

# WORKERS COMPENSATION COMMISSION

## INTERIM PAYMENT DIRECTION

This direction is issued pursuant to the *Workplace Injury Management and Workers Compensation Act 1998*

**Matter No:** 4051/20  
**Applicant:** Jagdeep Singh  
**Respondent:** Cleaning Edge Solutions (NSW) Pty Ltd  
**Date of direction:** 12 August 2020  
**Citation:** [2020] NSWCCR 6

### The Registrar directs:

1. That the respondent pay the applicant \$872 per week pursuant to section 38 of the *Workers Compensation Act 1987*.

### Background

2. Mr Singh's story is familiar to those with any exposure to workers compensation. He was born in a village in India in 1980 and came to Australia with his wife in 2009. He had little education in India, having completed the equivalent of year 8, and commenced working on the family farm after leaving school at the age of 15. Some of the skills he acquired whilst working for his family have been raised in the work capacity decision currently in dispute.
3. Mr Singh has very limited English and was assisted with the aid of an interpreter during the teleconference. During his work career, colleagues would assist by interpreting instructions into Punjabi so that he could understand. As he explained in his statement, he was never given any formal instruction in his job, and the concept of toolbox meetings, or general work health and safety was foreign to him before his injury.
4. Baiada Chicken Factory, where Mr Singh was working at the time of his injury (in the employ of the respondent as a cleaner), is, from what I can gather, a chicken processing plant. Cleaning Edge Solutions role appears to be as contractors to clean the factory at night.
5. On 28 October 2016, Mr Singh was working around industrial machinery known as the "MDM machine/wing cutter". His duties included cleaning out the blades of the wing cutter with a high-pressure hose. The hose was insufficient to remove all of the chicken remnants from the machine, and Mr Singh was required to remove some scraps with his left hand. Whilst undertaking this task, the machine unexpectedly turned on, causing significant injuries which continue to affect Mr Singh. His left middle finger was amputated, his thumb was partially amputated, and his other fingers and hand were severely lacerated.
6. In addition to his significant physical injuries, Mr Singh was also psychologically affected by the accident.

7. Remarkably, surgeons were able to reattach the severed finger and repair the other injuries suffered. Mr Singh was in hospital for nine days, and was off work for some three months. To his credit and that of his employer, he was able to return to suitable duties for a time cleaning with a hose. Those duties were removed and on 26 October 2017 (two days short of the anniversary of the injury) Mr Singh's employment was terminated.
8. Mr Singh has been in receipt of weekly payments since.
9. On 23 April 2020, a work capacity decision was made, reducing Mr Singh's weekly benefits from \$872 per week to \$109.72. This was based on Mr Singh's ability to work in suitable employment identified in the work capacity decision.
10. Through his legal representatives, Mr Singh brought the present proceedings to the Commission, claiming weekly benefits from 22 July 2020 (the date on which the proceedings were filed and the day before the work capacity decision was said to take effect). The decision as referred to the Commission before the expiry period of notice had expired, meaning Mr Singh was entitled to a stay by virtue of section 289B of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act).
11. This matter was referred to me, as delegate of the Registrar, for determination. As the work capacity decision was one to discontinue or reduce weekly payments, section 298 (providing a limit on the period of weeklies that the Registrar may determine) does not apply (section 297(1A) of the 1998 Act). The matter proceeded to a teleconference on 6 August 2020.
12. Despite my best endeavours, the parties were unable to come to an agreed resolution of the dispute. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied.

### **Issues in dispute**

13. The parties are agreed as to the applicant's PIAWE. The only issue to be determined in this dispute is the applicant's capacity to work in suitable employment.

### **The legislation**

14. The provisions concerning PIAWE and work capacity dispute were amended by the *Workers Compensation Legislation Amendment Act 2018*. Due to the transitional provisions, the sections applicable to Mr Singh's claim are those in force prior to those amendments. References to sections in this decision will reflect the legislation as it was and as is applicable in relation to these proceedings.
15. Clause 7 of Part 19L of Sch 6 to the *Workers Compensation Act 1987* (the 1987 Act) provides that:

"the earnings amendments (other than Schedule 3.1[10] to the amending Act) do not apply to an injury received by a worker before the commencement of the amendments."

16. Section 32A of the 1987 Act provides the following relevant definitions:

**“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.

**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.”

17. Section 297(1) of the 1998 Act provides:

“When a dispute to which this Part applies concerns weekly payments of compensation or medical expenses compensation, the Registrar can direct the person on whom the claim is made to pay the compensation concerned. Such a direction is referred to in this Part as an **interim payment direction**.”

## The evidence

### **The section 78 notice**

18. A section 78 notice was issued on 23 April 2020, reducing Mr Singh’s payments to \$109.72 a week based on sections 43(1)(a)-(d). The insurer was of the opinion that Mr Singh could work 8 hours a day, 5 days a week, in suitable employment identified as “general farm hand/machine operator”. It was calculated that Mr Singh would be able to earn \$762.28 a week in this employment, with a PIAWE of \$1090 per week.

### **Reports of Dr Giblin**

19. Dr Giblin first assessed Mr Singh in June 2017. On 13 June 2017, he issued a permanent impairment report, assessing Mr Singh as suffering 21% whole person impairment as a result of his injury. It is apparent from correspondence concerning an upcoming work capacity assessment sent to Mr Singh on 11 March 2020 that the insurer accepts that assessment, and as much was confirmed by the insurer's legal representative during the teleconference before me.
20. Dr Giblin took a history of amputation of the middle finger through the proximal phalanx, a thumb fracture, and lacerations of his hand and fingers. The amputated finger was surgically replanted at Sydney Hand Hospital.
21. With regard to Mr Singh's disabilities and complaints, Dr Giblin recorded that "his left hand is not of much use". His prognosis was reserved, but he opined that he was "permanently unfit to use his left upper extremity for repetitious pushing, pulling, lifting, twisting, gripping impact activities or operating vibrating machinery". Dr Giblin also suggested there was a risk of the development of post traumatic arthritis.
22. On 12 April 2019, Dr Giblin produced a further report concerning Mr Singh. He reports that Mr Singh had not worked for the previous 18 months. He took a history of persisting restricted function in his left hand with shooting pains when his fingers get caught. On physical examination, Dr Giblin recorded:

"The thumb, index and middle fingers remain slightly atrophic, cold to feel and slightly discoloured compared to the right hand. There is still dysesthesiae to sensory testing in the affected fingers"
23. He opined that Mr Singh's condition was largely unchanged from his report of 13 June 2017. He states:

"It remains my view that his prognosis is reasonable although restricted on the basis that his left hand will always have physical restrictions.

Specifically, his left hand is unsuitable for heavy labouring work or using vibrating machinery or constant gripping or impact activities.

He would be fit for a work environment avoiding those physical restrictions."
24. Dr Giblin also commented on the ARMS report dated 8 September 2018 (which I will discuss shortly), and specifically the summary of recommendations under heading 5 on pages 12, 13 and 14, which he viewed as being "reasonable and compatible with the injury".

### **The ARMS report by Janelle Toole**

25. This report was prepared by Janelle Toole, an occupational therapist. The report was prepared at the request of Mr Singh's legal representatives, in relation to domestic assistance, future treatment and other matters.
26. Ms Toole took a history of injury and post-injury treatment consistent with the other medical evidence in the case. It is unnecessary to repeat the treatment undertaken by Mr Singh following his injury, suffice to say it was extensive and involved significant therapy. Ms Toole also recorded Mr Singh's past care needs, including domestic assistance. With regards to future domestic requirements, Ms Toole recorded that Mr Singh was unable to use a knife for peeling vegetables, required assistance for heavier domestic tasks, and should be provided with the opportunity to trial adaptive equipment. A self-propelling mower was recommended.

27. In respect of employment, Ms Toole recorded that Mr Singh has limited English, which would impact on his suitability for alternative employment. She also recorded Mr Singh's history of return to work, which was then withdrawn.
28. Ms Toole provided the following recommendation:
- “On the basis of this assessment, Mr Singh has capacity for 8 hours per day, 5 days per week in suitable employment. Suitable work will require a role that avoids fine dexterity of the left hand, bilateral heavy lifting or forceful exertion of the left hand. One of Mr Singh's current work strengths is his capacity to drive and unrestricted sitting, standing and waling. He is right hand dominant hence farm work on a wine grape farm could provide a return to work opportunity. Some of the tasks are performed by tractor operations such as spraying vines. Other tasks such as pruning will require grip and strength with the dominant hand (uninjured) for secateurs and light lifting and handling of vine material with the left.”
29. Ms Toole also made certain recommendations about future domestic assistance, including meal preparation, yard/home maintenance, car care, manual handling and moving requirements.
30. As discussed above, Dr Giblin agreed with the recommendations of Ms Toole concerning past and future domestic assistance (as opposed to any other aspect of the report).

#### ***Report of Dr Gertler***

31. Dr Gertler, a psychiatrist, assessed Mr Singh at the request of his solicitors in 2018. He produced a report dated 2 July 2018. He took a history of injury consistent with the other medical evidence. Relevant to the psychological effects of the injury, he records:
- “Because of the emotional sequelae of the injury, Mr Singh developed symptoms of a post-traumatic nature as well as depression and he was referred to a psychiatrist who was able to converse with him in Punjabi, by telephone. He was also commenced on psychotropic medication. He remains however with ongoing symptomatology”.
32. Dr Gertler provided a diagnosis of post-traumatic stress disorder and went on to comment:

“The post-traumatic stress disorder, which has become chronic and associated with major depression, has been caused by the accident of the 28 October 2016.

Mr Singh in my opinion will never be fit to work around machinery”

#### ***The ARMS report of Karen Harrison***

33. A vocational assessment, dated 13 February 2020, was completed at the request of GIO. The purpose of the assessment was to “determine job options which Mr Jagdeep Singh may be suited to, given his work history, training, qualifications and functional capacity”. The return to work goal was described as “different job/different employer”.

34. Under the “executive summary”, it is concluded:

“Labour Market Analysis has not supported the identified vocational options, as the tasks for which Mr Singh has physical capacity to perform, his English language skills are insufficient. The tasks for which Mr Singh has the skills aptitude and experience, he does not have the physical capacity”.

35. The report provides the following medical summary:

“Mr Singh reported that on an occasional basis he required Panadeine Forte for pain relief, if he experienced increased left-hand pain following activity i.e., activity such as light gardening activities when his hand had become swollen.”

36. The report considered the functional capacity report provided by Ms Toole. In addition, during the assessment, Mr Singh self-reported some restrictions include poor grip strength with his left hand, pain in his right elbow, limited pulling, pushing and lifting, and that he would need to consider part time work initially as it had been considerable time since he had worked.

37. Mr Singh identified some roles that he may be interested in, some of which were discounted immediately. The vocational options identified in the report, based on Mr Singh’s skills, interests and abilities were commercial cleaner, farm hand and truck driver.

38. Ms Harrison then proceeds to complete a labour market analysis of those identified roles, including consideration of the job description, skill level, the physical and psychological demands, and the salary. The report includes discussions with employers advertising for roles and their consideration of Mr Singh in the role (in general terms). Ms Harrison does not opine on each occasion whether the identified role would be suitable. The report was also sent to Mr Singh’s treating general practitioner, Dr Calaizis.

### ***Certificates of capacity***

39. A number of certificates of capacity are included. The most recent indicates that Mr Singh has capacity for some type of work for 8 hours a day, 5 days a week, until 2 August 2020. The certificate includes the following limitations:

- (a) Limited use of left hand;
- (b) Bilateral carry 10kg;
- (c) Bilateral push 7.5kg;
- (d) Bilateral pull 10kg;
- (e) Left hand carry 2.5kg, and
- (f) Left hand push/pull 4kg.

40. Dr Calaizis was faxed a copy of the ARMS report completed by Ms Harrison. He was asked to opine if the jobs identified in that report were suitable for Mr Singh, being:
- (a) Commercial cleaner;
  - (b) Tractor driver;
  - (c) Farm hand, and
  - (d) Truck driver.
41. On each occasion, Dr Calaizis has circled “yes”. The only included proviso or commentary is in relation to the Farm Hand role, where Dr Calaizis has written “but no orange picking”.

## **Submissions**

### ***The applicant***

42. The applicant’s primary submission is that he is not fit to perform any of the jobs identified in the work capacity decision. Whilst he may be fit to do parts of the functions identified in some of those jobs, he is not fit to perform any of the jobs identified.
43. The applicant referred to the most recent work capacity certificate in which the doctor placed significant restrictions on lifting, pushing and pulling. The applicant referred to the evidence of Dr Giblin, who has determined Mr Singh suffers from 21% whole person impairment, an assessment accepted by the respondent, and points out that the respondent has not provided any orthopaedic evidence. The applicant acknowledges that he may be fit to work in a sedentary environment.
44. In respect of each of the jobs identified, the applicant submits:
- (a) cleaner – the duties listed are “light to medium”, require medium lifting and pulling, and require ladder climbing, which the applicant would be unable to do. Mr Singh attempted to return to pre-injury employment but was unsuccessful;
  - (b) tractor driver – there is an indication that frequent lifting and carrying is required in this role, inconsistent with the medical restrictions placed on Mr Singh. The role would involve frequent repetitive use of the hand and arm, and may involve maintenance on the tractor, which Mr Singh would be unable to do;
  - (c) farm hand – this role would involve heavy lifting of bags, soil, hay and other farm materials, which Mr Singh would be unable to do. He is unable to perform the repetitive movements required of this role, and
  - (d) truck driver – whilst acknowledged that Mr Singh has a truck licence and has capacity to drive, there are issues with how long he can drive for. Further, the other requirements of the role would present difficulties, and the role can occasionally be heavy. Examples given included strapping down loads, loading the truck, and maintenance. Mr Singh would be unable to change a tyre.
45. The applicant agrees with and accepts the PIAWE figure of \$1090 per week.

### ***The respondent***

46. In reply, the respondent submits that they secured evidence, acted in accordance with section 43 and issued the notice now in dispute. The insurer complied with its statutory obligations.
47. The respondent criticised the application brought by Mr Singh, noting that there is no evidence that post-dates the respondent's expert evidence, other than a self-serving statement.
48. The respondent referred to the certification of roles proposed in the ARMS report as completed by Dr Calaizis. The specific reference to "but no orange picking" in that certification suggest that the doctor clearly thought about what Mr Singh can do, and the other roles identified, and placed a specific restriction on one of them.
49. Whilst the respondent has relied on general farm hand/machine operator in the work capacity decision, I would be entitled in my decision to look beyond that, including other roles identified such as truck driver, and may in fact reduce the weekly payment to zero based on that role. It was noted that Dr Calaizis also indicated that role was suitable.
50. Ultimately, the applicant has not met his onus to prove.
51. The respondent also referred to section 38(3A) of the 1987 Act, which requires that a worker must apply for continuation of weekly payments after the second entitlement period. The respondent referred to *NSW Trustee and Guardian on behalf of Robert Birch v Olympic Aluminium Pty Ltd* [2016] NSWCCPD 54 (*Birch*) at [115] and submitted that the applicant had not complied.

### ***The applicant in response***

52. The applicant put brief submissions in response to point out that the issue concerning section 38(3A) was not put in the work capacity decision, and in any event, would not defeat the worker's application currently before the Commission.

### **Discussion**

53. Mr Singh suffered a significant injury in the course of his employ with the respondent. He has been assessed as suffering from permanent impairment of 21% (which the respondent accepts – as indicated during the teleconference and as evident in the correspondence sent to Mr Singh on 11 March 2020). This categorises Mr Singh as a "worker with high needs" per the definition in section 32A.
54. The medical evidence provided indicates that Mr Singh has been left with significant functional incapacity in his left (non-dominant) hand. Dr Giblin described his left hand as "not of much use" and "unsuitable for heavy labouring work or using vibrating machinery or constant gripping or impact activities".
55. The above provides context for the proceedings before me and the work capacity decision made by the insurer which has been disputed.
56. The issue before me is Mr Singh's capacity for work in suitable employment. Relying on sections 43(1)(a)-(d) of the 1987 Act, the work capacity decision determined that Mr Singh had capacity as a general farm hand / machine operator for 8 hours per day, 5 days a week.



57. The dispute concerns “suitable employment” as defined in section 32A. It appears agreed that Mr Singh has capacity for some type of work – his treating general practitioner has, for some time, certified him fit for 8 hours per day 5 days a week. The question for determination concerns what type of employment Mr Singh may be suitable for, and whether the employment identified in the work capacity decision (and, as the respondent submits, the other roles identified in the vocational assessment report) is suitable.
58. There are certain matters that I am entitled or required to have regard to when considering “suitable employment”, and certain matters that cannot be taken into account. I will consider each in turn.

***The nature of the incapacity***

59. The first relevant consideration under the definition is “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)”.
60. The certificate of capacity provided by the worker provides he has capacity for some type of work for 8 hours a day, 5 days a week. Dr Calaizis has also placed significant restrictions in the section “capacity for activities”, being:
  - (a) limited use of left hand;
  - (b) bilateral carry 10kg;
  - (c) bilateral push 7.5kg;
  - (d) bilateral pull 10kg;
  - (e) left hand carry 2.5kg, and
  - (f) left hand push/pull 4kg.
61. These restrictions may not represent a huge barrier for an office worker, but for Mr Singh, whose work experience in roles that involve physical activity, they present a significant barrier to return to work.
62. The other “medical information” includes the report of Dr Giblin, which describes the left hand as “not of much use”. The restrictions indicated in the certificate of capacity tell a similar story. The applicant also has a psychological condition as a result of his work injury, preventing him from ever working around heavy machinery (per the report of Dr Gertler). It is clear that Mr Singh will never be able to complete his pre-injury duties.
63. The ARMS report dated 8 September 2018, prepared by Ms Toole, identifies Mr Singh’s capacity as 8 hours per day 5 days per week, consistent with Dr Calaizis’ certification. Ms Toole opines that Mr Singh would require a role that avoids fine dexterity of the left hand, bilateral heavy lifting, or forceful exertion of the left hand. Ms Toole identifies “farm work on a wine grape farm” as a return to work opportunity, which involves some tasks performed by tractor and some such as pruning requiring light lifting and handling of vine material with the left.

64. There are some inconsistencies with the above summary. Firstly, Mr Singh's lifting capacity in his left hand is 2.5kg, and its use should be limited. No analysis is given of how much a grape vine might weigh. No consideration is given to the restriction requiring limited use of the left hand. No explanation is given of where Mr Singh might place the grapes he is cutting. Presumably they are placed in a bucket or some kind of container. Given Mr Singh's lifting restrictions, it is unclear how he is supposed to lift the container carrying the grapes after they have been collected.
65. Further, later in the report it is recommended that Mr Singh be provided with future yard/home maintenance for 1 hour per week at \$55 per service. Given that it is recommended that Mr Singh be provided with yard maintenance domestic assistance, I am not sure how he would be able to perform similar duties in employment.
66. The ARMS report dated 13 February 2020 endeavoured to identify suitable employment for Mr Singh. That report was sent to Dr Calaizis who, through circling "yes" next to four listed occupations, opined that Mr Singh was fit for all of those roles, bar "orange picking".
67. There are a number of issues I have with the weight that can be given to that document. There is no commentary provided by Dr Calaizis aside from the indication that Mr Singh is not fit for orange picking. This begs the question of whether Mr Singh would be fit for apple picking, but I am mindful of the idiom when comparing apples and oranges.
68. There appears to be no analysis or consideration provided by Dr Calaizis of the duties involved in the roles in comparison with the restrictions he has placed on Mr Singh when it comes to lifting, pulling and pushing. In a number of the roles, there is no consideration for Mr Singh's safety in performing the role. For example, in respect of the "commercial cleaner" role, the facsimile sent to Dr Calaizis indicates that climbing ladders will likely be frequent. I am not sure that with Mr Singh's restricted capacity, and his ongoing issues with grip strength in his left hand, it would be safe for him to climb a ladder, which would require stabilisation with his land hand whilst presumably performing duties with his uninjured right hand.

### ***The worker's age, education, skills and work experience***

69. Mr Singh is a relatively young man. At the time of his injury he was 36 years old, and is now 40. Aside from his significant hand injury (and the psychological condition arising out of same) he does not appear to have any other physical or mental issues.
70. The majority of the following information is taken from the ARMS report dated 13 February 2020.
71. Mr Singh's education is limited, and occurred mainly in India rather than in Australia. He left school in year 8 at the age of 15, and began working on the family farm. His lack of education is further complicated by his English language skills, which are poor. He participated in the teleconference through an interpreter. I did not gain the impression that Mr Singh was using the interpreter simply as a crutch, but rather he had genuinely low English language skills.
72. During the course of his injury and recovery, the insurer has attempted to upskill Mr Singh. He attended a Certificate I in Spoken and Written English at Griffith TAFE in 2018. He did not progress to the Certificate II in the same course. When Mr Singh was referred for assessment in order to obtain a forklift licence, it was determined that he did not have sufficient English skills to be successful.

73. Mr Singh has a class C driver's licence and has completed the knowledge test to gain his HR truck licence (apparently with significant assistance from his wife). He would need to complete a practical driving test to obtain a HR truck licence.
74. Mr Singh's work experience is also limited. As discussed above, he left school to commence work as a farm hand, working with his family. He left that employment when he came to Australia and worked as a fruit picker, after which he commenced employment with the respondent as a contract cleaner.
75. Mr Singh does have some relevant transferable skills gained through his employment, although I would question some of the skills recorded in the ARMS report, including communication skills (given his lack of English language ability) and WHS knowledge (given his history of never having heard of WHS prior to his work injury, never having attended a toolbox meeting, and the manner in which his injury occurred).

#### ***Plans or documents prepared as part of the return to work process***

76. I have discussed the relevant evidence above. The documentation before me includes two ARMS reports identifying roles that might be considered appropriate for Mr Singh, having regard to his experience and injury.

#### ***Occupational or rehabilitation services***

77. Mr Singh has been provided with a number of occupational and rehabilitation services. I have discussed above his attendance through the insurer in English language skills training, as well as a screener for obtaining a forklift licence. He has also apparently attended a job seeking module, as indicated by the signed document attached at page 1 of the Reply, although I understand that Mr Singh's wife completes most of the applications on his behalf.

#### **Decision**

78. The section 78 notice identifies farm hand / machine operator as suitable employment for Mr Singh. The respondent submits that I am entitled to consider whether the other roles identified in the ARMS report and signed off by Mr Singh's treating doctor also come within the definition of suitable employment (and could potentially result in a reduction of his entitlement to weekly benefits to zero). I am not satisfied that the employment option identified in the section 78 notice, or any other employment options identified by the insurer, are "suitable employment", having regard to the factors outlined in section 32A of the 1987 Act.
79. The role of farm hand, according to the ARMS report, involves routine tasks in producing crops such as fruit, nuts, grains, vegetables and mushrooms. Mr Singh has previous relevant experience in this area, having worked on his family's farm in India and as a fruit picker when he first came to Australia.
80. The kind of tasks involved include planting trees using hand tools and farm machines, building trellises, operating farm machines, spraying trees, pruning trees, picking fruit, irrigating land, sorting produce and loading containers into trucks. It appears that this is a generalist role exposed to a variety of duties. The duties may vary depending on the type of farm and crop being produced.

81. This role is described to require “medium to heavy physical demand”. Immediately this indicates that the role may not be suitable for Mr Singh, given his current lifting, pushing and pulling restrictions. Other physical demands include “heavy lifting” of different items, which is likely to be occasional, but may occur for prolonged periods at times. Again, given Mr Singh’s lifting restriction, he could clearly not perform this aspect of the role, as even “occasional” heavy lifting would be beyond his certified capacity.
82. The role also includes repetitive movements as likely, and the constant use of hand tools both manual and mechanical. Given Mr Singh has limited grip strength in his left hand, it is questionable whether he could use hand tools for any period of time (other than, for example, secateurs or a spade).
83. Whilst the ARMS report prepared by Ms Toole identifies wine grape picker as appropriate (which probably falls within the general description of “farm hand”), it should be acknowledged that the job involves more than just using one hand to cut and pick grapes.
84. With regards to the specific companies contacted as outlined in the ARMS report, all three roles identified lifting as part of the role in various weights (ranging from occasional lifting of 15kg to constant lifting of 5kg). Given Mr Singh’s left-handed lifting limit of 2.5kg, and limited use of the left hand, these are all beyond his restrictions. Further, Mr Singh’s English skills pose a significant barrier. For example, working in Pro Ten requires “ability to follow instructions and work in a team” but also indicates that Mr Singh’s level of English skills not being a barrier. Putting aside the lifting requirements of the job, it is not clear whether the instructions would be available in Mr Singh’s language (one of the risk factors that possibly contributed to occasion of his current injury).
85. The only job identified that would potentially be within Mr Singh’s lifting restrictions is with Leppington Seedlings, which requires only 5kg (noting his bilateral carry of 10kg). However, the role also involves some pushing and pulling in unspecified weights, as well as the “ability to read, write and understand truck floor plans and loading sheets”. This role is clearly not suitable, having regard to both Mr Singh’s medical capacity and English language ability.
86. I have also had regard to Mr Singh’s statement, of 21 July 2020 regardless of whether it is “self-serving”, as described by the respondent. One would question whether any statement prepared for the purpose of litigation would be anything other than self-serving. This statement, in my view, reflects the reported physical capacity of Mr Singh and is consistent with the medical evidence provided.
87. With regards to the role of farm hand, Mr Singh explains that he would not be able to do many aspects of the role, as it involves repetitive use of both hands. In particular, he would not be able to do pruning. He would also not be able to do maintenance work. He reports he would be able to do tractor driving, but not full hours, as after a period his fingers become numb and painful. Whilst farm hand work may involve tractor driving as a responsibility amongst other duties, I do not have evidence about the specific role of “tractor driver” before me. That role is likely to face similar issues as truck driving, being requirements to load materials, make repairs, and change tyres, all of which are beyond Mr Singh. To the extent that “tractor driver” is a relevantly identified position for consideration as suitable employment, I do not consider it to be suitable.

88. The next role identified is that of truck driver. This is described as “typically, a light to medium physical demand job”, which occasionally involves a heavy physical demand. A number of red flags appear in the description of the physical demands of the job, including use of upper limbs to push or pull to operate controls, and frequent repetitive hand and arm movements. In addition, the role requires record keeping skills, which may prove difficult given Mr Singh’s English language skills.
89. The role of garbage truck driver includes only occasional lifting of up to 10kg, but requires the occasional moving of bins which are not easily accessed by the truck.
90. Putting aside the constant use of the left hand required in any truck driving job, I do not see the role of garbage truck driver as suitable employment. Garbage bins are heavy and unwieldy and require two hands to operate and dexterity to manoeuvre. Given Mr Singh’s restrictions, the aspect of the job requiring moving of bins not easily accessed would not be able to be performed by him.
91. The other two roles identified require an MR licence, which Mr Singh does not have, and also involves communication with customers and written and verbal communications skills, as well as experience in the industry. These requirements place these roles beyond Mr Singh, given his skills, experience and background.
92. In his statement, Mr Singh suggests that he would be able to do some truck driving, but would not be able to do it on a full time basis. He indicates that he would have difficulty changing a truck tyre and manoeuvring gates and curtains on a truck. This role was the subject of some submissions during the teleconference, including with reference to the maintenance requirements of truck drivers. I accept the submissions of the applicant that these requirements would make Mr Singh unsuitable for this type of employment.
93. The third role for consideration (job option 1) is commercial cleaner. At the outset there are a number of issues with this occupation based on Mr Singh’s medical restrictions.
94. Firstly, Dr Gertler opined that Mr Singh would never be able to work around machinery. This is also reflected in the statement dated 21 July 2020. Whilst not all commercial cleaning roles would be at a factory type location, involving machinery, that is where Mr Singh’s experience lies.
95. Secondly, Mr Singh returned to suitable duties for a period with the respondent, but those duties were removed and he was unable to return to his pre-injury role. Mr Singh’s medical restrictions have not changed significantly since that time.
96. Thirdly, given Mr Singh’s restriction on use of his left hand, I am unsure how he would be able to perform the majority of duties in this role. Per the ARMS report, commercial cleaning involves tasks such as sweeping, vacuuming or polishing, which would involve both hands.
97. Fourthly, as previously identified, commercial cleaning potentially involves climbing on ladders, which would be unsafe given the physical limitations placed on Mr Singh due to his hand injury.

98. In respect of the specific jobs identified, the first (with CleanScope) is described as “physically demanding and has a standard lifting requirement of up to 20kg”. This is clearly unsuitable. The second, with Prompcorp also requires a demonstrated capacity to lift up to 20kg and a push/pull of greater than 10kg. The third, with Gabes Services, included lifting equipment such as bins and mop buckets which would be greater than 10kg. Given the medical restrictions placed on Mr Singh, it is clear that none of these roles are suitable.

99. This brings me to briefly return to the certification of Dr Calaizis, discussed above. In the facsimile sign-off he has provided on 12 February 2020, the doctor has indicated that the role of “commercial cleaner” is suitable. This lends further support to my conclusion that little weight can be given to this document. It appears that the doctor has not been provided with sufficient information for the conclusion he has reached, noting that the facsimile commences with the following:

“A Vocational Assessment was completed for Jagdeep Singh on 16 December 2019. The finding of the assessment was that Mr Singh may be suited to work as a:

- Commercial cleaner
- Tractor Driver
- Farm Hand
- Truck Driver”

100. That “vocational assessment” is not attached to the facsimile. Given that it is dated 13 February 2020, it could not have been attached. Dr Calaizis has signed off on the vocational options provided without the benefit of having read the ARMS report. Further, I am unsure how the “finding of the assessment” was that Mr Singh was suited to work in any of the roles identified. The purpose of the report, according to the executive summary, was to explore “vocational options”. The conclusion was that:

“Labour Market Analysis has not supported the identified vocational options, as the tasks for which Mr Singh has physical capacity to perform, his English language skills are insufficient. The tasks for which Mr Singh has the skills aptitude and experience, he does not have the physical capacity”.

101. The above conclusion accords with my view of the evidence before me.

102. Accordingly, there is no suitable employment for which Mr Singh has capacity based on the factors outlined in section 32A of the 1987 Act.

### **Section 38(3A)**

103. During its submissions, the respondent identified section 38(3A) of the 1987 Act as presenting a problem for Mr Singh’s case. The section provides that:

“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.”

104. The respondent submits that Mr Singh has not applied to the insurer in writing to have his weekly payments continued after the second entitlement period. At the date of the work capacity decision notice, Mr Singh had been paid for 173 weeks and has been paid since. He is within the period “after the second entitlement period”.
105. In support of this submission, the respondent referred to *Birch*. I do not accept this submission for two reasons.
106. Firstly, it is clear that the respondent has been paying Mr Singh during the section 38 period. It seems inconsistent for them to now argue that he had no entitlement during that period because he did not ask in writing for his pay to be continued. To punish the worker in these circumstances, who is not at fault, is inconsistent with the objectives of the workers compensation Acts. This is particularly so given Mr Singh’s English language capabilities. Given that his payments have continued, I am satisfied that it can be inferred that Mr Singh did ask for his payments to continue.
107. Secondly, Mr Singh commenced proceedings in the Commission on an approved form seeking that his payments continue beyond 23 July 2020, the date on which payments were due to cease due to the operation of the work capacity decision. In my view, this constitutes writing to the insurer to request the continuation of payments. It is noted that the application to the insurer cannot be made *earlier* than 52 weeks before the end of the second entitlement period, but there is no limitation on making such an application after.
108. The alternative remedy to this would be that following my decision, Mr Singh write to the insurer asking them to continue payments based on my decision. This seems like an unnecessary administrative step, but if I am wrong on the above, Mr Singh is invited to take the necessary actions to ensure his payments continue.
109. For completeness, I do not believe that section 38(3A) deprives me of any jurisdiction to make an interim payment direction as sought by Mr Singh.

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE INTERIM PAYMENT DIRECTION ISSUED BY PARNEL McADAM, REGISTRAR’S DELEGATE, WORKERS COMPENSATION COMMISSION.

*L Golic*

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

