



State Insurance Regulatory Authority

Workers Compensation

Merit Review Service

FINDINGS AND RECOMMENDATIONS ON MERIT REVIEW BY THE AUTHORITY

Worker:

Insurer:

Date of Review:

Date of Injury:

Claim Number:

Our Reference:

FINDINGS ON REVIEW

1. The following are findings made by the State Insurance Regulatory Authority (“the Authority”) on review and are to be the basis for the review decision.
2. The Worker has a present inability arising from an injury such that he is not able to return to work in either his pre-injury employment or in suitable employment.
3. The Worker has no current work capacity and is likely to continue indefinitely to have no current work capacity.
4. The Worker satisfies the special requirement for continuation of weekly payments of compensation after the second entitlement period, pursuant to section 38(2) of the *Workers Compensation Act 1987* (“the 1987 Act”).

RECOMMENDATION BASED ON FINDING

5. In accordance with section 44BB(3)(e) of the *Workers Compensation Act 1987* (“the 1987 Act”), the Authority may make recommendations based on its findings that are binding on the Insurer.
6. In accordance with section 38(6) of the 1987 Act, the Worker is entitled to weekly payments of compensation in the amount of \$811.52 from 16 November 2016 (subject to any notice period required under section 54 of the 1987 Act).

BACKGROUND

7. The Worker sustained an injury to his left hand and developed bilateral carpal tunnel syndrome in the course of his employment as a Baker. The Insurer accepts the injury in respect of the left hand and in respect of the carpal tunnel syndrome.
8. The Insurer accepted liability for the injuries under separate claims for compensation and made weekly payments of compensation to the Worker.
9. The Worker ceased working in August 2011. He has not returned to work to date.

10. The Insurer made a number of work capacity decisions in respect of the worker's claims. The Insurer also considered an earlier work related injury that the Worker suffered to his left knee which was subject to a separate workers compensation claim in the same decisions. The Insurer determined that the Worker had capacity to work 40 hours per week, that he was able to return to work in suitable employment, and that he did not meet the requirements under section 38(3) of the 1987 Act for an ongoing entitlement to weekly payments of compensation.
11. The Worker applied for an internal review of the Insurer's work capacity decisions. The Insurer conducted an internal review and made similar decisions, resulting in the same outcome. The Worker was notified of these decisions by letter and in the approved form.
12. The Worker made an application for merit review by the Authority. The application was received by the Authority. The application has been made within 30 days after the Worker received notice of the internal review, as required under section 44BB(3)(a) of the 1987 Act. The application has been lodged in the form approved by the Authority.

LEGISLATION

13. 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").
14. Section 43 of the 1987 Act describes a 'work capacity decision'.
15. Section 44BB of the 1987 Act provides for merit review of a work capacity decision of the Insurer, by the Authority.

SUBMISSIONS

16. In the application for merit review, the Worker's legal representatives set out the following grounds for review:
 - The Insurer has relied upon three separate injuries (addressing three different body parts) in their work capacity decision. Clarification is sought as to whether this is an appropriate approach noting that each injury has been processed as being separate and distinct by the Insurer at all times until a work capacity decision was undertaken.
 - The Insurer has considered three body systems being the right wrist, left hand and left knee only. The Worker's more recent WorkCover medical certificates include complaints affecting his left hip, left shoulder, left elbow and left ankle. These have appeared on his certificates of capacity since approximately mid-2016. These injuries are of some significance and appear to be the basis upon which the Worker's capacity for work was downgraded from suitable duties to no capacity in recent times.
 - The majority of the evidence relied upon by the Insurer pre-dates the downgrade to the Worker's work capacity in the middle of 2016 and does not take into account what would appear to be a worsening of the Worker's condition as well as secondary or consequential conditions as considered by the Worker's nominated treating doctor (NTD).

- The Insurer has not taken appropriate steps to assist the Worker in vocational retraining. On the contrary, the Insurer has not acted in good faith to assist the Worker by providing rehabilitation services as recommended by the appointed rehabilitation provider.
 - In completing the internal review, the Insurer referred to and relied upon additional evidence not included in the work capacity decision. It is procedurally unfair for the Insurer to be able to amend/modify their decision relying upon new information and records not previously available to the applicant when responding to the work capacity decision.
 - The Insurer has sought to interpret or rely upon only part of the comments of a Physiotherapist who conducted the functional assessment. The Worker's capacity for work as assessed by the Physiotherapist is subject to further treatment and the physiotherapist recommends further treatment.
 - The Earning Capacity Assessment Report is over two years old as are the records of the Worker's treating specialist. The Labour Market research Report is over 12 months old. The vast majority of the evidence relied upon is outdated and has been superseded by developments in the Worker's condition. It is inappropriate for the Insurer to seek to rely upon an opinion of the NTD from two years ago with respect to the Worker's capacity when it has clearly been overtaken by subsequent symptoms, treatment recommendations and most importantly an amended certificate of capacity.
 - There is objection to the "employer contacts" referred to in the internal review. There is no detail with respect to the time, date or nature of the communication between injury treatment and each of these employers. It is not clear whether the communication was specific to the Worker and his restrictions or alternatively was a general enquiry with respect to the availability of suitable work. It is also submitted that the evidence relied upon is not in adequate form to allow the Worker a meaningful opportunity to respond noting the lack of particularities specific to him and the generalised nature of the information.
17. In the reply to the Worker's application for merit review, the Insurer in summary makes the following submissions:
- The Worker's first claim for compensation was made in respect of his left knee.
 - The Worker's second claim for compensation was made in respect of his left hand.
 - The Worker's third claim for compensation was made in respect to both wrists.
 - It is the Insurer's obligation to make a work capacity decision on the holistic view of the worker. As such, they have addressed all currently open claims to include the Worker's multiple injuries.
 - The Insurer has accepted the injuries to the left knee, left hand and both wrists. A formal declinature was provided with respect to an injury to the left knee. The Insurer will continue to investigate liability in relation to the additional injuries and respond to these claims in due course.
 - Some of the evidence relied upon does pre-date the Worker's downgrade in capacity in August 2016. The Insurer has found it appropriate to reference all capacity information given the Worker's currently reported incapacity spanning 18 months prior to the original decision to encapsulate the history and development of the Worker's current clinical picture.

- The Insurer makes a number of submissions in response to the Worker's submissions about assistance provided for vocational retraining and recommendations made by the appointed rehabilitation provider.
- The internal review decision revised all available clinical and vocational information to ascertain the original work capacity decision was correct. In doing so, additional information was included in the decision which included clinical information from the Worker's treatment providers received following the work capacity decision that was entirely relevant. The Insurer lists this information.
- The Insurer considered the reports of the physiotherapist and notes that it was considered that the Worker had the current functional capacity to perform all of the inherent tasks in the vocational options. Furthermore, the Worker continues to be supported with the treatment recommended. Reference is made to an approval for a request made.
- The Insurer's work capacity decision took into account the Earning Capacity Assessment Report for the purpose of outlining the Worker's history of employment, education and claim at that point in time. The latest Labour Market Assessment Report was used for the purpose of re-evaluating the Worker's capacity to earn in suitable employment and to confirm if, in fact, those employment options remain "suitable employment" as defined by section 32A of the 1987 Act.
- The Insurer finds that the employer contacts sufficiently establish the functional, educational and skill requirements for the role.

DOCUMENTS CONSIDERED

18. 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.
19. 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.
20. In respect of the Worker's submissions regarding additional information that was relied upon in the internal review that he was not given an opportunity to respond to, I note that these submissions relate to the processes and procedures of the Insurer which I am unable to have regard to in this review. For the purposes of this review, I note that the Worker has had the opportunity to review all of the documents and make submissions to the Authority in respect to the information considered.

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 definitions of 'current work capacity' and 'no current work capacity' require me to consider the worker's "present inability arising from an injury" and the worker's ability to return to work in their pre-injury employment and ability to return to work in suitable employment.
23. I note that the Insurer considered all three of the Worker's injuries (left knee, left hand and bilateral wrists) and the incapacity arising out of these separate incidents in the same work capacity decisions. The Insurer also made one decision in respect of the Worker's entitlement to weekly payments of compensation applicable to all three of these claims for compensation.
24. The preferable approach to determining a worker's entitlement to weekly payments of compensation under the 1987 Act, in circumstances where a worker sustains multiple injuries arising from separate incidents, resulting in different incapacities and subject to separate workers' compensation claims, appears to me would be to determine the separate entitlements arising out of the separate injuries [*Denise Walsh v Department of Human Services & Ors* (2014) VSCA 244]. In this way, the Insurer would be determining the "present inability arising from an injury" and a worker's ability to return to employment as a result of that injury and the incapacity that arises from that injury [*Arnotts Snack Products Pty Ltd v Yacob* (1985) 57 ALR 229]. The worker's aggregate entitlement to weekly payments of compensation from multiple claims would be subject to any legislative provisions or common law principles regarding the maximum amount of weekly payments of compensation a worker is able to receive.
25. The above however is dependent on the circumstances of a worker's injuries, the nature of the medical information and other factors that may affect the appropriateness and practicality of determining separate entitlements to weekly payments of compensation in cases of multiple injuries [*Cordina Chicken Farms Pty Ltd v Thoa Hong Le* (2008) NSWCCPD 125].
26. In the Worker's circumstances, he sustained an injury to his left knee while running towards a bus and subsequently sustained injuries to his left hand and both wrists in separate incidents while undertaking his duties as a Baker. All of the injuries are accepted as work-related compensable injuries by the Insurer. The medical information before me indicates that the claim for the Worker's knee injury was made first and there was no causal connection or nexus between the knee injury and the subsequent injuries to the Worker's left hand and wrists [*Denise Walsh v Department of Human Services & Ors* (2014) VSCA 244].
27. In these circumstances, I have reviewed the Worker's entitlement to weekly payments of compensation arising out of the incapacity resulting from his knee injury and his ability to return to work in suitable employment considering the incapacity that arises out of this injury in a separate review.
28. In this review, I will proceed to review the Worker's entitlement to weekly payments of compensation arising out of his left hand and wrist injuries and his ability to return to work in suitable employment considering the combined incapacity that arises out of these injuries. I have proceeded in this way given that the injuries are with the same employer and a nexus exists between these injuries as they are to the same bodily part [*Denise Walsh v Department of Human Services & Ors* (2014) VSCA 244]. It is also difficult to discern the incapacity resulting from the injury to the left hand and wrists on the medical information before me [*Cordina Chicken Farms Pty Ltd v Thoa Hong Le* (2008) NSWCCPD 125].
29. I note the Worker's submissions in relation to further injuries sustained to his left hip, left shoulder, left elbow and left ankle which were recently included on his WorkCover NSW certificates of capacity and the Insurer's failure to consider these injuries in its work capacity decisions. The Insurer submits that liability for the injury to the Worker's left ankle was declined and a notice in accordance with section 74 of the 1998 Act has been issued. I have before me a further notice in accordance with section 74 in respect to the Worker's left hip, left shoulder, right shoulder, left elbow and left ankle. Given that the Insurer has declined liability in relation to these further injuries and they are not injuries subject to the work capacity decisions under review, I am unable to have regard to any incapacity arising from

these injuries in this review.

30. Disputes regarding liability for injuries may be referred to the Workers Compensation Commission if they are not able to be resolved directly with the Insurer.

Current work capacity and suitable employment

31. The Worker sustained an injury to his left hand while removing bread from oven tins. The information before me indicates that this was a strain injury. He was working as a Baker at the time.
32. During the course of his employment, the Worker also developed bilateral carpal tunnel syndrome. It is not clear when he first started to notice symptoms in relation to this injury.
33. The Worker underwent carpal tunnel surgery for his right wrist and for his left wrist.
34. I note that the Worker suffered an earlier work-related injury to his left knee. The incapacity arising out of that injury and the Worker's entitlement to weekly payments of compensation arising from that injury are reviewed in separate findings and recommendations by the Authority.
35. I note however that the majority of the medical opinions outlined below with regard to the Worker's capacity for work take into account all of the three injuries noted above, being injury to the left knee, left hand and both wrists. It is therefore difficult to discern the distinct incapacities arising out of the Worker's left hand and wrist injuries only, which in my view would require a medical opinion. Nevertheless this has not posed a significant issue for the purposes of this review given that my findings below in relation to suitable employment would be the same regardless of whether the incapacity arising out of the knee injury was considered or not.
36. The Worker ceased working in August 2011. He has not returned to work since.
37. A Hand and Wrist Surgeon is the Worker's treating specialist in respect to his hand and wrist. There is a report from him before me in which he notes that the Worker's diagnosis is that of "resolving bilateral carpal tunnel syndrome and residual left wrist pain and weakness". He refers to recent imaging studies and states the studies had not highlighted a structural injury or abnormality that would benefit by intervention. He then states:

He has, however, residual limitation on wrist motion and relative wrist weakness that limits his ability to effectively and efficiency (sic) use his wrist in a forceful manner without encountering pain and a feeling of wrist swelling.
38. The treating specialist opines that the Worker had reached maximum medical improvement in relation to his bilateral hand/wrist injuries. In response to a question from the Insurer regarding the Worker's "barriers" in achieving his "fitness for work goal", the treating specialist responds:

The Worker's barriers are those of reactive swelling and discomfort with repetitive forceful and wrist use (sic).
39. In response to a more general question regarding the Worker's capacity for work, the treating specialist responds:

There are no specific limitations in regard to hours of work. In my opinion, the Worker would require the ability to use a brace to support his left wrist at work and begin with a 2-3 kg lifting limit increased towards 5 kg if he is comfortable.

40. A rehabilitation provider conducted a functional assessment with the Worker. The rehabilitation provider notes the Worker's injuries in her report as injuries to the left wrist, right wrist and left knee. The rehabilitation provider concludes that based on the Worker's compensable injuries, he had demonstrated an ability to work 8 hours per day, 5 days per week. She assesses the Worker with the ability to work at a 'light level' of work however states this is the "minimal ability rather than a maximum ability" due to "self-limiting and inconsistent behaviour" observed throughout the assessment.
41. In terms of the Worker's physical capabilities, the rehabilitation provider provides the following assessment:
- Sitting – Frequently
 - Standing – Occasionally
 - Walking – Frequently
 - Squatting – Frequently self-limited
 - Lifting floor to waist – 11kg occasionally self-limited
 - Lifting waist to eye level – 9kg occasionally self-limited
 - Bilateral carrying – 1kg occasionally self-limited
 - One handed carry (right hand) – 7kg occasionally self-limited
 - Pushing/pulling – 5kg occasionally self-limited
42. An Occupational Medicine and Injury Management Consultant conducted an injury management consultation with the Worker. The occupational consultant notes the Worker's injuries at the start of his report as: left knee injury, left wrist injury and right carpal tunnel syndrome. The occupational consultant reports that the focus of the assessment was on the Worker's rehabilitation and return to work. The Worker reportedly advised that with treatment, he felt that he could possibly upgrade his hours of work on his certificates of capacity to 20 hours per week. The occupational consultant states: "I recommended an upgrade to at least normal hours suitable duties as this will widen/maximise any vocational opportunities that may arise".
43. The occupational consultant consulted the Worker's NTD as part of his review. He reported the following in respect to their discussion:
- The NTD confirmed various psychosocial barriers to recovery, potential upgrades and a durable RTW [return to work] in an alternative capacity. This includes chronic fluctuating symptoms about both upper limbs and left knee and perceived disabilities. The NTD recommended conditioning (hydrotherapy) and Rehab Provider assistance. The first goal was an upgrade to 20 hours suitable duties; and on subsequent reviews, he will consider further increases with a preferred eventual goal of normal hours suitable duties (as this will maximise any chances of obtaining permanent work).
44. A Surgeon reviewed the Worker for the purposes of an independent medical examination. In his report, he notes that he had previously assessed the Worker in 2014 and refers to the injuries to the Worker's left wrist, left knee and right carpal tunnel. The Surgeon states: "the Worker has multiple complaints, but little in the way of confirmatory clinical signs".
45. In response to questions regarding capacity for work from the Insurer, the Surgeon responds:
- As he presents today, I do not believe the Worker to be unfit for any type of work.
- Ingrained dirt, callus formation and skin thickening on both hands is consistent with recent manual work and indicates that he is fit for some type of work of a physical nature.
46. The Surgeon gives specific opinions in respect of the incapacity arising out of the Worker's separate work-related injuries. In respect to both the injuries to the left hand and wrists, he

opines that the Worker is "...fit for normal hours and duties". In respect of each injury he then states the prognosis for return to work is "poor" because the Worker had not worked since 2014.

47. An Orthopaedic Surgeon reviewed the Worker and produced a report. The Orthopaedic Surgeon's report is more concerned with treatment. He makes some recommendations for strengthening exercises for the wrist and exercise physiology. He does however note in his report:

I didn't do a full examination of the wrist as he (the Worker) told me that loading the wrist causes pain but I can elicit some pain around the scapholunate region.
48. The Worker was referred to the Physiotherapist for exercise physiology. In a report , the Physiotherapist refers to all three of the Worker's work related injuries. He reports that the Worker refused an objective examination as he felt it would increase his symptoms. The Physiotherapist does not specifically address capacity for work.
49. The NTD has completed the WorkCover NSW certificates of capacity before me. The certificates do not distinguish between the injuries and incapacities arising from the separate injuries and list all, if not most, of the work-related injuries on all of the certificates. The certificates also list the injuries to the Worker's left leg, left ankle, left hip and shoulders which the Insurer, as noted above, has declined liability in respect of.
50. The earliest certificate certifies the Worker with capacity to work 3 hours per day, 3 days per week, within certain physical capabilities, until 2 March 2015. The next certificate and certifies the Worker as having no capacity for work. There is no information provided in respect to the reason for the downgrade. This certification continues until the most recent certificate before me.
51. The NTD continues to outline the Worker's physical capabilities on the certificates certifying no capacity for work. On the most recent certificate , his capabilities are certified as follows:
 - Lifting/carrying capacity: No lifting
 - Sitting and standing tolerance: As tolerated
 - Pushing/pulling ability: Avoid
 - Bending/twisting/squatting ability: Avoid
 - Driving ability: As tolerated
52. As seen above, there is a divergence of opinion in respect to the Worker's capacity for work. The treating specialist, the rehabilitation provider, the occupational consultant and the Surgeon all assessed the Worker with the ability to work 8 hours per day, 5 days per week/normal hours (I note the Surgeon's comment that the prognosis for return to work was "poor" however this opinion was given in respect to occupational rehabilitation factors and separate to his medical opinion). The Physiotherapist did not give an opinion in respect to capacity for work. On the other end of the spectrum, the NTD has certified the Worker as having no capacity for work since 2 September 2016.
53. There is no information before me in respect to why the NTD may have changed the Worker's certified capacity for work from 9 hours per week to no capacity in September 2016. The Worker's legal representatives indicate that the additional injuries noted on the certificates, which the Insurer has declined liability in respect to, may be the cause and note that they are "secondary or consequential conditions" however this appears to be a somewhat medical opinion which is not supported by the medical information before me.
54. Notwithstanding the downgrade in the certificates, I note that the NTD's opinion prior to this time (9 hours per week) was also significantly different to the opinions of the treating specialist, the rehabilitation provider, the occupational consultant and the Surgeon who

not long after this certificate assessed the Worker as having capacity to work full-time. It would therefore appear that the NTD's opinion historically has also been in contrast to the remainder of the opinions before me regarding the Worker's capacity for work.

55. I note that the NTD's certificates consider not only the Worker's compensable injuries but also the injuries that the Insurer has disputed liability for. The Worker's legal representatives submit that these latter injuries appear to be the basis upon which the Worker's capacity was downgraded. Given that I am unable to consider any incapacity arising out of these injuries, for the reasons noted above, I find the remainder of the opinions before me more reliable than the NTD's certificates when assessing the nature of the Worker's incapacity arising out of his accepted work-related injuries. For this reason, but more significantly having regard to the balance of the opinions before me, I prefer the opinions of the treating specialist, the rehabilitation provider, the occupational consultant and the Surgeon in respect to the Worker's capacity for work, which they have assessed at full-time.
56. In respect to the Worker's physical capabilities, I note that only the rehabilitation provider and the NTD give an opinion about the Worker's specific capabilities considering all of his compensable injuries. For the same reasons as that noted above in relation to the Worker's hours of work, I prefer the opinion of the rehabilitation provider over that of the NTD. I do however also give significant weight to the opinion of the treating specialist given his speciality and consider that his opinion is still relevant given that he assessed that the Worker had reached maximum medical improvement at the time of his review.
57. I find that the Worker has capacity to work full-time within the physical capabilities assessed by rehabilitation provider, outlined below, and in accordance with the recommendations of the treating specialist, namely that he requires "the ability to use a brace to support his left wrist" and should avoid "repetitive forceful" use of his wrists.
 - Sitting – Frequently
 - Standing – Occasionally
 - Walking – Frequently
 - Squatting – Frequently self-limited
 - Lifting floor to waist – 11kg occasionally self-limited
 - Lifting waist to eye level – 9kg occasionally self-limited
 - Bilateral carrying – 1kg occasionally self-limited
 - One handed carry (right hand) – 7kg occasionally self-limited
 - Pushing/pulling – 5kg occasionally self-limited
58. In order to determine whether the Worker has current work capacity, I am required to determine whether he is able to return to work in his pre-injury employment and in suitable employment.
59. 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.

60. The Worker's pre-injury employment was as a Baker. The Worker's inability to return to this employment does not appear to be in dispute between the parties. I will therefore proceed on the basis 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.

61. In order to determine whether the Worker has current work capacity, I am required to determine whether he is able to return to work in suitable employment.

62. 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.

63. The Worker is 45 years of age. He completed his school education at Year 9. He obtained qualifications as a Baker. He attained a number of driving licences including a taxi licence, front end loader licence, forklift licence and heavy rigid licence. He also obtained a senior first aid certificate.

64. The Worker's employment history is outlined in a number of vocational assessments before me. His history is set out as follows:

- Front End Loader/Forklift Operator/Truck Driver
- Cook and Assistant Restaurant Manager
- Baker
- MR Truck Driver
- Batch maker/Machine Operator
- Batch Maker
- Baker [latest]

65. As noted above, the Worker has not returned to work since his employment ceased in August 2011.
66. There are three vocational assessment/labour market analysis reports before me . These reports identify the vocational options of Forklift Driver, Product Assembler, Information Officer/Customer Service Officer, Sales Assistant and Baking Factory Worker as suitable return to work options for the Worker. Upon review of the information before me however, I am not satisfied that any of these roles constitute suitable employment for the Worker.
67. In respect to the role of Forklift Driver, a report provides a list of the duties involved in the role, including but not limited to:
- Operating controls to align forklifts and raise and lower forks to stack and unstack items in warehouses, factories, timber yards and shipping terminals, and
 - Servicing and performing minor repairs and adjustments to forklifts.
68. The report notes that the role does not involve lifting and provides a list of the functional demands. The listed 'demands' of the role include but is not limited to:
- Frequently light but up to medium work demand levels,
 - Frequent repetitive hand, arm and leg/foot movements and pushing/pulling – required for operation of controls, and
 - Use of hand tools or equipment is occasionally required for machine maintenance.
69. In his report the treating specialist addressed the suitability of this role, stating:
- I agree that a forklift driving option may well be suitable for the Worker as long as he is able to do this with a supportive brace.
70. It is not clear on the information before me whether the Worker would be able to undertake the duties of a forklift driver with a supportive brace and three employers contacted in relation to this role, did not address this.
71. On the above information, I also have concerns whether the Worker would be able to undertake the duties of the role in light of his wrist injury, having regard to the treating specialist's recommendation that he should avoid "repetitive forceful" use of his wrists. The nature of the duties noted above and the listed functional demands indicate that repetitive hand movements and pushing pulling are required on a frequent basis and the functional demands of the role can be up to "medium work demands levels".
72. In light of the recommendations of the treating specialist and the Worker's capabilities as assessed by the rehabilitation provider, I am not satisfied that work as a Forklift Driver is suited to the Worker when having regard to the nature of his incapacity.
73. A report advises that it is mandatory to have a forklift drivers licence in NSW. It is noted that "the Worker has a current forklift ticket and will not require further training". I note however that this report was prepared in 2014 and online research indicates that forklift licences in NSW expire 5 years after the date of issue. It is not clear when the 'forklift ticket' referred to in the report was issued and there is no information before me in respect to whether the Worker currently holds a valid forklift licence.
74. For the above reasons, I am not satisfied that work as a Forklift Driver is suitable employment for the Worker on the information currently before me.
75. The role of Product Assembler reportedly may involve the following tasks:
- Locate, position and secure components on workbenches

- Punch and drill mounting holes in parts and assembled products
 - Assemble and secure components in sequence
 - Assemble parts by nailing, screwing, gluing and pinning, riveting, soldering and spot welding components
 - Fit hardware items, such as hinges, catches and knobs, to parts
 - Remove raised edges and finish items using files, grinding wheels and emery paper
 - Pack products into boxes and stack onto pallets
 - Operate automatic and semi-automatic machinery and tools, such as conveyor belts, bottling machines or soldering irons
 - Manually wind light electrical field coils.
76. For similar reasons as that noted above in relation to the role of Forklift Driver, I am not satisfied that the Worker would be able to avoid “repetitive forceful” use of his wrists if he was required to undertake the above tasks. I am not satisfied that work as a Product Assembler is suited to the Worker when having regard to the nature of his incapacity.
77. In respect to the role of Baking Factory Worker, I note that the role is similar to the Worker’s pre- injury employment as a Baker, where he sustained his injuries and developed carpal tunnel syndrome. For similar reasons to that noted above in relation to his need for a wrist brace and to avoid “repetitive forceful” use of his wrists, I am not satisfied that work as a Baking Factory Worker is suited to the Worker when having regard to the nature of his incapacity.
78. The role of Information Officer/Customer Service Officer can reportedly involve the following tasks:
- Answering inquiries about goods and services, and providing information about their availability, location, price and related issues.
 - Responding to inquiries about problems and providing advice, information and assistance.
 - Recording information about inquiries and complaints.
 - Referring complex inquiries to team leaders or expert advisers.
 - Accessing and operating computer network systems and communication systems such as public address and paging systems.
79. While this role is sedentary in nature, it is not clear whether the Worker has the required skills to undertake the above duties which involve customer service and significant computer use. the Worker has not had any experience in customer service roles in his employment history. The Labour Market Assessment report states:
- Labour market research at the time of this assessment indicates that previous experience in a customer service role is preferred.
80. The Worker’s work experience is in roles of a more physical nature and he does not appear to have had to have used a computer in any of his previous positions. He left school at the age of 15 and there is no information before me in the vocational assessments or rehabilitation reports in respect to his ability to use a computer.
81. I am not satisfied that work as an Information Officer/Customer Service Officer is suited to the Worker when having regard to his education, skills and work experience.
82. In respect to the remaining role of Sales Assistant, the duties that may be required reportedly include:

- Determining customer requirements and advising on product range, price, delivery, warranties and product use and care.
 - Demonstrating and explaining to customers the establishment's goods and services.
 - Selling food, beverages, clothing, footwear and other personal and household goods and services.
 - Accepting payment for goods and services by a variety of payment methods and preparing sales invoices.
 - Assisting with the ongoing management of stock such as product inventories and participating in stocktakes.
 - Stocking and displaying goods for sale, and wrapping and packing goods sold.
83. For similar reasons to that noted above in respect to the Worker's employment history and skills, particularly in relation to customer service, I am not satisfied that work as a Sales Assistant is suited to the Worker when having regard to his education, skills and work experience.
84. I note that the Labour Market Assessment report also stated in respect to this role:
- Labour market research at the time of this assessment indicates that experience in is often preferred.
85. In assessing suitable employment in accordance with the above definition, I am also required to have regard to any occupational rehabilitation services that are being, or have been, provided to or for the worker. I note the submissions made by the Worker's legal representatives in respect to vocational retraining and note that the Worker has not undertaken any retraining or work trials that may assist him in returning to work in any of the above roles.
86. Having regard to the balance of the factors in the definition of suitable employment under section 32A of the 1987 Act, I am not satisfied that the Worker is able to return to work in suitable employment.
87. Given that the Worker has a present inability arising from an injury such that he is not able to return to work, either in his pre-injury employment or in suitable employment, I find that the Worker has 'no current work capacity', in accordance with the definition under section 32A of the 1987 Act.

Existing recipient of weekly payments

88. An "existing recipient of weekly payments" is defined in clause 1, Part 19H, Schedule 6 of the 1987 Act as:
- Existing recipient of weekly payments means an injured worker who is in receipt of weekly payments of compensation immediately before the commencement of the weekly payments amendments.*
89. The Insurer has confirmed in its reply to the application for merit review that the Worker was in receipt of weekly payments of compensation immediately before 1 October 2012 in respect to his claim relating to his knee injury but not his further claims. I consider the above definition of existing recipients to apply to workers and not to claims for compensation. I am therefore satisfied that the Worker was in receipt of weekly payments immediately before the commencement of the weekly payments amendments and that he is an existing recipient of weekly payments. The weekly payments amendments as provided in Division 2, Part 19H, Schedule 6 of the 1987 Act therefore apply to the Worker's entitlement to weekly payments of compensation.

Entitlement periods for ongoing weekly payments

90. The Worker's ongoing entitlement to weekly payments is to be determined in accordance with the relevant entitlement period that is applicable at the time of review. 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 ("the post second entitlement period").
91. The Insurer indicates in their reply to the application for merit review that the Worker had been in receipt of 212 weeks of weekly payments of compensation, under his claim in respect to the wrist injury. On the basis of this information, I am satisfied that the Worker's entitlement to weekly payments of compensation falls after the second entitlement period and is to be determined in accordance with section 38 of the 1987 Act.

Special requirements for continuation of weekly payments after second entitlement period (after week 130)

92. Section 38 of the 1987 Act provides that an entitlement to weekly payments of compensation after the second entitlement period is only available to a worker with 'no current work capacity' if special requirements are met as follows:
- (2) A worker who is assessed by the Insurer as having no current work capacity and likely to continue indefinitely to have no current work capacity is entitled to compensation after the second entitlement period.*
93. Noting the matters to which I have referred to in these reasons and the information currently before me, I find that the Worker is likely to continue indefinitely to have no current work capacity. That is, for the foreseeable future or until such time as there is adequate information to support that he is able to return to work in suitable employment.
94. I find that the Worker satisfies the requirement under section 38(2) of the 1987 Act and is therefore entitled to continuation of weekly payments of compensation after the second entitlement period in accordance with section 38(2) of the 1987 Act.
95. As the Worker has no current work capacity, his entitlement to weekly payments of compensation is to be calculated under section 38(6) of the 1987 Act. This section provides:
- (6) The weekly payment of compensation to which an injured worker who has no current work capacity is entitled under this section after the second entitlement period is to be at the rate of:*
- (AWE × 80%) – D*

Calculation of entitlement

96. "AWE" means the Worker's pre-injury average weekly earnings. Schedule 6, Part 19H, Clause 9 of the 1987 Act provides for the following in relation to an "existing recipient of weekly compensation":

(3) For the purposes of the application under this clause of the weekly payments amendments to a worker, the worker's pre-injury average weekly earnings are deemed to be equal to the transitional amount.

97. The transitional amount applies for the purpose of calculating "AWE" which is currently \$1,014.40.
98. "D" is the amount of any non-pecuniary benefits, which, on the information before me, is nil.
99. Under section 38(6) of the 1987 Act, the Worker's entitlement to weekly payments of compensation is calculated as follows:
$$(\$1,014.40 \times 80\%) - \$0.00$$
$$= \$811.52$$
100. I find that the Worker's entitlement to weekly payments of compensation from 16 November 2016, being the date of the Insurer's work capacity decision, is \$811.52 in accordance with section 38(6) of the 1987 Act. This is subject to any notice period required under section 54 of the 1987 Act.

Merit Review Service
Delegate of the State Insurance Regulatory Authority