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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 and are to be the basis for the Insurer's work capacity decision.
2. The Worker has a present inability arising from an injury such that she is unable to return to her pre-injury employment.
3. The Worker has capacity for some type of employment 7 hours per day, 3 days per week.
4. The vocational options of receptionist and call centre operator are suitable employment in relation to the Worker.
5. The Worker has current work capacity.
6. The Worker is able to earn \$522.90 in suitable employment.

### **RECOMMENDATION BASED ON FINDINGS**

7. 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 *Workers Compensation Act 1987* (the 1987 Act).
8. The Insurer is to determine the Worker's entitlement to weekly payments of compensation in accordance with my findings above for the period from 11 February 2016 to 29 September 2016.

### **BACKGROUND**

9. The Insurer issued an "Acceptance of Liability" letter accepting liability for payment of weekly benefits and reasonable and necessary medical, hospital and rehabilitation treatment related to an injury the Worker sustained.
10. The Worker applied for an internal review and the Insurer issued an internal review decision calculating the Worker's pre-injury average weekly earnings to be \$1,057.69.
11. The Insurer made a number of work capacity decisions. The Insurer determined the Worker had the capacity to work 4 days per week, had an ability to earn \$600.00 per week and

calculated her entitlement to weekly payments of compensation at \$404.81.

12. The Insurer issued a “Notice to Apply Section 48A(3) of the *Workplace Injury Management and Workers Compensation Act 1998*” suspending the Worker’s weekly payments of compensation from 15 August 2016 on the basis of a failure to comply with her return to work plan. That notice was withdrawn on 14 October 2016.
13. The Worker made an application for merit review of the work capacity decisions, WCD 1 and WCD 2. The Insurer lodged its reply. The Authority issued a decision finding that as the Worker had not applied for an internal review of the decision WCD 1, the Authority did not have jurisdiction to undertake a merit review of the work capacity decisions.
14. The Insurer issued a “Notice under section 74 Notice of the *Workplace Injury Management and Workers Compensation Act 1998 NSW*” denying liability for weekly payments of compensation for the period 21 April 2015 to 10 February 2016.
15. The Worker made an application for internal review seeking a review of the decisions (a) about her work capacity; (b) about the amount she is able to earn in suitable employment, and (c) any other insurer decision that affects her entitlement to weekly payments of compensation, including a decision to suspend, discontinue or reduce the amount of weekly payments of compensation.
16. The Insurer issued a “Decision to Dispute your Claim. Further Notice under section 74 of the *Workplace Injury Management and Workers Compensation Act 1998*”.
17. The Insurer issued a letter to the Worker stating that it declined to make an internal review decision on the basis that it believed there was no jurisdiction to do so as a section 74 notice had been issued.
18. The Worker lodged an application for merit review with the Authority.
19. Pursuant to section 44BB(3)(b), an application for review by the Authority may be made without an internal review by the Insurer if the Insurer has failed to conduct an internal review and notify the worker of the decision on the internal review within 30 days after the application for internal review is made.

## **LEGISLATION**

20. 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).
21. Section 43 of the 1987 Act describes a “work capacity decision”.
22. Section 44BB of the 1987 Act provides for merit review of a work capacity decision of the Insurer, by the Authority.

## **DOCUMENTS CONSIDERED**

23. The documents I have considered are those listed in, and attached to, the application and the Insurer’s reply and the further documents and submissions received from the parties.

24. 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**

25. In the application for merit review, the Worker submits:

- The Authority has power to review the work capacity decisions, WCD 1 and WCD 2, pursuant to section 44BB(3)(b) of the 1987 Act.

### ***WCD 1***

- The Insurer made its decision on the basis that the Worker was able to earn \$600.00 per week in her bed and breakfast business. The evidence of the Worker as set out in her statement is that that business has not operated for a considerable period of time. The financial records which have been produced, corroborate the Worker's evidence. Therefore the basis of the Insurer's decision was factually incorrect and unsupported by any evidence.
- In determining whether the Worker has current work capacity regard must be had to the definitions in section 32A of the 1987 Act.
- Having regard to the Worker's age, experience and restrictions as set out in the certificates of capacity and her statement there is no realistic suitable employment available to her.
- In real or practical terms, having regard to the definition in section 32A, the Worker has no current work capacity.

### ***WCD 2***

- The Insurer's work capacity decision to suspend the Worker's weekly payments, has been overborne by the section 74 Notice which denied liability.
- The Worker's evidence is that she has complied with the return to work plan. Her employer has not provided her with any suitable duties and the Insurer has not assisted her in looking for alternative employment within the limits of her current restrictions.
- In those circumstances, the Insurer's decision to suspend payments was unreasonable and unjustified and should be set aside.

26. In reply, the Insurer has provided lengthy submissions. In summary, the Insurer submits:

- Despite submissions to the contrary on the last occasions, the Merit Review Service has determined that the Insurer made a work capacity decision (WCD 1).
- With respect to PIAWE, there is a dispute as to \$1 which they believe is due to the fact that the Worker's lawyers have utilised the net figures on the Worker's bank statement.
- The Insurer believes the Worker has not been transparent in relation to her income and she should be required to provide further information to adequately assess her current weekly earnings.
- The Insurer notes that the section 74 notice constitutes a liability decision and the Merit Review Service does not have jurisdiction to make a finding with respect to any ongoing entitlement to weekly compensation.

- Any review by the Authority must be confined to the closed period prior to 29 September 2016.
- The Worker has capacity to work full-time hours in suitable employment in line with the opinion of the independent medical specialist.
- The roles of administrative assistant, receptionist and call centre operator constitute suitable employment given her previous experience in both retail and administration and her Certificate III Business Administration Practice Management.
- The Worker has the ability to earn \$26.32 per hour as a call centre operator, which equates to \$1,000.16 per week based on a 38 hour week.
- Further, and in the alternative, the Worker's NTD outlines that she does not have any current physical restrictions save for the ability to undertake 24 hours per week.

27. The Worker provided further submissions and a statement. She submits:

- She disagrees with a number of assertions made by the Insurer regarding her disclosure of financial information. She maintains she has made full disclosure of all relevant financial material and information available to her.
- She disagrees that the roles of administrative assistant, receptionist and call centre operator are suitable employment. She is unable to do long periods of sitting and walking up and down stairs. She also can't bend to the floor level to file client files.
- She does not have current work capacity.

## **REASONS**

### **Nature of merit review**

28. This matter involves a merit review of the work capacity decision of an insurer in accordance with section 44BB(1)(b) of the 1987 Act. The review is not a review of an 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.
29. I note that although the Insurer has made submission regarding PIAWE, the determination regarding the Worker's PIAWE has not been referred to the Authority.
30. Based on the above submissions and the application form, I am of the view that the Worker has sought a review of the following work capacity decisions:
- (a) a decision about her current work capacity (section 43(1)(a)),
  - (b) a decision about what constitutes suitable employment (section 43(1)(b)),
  - (c) a decision about the amount the Worker is able to earn in suitable employment (section 43(1)(c)), and
  - (d) any other decision of an insurer that affects the Worker's entitlement to weekly payments of compensation, including a decision to suspend, discontinue or reduce the amount of the weekly payments of compensation payable to The Worker on the basis of any decision referred to in paragraphs (a)–(e) (section 43(1)(f)).

### **Power of the Authority**

31. In the merit review decision, the Authority found that the Insurer made a number of work capacity decisions (WCD 1). I accept that the Insurer made work capacity decisions under section 43(1)(a), (c) and (f) of the 1987 Act.
32. The section 74 notice, relates to the period of 21 April 2015 to 10 February 2016. As it is a notice disputing liability, the Authority has no jurisdiction to review the period of weekly payments covered by that section 74 notice.
33. The Insurer issued a notice under section 48A(3) of the 1998 Act alleging a failure of the Worker to comply with her obligations under the work injury management provisions of that Act. That notice was withdrawn on 14 October 2016.
34. The Insurer issued a section 74 notice disputing liability for the Worker's claim on the grounds that she no longer suffers any incapacity as a result of injury at work and therefore she is not entitled to any further benefits of weekly compensation pursuant to section 33 of the 1987 Act. The Authority has no jurisdiction to review that decision.
35. Therefore, the Authority only has jurisdiction to review a closed period from 11 February 2016 to 29 September 2016.

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

36. The Worker suffered an injury whilst working as a manager at a furniture and accessory store when she pulled on the heavy door, the handle came off and she fell backwards.
37. The issue for me is how the injury impacts upon the Worker's capacity for employment.
38. 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*
39. "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*
40. In undertaking this review, I will consider the information before me and assess if, and to what extent, the Worker had "current work capacity" or "no current work capacity" as defined and set out above.

### **Certificates of capacity**

41. Before me are a number of WorkCover NSW – certificates of capacity issued by the nominated treating doctor (NTD). In the certificate, the NTD certified the Worker with no current work capacity.
42. In the certificates of capacity issued, the NTD certifies the Worker as having capacity for some type of employment 4 hours per day, 4 days per week. The NTD made the following recommendations on tolerances:

Lifting/carrying capacity:	not more than 5 kg
Sitting tolerance:	15-30 min
Standing tolerance:	15-30 min

- |                                     |                    |
|-------------------------------------|--------------------|
| Pushing/pulling ability:            | not more than 5 kg |
| Bending/twisting/squatting ability: | limited            |
| Driving ability:                    | 30 min             |
43. The NTD issued a certificate certifying the Worker with capacity for some type of employment 5 hours per day, 4 days per week, with the following recommendations on tolerances:
- |                                     |  |
|-------------------------------------|--|
| Lifting/carrying capacity:          | not more than 5 kg                                 |
| Sitting tolerance:                  | 45 min, may be more with good lumbar support chair |
| Standing tolerance:                 | 30-45 min  |
| Pushing/pulling ability:            | not more than 5 kg                                 |
| Bending/twisting/squatting ability: | limited  |
| Driving ability:                    | 45 min, may be more with good lumbar support       |
44. The certificates issued by the NTD are in the same terms. The NTD certified the Worker with capacity for some type of employment 7 hours per day, 3 days per week with the same restrictions as above.
45. The NTD has issued further certificates of capacity which are outside the period I am reviewing.

**Medical reports**

46. A general surgeon (orthopaedics) provided a report which I note is outside the period. He opined that the Worker suffered a significant injury to her lumbar spine when she fell at work and believed it far more probable than not, that she incurred the major L4/5 left-sided disc protrusion that gave rise to her significant ongoing and continuous left-sided sciatica.
47. The general surgeon believed that she was not fit for her pre-injury employment as repetitive bending and lifting of the sort of items she should in the retail store would aggravate her lumbar discal pathology. He believed she could cope with sedentary-type work on a half-time basis were it available to her.
48. The NTD has provided a number of medical reports. In the report, the NTD stated that he treated the Worker with conservative measures and she has presented with ongoing axial back pain and sciatica pain since 3 September 2015 and he has referred her to a treating neurosurgeon. Her ongoing diagnosis and treatment is for her L4/5 disc prolapse.
49. The treating neurosurgeon has provided a number of medical reports, the most recent of which stated she continues to have ongoing low back pain with some occasional pain radiating from the buttocks all the way down the legs. The pain is particularly aggravated by prolonged sitting and some other physical activities. He noted she was keen on conservative treatment. He did not comment on her capacity for work.
50. The independent medical specialist provided three reports. In the first of two reports, the independent medical specialist diagnosed the Worker with a work related aggravation of a pre-existing degenerative disease of the lumbar spine. He stated that she has a significant canal stenosis at the L4/L5 segment due to the hypertrophy of the ligamentum flavum.
51. The independent medical specialist believed she had capacity to do normal hours of suitable duties. He stated that as she is 60 years of age, her options of work are limited. He stated that the probability of getting her back to her pre-injury duties is very poor.

52. In the second report, the independent medical specialist stated that the Worker has the capacity to do normal hours which does not involve lifting heavy objects. He also noted that she had difficulty doing the secretary job she had undertaken for a brief period.
53. The independent medical specialist provided a further report following a further review and opined that her present complaints are predominantly due to her age-related issues and that the kind of injury she had at work was a muscular injury which should have resolved in 6-8 weeks. Her present symptoms strongly suggest the degenerative disease of the lumbar spine and its normal progression. He notes she has difficulty accepting this as she had no problems with her back before the injury. He believed she has capacity to do normal hours with a weight restriction of 10 kg.

**Discussion and findings**

54. After considering the medical information, I accept the certificate of the NTD that the Worker has capacity for some type of employment 7 hours per day, 3 days per week. The NTD had been continually increasing the Worker’s capacity for some type of employment until the most recent certificate. The general surgeon was also of the view that the Worker could return to work in sedentary employment for about half the normal hours. I note the independent medical specialist has been of the opinion since January 2016 that the Worker could return to work in full-time capacity. Further, I note from the transferrable skills report discussed below, that the Worker was working in September to October 2015 for two to three days per week as a paralegal/administrative assistant which she found difficult to perform. The Worker has attended upon the NTD’s surgery for some time and he has referred her to the treating neurosurgeon. Although the treating neurosurgeon did not opine on the Worker’s capacity for employment, he noted her ongoing pain problems and the aggravation whilst sitting and other physical activities. The weight of the medical information is that the Worker had a limited work capacity with recommendations on tolerances.
55. I accept the recommendations as set out on the majority of the NTD’s certificates. I find that the Worker had a capacity for some type of employment 7 hours per day, 3 days per week with the following recommendations on tolerances:

Lifting/carrying capacity:	not more than 5 kg
Sitting tolerance:	45 min, may be more with good lumbar support chair
Standing tolerance:	30-45 min
Pushing/pulling ability:	not more than 5 kg
Bending/twisting/squatting ability:	limited
Driving ability:	45 min, may be more with good lumbar support

**Suitable employment**

56. In light of the definitions as set out above, to assess the Worker’s current work capacity, I need to consider the question of whether or not she has the ability to return to her pre-injury employment.
57. There is no issue before me that the Worker is unable to return to her pre-injury employment. I accept that she has a present inability arising from injury such that she is unable to return to work in her pre-injury employment.
58. In order to determine whether the Worker has current work capacity, I am required to consider whether the Worker is able to return to work in “suitable employment”. 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 Workers Compensation 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.*

59. There is some information before me that the Worker may be involved in a bed and breakfast business. However, the information indicates that bookings are rare and sporadic and have not occurred since 14 May 2016. The information before me suggests there are few bookings and the overheads may be as high as any income that has been earned. In my opinion, the Worker is not currently working.
60. Further I am not persuaded that the Worker is able to work in such a business as she has indicated that she is unable to do any of the tasks such as cleaning and bed-making and I believe the duties are not within her functional capacity as they are not sedentary in nature and require lifting, carrying and bending.
61. A rehabilitation services provider provided a transferrable skills analysis report and recorded that the Worker has worked in roles as a customer service and administrative supervisor, department supervisor, style advisor, personal assistant, real estate agent, remedial and aromatherapy massage therapist, artist, lecturer at an adult education night school and art gallery manager. At the time of injury, the Worker was working as a retail supervisor. Following her injury, the Worker worked for a brief period as a paralegal/administrative assistant. The Worker has extensive experience in customer service both in person and dealing with people on the telephone, general office administrative skills and liaising with people and organisations. The Worker was recorded as having above average computer and numeracy skills.
62. The rehabilitation services provider identified three vocational options for the Worker being administrative assistant, receptionist and call centre operator.
63. The position of administrative assistant states that it is a sedentary role where the worker is required to sit constantly at a workstation and carry out a variety of manual and computerised data entry and word processing tasks. The worker is required to occasionally walk about the office.
64. The independent medical specialist recorded that the Worker had difficulty performing this role and the employer contact noted that her reduced hours would preclude the Worker from being eligible for the role.
65. Whilst I accept that the Worker has the appropriate education, skills and work experience to be capable of undertaking the role from a vocational perspective, and noting there are no age related considerations, given the difficulty she has indicated to the independent medical specialist in performing the role and the requirement that an administrative assistant constantly sits at a work station, I am not persuaded that the position is suitable employment

for the Worker as defined in section 32A.

66. The position of receptionist is described as a sedentary role where the worker constantly sits at a work station undertaking manual and computerised tasks. The worker may stand and walk around the office. Positions are also available on a part-time basis over 20 hours per week.
67. The employer contact noted that the worker would be required to be seated for the majority of the shift in order to complete computer and telephone based activities and in liaising with customers. Employees can alternate between desk based duties and active tasks such as filing, tidying, scanning and photocopying. Further an ergonomic workstation can be provided as well as a sit-to-stand workstation if necessary. The employer confirmed that candidates can work a minimum of 3 days per week up to full-time hours.
68. I accept that the Worker has the appropriate education, skills and work experience to be capable of undertaking the duties of a receptionist. Further, there are no age-related considerations for the role. The employer contact noted that although a worker is required to be seated for the majority of the shift, the worker is able to alternate between desk based duties and more active duties and this can be done at the worker's discretion. Further, ergonomic workstations can be established for the worker. Noting that the Worker can sit for up to 45 minutes, especially with lumbar support and noting that the position either does not require lifting, carrying, pushing or pulling or twisting, and any need to do such is limited, I accept that the position is within the Worker's functional capacity taking into account her present inability arising from injury.
69. I find that the position of receptionist is suitable employment for the Worker as defined by section 32A of the 1987 Act.
70. The third vocational option is that of call centre operator. The position is described as sedentary with the requirement of answering incoming calls, emails and messages, and assisting customers with inquiries and other customer service duties. The worker constantly sits at a workstation and carries out a variety of manual and computerised tasks.
71. The employer contact noted the functional demands were considered light and that sit-to-stand desks would be able to be utilised.
72. I accept that the Worker has the appropriate education, skills and work experience with her previous customer service roles to undertake the duties of a call centre operator. Further, there are no age-related considerations for the role. The employer contact noted the duties were light in nature and the worker could sit and stand to undertake the duties. I accept that the position is suitable employment for the Worker.
73. I find that the position of call centre operator is suitable employment for the Worker as defined 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's reply states that the Worker has received 27 weeks of weekly payments of compensation up to the date of lodging the reply. The Worker has made no submissions in this regard.

76. I 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 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

77. "AWE" means the worker's pre-injury average weekly earnings.

78. The vocational assessment report indicated the following in relation to the suitable employment options:

(a) receptionist: the employer contact noted they paid \$25.90 per hour and the average hourly rate noted in the report is \$23.90.

(b) Call centre operator: the employer contact noted that they paid \$22.50 per hour and the average hourly rate noted in the report is \$26.32.

79. "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.

80. Section 35 of the 1987 Act provides that "E" means the amount to be taken into account as the worker's earnings after injury, calculated as whichever is the greater of the amounts.

81. In relation to the position of receptionist, I note that the employer contact could only provide a permanent position paying \$25.90. The Worker has a capacity to work 7 hours per day, 3 days per week and therefore, I am persuaded that the somewhere between the average hourly rate and that quoted by the employer is appropriate given her limited hours. I am satisfied that the Worker could earn the average of the 2 rates, being \$24.90 per hour.

82. In relation to the position of call centre operator, I note that the Worker is only able to work part-time and would require the ability to sit and stand at her desk. Although she has experience in customer service, she has not worked as a call centre operator. I am persuaded that the average of what the employer has noted and the amount paid to workers in this vocation, is the appropriate amount for the Worker. I find that the Worker could earn \$24.41 per hour as a call centre operator.

83. The position of receptionist has the higher rates of pay and is therefore the position I must use to determine "E".

84. The Worker is not currently working and her current weekly earnings as defined by section 44I of the 1987 Act are nil.

85. There is no dispute between the parties that the Worker's pre-injury average weekly earnings are \$1,057.69.
86. "D" is the amount of any non-pecuniary benefits which is nil.
87. The Worker's entitlement to weekly payments is calculated as follows:
- $$(AWE \times 80\%) - (E + D)$$
- $$(\$1,057.69 \times 80\%) - (\$24.90 \times 21 + 0)$$
- $$\$846.15 - \$522.90$$
- $$= \$323.25$$

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