



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.
2. The Worker is able to return to work in "suitable employment" as defined in section 32A of the *Workers Compensation Act 1987* (the 1987 Act).
3. The Worker has "current work capacity" as defined in section 32A of the 1987 Act.
4. The Worker does not meet the special requirements under section 38(3) of the 1987 Act for continuation of weekly payments of compensation after the second entitlement period.

RECOMMENDATIONS BASED ON FINDINGS

5. Under section 44BB(3)(e) of the 1987 Act the Authority may make binding recommendations to an insurer based on findings of its review.
6. The Authority does not make a recommendation for the reasons below.

BACKGROUND

7. The Worker has received weekly payments of compensation for an incapacity for work from an injury he sustained at Employer 1.
8. The Insurer ceased the Worker's weekly payments of compensation for reasons including:
 - The Worker has current work capacity.
 - The Worker is able to return to work in suitable employment.
 - The Worker does not meet the special requirements under section 38(3) of the 1987 Act for continuation of weekly payments of compensation after the second entitlement period.
9. The Worker referred the Insurer's decisions for internal review. The Insurer arrived at the same outcome.

10. The application for merit review was received by the Authority. The application has been made within time under section 4488(3)(a) of the 1987 Act. It has been made in the form approved by the Authority.

LEGISLATION

11. 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).
12. Section 43 of the 1987 Act describes a "work capacity decision".
13. Section 4488 of the 1987 Act provides for merit review of a work capacity decision of the Insurer, by the Authority.

DOCUMENTS CONSIDERED

14. The documents I have considered for this review are the Worker's application for merit review and the Insurer's reply form, the documents listed in and attached to those forms, and any further information provided to the Authority and exchanged between the parties.

SUBMISSIONS

15. In the application for merit review, Mr M of the law firm submits on the Worker's behalf that:
 - He wishes to have the work capacity decision reviewed and set aside.
 - He seeks to have his weekly compensation reinstated to his weekly payments at the rate applicable from the date of the determination by either the review from the Insurer or the State Insurance Regulatory Authority (SIRA) or the Workers Compensation Independent Review Officer (WIRO). He seeks that such payment should continue until such time as the further work capacity decision (WCD) comes into effect.
 - He was not made aware of the review process before SIRA and therefore it is submitted that the work capacity decision is invalid.
 - It is incorrect that the Insurer tried to contact him on several occasions before and after the work capacity decision.
 - In accordance with Guideline 5.3.1, the Insurer has failed to communicate the work capacity decision to him. A face to face meeting should have been provided.
 - Clause 5.3.1 states that it may be appropriate to communicate a work capacity decision in the presence of the nominated treating doctor or other relevant health care professionals. The Insurer has failed to provide this information in accordance with the Guidelines.
 - He was not provided with any information about the Workers Compensation Act, or had it explained to him prior to the work capacity decision. He was not requested in writing to supply further information in support of his entitlements to recover further weekly compensation. The Insurer has not complied with the Guidelines.

- The Insurer has been provided with copies of his tax returns for the financial year ending 30 June 2014. The Insurer stated that he earned \$10,585.00. If you divide that by 52 weeks it equals \$203.55 per week.
- It would seem that the Insurer's work capacity decision centred largely on the submission that his ability to earn was greater than his actual earnings. However, a worker's actual earnings are prima facie to be taken as his ability to earn unless it is established that for non-injury reasons the actual earnings do not reflect the ability to earn. This is a decision of the Supreme Court of NSW in *Aitken v Good Year Tyre and Rubber Company Australia Ltd* (1947)48S.R(NSW)20, and that decision remains good law to date. Whilst this case was subsequently doubted by Mr Cole, in a subsequent judgement Mr Cole reiterated that it was law. Here a worker is doing all the work that he can do. On such an application the employer has the onus of proof.
- His actual earnings are a true reflection of his ability to earn in his injured state.
- The Insurer has advised, incorrectly, that he does not satisfy the special requirements of section 38(3)(b) and therefore is not entitled to weekly benefits. However, this is just fundamentally incorrect. As stated above he has provided tax returns to the insurer and they indicate that he is earning \$203.55 per week. Therefore, he has returned to work and is working 15 hours or more and is in receipt of current weekly earnings of greater than \$155.00. He is therefore entitled to compensation after 130 weeks up to 260 weeks.
- His probable earnings were \$906.25 per week as adjusted to date in accordance with Schedule 6.19H.2 of the *Workers Compensation Act* 1987. Therefore, he should be paid \$702.70 per week as from 1 January 2013.
- His general practitioner, as stated by the Insurer in their work capacity decision, has said that he has restrictions in that he can only lift 5 kilograms in weight and he should not bend, twist, squat, push or pull. This limits the amount of time that he could be working as a real estate agent. He would have to take breaks during each day that he worked.
- The Insurer is relying on a vocational assessment which was prepared in 2004, and an initial assessment under section 40 back in 2007.
- The Insurer is relying on old information in order to cease his weekly payments.
- The Insurer, in its work capacity decision, made the following comments:

"As I have determined you as having "current work capacity" and you are not working in suitable employment you do not meet the requirements of section 38(3)(b) and are therefore no longer entitled to weekly benefits." However, in this case the vocational assessment, said his employment options included Real Estate Agent, Sales Representative and Sales Assistant. Then on page 3 they confirm that he is employed as a real estate agent and he is getting paid commission from properties that he sells, which is the normal way of real estate agents get paid and that he has earned a gross amount of wages of \$10, 585.00 for the financial year."
- These two paragraphs are totally illogical. The Worker questions how can someone be advised to obtain a job as a real estate agent, obtains the job and then the Insurer says they are not working in suitable employment.
- Further the Insurer in the final paragraph has stated that he is entitled to apply to the WIRO and that WIRO also provides funding for legal advice. There is no such funding of legal advice in regards to work capacity decisions. Such a statement is misleading.

16. In reply, the Insurer states they have no submissions to make at this time.
17. The Authority requested Mr M clarify which work capacity decisions of the Insurer the Worker wishes to have reviewed. The following submissions were received:

- The decision that is wrong is the one dated 21 October 2014.
- The Worker is unfit for pre-injury work as a shearer, and he has been awarded 6% WPI in regards to his lumbar spine, 4% WPI in regards to his cervical spine and 2% WPI in regards to his industrial deafness.
- The Worker's comparable weekly earnings are governed and his deemed earnings are \$1,006.90 per week.
- The following figures are indexed each July, based on movements in AWE (section 82B of the Workers Compensation Act 1987):

	(A)	(B)
01.07.2012	\$155.00	\$1,016.30
01.07.2013	\$158.00	\$1,081.20
01.07.2014	\$168.00	\$1,112.90
01.07.2015	\$173.00	\$1,129.50
(A)=	The amount specified in s.30, 40 and 41 of the <i>Workers Compensation Act 1987</i>	
(B)=	Probable weekly earnings but for the injury	

- The transitional amounts are as follows:

01.10.2012 to 31.03.2013	\$920.90
01.04.2013 to 30.09.2013	\$938.30
01.10.2013 to 31.03.2014	\$948.50
01.04.2014 to 30.09.2014	\$960.50
01.10.2014 to 31.03.2015	\$972.90
01.04.2015 to 30.09.2015	\$985.40
01.10.2015 to 31.03.2016	\$993.70
01.04.2016 to 30.09.2016	\$1006.90

- The work capacity decision was made on 21 October 2014; therefore, his transitional amount as of this date is \$972.90 per week.
- Therefore, the Insurer is wrong in their internal review when advising what the transitional amount was when they did the work capacity decision.

- His additional earnings are prima facie to be taken as his ability to earn or probable weekly income, unless it can be established that for non-injury reasons his actual earnings do not reflect his ability to earn (see *Aitken v Goodyear Tyre*).
- The onus is on the employer to establish the reasons why his actual income does not reflect his ability to earn. The Insurer has failed to establish this point. He was earning an *average* of \$203.55 per week.
- Work as a real estate agent is still limited having regard to his injuries he has suffered. He can only sit up to 60 minutes, before pain requires him to *move* around, he can stand for only 20 minutes at a time, he can only walk for 30 minutes, he is limited in his ability to handle or lift weights and can only drive a car for a maximum of 20 minutes.
- It is simply a question on the mathematics in this case.
- In this case, the Insurer has been provided with a medical report prepared by Dr B. In that medical report Dr B said that she believed he could work up to 25 hours per week, as an upper limit, because of the Worker's chronic pain he suffers in his back, with pain down right and left legs and neck pain with pain down the right and left arms.

REASONS

Nature of merit review

18. The Worker has made several submissions concerning the procedures of the Insurer, including but not limited to, that they have not complied with the applicable Guidelines. Such submissions are outside the scope of this review as they are not work capacity decisions as described by section 43(1) of the 1987 Act.
19. 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.
20. It is only the work capacity decisions the Worker chooses to refer for review by the Authority, in accordance with section 44BB(1)(b) of the 1987 Act, that the Authority has jurisdiction to review.
21. The Worker submits he would like to have the work capacity decision made on 21 October 2014 reviewed and he would like to have his weekly payments continued.
22. I note that the Insurer had ceased the Worker's entitlement to weekly payments under section 38(3) of the 1987 Act and made several work capacity decisions at that time (referred to in paragraph [8] above and as outlined by the Authority to the Worker).
23. I will review the Insurer's decisions which ultimately ceased the Worker's entitlement to weekly payments of compensation.

Current work capacity

24. Section 32A of the 1987 Act defines "current work capacity" and "no current work capacity":

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

25. The Worker sustained an injury. He was at the time trying to pull a sheep out of its catching pen when he fell onto his back. He was admitted to the Hospital where he stayed for one week.
26. CT scans taken at the hospital revealed no evidence of a spinal fracture. Subsequent investigations have shown the Worker as having minor spondylolisthesis and spondylitic changes with facet arthropathy.
27. The Worker has not returned to work as a shearer since his injury. In 2011 he secured employment as real estate agent.
28. Dr B is the Worker's nominated treating doctor. She further describes the Worker's injury in a letter. She describes the Worker presented to her "with some cervical degeneration and C5/6 and C6/7 nerve entrapment. Recently he has been having increasing pain left arm. Nerve conduction studies confirm carpal tunnel. He also suffers from left shoulder 'zapping', which settles partially with epilium."
29. Dr B issued a Queensland workers' compensation medical certificate. In the certificate she recommends the Worker is fit for "suitable duties" capable of lifting 5 kilograms. She certifies the Worker as unable to bend, twist, squat, push or pull. Dr B is silent on both the number of hours per day and days per week the Worker can work.
30. By letter, Dr B reports referring the Worker to the Clinic which is a multidisciplinary clinic designed to help patients manage chronic pain.
31. Dr B reports the Worker trialed interactive neurostimulation therapy with "initially encouraging results." She advised the Worker's ongoing therapy program "may" improve his pain and work tolerance, but "it is unlikely that his pain will completely resolve."
32. Dr B also notes the Worker was "working between 10 and 20 hours per week as a real estate agent, and is managing the pain reasonably well with this workload. At this point, I believe 25 hours a week would be his upper limit."
33. Injury management consultant Dr J examined the Worker. He describes the findings of his examination by report. He describes the Worker as being "static in his recovery [...] He is unlikely to show any further improvements. He has chronic pain without significant radiology."
34. Dr J assessed the Worker as "capable of full time work at 40 hours." He recommends the Worker can lift up to 5 kilograms of force in a non-repetitious manner, that the Worker "is able to walk, sit, stand and use his arms and legs," that the Worker "is limited in repetitive twisting, bending, stooping or attaining odd postures," and that the Worker is to "move around as desired when in pain aggravating postures."
35. Before me is a physiotherapy management plan. The name of the treating practitioner is unclear. However, the plan outlines that the Worker had changed his job to a real estate agent and the Physiotherapist detailed the "anticipated outcome at end of this plan" is for the Worker to have a full time "work status."

36. The most recent certificate issued by Dr B is before me. It, as with the intervening certificates, is issued on the same terms.
37. The medical opinions before me support that the Worker can return to some type of employment for at least 25 hours per week. I accept this. The other recommendations placed on the Worker in returning to employment will be discussed in further detail below when assessing the nature of his incapacity.
38. There is no dispute before me with respect to the Insurer's decision 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. I will proceed on this basis.
39. Therefore, in order to make a finding on the Worker's current work capacity, I am required to consider whether he can return to work in "suitable employment" as it defined in section 32A of the 1987 Act:

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 448), and*
- (ii) *the worker's age, education, skills and work experience, and*
- (iii) *any plan or document prepared as part of the return to work planning process, including 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.*

40. Before me is a vocational plan prepared by Rehab Provider 1 and an earning capacity assessment report prepared by Rehab Provider 2. The reports provide a history of the Worker's injury, employment and transferrable skills.
41. The vocational assessments were also undertaken to identify suitable employment options for of the Worker. The roles of real estate agent, property manager, sales representative and sales assistant are proposed as being suitable employment.
42. In relation to employment as a real estate agent, both Rehab Provider 1 and Rehab Provider 2 refer to the Australian and New Zealand Standard Classification of Occupations (ANZSCO) code 6121-15. The general job description provides that a real estate agent arranges the conduct of real estate transactions such as sales and leasing and assists buyers to find suitable properties on behalf of an agency.
43. Rehab Provider 1 also contacted several employers in the labour market to further explore the vocational requirements of the role. Their descriptions of the duties required in the role align with the ANZSCO description.

44. For instance, Employer 2 describes that employee in the role will complete data entry and documentation, cold call, deliver fliers, develop relationships with home owners and potential sellers, and inspect homes.
45. To determine whether the Worker is physically suited to employment as a real estate agent, I must have regard to the nature of his incapacity and the details provided in the medical information including, but not limited to, any certificate of capacity supplied by the Worker.
46. The Worker submits work as a real estate agent is still limited having regard to the injuries he has suffered. He can only sit up to 60 minutes before pain requires him to move around. He can stand for only 20 minutes at a time. He can only walk for 30 minutes or drive a car for a maximum of 20 minutes. The Worker submits he would have to take breaks during each day he works in the role.
47. These submissions are not reflected in the medical information before me.
48. As stated, in assessing the Worker's capacity; Dr B has continued to recommend a return to some type of suitable duties. She has not placed any limitations on the Worker's capacity for sitting, standing, walking or driving. She does not recommend for the Worker to rest during the working day.
49. I am persuaded by Dr B's recommendations. I am satisfied Dr B is well-placed to assess the Worker's capacity for employment. She has continued to assess the Worker's capacity as the nominated treating doctor.
50. I also note Dr J did not place any limitations on the Worker's capacity to undertake sitting, standing, walking or driving. He recommended the Worker "is able to walk, sit, stand and use his arms and legs."
51. In returning to employment, both Drs B and J recommend the Worker is capable of lifting up to 5 kilograms. The employers contacted by Rehab Provider 1, including Employer 2, confirmed their employees are not required to lift more than that amount.
52. Dr B recommends the Worker is to avoid bending, twisting, squatting, pushing or pulling. Dr J states the Worker "is limited in repetitive twisting, bending, stooping or attaining odd postures" and the Worker is to "move around as desired when in pain aggravating postures."
53. The employers, including Employer 2, advise the role is a "fairly mobile position" comprised of desk work, typing and nil repetitive movements. Rehab Provider 2 similarly confirms that the Worker "would be able to undertake frequent postural changes throughout the day as needed." There is no indication, either from the employers or in the description of the duties that the employee in this role would be required to bend, twist, squat, push or pull in the role.
54. Further, both Drs B and J have indicated their support for the Worker to undertake employment as a real estate agent.
55. Dr B reported that the Worker was "working between 10 and 20 hours per week as a real estate agent, and is managing the pain reasonably well with this workload." Dr J reports having read Rehab Provider 1's vocational plan report. He recommends the vocation of a real estate agent is "entirely appropriate and would not recommend further rehabilitation at any level."
56. In considering the duties of the role, the expressed employer comments and the recommendations of Drs B and J, I am satisfied there is sufficient medical information before me to find that the Worker is suited to employment as a real estate agent when having regard to the nature of his incapacity.

57. Both Rehab Provider 1 and Rehab Provider 2 provide details of the Worker's education, skills and work experience.
58. They describe that the Worker had pursued employment as a real estate agent following his injury. In 2008 he obtained his Full Real Estate Licence at the Real Estate Institute of Queensland.
59. Then in 2011 he secured employment in the role with "Employer 3." He would list and sell property, conduct open house inspections, write contracts, and communicate via email, telephone and letters with sellers, buyers and other relevant stakeholders.
60. Rehab Provider 2 describe the Worker's transferrable skills as they relate to employment as a real estate agent:

"The Worker is currently working in real estate where he buys and sells properties, negotiates prices, show properties to potential buyers, inspects and- assesses properties, liaises- with customers- and vendors, and advertises properties. He has a good working knowledge of the surrounding area. He has excellent communication skills and interpersonal skills and a strong customer service and sales focus. He has well developed negotiation and conflict resolution skills and is able to establish professional relationships with customers and clients. He can work independently and as part of a team and does not require supervision. He has good time management and organisation skills and can complete his tasks within operational deadlines. He has excellent problem solving and analytical skills and good administrative skills. He is suited to continuing work in this role."
61. I note all three of the employers contacted by Rehab Provider 1 indicate that the Worker would be a suitable candidate for the position. He also possesses the desired real estate certificate and driver's licence.
62. The Worker is 59 years of age. Rehab Provider 1 report "the age group of 55-59 year olds holds 9.3% share of this occupation. This is consistent with the 8.5% that his age group holds across all occupations. This demonstrates that within the profession of real estate agent, the Worker's age is not a barrier in securing [the] role whilst compared to other occupations."
63. The above information supports that employment as a real estate agent is work for which the Worker is currently suited when having regard to his age, education, skills and work experience.
64. The former occupational rehabilitation provider Rehab Provider 3 issued a final rehabilitation report. They state the Worker's return to work goal was for him to return to work in a different job with a different employer as a real estate agent and:

"The Worker required financial assistance with obtaining a Real Estate Licence. This was organised with the help of CRS then further assistance was given with job search. The Worker has since obtained fulltime employment with Employer 4."
65. Given the above, I am satisfied the Worker is suited to employment as a real estate agent when having regard to any occupational rehabilitation services that have been provided to or for him.
66. In light of the information before me and in considering the definition of suitable employment as provided in section 32A of the 1987 Act, I am satisfied the role of a real estate agent is suitable employment for the Worker.
67. Accordingly, I am satisfied the Worker is able to return to work in suitable employment and he has "current work capacity" as defined in section 32A of the 1987 Act.

Existing recipient of weekly payments

68. 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.

69. It is common ground between the Insurer and the Worker, and I am satisfied that, he is an existing recipient of weekly payments. Therefore, the weekly payments amendments as provided in Division 2, Part 19H, Schedule 6 of the 1987 Act apply to the Worker's entitlement to weekly payments of compensation.

70. Under Clause 9 of Schedule 6, Part 19H, the Worker's pre-injury average weekly earnings are deemed to be equal to the transitional amount, which is currently \$1,006.90. I agree with the Worker's submission the transitional amount was \$972.92.

Entitlement periods for ongoing weekly payments

71. 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 under section 36 of the 1987 Act ("the first entitlement period")
- b. Weekly payments in weeks 14-130 are to be determined under section 37 of the 1987 Act ("the second entitlement period")
- c. Weekly payments after the second entitlement period (after week 130) are to be determined under subsections 38(6) or (7), but only if the special requirements for continuation of weekly payments after the second entitlement period are met under section 38 of the 1987 Act.

72. At the time of the Insurer's work capacity decision, the Worker had received over 400 weeks of weekly payments of compensation.

73. Therefore, 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

74. I am satisfied the Worker has "current work capacity". A worker with "current work capacity" is only entitled to weekly payments of compensation under section 38 of the 1987 Act if special requirements are met as follows:

{3} A worker (other than a worker with high needs) who is assessed by the insurer as having current work capacity is entitled to compensation after the second entitlement period only if:

- (a) the worker has applied to the insurer in writing (in the form approved by the Authority) no earlier than 52 weeks before the end of the second entitlement period for continuation of weekly payments after the second entitlement period, and*
- (b) the worker has returned to work (whether in self-employment or other employment) for a period of not less than 15 hours per week and is in receipt of current weekly earnings (or current weekly earnings together with a deductible amount) of at least \$183 per week, and*
- (c) the worker is assessed by the insurer as being, and as likely to continue indefinitely to be, incapable of undertaking further additional employment or work that would increase the worker's current weekly earnings.*

(3A) A worker with high needs who is assessed by the insurer as having current work capacity is entitled to compensation after the second entitlement period only if the worker has applied to the insurer in

writing (in the form approved by the Authority) no earlier than 52 weeks before the end of the second entitlement period for continuation of weekly payments after the second entitlement period.

75. The Insurer's decision on internal review, made the following comments: "The Worker has received the following settlements of whole person impairment (WPI):

- 6% WPI in relation to the lumbar spine
- 4% WPI in relation to the cervical spine
- 2% WPI for Industrial Deafness [...]

Accordingly, I have determined that [the Worker] does not meet the definition of worker with high needs, as provided by section 32A of the 1987 Act."

76.. The Worker has not provided evidence to the contrary or that would persuade me that he is a worker-with high needs. Therefore, I will proceed on the basis that the Worker is a worker other than a worker with high needs.

77. As such, the Worker is entitled to weekly payments of compensation after the second entitlement period only if he meets all three special requirements provided in section 38(3) of the 1987 Act.

78. In its work capacity decision, the Insurer outlines the following to the Worker:

The decision I have made will change the weekly benefits you are paid under your claim. Sections 36-39 of The Act are used to determine how your weekly benefit is calculated, and the section that affects you is [sic] determined by how many weeks of incapacity have elapsed since your injury first occurred. Because you have received 442.6 weeks of weekly payments since the date of injury, your benefits are currently calculated using section 38.

79. The Insurer then states "Under Section 38, and if you are determined as having "current work capacity" there are special requirements you must meet in order to be entitled to weekly benefits" and the Insurer referred to section 38(3) in its entirety.

80. I note that each of the special requirements set out in section 38(3) must be met by the Worker for him to establish his ongoing entitlement to weekly payments of compensation after the second entitlement period.

81. On internal review, the Insurer again found that the Worker has current work capacity. They state "To be entitled to weekly payments under section 38, a worker who has current work capacity must first satisfy the special requirements of section 38 (3) which states [...]."

82. Again, the Insurer details section 38(3) in its entirety to the Worker. Ultimately, the Insurer's work capacity decision and decision on internal review has ceased the Worker's entitlement to weekly payments of compensation on the basis that he does not meet the special requirements under section 38.

83. The Authority wrote to the Worker, through his solicitor. The Worker was advised that the Insurer has made a decision he does not meet the requirements of section 38(3). The Worker was advised the Authority is able to review his entitlement to ongoing payments of weekly compensation and "you will need to provide financial information, preferably pay slips, which cover the period to support this.

84. I am not satisfied on the information before me that the Worker meets the requirements of section 38(3) of the 1987 Act. Section 38(3)(c) requires that the Worker be assessed as being, and as likely to continue indefinitely to be, incapable of undertaking further additional employment or work that would increase his current weekly earnings. This section imposes a requirement that a worker is working to their maximum capacity for employment. It is not enough that a worker works 15 hours per week or more and is earning \$203.55 as demonstrated in the tax

returns as has been submitted by the Worker. In order to satisfy section 38(3)(c), the Worker would essentially need to be working to his capacity of 25 hours every week.

85. However, the information before me that addresses the number of hours per week that the Worker has been working does not establish that he is in employment or work for those hours.
86. For instance, Dr B advised that the Worker was "working between 10 and 20 hours per week as a real estate agent [...]." Such hours fall short of the 25 hours that the Worker is able to work.
87. Rehab Provider 1's vocational plan indicates the Worker was working 15 hours per week at the time. Again, these hours do not meet the 25 hours that the Worker is able to work.
88. The Insurer's decision on internal review states "the Worker advised his case manager that he had recently sold his business, but had continued working on a-commission only basis as a Real Estate Agent. Despite this, there is currently [no] information available that indicates that the Worker is currently working."
89. Given the information before me, I am not satisfied the Worker meets the special requirements under section 38(3) of the 1987 Act to be entitled to weekly payments of compensation after the second entitlement period.
90. As I have arrived at the same conclusion as the Insurer regarding the Worker's entitlement to weekly payments of compensation, I have made no recommendations under section 44BB(3)(g) of the 1987 Act. The work capacity decision to discontinue the Worker's weekly payments of compensation stands.

Merit Review Service
Delegate of the State Insurance Regulatory Authority

