

60. Of the employment that I have found to be suitable for the Worker, the role of an administrative assistant with the government agency offers the highest rate of pay, being \$60,154 per year.

61. I have calculated the weekly rate of pay as follows:

$$\$60,154/52 = \$1,156.80$$

62. I find that The Worker is able to earn \$1,156.80 per week in suitable employment.

**MERIT REVIEW SERVICE
DELEGATE OF THE STATE INSURANCE REGULATORY AUTHORITY**