



FINDINGS AND RECOMMENDATIONS ON MERIT REVIEW BY THE AUTHORITY

Worker:

Insurer:

Date of Review:

Date of Injury:

Claim Number:

Our Reference:

FINDINGS ON REVIEW

1. The following are findings made by the State Insurance Regulatory Authority (the Authority) on review.
2. The Worker has “current work capacity” as defined in section 32A of the *Workers Compensation Act 1987* (the 1987 Act).
3. The vocational option of product assembler is suitable employment in relation to The Worker.
4. The amount of \$756.40 is to be taken into account as the Worker’s earnings after injury.

RECOMMENDATION BASED ON FINDINGS

5. The following recommendation made by the Authority is binding on the Insurer and must be given effect to by the Insurer in accordance with section 44BB(3)(g) of the 1987 Act.
6. The Insurer is to determine the Worker’s entitlement to weekly payments of compensation.

BACKGROUND

7. The Worker noted a gradual onset of pain in his lumbar spine during the course of his normal duties as a line packer lifting boxes of stock, pushing pallets and cuttings seals on boxes.
8. The Worker is 30 years of age.
9. The Insurer made a work capacity decision, reducing the Worker’s entitlement to weekly payments of compensation to nil under section 36 of the 1987 Act on the basis that he had current work capacity and was able to return to work in suitable employment as a machine operator (stationary).
10. The Insurer undertook an internal review in this matter and made a decision. On internal review, the Insurer determined the Worker had current work capacity and was able to return to work in suitable employment as a product assembler.
11. The application for merit review was received by the Authority. 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.

12. The Insurer issued a notice pursuant to section 74 of the *Workplace Injury Management and Workers Compensation Act 1998*. I note that that notice relates to medical and related treatment expenses pursuant to section 60 of the 1987 Act.

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), and
 - *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.

DOCUMENTS CONSIDERED

16. The documents I have considered are those listed in, and attached to, the application and the Insurer’s reply and any further information provided to the Authority and exchanged between the parties.
17. 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.

SUBMISSIONS

18. In the application for merit review, the Worker submits:
 - The decision should be revoked and payments reinstated.
 - The work capacity decision should be revoked as suitable employment has not been identified. The role of machine operator (stationary) is not suitable employment because he has had no experience working as a machine operator. The physical requirements of a machine operator (stationary) requires constant standing as identified on page 9 of the Transferrable Skills Analysis Report. The work capacity certificate of the nominated treating doctor (NTD) states that he is to avoid standing over a long period of time. Page 9 of the Transferrable Skills Analysis Report identified he had a below average English language ability. The jobs identified required on the job training. His below average English language ability would prevent him from being able to obtain such training.
19. In reply, the Insurer submits:

- The Worker has been certified for full-time hours since the initial WorkCover Certificate of Capacity. Since that time his lifting/carrying/pushing/pulling restrictions have been progressively upgraded to 10 kg.
- The role of product assembler is within the Worker's transferable skills, especially noting his most recent employment as a process worker. The physical requirements of a product assembler, including the required standing and sitting, are within the restrictions provided by the certificate of capacity.
- Based on the evidence available as per the certificate of capacity, the Insurer submits that the Worker has capacity to work 40 hours per week. Further, the Insurer is satisfied that product assembler satisfies the above definition of suitable employment as per section 32A of the 1987 Act.
- In accordance with section 36(2) of the 1987 Act, the Insurer has calculated the Worker's entitlement as follows:

\$834.76 x 95%	\$793.02 per week
Less amount able to earn in suitable employment	\$874.00 per week
New weekly benefit (maximum benefit payable)	\$0.00 per week

REASONS

Nature of merit review

20. 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.
21. The review is not a review of the Insurer's procedures in making the work capacity decision and/or internal review decision.
22. 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.

Current work capacity

23. The Insurer found in both the initial work capacity decision and the internal review decision that the Worker has the capacity to work in some type of employment 8 hours per day, 5 days per week with recommendations of lifting/carrying/pushing/pulling less than 10 kg and avoid standing over a long period of time.
24. The Worker has not referred this decision for a merit review by the Authority. I have proceeded with this review on the basis that the Worker has the capacity to work in some type of employment 8 hours per day, 5 days per week with recommendations of lifting/carrying/pushing/pulling less than 10 kg and avoid standing over a long period of time is not disputed by him.
25. In order to determine whether the Worker has an entitlement to weekly payments of compensation and, if so, what the entitlement is, I must determine whether he has current work capacity.
26. "Current work capacity" and "no current work capacity" are defined in section 32A of the 1987 Act as:

current work capacity, in relation to a worker, means a present inability arising from an injury such that the worker is not able to return to his or her pre-injury employment but is able to return to work in suitable employment

no current work capacity, in relation to a worker, means a present inability arising from an injury such that the worker is not able to return to work, either in the worker's pre-injury employment or in suitable employment

27. The definition of current work capacity requires an assessment of whether the Worker is able to return to work in suitable employment. The Worker has not referred any decision regarding pre- injury employment for merit review by the Authority.

Suitable employment

28. "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.

29. The Worker is not currently working.
30. There is no issue before the Authority that the Worker is unable to return to work in his pre-injury employment. In the absence of any dispute on this point being referred to the Authority for review, I accept that the Worker is unable to return to work in his pre-injury employment.
31. A Transferrable Skills and Analysis Report is before me. That report records that the Worker's native language is Vietnamese. There is no indication that an interpreter was present and in relation to his cognitive testing it is stated that he appeared to understand all instructions and completed all tasks requested of him. I note that a Vietnamese interpreter attended at the appointment with an independent medical specialist "to assist with history taking". There is no indication that an interpreter was present at any of the rehabilitation and return to work meetings. The report indicates he is fluent in Vietnamese, but he has below average English language ability.
32. The report records that the Worker trained as a hairdresser. From 2011 to the date of injury, he was employed as a process worker/warehouse labourer at his pre-injury employer. The duties of that position required him to receive incoming goods, check them for damage and

discrepancies between goods and invoices; unload vehicles; operate computers to obtain details of location and quantity of items in stock; label goods with details of storage location; pack and weigh goods and seal boxes; operate machines to lift, place and remove goods on high levels; operate specialised equipment, such as manually and electronically guided order pickers, and check goods off picking list; assist with regular stocktakes; and use hand equipment such as pallet lifters to move goods.

33. The report identifies 2 vocations as suitable employment options for the Worker: machine operator (stationary) and product assembler.

Product assembler

34. The position duties are described as locating, positioning and securing components on a work bench; punching and drilling mounting holes in parts and assembled products; assembling and securing components in sequences; assembling parts by nailing, screwing, gluing and pinning, riveting, soldering and spot welding components; fitting hardware items, such as hinges, catches and knobs to parts; attaching and fastening jewellery parts to fabricate bracelets, necklaces, brooches and earrings.
35. Two employer contacts were made. Both advised that no experience was required and that on-the-job training was provided. The Worker has submitted that he does not have sufficient English language skills for either of the positions identified.
36. I note that one of the employers stated that limited English language skills were not a barrier to employment. I also note that the Worker was able to undertake all instructions and tasks required of him during the vocational assessment and that he was noted to have below average English skills, not that he had no English skills.
37. The Worker worked as a process worker for approximately 6 years before he was injured. The duties of that position required him to check orders, invoices and computers. Although he has below average English skills, that he was able to undertake these tasks indicates that he has sufficient English skills to receive on-the-job training as a product assembler. I accept that the Worker has the necessary education, skills and work experience to undertake this role given that no experience is required and on-the-job training provided, together with six years experience as a process worker. Further, as the Worker is only 30 years of age, there are no age related considerations for the position.
38. I must also consider whether the work is suitable for the Worker having regard to the nature of his incapacity.
39. The employers have noted that these are light positions with limited pushing and pulling and items are moved via trolleys. Lifting was below 10 kg. Although the worker is required to stand throughout the shift, the employers confirmed that the worker would be able to sit on a stool and stand and work at bench height. The Worker would be able to transition between sitting and standing.
40. I find that the position of product assembler is suitable employment for the Worker as defined in section 32A of the 1987 Act.

Machine operator (stationary)

41. I note the key duties of this position are fixing attachments to machines, setting controls and loading material to be processed; starting machines, observing operation and adjusting controls to regulate temperature, pressure, intake of raw materials and speed; sampling output for defects and variations, and adjusting machine settings accordingly; unloading and storing output and cleaning and lubricating machines and performing minor repairs.
42. I note that one employer stated lifting was not implicit but could be repetitive and that the job also involved the manipulation of the packaging once on the machine bed and the second

employer noted that lifting would not exceed 15 kg. One employer noted that previous experience was required and a high mechanical aptitude and reasoning was required.

43. I am not satisfied that the Worker has the necessary education, skills and work experience to undertake this role, nor am I satisfied that the position is suitable having regard to the nature of his incapacity as a result of injury.
44. I find that the position of machine operator (stationary) is not suitable employment for the Worker as defined by section 32A of the 1987 Act.

Current work capacity

45. As the Worker is not able to return to his pre-injury employment, and I have found that he is able to return to work in suitable employment, I therefore find that the Worker has current work capacity pursuant to section 32A of the 1987 Act.

Pre-injury average weekly earnings

46. The Worker does not dispute the amount arrived at by the Insurer for her PIAWE and accepts the figure of \$834.76.
47. I will proceed on this basis.

Entitlement periods for ongoing weekly payments

48. 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.
49. The Insurer, in its reply to an application for merit review, indicated that the Worker had received 12 weeks of weekly payments of compensation.
50. It was confirmed that the Worker's entitlement were reduced to nil. Therefore, his total weeks of weekly payments of compensation paid were 12 weeks. However, the definition for "first entitlement period" in section 32A states:

"first entitlement period, in relation to a claim for compensation in the form of weekly payments made by a worker, means an aggregate period not exceeding 13 weeks (whether or not consecutive) in respect of which a weekly payment has been paid or is payable to the worker."
51. At the time payments were reduced to nil, the Worker was in the "first entitlement period". However, as payments are defined as "paid or is payable" to the Worker, under this determination the Worker is now in the second entitlement period under section 37.

52. I therefore find that the Worker's entitlement to weekly payments of compensation currently falls in the second entitlement period and is to be calculated in accordance with section 37 of the 1987 Act.
53. The Worker has current work capacity, therefore section 37(3) of the 1987 Act provides the basis upon which his entitlement to weekly payments of compensation is to be calculated, 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

54. "AWE" means the worker's pre-injury average weekly earnings (PIAWE).
55. The Worker's PIAWE is \$834.76 and this matter is not in dispute.
56. "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.
57. "D" is the amount of any non-pecuniary benefits which is nil.

Ability to earn in suitable employment

58. I have found the role of product assembler as suitable employment for the Worker. The Worker has the capacity to perform 40 hours per week (8 hours a day, 5 days a week).
59. The Transferrable Skills Analysis Report indicates that the average earnings in this position are \$800.00 per week. The *Manufacturing & Associated Industries and Occupations Award 2010* states that the award rate for 38 hours per week is \$718.60, being \$18.91 per hour. One employer paid \$874.00 per week for 38 hours per week and the other \$760.00 per week for a 35 hour week.
60. In my view, given that the Worker would be entering this industry for the first time and would require on-the-job training to undertake the role, the Award rate of \$18.91 is his ability to earn in suitable employment.
61. I therefore find the Worker's ability to earn in suitable employment to be \$756.40 per week.
62. The Insurer is to calculate the Worker's entitlement to weekly payments of compensation in accordance with my findings.