



# State Insurance Regulatory Authority

Workers Compensation

Merit Review Service

## FINDINGS AND RECOMMENDATIONS ON MERIT REVIEW BY THE AUTHORITY

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**Worker:**

**Insurer:**

**Date of Review:**

**Date of Injury:**

**Claim Number:**

**Our Reference:**

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### FINDINGS ON REVIEW

1. The following are findings made by the State Insurance Regulatory Authority (the Authority) on review.
2. The Worker has the ability to return to work in “suitable employment” as defined in section 32A of the *Workers Compensation Act 1987* (the 1987 Act)
3. The Worker has “current work capacity” as defined in section 32A of the 1987 Act.
4. The Worker does not meet the requirements of section 38(3) of the 1987 Act and as such is not entitled to weekly payments of compensation.

### RECOMMENDATION BASED ON FINDINGS

5. The following recommendation made by the Authority is binding on the Insurer and must be given effect by the Insurer under section 44BB(3)(e) of the 1987 Act.
6. The Authority does not make a recommendation for the reasons below.

### BACKGROUND

7. The Worker was employed as a Formworker/Carpenter when he fractured three ribs after a fall from an elevated platform to the ground in the course of his employment.
8. The Worker made a claim for compensation and has been in receipt of weekly payments of compensation from the Insurer.
9. After he sustained his injury the Worker was terminated from his position.
10. The Insurer made a number of work capacity decisions, the combined effect of which was to cease the Worker’s entitlement to weekly payments of compensation under section 38 of the 1987 Act.
11. At The Worker’s request the Insurer undertook an internal review in this matter and made a decision which arrived at the same conclusion as the work capacity decision to cease the Worker’s entitlement to weekly payments of compensation.

12. The Worker has made an application for merit review which was received by the Authority. The application has been made within 30 days after the Worker received notice of the internal review, as is required under section 44BB(3)(a) of the 1987 Act. The application has been lodged in the form approved by the Authority.

## **LEGISLATION**

13. The legislative framework governing work capacity decisions and reviews is contained in the:
  - *Workers Compensation Act 1987* (the 1987 Act);
  - *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act);
  - *Workers Compensation Regulation 2016* (the Regulation).
14. Section 43 of the 1987 Act describes a “work capacity decision”.
15. Section 44BB of the 1987 Act provides for merit review of a work capacity decision of the Insurer, by the Authority.

## **DOCUMENTS CONSIDERED**

16. The documents I have considered for this review are the Worker’s application for merit review and the Insurer’s reply form, the documents listed in and attached to those forms, and any further information that has been supplied to the Authority by the Worker and the Insurer.

## **SUBMISSIONS**

17. In the application for merit review, the Worker makes the following submissions:
  - The job of forklift driver identified by the Insurer is not suitable employment because he has suffered significant injuries to his right side and back as a result of falling approximately 1 metre from a work platform to the concrete ground below. These injuries resulted in him being transported to hospital and fractures of his 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> ribs which were confirmed by x-ray examination.
  - He would have difficulties performing the work of a forklift driver.
  - He has difficulties bending, lifting, twisting, wrapping pallets, lifting boxes and driving a forklift in reverse.
18. In its reply the Insurer submits:
  - The Worker has capacity to work 8 hours per day, 5 days per week as per his WorkCover NSW Certificate of Capacity issued by the nominated treating doctor (NTD).
  - Employment as a forklift driver is suitable employment for the Worker. The general physical demands are within his current physical restrictions and he has a valid forklift licence and experience in the role.
  - The Worker has not met the special requirements of section 38(3).
  - The issues raised in the application for merit review have been noted. The Insurer maintains that the work capacity decision that has been made is supported by medical and rehabilitation information that has been obtained to undertake a work capacity assessment.

## REASONS

### Nature of merit review

19. This matter involves a merit review of the work capacity decision of the Insurer in accordance with section 44BB(1)(b) of the 1987 Act. The review is not a review of the Insurer's procedures in making the work capacity decision and/or internal review decision. The review requires that I consider all of the information before me substantively on its merits and make findings and recommendations that are most correct and preferable.
20. I note that it is only those decisions that the Worker chooses to refer for review by the Authority, in accordance with section 44BB of the 1987 Act, that the Authority has jurisdiction to review. In his application for merit review, the Worker has referred the following work capacity decisions of the Insurer for review by the Authority:
  - A decision about his current work capacity;
  - A decision about what constitutes suitable employment for him;
21. Therefore, these findings and recommendations will be confined to a merit review of only these decisions made by the Insurer that the Worker has referred.

### Current work capacity and suitable employment

22. Section 32A of the 1987 Act defines "current work capacity" and "no current work capacity" as:

*current work capacity, in relation to a worker, means a present inability arising from an injury such that the worker is not able to return to his or her pre-injury employment but is able to return to work in suitable employment*

*no current work capacity, in relation to a worker, means a present inability arising from an injury such that the worker is not able to return to work, either in the worker's pre-injury employment or in suitable employment*
23. The Worker was employed as a Formwork Carpenter when he fell off an elevated platform he was working on. The platform was approximately 1.5 meters off the ground, and from there he was lifting a length of plywood to a colleague working above him. The Worker lost his balance and fell to the ground, striking his right side as he fell. Despite being in pain he continued working, but collapsed to the ground when he tried to lift some timber. The Worker was then taken to hospital by ambulance where investigations revealed three broken ribs.
24. The Worker returned to work after 2-3 weeks to perform light duties, but his employment was terminated some 3 months later. He has not worked since.
25. The issue for me to consider, based on the information before me, is how the injuries impact upon the Worker's capacity to work.
26. The Worker does not make any submissions about his current work capacity. The only information before me in respect of his work capacity is Work Cover NSW Certificates of Capacity (Certificates). There is also an individual Certificate. All Certificates have been completed by the NTD.
27. The Certificates have remained consistent throughout the period and are identical, which suggest that the Worker's capacity may have remained the same. The NTD notes the Worker's diagnosis as "post ribs fracture- persist right side chest wall and ribs pain" and certifies him as having capacity for some type of employment for 8 hours per day 5 days per week, with the following restrictions:
  - Lifting/carrying capacity 7kg both hands

- Pushing/pulling ability 7kg
  - Bending/twisting/squatting ability limited twisting, limited bending upper body
28. There is no other medical information before me. In the absence of any submissions from the Worker as to why his current work capacity should be reviewed I see no reason not to accept the Certificates produced by the NTD. The NTD has treated the Worker since and has had the benefit of regularly assessing his injury. Her finding with respect to his capacity and restrictions has remained consistent. On that basis, I accept that the Worker has capacity to work in some type of employment 8 hours per day, 5 days per week with the restrictions noted above.

Suitable employment

29. In order to determine whether the Worker has current work capacity, I am required to consider whether he can return to work in “suitable employment”. Suitable employment is defined in section 32A of the 1987 Act as:

**Suitable employment**, in relation to a worker, means employment in work for which the worker is currently suited:

(a) having regard to:

- (i) the nature of the worker’s incapacity and the details provided in medical information including, but not limited to, any certificate of capacity supplied by the worker (under section 44B), and
- (ii) the worker’s age, education, skills and work experience, and
- (iii) any plan or document prepared as part of the return to work planning process, including an injury management plan under Chapter 3 of the 1998 Act, and
- (iv) any occupational rehabilitation services that are being, or have been, provided to or for the worker, and
- (v) such other matters as the WorkCover 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.

30. The information before me indicates that the Worker was born in Vietnam and moved to Australia. English is the Worker’s second language and he is noted to have average English literacy skills, to the equivalent of a year 8 high school student. The Worker worked as a forklift operator for two different employers for a period of ten years in total. In 2010 the Worker gained employment as a Formwork Carpenter, and in 2012 he took on the position of formwork carpenter with the Employer.
31. The Insurer has found that the role of forklift operator is work for which the Worker is currently suited. In its internal review decision the Insurer maintains this decision.
32. I note that the NTD agreed that the role of forklift driver is suitable employment for the Worker, specifying that it was suitable on a full time basis. No comments or restrictions are noted by the NTD on the approval notices. The NTD has also agreed that the roles of Bus and Coach Driver, Delivery driver, Car Park Attendant, Light Packer and Product Assembler were suitable employment.

33. The Worker signed a document titled "Agreement of Proposed Vocational Options" in which he agreed that the role of forklift driver, as well as that of traffic controller, light packer, and product assembler, were suitable employment options for him.
34. I have before me a vocational assessment report, an earning capacity assessment report, and a further vocational assessment report in which the role of forklift operator, in addition to other roles, are proposed as suitable employment options for the Worker. I will refer to the most recent vocational assessment report noting that all three contain consistent information in respect of the roles considered. That report also proposed the roles of Bus and Coach Driver and Delivery Driver. I note that the report indicates that all other positions previously proposed have been excluded due to the functional requirements of the role being outside the Worker's restrictions.
35. As part of its analysis, the company which produced the latter vocational assessment report contacted three employers in respect of each role it proposed as suitable. I will consider each of the roles below.

#### Forklift Driver

36. The vocational assessment report details the duties of a forklift driver as including:
  - Operating controls to align forklifts and raise and lower forks to stack and unstack items in warehouses, factories, timber yards and shipping terminals;
  - Operating forklifts which run on rails or use electronic guidance systems to control movements in narrow aisles;
  - Transporting goods to designated areas;
  - Ensuring goods are stored in correct areas;
  - Monitoring equipment operation visually through gauges and instruments and through computerised monitoring equipment;
37. The role is described as frequently "light" but up to "medium" work demand levels. Workers climb up steps to sit in the vehicle operating cab and use upper limbs and body to stretch down and across to operate controls. Twisting of the body or neck is required when reversing the vehicle. Bending is not required.
38. The first employer contacted advised that the position offered involved forklift operations and light duties at a warehouse. The second employer indicated the position offered included warehouse operations and handling and maintaining stock. This position involved some heavy lifting of 10-15kg, though it was suggested that adjustments could be made for the right candidate. The third employer contacted advised that the position involved forklift driving, order picking and packing, and warehouse cleaning duties.
39. Each employer contacted indicated that the Worker's previous experience as a forklift driver made him suitable for the role.
40. While I note that the NTD, and the Worker himself, agreed that this role is suitable employment for him, it is unclear if both of them were aware of all of the duties associated with the role, and the fact that it appears to be most commonly offered with other tasks such as cleaning and stock maintenance. The report notes that the Worker advised and demonstrated that he had no issues with squatting but experienced pain in his ribs when bending forward to pick anything from the floor. The other tasks associated with the role of forklift driver involve bending.
41. I note the Worker's submission that he would have difficulties bending, lifting, twisting, wrapping pallets, lifting boxes and driving a forklift in reverse. While I note that the Worker's lifting restriction is addressed in the vocational assessment report it does not appear that any consideration has been given to his limited ability to bend, twist and squat. Each of the positions considered involves duties in addition to simply operating a forklift. I have concerns about the operation of a forklift, noting the Worker's submission in respect of the need to twist his body to reverse the forklift. However, I also have concerns about the additional

duties involved such as handling and maintaining stock, warehouse cleaning, and order picking and packing. The nature of these duties have not been specified and I can only assume that there would be bending and twisting involved in performing these tasks. As the extent of such bending and twisting has not been addressed in respect of these additional duties, and in respect of the specifics of operating a forklift, I cannot be satisfied on the information before me that this role is suitable for the Worker.

#### Bus and Coach Driver

42. The vocational assessment report details the duties of the role as including:
  - Stopping at set locations to pick up and set down passengers
  - Opening and closing doors before and after passengers board or alight
  - Collecting fares and giving change and tickets and monitoring electronic entry
  - Advising passengers on destinations
43. The role is described as sedentary to medium physical demand. Drivers sit frequently to constantly, and use upper limbs, feet and body to stretch down and across to operate controls.
44. The first employer contacted indicated duties consistent with the general duties described. A person with an unrestricted driving licence can apply and is provided paid training to upgrade to the appropriate licence after selection. An English competency test must also be completed. The second employer offered a role with the same duties and advised that obtaining an LR licence, bus driving authority, and working with children check is an advantage. The third employer contacted did not specify the requirements of the role, but the report notes that a LR licence would be required to obtain this role.
45. Only one of the three employers contacted indicated that the Worker could potentially obtain employment as a Bus and Coach Driver without currently having a LR licence. I am not satisfied that this role is readily obtainable without the qualification of an LR licence. There is no information before me to suggest that any occupational rehabilitation has been directed towards the Worker obtaining a licence. While this role may be suitable for the Worker at such time that he obtains a LR licence, it is not employment to which he is currently suited.

#### Delivery Driver

46. The vocational assessment report details the role as involving the following duties:
  - Determining destination of goods and most appropriate delivery routes;
  - Manoeuvring vehicles into position for loading and unloading;
  - Verifying loading documents;
  - May receive payments for deliveries and arrange accounts
47. The role is described as being of light physical demand. Driving is frequent to constant, and there is a frequent requirement to lift and carry items, and also to bend to facilitate loading and unloading.
48. The first employer contacted indicated the position involved the delivery and pick up of living aid equipment such as wheelchairs, commodes, recliner chairs and beds, and assembly of the equipment. Assisting with warehouse duties, such as picking/packing, and cleaning of the van was also required. It was advised that lifting of up to 10kg would be required independently, and that the Worker would be suitable for the role once his lifting capacity improved. The second employer contacted advised duties involved the delivery of hampers. The third employer contacted offered the position of Light Delivery Driver. Duties included driving, loading and unloading, and cleaning the van. It was advised that no lifting over 7kg was required.
49. While it is clear that the first position offered was not suitable employment for the Worker, the other two positions suggest that there are positions available which are within the Worker's

functional capacity. In positions such as that of light delivery driver, or hamper delivery, there is no heavy lifting, and while there may be bending and twisting required in unpacking deliveries, I do not consider this would be outside the Worker's functional tolerances. The Worker possesses an unrestricted driving licence, the only requirement of this role, and has also indicated a willingness to perform the role.

50. Accordingly, I consider this role to be suitable employment for the Worker.

#### **Findings on current work capacity and suitable employment**

51. On balance, the information before me supports that having regard to the nature of the Worker's incapacity, his age, education, skills, work experience, and information as to occupational rehabilitation that has been provided, and having regard to the balance of matters contained in the definition of suitable employment, he is able to return to work in suitable employment. I am satisfied that employment as a delivery driver is suitable employment for the Worker.

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

52. The following provisions of the 1987 Act provide the basis for determination and calculation of a worker's weekly payments entitlement:

- a. Weekly payments in the first 13 weeks are to be determined in accordance with section 36 of the 1987 Act ("the first entitlement period");
- b. Weekly payments in weeks 14–130 are to be determined in accordance with section 37 of the 1987 Act ("the second entitlement period"); and
- c. Weekly payments after the second entitlement period (after week 130) are to be determined in accordance with subsections 38(6) or (7), but only if the special requirements for continuation of weekly payments after the second entitlement period are met in accordance with section 38 of the 1987 Act.

53. The Worker has received greater than 130 weeks of weekly payments since the date of his injury. Therefore the Worker's entitlement to weekly payments of compensation falls after the second entitlement period and is to be calculated in accordance with section 38 of the Act.

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

54. I am satisfied that the Worker has "current work capacity". A worker with "current work capacity" is only entitled to weekly payments of compensation under section 38 of the 1987 Act if special requirements are met as follows:

*(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 \$168 per week, and*
- (c) the worker is assessed by the insurer as being, and as likely to continue indefinitely to be, incapable of undertaking further additional employment or work that would increase the worker's current weekly earnings.*

- (3A) A worker with high needs who is assessed by the insurer as having current work capacity is entitled to compensation after the second entitlement period only if the worker has applied to the insurer in writing (in the form approved by the Authority) no earlier than 52 weeks before the end of the second entitlement period for continuation of weekly payments after the second entitlement period.*
55. The Worker is entitled to weekly payments of compensation only if he meets all three special requirements provided in section 38(3) of the 1987 Act unless he is a “worker with high needs” as defined in section 32A of the 1987 Act.
56. Section 32 A defines a “worker with high needs” as:
- a worker whose injury has resulted in permanent impairment and:*
- (a) the degree of permanent impairment has been assessed for the purposes of Division 4 to be more than 20%, or*
- (b) an assessment of the degree of permanent impairment is pending and has not been made because an approved medical specialist has declined to make the assessment on the basis that maximum medical improvement has not been reached and the degree of permanent impairment is not fully ascertainable, or*
- Note :** *Paragraph (b) no longer applies once the degree of permanent impairment has been assessed.*
- (c) the insurer is satisfied that the degree of permanent impairment is likely to be more than 20%,*
57. There is no information before me to suggest that the Worker is a worker with high needs.
58. There is no information before me to indicate that the Worker is currently working and earning at least \$183 per week. Given that the Worker is assessed as having current work capacity, but has not returned to work for a period of not less than 15 hours per week and is not in receipt of current earnings of at least \$183 per week, he does not meet the requirements of section 38(3)(b) of the 1987 Act.
59. As section 38(3) has not been satisfied, the Worker is not entitled to weekly payments of compensation. As I have arrived at the same conclusion as the Insurer regarding his entitlement to weekly payments of compensation, I have made no recommendations under section 44BB(3)(e) of the 1987 Act.

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