

ONGOING PARTIAL INCAPACITY BENEFITS

This operational instruction summarises the requirements for scheme agents regarding the Claims continuum and the application of section 38, section 40A and section 52A of the *Workers Compensation Act 1987*.

GENERAL PRINCIPLE

The proper determination of the weekly compensation Benefit depends upon the individual circumstances of a Worker and their compensable Injury. The Scheme Agent must have appropriate procedures in place to ensure that legislative requirements are met and due process is followed.

The case law regarding the determination of a Worker's right to receive weekly compensation Benefits establishes that procedures must be valid and fair, and the Scheme Agent's approach to managing the Claim and communicating to the Worker must demonstrate an understanding of, and a tailored approach to, the Worker's circumstances.

PRINCIPLES TO BE APPLIED TO CLAIMS MANAGEMENT

The Scheme Agent's customer service and communication framework guides the Scheme Agent's approach to communication with the Worker. Throughout the life of the Claim the Scheme Agent must:

- take a holistic approach to developing, implementing and reviewing the Claims strategy
- consider the health, social and financial implications for the Worker
- work collaboratively with the Worker, Employer, Nominated Treating Doctor and other relevant parties towards a planned outcome
- ensure the Worker's expectations are aligned with the overall Claims strategy that is implemented in the management of the Claim
- ensure the implementation of the Claim strategy includes plain language communication and education with the Worker and other relevant parties throughout the life of the Claim on changes to weekly compensation Benefits (in advance and at the time of change). **Note:** The Scheme Agent should engage the Nominated Treating Doctor early in the Claim and help the Nominated Treating Doctor understand the weekly compensation Benefit structure in order to enable the Nominated Treating Doctor to participate in the Claims strategy in an informed way.
- ensure all reasonable Return To Work opportunities are promoted and provided to the Worker – including working with Employers to identify Suitable Duties during total and partial incapacity
- conduct regular Claim strategy reviews that are time and event driven
- maintain regular contact with the Worker, Nominated Treating Doctor, Employer and other relevant parties

When a Worker first becomes certified as partially incapacitated for work or when there is a change to the weekly compensation Benefit the Worker is being paid – such as from section 36 or 37 to section 38 or 40, or between sections 38 and 40 – a scheme agent must:

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- advise the Worker, both verbally and in writing, the section under which the weekly compensation Benefits are now being paid, the period of time the weekly compensation Benefit may be paid and the specific requirements, expectations and implications of the weekly compensation Benefit
- establish and review an Injury Management Plan for the Worker, within the meaning of sections 42, 45, 46 and 47 of the *Workplace Injury Management and Workers Compensation Act 1998*, which aligns to the Claim strategy

If a Worker’s capacity fluctuates and as a result there are regular changes in weekly compensation Benefit between sections 36, 37, 38 and 40, the Scheme Agent must be satisfied the weekly compensation Benefit change has been effectively communicated and the Worker understands the change and implications of the section being paid.

DECISION MAKING

When making decisions regarding the Claim, the Scheme Agent must adhere to their sound decision making model and give consideration to all available information, in a manner free of preference or prejudice and with regard to the Return To Work, health, social and financial outcomes for the Worker.

The Scheme Agent must:

- identify the need for a decision
- ensure the statutory change or a decision to reduce weekly compensation Benefits is evidence based
- ensure decisions that adversely affect the Worker are escalated for review prior to the decision being communicated to the Worker
- when considering any reduction or cessation of weekly compensation Benefits pursuant to section 38A(5), section 40 and/or section 52A, be satisfied that a comprehensive Claims strategy has been implemented where all reasonable Return To Work opportunities have been promoted and provided to the Worker
- ensure the Worker is partially incapacitated, both medically and according to Law, when considering any reduction or cessation of weekly compensation Benefits pursuant to section 38A, section 40 and section 52A.
- ensure decisions are made and effectively communicated within defined time frames
- consider all the implications of the decision on the Employer, Worker and other relevant parties
- consider any other relevant circumstances.

SECTION 38 BENEFITS

The Scheme Agent has the responsibility to ensure all reasonable efforts have been undertaken to identify Suitable Duties with the pre-Injury Employer, prior to the commencement of section 38 weekly compensation Benefits.

Section 38 Benefits are a **special payment** for partially incapacitated Workers not suitably employed while seeking employment or undertaking rehabilitation assistance, for a period of 52 weeks. It is important for scheme agents to communicate this to the Worker.

If there are no Suitable Duties and the Worker is involved in rehabilitation, retraining or seeking suitable employment, they may receive a weekly compensation Benefit under section 38 of the 1987 Act.

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The maximum period for which the Worker is entitled to section 38 payments is 52 weeks.

The following is a summary of the general requirements under section 38A on what constitutes 'seeking suitable employment':

- the Worker is ready, willing and able to accept an offer of suitable employment from the Employer, and
- the Worker supplies WorkCover Medical Certificates to the Employer and/or insurer to assist in the determination of suitable employment, and
- the Worker has requested the Employer and / or insurer to provide suitable employment or it is apparent from the circumstances the Worker is ready, willing and able to accept an offer of suitable employment from the Employer, and
- the Worker is taking reasonable steps to obtain suitable employment

The Scheme Agent needs to ensure the requirements of section 38A(3) are fulfilled.

The Scheme Agent must ensure:

- clear communication to the Worker on the intent of section 38. Section 38 is a time limited weekly compensation Benefit to provide the Worker with assistance and access to rehabilitation and/or vocational programs to improve capacity to seek and obtain suitable employment
- clear communication to the Worker on the relationship between section 38 and section 40
- support for the Worker to obtain employment, whether independently job-seeking or with rehabilitation assistance, from at least the commencement of section 38 weekly compensation Benefits, to facilitate all reasonable Return To Work opportunities
- the job seeking requirements are assessed on a case by case basis and consider both the employability of the Worker and the labour market conditions
- Return To Work assistance is provided as soon as it is apparent that the Employer is unable to provide suitable employment or the Worker's employment has been or is to be terminated

If not undertaking retraining or other occupational rehabilitation, evidence of job seeking by the Worker must be reasonable and may include:

- receiving job seeking assistance with an accredited rehabilitation provider
- submission of job seeking diaries
- attendance at job interviews
- registration with Centrelink and use of the facilities available in Centrelink Customer Service Centres
- active review of the employment sections of local and national newspapers
- search of employment sites on the internet such as the Australian Job Search internet site (www.jobsearch.gov.au)

If there is evidence the Worker has unreasonably failed to meet the requirements of section 38 the Scheme Agent must effectively communicate the requirements and ramifications to the Worker. The evidence may include the Worker not taking reasonable steps to obtain suitable employment, such as in circumstances where the Worker had unreasonably refused to participate in retraining or to undertake work in a position, which is consistent with their capacity and skills.

Significant efforts with Return To Work should be undertaken during the payment period of section 38 Benefits, to minimise the need for an assessment under section 40A of the 1987 Act.

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SECTION 40A ASSESSMENT

Section 40A involves an assessment of a partially incapacitated Worker's ability to earn in some suitable employment.

Section 40A assessments to determine a Worker's entitlement to weekly compensation Benefits should only be considered when:

- all components of section 38 Benefits have been exhausted including weekly compensation Benefits and rehabilitation/job-seeking opportunities or
- the Worker unreasonably rejects suitable employment within the meaning of section 43A and section 40(2B) or
- there is evidence the Worker is not maximising ability to earn within the meaning of section 40(3)

The Scheme Agent needs to fulfil the requirements of section 40A(2), which are:

“An injured worker is not required to undergo such an assessment unless the worker has been informed about the possible entitlements of the worker under section 38 and the requirements for the worker to obtain those entitlements, and about the possible effects of section 52A on the worker. The giving of that information does not constitute an admission of liability by an employer or insurer under this Act or independently of this Act.”

Determining the appropriateness of referral for section 40A assessment

The Scheme Agent is responsible for:

- ensuring all reasonable Return To Work opportunities have been promoted and provided to the Worker – consistent with the capacity to work
- identifying any relevant circumstances which affect future employment prospects – such as literacy level, non-English speaking background, fluctuations in fitness for work capacity ie capacity downgrades and upgrades from total to partial incapacity and vice versa, and any other special needs of the Worker
- assessing all the evidence of the Worker's current physical and vocational capacity to determine suitable occupations and employment prospects
- determining what components of the section 40A assessment are required based on the evidence on file eg, determining whether the assessment necessitates functional capacity information, vocational capacity information and/or labour market analysis

Referrals to Third Party Service Providers should only be considered when the relevant evidence on the Claim file is incomplete and it is necessary to undertake an objective assessment of the Worker's capacity to earn.

When making a referral the Scheme Agent must:

- ensure the Third Party Service Provider has demonstrated expertise conducting section 40A assessments and delivering quality, considered and objective reports, and
- provide relevant Claim information to the Third Party Service Provider such as Wage details, medical and rehabilitation information, and
- outline the specific information required from the Third Party Service Provider

Content of section 40A assessment report

The Scheme Agent must ensure the report:

- addresses the requirements of section 43A(1) of the 1987 Act

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- contains evidence of any future employment prospects, which were likely for the Worker, but for the Injury. This is relevant when determining what the Worker would probably have been earning if not for the Injury pursuant to section 40(2)(a). For example, a Worker at the time of Injury was completing an apprenticeship and would have expected to become a tradesperson on completion but had to cease due to the Injury or the Worker had a succession plan with the pre-Injury Employer and was progressing to higher paying positions. The Scheme Agent must ensure the intention was likely to result in probable achievement
- contains evidence of any jobs the Worker can undertake at the time of the assessment. The list of job options that have been identified should:
 - be consistent with the Worker’s functional and vocational capacity,
 - include Wage or salary details,
 - be available in the Worker’s reasonably accessible labour market. A reasonable accessible labour market is to include consideration of:
 - § geographical location - is the Worker able to travel to the place of employment considering public and private transport availability, and
 - § the general availability of the number of jobs of the type identified for the Worker in the Worker’s geographical location, and
 - § any relevant circumstances which affect future employment prospects
- includes the methodology used to establish the labour market conditions for the job options identified

Application of section 40A assessment

Prior to applying the section 40A assessment findings, the Scheme Agent must ensure that:

- assessment findings are reviewed against the Scheme Agent’s decision making model, and
- discussion is undertaken with relevant parties, such as the Worker and Nominated Treating Doctor and other relevant parties, on the assessment findings relevant to the job options identified and the Worker’s capacity to perform the jobs. The Scheme Agent must be satisfied the opinion of the Nominated Treating Doctor has been considered in the decision to apply the outcome of the section 40A assessment, and
- calculation of the Worker’s earning capacity is accurate. The Scheme Agent has the responsibility to ensure accurate information is provided on the jobs identified, for example Wage information. When determining a Worker’s ability to earn in some suitable employment, pursuant to section 40(2)(b), it must be a weighted average of the ability to earn in suitable employment in the reasonably accessible labour market. The Scheme Agent needs to be satisfied that the assessment identifies the opportunities in the labour market open to the Worker and the earnings those types of jobs will produce. The jobs that are more readily available weigh high and those that are rarely available weigh low. The accessible labour market determination is to be made with reference to the place where the Worker is living at the time of the section 40A assessment, not where the Worker was living or working at the time of Injury, and
- discretion is exercised based on the Worker’s circumstances when calculating the section 40 weekly compensation Benefit. In accordance with section 40(1), decide if the proposed reduction bears *“such relation to the amount of that reduction as may appear proper in the circumstances of the case”* and exercise discretion accordingly. The nature of the discretion

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requires an examination of the circumstances of the case, in order for the decision making to determine whether the reduction is proper. Examples of relevant circumstances include, but are not limited to: carer's responsibilities where a Worker decides to care for a child rather than offer themselves on the labour market, or evidence of other supervening illnesses or injuries which are non-work related, and

- comprehensive Claims strategy has been implemented throughout the life of the Claim with clear evidence available that the Scheme Agent has:
 - effectively communicated weekly compensation Benefit entitlements to the worker, including advice on legislative step-downs, and
 - supported the Worker to obtain employment either independently job-seeking or with rehabilitation assistance to facilitate all reasonable Return To Work opportunities.

The Scheme Agent needs to ensure information, relevant to the Worker's needs and in accordance with the law, has been effectively communicated, and

- the Worker is partially incapacitated both medically and according to law, **Note:** if there is no suitable employment that the Worker can do in the reasonably accessible labour market, taking into account the Worker's restrictions, then at Law, the Worker is totally incapacitated, and
- employment options identified in the section 40A assessment are assessed against the definition of "suitable employment" under section 43A of the 1987 Act, and
- communication to the Worker of the section 40A outcome, both verbally and in writing. In addition to providing advice to the Worker on the outcome of section 40A, the Scheme Agent must advise the Worker of necessary action post section 40A application including rights and responsibilities, obligations, expectations aligned to Claim strategy and potential weekly compensation Benefit changes, and
- the notice to terminate or reduce weekly compensation Benefits is consistent with the requirements under Part 4 of the *WorkCover Guidelines for Claiming Compensation Benefits*.

SECTION 52A DISCONTINUATION OF PARTIAL INCAPACITY WEEKLY COMPENSATION

Section 52A of the 1987 Act provides that a Worker is not entitled to partial incapacity weekly compensation Benefits after the Worker has received weekly compensation payments for partial incapacity for a period of 104 weeks **providing** the ground/s for discontinuation apply to the Worker at the relevant time. This 104 week period does not have to have been continuous and the period may be an aggregation of weeks.

The application of section 52A removes a Worker's right to partial incapacity weekly compensation Benefits for that Injury. The Worker does, however, maintain their right to weekly compensation Benefits for any subsequent period of total incapacity and expenses under section 60 of the 1987 Act.

Therefore, as this is a severe penalty, section 52A should be activated through a correct and justifiable decision with the grounds for discontinuation stringently reviewed and confirmed at the relevant time and made only following the exhaustion of all appropriate Return To Work options (such as rehabilitation, retraining or job-seeking) for the Worker.

The onus of establishing the evidence that would disentitle a Worker to partial incapacity weekly compensation Benefits under section 52A rests with the Employer i.e. the Scheme Agent.

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Application of section 52A

To apply section 52A a Scheme Agent is required to:

- provide evidence in the Claim file of the Claims strategy from date of Injury (such as the Case Management Plan or the Injury Management Plan, copies of correspondence, case notes of conversations etc.) that shows:
 - the ongoing communication from the Scheme Agent with the Worker and other relevant parties of the Worker's obligations at Law and of the potential impact of not actively participating in seeking suitable employment (while the Worker was not suitably employed)
 - the rehabilitation, retraining or job-seeking assistance and support that has been provided by the Scheme Agent and Third Party Service Provider/s during the period that the Worker was not suitably employed and was in receipt of weekly compensation Benefits for partial incapacity for work (whether or not any part of that period was compensated as if the incapacity for work was total i.e. section 38)
- undertake a stringent review of the grounds for discontinuation to ensure that the ground/s have been correctly established and the notice to the Worker is correct and reflects the evidence that the Scheme Agent has taken into account.
- provide a notice to the Worker that the Scheme Agent intends to discontinue partial incapacity weekly compensation Benefits by application of section 52A. The notice is to be in the form of a section 54 notice under the 1987 Act and must comply with all of the requirements specified in Part 4 of the *Guidelines for Claiming Compensation Benefits*. This notice to discontinue under section 52A can only be given to the Worker if three requirements are satisfied:
 - evidence that the Worker has received 98 weeks or more of weekly compensation Benefits for partial incapacity (section 38 or section 40) although the payment of weekly compensation Benefits for partial incapacity cannot be ceased until the Worker has received 104 weeks of payment, and
 - evidence that the Worker is partially incapacitated for work and, at the time of giving the notice to the Worker, that the Worker was receiving weekly compensation Benefits for partial incapacity and the Worker was aware that the weekly compensation Benefits were being paid for partial incapacity, and
 - at the relevant time of issuing the notice one (or more) of the three grounds for discontinuation in section 52A(1) applied to the Worker.

Establishment of the Grounds for Discontinuation

The grounds for discontinuation are contained in section 52A(1). To establish whether the grounds for discontinuation are correct at the relevant time the Scheme Agent should ensure that **at a minimum the following** are considered in the decision making process for each of the grounds.

Section 52A(1)(a) – The Worker is not suitably employed (within the meaning of section 43A) and is not seeking suitable employment (as determined in accordance with section 38A).

- evidence that the Worker is not suitably employed and
- evidence that the Worker is not ready, willing and able to accept an offer of suitable employment from the Employer. **Note:** If a Worker has moved to another location, this in itself does not necessarily mean that they are not “ready, willing and able” to accept an offer of suitable employment from the Employer with whom they sustained the Injury, and

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- evidence that the Worker has not supplied the Employer (or the Scheme Agent who is liable to indemnify the Employer) with a Medical Certificate that contains information that is reasonably sufficient to assist in determining what is suitable employment for the Worker. **Note 1:** The Medical Certificate must provide information to assist in determining what work a Worker can perform. The certificate must specify or at least assist in determining the type of work in the doctor's opinion that the Worker can perform. **Note 2:** To ensure due process, the Scheme Agent should explore any reason/s that the Worker has not supplied a Medical Certificate or a Medical Certificate that does not contain the necessary information and assist the Worker to comply with the requirement, and
- evidence that the Worker has been advised of the requirement to request suitable employment from the Employer (or the Scheme Agent who is liable to indemnify the Employer), and
- evidence that the Worker is not taking reasonable steps to obtain suitable employment from some other person (including seeking or receiving rehabilitation training that is reasonably necessary to improve the Workers' employment prospects). **Note 1:** The Worker does not need to take reasonable steps to obtain suitable employment from some other person unless the Scheme Agent has notified the Worker of this requirement. **Note 2:** Careful consideration needs to be given by the Scheme Agent as to what are "reasonable steps" for the Worker. Reasonable has been defined as "endowed with reason" and "not excessive" (Macquarie Dictionary). Extending this further means that consideration must be given to the grounds or cause for a Workers actions. This means considering all of the circumstances surrounding the Worker i.e. an assessment of reasonableness of a Worker's decision depends upon the Worker's knowledge at the relevant time. For example, if a scheme agent imposes a requirement that a Worker is to make application for a certain number of jobs every week without fail and the Worker continuously faces rejection and possibly humiliation in undertaking these applications it may mean that this approach ceases to be "reasonable steps" for the Worker. However, an example of where the steps may not be reasonable is where a Worker visits factories requesting employment on "light duties" rather than seeking employment that is consistent with their capacity. It may also include circumstances where the Worker had indicated unwillingness to be retrained or to undertake work consistent with their capacity and skills, and
- evidence of the ongoing support to assist the Worker to return to suitable employment during and for the period that the Worker was not suitably employed and in receipt of partial incapacity weekly compensation Benefits

or

- evidence that the Worker is not suitably employed and
- evidence that the Worker has unreasonably refused an offer from any person of suitable employment or necessary rehabilitation training, unreasonably refused to have an assessment made of the Worker's employment prospects or unreasonably refused to cooperate in procedures connected with the provision or arrangements of suitable employment or rehabilitation training under the Employer's Return To Work program. **Note 1:** Careful consideration needs to be given by the Scheme Agent as to what is "unreasonable" for the Worker. Unreasonable has been defined as "not reasonable, not endowed with reason" and "not guided by reason or good sense" (Macquarie Dictionary). This means considering all of the circumstances surrounding the Worker at the relevant time. Whether a Worker has acted "unreasonably" is determined by what is known to the Worker, not what is known to anyone, or even everyone, else. An Injured Worker should not be found to have unreasonably refused suitable employment if the offer of work is accompanied by a totally unreasonable condition. For example, if suitable employment was offered only on the condition that a Worker relinquished

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their status as a permanent employee to become a casual Worker. **Note 2:** Unreasonably refusing to cooperate under the Employers Return To Work Program is limited in scope to the Employer with whom the Worker sustained their Injury, and

- evidence of the ongoing support to assist the Worker to return to suitable employment during and for the period that the Worker was not suitably employed and in receipt of partial incapacity weekly compensation Benefits.

Section 52A(1)(b) – The Worker is not suitably employed (within the meaning of section 43A) and has unreasonably rejected suitable employment (within the meaning of section 40 (2B))

- evidence that the Worker is not suitably employed
- evidence that the Worker has unreasonably rejected suitable employment. A Worker cannot unreasonably reject suitable employment if it is not suitable employment in the first place. Section 43A of the 1987 Act makes it clear that there is more to suitable employment than just what a Worker can physically do. **Note:** As noted above careful consideration needs to be given by the Scheme Agent as to what is “unreasonable” for the Worker at the relevant time. For example, acceptance by a Worker of a voluntary redundancy in circumstances in which no suitable employment, retraining or redeployment was offered cannot, without more, lead to a finding that a Worker “unreasonably rejected suitable employment”. Also, there is no unreasonable refusal of suitable employment when a Worker resigns in circumstances where no actual suitable employment is being offered to the Worker, or
- evidence that having obtained suitable employment, the Worker unreasonably gave that suitable employment away. **Note:** As noted above careful consideration needs to be given by the Scheme Agent as to what is “unreasonable” for the Worker at the relevant time. For example, if a Worker obtained suitable employment that started out with the Employer agreeing to take into account the work restrictions certified by the Worker’s Nominated Treating Doctor though in reality the Worker was asked or pressured to work in conflict with those restrictions and as a consequence resigns from that suitable employment this should not be seen as “unreasonably rejecting suitable employment”, and
- evidence of the ongoing support to assist the Worker to return to suitable employment during and for the period that the Worker was not suitably employed and in receipt of partial incapacity weekly compensation Benefits.

Section 52A(1)(c) – The Worker has sought suitable employment but has failed to obtain suitable employment primarily because of the state of the labour market (rather than because of the effects of the Worker’s Injury)

The Scheme Agent must have:

- evidence of the state of the labour market that is reasonably accessible for the Worker taking into account the Worker’s certified restrictions. **Note:** If relying on section 52A(1)(c), the Scheme Agent bears the onus of establishing the state of the labour market pertaining to the Worker, and
- evidence that the Worker’s failure to obtain suitable employment is primarily because of the state of the labour market and not because of the Worker’s Injury. **Note 1:** If there is no suitable employment that the Worker can do in the reasonably accessible labour market, taking into account the Workers restrictions, then at Law, the Worker is totally incapacitated. Therefore, section 52A cannot apply. **Note 2:** The word “primarily” in the Law suggests that the state of the labour market must be the major and single most important cause. **Note 3:** If there are jobs in the Worker’s labour market that are suitable employment but the Worker does not obtain the job because an Employer prefers an able bodied person to a Worker with restrictions

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then that would mean that the Worker did not obtain the job because of their Injury (not the labour market) and section 52A(1)(c) would not apply, and

- evidence of the ongoing support to assist the Worker to return to suitable employment during and for the period that the Worker was not suitably employed and in receipt of partial incapacity weekly compensation Benefits.

References

Deed, Schedule 1, clause, 5.3, 5.3.1, 5.4, 5.4.1, 5.5.1; Schedule 2, clause 2.2.4, 2.2.5, 2.2.10, 2.3.1, 2.4/

Workers Compensation Act 1987/

Workplace Injury Management and Workers Compensation Act 1998/

WorkCover Guidelines for Claiming Compensation Benefits Part 4/.

WCA brochure “Your Recovery and Return to Work After a Workplace Injury” – Publication Number 1415.

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