



# 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 State Insurance Regulatory Authority (the Authority) finds:
  - a. The Worker has current work capacity.
  - b. The Worker has a present inability arising from an injury such that she is unable to return to work in her pre-injury employment.
  - c. The Worker has a present inability arising from an injury such that she is able to return to work in suitable employment in the role of a psychologist.
  - d. The Worker's entitlement to weekly payments of compensation falls after the second entitlement period under section 38 of the *Workers Compensation Act 1987* (the 1987 Act).
  - e. The Worker does not meet the special requirements to be entitled to weekly payments after the second entitlement period under section 38(3) of the 1987 Act.

#### RECOMMENDATIONS BASED ON FINDINGS

2. The Authority does not make any recommendations to the Insurer for the reasons below.

#### BACKGROUND

3. The Worker suffered an injury when she fell down stairs at work. She suffered injury to her neck, shoulder, wrists, lower back and knees.
4. The Worker is 57 years of age.
5. The Insurer made a number of work capacity decisions on 30 July 2015, reducing the Worker's entitlement to weekly payments of compensation to nil under section 38 of the 1987 Act.
6. The Insurer undertook an internal review in this matter and made a decision, affirming the work capacity decision.
7. The application for merit review was received by the Authority on 23 June 2017. The application was made within 30 days after the Worker received notice of the internal review. The application has been lodged in the form approved by the Authority (section 44BB(3)(a) of the 1987 Act).

## LEGISLATION

8. 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), and
  - *Workers Compensation Regulation 2016* (the Regulation).
9. Section 43 of the 1987 Act describes a “work capacity decision”.
10. Section 44BB of the 1987 Act provides for merit review of a work capacity decision of the Insurer, by the Authority.

## DOCUMENTS CONSIDERED

11. I have considered all of the information that was provided by the parties in relation to the Worker’s application for merit review.
12. I am satisfied that both parties have had the opportunity to respond to the other party’s submissions and that the information provided has been exchanged between the parties.

## SUBMISSIONS

13. In the application for merit review, the Worker submits:
  - To earn the amount of \$286,000, the Worker would need to be an eminent psychologist with a high level of reputation, a high patient base built up with years in private practice which the Worker does not have.
  - She does not have the same skills set and experience as other trained psychologists. She did not go to university. She came to Australia in 1978. Whilst she speaks English, her English is not as fluent or at the level of a person who went to school in Australia. Her work experience has primarily been at community welfare and health centres assisting poorer members of the community. She worked as a welfare worker and as a bilingual counsellor, and as a translator before becoming a psychologist.
  - She started private practice in about March 2015 because she was unable to find employment as an employed psychologist.
  - The Insurer has erred in failing to properly consider her education, skills and experience in determining what she is able to earn in private practice.
  - Her earning capacity working in private practice as a psychologist is currently what she is earning in working in private practice as a psychologist.
  - Most of her patients are from a NESB. She does not have the skills and experience of an eminent psychologist. The number of patients she sees per week is limited by her injuries and disabilities. Her nominated treating doctor places a limitation on seeing no more than 2 patients per day, 8 patients per week, and to avoid tasks which require prolonged use of pen and pencil.
  - On the basis of the nominated treating doctor’s medical certificate, it is submitted that she should only be working up to 16 hours per week as a psychologist on the basis of seeing 8 patients per week and spending 2 hours working per patient. In her statement she says she is currently seeing about 8 to 12 patients per week, and experiences increased symptoms

when she sees more than 8 patients per week and that she cannot see any more patients than what she is currently seeing.

- According to her financial records in 2015 she earned \$401.42 gross per week; in 2016 she earned \$434.69 gross per week and up to 18 April 2017 in this financial year she earns \$364.10 per week.
- The Insurer erred in considering what she could be earning as a professional operating a business rather than considering what she could be earning as an employee.

14. The Worker also provided a statement dated 23 June 2017. She states:

- A consultation with a patient will take 1 hour.
- Prior to seeing a patient, she prepares by reviewing the file, reviewing previous test results, reading, and photocopying relevant material.
- After seeing a patient, she will spend time scoring test results, report writing, typing, writing files, letters, liaising and making phone calls.
- She estimates that for one hour consultation with a patient, she will spend about 2 hours in total working including any time spent travelling to see the patient.
- She receives a fee of about \$84.80 per client session from Medicare.
- She is spending more than 15 hours per week working and estimates that she is currently working about 20 hours per week.

15. In reply, the Insurer submits:

- The Worker is an existing recipient and has received 193 weeks of weekly payments of compensation.
- The worker was assessed as being capable of earning up to \$5,500 per week in a part-time psychologist role. It concedes that this estimate is high and is based on the feedback of one specific employer contacted in the Earning Capacity Assessment. It is noted, however, that these roles are specifically for a psychologist working within a private practice, thus they are generally higher than the salaries offered within the public sector.
- A role as a community services psychologist was also identified in the Earning Capacity Assessment and the range of earnings was from \$37.97 to \$39.43 per hour. The Insurer in fact did not rely on the Worker's ability to earn in determining that she had no further entitlement. Instead, it found that the Worker did not meet the special criteria under section 38 to qualify for ongoing weekly benefits. It found that the Worker is not working to her full certified capacity of 25 hours per week. It notes that despite her solicitor's submission that the Worker is fit for 16 hours per week, the WorkCover certificate they have provided to support the claim certifies the Worker as fit for 25 hours per week. The current certificate, dated 24 April 2017, continues to certify the Worker as having capacity for 25 hours suitable employment per week.
- The Worker submits that she works for 16 hours per week. However, during the internal review, it conducted a breakdown of the information submitted and found that based upon the supplied documentation, the Worker was working a maximum of 9 hours per week. This is explained in the internal review dated 25 May 2017.
- Additionally, the Worker has advised that she claims back \$84.80 per session from Medicare (as evidenced by the Summary of Medicare Refund Claims referred to in the internal review). the Worker further submits that she currently earns an average of \$364.10 per week. When \$364.10 is divided by \$84.80, the result is 4.3. MRS will note that this is actually fewer clients than the Worker was estimated to see during the

internal review which estimated 4.7 to 5.9 counselling hours per week based upon the material provided. In order for the Worker to be working her alleged capacity of 16 hours per week, she would have to be performing more than 2 hours of fee administration/reporting, for every paid hour of work. The Insurer does not have any evidence that this is the case and maintains that the Worker is not working to her full capacity and is not working at least 15 hours per week.

- In summation, it maintains that the Worker does not meet the criteria for ongoing benefits under section 38, specifically:
  - The Worker is not working up to 15 hours per week;
  - The Worker has capacity to work for 25 hours per week, but is not working consistently at these hours; and
  - The Worker has the capacity and ability to engage in further employment that would increase her current earnings.
- It therefore maintains that the Worker has no entitlement to weekly benefits under section 38.

## REASONS

### Nature of merit review

16. This matter involves a merit review of the work capacity decisions of the Insurer in accordance with section 44BB(1)(b) of the 1987 Act.
17. The review is not a review of the Insurer's procedures in making the work capacity decision and/or internal review decision.
18. I am required to consider all of the information that has been provided and make findings and recommendations that are most correct and preferable.

### Current work capacity and suitable employment

19. The issue for me is how the injuries impact upon the Worker's capacity for employment.
20. 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*
21. In undertaking this review, I will consider the information before me and assess if, and to what extent, the Worker has "current work capacity" or "no current work capacity" as defined and set out above.
22. Before me are a number of WorkCover Certificates of Capacity issued by the Worker's nominated treating doctor which cover the period from 31 July 2015 to 20 July 2017. Those certificates with respect to her capacity to work, are in the same terms. The nominated treating doctor has certified the Worker with capacity for some type of employment 5 hours a day, 5 days per week with the following recommendations:

"Lifting/carrying capacity:	2 kg floor to chest
Sitting tolerance:	30 mins
Standing tolerance:	15 mins

Driving ability:	30 mins from home
Other:	2 clients per day 8 clients per week avoid repetitive bending & twisting back, avoid squatting, avoid task which required prolonged use of pen and pencil, avoid all lifting above shoulder height, use of voice recorder, avoid work as intake officer, can work as counsellor, 1 hour break after 3 hours of working, avoid public transport, can use taxi for appointment'

23. There are also before me a number of medical reports.
24. A neurosurgeon, provided a report dated 9 April 2014. He was of the opinion there was no good evidence before him that the Worker had any work restriction, but that she had a chronic pain state and there was no evidence that there should be significant restrictions greater than would apply to a normal woman of the Worker's age.
25. The first orthopaedic surgeon, provided a report dated 23 September 2014. The first orthopaedic surgeon was of the opinion that the Worker was fit for her pre-injury work as a psychologist which included her capacity to drive her vehicle and work at a desk using a pencil or pen or computer keyboard without limitation. She was capable of lifting any weight expected from her job description and for sitting for unlimited periods of time. She would have the capacity to alter her posture or stand for stretching. He believed there was no restriction on her mobility with walking, squatting or lifting above shoulder height.
26. A physiotherapist, provided a summary report on 2 December 2014 noting that ongoing physiotherapy treatment is not considered to be reasonably necessary as the Worker has likely reached maximal benefit from conservative treatment.
27. A consultant forensic psychiatrist, provided a report on 23 March 2015. He was of the opinion that the Worker was not suffering from a diagnosable psychiatric condition presently. He believed that from a psychiatric perspective there are no limitations on her work capacity.
28. A second orthopaedic surgeon, provided a report dated 13 April 2017. He noted that the Worker continues to complain of bilateral anterior knee pain. She does not have any significant chondral pathology or wear in the patella-femoral articulation but has poor patella- femoral mechanics requiring physiotherapy.
29. After considering all the medical information, I find that the Worker has capacity for some type of employment 5 hours per day, 5 days per week with the recommendations of lifting up to 2kg from floor to chest; 30 minute sitting tolerance; 15 minute standing tolerance; avoiding prolonged use of pen and pencil; not lifting above shoulder height and having an hour break after 3 hours of work.
30. I note the nominated treating has stated that the Worker should only see 2 patients a day and up to 8 per week. This is inconsistent with his certifying her with capacity for 5 hours per day, 5 days per week which he has continued to certify as her capacity for some type of employment. In my view, based on all the medical information before me, the Worker is able to undertake either consultations or preparation work within the recommendations and the hours certified by the nominated treating doctor.
31. The Worker has stated that when she sees a client she spends up to an hour undertaking preparation or review work. In my opinion, the Worker could do a mix of seeing clients and her other work across 25 hours per week. I note all the other medical information before me indicates that the Worker could return to work with few limitations on her ability to perform her duties as a psychologist. Both the neurosurgeon and the first orthopaedic surgeon were of the view that she had very few restrictions and could use both pen and paper and keyboard, as well as be able to sit and adjust her posture as needed. The consultant forensic psychiatrist was also of the view she could return to her work as a psychologist. I further note that the Worker has been seeing more than 2 clients per day,

4 days per week and has seen up to 10 clients per week in May and June 2017, and 11 per week during the period of March and April 2017 (discussed below).

32. I find that the Worker has the capacity for some type of employment for 5 hours per day, 5 days per week with the recommendations in accordance with my findings in paragraph [29].

### **Pre-injury employment**

33. There is no issue before me that the Worker is unable to return to work in her pre-injury employment. In the absence of any dispute, I accept that the Worker is unable to return to work in her pre-injury employment.

### **Suitable employment**

34. In order to determine whether the Worker has current work capacity, I am required to consider whether the Worker is able to return to work in "suitable employment". 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 Workers Compensation 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.

35. The Worker is currently working in private practice as a psychologist.
36. The Worker was working as a community psychologist before her injury. A rehabilitation services provider prepared an earning capacity assessment report.
37. The Worker was educated before coming to Australia. In 1990 she obtained a Bachelor of Arts (Interpreting and Translating). In 1996 she obtained a Bachelor of Arts (Psychology). In 1998 she obtained a Master of Arts (Psychology) (Family Therapy).
38. The Worker worked as a welfare worker between 1983 and 1986; a bilingual counsellor between 1990 and 1998 and as a generalist counsellor between 1998 and 2001. She was working as a psychologist between 2001 and 2014. Since March 2015 she has been self-employed as a psychologist.

39. The Worker has extensive experience as a community psychologist and in her own private practice. She has not submitted that she is unable to undertake the role but believes that her ability to earn should be a reflection of her current earnings and that she needs to adjust the amount of clients she sees based on his ability to write and use a computer. Based on the information before me in the earning capacity assessment report, the employer contacts and the fact that the Worker has returned to work as a psychologist, I am satisfied that the Worker has the necessary education, skills and work experience to be a psychologist and that the role is within her functional tolerances. I accept there are also no age related considerations for the position.
40. I find that the role of a psychologist is suitable employment for the Worker as defined in section 32A of the 1987 Act.

#### **Existing recipient of weekly payments**

41. An “existing recipient of weekly payments” is defined in clause 1, Part 19H, Schedule 6 of the 1987 Act as:

*existing recipient of weekly payments means an injured worker who is in receipt of weekly payments of compensation immediately before the commencement of the weekly payments amendments.*

42. The Insurer has advised that the Worker is an existing recipient of weekly payments as she was in receipt of weekly payments of compensation immediately before the commencement of the weekly payments amendments. Therefore the weekly payments amendments as provided in Division 2, Part 19H, Schedule 6 of the 1987 Act apply to the Worker’s entitlement to weekly payments of compensation.

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

43. 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.
44. The Insurer has advised that the Worker has received 193 weeks of weekly payments of compensation up to the filing of the reply. That has not been disputed by the Worker.
45. I accept the Insurer’s statement that the Worker’s entitlement to weekly payments of compensation currently falls after the second entitlement period and is to be calculated in accordance with section 38 of the 1987 Act.

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

46. Section 38 of the 1987 Act provides that an entitlement to weekly payments after the second entitlement period is only available if special requirements are met as follows:
  - (2) *A worker who is assessed by the Insurer as having no current work capacity and likely to continue indefinitely to have no current work capacity is entitled to compensation after the second entitlement period.*

- (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.

47. A "worker with high needs" is defined in section 32A of the 1987 Act must be met, as follows:

**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 the highest needs

48. To satisfy the requirements of being a "worker with high needs" as set out in section 32A, at least one of the sub-sections (a), (b) or (c) of the definition must be met by the worker.
49. There is no information before me that the Worker has been assessed as being a worker with high needs and the Worker has not submitted that she is a worker with high needs.
50. Therefore, the requirements of section 38(3) of the 1987 Act apply in this matter.
51. With respect to sub-section 38(3)(a), I note that this section does not apply to an existing recipient of weekly payment for the purposes of clause 16 Schedule 8 of the Regulation.
52. Sub-section 38(3)(b) is a two-part test and the Worker needs to satisfy both parts of the test, being that she is required to have returned to work (whether in self-employment or other employment), for a period of not less than 15 hours per week and be in receipt of current weekly earnings (or current weekly earnings together with a deductible amount) of at least \$185 per week (as currently indexed).
53. I accept the Worker's submission that the amount of \$295.00 per hour is not a reflection of the Worker's ability to earn in suitable employment. Her experience prior to injury was in community psychology working in hospitals or community centres and not in private practice. Although she now works in her own practice, the amount she earns is based on the Medicare base rate fee of \$84.80 per client.
54. I have reviewed and calculated the number of weeks and in the Details of Service Allied Health Professional remittance provided by the Worker and calculated in the internal review decision, with the addition of the remittance of 18 April 2017.

Period	weeks	Days Overflow	Hours	fee (\$)	fee claims (\$)	claimed amount (\$)	Claimed amount	Average hours
March to April 2015			13	84.80	1,102.40	1,124.15	21.75	
2 April to 4 May 2015	4	3	15	84.80	1,272.00	1,272.00	0.00	3.75
5 May to 3 June 2015	4	2	12	84.80	1,017.60	1,039.35	21.75	3.00
4 June to 8 July 2015	5	0	13	84.80	1,102.40	1,145.90	43.50	2.60
9 July to 9 August 2015	4	2	16	84.80	1,356.80	1,378.55	21.75	4.00
10 August to 7 September 2015	4	1	13	84.80	1,102.40	1,145.90	43.50	3.25
8 September to 13 October 2015	4	4	23	84.80	1,950.40	1,950.40	0.00	5.75
14 October to 3 November 2015	3	0	26	84.80	2,204.80	2,226.55	21.75	8.67
4 November to 11 December 2015	5	2	27	84.80	2,289.60	2,289.60	0.00	5.40
12 December 2015 to 29 February 2016	11	3	28	84.80	2,374.40	2,374.40	0.00	2.55
1 March 2016 to 2 March 2016			24	84.80	2,035.20	2,035.20	0.00	24.00
3 March 2016 to 12 May 2016	10	1	71	84.80	6,020.80	6,020.80	0.00	7.10
13 May 2016 to 5 June 2016	3	2	34	84.80	2,883.20	2,883.20	0.00	11.33
6 June 2016 to 13 September 2016	14	0	95	84.80	8,056.00	8,056.00	0.00	6.79
14 September 2016 to 16 January 2017	17	3	25	84.80	2,120.00	2,120.00	0.00	1.47
17 January 2017 to 1 March 2017	6	2	31	84.80	2,628.80	2,628.80	0.00	5.17
2 March 2017 to 18 April 2017	7	1	77	84.80	6,529.60	6,573.10	43.50	11.00
<b>total</b>	<b>101</b>	<b>26</b>	<b>530</b>		<b>44,944.00</b>	<b>45,139.75</b>	<b>195.75</b>	

55. I note in the internal review decision, the Worker advised that she worked an additional 15 to 30 minutes of administrative work for each case, depending on the case. Her submissions on this review and in her statement are "I will spend about 2 hours in total working including any time spent travelling to see the patient" (at [20]) per case. In her statement she also indicates that she works 20 hours a week.
56. From the table at [54] I have excluded the March to April 2015 amount as they are undefined weeks. I note there is one claim for 2 March 2016 for 24 appointments which is an anomaly in the amount of hours. But even including that figure and dividing by the 101 weeks for the period, the average hours the Worker has worked is 5.2475 hours. Even adding an additional hour to those cases would be an average of 10.495 hours. However, I note that from 2 March 2017, the Worker has been working on average 11 hours on appointments plus time for case preparation and review.
57. I note from the Worker's 2015 to 2016 income tax return, the taxable income for her counselling occupation was \$6,995 gross.
58. Given that she is receiving \$84.80 per client consultation, I accept that the Worker is receiving more than \$185.00 per week.
59. The information before me does not support that the Worker met the requirements of section 38(3)(b) from the date of the work capacity decision to 2 March 2017 as she did not work at least 15 hours per week based on the number of appointments, even if 30 minutes to an hour was included for each appointment.
60. I also note that the Worker has provided a diary showing a number of appointments for May, June and July 2017. I note that many of these appointments had not taken place at the time the diary was submitted.

<b>May</b>					<b>total</b>
<b>1</b> 3 appointments	<b>2</b> 2 appointments	<b>3</b> 2 appointments	<b>4</b> 1 appointment	<b>5</b> 2 appointments	<b>10</b>
<b>8</b> 2 appointments	<b>9</b> 2 appointments	<b>10</b> 2 appointments	<b>11</b> 2 appointments	<b>12</b> 2 appointments	<b>10</b>
<b>15</b> 2 appointments	<b>16</b> 2 appointments	<b>17</b> 2 appointments	<b>18</b> 2 appointments	<b>19</b> 2 appointments	<b>10</b>
<b>22</b> 1 appointment	<b>23</b> 2 appointments	<b>24</b> 3 appointments	<b>25</b> 2 appointments	<b>26</b> 2 appointments	<b>10</b>
<b>29</b> 2 appointments	<b>30</b> 2 appointments	<b>31</b> 3 appointments (1 cancelled)			
<b>June</b>					
			<b>1</b> 1 appointment	<b>2</b> 2 appointments (1 cancelled)	<b>8</b>
<b>5</b> 2 appointments	<b>6</b> 2 appointments	<b>7</b> 2 appointments	<b>8</b> 2 appointments	<b>9</b> 1 appointment	<b>9</b>
<b>12 Public holiday</b>	<b>Sick</b>	<b>14</b> 3 appointments (1 cancelled)	<b>15</b> 3 appointments	<b>16</b> 2 appointments	<b>7</b>
<b>19</b> 3 appointments (1 cancelled)	<b>20</b> 2 appointments (1 cancelled)	<b>21</b> 2 appointments	<b>22</b> 3 appointments	<b>23</b> 2 appointments	<b>10</b>
<b>26</b> 3 appointments (1 cancelled)	<b>27</b> 2 appointments (1 cancelled)	<b>28</b> 3 appointments (1 cancelled)	<b>29</b> 3 appointments (2 cancelled)	<b>30</b> 2 appointments	<b>10</b>
<b>July</b>					
<b>3</b> 2 appointments	<b>4</b> 3 appointments (1 cancelled)	<b>5</b> 3 appointments (1 cancelled)	<b>6</b> 2 appointments	<b>7</b> 1 appointment	<b>9</b>
<b>10</b> 3 appointments (1 cancelled)	<b>11</b> 2 appointments	<b>12</b> 2 appointments (1 cancelled)	<b>13</b> 2 appointments	<b>14</b> 2 appointments	<b>9</b>
<b>17</b> 3 appointments	<b>18</b> 2 appointments	<b>19</b>	<b>20</b>	<b>21</b>	
<b>24</b>	<b>25</b>	<b>26</b>			

61. The Worker's diary indicates that she averages 9-10 clients per week for an hourly session plus time for case preparation and review. I accept that the Worker would require between 30 minutes and 1 hour for case preparation though there are no records or timesheets before me to precisely calculate her actual hours. In that respect, from March 2017 to 18 April 2017 when the Worker was seeing an average of 11 patients per week, and between 1 May 2017 and 30 June 2017 when she was seeing an average of 9 to 10 clients per week, the Worker may have been working more than 15 hours per week in some of those weeks.
62. Therefore, it is possible that for the period from 2 March 2017 to 30 June 2017, there were periods in each "subsequent period of 12 weeks" (which are determined in accordance with clause 21, Schedule 8 of the Regulation) during the period relevant to this review that the Worker had worked more than 15 hours per week.
63. Even if the Worker satisfied the requirements of section 38(3)(b) in the period 2 March 2017 to 30 June 2017, the Worker would still need to satisfy the requirements of sub-section 38(3)(c) of the 1987 Act.
64. To satisfy sub-section 38(3)(c), the Worker must be assessed as being, and likely to continue indefinitely to be, incapable of undertaking further additional employment of work that would increase her current weekly earnings.
65. I have found that the Worker has capacity to undertake some type of employment for 25 hours per week which has been consistently certified by her nominated treating doctor. I have also

found that she is able to balance her consultations and preparation and review of cases in those hours. On my findings above, even if I were to accept that the Worker does an hour of preparation work and file review for each matter, she only worked, at most, between 18 and 22 hours per week in the period from 2 March 2017 to 30 June 2017.

66. I am not satisfied that the Worker meets the requirements of sub-section 38(3)(c) of the 1987 Act.
67. The Worker therefore is not entitled to weekly payments of compensation under section 38 of the 1987 Act.
68. Given that the outcome of my review does not differ from the outcome of the Insurer's internal review decision, it is not necessary that I make any recommendations to the Insurer.

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