



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 and are to be the basis for the Insurer's review decision.
2. 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.
3. The Worker is able to return to work in suitable employment.
4. The Worker has current work capacity.
5. The Worker is able to earn \$999.40 per week in suitable employment.

RECOMMENDATIONS BASED ON FINDINGS

6. The following recommendations made by the Authority are binding on the Insurer and must be given effect to by the Insurer in accordance with section 44BB(3)(g) of the *Workers Compensation Act 1987* ("the 1987 Act").
7. In accordance with section 37(3) of the 1987 Act, the Worker is entitled to weekly payments of compensation in the amount of \$499.06 from 29 March 2017 to 5 June 2017 (subject to any notice period required under section 54 of the 1987 Act)
8. In accordance with section 37(3) of the 1987 Act, the Worker is entitled to ongoing weekly payments of compensation in the amount of \$32.07 from 6 June 2017.

BACKGROUND

9. The Worker sustained an injury to his lower back in the course of his employment as a Concreter/Crew Leader with Employer 1.
10. The Worker continued to work following his injury, returning to work on a graduated

return to work program. In February 2017 he commenced employment with Employer 2.

11. The Worker recently ceased working and is currently not employed.
12. The Worker has been in receipt of weekly payments of compensation from the Insurer.
13. The Insurer made a series of work capacity decisions resulting in the reduction of the Worker's entitlement to weekly payments of compensation to nil under section 37 of the 1987 Act. The Insurer determined that the Worker had the capacity to work 40 hours per week within his physical capabilities, that the role of Leading Hand was suitable employment for him, that the amount of his pre-injury average weekly earnings ("PIAWE") was \$1,873.08 (including overtime & shift allowances) and that he had the ability to earn \$1,400.00 per week.
14. The Worker applied for internal review of the Insurer's decisions. The Insurer conducted an internal review and made similar decisions, resulting in the same outcome.
15. The Worker made an application for merit review by the Authority. The application was received. The application has been made within 30 days after the Worker received notice of the internal review, as is required under section 44BB(3)(a) of the 1987 Act. The application has been lodged in the form approved by the Authority.

LEGISLATION

16. 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).
17. Section 43 of the 1987 Act describes a "work capacity decision".
18. Section 44BB of the 1987 Act provides for merit review of a work capacity decision of the Insurer, by the Authority.

SUBMISSIONS

19. In the application for merit review, the Worker makes the following submissions:
 - The fair notice letter was issued and there was new information included in the work capacity decision.
 - His current role has been modified and does not constitute suitable employment as a Leading Hand.
 - The role of Leading Hand has not been assessed for its physical requirements in line with his current restrictions. It also has not been assessed by a rehabilitation provider.
 - No job seeking assistance has been provided.
 - His current employment is casual in nature.

20. In the reply to the Worker's application for merit review, the Insurer provides extracts of its work capacity decision and internal review and makes the following submissions:

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

21. The Worker made the following further submissions:

- He is not disputing the pre-injury average weekly earnings amount. He is disputing the "current work capacity decision" which has been made focusing mainly on suitable employment without any assessment of the current employment.
- He would like the merits of the decision reviewed and all aspects of the decision reviewed including the 'inclusion of new information between the fair notice period and work capacity decision.
- He would like to note that he was not able to maintain his employment with Employer 2 and is no longer working in that role.
- He requested assistance to find employment through rehab which also did not occur.
- He notes that the roles in the vocational assessment do not and did not match his current certification. The report also talks about modifying the role, hence being suitable duties and not suitable employment.

DOCUMENTS CONSIDERED

22. The documents I have considered in this review are those listed in, and attached to, the application for merit review, the Insurer's reply and any further information provided by the parties.

23. 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.

24. In respect of the Worker's submission regarding the Insurer considering new information in the work capacity decisions that were not provided to him in the fair notice period, I note that this is a matter relating to the processes and procedures of the Insurer. Due to the nature of this review, outlined below, I have not addressed this matter in this review. For the purposes of this review, I note the Worker has had the opportunity to review all of the documents and make submissions to the Authority in respect to the documents considered.

REASONS

Nature of merit review

25. This matter involves a merit review of the Insurer's work capacity decision in accordance

with section 44BB(1)(b) of the 1987 Act.

26. The review is not a review of the Insurer's processes in making the work capacity decision and/or the internal review decision. The review requires that I consider all of the information before me substantively on its merits and make findings and recommendations that, in light of the information before me, are most correct and preferable.
27. The Authority is only able to review the work capacity decisions of an insurer that are referred for review by a worker in accordance with section 44BB of the 1987 Act.
28. Section 43(1) of the 1987 Act describes the various types of work capacity decisions that can be made by an Insurer.
29. The Worker has advised the Authority in his application for merit review that he seeks the Authority review the following work capacity decisions of the Insurer:
 - His current work capacity
 - What constitutes suitable employment for him
 - The amount he is able to earn in suitable employment
 - Whether, as a result of his injury, the Worker is unable (without substantial risk of further injury) to engage in employment of a certain kind because of the nature of that employment
 - Any other decision that affects his entitlement to weekly payments of compensation, including a decision to suspend, discontinue or reduce the amount of the weekly payments of compensation payable to him on the basis of any of the above decisions.
30. Accordingly, I will be reviewing the above decisions, with the exception of a decision in respect to "whether, as a result of his injury, the Worker is unable (without substantial risk of further injury) to engage in employment of a certain kind because of the nature of that employment" as the Insurer has not made a work capacity decision in this respect on the notices before me.

Current work capacity

31. The Worker experienced a sharp pain in his lower back and pain radiating down to his right thigh while shovelling wet concrete. He was working as a Concreter/Crew Leader with Employer 1 at the time. His back injury has been associated with repetitive manual heavy handling tasks involved in that role.
32. Following his injury, the Worker returned to work on a graduated return to work program and on suitable duties. He continued to work in this role until approximately February 2017 when he commenced employment as a Leading Hand with Employer 2. In approximately May 2017, The Worker ceased working in this role and is currently not employed.
33. The Worker has been treated conservatively since his injury with medication, physiotherapy, hydrotherapy and a cortisone injection.
34. The Worker's nominated treating doctor (NTD) issued a report with the diagnosis of

"right posterolateral disc protrusion at LS/51 levels with early impingement upon the right 51 nerve root at the lateral recess" and opined that the Worker was totally unfit for work.

35. A Consultant Occupational Physician reviewed the Worker. In his initial report, he stated that a return to suitable work duties with reduced hours was appropriate for the Worker and that further workplace review and medical consultation was required prior to upgrading his hours of work. He opined:

I consider that the following medical restrictions may reasonably be considered for the Worker :
nil lifting weights of greater than 10kg on an occasional basis; to avoid extended and/or repetitive lifting and bending tasks, to maintain a variety of work postures.

36. In the more recent report the Consultant Occupational Physician notes that the Worker had experienced an exacerbation of his injury that week while pushing tools at work. He states: "based upon today's review, it is evident that [he] has experienced more low grade episodes as documented above". The Consultant Occupational Physician does not specifically refer to capacity for work in this report, focusing more on the Worker's employment and duties at work at that time.

37. The Worker underwent a functional assessment with Physiotherapist 1. The results of the assessment are outlined in an Earning Capacity Assessment report. The Physiotherapist 1 assessed that the Worker was fit for "light levels of work" and was "capable of working up to full time hours 38 hours per week) provided an appropriate work environment/work duties were available". The Physiotherapist 1 made the following recommendations:

- Lifting up to 6.5 kilograms bilaterally from floor to waist height, and lifting up to 6.5 kilograms bilaterally from waist to chest height
- Carrying up to 11.5 kilograms with the left arm, 13.5 kilograms with the right arm and 11.5 kilograms bilaterally
- Avoid repetitive twisting and bending of the lumbar spine
- Avoid sustained or repetitive squatting
- Avoid working in a stooping position
- To alternate postures or perform stretches or take mini rest breaks on as required basis.

38. The Physiotherapist 1 opined that the Worker had the physical capacity to perform the roles of Light delivery Driver, Light Courier Driver and Webster Packer, "provided that the above limitations are made available".

39. The Occupational Physician 2 reviewed the Worker and produced a report. He did not give a specific opinion regarding capacity for work however noted that the Worker reported developing constant lower back pain after he worked for two days in a row. The pain also radiated to his right knee and left buttock. Occupational Physician 2 recommended the Worker continue with hydrotherapy and physiotherapy, consultation

with his specialist and to consider neuro-surgical intervention.

40. A Neurosurgeon & Spine Surgeon is the Worker's treating specialist. There are a number of his reports before me dating back to 8 June 2016. In the most recent report, he notes that he last reviewed the Worker on 17 January 2017. The Worker had an exacerbation of his back injury. The neurosurgeon reports that the Worker's injury had improved significantly and he was working 6 hours per day, 4 days per week at that time. He then reports:

He has been offered a new job which is mainly supervisory foreman. Currently I feel if he were to take that job, I think he is ready for 8 hours a day, 5 days a week, lifting 10 kg from ground level and 20 kg from waist height. He should still try to avoid repetitive bending and twisting.

If he does not take the job and keeps his current position then he should work 4 days a week with his current weight restrictions...

41. There is an email before me from a Rehabilitation Consultant to the Insurer. The Rehabilitation Consultant appears to have attended the Worker's consultation with the neurosurgeon. She provides a summary of the consultation and the neurosurgeon's opinion, noted above. The Worker reportedly advised in the consultation that he had been lifting "more than his current medical restrictions" and the neurosurgeon advised that this was fine as long as it was not repetitive. The neurosurgeon reportedly opined that there was no need for surgery.
42. There are also three reports from a Physiotherapist 2. The most recent notes that the Worker had completed several sessions of a hydrotherapy program. His pain level was reportedly slowly decreasing and there had been functional improvements in his lifting capacity and range of motion since commencing hydrotherapy. The Physiotherapist 2 recommends another eight hydrotherapy sessions to "help promote greater exercise rehabilitation and self-help.
43. The NTD has issued the WorkCover NSW certificates of capacity before me. The certificates date back to 5 June 2016. The Worker was certified as having no capacity for work until 8 July 2016. His certified capacity has since then gradually increased and has been a minimum of 8 hours per day, 5 days per week since 25 October 2016, with the exception of one certificate. In the most recent certificate, he is certified as having capacity to work 8 hours per day, 5 days per week with the following physical capabilities:
- Lifting/carrying capacity: 10kg from ground level and 20kg from waist level
 - Sitting tolerance: no limit
 - Standing tolerance: no limit
 - Pushing/pulling ability: As tolerated
 - Bending/twisting/squatting ability: As tolerated. Avoid repetition.
 - Drivingability: As tolerated
44. When assessing the Worker's current capacity for work based on the above information, I consider the information to be relatively consistent in relation to hours of work and the Worker's physical capabilities. The Worker's capacity for work appears to have improved

over the last months and the opinions indicate that he is able to work full-time in a role that is supervisory or within his physical capabilities. The neurosurgeon and the NTD provide the most recent opinions regarding the Worker's physical capabilities and these opinions are consistent. As the Worker's treating doctors, with regular reviews with the Worker, I give weight to the opinions of these doctors. I am satisfied the Worker's physical capabilities are currently in line with the opinions of the neurosurgeon and the NTD.

45. I find the Worker has capacity to work 8 hours per day, 5 days per week within the physical capabilities outlined in the NTD's certificate of capacity.
46. In order to determine whether the Worker has an entitlement to weekly payments of compensation I am required to determine whether he has "current work capacity".
47. Section 32A of the 1987 Act defines "current work capacity" and "no current work capacity".

"Current work capacity" is defined 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" is defined as:

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.

48. There is no dispute between the parties in relation to the Worker being unable to return to his pre- injury duties and employment. It is accepted that the Worker has a present inability arising from an injury such that he is not able to return to his pre-injury employment.
49. 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

50. Suitable employment is defined in section 32A of the 1987 Act as:

employment in work for which the worker is currently suited:

(a) *having regard to:*

- (i) *the nature of the worker's incapacity and the details provided in medical information including, but not limited to, any certificate of capacity supplied by the worker (under section 448), and*
- (ii) *the worker's age, education, skills and work experience, and*
- (iii) *any plan or document prepared as part of the return to work planning process, including an injury management plan under Chapter 3 of the 1998 Act, and*

(iv) *any occupational rehabilitation services that are being, or have been, provided to or for the worker, and*

(v) *such other matters as the WorkCover Guidelines may specify, and*

{b) *regardless of:*

(i) *whether the work or the employment is available, and*

(ii) *whether the work or the employment is of a type or nature that is generally available in the employment market, and*

(iii) *the nature of the workers pre-injury employment, and*

(iv) *the worker's place of residence.*

51. The Worker is 29 years of age. He completed his school education to a Year 10 level, obtaining his School Certificate, and subsequently commenced an apprenticeship in landscaping. The Worker worked as an Apprentice Landscaper however did not complete the apprenticeship. He then worked as a Concrete Cutter, as a Concreter/Team Leader for Employer 1 and as a Leading Hand with Employer 2.

52. As noted above, the Worker is currently not working. He advised the Authority that he was unable to maintain his employment with Employer 2.

53. An occupational rehabilitation services provider conducted a vocational assessment with the Worker and produced an Earning Capacity Assessment (ECA) report. This report identifies a number of roles as suitable work options for the Worker.

54. Amongst these roles is that of Webster Packer/Light Packer. The duties of this role reportedly include:

- Placing and packing items into boxes or containers
- Labelling various products
- Checking products to reject defective items and packing into boxes or containers.

55. The ECA report notes that the role is classified as 'light/sedentary' in physical demand. Employers contacted in the labour market also reportedly indicated that the role was light/sedentary in nature.

56. In respect to the specific physical demands of the role, it is noted that the lifting and carrying requirements of the role are "as demonstrated" referring to the results of the functional assessment and that there is no squatting or stooping and repetitive bending or twisting required in the role. It is also noted that the role provides one the opportunity to alternate posture, perform stretches or take mini rest breaks on an as required basis.

57. The Worker submits that the roles identified in the vocational assessment do not match his current certification. The ECA report states that the physical demands of the role are within the Worker's certificate of capacity at that time. That certificate however had more limited restrictions than that of the Worker's most recent certificate (paragraph 43). With the exception of the lifting capacity which was a general 15kg. This is in excess

of the Worker's current lifting restriction from ground level which is 10kg. However, three recruitment agents contacted as part of the assessment confirmed that the required lifting from floor level was up to 6.5 kilograms (in line with the demonstrated capacity of the functional assessment).

58. The recruitment agents contacted also confirmed that the Packer roles they were advertising were within the Worker's other capabilities assessed in the Physiotherapist 1's functional assessment. These capabilities were similar and more limited than the Worker's current capabilities outlined in the certificate of capacity.
59. I also note the Physiotherapist 1's assessment that the Worker had the physical capacity to perform the role of Webster Packer.
60. I am therefore satisfied that the physical demands of the role of Webster Packer/Light Packer is within the Worker's current certified capacity.
61. The Worker also submits that the ECA report talks about modifying the role, hence being suitable duties and not suitable employment. I cannot find information in the ECA report to support this submission. The three recruitment agents contacted were advertising for roles packaging pharmaceutical products which are light in nature and would not require the Worker to work outside of his physical capabilities. Accordingly, there are jobs that exist in the labour market of this nature.
62. Based on the above information, I am satisfied that the identified role of Webster Packer/Light Packer is suited to the Worker when having regard to the nature of his incapacity.
63. In respect to the Worker's education, skills and work experience, the ECA report notes that there are no formal qualifications or minimum education requirements for the role and training is provided on the job.
64. The report notes that labour market research indicated that employers require workers who are practical, careful, patient, have attention to detail, good hand eye coordination and are able to follow instructions and work as part of a team.
65. The occupational rehabilitation services provider reports that the Worker is competitive for this role as he has experience in the construction industry working as a Concreter. She states that during his time as a Concreter, he has learned to work in a team as well as unsupervised, work methodically and use a variety of hand and power tools. She also notes that the Worker has been responsible for supervising other concreting staff, giving direction and delegating tasks and he is able to perform routine tasks, sort, pack and label items.
66. The three recruitment agents contacted all indicated that they would be willing to hire someone of similar age group and skills of the Worker.
67. Having regard to the above information and considering the Worker's experience as a Landscaper and in the concreting industry, I am satisfied that the Worker has significant transferrable skills in line with what employers have indicated above that they require.
68. I am satisfied that the role of Webster Packer/Light Packer is suited to the Worker when having regard to his age, education, skills and work experience.

69. When assessing suitable employment, I am also required to have regard to any occupational rehabilitation services that are being, or have been, provided to or for the worker. The Worker makes submissions in respect to job seeking assistance not being provided. It appears from the information before me that the Worker was employed in his pre-injury role and then the role with Employer 2 for most part of the time since his injury. There are a number of reports before me which indicate that occupational rehabilitation assistance was provided to assist the Worker with his pre-injury role following the injury. He was then successful in obtaining the role with Employer 2.
70. I acknowledge the Worker's submissions in relation to his request for job seeking assistance however the information before me does not indicate that the Worker requires significant assistance in this area or retraining to obtain work as a Webster Packer/Light Packer.
71. Having regard to the balance of the factors under the definition of suitable employment in section 32A of the 1987 Act, I find that employment as a Webster Packer/Light Packer constitutes suitable employment for the Worker.
72. I note that the ECA report also identified the role of Delivery Driver and Courier Driver as suitable options for the Worker. However, given the Worker's current certified driving ability of "as tolerated", I am unable to determine on the information before me whether these roles are suited to the nature of the Worker's incapacity, particularly considering the Worker is certified to work full-time. I have also not considered the role of Leading Hand, identified by the Insurer in its decisions, as the Worker is no longer employed in this role and there is minimal information in relation to the role before me.
73. I find 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 is able to return to work in suitable employment as a Webster Packer/Light Packer. I find that the Worker has current work capacity in accordance with the definition in section 32A of the 1987 Act.

Entitlement periods for ongoing weekly payments

74. 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.
75. The Insurer indicates in their reply to the application for merit review that the Worker

had received 50 weeks of weekly payments. I am therefore satisfied that at the date of this review, the Worker's weekly payments of compensation will be in the entitlement period between 14 and 130 weeks of weekly payments.

76. The Worker's entitlement to weekly payments of compensation therefore currently falls in the second entitlement period and is to be calculated in accordance with section 37(3) of the 1987 Act, as follows:

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.

Ability to earn in suitable employment

77. I have found above that the Worker has the capacity to work full-time and that work as a Webster Packer/Light Packer constitutes suitable employment for him.
78. The ECA report states that the average earnings for this role based on "current pay rate in the open labour market" is \$999.40 gross for 38 hours per week. I note that the Worker is certified to work 40 hours per week however given that 38 hours is the national standard for full-time hours per week, I accept this to be the Worker's ability to earn if he were to work in this role.
79. I find that the Worker has the ability to earn \$999.40 per week in suitable employment.

Calculation of entitlement

80. In order to determine "AWE" for the purposes of the formulas provided by section 37 of the 1987 Act, the Worker's pre-injury average weekly earnings ("PIAWE") must be calculated. The Insurer has determined the Worker's PIAWE to be \$1,873.08. The Worker advised that he did not wish to refer the Insurer's calculation of PIAWE to the Authority for review.
81. The Insurer indicates in its internal review that the Worker's PIAWE drops to \$1,289.34 as of 6 June 2017 as a result of his overtime and shift allowances being removed after 52 weeks of weekly payments, in accordance with Section 44C(5) of the 1987 Act.
82. The amount of \$1,289.34 will therefore be used as The Worker's "AWE" for the purposes of the above formula.
83. "D" is the amount of any non-pecuniary benefits which is currently nil.
84. "MAX" means the maximum weekly compensation amount, which is referred to in section 34(1) of the 1987 Act and is currently \$2,084.90 (indexed as at 1 April 2017).

85. "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.

86. I have found above that the Worker has the ability to earn \$999.40 per week in suitable employment. "E" is therefore \$999.40 for the purposes of the above formula except in circumstances where the Worker might return to work and his current weekly earnings are higher than that amount, in which case "E" would be the amount of his current weekly earnings.

87. Applying the formula in section 37(3)(a) of the 1987 Act, the Worker's entitlement is calculated as follows:

$$\begin{aligned} & (\text{AWE} \times 80\%) - (\text{E} + \text{D}) \\ & (\$1,289.34 \times 80\%) - (\$999.40 + \$0.00) \\ & = \$1,031.47 - \$999.40 \\ & = \$32.07 \end{aligned}$$

88. Applying the formula in section 37(3)(b) of the 1987 Act, the Worker's entitlement is calculated as follows:

$$\begin{aligned} & \text{MAX} - (\text{E} + \text{D}) \\ & = \$2,084.00 - (\$999.40 + \$0.00) \\ & = \$1,085.50 \end{aligned}$$

89. Section 37(3) of the 1987 Act requires the lesser amount of (a) and (b) to be determined as the worker's entitlement under this section. In this instance, it is \$32.07.

90. For the period 29 March 2017 (date of work capacity decision) to 5 June 2017, when the Worker's PIAWE was \$1,873.08 (before dropping to \$1,289.34), the Worker's entitlement under section 37(3)(a) of the 1987 Act was as follows:

$$\begin{aligned} & (\text{AWE} \times 80\%) - (\text{E} + \text{D}) \\ & (\$1,873.08 \times 80\%) - (\$999.40 + \$0.00) \\ & = \$1,498.46 - \$999.40 \\ & = \$499.06 \end{aligned}$$

91. I find that the Worker's entitlement to weekly payments of compensation in the period 29 March 2017 (date of work capacity decision) to 5 June 2017 is calculated in the amount of \$499.06 (subject to any notice period required under section 54 of the 1987 Act).

92. I find that the Worker's ongoing entitlement to weekly payments of compensation from 6 June 2017 is calculated in the amount of \$32.07.

Merit Review Service
Delegate of the State Insurance Regulatory Authority