



# State Insurance Regulatory Authority

Workers Compensation

Merit Review Service

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## FINDINGS AND RECOMMENDATIONS ON MERIT REVIEW BY THE AUTHORITY

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Worker:

Insurer:

Date of Review:

Date of Injury:

Claim Number:

Our Reference:

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### FINDINGS ON REVIEW

1. The following are findings made by the State Insurance Regulatory Authority (the Authority) on review.
2. The Worker is able to return to work in suitable employment.
3. The Worker has current work capacity.
4. The vocational option of Administrator (or General Clerk) is suitable employment for the Worker.
5. The Worker is able to earn \$874.00 per week in suitable employment.

### RECOMMENDATIONS BASED ON FINDINGS

6. 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. The Authority makes no recommendations for the reasons below.

### BACKGROUND

8. The Worker was employed as a Process Worker/Baker. His work included moving heavy bags of flour and making up dough with his hands. The Worker reported sustaining an injury to his bilateral wrists and right elbow.
9. The Insurer accepted liability the bilateral wrists and right elbow injury and commenced weekly payments of compensation.
10. There has since been a claim made for bilateral shoulder injuries however the Insurer has disputed liability for this claim.
11. The Insurer made a work capacity decision reducing the Worker's weekly payments of compensation to nil under to section 37(3) of the 1987 Act.

12. The Insurer undertook an internal review and made a decision. The internal review decision resulted in essentially the same outcome as the original work capacity decision.
13. The application for merit review was received by the Authority. The application has been lodged in the form approved by the Authority and made within 30 days, as is required under section 44BB(3)(a) of the 1987 Act.

## **LEGISLATION AND GUIDELINES**

14. 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).
15. Section 43 of the 1987 Act describes a "work capacity decision".
16. Section 44BB of the 1987 Act provides for merit review of a work capacity decision of the Insurer, by the Authority.

## **INFORMATION CONSIDERED**

17. The information that I have considered in undertaking this review is the information attached to the application for merit review and the Insurer's reply and any other information that has been supplied by the parties, which I am satisfied has been exchanged between them.

## **SUBMISSIONS**

18. In the application for merit review, the Worker submits:
  - The position of "light courier driver" does not exist.
  - Couriers are required to lift a variety of parcels, some of which are beyond the Worker's capacity.
  - The light courier work appears to involve delivery by motorbike and the Worker does not have a license to do so.
  - The earnings of the light courier job are not accurate at \$27.33 per hour.
  - the Worker wishes to provide a further statement as well as a report from his GP.
19. In reply, the Insurer sets out its findings from the original work capacity decision and maintains that the work capacity decision "is supported by medical and rehabilitation information that has been obtained..."
20. The Insurer also states that the issues raised the Worker are "noted".

## **REASONS**

### **Nature of merit review**

21. This matter involves a merit review of the work capacity decision of the Insurer in accordance with section 44BB(1)(b) of the 1987 Act. The review is not a review of the Insurer's procedures

in making the work capacity decision and/or 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.

22. The Worker states that he does not agree with the Insurer's orthopaedic specialist's finding that his shoulder injury is not caused by work.
23. I note that the Worker's claim for right and left shoulder injury was formally disputed by the Insurer in a notice issued under section 74 of the 1998 Act.
24. As this decision can be the subject of a medical dispute, it cannot be considered as a work capacity decision- see section 43(2)(b) of the 1987 Act.
25. Therefore in this merit review I cannot consider the impact of any right and left shoulder injury on the Worker's current work capacity.
26. Noting the Worker's submissions, I consider that he has referred the following decisions to the Authority for review:
  - Current work capacity (section 43(1)(a))
  - Suitable employment (section 43(1)(b))
  - Amount the Worker is able to earn in suitable employment (section 43(1)(c))
27. This merit review will confine itself to consideration of the above.

#### **Current work capacity and suitable employment**

28. The most recent information I have regarding the Worker's capacity to work is contained in WorkCover NSW Certificates of Capacity from his nominated treating doctor (NTD).
29. The certificate states that the Worker has capacity to work "normal hours" within the following functional tolerances:
  - Lifting/carrying not more than 5-10kgs
  - Pushing/pulling not suitable
  - Bending/twisting/squatting not suitable
30. I interpret "normal hours" to mean full time hours (38 hours per week) as these were the Worker's pre-injury work hours.
31. The NTD also commented on the type of work the Worker could be suited in. He stated:

"Sedentary / Office / supervisory duties (no lifting >10kgs, no upper limbs frequent twisting, turning, pushing, pulling, etc) as per RTP..."
32. There is also a functional assessment which was carried out by an exercise physiologist from an occupational rehabilitation provider. I note that the findings under the heading "fitness for work" are consistent with the findings of the NTD, namely that the Worker is fit for full time sedentary to light work.
33. As the Worker's nominated treating doctor, the NTD would have a good understanding of the symptoms, progression and treatment of the Worker's injury. The NTD has also conducted numerous reviews of the Worker's work capacity, with the findings of each review documented on WorkCover NSW Certificates of Capacity.
34. I therefore find that the Worker has capacity for some type of full time employment (38 hours per week) with the various functional tolerances as reproduced above.
35. Section 32A of the 1987 Act 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*

36. "No current work capacity" is defined in section 32A of the 1987 Act 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*

37. There is no dispute that the Worker is unable to return to his pre-injury employment as a Process Worker / Baker. I am therefore required to consider whether the Worker is able to return to work in suitable employment in order to determine whether he has "current work capacity" or "no current work capacity". 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:**

(o) 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 on 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.

38. The occupational rehabilitation provider provided an earning capacity assessment report. The role of Administrator (or General Clerk) was identified as suitable employment for the Worker.

39. The role of Administrator (or General Clerk) is described as providing administrative duties such as booking meetings, answering phone calls, copying and other ad hoc administrative tasks.

40. Following his injury, the Worker worked suitable duties in the role of Administrator which comprised of "mainly office work with tasks such as taking orders, daily invoicing, calling suppliers, helping with Quality Assurance and answering phone calls". These duties in my view are similar to the administrative duties described by the occupational rehabilitation provider for the role of Administrator. By performing these duties while on suitable duties, the Worker would have exercised many of the skills required for the role of Administrator in the open labour market.

41. The Worker performed these suitable duties for 36-38 hours per week for a period of 8 months which, in my view, is a substantial period of time especially considering he was working full time hours. He finished his suitable duties not because of unsatisfactory performance, but because his pre-injury employer no longer had suitable duties available. These factors add weight to a finding that the Worker has the skills and work experience to be suited to the role of Administrator.

42. Employers contacted highlighted the need for good computer skills. I am satisfied the Worker meets this requirement having reported advanced computer skills and demonstrated by the completion of various computer hardware and software courses.
43. The occupational rehabilitation provider also rated the Worker's verbal English skills to be excellent and he was able to complete the required forms in English.
44. I am aware from the Worker's employment history that he has not been employed in the role of Administrator. However, I am satisfied the experience gained in the suitable duties performed, together with his computer skills and verbal and written English skills, he has the requisite transferrable skills to be suited to the role of Administrator.
45. In relation to whether the Worker has the physical capacity to perform the role of Administrator, I note that the role is considered to be sedentary which is consistent with the opinion of his NTD. As such, there is no requirement to lift heavy objects or to push, pull, bend, twist or squat. The NTD recently reviewed and approved the role of Administrator on a full time basis.
46. I accept that with computer work there will be some keying involved, such as in the creation of letters or data entry, however I am not of the view that this keying would be of the same force and intensity as the hand pushing of dough repetitively performed in his pre-injury role. I note that the Worker was observed at the functional assessment to be able to type on a laptop computer "continuously without difficulty or reports of pain".
47. Furthermore, I accept that there are various other duties associated with administrative work which will allow the Worker to adjust his position and to alternate the use of left and right hands with the ability to take short rest breaks as required.
48. I am therefore satisfied that the role of Administrator is suitable employment for the Worker having had regard to the nature of his incapacity.
49. Having had regard to the balance of the factors under section the definition of suitable employment in section 32A of the 1987 Act, I find that the role of Administrator (or General Clerk) to be suitable employment for the Worker.
50. 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. I find that the Worker has current work capacity in accordance with the definition in section 32A of the 1987 Act.

#### **"Light" Courier Driver**

51. In relation to the role of "Light Courier Driver", I note that the Worker has provided a number of submissions regarding his lack of physical capacity to perform this role. I accept that "Light Courier Driver" is not a role that was identified by the occupational rehabilitation provider in their labour market analysis. The employers contacted only referred to Courier Driver.
52. The role of Courier Driver will require the Worker to deliver items. Notwithstanding that the role description states that the items delivered will be light, I am not convinced that this will always apply to every item. There may also be an increased risk of twisting or bending movements involving the upper limb when getting out of the vehicle or when manoeuvring items for delivery.
53. I have therefore identified the role of Administrator above which is a sedentary role that requires little or no lifting requirements. From the job logs provided, it appears that the Worker has been applying for Administrator type roles albeit without success. I would encourage him to continue to do so.

### **Amount the Worker is able to earn in suitable employment**

54. Two employers contacted advertised entry level Administrator positions. The remuneration for these roles is \$23.00 per hour (base) which equates to \$874.00 gross per week for a 38 hour week. While the Worker has the experience and skills to be suited to the role of Administrator, he has not previously held such a position in the open labour market. I therefore consider the remuneration for an entry level position to be the amount the Worker is able to earn.
55. Accordingly, I find that the Worker is able to earn \$874.00 gross per week in suitable employment.

### **Entitlement periods for ongoing weekly payments**

56. 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.
57. The Insurer's reply to the application for merit review states that the Worker has received a total of 57 weeks of weekly payments.
58. At the time of this merit review decision, I find that the Worker's entitlement to weekly payments of compensation currently falls in the second entitlement period (weeks 14-130) and is to be calculated in accordance with section 37(3) of the 1987 Act, 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**

59. "AWE" means the worker's pre-injury average weekly earnings. In its work capacity decision, the Insurer calculated this figure to be \$848.00 gross per week. The Worker does not dispute this figure.
60. Accordingly I find that the amount of \$848.00 will be used as the Worker's "AWE" for the purposes of the above formula under section 37(3) of the 1987 Act.
61. "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.

62. I have found above that the Worker's ability to earn in suitable employment to be \$874.00 per week based on a 38 hour week. This figure will represent the Worker's earnings after the injury (or "E") as he is not presently working.

63. "D" is the amount of any non-pecuniary benefits which in the Worker's case is nil.

64. In accordance with section 37(3) of the 1987 Act:

$\$848.00 \times 80\% - \$874.00$

$= \$678.40 - \$874.00$

$= \$0.00.$

65. I therefore find that the Worker is entitled to weekly payments of compensation in the amount of \$0.00.

66. Although I have found a different vocation to be suitable employment, I have ultimately reached the same conclusion as the Insurer in relation to the Worker's entitlement. A recommendation to the Insurer is therefore not necessary. The work capacity decision to discontinue the Worker's weekly payments of compensation stands.

**Merit Review Service**  
**Delegate of the State Insurance Regulatory Authority**