WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

Issued in accordance with section 294 of the *Workplace Injury Management and Workers Compensation Act 1998*

Matter Number: **6317/20**
Applicant: **Oliver Roberts**
Respondent: **University of Sydney**
Date of Determination: **21 January 2021**
Citation No: **[2021] NSWWCC 25**

The Commission determines:

Findings

1. The Commission has the power to order weekly compensation pursuant to s 38 of the *Workers Compensation Act 1987* (the 1987 Act).

2. The applicant has satisfied the necessary conditions in s 38(3) of the 1987 Act.

Orders

3. The respondent pays the applicant weekly compensation pursuant to s 38 of the 1987 Act at $736 per week from 28 October 2020 to date and continuing.

4. The respondent is entitled to credit for any payments of weekly compensation made during the period of this order.

JOHN HARRIS
Arbitrator

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF JOHN HARRIS, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

Lucy Golic
Acting Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

Background

1. Mr Oliver Roberts (the applicant) was employed by the University of Sydney (the respondent) and suffered a compensable psychological injury on 12 November 2017 (deemed).

2. On 22 July 2020, the respondent served a notice pursuant to s 78 of the *Workplace Injury Management & Workers Compensation Act 1998* (the 1998 Act) advising that compensation payments would be reduced from 31 October 2020.[1] The basis of that decision was that the applicant had capacity to earn $947.37 per week and the weekly payments of compensation would be reduced to $1,114.13 from 31 October 2020.

3. On 7 October 2020, the respondent advised the applicant that he did not satisfy the requirements of s 38(3) of the *Workers Compensation Act 1987* (the 1987 Act). That notice provided (in bold print):[2]

> "You have not been assessed as indefinitely unable to undertake further work to increase these earnings".

4. Reference was then made in the notice to the decision being made "under section 38(3)(c)" of the 1987 Act. A further reason provided in the notice in support of the decision was as follows:

> "Your Nominated Treating Doctor has certified that you have capacity for some type of employment for 30 hours per week within functional restrictions, however, you are currently working less than 15 hours per week."

5. This is a claim for weekly compensation from 28 October 2020 to date and continuing. The claim was initially before a Registrar's Delegate who referred the matter to a Commission Arbitrator on the basis that "a jurisdictional issue had been raised in relation to the application of section 38(3)(c)".

6. The matter was listed for a telephone conference before me on 2 December 2020 when the following Directions were issued:

    1. The Application and attachments and the Reply and attachments are admitted into evidence without objection.

    2. The issues for determination are the:

        (a) The effect and operation of s 38(3)(c) of the 1987 Act; and
        (b) Extent of the applicant's capacity.

    3. The applicant is to file and serve further evidence of actual earnings by close of business, 9 December 2020.

    4. The respondent is to file and serve by close of business 16 December 2020:

        (a) Any further evidence on actual earnings; and
        (b) Written submissions.

    5. The applicant is to file and serve written submissions by close of business, 8 January 2021.

[1] Reply, p 8.
[2] Reply, p 20.

6. The respondent is to file and serve any submissions in reply by close of business, 15 January 2021.

7. Following receipt of the respondent's written submissions which asserted that the Commission lacked jurisdiction to order weekly compensation after the second entitlement period, the parties were referred to the decision of the Court of Appeal in *Sabanayagam v St George Bank Ltd*[3] (*Sabanayagam*).

8. Further written submissions were filed by the parties following receipt of the further direction from the Commission.

9. The ambit of the respondent's written submissions was outside the issues raised in its notices and the issues identified at the telephone conference. This matter was raised by the applicant in his written submissions.

EVIDENCE

10. The documentation admitted into evidence was:

    (a) Application to Resolve a Dispute (Application);

    (b) Reply;

    (c) Letter dated 4 December 2020 from the applicant's statements attaching income statements;

    (d) Late application filed by the respondent, and

    (e) Late application filed by the applicant on 7 January 2020.

11. There was no application to adduce oral evidence. The applicant objected to the respondent's late application which attached material from the website of Pasture.io. The applicant is presently self-employed by Pasture.io as the Chief Executive Officer.

12. The applicant objected to the late application filed by the respondent as being outside the scope of the Directions issued following the telephone conference. It was submitted that the document was not evidence of "actual earnings" and did not support the "unfounded assertion" in the respondent's written submissions.

13. It was submitted that the material otherwise had "little probative value" and represents marketing material on a website not reflective of actual capacity.

14. I admit the further material filed by the respondent. There was no suggestion by the applicant that it is prejudiced by the late application and it did not seek to respond to the material. Further, the documents have some relevance as they provide some background to the business, "Pasture.io". It is that business which the applicant's medical case suggests that he is only fit to undertake part-time work. The material provides some indication as to what the company does, particularly in circumstances where the applicant states in the material that he is the "Founder & Chief Executive Officer" and then proceeds to describe his "strong background" in the Australian dairy industry.

15. The material is clearly relevant to a consideration of s 38(3)(c) and an assessment of the applicant's capacity.

[3] [2016] NSWCA 145.

Applicant's statement

16. The applicant provided a statement dated 16 October 2020[4] describing his ongoing psychological symptoms, low mood, affected sleep and inability to concentrate and focus. He stated that he also suffers from ongoing bilateral knee pain.

17. The applicant stated that he earnt "approximately $200 to $300 per week"[5] from his self-employment role with Pasture.io.

18. The applicant stated that his symptoms are "extremely severe", can be easily triggered and vary on a daily basis. In light of these symptoms, the applicant does not believe that he can work on the open labour market. He stated that self-employment allows him to pace himself and take breaks as required.

Dr Rekha Ratnagobal

19. Dr Rekha Ratnagobal, general practitioner, provided a report dated 10 July 2019 when she opined that the applicant was able to work three full days per week.[6] At that time the doctor certified the applicant fit for roles such as Project Manager, Operations Manager and/or General Manager.[7]

20. A certificate completed by Dr Ratnagobal dated 5 July 2019 noted fatigue, poor concentration, difficulty sleeping and certified the applicant fit for three days of work per week.[8]

21. In late 2019 the doctor maintained these hours noting that the applicant was "only fit to complete the duties required of current self-employment".[9] These certificates were similar in substance throughout the first half of 2020.

22. On 24 July 2020 the general practitioner certified the applicant fit for 30 hours per week with restrictions limited to duties in self-employment as stated in prior reports.[10] This opinion was repeated in a certificate dated 14 September 2020.[11]

23. In a report dated 12 October 2020,[12] Dr Ratnagobal diagnosed depression and anxiety with symptoms of a "fluctuant nature". In light of those symptoms, the doctor opined that the applicant was not able to work "within the rigid constructs of an employed role" without risking recurrent flares and that self-employment enabled the work to be spread across the week.

24. Dr Ratnagobal opined that the maximum capacity to work was between 20 and 30 hours per week within his self-employed role. The doctor opined that the applicant was not fit to work in meaningful employment of up to 16 hours per week and opined that the prognosis was "poor", that he would not return to working for others and the best outlook was the current start-up and self-employed role.[13]

[4] Application, p 1.
[5] Application, p 3.
[6] Reply, p 30.
[7] Reply, p 34.
[8] Reply, p 46.
[9] Reply, p 53.
[10] Reply, p 61.
[11] Reply, p 64.
[12] Application, p 44.
[13] Application, p 45.

25. A recent certificate of capacity dated 21 December 2020 restricted the applicant as "only fit to complete the work duties required of current self-employment" with an estimate of capacity of 15-20 hours per week.[14]

Dr Takyar

26. Dr Ash Takyar provided a report dated 9 October 2020.[15] The doctor described the applicant's current work status in the following terms:[16]

> "Mr Roberts stated that he now spends around 30 hours a week working in his own start-up which services farms. He has 12 people employed in a team working remotely. He stated that his 30 hours a week likely translate to around 20 hours a week normally; he thought he was working at least 25% less efficiently as usual for him, because of his psychiatric symptoms."

27. Dr Takyar diagnosed a major depressive disorder with anxiety. He opined that the applicant has "true psychiatric capacity: of around 15-20 hours per week for employment for which he has the skill, training and experience". That ability was limited to working in self-employment as opposed to on the open labour market because the applicant was "too unwell to efficiently work".

28. Dr Takyar did not accept that the applicant was fit to work on a part-time basis as a project manager, operations manager or general manager outside of self-employment. The doctor opined that "for the foreseeable future" the applicant had capacity for employment around 15-20 hours per week "in a sheltered manner in his self-employment".[17]

Andrew Hook

29. Andrew Hook, Rehabilitation Counsellor, provided a report dated 22 October 2020.[18]

30. Mr Hook agreed with the opinion expressed by Dr Takyar that the applicant was able to work in his current employment with Pasture.io for between 15-20 hours per week but would struggle to work as an employee elsewhere.

Dr Anil Reddy

31. Dr Anil Reddy, treating psychiatrist, provided a short report dated 15 September 2020. Dr Reddy diagnosed major depression and chronic fatigue and prescribed medication to assist the applicant's mood.[19]

Other reports

32. A functional capacity report prepared by Mr Cheng, occupational therapist dated 11 February 2020 noted that the applicant reported working approximately 24 hours per week completing administrative duties and attending internal and external meetings over the phone.[20]

[14] Applicant's late Application.
[15] Application, p 14.
[16] Application, p 17.
[17] Application, p 21.
[18] Application, p 22.
[19] Application, p 50.
[20] Reply, p 116.

33. A vocational assessment report prepared by Ms Dungarwalla, provisional psychologist, in mid-2018 noted that the applicant had various educational qualifications including a Master of Business Administration and a Bachelor of Agriculture. The applicant was reported as displaying above average communication skills in keeping with his educational qualifications.[21]

34. The report noted that the applicant was the owner/operator of "Pasture.io" and "Milkflow.io" described as "self-employment". The author identified vocational options of project manager, operations manager or general manager for the applicant and that the applicant was motivated and eager to return to employment.

Pasture.io

35. The document from Pasture.io describes the roles and qualifications of a number of employees including the applicant within the organisation. It otherwise provides details of the various ways the organisation assists farmers in respect of climatic conditions and farming practices.

LEGISLATION

36. Section 38 of the 1987 Act provides:

> "(1) A worker's entitlement to compensation in the form of weekly payments under this Part ceases on the expiry of the second entitlement period unless the worker is entitled to compensation after the second entitlement period under this section.
>
> (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."

JURISDICTION IN THE SECTION 38 PERIOD

Submissions

37. The respondent submitted that the Commission had no jurisdiction to determine entitlements within the s 38 period. It referred to the decision of *Lee v Bunnings Group Ltd*[22] (*Lee*) where Keating P stated:[23]

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[21] Reply, p 65.
[22] [2013] NSWWCCPD 54.
[23] *Lee* at [57].

> "It is clear from the unambiguous terms of s 38 that an entitlement to compensation under that section must be assessed by the insurer, not by the Commission."

38. The respondent submitted that s 38 was a unique provision requiring assessment by an insurer when contrasted with other sections such as ss 36, 37 and 60.

39. It was submitted that s 105 did not provide "unlimited jurisdiction" but that "section 38 operated to provide an exclusion to the jurisdiction conferred by section 105".[24] The respondent thereby submitted that the Commission cannot make any orders as any assessment "would not be assessment by the insurer and could not satisfy the terms of section 38".[25]

40. It was further submitted that the Commission does not have power to make declaratory relief: *Widdup v Hamilton*[26] and it does not possess an inherent jurisdiction and possesses only "such powers which are incidental and necessary to the exercise of its statutory jurisdiction", citing *Raniere Nominees Pty Ltd v Daley* (*Raniere*).[27] Thus, the Commission can only make an order applying the terms of the statute which require an assessment by an insurer. If the Commission made an assessment, then it could not satisfy the terms of s 38.

41. It was submitted that the Commission can only act in accordance with the insurer's assessment. As the insurer had made an assessment that the applicant has current work capacity and is not indefinitely unable to undertake further work to increase his current earnings, there is no entitlement after the second entitlement period.

42. The applicant referred to the Direction issued by the Commission with respect to *Sabanayagam*. He also referred to the removal of the former s 43A of the 1987 Act and submitted that it appeared that Parliament "intended for all exercises of an insurer's decision-making power under section 43 to be subject to scrutiny" by the Commission.[28]

43. The applicant submitted that the decision made by letters dated 22 July 2020 and 7 October 2020 were "work capacity decisions" and the Commission had "jurisdictional power to determine those decisions".[29]

44. In reply the respondent submitted that it was immaterial whether the insurer's decisions were categorised as work capacity decisions. The Commission's jurisdiction about a work capacity decision only extended to other sections of the 1987 Act and did not extend to s 38 which is worded differently.

45. The applicant did not respond to the submissions about the interpretation of s 38 and the effect of the decision in *Lee*.

Reasons

46. The question of the Commission's jurisdiction to order weekly compensation under s 38 of the 1987 Act was first raised in the respondent's written submissions. As the matter is of general importance and the parties were provided some initial observations to accord procedural fairness, leave is granted to raise that issue. However, I am not bound by a construction of legislation that has been argued by the parties: *Coleman v Power*.[30]

47. The respondent's submissions on this issue are inconsistent with the decision of the Court of Appeal in *Sabanayagam*.

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[24] Respondent's submissions, [16].
[25] Respondent's submissions, [18].
[26] [2006] NSWCA 258.
[27] [2006] NSWCA 235 at [66].
[28] Applicant's submissions, [17].
[29] Applicant's submissions, [18].
[30] [2004] HCA 39 (*Coleman*) at [243] per Kirby J.

48. In *Sabanayagam* the worker had been paid weekly compensation for more than 130 weeks and was seeking an order for the payment of weekly benefits pursuant to s 38 of the 1987 Act.[31]

49. The Arbitrator and the Deputy President, held, for different reasons that the insurer had made a work capacity decision. At that time there was a prohibitive clause which prevented the Commission from exercising jurisdiction about "a work capacity decision".[32]

50. The Court of Appeal held that the insurer had not made a work capacity decision and remitted the matter back to the Commission for determination of the claim for weekly compensation. In essence, the matter was returned to the Commission for the determination of any entitlement to weekly compensation pursuant to s 38 of the 1987 Act.

51. During the course of his Reasons, Sackville AJA (with whom Beazley P agreed[33]) held:

    (a) Pursuant to s 105 the Commission has jurisdiction over matters that must arise under either the 1987 Act or the 1998 Act. A matter arises under a law of the Parliament "if the right or duty in question owes its existence to the law or depends on the law for its enforcement".[34]

    (b) The worker was entitled to weekly compensation after the second entitlement period "if she satisfied the requirements of s 38(2) or s 38(3)" of the 1987 Act.[35]

    (c) Putting to one side the prohibition then provided by s 43(1) and s 43(3), the Commission had "jurisdiction to settle the controversy".

52. The decision of the Court of Appeal is contrary to the observations of Keating P in *Lee*. I reject the respondent's submissions that *Lee* "remains good law" and I am otherwise bound by it.

53. Apart from the binding Court of Appeal decision, and if this matter proceeds on appeal, I express further reasons why I reject the respondent's submission that the Commission has no jurisdiction or power to award weekly compensation during the s 38 period.

54. The principles of statutory construction are well settled. As the plurality stated in *Military Rehabilitation Commission v May*[36], the "question of construction is determined by reference to the text, context and purpose of the Act", citing *Project Blue Sky Inc v Australian roadcasting Authority*[37] and *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*[38].

55. Amendments to the 1987 Act and 1998 Act by *Workers Compensation Legislation Amendment Act 2018* enacted the following changes which only widened the jurisdiction of the Commission. These amendments included:

    (a) Repealing the prohibition clauses in s 43(1) and (3) of the 1987 Act;

    (b) Repealing the note in s 105 of the 1998 Act concerning the restriction of the Commission's jurisdiction to determine any dispute about a work capacity decision;

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[31] *Sabanayagam* at [29].
[32] Sub-sections 43(1) and (3) of the 1987 Act.
[33] *Sabanayagam* at [1].
[34] *Sabanayagam* at [125].
[35] *Sabanayagam* at [127].
[36] [2016] HCA 19 at [10].
[37] [1998] HCA 28 at [69]-[71].
[38] [2009] HCA 41 (*Alcan*).

(c) Repealing various sections which enabled a different body to review a decision about a work capacity decision (see the former ss 44BA-44BF of the 1987 Act), and

(d) Inserting s 289B in the 1998 Act which enacted a stay of a work capacity decision where "a dispute for determination" was referred to the Commission.

56. Contextually, the amendments enacted in 2018 only reinforced the broad jurisdiction of the Commission. The respondent's submission that its construction of s 38 is confirmed by other provisions was made in the absence of any reference to the 2018 amendments. These amendments were enacted after *Lee* was determined. The observations in that case were made in the context that work capacity decisions were reviewed by a different body.

57. The applicant referred to the notices issued by the insurer, which were "work capacity decisions" within the meaning of s 43 of the 1987 Act. The first notice dated 22 July 2020 was a decision about the worker's capacity within the meaning of s 43(1)(a) and (c) of the 1987 Act.

58. Section 289B provides that the referral of a dispute to the Commission of a work capacity decision that discontinues or reduces the amount of weekly compensation is "stayed". The section clearly contemplates that the Commission will "determine" a dispute about a work capacity decision. It would be nonsensical that the Commission has jurisdiction within the first and second entitlement period where a work capacity decision had been made but had no such power after the second entitlement period.

59. The respondent in its reply accepted that the Commission had jurisdiction to review a work capacity decision in the ss 36 and s 37 period but not thereafter.

60. Whilst the wording of s 38 refers to an insurer deciding the matter, the issue is whether a worker can contest the insurer's decision before the Commission. Despite the reference to the matters in s 38 being decided by an insurer, in my view, the broad jurisdiction of the Commission under s 105 of the 1998 Act to "hear and determine all matters arising under" the 1987 Act and the 1998 Act encompass jurisdiction and power within the Commission to hear disputes regarding a worker's entitlement under s 38.

61. In *Uelese v Minister for Immigration and Border Protection*[39] the plurality of the High Court cited *Legal Services Board v Gillespie-Jones*[40] and stated that "a construction that 'appears irrational and unjust' is to be avoided where the statutory text does not require that construction". These observations are equally apposite to the construction proposed by the applicant in this case.

62. It would be an absurd construction that, following the 2018 amendments, a worker has no right to contest an insurer's decision concerning the entitlement to weekly compensation pursuant to s 38 of the 1987 Act.

63. Recent Court of Appeal decisions have otherwise confirmed the jurisdiction of the Commission to award weekly compensation after the third entitlement period: *Hochbaum v RSM Building Services Pty Ltd*[41] (*Hochbaum*).

64. The order of the Court in *Hochbaum* confirmed the power of the Commission to make an order for weekly compensation after the 260-week period.[42] This is grossly inconsistent with

[39] [2015] HCA 15 at [45] per French CJ, Kiefel, Bell and Keane JJ.
[40] [2013] HCA 35 at [48].
[41] [2020] NSWCA 113.
[42] *Hochbaum* at [13] and [73].

the respondent's submission that the Commission had jurisdiction pursuant to s 39 of the 1987 Act to order weekly compensation after the expiry of five years but lacked jurisdiction to order weekly payments of compensation during the s 38 period.

65. Finally, whilst the respondent's submission is probably correct that the Commission cannot make declarations in the absence of making orders, that does not mean that the Commission cannot make findings incidental to its power of making orders in accordance with relief sought under the 1987 Act. That observation is consistent with the discussion in *Raniere* where Santow JA stated that the Commission had "only such powers which are incidental and necessary to the exercise of its statutory jurisdiction".[43]

66. Consistent with these powers is the ability to make findings incidental to an order that a worker has satisfied the statutory preconditions in s 38(3). The Commission can make a preliminary finding that it is satisfied that a worker falls within either s 38(2) (has no current work capacity) or s 38(3) (has current work capacity), and if the latter, satisfies the conditions set out in s 38(3)(a), (b) and (c). Whilst the section refers to the insurer deciding the issue, when that becomes a dispute between the parties, it is then within the jurisdiction of the Commission to determine whether the worker has satisfied the various statutory preconditions in s 38(3) of the 1987 Act.

67. For these Reasons, the respondent's submission that the Commission lacks jurisdiction to order weekly compensation pursuant to s 38 of the 1987 Act after the second entitlement period is inconsistent with binding Court of Appeal authority and is rejected.

APPLICATION OF SECTION 38(3)(b)

68. The respondent submitted that the applicant had not satisfied s 38(3)(b) of the 1987 Act, that is, he is working at least 15 hours per week and earning at least $200.[44]

69. The applicant submitted that the assertion that the worker had not satisfied the precondition in s 38(3)(b) had not been raised in any notice nor in the issues articulated at the telephone conference.

70. The respondent never sought leave in its submission to raise an issue under s 38(3)(b).

71. There was no suggestion at the telephone conference that s 38(3)(b) was an issue raised by the respondent. The initial Directions set out at [5] herein, record the issues in dispute and make no reference to s 38(3)(b).

72. I otherwise agree with the applicant's submission that no issue was articulated in any notice that liability to pay weekly compensation was denied due to non-compliance by the applicant with the preconditions required in s 38(3)(b). The brief mention in the notice that the applicant is "currently working less than 15 hours per week"[45] was made in the context that the insurer was not satisfied with s 38(3)(c) of the 1987 Act. Consistent with authorities such as *Department of Corrective Services v Bowditch*[46] and *Mateus v Zodune Pty Ltd*[47], the articulation of any issues must be clear.

73. It was not clear in the notice and was not suggested to be an issue at the telephone conference that s 38(3)(b) was in dispute. No leave was sought by the respondent to raise the issue. In these circumstances that issue is not before the Commission: *Whaley v Upper Hunter Shire Council*.[48]

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[43] At [66], Spigelman CJ agreeing.
[44] Respondent's submissions, [25]-[31].
[45] Reply, p 20.
[46] [2007] NSWWCCPD 244 at [33].
[47] [2007] NSWWCCPD 227.
[48] [2016] NSWWCCPD 32 at [50]-[52].

74. I observe that the respondent's submissions referred to the material from the website of Pasture.io in the context of its submissions[49] and asserted that there were extensive financial records in existence and that in the absence of these records:[50]

> "[T]he applicant's incomplete and unverified evidence should not be accepted as establishing that the applicant is in fact earning the $200 per week necessary to satisfy the provisions of section 38(3)(b) and be entitled to any ongoing weekly compensation."

75. The material cannot be simply brushed aside, as the applicant purported to submit, on the basis that it was "felicitous information designed to market the company and cast it in the best light possible".[51] If the material on Pasture.io is properly described in terms of what the applicant submitted then the evidence should be before the Commission rather than made by way of submission without an evidentiary basis. Whilst I do not accept that there is an issue based on s 38(3)(b), I return to this material later in the Reasons on the issue of capacity.

APPLICATION OF SECTION 38(3)(c)

Submissions

76. The respondent submitted that s 38(3)(c) required "a conclusion that the applicant is incapable of undertaking further additional employment or work that would increase his current weekly earnings".[52]

77. The respondent referred to the evidence of the general practitioner where it was stated that the applicant was able to work three full days per week in July 2019, between 20 and 30 hours per week as at 12 October 2020 and in a recent certificate, 30 hours per week as part of a graduated return to work.

78. It was noted that the certification of the treating doctor is that the applicant is capable of working 30 hours per week and that there has been an improvement in his condition as his capacity for work has increased from 24 hours to 30 hours per week. It was suggested that "there is no reason to conclude that any improvement is likely to be ongoing".[53]

79. It was submitted that the applicant asserted that he was only working 15-20 hours per week and that he could work an additional 10-15 hours per week which would logically "increase his earnings".[54]

80. The respondent otherwise submitted that the medical evidence does not address the critical question posed by sub-section (c), that is whether the applicant is "likely to continue indefinitely to be, incapable of undertaking further additional employment or work that would increase [his] current weekly earnings". It was submitted that "this requires a determination that the applicant's condition had stabilised and is unlikely to change in the foreseeable future."[55]

81. The respondent noted that no one had assessed permanent impairment and whether the applicant had attained maximum medical improvement. This suggested that the applicant's condition may improve over time.[56]

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[49] Respondent's submissions, [28].
[50] Respondent's submissions, [28].
[51] Applicant's submissions, [54].
[52] Respondent's submissions, [32].
[53] Respondent's submissions, [35].
[54] Respondent's submissions, [36].
[55] Respondent's submissions, [38].
[56] Respondent's submissions, [41].

82. It was submitted that Dr Takyar "does not address" the correct question when he referred to work "at the current time". The doctor's report was also written with the understanding that the applicant was working 30 hours per week. Mr Hook does not address the question as to the applicant's work capacity and simply adopted the opinion expressed by Dr Takyar.

83. The applicant submitted that s 38(3)(c) requires two elements:

    (a) That a worker is assessed as likely to continue indefinitely, and
    (b) Is incapable of undertaking further additional employment or work.

84. The applicant referred to dictionary meanings that "likely" meant "probably" and that "indefinite" meant "not definite; without fixed or specified limit". It was submitted that the latter meaning was consistent with s 38(3) of the 1987 Act which provided that an insurer may make a further decision.

85. It was submitted that the relevant time for the assessment of current capacity was at the time of the decision on 7 October 2020 and not at the time of the Commission's determination: *Clarke v Secretary, Department of Communities and Justice*[57] (*Clarke*).

86. Dr Takyar examined the applicant in September 2020 and opined that the applicant would remain incapacitated by reason of injury "for the foreseeable future". That opinion satisfied the meaning of "indefinitely" in s 38(3)(c).

87. The certificates of capacity over time show that the applicant's condition "had effectively deteriorated and ossified".[58] The general practitioner in September 2019 removed the word "exploring" from the certificate and simply noted that the applicant was fit to undertake current self-employment. This restriction remains on the certificates which reflect the fact that the applicant's condition is "unlikely to change".

88. The applicant stated that he is working in self-employment between 15 and 30 hours per week which is in line with his waxing and waning symptoms.

89. The other element of s 38(3)(c) is whether a worker is incapable of undertaking "further additional employment or work that would increase the worker's current weekly earnings". This appears to capture concepts of working extra hours in the same job or additional employment in a different job which would increase the worker's current weekly earnings.

90. The applicant submitted that he cannot work any hours outside of self-employment, and this varies on the basis of his symptomatology. Contrasted with this is the respondent's case, which is dependent upon an interpretation of the certificates of capacity which were completed by the general practitioner to estimate the applicant's best endeavours in self-employment.

91. The respondent submitted in reply that Dr Takyar's opinion was insufficient to meet the requirements of s 38. The doctor did not address the extent of the applicant's likely future capacity.

Reasons

92. I do not agree with the applicant's submission that words that have a clear meaning require the substitution of a different word to explain their meaning. There is no need to substitute "probably" for "likely" as was submitted by the applicant.

[57] [2019] NSWWCC 399 at [25].
[58] Applicant's submissions, [33].

93. I also do not agree with the applicant's submission that satisfaction of the test in s 38(3)(c) is only undertaken at the time of the notice.

94. The applicant referred to the decision of *Clarke* in support of that submission. The error with that submission is that the worker in that case was seeking an order for weekly compensation in respect of a past period, some 12 months prior to the order of the Commission. Accordingly, the operation of the s 38 entitlement was then discussed in the context of a period prior to the date of the order.

95. The applicant is seeking an order of weekly compensation over a period on an ongoing basis. In those circumstances a worker is required to satisfy the test over the entire period and not only when the notice was given. Accordingly, if a worker cannot satisfy the test for part of the period, then that portion of the claim would fail because a necessary precondition is not satisfied.

96. That interpretation is also consistent with the ongoing nature of the requirement provided by s 38(3)(b), subject to the operation of s 40, that a worker must be in employment for at least 15 hours per week and at least the minimum value as prescribed by the regulations.

97. This interpretation is also consistent with s 38(8) of the 1987 Act which provides that the assessment under s 38 "may be reassessed at any time". That sub-section indicates that satisfaction of the pre-conditions in s 38(3) may fluctuate over time.

98. There were submissions on the meaning of "indefinitely" in the context of "likely to continue indefinitely".

99. I agree with the applicant's submission that the meaning of "indefinitely" is akin to an unknown or non-specific period.

100. I also agree with part of the respondent's submission that the meaning relates to the "foreseeable future", although the meaning is probably more restrictive than that because the satisfaction of the concept requires incapacity of an indefinite nature rather than just in the foreseeable period.

101. There were suggestions in the respondent's submissions that the meaning of "indefinitely" was not satisfied because no doctor had assessed the applicant as having attained "maximum medical improvement". That concept is defined in clause 1.15 of the fourth edition of the *NSW workers compensation guidelines for the evaluation of permanent impairment,* that is that the condition is "well stabilised and is unlikely to change substantially in the next year".

102. Maximum medical improvement applies to the assessment of permanent impairment. The concept of "indefinitely" in s 38 relates to loss of capacity and the entitlement to weekly compensation. That meaning of "indefinitely" is not the same as "maximum medical improvement" and I reject the submission that the statutory meaning of the latter is relevant.

103. The meaning of "indefinitely" is not the same as "definitely". "Indefinitely" does not mean "permanent", although this was only indirectly suggested by the respondent when it submitted that it meant the same as "maximum medical improvement".

104. As the applicant submitted, the respondent incorrectly quoted the test in s 38(3)(c) in the October 2020 notice. In these circumstances I turn to whether the applicant has satisfied the test provided by s 38(3)(c).

105. It appears common ground and I accept the applicant's evidence that he is working approximately 15-20 hours per week in his described self-employment with Pasture.io. The preponderance of the current medical evidence is that the applicant is only fit to work between 15 and 20 hours per week in this work. That conclusion accords with the recent opinions expressed by Dr Takyar, psychiatrist and confirmed by Mr Hook. It is otherwise consistent with the recent opinion expressed by the general practitioner, Dr Ratnagobal.

106. The conclusion expressed by Dr Takyar is consistent with the diagnosis of major depression expressed by the treating psychiatrist, Dr Reddy. Both doctors refer to various reported symptoms consistent with the applicant's evidence of a serious psychological illness.

107. I note that Dr Ratnagobal expressed an opinion in a variety of certificates that the applicant had a capacity to work between 20 and 30 hours per week and at times, 30 hours per week. The respondent relied upon the opinions expressed by the general practitioner in support of its submission that the applicant had a greater capacity for work than what he is presently doing. Whilst I agree that the general practitioner expressed a wider view in earlier certificates, her updated opinion is inconsistent with that and in accordance with the opinion expressed by Dr Takyar.

108. Based on this evidence I am satisfied that at all relevant times since October 2020 to date the applicant is likely to continue indefinitely to be incapable of undertaking further additional employment or work that would increase his earnings. My reasons for this conclusion are based on the longevity of the psychological symptoms since injury, the recent diagnosis by the treating psychiatrist, the current certification by the general practitioner and the opinion by Dr Takyar that the incapacity will continue for the foreseeable future.

109. For these reasons, the applicant has satisfied the preconditions provided by s 38(3)(c) of the 1987 Act.

CAPACITY

Submissions

110. The respondent submitted that the pre-injury average weekly earnings (PIAWE) was $2,170 and that the applicant was fit for the position of general manager for 30 hours per week based on the opinions expressed by Dr Ratnagobal, Dr Takyar and Mr Hook.

111. The respondent submitted that Dr Takyar states that the applicant would struggle in the identified roles of project manager, operations manager or general manager "but does not dispute that they would constitute suitable employment"[59] as defined in the 1987 Act.

112. The applicant is essentially undertaking the role of general manager and would have been capable of earning $947.36 for 16 hours per week. The current certification of 30 hours per week means that the applicant can earn $1,776.32, which is greater than 80% of the PIAWE.

113. The applicant referred to his statement evidence concerning his earnings and symptoms. Reference was also made to the opinion expressed by Dr Takyar.

114. It was submitted that the respondent's characterisation of Dr Takyar's opinion was incorrect because it did not go to the issue of s 38(3)(c).[60]

115. The applicant submitted that Dr Takyar opined that the applicant was fully working and that his capacity will not change for the foreseeable future. This is contrasted with the contrary evidence relied upon by the respondent which was based on a "superficial reading" of a certificate of capacity.

[59] Respondent's submissions, [42].
[60] Applicant's submissions, [69].

116. It was submitted that the applicant's earnings in self-employment were limited to his earnings of $300 and the applicant was otherwise entitled to ongoing weekly benefits at $1,715.13 gross per week.

117. In its reply submissions, the respondent noted that the applicant bears the onus of proof in proving the elements of an entitlement to compensation. The only evidence before the Commission is bare assertion about what is being earnt in the absence of other records. It is immaterial on what evidence the insurer decided the matter. The applicant's entitlement must be determined based on the material before the Commission.

Reasons

118. The applicant bears the onus of proof on the balance of probabilities.[61]

119. "Current work capacity" is defined in s 32A of the 1987 Act as "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".

120. "Suitable employment" is defined in s 32A of the 1987 Act as "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."

121. I repeat my findings that the applicant has capacity to work in suitable employment in his role as Chief Executive Officer with Pasture.io working on a part-time basis of between 15 and 20 hours per week.

122. The applicant's submissions at times confused[62] the satisfaction of the test in s 38(3)(c) with an assessment of the extent of the applicant's incapacity. Accepting the applicant's submissions that he has the capacity to work between 15 and 20 hours per week in his role as Founder and Chief Executive Officer of Pasture.io, it is in my view a gross undervaluation that these services were assessed in the order of $200-$300 per week.

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[61] *Nguyen v Cosmopolitan Homes (NSW) Pty Ltd* [2008] NSWCA 246 per McDougall J at [44]- [55], McColl and Bell JJA (as their Honours then were) agreeing; *Chen v State of New South Wales (No 2)* [2016] NSWCA 292 per Leeming JA at [33]-[34]; McColl JA agreeing at [1].
[62] See for example Applicant's submissions, [69].

123. The respondent has disputed that the services rendered by the applicant warranted such a minimum remuneration and referred to the absence of any financial material. The applicant has relied upon his sworn evidence.

124. My reasons for not accepting the applicant's sworn evidence are that I am not prepared to accept that the value of these services is of such minimal return in the order of $15 per hour. Not only is that rate less than the minimum wage, it bears no reflection of the skills the applicant brings to the organisation with his education and qualifications.

125. I also rely on the documents from Pasture.io which tend to show a professional organisation run by the applicant. I do not accept the applicant's submissions in this material in the absence of evidence that could easily have been led.

126. There is otherwise no primary financial material from the applicant showing the business accounts and/or his actual earnings. In this respect I agree with the respondent's submissions.[63]

127. The applicant's submissions on the PIAWE suggested to the rate of $1,715.13 per week as this is the rate he was being paid in the insurer's list of payments.

128. Counsel's submissions appear to have widened the issues that were agreed to be in dispute and articulated at the telephone conference.

129. The amount pleaded in the Application is based on a PIAWE of $2,170. That is the same figure used in the s 78 notice dated 22 July 2020.

130. I do not know if the rate referred to by the applicant in his submissions was before or after any figure, that is, whether $300 or any other amount, was deducted to arrive at the rate of $1,715.13 per week. The basis of the submission was said to be the rate the applicant was then paid in accordance with the insurer's list of payments.

131. In these circumstances, I apply the PIAWE of $2,170 as specified in the July 2020 notice and the Application.

132. The respondent's s 78 notice dated 22 July 2020, repeated in its written submissions, assessed a value of the applicant's labour in the order of $947.36 for a 16-hour week.

133. The respondent in its submissions argued that the applicant's capacity was in the order of $1,776 per week based on a 30-hour week.

134. I am satisfied that this is an appropriate hourly rate noting the Commission has judicial knowledge of wage rates: *Marcus v Ready Workforce Pty Ltd*.[64] As the applicant is probably working more than 16 hours per week, I am satisfied that the applicant[65] has a current work capacity to earn in suitable employment the amount of $1,000 per week in his current role with Pasture.io noting his present restrictions.

135. In these circumstances the applicant is entitled to weekly compensation based on 80% of $2,170 which equates to $1,736 less $1,000 reflecting the calculation of the applicant's current work capacity.

136. The findings and orders are set out in the Certificate of Determination.

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[63] See [113] herein.
[64] [2007] NSWWCCPD 199 at [33].
[65] The applicant bearing the onus of proof.