



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 is able to return to work in suitable employment.
3. The vocational options of Production Manager, Project Manager and Marketing Co-ordinator are suitable employment for the Worker.
4. The Worker has current work capacity.
5. The Worker is able to earn \$1,472.95 per week in suitable employment as a Project Manager.

RECOMMENDATIONS BASED ON FINDINGS

6. The Authority may make binding recommendation to the Insurer on the basis of its findings on review in accordance with section 44BB(3)(e) of the *Workers Compensation Act 1987* (the 1987 Act).
7. The Authority makes no recommendations for the reasons below.

BACKGROUND

8. The Worker was employed as a Client Services Manager. He was working from home when a delivery of point of sales was delivered. While lifting one of the heavier boxes, the Worker injured his lower back, with pain radiating down the back of his right leg to his foot.
9. The Worker returned to work on suitable duties and worked until 1 March 2016, when his employment contract was not renewed. The Worker is not currently working.
10. The Insurer accepted liability and commenced weekly payments of compensation to the Worker.
11. The Insurer made a number of work capacity decisions. The outcome of these decisions was the reduction of the Worker's weekly payments of compensation to \$0.00 under section 37(3) of the 1987 Act. This reduction was to take effect on 23 August 2016.
12. The Worker applied for an internal review, which was received by the Insurer. Due to an oversight by the Insurer, an internal review was not conducted.
13. The application for merit review was received by the Authority. The application has been lodged in the form approved by the Authority and is accepted for lodgement as the

Insurer has failed to conduct an internal review within 30 days in accordance with section 44BB(3)(b) of the 1987 Act.

LEGISLATION AND GUIDELINES

14. The legislative framework governing work capacity decisions and reviews is contained in the:

- *Workers Compensation Act 1987* (the 1987 Act);
- *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act);
- *Workers Compensation Regulation 2016* (the Regulation).

15. Section 43 of the 1987 Act describes a “work capacity decision”.

16. Section 44BB of the 1987 Act provides for merit review of a work capacity decision of the Insurer, by the Authority.

INFORMATION CONSIDERED

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

SUBMISSIONS

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

- The Insurer did not request an occupational rehabilitation provider to assess the state of the Worker’s physical ability in a work environment before conducting a work capacity assessment.
- The Insurer has not taken into account his medications which cause drowsiness and he is restricted from driving a motor vehicle.
- The removal of the restriction to lift was made by his case manager and not by any medical professional.
- As a result of his injury, he is unable to engage in employment of a certain kind which will affect the amount he is able to earn.
- The Worker states that his capacity since the injury included:
 - Avoid driving 1 hour
 - Lifting/carrying no more than 5 kgs
 - Sitting, standing as tolerated
 - Avoid pushing, pulling, bending, twisting and squatting.

19. In reply, the Insurer submits that the Worker has capacity to work in suitable employment as identified in the earning capacity assessment report.

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. 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.

21. The Worker has made a number of submissions pertaining to the Insurer's failure to provide responses to, or the Insurer's decision to decline treatment requests from his treating doctor or physiotherapist. These matters in my view go towards either the Insurer's procedures or are decisions that may be the subject of a medical dispute and cannot be reviewed here – see section 43(2)(b) of the 1987 Act.
22. The same applies to the alleged failure by the Insurer to provide documentation in support of the reasoning of the work capacity decision.

Current work capacity and suitable employment

23. I have a copy of what appears to be the latest WorkCover NSW Certificate of Capacity from the Worker's nominated treating doctor (NTD). It covers the period from 23 January 2017 to 23 February 2017.
24. This certificate is consistent with earlier certificates where the Worker's capacity was for "normal" hours per day, "normal" days per week. As the Worker's pre-injury employment was for 38 hours per week, I interpret "normal" to mean 38 hours per week.
25. The restrictions in the latest certificate however differ from previous certificates in that the Worker presently has restrictions to his sitting, standing, pushing/pulling, bending/twisting/squatting and driving whereas these were all described as "N/A" in earlier certificates.
26. These restrictions are as follows:
 - Lifting/carrying avoid lifting anything > 10kgs
 - Sitting 20 min at a given time with stretches in between
 - Standing 25 mins at a given time with 5 min sitting break in between
 - Pushing/pulling 10kg
 - Driving no more than 20 mins per trip
27. The only other information I have before me regarding capacity for work is an "initial assessment report" and an "independent medical examination" report from an independent medical specialist. I note that the recommendations in these two reports are largely consistent with the views of the NTD.
28. Given that the NTD has treated the Worker for an extended period of time, with regular reviews including a recent WorkCover NSW Certificate of Capacity, I find that the Worker's capacity for work is in accordance with the NTD's assessment.
29. I therefore find that the Worker has capacity to work in some type of employment for 38 hours per week with physical restrictions as per the WorkCover NSW Certificate of Capacity with the restrictions contained therein and reproduced above in paragraph 26.
30. 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
31. "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

32. There is no dispute that the Worker is unable to return to his pre-injury employment. I am therefore required to consider whether the Worker is able to return to work in suitable employment in order to determine whether he has “current work capacity” or “no current work capacity”. Suitable employment is defined in section 32A of the 1987 Act as:

Suitable employment, in relation to a worker, means employment in work for which the worker is currently suited:

(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.

33. A rehabilitation provider conducted an earning capacity assessment and provided an earning capacity report. The roles of Production Manager, Project Manager and Marketing Co-ordinator were identified as “suitable employment” for the Worker. The report provides a detailed description of the duties of each of these roles.

34. The Worker completed Year 12 in Australia and holds the following qualifications: Bachelor of Computer Science; Master in Design Science (Digital Media); Certificate IV in Project Management; Certificate in Radio Journalism (writing, producing and announcing). I am satisfied he has the necessary education to be suited to the roles identified.

35. As discussed in the earning capacity report, I note that the Worker has substantial work experience in production, project and marketing management/co-ordinator roles having worked as a Client Services Manager in his pre-injury role, Digital Producer/Production Manager, Project Manager as well as various other marketing, communication and field operation management roles.

36. These previous roles are relatively recent in the Worker’s employment history and there is evidence that the Worker has been applying for these roles as discussed in various case conferences with the rehabilitation provider. The rehabilitation provider have also stated that the Worker does not require any retraining for the roles which I accept, based on the Worker’s previous experience and qualifications. I am therefore satisfied the Worker has the necessary experience and skills to be suited to the roles.

37. In relation to the Worker’s physical capacity, I accept that he continues to suffer from back pain with radiation into his right leg and big toe. The analgesics he takes and the physiotherapy treatment is evidence of the Worker’s continuing symptoms.

38. However and notwithstanding the Worker’s continuing symptoms, I have accepted the information from his nominated treating doctor, that he has capacity for some type of employment. The Insurer has identified the above roles which are all described as sedentary

roles in the labour market research conducted. This report included an analysis of current employers for vacant roles in the open labour market who have all confirmed that the roles do not require lifting, pushing or pulling activities of greater than 10kg. The roles are also described as self-paced and the Worker will have the ability to take rest breaks or adjust his posture as required.

39. In relation to driving requirements, I note that the employer contacts have specified that there would not be any driving requirement of over 1 hour. I acknowledge that the Worker's driving ability is currently only 20 minutes per trip, however as the duties of the role are sedentary and administrative based there is nothing in the duties of the role that would suggest a need for driving that would exceed 20 minutes per trip. Moreover, most employer contacts have advised that there would be no driving at all.
40. In the rehabilitation provider reports, namely the closure report and progress reports, there have also been some concerns raised by the Worker regarding his place of residence and the limited public transportation available. While I sympathise with the Worker's concerns, the definition of suitable employment does not allow me to consider the Worker's place of residence. Nor does the role need to be available or of a type that is generally available on the employment market.
41. The NTD was provided with a list of duties for each of the roles and indicated his approval for 8 hours per day, 5 days per week. As the NTD is the Worker's nominated treating doctor, I am satisfied there is a medical opinion to support the roles proposed.
42. I am therefore satisfied that the Worker has the functional capacity to be currently suited to the roles of Production Manager, Project Manager and Marketing Co-ordinator.
43. I note that the Worker has provided a number of submissions regarding what he considers to be inadequate occupational rehabilitation services provided by the Insurer. I note that the Worker completed a Career Enhancement Training Program held over three days in March 2016. He has also been provided with one-on-one job seeking assistance. Furthermore, the Worker's ability to secure job interviews with a Project Lead role and a casual administration role is testament of his ability to independently job seek. There is, in my view, no requirement for the Insurer to secure a work placement program as the Worker has the ability to apply for, and the capacity to work in the employment options identified. I am therefore satisfied that occupational rehabilitation services already provided to the Worker will enable him to be currently suited to the identified job options.
44. Accordingly, having had regard to the balance of the factors in the definition of suitable employment in section 32A of the 1987 Act, I find that employment as a Production Manager, Project Manager and Marketing Co-ordinator constitutes suitable employment for the Worker.
45. I find that the Worker has a present inability arising from an injury such that he is not able to return to work in his pre-injury employment but is able to return to work in suitable employment. I find that the Worker has current work capacity in accordance with the definition in section 32A of the 1987 Act.

Entitlement periods for ongoing weekly payments

46. 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.
47. The Insurer's reply to the application for merit review states that the Worker has received a total of 30 weeks of weekly payments.
48. At the time of this merit review decision, I find that the Worker's entitlement to weekly payments of compensation currently falls in the second entitlement period (weeks 14-130) and is to be calculated in accordance with section 37(3) of the 1987 Act, as follows:
- (3) *The weekly payment of compensation to which an injured worker who has current work capacity and has returned to work for less than 15 hours per week (or who has not returned to work) is entitled during the second entitlement period is to be at the rate of:*
- (a) $(AWE \times 80\%) - (E + D)$, or
- (b) $MAX - (E + D)$,
- whichever is the lesser.*

Calculation of entitlement

49. "AWE" means the worker's pre-injury average weekly earnings. In its work capacity decision, the Insurer calculated this figure to be \$1,442.30 gross per week. The Worker does not dispute this figure.
50. Accordingly I find that the amount of \$1,442.30 will be used as the Worker's "AWE" for the purposes of the above formula under section 37(3) of the 1987 Act.
51. "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.
52. I have found above that the Worker has the capacity to work 38 hours per week with various functional tolerances as a result of the injury to his back. I have found the roles of Production Manager, Project Manager and Marketing Co-ordinator to be suitable employment for the Worker.
53. From the employers contacted by the rehabilitation provider, I note that the role of Project Manager appears to attract the highest salary.
54. The employer contacts stated that the weekly pay for a full time (38 hours per week) Project Manager is \$1,436.40, \$1,444.00 and \$1,538.46. Given the Worker's high degree of experience in production/project roles, I am of the view that the likely amount he is able to earn in the role of Project Manager would be the average of the three amounts provided by the employer contacts.
55. Therefore, I find the Worker's ability to earn in suitable employment to be \$1,472.95 per week based on a 38 hour week (\$4,418.66 divided by 3). This figure will represent the Worker's earnings after the injury (or "E") as he is not presently working.
56. "D" is the amount of any non-pecuniary benefits which in the Worker's case is nil.
57. In accordance with section 37(3) of the 1987 Act:
- $$\begin{aligned} & \$1,442.30 \times 80\% - \$1,472.95 \\ & = \$1,153.84 - \$1,472.95 \\ & = \$0.00. \end{aligned}$$

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

59. I have ultimately reached the same conclusions as the Insurer. A recommendation to the Insurer is therefore not necessary. The work capacity decision to discontinue the Worker's weekly payments of compensation stands.

Merit Review Service
Delegate of the State Insurance Regulatory Authority