



## **COVERED CASES**

### **Case Snippet**

*GAERTNER -v- WORKCOVER  
(ALL TRANSPORT CRASH REPAIRS)*

*[2001] SAWCT 22*

*(Sections 35(2)/38)*

This case also addressed the relevant requirements for a successful Section 38 review applying Section 35(2).

The facts of this case are as follows:

The worker injured his lower back on the 28th October 1997. His claim was accepted. He had not worked more than one or two days since the date of injury. He had been certified unfit for his pre-injury employment, however it was noted that there was a non-organic contribution to his pain perception. The worker did not appear to be having active treatment.

A Section 38 review was undertaken by the Agent, reducing the worker's weekly payments on the basis that he could perform the work of a full-time process worker – light assembly. Due to the worker's pre-injury duties of employment, he was considered vocationally suited to this position. A task analysis was obtained of the physical demands of the duties involved in this position.

Mr Fry considered that the worker was medically capable of undertaking the identified position, but that non-medical factors would also come into play, such as motivation, which would in turn impact on the worker's capacity.

Both Drs Blight and Potter considered that the worker was not functionally capable of undertaking the position based on the worker's history reported to them.

Acting Deputy President Thompson noted that the worker had the capacity to run his own business and had superior mechanical skills. His condition appeared not to be improving, perhaps even deteriorating despite the worker not working for four years.

His Honour held that although the worker suffered pain, he had exaggerated his physical disability and was not as incapacitated as he alleged or as he had persuaded Drs Potter and Blight.

However, His Honour nevertheless held that the worker was unfit to work on a full-time basis as he could not confidently predict the worker's capacity in this regard without some objective functional testing (ie, work trial) in the work place to accurately determine the worker's capacity.

This case highlights the need for actual evidence of the worker's physical suitability to a particular position before a second year review will be successful.

A work trial may not be required in each case. However the longer the worker has been out of the workforce the more relevant they become.