



**State Insurance Regulatory Authority**  
**Workers Compensation**  
**Merit Review Service**

**FINDINGS AND RECOMMENDATIONS ON MERIT REVIEW BY THE AUTHORITY**

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**Worker:**

**Insurer:**

**Date of Review:**

**Date of Injury:**

**Claim Number:**

**Our Reference:**

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**FINDINGS ON REVIEW**

1. The following are findings made by the State Insurance Regulatory Authority (the Authority) on review.
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. No recommendation is made for the reasons below.

**BACKGROUND**

7. The Worker fell 6 metres from a window while working as a Site Supervisor. He sustained multiple fractures, contusion injury, depression, anxiety, persisting headaches and dizzy spells, ongoing lumbar back pain and paraesthesia.
8. He made a claim for compensation which has been accepted by the Insurer. He has received weekly payments of compensation for an incapacity for work resulting from the injury.
9. The Insurer made a number of work capacity decisions, and ultimately decided that the Worker does not meet the special requirements for continuation of weekly payments after the second entitlement period.
10. The Worker referred a number of decisions for internal review by the Insurer. The Insurer affirmed its decisions, including the decision to cease the Worker's entitlement to weekly payments of compensation under section 38(3) of the 1987 Act.
11. The Authority received the application for merit review. I am satisfied that the application has been made within 30 days as required under section 44BB(3)(a) of the 1987 Act. The application is also made 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 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

16. The Worker has referred to his submissions made in the internal review, in support of this application for merit review. Those submissions are lengthy and address the history of his matter in some detail, and I have considered them in their entirety. However, the points the Worker makes in those submissions include the following:

- He sustained multiple injuries to numerous parts of his body (as stated on page 3 of his internal review application).
- He is in constant pain in his neck, shoulder, middle and lower back, has numbness in his right foot, dizziness, vertigo symptoms and persistent headaches. He is currently being treated at physiotherapy, also a psychologist for PTSD, and his medication consists of anti-depressants and pain killers.
- Nearly three years on from the injury, if he sits at a desk for any period of time he suffers severe neck pains and constant headache level increases significantly.
- He has tried work with three different companies as a Site Manager in three different fields but to his disappointment he struggled to complete any of these positions without causing stress and causing himself pain.
- On 21 November 2014 his employment with the pre-injury employer was terminated. He had been undertaking independent job seeking activities from home, and he was hopeful of obtaining a role which did not require as much physical labour due to pain and discomfort.
- He relocated in February 2015 following an offer of employment as an Office Administrator with Employer 2 to commence the following month. His nominated treating doctor (NTD) provided medical endorsement of his capacity to work in this vocation at this point he had not been able to gain employment and he was not aware of any limitations at this time.
- He was contacted by Employer 1 to advise that commencement of his new role had been delayed. He was eventually told that the existing partnership had been dissolved due to monetary issues.
- He felt he was bullied by a Case Manager to return to work threatening to cut off payments if he didn't that was stressful and put him in a dangerous position.

- The following month he attended an interview for a role as an Insurance Building Estimator but was not successful.
- He secured a work trial opportunity as a leading hand/Site Supervisor located with Employer 2. The rehab provider proceeded to undertake a workplace assessment which found that the duties available were functionally appropriate and commensurate to his approved vocational goal of project manager. A suitable duties plan was developed in order to allow a graded commencement of duties and gradual increase in capacity and tolerances which never eventuated. He completed the work trial over four weeks demonstrating that his capacity for the role required additional support in the form of an assistant.
- Following completion of the trial, it was confirmed that the Worker had successfully secured employment in a different role with Employer 2 utilising the Job Cover placement program incentive. Following medical approval from the NTD, he commenced employment as a Leading Hand/Fibre Installer on 18 January 2016.
- On 29 February 2016, the Worker confirmed that his employment with Employer 2 had ceased due to the business' loss of a contract and having to support an extra employee as his assistant whilst he was employed, due to his limitations that arose, resulting in a downturn in work.
- The following month the Worker reported that he had secured temporary employment as a Site Manager with Employer 3 for a two week period as previously mentioned above commencing 16 March 2016. Following this, he completed a contract role with Employer 4 also noted above which concluded in May 2016.
- His symptoms from working as a Site Manager are on record at the doctors and also reported by witnesses by the rehab provider as the rehab provider was present at his visit to the doctor, contrary to the rehab provider writing a report supporting that he was able to return to work.
- There was no way he could have sustained a Site Manager position he tried for any period of time. Standing and sitting, moving through internal scaffold was slow and painful and headaches increased again. He was taking panadol and nurofen just to get through the shift.
- He then tried a position for Employer 5 this was a 6 week contract - the longest "stint", this was the straw that broke the camel's back as at the end he was riddled with pain. There is no way he could sustain employment as a site or manager or anything similar where there is excessive sitting, walking or concentrating for any long period of time.
- He advised that he does not have qualifications or the experience to be a Project Manager. Without a qualification in Project Management or Estimation or at least around 5 years' experience his chances of obtaining a position are virtually zero.
- The role of a Project Manager is sedentary work but again this causes pain and stress that can get out of control. He finds it hard to concentrate for any period of time.
- Driving between the office and work sites would on occasion be a few hours away and would increase driving times over long distances.
- He has continued to seek new employment however is currently not working.
- He is unable to currently working (sic) at least 15 hours per week and therefore not earning at least \$183.00 per week.

17. In reply, the Insurer submits:

- At the time of the internal review, the most recent WorkCover-NSW Certificate of Capacity certified the Worker as having capacity for employment 8 hours per day, 5 days per week with restrictions.

- The Insurer relies on the internal review decision. Project Manager and Sales Representative are suitable employment within the meaning of section 32A of the Workers Compensation Act 1987 as argued in the internal review decision.
- The Worker has received 157 weeks of weekly payments of compensation and therefore section 38 of the 1987 Act applies.
- There is no evidence to indicate the Worker is a worker with high needs. Therefore his whole person impairment is not more than 20% and the Worker is not a worker with high needs.
- Section 38(3) of the Act therefore applies. The Worker has not returned to work for a period of not less than 15 hours and is not in receipt of earnings of at least \$183.00 per week. He does not satisfy the requirements of section 38(3)(b) of the 1987 Act.

## **REASONS**

### **Nature of merit review and Jurisdiction**

18. 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.
19. The review is not a review of the Insurer's procedures in making the work capacity decision and/or internal review decision.
20. The review requires that I consider all of the information before me substantively on its merits and make findings that, in light of the information before me, are most correct and preferable.

### **Current work capacity**

21. The Worker was working as a Site Manager. He tried to close a window which was jammed. He was exerting pressure and then the window gave way. He lost his balance and fell 6 metres onto a bitumen road.
22. He sustained severe multiple injuries which include multiple fractures, including right fracture of the humerus with displacement, fracture of the right elbow, vertebral fractures, complex pelvic fractures, two rib fractures and a crush fracture with the vertebral bodies. He also sustained contusion injury, depression, anxiety, persisting headaches and dizzy spells, ongoing lumbar back pain and paraesthesia.
23. He was in hospital for two weeks then in a wheelchair nursed by his wife. He experienced considerable difficulty around the home. He started walking after about three months. He started intensive rehabilitation on crutches and gradually was able to walk independently.
24. He tried to return to work but was told there were no duties available and he was terminated. He had further operative treatment.
25. There is a report of a consultant clinical psychologist before me. The Worker is diagnosed with having sustained an adjustment disorder secondary to the many physical injuries he sustained.
26. The worker was examined by an occupational physician. The occupational physician considered that the Worker's then certification of the treating doctor, that the Worker was able to work 3 hours per day, 5 days per week with lifting of between 4-7 kilograms, sitting and standing and driving up to 45 minutes or to pain level, was appropriate.
27. The occupational physician considered that the Worker's capacity "will increase gradually to full hours but because of the nature of the injuries he may not be able to progress to full physical duties

required in the building industry". The occupational physician went on to state that the Worker would be "required to seek sedentary or light physical duties in the future".

28. An occupational therapist for the rehab provider conducted a functional capacity evaluation. In a report, she recommended that the Worker has capacity for light work on a full time basis, with sitting, standing and driving up to 60 minutes, walking for approximately 45 minutes at a time, negotiate stairs for 3 minutes at a time, and forward reaching on the right side for approximately 3 minutes at a time.
29. A treating doctor provided a brief report to confirm that the Worker's headaches and dizziness arise from the injuries he sustained.
30. The Worker was examined by an orthopaedic surgeon for the Insurer. The orthopaedic surgeon assessed the Worker with 17% whole person impairment. The orthopaedic surgeon stated:

*"He has no capacity for a return to full-time hours as a Site Supervisor or Project Manager or Sales Representative at this stage. The medical evidence for this has been detailed in the body of my report and previous responses above.*

*The work he is attempting may be effective as he can undertake workplace health and safety activities on a part-time basis. I do not believe that he will be able to return to full-time hours for at least a year.*

*An attempt at part-time work as a Supervisor has been attempted but has not been possible. Any prolonged sitting or standing, bending or lifting would result in increased symptoms".*
31. Since June 2016, the Worker has been certified by the NTD to have capacity to work full-time hours of employment, with restrictions. I note in the earliest certificate before me, the NTD has stated:

*"Restricted hours and duties only if the role has a significant physical requirement (pt is considered available for full-time in management/supervisory roles with minimal physical demands as below and/or retraining options".*
32. The Worker continued to be certified by the NTD to have capacity to work full-time hours of employment with restrictions, throughout 2016.
33. The most recent WorkCover - Certificate of Capacity before me is dated 11 January 2017. The Worker has been certified by his treating doctor to have capacity for the period 10 January 2017 to 10 February 2017, to undertake 8 hours of employment per day, 5 days per week with restrictions of: 7-10 kilogram lifting and pushing/pulling but not repetitive, 60 minute driving, sitting and standing tolerance, 10 kilogram pushing/pulling ability, and no repeated bending/twisting/squatting.
34. The Worker has made extensive submissions addressing his own view as to what work he can undertake, and the types of symptoms that he experiences on an ongoing basis. I have considered these submissions in detail.
35. Whilst there is no doubt the Worker sustained what can only be described as very serious injuries as a result of the fall, and there is no question whatsoever that those injuries continue to significantly impact upon the Worker's capacity to work. However, there is also no question in my mind that the Worker has some capacity to work. The medical evidence before me is entirely consistent in supporting that the Worker does have some type of capacity for employment.
36. The treating doctor has continually certified the Worker to be able to work full-time, in the event that appropriate restrictions are observed. In June 2016, the treating doctor stated that restricted hours should only apply "if the role has a significant physical requirement" and that the Worker is considered available for full-time in management/supervisory roles with minimal physical demands.
37. However, I also take into consideration the Worker's submissions that he has at least attempted a number of roles including a Site Supervisor role and experienced considerable difficulty.

Indeed, the orthopaedic surgeon has stated that the Worker has no capacity for a return to full-time hours as a Site Supervisor or Project Manager or Sales Representative at this stage.

38. However, it is clear from the orthopaedic surgeon's report that even he considers the Worker fit for at least part-time hours of work in a role with minimal physical demands. The occupational physician stated some time back that the Worker was able to work 3 hours per day, 5 days per week with lifting of between 4-7 kilograms, sitting and standing and driving up to 45 minutes or to pain level.
39. In contrast, the treating doctor certainly remains of the view that the Worker can work on a full-time basis, and therefore certainly, at the very least, on a part time basis, as long as restrictions are observed, and this is so, notwithstanding the Worker's reporting ongoing headaches and dizziness. Further, the functional capacity evaluation (which I note the Worker has taken some issue with) supports that the Worker can work full-time but only in light or sedentary work.
40. When one considers the severity of the injury, the significant ongoing impact of the symptoms the Worker continues to experience as detailed in his submissions and the medical evidence, and in particular the most recent report of the orthopaedic specialist, the balance of evidence supports that the Worker has a capacity to work in light or sedentary work at a minimum of 3 hours per day, 5 days per week, with restrictions, as outlined in the occupational physician's report.
41. In my view it is possible that the Worker has a greater capacity for employment as certified by his treating doctor. However, on the balance of probabilities, notwithstanding the many issues the Worker has raised in his submissions, including headaches, his dizziness and the many physical restrictions he has, including symptoms that arise from prolonged sitting, standing, and so forth, he would be able to manage these if performed over shortened hours of 3 hours work per day over 5 days per week in an appropriate environment.
42. I find that the Worker has capacity for employment, for at least 3 hours per day, over 5 days per week. I accept the restrictions imposed by the treating doctor, which are essentially consistent with the occupational physician's view that light or sedentary work is appropriate and the recommendations in the functional capacity evaluation, although I note it was also recommended that walking was limited to approximately 45 minutes at a time, negotiate stairs for 3 minutes at a time, and forward reaching on the right side for approximately 3 minutes at a time.
43. Accordingly, I find appropriate restrictions to be 7-10 kilogram lifting and pushing/pulling but not repetitive, 60 minute driving limit, 60 minute sitting and standing tolerance, 10 kilogram pushing/pulling ability, no repeated bending/twisting/squatting, walking limited to approximately 45 minutes at a time, negotiate stairs for 3 minutes at a time, and forward reaching on the right side for approximately 3 minutes at a time.
44. 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
45. 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 as a Site Manager. This is also supported by the evidence, including the Worker's own submissions based on his attempt at a Site Supervisor role, and the orthopaedic surgeon has also stated it is not possible.
46. 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" which 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.

47. At this point, it is important to recognise that this is a merit review of the Insurer's work capacity decision that the Worker is able to return to work in suitable employment (and that he therefore has current work capacity).
48. In undertaking a merit review of the Insurer's decision, the Authority is required to consider the entirety of the information before it. I must consider the information substantively on its merits and make findings that, in light of the information before me, are most correct and preferable.
49. There is a report of the rehab provider in the information before me, which states that the roles of Site Supervisor, Project Manager and Sales Representative are suitable employment for the Worker.
50. However, having considered the report in some detail, noting the medical evidence, and the Worker's submissions concerning his experiences in the role of a Site Manager (a role which, as he states may involve walking a considerable amount, and driving to and from sites which may be far away) I do not consider that role to be suitable for him from a functional perspective.
51. With respect to the role of a Project Manager, the rehab provider report states that this role also involves frequent standing and "walking on construction sites" and "bending squatting or crouching and stretching, twisting climbing is likely to be required on a regular basis when visiting and inspecting constructions sites", yet I have found that the Worker should not engage in such repeated activities. Further, the types of jobs listed as examples in the rehab provider's report indicate that there is a non-sedentary aspect to the role, including frequent driving to sites and sitting in cars (the amount of time over which the Worker may have no control) which suggest that the physical requirements of the role may not be suited to him, as these requirements may exceed his driving limitation and he may not simply be at liberty to take a pause in a such a role that might relieve his symptoms.
52. Similarly, the role of a Sales Representative also involves driving to client sites and there is a non-sedentary aspect to the role that may not be suitable when one considers the entirety of the evidence.
53. However, I do note that the Worker successfully applied for, and was offered the role of an Office Administrator, an entirely sedentary role performing duties at a desk in an office. This is evident from a letter before me of the Chief Executive Officer of Employer 2. I do note that the role regrettably did not proceed. However, this had nothing to do with the Worker's injury. This was due to financial issues concerning the organisation he had obtained employment with.

54. On 17 March 2016, the NTD agreed that the role of an Office Administrator was suitable employment for the Worker from a functional perspective. This is made clear in a report of the rehab provider.
55. I do note that the Worker submits that "there is no way he could sustain employment as a site manager or anything similar where there is excessive sitting, walking or concentrating for any long period of time". The role of an Office Administrator is plainly a very different type of employment to work on a site or as a manager. It is an entirely sedentary role with sedentary physical demands. The role involves sitting at a desk and concentration, however I am not, in any event, persuaded that the medical evidence in particular supports the Worker's submission that he cannot perform a role involving concentration for a long period of time, or at the very least, such circumstances would not be manageable in the context of part-time office work.
56. It should be noted that each of the medical reports before me supports that the Worker is able to work in sedentary work at the very least. Further, whilst I acknowledge the Worker experiences difficulties concentrating, there is simply inadequate medical expert evidence before me that supports that the Worker is incapacitated to perform employment because of his inability to concentrate. I accept that the Worker gets headaches and experiences difficulty in concentration. But there is insufficient medical evidence in my view, that goes so far as to indicate that the Worker is not able to engage in employment on that basis. On the contrary, the medical evidence considered in totality supports that the Worker is able to perform sedentary employment within his functional restrictions, albeit with breaks and rest periods.
57. There are such roles available on a part time basis, commensurate with The Worker's capacity for employment 3 hours per day, 5 days per week. In such a role he would be reasonably able to alternate positions, take mini breaks and rests, and in the context where shifts were limited to part-time hours of work, it is my view that he would have the physical capability of performing at least 15 hours per week in such a role on the totality of the evidence, and in particular the medical evidence, now before me.
58. With respect to the Worker's skills, experience, employment history, and the balance of matters contained in the definition of suitable employment, as I have indicated there is a letter of employment of Employer 2 before me. It supports that the Worker was able to secure employment as an Office Administrator in the labour market.
59. It is unsurprising that the Worker was able to secure a job in the labour market as an Office Administrator. He has experience in undertaking administrative tasks and functions at a much higher level than that required at the level of an Office Administrator. He has undertaken a small business management course, a MYOB Accounting Course and a work health and safety certificate.
60. He has worked as a site manager managing site operations, maintaining and approving records, administering paperwork, quotes, orders, and submitting monthly reports. Between 2002-2008 he worked as a Project and Business Development Manager, and between 1996 and 2002 as an Operations Manager, managing accounts and again maintaining and approving records.
61. He has high level analytical skills, able to work in a team, time management skills, ordering and planning skills, and administration skills. He is competent to advanced in Office, Word, MYOB, Powerpoint, Linux and Windows based programs and clearly is competent in using a computer and undertaking office and administrative type duties.
62. Most significantly however, the Worker has demonstrated that he can actually secure a job as an Office Administrator in the employment market, as he did. In my view, his skills and experience are currently suited for such a role in the labour market. There is no question that such a role is suitable employment for him from a functional perspective at the very least, on a part-time basis, and his treating doctor agrees the role is suitable.

63. I find that the role of an Office Administrator is suitable employment for the Worker and he is able to undertake such work, on a part-time basis at the very least. In arriving at this conclusion, I have regard to the information before me and regard to the definition of suitable employment as provided in section 32A of the 1987 Act.
64. I find that the Worker is able to return to work in suitable employment. I find that the Worker has "current work capacity" as defined in section 32A of the 1987 Act.

#### **Entitlement periods for ongoing weekly payments**

65. 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.
66. The Insurer, in their reply to the Worker's application for merit review, indicates that he had received 157 weeks of weekly payments of compensation.
67. Therefore, 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.

#### **Special requirements for continuation of weekly payments after second entitlement period**

68. I am satisfied that 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.*

69. The Worker is entitled to weekly payments of compensation only if he meets all three special requirements provided in section 38(3) of the 1987 Act unless he is a "worker with high needs" as defined in 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.*
70. The only report before me containing an assessment of the Worker's whole person impairment is that of the orthopaedic surgeon, where he was assessed to have 17% whole person impairment. Clearly, The Worker does not meet criteria (a) or (b) as described above in such circumstances. Further, the Insurer has clearly indicated that it is not satisfied that the degree of permanent impairment is likely to be more than 20%. There is certainly no persuasive evidence available to support that the Insurer should be satisfied that the degree of permanent impairment is likely to be more than 20%. Particularly as the Worker has been assessed by the orthopaedic surgeon to only have 17% whole person impairment.
71. Accordingly, I am not satisfied on the information before me that the Worker is a "worker with high needs" pursuant to section 32A of the 1987 Act as he does not meet any of the criteria in (a),(b) or (c) of the definition. Section 38(3A) of the 1987 Act does not apply.
72. I have found that the Worker has current work capacity. In order to meet the requirement of section 38(3)(b) of the 1987 Act, the Worker needs to have returned to work for a period of not less than 15 hours per week and earning at least \$183 per week (as indexed).
73. It should be noted that the requirement to return to work under section 38(3) of the 1987 is strictly imposed by the legislation, notwithstanding the serious nature of the Worker's injury. It does not matter that in the type of suitable employment I have identified, for example, the Worker would earn much less than that of his pre-injury employment.
74. The legislation simply requires that I consider whether the Worker is able to return to some type of suitable employment and I have found he is able to do so. Accordingly, he has current work capacity and section 38(3) of the 1987 Act applies to him as he has received 157 weeks of weekly payments.
75. However, there is no evidence that the Worker is currently working. Accordingly, I must find, as the Insurer found, that 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. Accordingly, the Worker is not entitled to payments of weekly compensation for the period after the second entitlement period, in accordance with section 38(1) of the 1987 Act.
76. As I have arrived at the same conclusion as the Insurer, and noting that making of recommendations by the Authority is a matter of discretion for the Authority, there is no need for the Insurer for any course of action different to that already adopted. I make no recommendation.

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