



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 under section 44BB(3)(e) of the *Workers Compensation Act 1987* (the 1987 Act).
2. The Worker has a present inability arising from an injury such that he is able to work for 4 hours a day, 5 days a week with: lifting/carrying up to 10kg, sitting tolerance of 15 to 30 minutes with a break, standing tolerance of 15 minutes, pushing/pulling ability of 10kg, avoid bending, twisting or squatting, and a driving ability of 15 to 30 minutes with a break.
3. The Worker has a present inability arising from an injury such that he is not able to return to his pre-injury employment but is able to return to work in suitable employment and therefore has “current work capacity” as defined by section 32A of the 1987 Act.
4. The Worker does not meet the special requirements under section 38(3) of the 1987 Act to be entitled to 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 the Insurer based on the findings of this merit review.
6. No recommendation is made for the reasons below.

BACKGROUND

7. The Worker has been receiving weekly payments of compensation for an incapacity for work resulting from an injury when he tripped and fell while working as a manager at Employer 1.
8. The Insurer made a work capacity decision to discontinue the Worker’s weekly payments of compensation on the basis that he did not meet the special requirements under section 38(3) of the 1987 Act to be entitled to weekly payments after the second entitlement period.

9. The Insurer decided to dispute liability for injury to the Worker's cervical spine or for compensation payable for such an injury because the employment concerned was not a substantial contributing factor to the injury.
10. The Worker referred the work capacity decision for internal review. The Insurer affirmed its original decision.
11. The application for merit review was received by the Authority. It was made within time and in the approved form.

LEGISLATION

12. 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)
13. Section 43 of the 1987 Act describes a "work capacity decision".
14. Section 44BB of the 1987 Act provides for merit review of a work capacity decision of an insurer by the Authority.

DOCUMENTS CONSIDERED

15. The documents I have considered for this review are the 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 Worker and the Insurer.

SUBMISSIONS

16. In the application for merit review and related attachments, the Worker submits:
 - The Insurer relied upon additional information of its own which it had in its possession at the time it made its work capacity decision. He has not had the opportunity to consider or respond to that additional material. The Insurer has made a decision relying upon information not provided to him and that he has not been given the opportunity to respond to. This is unjust and a denial of procedural fairness.
 - The Insurer's decision to deny his neck condition is unfair. The Insurer has disregarded his neck condition when it assessed his work capacity. His neck condition was previously accepted as a work injury.
 - The Insurer has no evidence to justify its conclusion that his degree of whole person impairment (WPI) does not exceed 20%. He understands it is possible if his neck was included. His level of WPI is very important with respect to his entitlement to weekly payments.
 - He meets the special requirements under section 38(3) of the 1987 Act and the Insurer has approached that assessment incorrectly for multiple reasons (which he sets out).
17. In reply, the Insurer submits:
 - The Guidelines for Claiming Workers Compensation 2016 do not indicate that only additional information from the injured worker can be considered. These guidelines

indicate that all information, irrespective of whether it was included in the initial work capacity decision, can be considered.

- In the event that the Worker challenges liability for his cervical spine injury, which is yet to occur, then the insurer will re-assess the matter to determine if a new work capacity decision is required. Until such time that there is a change to the liability decision regarding the cervical spine injury, the insurer maintain that the current work capacity decision is correct.
- The Insurer's position regarding the Worker's WPI has been made clear.
- There are a number of evident inconsistencies with the Worker's self-employment which question whether it is actual employment and whether the money he receives from this venture is in fact wages or an incrementally incurred liability.

REASONS

Nature of merit review

18. This is a merit review of the Insurer's work capacity decision to discontinue the Worker's weekly payments of compensation on the basis that he does not meet the special requirements under section 38(3) of the 1987 Act. It is not a review of the Insurer's procedures in making the work capacity decision. The Authority must consider the available information substantively on its merit and make findings that are most correct and preferable.
19. The Insurer decided to dispute liability for injury to the Worker's cervical spine. I acknowledge the Worker's submissions about why he thinks this decision is wrong. However, the decision is not a work capacity decision under section 43(1)(a)–(f) of the 1987 Act so the Authority is not able to review that decision in this merit review. The Workers Compensation Commission has jurisdiction to determine that matter. As it will be seen below, whether or not the Worker's cervical spine condition is considered in this review does not have a material impact on the outcome based on the available information.
20. The Insurer has accepted that there was a work injury to the Worker's lower back. It has accepted that the Worker's employer at that time, Employer 1, is liable for weekly payments of compensation for his incapacity for work resulting from that injury. I will proceed on that basis.

Current work capacity

21. To assess a worker's entitlement to weekly payments of compensation after the second entitlement period (after week 130) an insurer is required to assess if a worker has "current work capacity" or "no current work capacity" as defined under section 32A of the 1987 Act:

***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.*

22. The assessment in this case involves a detailed look at the past and present medical and related information before me to isolate the present inability arising from the Worker's lower back injury.

23. Mr K (an occupational therapist) prepared a "Section 40 Assessment Report". Mr K noted under the heading of "current symptoms and physical findings" that the Worker reported symptoms of constant low back pain and constant right side leg pain over the posterolateral aspect from knee to heel level as well as pins and needles sensations and numbness in his right foot. Mr K assessed that the Worker had capacity to work in a job of "sedentary to light" strength demand and recommended:
- No lifting from ground level
 - Waist to waist transferring of 7.75kg
 - Waist to shoulder lifting of 5.5kg
 - Bilateral (two hand carry) over 20 metres of 7.5kg
 - Avoid repetitive stair climbing and carrying loads whilst traversing stairs
 - Avoid prolonged periods of static standing and walking without the opportunity to vary his posture. Postural breaks approximately every 30-45 minutes are recommended.
24. Mr K stated that "[the Worker] indicated that he works 4 hours per day, 5 days per week as per his medical restrictions. In light of the fact the Worker reported he is able to self-pace his work activities as he works from home, he would appear capable of upgrading his work hours to full-time".
25. Dr T is a "Specialist Surgeon & GP" and treated the Worker. In a report, Dr T diagnosed the Worker with "Recurrent heavy lifting at his work and fall would have caused his mild generalised posterior disc bulge at L4-5 and L5-S1 discs". Dr T stated that "the Worker has been declared fit for selected duties with lifting restrictions of 10kg and working for four hours per day 5 days per week permanently. He was certified to have reached his maximum medical improvement and is fit for permanently modified duties".
26. Dr H is an occupational physician. He examined the Worker for the Insurer in his capacity as an injury management consultant. In his report, Dr H noted that there was "neck pain consistent with mild cervical spondylosis but the range of movement was good and there was no imaging support". Dr H also noted "Lumbar spondylosis. There was a reduction in movement and imaging support for this diagnosis". Dr H stated in regard to neck function that the Worker "should avoid fixed neck positions and extreme or rapid neck movements" and in regard to lower back function "should observe the usual back restrictions, i.e. be able to sit or stand at will, avoid repetitive bending and lifting, and observe a weight restriction of 10kg".
27. Dr H considered that the Worker was fit to travel 90 minutes on public transport "provided he can sit or stand". He did not consider that the Worker was able to drive for 90 minutes and stated "[the Worker's] claimed sitting tolerance of 10 minutes is very conservative and I would regard him as able to drive for 30 minutes provided that he can break his journey appropriately, *if necessary*" (emphasis in original).
28. On hours of work, Dr H stated "I feel that the Worker is capable of working full normal hours".

29. Dr R is an orthopaedic surgeon. He examined the Worker for the Insurer. In his report, Dr R expressed doubt about the work-relatedness of the Worker's condition but nonetheless assessed work capacity as follows:

In my opinion this gentleman is fit for work normal hours where there is no bending, stooping, lifting or carrying more than 10 kilos and where he can sit, stand and move about according to comfort.

30. Dr J is an orthopaedic surgeon. He examined the Worker for the Insurer. Dr J reported:

The only abnormal findings on today's examination was some degree of restriction of straight leg raising his right lower limb as well as some degree of altered sensation present in his right lower limb. It did not conform to any particular dermatome pattern.

Back – The diagnosis is that of discal damage to the L4/5 and L5/S1 levels of his lumbar spine region which with the passage of time has developed into some degree of spinal canal stenosis with degenerative spondylolisthesis at the L4/5 level of his lumbar spine region. The diagnosis is made on the history provided by this gentleman, physical examination as well as MRI scans. The condition is consistent with the history provided.

Neck – Musculoligamentous strain of his cervical spine region. The diagnosis is made on history provided by this gentleman as well as physical examination.

...

This gentleman should avoid activities that are arduous in nature and require him to do bending and twisting movements of his back. He should avoid repetitively lifting objects of 10 kilos. Whereas this gentleman is probably not fit for his pre-injury duties, he could continue doing the duties that he was doing when he was self-employed. This gentleman advised me the only reason why he stopped working was to undergo open heart surgery.

I would expect with this gentleman's ongoing symptoms if appropriate light duties could be made available to him, he could work on a full-time basis with his ongoing back symptoms.

31. Dr M is a sports physician. He examined the Worker for the Insurer. In his report, Dr M's diagnosis and opinion was:

- Mechanical back pain and degenerative spinal canal stenosis

In his current state, this gentleman presented extremely debilitated with severe constant low back pain. If he presented to his local doctor as he presented today, one could not suggest he could perform any more than 20 hours per week, i.e. 5 hours per day 4 days per week with a lifting restriction of 5kgs at waist height. He should not be asked to lift any weight from the floor and to not lift anything above chest height.

32. In a supplementary report, Dr M stated:

I believe that the Worker has the physical capability to work 4 hours per day on 5 days per week with a lifting restriction of 5kgs at waist height...Unfortunately I could not get Dr F to understand that this gentleman agreed that he could perform light work with a lifting restriction of 5 kgs at waist height when I examined him and discussed my clinical findings with him.

33. Dr P is an orthopaedic surgeon. He examined the Worker for the Insurer. In the report, Dr P stated under the heading "diagnosis":

The Worker is a right-hand-dominant gentleman who was employed by Employer 1. He sustained injuries to the cervical and lumbar spine in a fall at work. Attention was directed primarily to the lumbar spine where he sustained aggravation of some pre-existing degenerative disc disease at L4-5 and L5-S1. He was managed conservatively under the care of Drs E, C, A and S. More recently he has been investigated for chronic neck pain with investigations confirming multilevel changes or cervical spondylosis. This has been managed by Dr S in 2016 with physiotherapy and bilateral corticosteroid injections to good effect.

34. Dr P later stated:

Based on my examination today, I would recommend the Worker be placed on suitable duties with restrictions that include not lifting in excess of 10kg, avoiding repetitive bending, lifting and twisting manoeuvres, limited periods of prolonged fixed gaze. He should alternate his tasks where possible and have the opportunity for regular breaks. I would recommend reduced hours, for example, 5-6 hours a day, 4-5 days a week.

...

I would agree with Dr M's assessment of the Worker's capacity to work though believe he probably has the capacity to work greater hours.

35. Dr P re-examined the Worker. In the report, Dr P stated:

Based on my two assessments of the Worker I would recommend suitable duties with a lifting restriction of 10kg and instructions to avoid repetitive bending, lifting and twisting manoeuvres and limited periods of prolonged fixed gaze. He should alternate his tasks where possible and have the opportunity for regular rest breaks. I would recommend reduced hours of 5-6 hours a day, 4-5 days a week. This reflects the contribution of both his cervical and lumbar spines.

36. Dr P also prepared an "Impairment Assessment" report in which he stated "Based on the available information I do not believe there is sufficient evidence to conclude that [the Worker's] current cervical spine is the result of injuries sustained in the workplace incident". However, he assessed 7% whole person impairment to the Worker as a result of a lumbar spine injury.

37. Dr F is the nominated treating doctor. Dr F has diagnosed the Worker with "Degenerative changes lower back L4/L5 and canal stenosis/Neck pain". Dr F has certified the Worker as having capacity to work for 5 hours a day 3 days a week with:

- lifting/carrying capacity of 10kg
- sitting tolerance of 15 to 30 minutes with break
- standing tolerance of 15 minutes
- no bending, twisting or squatting ability
- driving ability of 15 to 30 minutes with break

38. Prior to this, Dr F certified that the Worker had capacity for 5 hours a day 3 days a week with a 10kg lifting/carrying capacity and a recommendation for no frequent bending. Even earlier, there are "WorkCover NSW Medical Certificates" which show that Dr F had at that time certified the Worker as having capacity to work 4 hours a day 5 days a week with lifting up to 10kg and no frequent bending.

39. I also note the various medical imaging reports about the Worker's lumbar spine and cervical spine which I have considered. They do not directly address the Worker's capacity for work.

40. Generally, the information about the Worker's work capacity is consistent between the opinions that have considered only his lower back and those that have considered his lower back and neck together.

41. Dr H specifically addressed neck function and lower back function separately and considered that the Worker's neck condition only caused him an inability to maintain fixed neck positions and extreme or rapid neck movements. It was the condition of the Worker's back that limited his ability to lift, sit, stand and bend.

42. These assessed inabilities related to the lower back are closely consistent with Dr F's certification and generally consistent with the other medical opinions before me. There is a consistent opinion that the Worker should not engage in manual handling of more than 10kg, be able to change his sit and stand posture regularly, and avoid bending, twisting and squatting. The inabilities that arise out of the Worker's neck condition overlap with the inabilities that arise from his lower back condition, namely, the inability to maintain a prolonged fixed spine posture.
43. The main point of difference in the opinions before me relates to how many hours of work the Worker has capacity to do each week rather than the other specific functional limitations. Dr F stands alone in his opinion that the Worker is only able to do 5 hours a day, 3 days a week. On the other hand, Dr P, Dr M, and Dr T considered that the Worker was able to work an extra day, that is 5 hours a day 4 days a week. Dr J, Dr R, Dr H and Mr K considered that the Worker was able to work to a full time capacity if he was able to work within his restrictions.
44. In my view, the weight of information supports that the Worker is able to work for more than 5 hours a day 3 days a week as stated by Dr F. The consistent thread of opinion over a number of years from multiple doctors is that the Worker is able to work at least 5 hours a day 4 days a week regardless of whether his back and neck condition were assessed together or separately. I find that logical and persuasive in circumstances where the Worker would be able to work in employment that is not physically demanding and gives him the flexibility to change posture regularly such as he was doing.
45. Based on this analysis, whether the assessment is confined to the Worker's lower back injury or together with his neck condition makes no material difference.
46. I find that the Worker has a present inability arising from his lower back injury such that he is able to work for 20 hours a week (5 hours a day 4 days a week or 4 hours a day 5 days a week) with:
- Lifting/carrying up to 10kg
 - Sitting tolerance of 15 to 30 minutes with a break
 - Standing tolerance of 15 minutes
 - Avoid bending, twisting or squatting
 - Driving ability of 15 to 30 minutes with a break.
47. The medical information before me does not support that the Worker is able to return to work in his pre-injury employment given the inabilities arising from his back injury. In fact, a number of the medical opinions specifically say that he cannot. I am persuaded that the Worker has a present inability arising from his lower back injury such that he is not able to return to his pre-injury employment.
48. For the Worker to have "current work capacity" he must be able to return to work in "suitable employment" as 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 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.*

49. A Labour Market Research Report was prepared as part of the return to work planning process by rehab provider 1 to examine the suitability of employment as an online retailer for the Worker. There was also an earlier Labour Market Research Report by rehab provider 1 which considered suitable employment as an online retailer for the Worker. I will refer to the more recent report as that reflects the most recent employment market information for assessing if there is employment in work for which the Worker is currently suited.
50. According to the report, an online retailer is a type of "Retail Supervisor" (ANZSCO Code 6215-11) supervising sales transacted over the Internet. The general duties of this type of employment are listed in the report.
51. The physical demands of the role are stated generally to be sitting at a computer with breaks to stand and stretch as required, minimal standing and walking to gather objects for posting, fine motor movements to use a computer, keyboard and mouse, lifting and carrying up to 10kg, driving is not required, twisting and squatting is unlikely to be required. Employers in the employment market contacted by rehab provider 1 reported physical demands consistent with the general job description and advised that there are casual and part-time jobs in this area.
52. I acknowledge that employment as an online retailer predominantly requires sitting. However, it is apparent that this type of work is flexible enough for a worker to have a break and stand and stretch for short periods every 20–30 minutes which is suitable for the Worker.
53. The Worker has been working as a self-employed online retailer according to his application for merit review. A description of the Worker's current self-employment as an online retailer was given by Mr G, a rehabilitation consultant for rehab provider 2, who prepared an Ergonomic Home Assessment Report. Mr G gave the following description of the Worker's self-employment:
- The Worker reported he runs an internet based sales business that involves customers making orders online for small products consisting of lace, small artificial flowers and other small decorative products.
- The Worker may liaise with customers on the phone or via email regarding products and orders. Once an order is confirmed, an invoice is produced and the stock is picked from shelves in the small office room. The Worker will then move to a second workstation where he will cut and pack the order into a postage box with the invoice.
54. That is consistent with the general job description given in the labour market research report. The Worker's ability to work in self-employment as an online retailer for over 12 months adds weight to the view that employment as an online retailer is physically suitable for him.

55. I acknowledge that Mr G made a number of recommendations to improve the ergonomics of the Worker's home office. There have also been similar assessments done by Mr S of rehab provider 1. The Worker has argued that the Insurer has not compensated him for all the ergonomic equipment that has been recommended for his home office. A dispute about such compensation is outside the scope of this review. An assessment of suitable employment is not confined to the Worker's current employment. It requires a broader assessment of whether the Worker is able to return to work in suitable employment in the employment market at large. The information before me supports that he is able to return to work in suitable employment as an online retailer. The Worker's demonstrated ability to do such work in self-employment over the past year adds weight to that view. Even if I accept the Worker's submissions that the Insurer has failed to compensate him for all the recommended home office modifications, it would not persuade me that employment as an online retailer is not physically suitable for him having regard to the nature of his incapacity.
56. I am persuaded that employment as an online retailer is employment in work for which the Worker is currently suited having regard to the nature of his incapacity.
57. According to rehab provider 1's report, workers aged 60–64 make up 2.6% of this occupation. Year 12 High School or Certificate II level of education is generally required or at least one year of industry experience. The skills required are computer literacy, effective communication, multi-tasking and prompt action for posting sold items.
58. I acknowledge that the Worker's age puts him in a relatively small employment market for this type of work based on the statistics. However, the information is that such jobs exist for a worker of the Worker's age. Further, the Worker has relevant industry experience and skills as a service manager at Employer 1 and part-owner of Employer 2. A vocational assessment report by rehab provider 1 states that the Worker's previous work experience involved such things as liaising with customers, suppliers and service providers, managing budgets and sales targets, updating stock details on a website, invoicing, and organising demonstrations at trade shows. He also has skills and work experience from his past year of work as a self-employed online retailer. I am persuaded that the Worker's age, education, skills and work experience are currently suited to employment as an online retailer without further return to work planning or occupational rehabilitation services.
59. I am persuaded that employment as an online retailer is "suitable employment" for the Worker as defined by section 32A of the 1987 Act.
60. I find that the Worker has a present inability arising from an injury such that he is not able to return to his pre-injury employment but is able to return to work in suitable employment and therefore should be assessed by the Insurer as having "current work capacity" as defined by section 32A of the 1987 Act.

Continuation of weekly payments after second entitlement period (after week 130)

61. The Insurer has stated that the Worker has received 416 weeks of weekly payments of compensation. The Worker has not disputed this. I am satisfied that he has been paid more than 130 weeks of weekly payments of compensation, is after the second entitlement period and his entitlement to ongoing weekly payments is subject to section 38 of the 1987 Act.
62. A worker who is assessed as having "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 \$155 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.*

63. Whether the Worker is required to meet the requirements under sub-section (3) or (3A) depends on if he is a "worker with high needs" as defined by section 32A of the 1987 Act:

worker with high needs means a worker whose injury has resulted in permanent impairment and:

- (a) *the degree of permanent impairment has been assessed for the purposes of Division 4 to be more than 20%, or*
- (b) *an assessment of the degree of permanent impairment is pending and has not been made because an approved medical specialist has declined to make the assessment on the basis that maximum medical improvement has not been reached and the degree of permanent impairment is not fully ascertainable, or*
- (c) *the insurer is satisfied that the degree of permanent impairment is likely to be more than 20%, and includes a worker with highest needs.*

64. The Insurer has decided that the Worker is not a worker with high needs and has therefore assessed his entitlement to weekly payments of compensation after the second entitlement period under section 38(3) of the 1987 Act.
65. According to the Insurer at paragraph [41] of its internal review statement of reasons, the Worker received a settlement for 16.25% impairment of the lower back and 7% loss of use of the right leg at or above the knee. That supports that his injury has resulted in permanent impairment, and I accept that is the case. The question is whether or not the Worker meets criteria (a), (b) or (c).
66. The Worker submits in his application for merit review that "[the Insurer has] no evidence to justify [its] conclusion that my WPI [Whole Person Impairment] does not exceed 20%. From my understanding, this is possible if my neck were included. As you would appreciate, my level of WPI is very important with respect to my entitlement to weekly payments". The Worker also submits "The case manager has determined without appropriate medical evidence that my impairment is likely to be 5-8% citing ICAR [sic, icare] although they are not medical professionals approved to make an impairment decision".
67. The Insurer suggested in its work capacity decision notice and its internal review statement of reasons that it could use a "Quality Assessor of WPI" to determine the likely degree of permanent impairment. However, an assessor of the degree of permanent impairment must, among other things, be "a registered medical practitioner recognised as a medical specialist" and have "qualifications, training and experience relevant to the body system being assessed" under guideline 1.40 of the NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment, fourth edition.

It is misleading for an insurer to give the impression to an injured worker that it is able to assess the degree of permanent impairment and should not be done.

68. Having said that, the Insurer does not have to disprove that the Worker has a whole person impairment of more than 20%. To meet criterion (a) of the definition, the Worker must show evidence that his degree of permanent impairment has been assessed for the purposes of Division 4 of the 1987 Act to be more than 20%. As it stands, no such information has been made available. Criterion (a) of the definition has not been shown to be met.
69. Criterion (b) is not met because an approved medical specialist has not declined to make an assessment on the basis indicated in the definition.
70. That leaves criterion (c). The Insurer has indicated that it is not satisfied that the Worker's degree of permanent impairment is likely to be more than 20%. It is relevant to point out that an insurer does not need to put a specific figure on the likely degree of permanent impairment. Only medical specialists who are trained assessors and listed on the Authority's website are able to assess the degree of permanent impairment. The Insurer is merely required to decide if it is satisfied or not that the degree of permanent impairment is likely to be more than 20%.
71. I acknowledge the Worker's submission that it is "possible" that his degree of permanent impairment would be more than 20% if injuries to his neck and lower back were assessed together. However, criterion (c) asks if the insurer is satisfied that the degree of permanent impairment is "likely" to be more than 20%. Something more than possibility must be established. No persuasive information or reasoning has been put forward to support that the Insurer should be satisfied that the degree of permanent impairment is likely to be more than 20%. Whether or not the Worker's neck condition is considered with his lower back injury, there is simply inadequate information to support a finding that the Insurer should be satisfied that the degree of permanent impairment is likely to be more than 20% and for the Authority to make any finding and recommendation to that effect on merit review.
72. I do not find that the Worker is a "worker with high needs" as defined by section 32A of the 1987 Act based on the available information.
73. The Worker must meet the special requirements under section 38(3) of the 1987 Act to be entitled to ongoing weekly payments.
74. The Worker has returned to work in self-employment. He is a sole trader under the business name "Employer 3" using a legitimate ABN. I have no doubt about the Worker's submission that he is engaged in legitimate self-employment.
75. The Worker states that he allocates himself \$200 a week as "earnings" from his self-employment. He has provided pay slips in support of that. The Worker presents as a man of good character and his honesty is not in question. However, section 38(3)(b) requires that the Worker be in receipt of current weekly earnings (or current weekly earnings together with a deductible amount) of at least \$183 (as currently indexed). The available information does not support that a "deductible amount" as defined by section 35(1) of the 1987 Act applies in this case.
76. "Current weekly earnings" is a term defined by section 44I of the 1987 Act:

*In this Act, **current weekly earnings** of a worker in relation to a week means:*

- (a) if the worker's base rate of pay is calculated on the basis of ordinary hours worked, the sum of the following amounts:*
 - (i) the worker's earnings calculated at that rate for the ordinary hours worked during that week,*
 - (ii) amounts paid or payable for overtime or shift allowances in respect of that week,*
 - (iii) amounts paid or payable as piece rates or commissions in respect of that week, or*

(b) *in any other case, the worker's actual earnings in respect of that week but not including any amount that is a base rate of pay exclusion unless it is:*

(i) *paid or payable for overtime or shift allowances in respect of that week, or*

(ii) *paid or payable as piece rates or commissions in respect of that week.*

77. "Base rate of pay" is defined by section 44G of the 1987 Act:

(1) *In relation to pre-injury average weekly earnings and current weekly earnings, a reference to a base rate of pay is a reference to the rate of pay payable to a worker for his or her ordinary hours of work but does not include any of the following amounts (referred to in this Division as base rate of pay exclusions):*

(a) *incentive based payments or bonuses,*

(b) *loadings,*

(c) *monetary allowances,*

(d) *piece rates or commissions,*

(e) *overtime or shift allowances,*

(f) *any separately identifiable amount not referred to in paragraphs (a) to (e).*

78. The Worker's pay slips are relevant information to assess his current weekly earnings but they are not determinative. The pay slips must be considered in light of the structure and operation of the Worker's self-employment.

79. The Worker submits that "I disagree with [the Insurer] as the Act does not preclude wages drawn from start up capital as long as they comply with the minimum amount as set in the Act". In principle, that submission is correct. However, the Worker is self-employed and does not earn "wages" as an employee would. He is in business for himself as a self-employed sole trader selling goods. The Worker stated in his application for internal review that:

The case manager organised a forensic investigation within 4 months. Digital invoices were requested and presented to the value of \$1,811.88. Cash sales to the value of \$893.12 were not requested and not presented at the forensic assessment. They are however included in my tax return.

80. Plainly, his self-employment is structured around selling goods and his earnings are generated from sales not a base rate of pay calculated on the basis of ordinary hours of work. His customers do not pay him an hourly rate for a service. They buy goods from him and he earns the amount of a sale minus the related operational costs. This is "any other case" and current weekly earnings are the Worker's "actual earnings" for a week under section 44I(b). In this case, that should be calculated by taking the total amount of the Worker's sales minus his operational costs in a given week. I am not persuaded that the Worker's pay slips accurately reflect how his self-employment operates and give a reliable measure of his "current weekly earnings" as defined by section 44I of the 1987 Act.

81. I acknowledge the Worker's submission in attachment 4 to his application for merit review that such an approach does not take into account his "personal earnings which can be from sales, line of credit, loan or any other capital used as a start-up fund for the business". He submits "the case manager is not familiar with small business and has confused sales with personal earnings or paying himself a wage. Sales fluctuate and cannot be considered as earnings". He also submits that "small businesses often rely on drawing a wage from capital until the business is self sufficient and able to pay a wage". However, I do not agree with the Worker that other sources of income outside of sales such as line of credit, loan or any other capital can be characterised as "earnings" or "actual earnings" in the context of his self-employment as a sole trader. The Worker is not an employee earning a wage. He is a self-

employed sole trader selling goods. If his business costs exceed his sales then his business makes a loss. Drawing on other sources of income for that week such as a loan does not change the fact that his self-employment has failed to generate any actual earnings in that week.

82. The Worker has stated in attachment 4 to his application for merit review that “The first payslip was for the period of 25 January, 2016 until 29 January 2016 and the report took into consideration the period between 25 January 2016 until 3 June 2016 – a total of 4 months”. In his application for internal review, the Worker indicated that in this period he had digital invoices to the value of \$1,811.88 and cash sales to the value of \$893.12. That totals an amount of $\$1,811.88 + \$893.12 = \$2,705.00$ in the 18 weeks from 25 January 2016 to 3 June 2016. That equates to an average maximum actual earnings of $\$150.28$ ($\$2,705.00 \div 18$) without deducting any amounts for operational costs which would further reduce that figure. Accordingly, the Worker has not been meeting the required minimum current weekly earnings under section 38(3)(b) of the 1987 Act. The information before me does not support that circumstances have changed since that time such that his current weekly earnings have increased to the required amount. I am not persuaded that the Worker meets the special requirements under section 38(3)(b) of the 1987 Act to be entitled to ongoing weekly payments of compensation.
83. I acknowledge the Worker’s submission that “When my partner and my delegate Ms M spoke to the Insurer, she explained that it will take at least 9 months to see a good level of sales”. However, the fact that self-employment may take time to build does not change that a worker must show that they are meeting the requirements under section 38(3)(b). The Worker is required to show that he meets the special requirements under section 38(3)(b) whether in self-employment or other employment. He has not done so.
84. I am also not persuaded that the Worker should be assessed as meeting the requirement under section 38(3)(c) of the 1987 Act. The Worker has submitted that “as I forecasted in my business plan, sales have gradually picked up and the business is now making more sales. Gradually the increase in sales will be reflected in my payslips”. It is apparent from that submission that if there were more sales, the Worker would be capable of undertaking further additional employment or work to process those sales and increase his current weekly earnings. Essentially, the issue is not the Worker’s incapability but market forces (i.e. a lack of demand from customers). In those circumstances, I am not persuaded that the Worker should be 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 his current weekly earnings.
85. I find that the Worker does not meet the special requirements under section 38(3) of the 1987 Act to be entitled to weekly payments of compensation.
86. As this is ultimately the same outcome as the Insurer’s work capacity decision there is no need to make a recommendation to the Insurer to trigger a “review decision”. The Insurer’s work capacity decision to discontinue the Worker’s weekly payments of compensation on the basis that he does not meet the special requirements under section 38(3) of the 1987 Act stands.

Merit Review Service
Delegate of the State Insurance Regulatory Authority