



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 the capacity to work 40 hours per week.
3. Employment as a business analyst/research and development manager constitutes “suitable employment”, as defined in section 32A of the *Workers Compensation Act 1987* (the 1987 Act), for the Worker.
4. The Worker’s entitlement to weekly payments of compensation under section 37(2) of the 1987 Act is calculated to be nil.

RECOMMENDATIONS BASED ON FINDINGS

5. Under section 44BB(3)(e) of the 1987 Act the Authority may make binding recommendations to an insurer based on findings of its review.
6. The Authority does not make a recommendation for the reasons below.

BACKGROUND

7. The Worker sustained an injury to his left and right arms during the course of his employment as an asbestos remover.
8. The Insurer accepted liability for the injury. The Worker has received weekly payments of compensation for incapacity resulting from that injury.
9. In its work capacity decision, the Insurer calculated the Worker’s entitlement to weekly payments of compensation to be \$0.00. The Insurer decided that:
 - The Worker has the capacity to work 40 hours per week
 - The role of business Analyst/Research and Development Manager is suitable employment the Worker
 - The Worker is able to earn \$1,720.80 gross per week in suitable employment
 - The Worker’s current weekly earnings are \$1,066.00
 - The Worker’s PIAWE is \$1,060.00 per week.

10. The Worker referred the Insurer's decision for internal review. The Insurer affirmed in its internal review that the Worker's weekly payments were to be calculated at \$0.00 per week.
11. The Worker made an application for merit review to the Authority. The application for merit review was received by the Authority. The application has been made within time under section 44BB(3)(a) of the 1987 Act.

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.

INFORMATION CONSIDERED

15. The information 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 provided to the Authority and exchanged between the parties.

SUBMISSIONS

16. In the application for merit review, the Worker submits:
 - There is misrepresentation of information to conclude that he is able to work a standard 40 hours per week based solely on the [certificate of capacity] issued by the former NTD.
 - The 40 hour per week modified suitable duties also includes all the requirements on the back to work plan. All of which make up his 40 hour work week as agreed by the Insurer, rehabilitation provider, employer, treating doctor and himself.
 - The Insurer has set aside and has excluded factors surrounding his work week had has made a prejudicial decision understanding what his work week entails to suspend the compensation portion of his claim.
 - The fact that he still requires treatment and he still has driving issues and he has months of physiotherapy to complete.
17. In reply, the Insurer submits (in summary):
 - The Worker's capacity to work 8 hours per day, 5 days per week, has remained consistent.
 - It arranged a case conference with the former NTD to investigate the changes in the Worker's certification. Following the case conference, the former NTD issued a certificate of capacity that again confirms that the Worker has the capacity to work 8 hours per day, 5 days per week.

- The Worker has been able to demonstrate, and continues to demonstrate, an ability to work 8 hours per day, 5 days per week in suitable duties. This is confirmed by the Worker's payslips.
- The Worker has been working with no economic loss.
- The role of business analyst/research and development manager was identified as suitable employment for the Worker. The former NTD approved the roles as suitable. The Worker has the ability to earn \$43.02 or \$1,720.80 per week in that role.
- The Worker's entitlement to weekly payments of compensation is calculated to be nil under section 37(2) of the 1987 Act.
- The Worker has not been in receipt of weekly benefits. No notice under section 54 is applicable.

18. Both the Insurer and the Worker have provided further submissions to the Authority that I have read and considered. I note the following submissions made by the Worker (in summary):

- The certificate of capacity does not indicate exactly what his restrictions are and does not denote the actual hours he works.
- The Insurer told the former NTD to exclude any and all consideration and information as it pertained to his carpal tunnel syndrome.
- He does not dispute the Insurer's decision about the amount of his PIAWE.
- He is very capable of the positions identified in the vocational assessment. His dispute is that he has been and still is on home duties and those positions require extensive travel which he is unable to do at this time. Currently, he is unable to attain any of the proposed positions with his current physical capacity to fulfill the job requirement as those positions are not available in the area and within his travel restrictions. The employers he contacted provided him totally different information on his ability to earn a fulltime income; based on his current situation.
- He is unable to secure full-time employment because of his restrictions.
- Statistics show that 63% of people that had a shoulder injury develop carpal tunnel syndrome or some kind of nerve incapacity.
- The work capacity decision made by the Insurer was premature, with notable information excluded.
- The Worker provided additional project information whilst undertaking suitable duties and further submissions following receipt of an injury management consultation report prepared by the independent management consultant 1. In summary, the submissions include:
 - He was in pain the whole time during the examination.
 - How can the independent management consultant 1 determine that there is no clear causality between his wrist symptoms and employment? The independent management consultant 1 offers no medical advice on how he acquired the injury.
 - There is no medical evidence of any kind of left shoulder injury during or after his football season.
 - He has never worked 40 hours per week when undertaking home duties.
 - The opinion that he is good to go on public transport without observance cannot be determined by opinion only.

- The overuse and continued complaints and concerns with his left arm should have been considered. Those symptoms only came about since the suitable duties were assigned.
- He has tension headaches 24/7. The Worker also describes his functional capacity and tolerances.
- The role of injury management consultant is distinctly different from an independent medical examiner. It is not the role of an injury management consultant to comment on the appropriateness of treatment, diagnostic procedures, or liability of a worker's compensation claim.
- The Insurer has attempted on a number of occasions to convince the current NTD to upgrade him, and have failed.
- At the moment the GP has the best handle of the situation he is the only medical practitioner that is truly independent.

REASONS

Nature of merit review

19. The Worker has made submissions the work capacity decision(s) made by the Insurer was premature, with notable information excluded. These submissions concern the processes and procedures of the Insurer, which is outside the scope of this review. This is a merit review under section 44BB(1)(b) of the 1987 Act of a work capacity decision of an insurer. It is not a review of an insurer's procedures in making a work capacity decision.
20. The review requires I consider all of the information before me substantively on its merits and make findings and recommendations that, in light of the information before me, are most correct and preferable.
21. The Worker has provided several submissions relating to a diagnosis of carpal tunnel syndrome. The Worker submits he sustained this injury while undertaking suitable duties and he has made a claim for compensation.
22. I recognise from the information before me that the Worker's carpal tunnel syndrome is a genuine and practical barrier to undertaking certain types of employment and on the number of hours that he can work.
23. However, the Insurer has issued a section 74 notice, declining liability for the claimed carpal tunnel injury. That decision is a decision that is not amenable to review by the Authority.
24. Accordingly, this review will be confined to consideration of the Worker's capacity for employment in relation to the injury in respect of which the Insurer has accepted liability, being the left shoulder and right elbow.

Current work capacity and suitable employment

25. The Worker sustained an injury to his left shoulder and right elbow . He was at that time working as an asbestos remover.
26. On the occasion of injury, the Worker was pulling a 'misting machine' out of mud. It was when he pulled it up that he noticed a twinge in his left shoulder and a burning sensation in his right elbow.
27. The Worker underwent a left shoulder arthroscopy, biceps tendon tenodesis and a subacromial space decompression. There are several reports before me which pre-date the Worker's shoulder surgery. They include treating doctor, specialist, allied health provider and

independent reports. Those reports have provided me with an understanding of the treatment and management of the Worker's injury at the time they were issued.

28. However, I am required to assess the Worker's current capacity for employment. Given the timing of the Worker's shoulder surgery, I place more weight to the recent reports before me.
29. The current opinions assessing the Worker's capacity for employment are provided by the treating orthopaedic surgeon, the former NTD, the current NTD, the injury management consultant 2 and the injury management consultant 1.
30. The treating orthopaedic surgeon reviewed the Worker and reported to be "very pleased" with the Worker's progression post-surgery. He reports having encouraged the Worker to consider a sedentary role at work. The treating orthopaedic surgeon says that statistically it will be better for the Worker's overall recovery and return to work.
31. The independent management consultant 2 examined the Worker and notes that the Worker was 10 weeks post-surgery and says he found the Worker's complaints of significant pain with very limited movement in the left upper limb "difficult to explain based on organic grounds." The independent management consultant 2 recommends that the Worker is fit for suitable duties of a sedentary or clerical nature over 8 hours, 5 days per week.
32. The Worker returned to work undertaking the role of a researcher. The former NTD certified the Worker capable of working for 8 hours per day, 5 days per week at that time.
33. The treating orthopaedic surgeon also states in his report it is "fantastic" the Worker accepted a new role at work.
34. The former NTD certified the Worker capable of working 40 hours per week, which is to include 1 day of job searching, 16 hours of home physiotherapy, 16 hours of production, less travelling time to medical appointments.
35. A medical case conference was arranged with the former NTD, the Worker, the Insurer and the rehabilitation provider. The case conference summary reports that the former NTD was advised that the Worker's capacity for employment should not include hours involved in job seeking or treatment.
36. The former NTD then issued a certificate of capacity recommending that the Worker can work for 8 hours per day, 5 days per week. He removed any hours previously placed on job searching and physiotherapy from his assessment of the number of hours the Worker can work in employment. There are no further certificates prepared by the former NTD before me.
37. The Worker consulted with the current NTD and was certified with the capacity to work 5.5 hours per day over 3 non-consecutive days.
38. The independent management consultant 2 conducted a file review and contacted the current NTD. The current NTD advised that the Worker's hours of work were reduced because he presented with difficulties managing his pain. The current NTD said there were perceptions of the former NTD being "pressured" into certifying the Worker fit for full hours when the Worker was not able to cope with full hours. The independent management consultant 2 disagreed with the current NTD. He found it difficult to accept that the Worker "could perform no activity whatsoever for 2 days of the week."
39. The independent management consultant 2 advised the current NTD that a return to a full shift of sedentary duties was seen with many other individuals who had sustained unilateral shoulder injuries. The current NTD says he accepts this, but he feels that the Worker's difficulty in managing his pain necessitated a downgrade. The current NTD said to the independent management consultant 2 that the Worker "was becoming more depressed and that this was a barrier with his return to work." The current NTD had agreed to "attempt an upgrade" in the Worker's hours of work at the next review.
40. The next certificate issued by the current NTD maintains that the Worker is able to work for 5.5 hours per day over 3 non-consecutive days per week.

41. The independent management consultant 1 reviewed the Worker. By reports, the independent management consultant 1 details his conversation with the current NTD. There is a mutual agreement that the Worker presents with “significant pain problems.” However, the independent management consultant 1 in considering the Worker’s pain and his findings on examination, recommends is that the Worker “should be able to do sedentary work for 40 hours per week.”
42. I am satisfied that the Worker has the capacity to return to some type of employment in light of the medical opinions above.
43. There are divergent opinions of how many hours per week the Worker can work. The current NTD’s opinion that the Worker is limited to part-time hours is against the opinions of the independent management consultant 2, the former NTD and the independent management consultant 1. The treating orthopaedic surgeon does not offer an opinion on the number of hours that the Worker can work.
44. I acknowledge that the Worker submits there has been a misrepresentation of information to conclude that he is able to work a standard 40 hours per week based solely on the certificate of capacity issued by the former NTD. However, following a case conference where the former NTD was asked to specify his opinion on the number of hours that the Worker can actually work, he issued a certificate of capacity that certified the Worker capable of undertaking some type of employment for 40 hours per week.
45. I also acknowledge the current NTD’s comments that the Worker “was becoming more depressed and that this was a barrier with his return to work.” However, I find it significant that the current NTD had said that the Worker’s difficulty in managing his pain had necessitated the downgrade and he does not provide a psychological diagnosis in either of certificate of capacity that he has issued before me.
46. The Worker submits that the GP has the best handle of the situation he is the only medical practitioner that is truly independent.
47. However, in this instance and given the details provided in the medical information, I am persuaded by the balance of medical opinions before me. I find that the Worker has the capacity to undertake some type of employment for 40 hours per week.
48. In assessing whether the Worker has “current work capacity” or “no current work capacity”, I am required to refer to the definitions under section 32A of the 1987 Act:

***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*

49. The definitions require me to consider whether the Worker can return to work in his *pre-injury employment* and *suitable employment*.

Pre-injury employment

50. 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. I will proceed on that basis.

Suitable employment

51. “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.

52. Before I set out my findings in relation to suitable employment, it is important that I address the Worker's submissions. He has raised concerns with the travel times in relation to travel from his home to potential employment sites. Further, the current NTD has advised on the certificate of capacity that the Worker is to "travel within [a] 30 minute radius of home."
53. When I am assessing whether or not employment is "suitable employment" in accordance with the definition above, I must do so "regardless of the worker's place of residence." I am therefore not able to consider travel time to and from a potential employment site when determining whether a particular role is a suitable employment option.
54. The rehabilitation consultant conducted an earning capacity assessment of the Worker on behalf of the rehabilitation provider. His findings and recommendations are set out in a report.
55. The rehabilitation consultant proposes employment as a business analyst/research and development manager constitutes suitable employment for the Worker.
56. The typical duties of the role are detailed in page 14 of the vocational assessment. Both the rehabilitation consultant and the three employers he reports contacting advised those duties are sedentary in nature. I accept this.
57. The balance of medical opinions before me support that the Worker can undertake sedentary employment. The former NTD and the independent management consultants have directly approved the role of business analyst/research and development manager to be suitable for the Worker. I have detailed the treating orthopaedic surgeon's encouragement for the Worker to return to work in sedentary employment.
58. I note that the current NTD has recommended that the Worker is limited to 30 minutes keyboard duties at a time. He recommends that the Worker is to take breaks as required if he is in pain or his muscles are fatigued. I also note the Worker's submission that his return to work plans indicate he must cease an activity if it causes him significant increased pain to either upper limb.
59. However, in my view, the current NTD's recommendation that the Worker is to limit keyboard duties to 30 minutes at a time, in relation to his accepted left shoulder and right elbow injury only, is against the weight of the medical opinions before me.
60. For instance, the independent management consultant 1 recommends that "if one were to consider the non-compensable wrist injuries, the Worker should avoid repetitive use of the hands, including data entry" but having

regard to any incapacity arising from the Worker's left shoulder and right elbow injury only, the Worker "should be able to do sedentary work up to 40 hours per week" and there is no restriction placed on the Worker using a keyboard.

61. I find the independent management consultant 1's recommendations persuasive. This is because his opinion that the Worker can undertake sedentary work, having regard to his accepted injury only, is supported by the independent management consultant 2, the former NTD and the treating orthopaedic surgeon. They also make no mention that the Worker has any incapacity when using a keyboard.
62. I acknowledge that the treating orthopaedic surgeon advised in a report that the Worker's shoulder will "typically be OK if it is moving but when it is still for a prolonged period of time such as when he is on the freeway, he will get a nagging achy discomfort in his left shoulder." However, that is the same report that the treating orthopaedic surgeon expressed it was fantastic that the Worker accepted a new role that is sedentary in nature.
63. Further, in reading the description of the role as provided by the rehabilitation consultant and the expressed employer comments, it is my view that there are a variety of tasks available to employees that would allow for changes of posture, such that the Worker could move his shoulder if necessary in the role to avoid the "nagging achy discomfort in his left shoulder."
64. For instance, the rehabilitation consultant describes that frequently standing and walking on site is a "key functional" demand of the role. Further, there is no indication to suggest that employees could not stretch or move about their arms when working in front of a computer.
65. The employers comment that employees occasionally lift light office supplies that are less than 5 kilograms, and occasionally squat to obtain documents and files. The opinions provided by the former NTD, the treating orthopaedic surgeon, the independent management consultant 2, the independent management consultant 1 and the current NTD support the Worker is able to undertake those activities.
66. I have considered the duties required in the role, the expressed employer comments and the medical opinions supporting the Worker is suited to the role.
67. On that information, I am satisfied that on balance the Worker is suited to employment as a business analyst/research and development manager when having regard to the nature of his incapacity. There are positions offered in the labour market that do not require lifting more than 5 kilograms or lifting above shoulder height. the rehabilitation consultant and the employers he contacted advised driving is not required of the role.
68. In considering the Worker's work experience, I note that he had worked as a regional business development manager, a chief operations officer, a SME business consultant, an associate director, a principal consultant, an investigator and an asbestos removalist. He is currently employed as a researcher.
69. The Worker describes in his resume that he developed a level of skill and experience that is extremely broad when it comes to business operations, recruitment, research and development, project management, HR, C level interactions and executive business analyst.
70. I am satisfied that in his previous employment, the Worker would have developed skills transferrable to many of the duties the rehabilitation consultant report is required as a business analyst/research and development manager. This includes his report writing abilities, investigative abilities, consultation skills and interpersonal/communication skills.
71. Further, the employers contacted by the rehabilitation consultant all stated that they would consider hiring the Worker based on his work experience.
72. The Worker holds a Business Administration Degree and a Master of Business Administration. The Worker has also obtained a Financial Property Investment Advisor / Industrial Health Insurance Underwriting / Pre-Financial Advisement and Securities Certification. He is a Licenced Certified Executive Business Analyst. He also completed a Certificate III in Investigation Services.

73. I consider the Worker's education supports his comments, and the comments made by the rehabilitation consultant and the employers he contacted, that he has the necessary qualifications to undertake the role.
74. I am satisfied that the Worker is currently suited to employment as a business analyst/research and development manager having regard to his age, education, skills and work experience.

Finding on suitable employment

75. For the reasons set out above, and in light of the relevant considerations provided in the definition of suitable employment, I am satisfied that the role of a business analyst/research and development manager is employment in work for which the Worker is currently suited.
76. I find that the Worker is able to return to work in suitable employment.

Finding on current work capacity

77. I am satisfied 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 but he is able to return to work in suitable employment.
78. I find that the Worker has current work capacity as defined by section 32A of the 1987 Act.

Calculation of entitlement

79. The Insurer's reply form indicates that the Worker has received 54 weeks of weekly payments, and there is no dispute about this. This currently places him in the "second entitlement period" as defined in section 32A of the 1987 Act.
80. The Worker is currently working more than 15 hours per week, so section 37(2) is to be applied to calculate his rate of weekly payments:

(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.

81. Section 35 of the 1987 Act sets out the factors to determine the rate of weekly payments:

AWE means the worker's pre-injury average weekly earnings. The Insurer determined the Worker's AWE is currently \$1,060.00. The Worker confirmed to the Authority that he does not dispute this decision of the Insurer.

D is the value of any non-pecuniary benefits. The Insurer decided the value is \$0.00 and this has not been disputed.

MAX means the maximum weekly compensation amount. The maximum weekly compensation amount "MAX" does not apply in this case because the rate of $(AWE \times 95\%) - (E + D)$ results in a lesser calculation.

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.

The Worker's ability to earn in suitable employment

82. I have found the Worker is able to work for 40 hours per week. I have also found that employment as a business analyst/research and development manager is suitable employment for the Worker.
83. The rehabilitation consultant's labour market contacts report that employees earn between \$35.42 and \$43.02 per hour in the role.
84. In my view, the Worker has the skills and functional capacity to perform each of those identified roles. Given the Worker's extensive work experience relevant to the role, his education and skills, I consider the Worker is able to earn the higher amount, being \$43.02 per hour in the role. As I have indicated, this is the highest amount identified by each of the three employers contacted. The employer's all advised the role was available for full time hours of 8 hours per day, 5 days per week.
85. I find that the Worker is able to earn \$1,720.08 (\$43.02 x 40 hours per week) in employment as a business analyst/research and development manager.
86. I note that other vocational options were identified as suitable employment for the Worker on the information before me, including his current role as a researcher. However, as the earnings associated with those roles are less than the amount that I have found the Worker is able to earn as a business analyst/research and development manager, I have not assessed the suitability of those roles.

Current weekly earnings

87. The Worker's payslips indicate that he is paid \$26.65 per hour for 40 ordinary hours of work. I therefore calculate his current weekly earnings as \$1,066.00 (\$26.64 per hour x 40 hours per week).

Calculation

88. I have determined the Worker has the ability to earn \$1,702.08 per week and this is the amount to be substituted as "E" in the formula provided by section 37(2) of the 1987 Act, except in instances where the Worker's current weekly earnings exceed that amount.
89. In accordance with section 37(2) of the 1987 Act, I calculate the Worker's entitlement to weekly of compensation to be \$0.00:
$$(AWE \times 95\%) - (E + D) = (1,060.00 \times 95\%) - (\$1,702.08 + \$0.00) = \$0.00.$$
90. As I have arrived at the same conclusion as the Insurer regarding the Worker's entitlement to weekly payments of compensation, I have made no recommendations under section 44BB(3)(g) of the 1987 Act.

Merit Review Service
Delegate of the State Insurance Regulatory Authority