



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 has the capacity to work for 5 hours per day, 5 days per week.
3. The Worker is able to, and has, returned to work in suitable employment as a Guardian/Caregiver.
4. The Worker has current work capacity.
5. The Worker does not satisfy the definition of “a worker with high needs”.
6. The Worker does not satisfy the special requirements for continuation of weekly payments of compensation after the second entitlement period pursuant to section 38(3) of the *Workers Compensation Act 1987* (the 1987 Act).

RECOMMENDATION BASED ON FINDINGS

7. The Authority may make binding a recommendation to the Insurer on the basis of its findings on review in accordance with section 44BB(3)(e) of the 1987 Act.
8. For the reasons provided below, the Authority makes no recommendation.

BACKGROUND

9. The Insurer made a work capacity decision ceasing the Worker’s entitlement to weekly payments of compensation under section 38 of the 1987 Act.
10. The Insurer undertook an internal review in this matter and made a decision.
11. The application for merit review was received by the Authority. The application has been made within 30 days after the Worker received notice of the internal review, as is required under section 44BB(3)(a) of the 1987 Act. The application has been lodged in the form approved by the Authority.

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 the Insurer, by the Authority.

DOCUMENTS CONSIDERED

15. The documents I have considered are those listed in, and attached to, the application for merit review, the Insurer’s reply and any further information received by the Authority, which I am satisfied has been exchanged between the parties.

SUBMISSIONS

16. In the application for merit review, the Worker submits:
 - She relies upon the prior merit review and her application for internal review of the subject work capacity decision.
 - There is no evidence to support the assertion that she is working below capacity.
 - The Insurer has again not provided documents requested by her and has again denied her “natural justice”.
 - The current evidence establishes that she is likely to continue indefinitely to be incapable of undertaking further work or employment which would increase her current weekly earnings.
 - There is no evidence that the Insurer has addressed or assessed the issue of whether she is likely to continue to be indefinitely capable of undertaking further work or employment that would increase her current weekly earnings.
 - The Insurer again ignores the current certificate of Dr P as to capacity which includes the 5 hours for which she is certified fit for ongoing study. Thus between current study and hours worked, she is working to capacity.
 - She has whole person impairment (WPI) of greater than 20%.
17. Reference is made to “grounds 1 – “9 in [the Worker’s] application for internal review which have not been addressed by the Insurer”. I have read and considered these submissions.
18. Further reference is made to a statement, attached to the application for merit review. I have also read and considered this statement.
19. In reply, the Insurer submits:
 - The Worker is demonstrating the capacity to work an average of 16 hours per week.
 - The Insurer denies that the Worker has not been provided natural justice.

- Dr P continues to certify the Worker with capacity for 25 hours per week (5 hours per day, 5 days per week with support) and is only working an average of 16 hours per week.
- The certificates of Dr P are accepted which state that the Worker has partial capacity for 5 hours per day, 5 days per week. Dr P has also confirmed that the roles of Chemist, Occupational Health and Safety Officer, Import/Export Clerk, Program/Project Administrator, School Laboratory Technician, Chemistry Technician, Quality Assurance Officer, Materials Engineering Assistant and Tutor were deemed to be suitable employment for the Worker.
- All current medical evidence has been reviewed and the Worker has been assessed as likely to have between 0 and 10% WPI. No claim for WPI has been received.
- The Worker is self-employed as a Tutor and therefore can obtain further work to increase her earnings.
- The Worker does not meet the special requirements for continuation of weekly payments of compensation after the second entitlement period.

REASONS

Nature of merit review

20. This matter involves a merit review of the work capacity decision of the Insurer in accordance with section 44BB(1)(b) of the 1987 Act.
21. The review is not a review of the Insurer's procedures in making the work capacity decision and/or internal review decision. 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.
22. I am satisfied that the Worker is disputing the work capacity decisions made by the Insurer including the decision regarding her eligibility for continuation of weekly payments of compensation under section 38(3)(c) of the 1987 Act and the decision that she is not "a worker with high needs" in accordance with the definition under section 32A of the 1987 Act.
23. I will proceed to determine the Worker's current work capacity, what constitutes suitable employment for her, her ability to earn in suitable employment, her current weekly earnings, whether or not she satisfies the special requirements for continuation of weekly payments and whether or not she satisfies the definition of "a worker with high needs".
24. The Worker's legal representative confirmed that only the "current weekly earnings" limb of section 43(1)(d) of the 1987 Act was in dispute and not "pre-injury average weekly earnings".
25. I will calculate the Worker's entitlement to weekly payments of compensation, if any, on the basis of the above determinations.

Present inability arising from an injury

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

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

27. The Worker sustained a psychological injury during her employment as a Research Associate with the Employer.
28. I have before me numerous reports and certificates of capacity, which I will address separately. Some of these reports do not relate to the Worker's capacity for employment. As a result, these will not be addressed below.

Dr E

29. Dr E, Psychiatrist, reviewed the Worker.
30. Dr E's report outlines a significant portion of the Worker's history. I will focus on Dr E's opinion with respect to diagnosis and capacity for employment.
31. Dr E considered that the Worker developed a Major Depressive Disorder "of moderate severity with suicidal ideation that has improved." Dr E also considered that the Worker has Panic Disorder and some Agoraphobia. Dr E again noted that the Worker's mental state had improved over the "last few months".
32. Dr E noted that the Worker was currently performing part time work which involved assisting overseas students with orientation to an Australian city, studies and living away from home.
33. Dr E opined that, "[the Worker's] current work capacity remains limited by her mental state and she is unfit to resume her pre-injury employment or other suitable employment."

Dr K

34. I have two reports before me from Dr K, Injury Management Consultant.
35. The first report was an Onsite File Review report. Dr K had discussions with Mr J, psychologist. At this stage, Dr K was unable to speak with Dr P, nominated treating doctor.
36. Dr K reported his conversation with Mr J as follows:
 - Mr J had not seen the Worker for 3 weeks (prior to this discussion) and at that time she was not suicidal.
 - The Worker appeared to dramatically "regress" whenever the subject of returning to pre-injury duties was discussed.
 - During the last consult, the Worker did not speak to Mr J, but communicated by writing notes to him, despite the fact he was present in the room. "This hampered his ability to assess her capacity for work."
 - It was noted that the Insurer had arranged an independent medical examination (IME) and the Worker has not attended, with Dr P stating she was "too ill" to attend. Mr J felt that the Worker would be able to attend an IME at that point.
37. Dr K recommended the following:
 - Despite the Worker's hysterics and odd behaviour, she is not suicidal at this point. Based on the discussion with the psychologist, the possibility of a pre-existing personality disorder must be considered.

- Given Mr J's opinion, clarification should be sought from Dr P exactly why the Worker could not attend an IME and "why, if she is so ill that he is concerned regarding the possibility of suicide, that a psychiatrist is not involved."
 - A referral is to be made to a psychiatrist and this would assist in determining work capacity.
 - Based on the Worker's ability to undergo a university course with a practical placement, it is likely that she would be fit for suitable duties with another employer on a full time basis.
38. The second report is a "supplementary report" produced following Dr K's discussion with Dr P.
39. The Worker's work capacity was discussed between Dr's K and P as follows:
- The fact that the Worker was undertaking a university degree was noted. Dr K advised Dr P that a certificate of capacity should represent what an individual can do, rather what they cannot do. Dr K stated that if the Worker was able to perform some of the course load for a university degree, this indicated she had a capacity.
 - Dr P did not dispute this, but stated that the Worker was not performing the full load at present and had not completed the entire practical placement. Dr P advised that he was regularly writing certificates requesting extensions for the Worker's assignments and other course work.
 - Following further discussion it was agreed that 20 hours per week would represent the Worker's current capacity with respect to work and Dr K requested Dr P specify this on the next certificate.
 - Dr P indicated that, in his view, the Worker would be best off being managed outside the workers compensation scheme and Dr K agreed. Dr K suggested that "the best scenario for [the Worker] would be for her to be able to return to a full shift of work so that she could be successfully redeployed." Dr K reported that Dr P agreed.
 - Return to work goals were discussed and it was agreed that the Worker would not return to her pre-injury duties and she would not be able to do the same job with a different employer.
 - Dr P stated categorically that the Worker would be unable to work as an academic even with a different employer. Dr P considered that the Worker would be able to be successful in finding work as a social worker following the completion of her studies.
 - Upgrades to the Worker's certificate were discussed and Dr P agreed in principle that upgrades in certificates could occur over the rest of the year.
 - An agreement regarding a definite time frame for a return to full time work was not reached.

Dr S

40. I have two reports before me from Dr S, psychiatrist. Dr S reviewed the Worker for the purposes of an injury management consultation. The latter report does not offer an opinion with respect to the Worker's capacity for employment.
41. Dr S opined in his first report, "I would comment that I had taken the liberty of advising [the Worker], I hope helpfully, that I did not feel that, from a psychological point of view, she was sufficiently recovered to be successful in obtaining work, if she reached the stage of interview, based on her presentation in this examination."

42. At the time of Dr S's report, he stated that he would recommend to Dr P that the Worker be certified as having no capacity for a further two months, during which she would gain further benefit from an increase in her antidepressant.

Mr J

43. I have before me a letter from Mr J, psychologist. Mr J stated:

It is recommended that the Worker be given special consideration in her current course of study. As the Worker continues to recover, it is likely that she will develop an improved capacity to function and perform at her true level. It is anticipated that the Worker's functioning in her university studies will be back to normal later.

Dr P

44. Dr P is the Worker's nominated treating doctor (NTD). I have before me work capacity certificates.
45. The Worker has been certified as having the capacity to undertake some type of employment for 5 hours per day, 5 days per week. There have been variations in the comments made by Dr P in the certificates before me.
46. Under a heading of "Capacity Assessment", Dr P has indicated that the Worker (emphasis retained), "CAN sit, stand/walk, bend, squat, kneel, reach above shoulder, use injured arm/hand, lift and neck movement".
47. Under a heading of "Mental Health Function", Dr P has indicated that the Worker's memory is "not affected" and her attention/concentration and judgement is "affected". As an additional comment, Dr P has noted that, "the Worker experiences severe emotional distress when discussing her work place experiences."
48. Under a heading of "Other Functional Considerations", Dr P noted that the Worker "is managing 5 hours per day 5 days per week with support".
49. Under a heading of "Work Environment Considerations", Dr P indicated that the Worker "cannot work in an academic environment".
50. Dr P indicates that the Worker has "a capacity for suitable employment" and the most recent certificate before me covers her.

Finding on present inability arising from an injury

51. The balance of current information before me supports that the Worker has capacity for some type of employment.
52. While I note that Drs E and S indicated that the Worker did not have capacity for employment, these opinions were provided in 2015. Since that time, Dr P has continuously certified the Worker as having capacity for employment.
53. Dr K's opinion is also consistent with that of Dr P and further, Dr P agreed with Dr K's assertion that the Worker had capacity for employment.
54. Dr K's discussion with Dr P took place in August 2015. Upon review of the certificates issued by Dr P at that time, that discussion is reflected on the certificate, whereby the Worker was upgraded to 4 hours per day, 5 days per week.

55. This point is consistent with Dr K's report whereby it was agreed that 20 hours per week was the Worker's capacity.
56. I consider that Dr P is best placed to provide an accurate assessment of the Worker's capacity for employment. The information before me supports that the Worker is reviewed by Dr P on a very regular basis. I also consider it significant that Dr P has maintained his certification of the Worker for a year.
57. I consider that the Worker has demonstrated that she can return to some type of employment, by virtue of the fact that she is currently self-employed and has been for a significant period of time. I am of the view that this would add weight to support that the Worker can return to some type of employment.
58. I therefore find that the Worker has the capacity for some type of employment for 5 hours per day, 5 days per week. There are no physical limitations imposed upon the Worker's capacity however I consider that the Worker is to not return to academic work and consideration is to be given to her "affected" attention/concentration and judgement, as outlined on Dr P's certificates.
59. Submissions have been made with respect to Dr P's recommended composition of the 5 hours per day, 5 days per week (25 hours per week). In particular a submission is made that Dr P intended that the Worker had the capacity for 25 hours however 5 of those hours are for study. In the application for merit review, it is submitted that, "the insurer again ignores that the current certificate of Dr P as to capacity included the 5 hours for which [the Worker] is certified fit [for] ongoing study. Thus between current study and hours worked [the Worker] is working to capacity."
60. At no stage on the certificates before me is this indicated. I have closely reviewed all the certificates before me and I am not satisfied this is Dr P's certification. I do have one letter from Dr P, which was requested by the Worker, which indicates, "the Worker has been certified fit for work or study for 5 hours per day, 5 days per week."
61. In my view, this letter, in conjunction with the certificates before me, does not support the submission that the Worker's assessed capacity of 25 hours per week essentially comprises of 20 hours of work and 5 hours of study. Dr P specifically states in his letter that the 5 hours per day, 5 days per week is for work or study (my emphasis). On my reading, this means that Dr P considers that the Worker is able to work 5 hours per day, 5 days per week or study for 5 hours per day, 5 days per week. I do not consider that this splits the assessed capacity between work and study. Ultimately, Dr P has confirmed that the Worker is able to work for 5 hours per day, 5 days per week.

Pre-injury employment

62. There is no dispute before me with respect to the Worker's inability to return to her pre-injury employment and this has not been referred to the Authority for review.
63. I will proceed on the basis that the Worker has a present inability arising from an injury such that she is not able to return to her pre-injury employment.

Suitable employment

64. "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.*

65. I have before me a Vocational Assessment report from Rehab Provider 1 which has proposed the roles of Research and Development Manager and Tutor as suitable employment for the Worker.
66. I have concerns regarding the vocational assessment report. I do not consider it is appropriate to rely upon it in determining suitable employment for the Worker. The Worker has made many submissions with respect to inaccuracies in this report and I am of the view, this may not be unfounded given the Worker did not participate in the assessment.
67. The report refers to several facts which do not appear to be correct, such as the fact that at the time of this report, the Worker had the capacity for "full time suitable employment". Upon review of the certificates before me, at no stage has Dr P certified the Worker as having the capacity for full time employment.
68. The report continuously refers to the Worker's current employment as a Tutor and in the Worker's "Work History" outlines duties which the Worker allegedly performs, which are not accurate. The Worker submits that she performs the role of a Guardian/Caregiver. While I note that the Worker's income statements have indicated some tutoring, this has not been performed until recently.
69. In support of this, I have been provided with the Worker's "Contractor Agreement" which outlines comprehensively her role as Guardian/Caregiver. An appendix to this agreement is an 8 page document entitled "ISA Guardian & Welfare Services Guardian/Caregiver Guidelines".
70. In my view, it is clear that the Worker is not performing the role of a Tutor but is performing the role of a Guardian/Caregiver. Upon review of the guidelines for the Worker's current role, at no stage, does she perform the tasks of a Tutor, much less the tasks Rehab Provider 1 indicated.
71. I have no doubt that the Worker possesses the appropriate skills, education and work experience to undertake the roles of Research and Development Manager and Tutor. The Worker is highly educated, having obtained a PhD, among other degrees and qualifications, which are directly relevant to the roles identified.
72. However, it does not appear that Rehab Provider 1 has considered the nature of the Worker's incapacity in determining these roles to be suitable. There is a focus on the physical requirements of the role, which is perplexing, because the Worker's injury is of a psychological nature. Further, Dr P has not indicated any physical restrictions.

73. Dr P has, however, indicated several psychological restrictions, which do not appear to have been addressed. For example, the fact that the Worker is not able to return to academic work and that her concentration, attention and judgement are affected.
74. For the role of Tutor, under a heading of “Psychological/Personal Requirements” there is an incomplete sentence of, “Personal attributes required to access this role include” with no elaboration. It is then indicated that “yes” the Worker has the psychological/personal requirements.
75. I fail to see how it could be concluded that the Worker has the psychological/personal requirements for the role when these requirements were not even indicated. I am not prepared to infer that she does. I do not consider the role of Tutor to be suitable employment.
76. Dr P has, for quite some time, indicated that the Worker cannot return to academic work and provided his disapproval for the role of Research and Development Manager, with the following notation:
- Due to ongoing posttraumatic stress symptoms I think it's highly unlikely the Worker will ever return to a research/laboratory workplace.*
77. It does not appear that Rehab Provider 1 has considered the Worker’s psychological function, particularly her affected attention/concentration, especially in light of the need of “attention to detail” in this role. I do not consider the role of Research and Development Manager to be suitable employment.
78. The most accurate information I have been provided with is the information with respect to the Worker’s current role as a Guardian/Caregiver, as outlined above. The Worker has been performing this role since March 2015.
79. As a Guardian/Caregiver, the Worker is required to assist and provide information to overseas students in the following ways:
- Meet and greet the students
 - Travel to and from school
 - Visa regulations
 - Maintain contact with host
 - Bank account
 - Health cover
 - Hospital or doctor visits
 - Local area briefing
 - Emergency contacts
 - Contact with students/parents
80. In my view, given the Worker has been performing this role for over a year and a half, and has maintained this role, I consider that she has the necessary skills, education and work experience to be suited to the role.

81. For the same reasons, I consider that this role is suited to the nature of the Worker's incapacity. This role does not involve any academic work and while the Worker's attention, concentration and judgement is "affected" I do not have any information before me to support that this is detrimental to the performance of her role. On the contrary, as noted above, the Worker has been performing this role since March 2015.
82. I therefore find that the role of Guardian/Caregiver is suitable employment for the Worker having regard to the definition under section 32A of the 1987 Act.
83. I also have before me a "Comprehensive Initial Assessment" report produced by Rehab Provider 2. This report proposes 8 roles as suitable employment for the Worker. While this report addresses, in part, the Worker's skills and experience, there is no information regarding the psychological requirements of the roles. As a result, there is insufficient information to allow a determination as to whether those roles satisfy the definition of suitable employment under section 32A of the 1987 Act.

Current work capacity

84. I have found the Worker's current role as a Guardian/Caregiver to be suitable employment for her to perform.
85. I therefore find that the Worker has current work capacity pursuant to section 32A of the 1987 Act.

Entitlement periods for ongoing weekly payments

86. 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.
87. The Insurer, in their reply to an application for merit review, indicated that the Worker had received 158 weeks of weekly payments of compensation. I am satisfied that the Worker's entitlement to weekly payments of compensation currently falls after the second entitlement period and is to be determined in accordance with section 38 of the 1987 Act.

A worker with high needs

88. The Worker makes a submission that she "has a WPI of greater than 20%". In my view, this submission relates to the definition of "a worker with high needs" and her eligibility for continuation of weekly payments of compensation under section 38(3) of the 1987 Act.
89. I am not satisfied that the Worker is "a worker with high needs" as defined, for the following reasons.
90. The definition of "a worker with high needs" is provided by section 32A of the 1987 Act, below:
***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

Note. Paragraph (b) no longer applies once the degree of permanent impairment has been assessed.

(c) the insurer is satisfied that the degree of permanent impairment is likely to be more than 20%,

91. In order to be “a worker with high needs”, the Worker needs to satisfy either (a), (b) or (c) as outlined above.
92. The Worker’s degree of permanent impairment (WPI), based on the information before me, has not been assessed for the purposes of Division 4 of the 1987 Act to be more than 20%. In fact, it does not appear, based on the information before me, that the Worker has undergone an assessment of WPI.
93. The Worker submitted to the Authority that she is “awaiting a current assessment of WPI...”
94. Division 4 of the 1987 Act relates to compensation for non-economic loss. Section 65 of the 1987 Act provides for the determination of the degree of permanent impairment and specifies that for the purposes of this Division, the degree of permanent impairment that results from an injury is to be assessed as provided by this section and Part 7 (Medical Assessment) of Chapter 7 of the 1998 Act.
95. Section 319 of the 1998 Act defines a medical dispute to include a dispute about the degree of permanent impairment of the worker as a result of an injury. An approved medical specialist (AMS) is also defined as a medical practitioner appointed under this Part as an AMS, who in accordance with section 320 of the 1987 Act is appointed by the President of the Workers Compensation Commission (WCC).
96. Section 321 of the 1998 Act provides that a medical dispute may be referred for assessment under this Part by a Court, the Commission or the Registrar, either of their own motion or at the request of a party to the dispute.
97. In considering the provisions within Part 7, Chapter 7 of the 1998 Act, I am of the view that a medical dispute is determined by referral of the dispute to an AMS appointed by the WCC for assessment of the degree of permanent impairment. Further, that the assessment is to be undertaken in accordance with WorkCover Guidelines (as in force at the time the assessment is made).
98. The Worker has not yet been assessed for WPI, much less has she been assessed for the purposes of Division 4 of the 1987 Act.
99. For completeness, I note that the Worker does not satisfy either of the remaining criteria. There is no information before me to support that an AMS has declined to make an assessment based on the Worker having not yet reached maximum medical improvement such that (b) would apply.
100. The Insurer submits a claim for WPI has not been received from the Worker and therefore has not been assessed with WPI greater than 20%. It is clear to me that the Insurer is not satisfied that the Worker’s degree of permanent impairment is likely to be more than 20%, such that (c) does not apply.
101. On the basis of the above, I find that the Worker does not satisfy the definition of “a worker with high needs” in accordance with section 32A of the 1987 Act.
102. Therefore, the special requirements for continuation of weekly payments of compensation under section 38(3) of the 1987 Act apply to the Worker.

Special requirements for continuation of weekly payments after second entitlement period (after week 130)

103. Section 38 of the 1987 Act provides that an entitlement to a worker with “current work capacity” to weekly payments after the second entitlement period is only available 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.*

104. A significant point of contention with respect to the Worker’s application for merit review is the Insurer’s decision that she is not working to her capacity.

105. The Worker’s submissions reveal that she believes she is working to her capacity when combining her work and study. I have provided reasons above as to why I do not accept that Dr P has certified the Worker in that way.

106. The Worker’s study cannot be included in the hours per week she works for the purposes of section 38(3) of the 1987 Act.

107. Section 38(3)(b) of the 1987 Act requires that a worker “return to work (whether in self-employment or other employment)...” and section 38(3)(c) of the 1987 Act requires that the worker be “incapable of undertaking further additional employment or work that would increase the worker’s current weekly earnings.”

108. Butterworths Australian Legal Dictionary defines “employment” as:

A relationship in which parties agree that one party will perform work for another in exchange for remuneration...

109. As the Worker’s study is not “employment” whereby she receives remuneration, it cannot be considered in determining her eligibility for a continuation of weekly payments of compensation under section 38(3) of the 1987 Act.

110. I am not satisfied that the Worker satisfies (c) of section 38(3) of the 1987 Act.

111. I have before me two “Income Statement for Self Employed Workers” documents which covered the Worker’s hours/earnings for a period totalling 10 weeks and 4 days.

112. The first document indicated hours totalling 65.7. The second document indicated hours totalling 43.

113. During these 10 weeks and 4 days (both documents), the Worker worked a total of 108.7 hours.

114. In order for her to satisfy (c), the Worker would need to work at least 25 hours per week.

115. If I were to take the whole period, over the 10 weeks and 4 days, the Worker would need to work a total of 270 hours (10.8 weeks x 25 hours per week). The Worker only worked 108.7 hours. This equates to 10.06 hours per week (108.7 hours / 10.8 weeks).

116. If I were to separate the two documents and calculate by the two periods, in the first period (4.6 weeks), the Worker worked a total of 14.28 hours for those weeks (65.7 hours / 4.6 weeks). For the second period (4.4 weeks), the Worker worked a total of 9.77 hours for those weeks (43 hours / 4.4 weeks).
117. For the Worker's understanding, if I were to accept that Dr P considered that her capacity comprised of 20 hours of work and 5 hours of study, which as noted above, I do not, the Worker would still not meet the requirements of section 38(3)(c) of the 1987 Act.
118. In the event that it was accepted that the Worker had to perform 20 hours per week of work (25 hours minus 5 hours of study), I would not be satisfied that the Worker could not be assessed as likely to continue indefinitely to be incapable of undertaking further work or employment that would increase her current weekly earnings.
119. As can be seen above, the maximum the Worker has worked in the first period was 14.28 hours per week.
120. In essence, taking that particular week, the Worker still would have to work additional 5.72 hours to total 20 hours, regardless of the hours of study she undertakes. In fact, the Worker, in order to satisfy (c), would need to work an additional 10.72 hours to total 25 hours per week, which is her assessed capacity. Either way, the Worker is not working to her capacity such that she does not satisfy section 38(3)(c) of the 1987 Act.
121. Submissions are made that there is no evidence that the Worker is not working to capacity. In my view, the Worker's income statements clearly show that she is not working to her capacity. These statements outline the hours the Worker is working and at no stage does she perform 25 hours per week. The Worker does not even perform 20 hours per week.
122. I therefore find that the Worker does not satisfy the special requirements for continuation of weekly payments of compensation after the second entitlement period pursuant to section 38(3) of the 1987 Act.
123. It is not necessary that I determine the Worker's ability to earn in suitable employment or her current weekly earnings ("E"). As I have found that the Worker does not satisfy the special requirements, a calculation does not need to be performed.
124. As I have arrived at the same conclusion as the Insurer, namely that the Worker does not satisfy the special requirements for continuation of weekly payments of compensation, it is not necessary that I make a recommendation to the Insurer.
125. I consider it appropriate to note that the Worker has redeployed herself into a role where she assists overseas students in their transition to studying and living in Australia. The Worker has also continued to further educate herself. I would like to take this opportunity to commend the Worker on her work and study following her injury.

Merit Review Service
Delegate of the State Insurance Regulatory Authority