

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 2676/20
Applicant: Nawaf Nathem Zubary
Respondent: SM NSW Pty Ltd
Date of Determination: 28 August 2020
Date of Amendment: 31 August 2020
Citation: [2020] NSWCC 296

The Commission determines:

1. I amend the name of the respondent wherever it appears to add the words “(In Liquidation)” after the name “SM NSW Pty Ltd”.
2. There is an award for the respondent

A brief statement is attached setting out the Commission’s reasons for the determination.

John Wynyard
Arbitrator

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

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Nawaf Nathem Zubary, the applicant brings an action SM NSW Pty Ltd, the respondent for payment of weekly compensation following an alleged injury to his lower back on 20 February 2019.
2. Following the teleconference, I issued directions on 17 June 2020 granting leave, amongst other things, for the respondent to rely on the issues raised in a draft document entitled "78 notice".
3. On 11 June 2020, a document entitled Section 78 was issued in the same broad terms as were before me in the draft s 78 notice at teleconference.
4. The Application to Resolve a Dispute (ARD) and the Reply were duly lodged.

ISSUES FOR DETERMINATION

5. The parties agree that the following issues remain in dispute:
 - (a) Did Mr Zubary injure his lower back whilst working for the respondent on or about 20 February 2019?
 - (b) Is Mr Zubary disentitled to compensation by ss 254 and 261 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) by virtue of his failure to either give notice and/or make a claim for compensation within the time prescribed.

PROCEDURE BEFORE THE COMMISSION

6. The matter was heard over two days. On 15 July 2020, (the hearing having been conducted firstly by video conference and then from 11.45 am by teleconference) the matter was adjourned part heard until 29 July 2020. The applicant was represented by Mr Luke Morgan of counsel instructed by Ms Esther Ihn from Benefit Legal. The respondent was represented by Ms Kavita Balendra of counsel instructed by Ms Shabnam Thompson & Mr Danny Khoshaba of Mills Oakley Lawyers. 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. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

EVIDENCE

Documentary evidence

7. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) ARD and attached documents;
 - (b) Application to Admit Late Documents (ALD) dated 6 July 2020 and annexures;
 - (c) ALD dated 18 June 2020 containing the Reply, and
 - (d) ALD dated 18 June 2020 and annexures.

Oral evidence

8. Ms Balendra made an application to cross-examine the applicant's witness Mr Al Hadedy. As the matter was unable to complete on the first day, leave was granted to the respondent to issue a Summons to Mr Al Hadedy. Although Ms Balendra commenced her submissions on 15 July 2020 it was upon the basis that she had not closed her case as she wished to cross-examine Mr Al Hadedy. When the matter resumed on 29 July 2020 Mr Al Hadedy attended by telephone and was cross-examined by Ms Balendra.

FINDINGS AND REASONS

Issues raised by leave

9. Following the leave granted at teleconference, a s 78 notice dated 11 June 2020 was lodged in an ALD dated 18 June 2020. Although it referred to a claim for psychological injury, the application had been made at teleconference in respect of the claim for weekly payments before me. The notice was a substantial document which raised a number of issues:
 - Mr Zubary made statements that were inconsistent with contemporaneous records:
 - (a) Mr Zubary told Dr Stephen that he had not worked prior to employment with the respondent but clinical records reveal Mr Zubary was working on 24 July 2016 in carpentry, and that he had been injured at work on 28 June 2016.
 - (b) Mr Zubary stated that he did not report the subject injury because he was fearful of losing his job, whereas he ceased work in March 2019 but failed to report his injury until August 2019.
 - (c) Mr Zubary stated to Dr Kumagaya that he had discussed his injuries and concerns with the respondent whereas Mr Zubary stated that he did not report his injury in his statement.
 - (d) Mr Zubary told Dr Kumagaya that he had no past psychological history, whereas the clinical records showed that he suffered from some psychological condition in January 2015.
 - (e) Mr Zubary told Dr Kumagaya that he did not abuse illicit substances which statement was inconsistent with a clinical entry in July 2015.
 - (f) Mr Zubary told Dr Panjratana, his medico-legal referee and Dr Stephen that he had not suffered any prior injuries or issues, whereas the clinical records showed that on 22 February 2018 complaints of recurrent lower back pain were recorded, and an x-ray (which has not been located), was taken of the lumbar spine.
 - Clinical records also demonstrated that Mr Zubary was involved in a car accident in 2014.
 - The clinical records also showed that Mr Zubary sustained a right shoulder injury in or around June 2015 whilst lifting weights at a gym.
 - The assessment of Dr Stephen was that Mr Zubary was not genuine in his complaints and that he presented with "multiple and flagrant" inconsistencies.
10. These matters, it was stated, led to the conclusion that Mr Zubary had not discharged his onus of proof.

Mr Zubary

11. Mr Zubary was born in 1995 and is now 25 years old. Mr Zubary arrived in Australia in 2012 as an asylum seeker from Iraq. He originally went to Indonesia, and over an eight month period came from there to Australia by boat and was taken to Christmas Island. He was sent to Perth and ultimately came to Sydney. He arrived in Australia on 26 December 2012 when he was 17 years of age. He completed schooling to year 9 in Iraq and has had no schooling since.
12. In his statement of 3 October 2019, Mr Zubary said that on hearing of a job opportunity in the building industry from a friend and associate, he attended a work site at Macquarie Park and, following an interview was hired by the respondent. He worked there for approximately 2 weeks, doing different tasks for different supervisors.
13. He was then given work at another site, near the Arncliffe station. He was again under the control of several supervisors, and had a variety of different tasks.
14. On 20 February 2019, Mr Zubary's job was to place timber formwork into position for a concrete pour. He said there was a stack of about 25 pieces of formwork which varied between 3.6 m to 4.8 m in length and were approximately 10 cm wide and 20 cm deep. He was told to collect one piece at a time, place it on his shoulder and walk about 5 m to an internal scaffold, from whence he would place the formwork on the scaffold, climb up and lift the formwork up to the ceiling level by raising his arms above his head as he did so. He would then place the timber in position and hammer the formwork into place. Mr Zubary said the formwork was heavy and cumbersome to lift and carry.
15. During one of these manoeuvres, Mr Zubary said he felt pain and discomfort in the right near side of his neck, and a sharp pain in the centre of his lower back, with "electric type shock pains" down his right leg and into his right foot.¹ Mr Zubary said:²

"I knew that I had injured myself. I was worried about reporting the injury because I had recently started working at the job site and I did not want to lose the job...
...
I decided that I would not say anything and try and self-manage the pain and discomfort. For the rest of the afternoon, I was cautious of my workplace actions and tried to avoid lifting and carrying heavy weights."
16. Mr Zubary said that over the next few days he suffered from ongoing neck and back pain, from which he had trouble sitting for extended periods of time, and when standing and walking. He said his sleep was affected by his condition and he felt generally unwell. He said:

"From 20 February 2019 through to 5 March 2019, I continued to suffer from severe back and neck pain. I was struggling at work and on 3 to 4 occasions I was not able to attend work."
17. Mr Zubary said that he tried to avoid heavy lifting and to protect his neck and back.
18. Mr Zubary said that he was approached by one of the foremen on 5 March 2019 and was advised that he was finishing up at the end of the day³. Mr Zubary said he left the building site where he was working at Arncliffe and returned home on that day. At this time, he had been living with a cousin in Fairfield for the previous three years. That cousin was Mr Jarrah Al Hadedy who gave a statement on 25 October 2019 and, as indicated, was cross-examined on 29 July 2019.

¹ ARD page 6 [38].

² ARD pages 7-8.

³ ARD page 8 [49].

19. Mr Zubary stated⁴:

“I remain unable to work since 5 March 2019 when I was terminated. Effectively, I have not been able to work since the date of my injury on 20 February 2019.”

20. Mr Zubary said that he eventually consulted a GP on 1 August 2019. He said⁵:

“Throughout this time, I remained at home, often lying down on my back to rest, I was scared about the potential bad news that I would hear from the doctors. Because of this fear, I did not seek any medical help from 5 March 2019 to 1 August 2019.”

21. Mr Zubary stated that he survived over this period through the generosity of his friends and family. He said that it was suggested to him that he see “the Workers Doctor” by his cousin and friends towards the end of July.

Mr Al Hadedy

22. As indicated, Mr Zubary was supported by a statement by Mr Jarah Al Hadedy dated 29 October 2019.⁶ Mr Al Hadedy was born in 1989 and said that up until mid-October 2019, he had been residing with the applicant, whom he had known since 2012 and with whom he had been sharing accommodation.

23. Mr Al Hadedy said⁷:

“On 20 February 2019, I remember Nawaf came home after work and appeared to be in pain. I asked him what had happened and he told me he had an accident at work.

I saw him in great pain screaming at night and not being able to sleep because of the back pain.

After the accident he couldn’t move around like he did before.

Even if he wanted to go out, I ran errands for him and helped him around the house. I could see that he could not even have a shower by himself or go to the toilet

....

I used to work before his accident but after his accident I stop working to look after him.”

24. Mr Al Hadedy was cross-examined by Ms Balendra on 29 July 2020. On that occasion, the interpreter was Mr Charles Thomas, whose assistance was much appreciated.

25. Mr Al Hadedy was a cooperative witness, although at the start of cross-examination he appeared to misunderstand the nature of the proceedings and enjoined us to “hurry up”. He was employed installing solar panels and said he was at work. He said he had been at work for about two months and that before then he was with his wife and had stopped working elsewhere. When asked when he was employed, Mr Al Hadedy said that he could not remember dates.

⁴ ARD page 10.

⁵ ARD page 9.

⁶ ALD dated 6 July 2020.

⁷ ALD dated 6 July 2020.

26. His account then differed somewhat from the content of his statement. He said that he saw the applicant was in some pain at home. He said that the applicant did not say what the problem was at the time, but that later when Mr Al Hadedy asked him, Mr Zubary told him that he injured himself at work. He thought that conversation took place about 10 days later.
27. He had seen the applicant in pain and the applicant had told him that he could not speak to his doctor because there was a language barrier between them.
28. I interpose to observe that neither Mr Al Hadedy nor Mr Zubary appeared to even have the most rudimentary grasp of the English language.
29. Mr Al Hadedy said that when the applicant said he injured himself at work. Mr Zubary did not say why he “fell over” at work, but that he injured himself and complained of back pain.
30. He said that he visited the doctor with the applicant but that he was not allowed to go in.
31. Mr Al Hadedy said that the applicant got no benefit from the visit.
32. In the re-examination, Mr Al Hadedy confirmed that he had been told by the applicant that the injury had occurred at work.
33. Mr Al Hadedy was then excused.

CLINICAL NOTES

Fairfield Chase Medical and Dental Centre

34. Mr Zubary had been attending the Fairfield Chase Medical and Dental Centre since 2013.
35. The respondent lodged three certificates from the practice that had Mr Zubary off work on 6 February 2019, 25 February 2019 and 4 March 2019.⁸ The first certificate was issued by Dr Arafa Yehia, the second by Dr Vipal Mehta and the third by Dr Sabri Hasan. Each certificate was not in the approved WorkCover form, and each advised that Mr Zubary was unable to attend work “due to a medical condition.”
36. The clinical notes for those three dates showed that Mr Zubary attended for treatment of “sore throat, fever, body pain” (6 February 2019) “body aches and fever” (25 February 2019), and “cough, dyspnoea, asthmatic” (4 March 2019)⁹.
37. The notes also show that Mr Zubary attended on 13 April 2019 complaining of gastrointestinal problems, on 15 April 2019 complaining of a “chesty cough”, and on 23 July 2019 complaining of “URTI.” Mr Zubary did not attend again until 22 August 2019, when Dr Yehia took the following history:

“PT presented today, alleged that has had neck and shoulder pain started 20/2/19
 He was dismissed from work on 5/3/19 because of pain
 He presented to medical centre on 25/3 & 5/3 & 13/4 & 15/4 & 23/7/2019 with different complaints”.
38. I infer that Dr Yehia was in fact referring to 25 February 2019 rather than 25 March 2019, in accordance with what appears in the notes.
39. As to past history, the notes recorded that on 15 June 2015, Dr Kasha Barba recorded a history that Mr Zubary complained of a one week history of right sided shoulder pain, that there had been a car accident one year before, and that he lifted weights at the gym.

⁸ Reply pages 177-179.

⁹ ARD pages 41-42.

40. On 18 June 2015, Dr Yehia reported that Mr Zubary was suffering from pain in the right shoulder after lifting weights at the gym. No further complaints were made in the notes regarding the right shoulder.¹⁰
41. On 28 June 2016, Dr Yehia noted:¹¹
- “injury at work to finger nail
nail bed out
need removal under LA...”
42. On 22 February 2018, Dr Yehia recorded:¹²
- “recurrent LBP more mane (sic), radiates to sides and to back of legs....
Diagnostic imaging requested: X-ray – spine – lumbo-sacral--recurrent ABP
more mane, radiates to sides and back of legs..”
43. There is no record of any x-ray being taken at that time.
44. MRI scans of the cervical and lumbar areas of the spine were taken on 2 September 2019.
45. Mr Zubary made a supplementary statement on 10 March 2020. He said that he did not recollect making such a complaint to the doctor. He did not believe that he suffered from any back complaint prior to his workplace injury on 20 February 2019.
46. He said that he went to the Fairfield Chase Medical and Dental Centre to speak to Dr Yehia about the entry of 22 February 2018, but was advised that she no longer worked at the practice. He concluded by saying “I strongly deny that I suffered from any lower back complaint prior to my work injury”.

The worker’s doctor

47. As indicated, Mr Zubary transferred from the Fairfield Chase Medical and Dental Centre to a centre called Workers Doctor, and saw Dr Eric Lim.
48. Dr Lim recorded on 1 August 2019 that he had been consulted by Mr Zubary¹³.
49. Dr Lim took a general history, in the main consistent with the other histories given, except that he gave the date of 5 March 2019 as the date of injury. Dr Lim also noted that 5 March 2019 was the last day at work. I do not think much turns on that inconsistency.
50. Dr Lim arranged for a claim form to be signed.¹⁴

Investigations

51. Mr Zubary was referred by his GP for multi-positional MRI scans of the cervical and lumbar areas of the spine. The MRI of the lumbar spine occurred on 2 September 2019.¹⁵
52. Dr Matthew Lee, the radiologist, reported:

“L5/S1 right paracentral herniation contacting right S1 nerve root.”

¹⁰ Both entries at ARD page 54.

¹¹ ARD page 50.

¹² ARD page 44.

¹³ ARD page 67.

¹⁴ ARD page 9 [56].

¹⁵ Reply page 231.

Dr Bhisham Singh

53. Mr Zubary was referred to Dr Bhisham Singh, Orthopaedic Surgeon, for opinion and management. Dr Singh reported to the Workers Doctor practice on 17 March 2020.
54. Dr Singh's report, being that of a treating surgeon, was not detailed. He described the consultation as being a "follow-up." Dr Singh noted Mr Zubary's continued complaints of back and leg pain, and said he was writing to the insurer to obtain approval for a right L5/S1 injection. Dr Singh said:¹⁶

"It is unfortunate that he has not been able to have the injection as prescribed by me in October 2019."

55. Dr Singh's diagnosis was an L5/S1 disc protrusion, and he referred Mr Zubary for a further MRI.¹⁷
56. The report of 17 March 2020 was the only evidence from Dr Singh., There is no record of any further MRI scan being taken after 2 September 2019.
57. As will be seen, Mr Zubary indicated to his medico-legal referee, Dr Panjraton, that he had seen Dr Singh on 20 September 2019.

Medico-legal specialists

Dr Vijay Panjraton

58. Dr Vijay Panjraton, Orthopaedic Surgeon, was retained as Mr Zubary's medico-legal referee. On 25 November 2019, he took a consistent history that Mr Zubary had felt pain in his back whilst carrying heavy timbers. Dr Panjraton recorded¹⁸:

"Although he stayed at work after the injury he could not work properly, had intermittent days off and was noticeably not working normally. He was approached on 5 March 2019 and his employment terminated. At the time, he was still on his normal duties but not functioning properly but was trying his best but not to his normal capacity. His services were terminated because he could not manage the normal duties expected of him."

59. Dr Panjraton reported that Mr Zubary consulted his GP, Dr Yehia on 5 March 2019. Dr Panjraton recorded that Mr Zubary saw the doctor as he had a headache, felt feverish and generally unwell that day. Dr Panjraton said:

"[Mr Zubary] did not notify the doctor about his injury as he was apprehensive of any unknown consequences not being familiar with the system."

60. Dr Panjraton noted that Mr Zubary stayed at home until one of his cousins advised him of the "workers doctor" whom he consulted on 1 August 2019. Treatment subsequently had been by way of physiotherapy and one consultation with Dr Bhisham Singh, spinal surgeon.
61. Dr Panjraton noted the contents of Mr Zubary's statement and reviewed the imaging, which consisted of an MRI of the cervical spine on 30 August 2018 and a multipositional lumbar MRI scan on 2 September 2019.

¹⁶ Reply page 225.

¹⁷ ARD pages 225-226.

¹⁸ ARD page 33.

62. Dr Panjratan said¹⁹

“The consultation with the GP, as per the notes, seems to be because of general malaise and runny nose, etc., and he did not inform his GP about his back, stating that he was worried that he might jeopardise his future chances for work.”

63. In the examination, Dr Panjratan noted that Mr Zubary was in quite significant pain, was restless and that he limped on the right leg.

64. Dr Panjratan diagnosed relevantly an L5/S1 right paracentral herniation contacting the S1 nerve root.

65. Dr Panjratan was not optimistic about the prognosis, noting that when he assessed Mr Zubary it was nine months since the injury and that he was still in “severe pain, limping badly and visibly disabled”. Dr Panjratan thought that a further MRI scan should be obtained.

66. Dr Panjratan was told that Mr Zubary had “no previous problems.

Dr John Stephen

67. The medico-legal referee retained on behalf of the respondent was Dr John Stephen, Orthopaedic Surgeon. He reported on 23 October 2019 and 16 March 2020.

68. In his report of 23 October 2019²⁰, Dr Stephen took a consistent history of the injury. He noted (as did Dr Panjratan) that Mr Zubary’s employment was terminated because he was working too slowly. The history taken by Dr Stephen was that the applicant did not see a doctor until August 2019, and that he rested at home until that time.

69. Dr Stephen was told that Mr Zubary was in “perfect health” before February 2019. There had been no musculoskeletal problems, no medical illnesses and that Mr Zubary had been fit and healthy.

70. Dr Stephen noted on examination that Mr Zubary walked with a mild right antalgic limp. Dr Stephen thought Mr Zubary exhibited non-organic signs on examination of the low back and neck. Dr Stephen also noted widespread and “rather exaggerated tenderness” when Mr Zubary was lying prone.

71. Dr Stephen considered the MRI scan of the lumbar spine of 2 September 2019, agreeing with the radiologist that there was a degenerative change at the lumbo-sacral level “with a right paracentral herniation adjacent to the right S1 nerve root.” Dr Stephen thought that the nerve root was not displaced²¹.

72. Under “Diagnosis” Dr Stephen said:

“Whilst it is true that there is degenerative change of an unusual degree for a 24 year old person in Mr Zubary’s neck and that there is lumbosacral disc degeneration with a small disc prolapse adjacent to the right S1 nerve root, it is my firm opinion that Mr Zubary who exhibited multiple and flagrant inconsistencies throughout the physical examination, was not genuine in his complaints. It is possible that he may have sustained a temporary aggravation of pre-existing and asymptomatic degenerative change in the neck and low back as a result of his work activities, but this temporary aggravation was just that, temporary – and has long since ceased.”

¹⁹ ARD page 36.

²⁰ Reply page 190.

²¹ ARD page 193.

73. In his second report of 16 March 2020, Dr Stephen said:²²

“The applicant exhibited multiple and flagrant inconsistencies throughout the examination and that he was not genuine in his complaints”.

74. Dr Stephen reviewed the report of Dr Panjratana and noted that the inconsistencies identified by him on examination were not commented upon by Dr Panjratana.

75. On this occasion, Dr Stephen had available to him the clinical records from the Fairfield Chase Medical and Dental Centre. His retaining solicitors asked the following question:

“1. Noting the lack of objective evidence of a work injury, the lapse in time in the worker seeking treatment and reporting the injury (despite seeing his doctor on multiple occasions after 20 February 2019), the inconsistencies in his allegations, and the prior complaint of recurrent lower back pain radiating to the legs recorded in the clinical records, please provide your opinion on whether you consider the worker’s current injury arose out of or in the course of employment on 20 February 2019.”

76. Dr Stephen responded:

“You have provided additional information, which serves to reinforce my opinion that when I examined Mr Zubary there were no ongoing work related residual in relation to the neck or back. This opinion was largely based on those flagrant inconsistencies observed during physical examination. It is supported by inconsistencies in the history which were previously unknown to me and which have been described immediately above.”

SUBMISSIONS

Ms Balendra

77. On 15 July 2020, in her submissions Ms Balendra referred to Mr Zubary’s reason for failing to seek medical attention for his back until 1 August 2019.

78. Ms Balendra referred me to the three certificates of illness dated 6 February 2019, 25 February 2019 and 4 March 2019 .

79. Although the three certificates simply described the applicant as having “a medical condition,” the records of the GP revealed the nature of the condition. They did not relate to Mr Zubary’s back or neck, but related to fever, sore throat, body pain and other flu like symptoms. Moreover, Ms Balendra submitted, the GP records showed that the applicant attended both before and after his alleged injury for the same condition.

80. Mr Zubary had no problem in attending his GP regarding his illnesses, Ms Balendra said, and his reluctance to mention his back condition at the time was illogical and not credible. Neither did it explain the delay before he attended the “Workers Doctor” Dr Lim.

81. In any event, Ms Balendra argued, the result was that there was no record of injury that could be described as being contemporaneous, and the Commission accordingly was dependent upon Mr Zubary’s statement, which was not made until October 2019, some months later.

82. I was referred to Dr Stephen’s two reports. Ms Balendra submitted that I would accept Dr Stephen’s opinion that the “flagrant inconsistencies” noted during the consultation showed the applicant to be unreliable, to the extent that his credit became suspect.

²² ALD page 7.

83. Ms Balendra submitted that the applicant had not been truthful and forthcoming, and that his evidence was accordingly unreliable in view of the inconsistencies to which she had referred. Ms Balendra submitted that Mr Zubary was not able to provide objective evidence supporting his allegation that he was injured as he described. Against that background, Ms Balendra submitted that Mr Zubary's explanation for failing to seek medical help until August 2019 was unacceptable.
84. The case adjourned at that point, and Ms Balendra resumed her submissions after cross-examination of Mr Al Hadedy had concluded when the matter resumed on 29 July 2020.
85. Ms Balendra submitted that I could put no weight on Mr Al Hadedy's evidence. He had no independent recollection of dates and his oral evidence was inconsistent with his statement.
86. The contemporaneous evidence in the clinical notes demonstrated that Mr Zubary attended on his GP on several occasions 20 February 2019 and 22 August 2019 when Dr Yehia was first told of the work-related injury. I would not be satisfied either that there was a language difficulty between the applicant and the practitioners within the Fairfield Chase Medical and Dental Centre. There was no mention of it in the clinical notes, which were detailed. I would not be satisfied, Ms Balendra argued, that there was either a language difficulty between the medical practitioners and Mr Zubary, or that he was reluctant to report a work injury, as he had done so in relation to his fingernail in 2016.

Mr Morgan

87. Mr Morgan first addressed the question of notice which had been raised in the dispute notice, but he submitted not pressed with vigour by the respondent.
88. Section 254 of the 1998 Act provides relevantly:
 - (1) Neither compensation nor work injury damages are recoverable by an injured worker unless notice of the injury is given to the employer as soon as possible after the injury happened and before the worker has voluntarily left the employment in which the worker was at the time of the injury.
 - (2) The failure to give notice of injury as required by this section (or any defect or inaccuracy in a notice of injury) is not a bar to the recovery of compensation or work injury damages if in proceedings to recover the compensation or damages it is found that there are special circumstances as provided by this section.
 - (3) Each of the following constitutes special circumstances-
 - (a) the person against whom the proceedings are taken has not been prejudiced in respect of the proceedings by the failure to give notice of injury or by the defect or inaccuracy in the notice,
 - (b) the failure to give notice of injury, or the defect or inaccuracy in the notice, was occasioned by ignorance, mistake, absence from the State or other reasonable cause".
89. Mr Morgan submitted that the provisions of subsection (1) did not apply because Mr Zubary did not leave his employment voluntarily. He submitted that the bar on the payment of compensation in subsection (1) was dependent upon a voluntary departure as the word "and" in the third line meant that there was a conjunctive element in the subsection.

90. In any event Mr Morgan submitted that the applicant has provided a reasonable explanation for his failure to give notice, being his ignorance of the workers compensation system.
91. Mr Morgan referred to the evidence contained in the document described in the Reply as “Third Factual Report.”²³The authors of that report advised that the respondent company was in liquidation and that no records were available. The contact from the respondent, a Ms Marques had advised the investigator that no injury was recorded to the respondent or to the builder but that she could not help any further.
92. Mr Morgan submitted that accordingly no prejudice could be shown to the respondent and that in any event the explanation for Mr Zubary’s failure to give notice was a reasonable cause in view of his being a person who spoke no English and who arrived in the country as a refugee.
93. Mr Morgan referred to the provisions of s 261 of the 1998 Act. This provides relevantly:
- “(1) Compensation cannot be recovered unless a claim for the compensation has been made within 6 months after the injury or accident happened or, in the case of death, within 6 months after the date of death.
- (1)
- (2)
- (3) The failure to make a claim within the period required by this section is not a bar to the recovery of compensation if it is found that the failure was occasioned by ignorance, mistake, absence from the State or other reasonable cause, and either-
- (a) the claim is made within 3 years after the injury or accident happened or, in the case of death, within 3 years after the date of death...”
94. Mr Morgan submitted that this section has no application because the claim was made within the six-month period, and the claim form was signed on 1 August 2019.²⁴ Moreover, Mr Zubary was paid interim payments of compensation until 24 October 2019.
95. The respondent’s case, Mr Morgan submitted, relied upon the opinion of Dr Stephen, which was that an aggravation had occurred at the time of the incident, but that it had ceased. Mr Morgan referred to the MRI scan of 2 September 2019 and the diagnosis given by Dr Singh on 17 March 2020 in submitting that the pathology revealed in Mr Zubary’s lumbar spine was not inconsequential.
96. Mr Morgan referred to Dr Stephen’s dismissal of Mr Zubary’s complaints as being not genuine. Mr Morgan compared that opinion to the acceptance by Dr Panjraton of Mr Zubary’s bona fides. Dr Panjraton noted Mr Zubary’s entry into Australia as an asylum seeker, who was not entitled to Centrelink payments. I was referred to the summary of treatment described by Dr Panjraton which, it was submitted, was consistent with the clinical notes.
97. Mr Morgan also relied upon the description given by Dr Panjraton on examination. Dr Panjraton reported that Mr Zubary seemed to be in pain and discomfort, and was limping on his right leg, and I would accept that he was incapacitated.
98. Mr Morgan concluded by submitting that Mr Zubary was a man who had come into the community from Christmas Island, with a background of having fled his native country. It was plausible that he would have a fear of “making waves.”

²³ Reply page 173.

²⁴ ARD page 19.

99. Bearing that in mind, his reasons for not reporting his injury to his employer or his doctors were plausible. There was no argument that when he began his employment Mr Zubary was then only 23 years old and was capable of doing the arduous work of a formwork labourer.
100. Mr Morgan also referred to the supportive evidence from Mr Al Hadedy. He conceded that the inconsistencies referred to by Ms Balendra would affect the weight to be given to that evidence, but the essential corroboration was present. Mr Al Hadedy did confirm that he was told that Mr Zubary's injury occurred at work, albeit 10 days later than he said in his statement. Mr Morgan submitted that the evidence was part of an overall picture that established that Mr Zubary's injury occurred as described.
101. Mr Morgan further submitted that the employer had been disinterested, which in itself tipped the evidentiary balance in favour of Mr Zubary's account. Mr Morgan stressed the probabilities of such an injury occurring. He said that the combination of Mr Zubary's background and his unusual back pathology were relevant matters, and the actual circumstances described by Mr Zubary had that degree of detail that was too detailed for a man of no education to invent, as I understood the submission.
102. Mr Morgan submitted that I would be satisfied that Mr Zubary had no current work capacity.

Ms Balendra in reply

103. Ms Balendra submitted that whilst Mr Zubary was indeed an asylum seeker with limited English, the submission that he did not want to "make waves" had to be seen in the light of the fact that Mr Zubary had no qualms about presenting to the medical centre, and that he was not concerned about having time off.
104. Inasmuch as Mr Morgan might have suggested that Mr Zubary's statement had not been challenged, Ms Balendra said that it had always been clear that the respondent had issues with Mr Zubary's case, and indeed his second statement was an attempt to address some of them. It could not be argued that Mr Zubary had been taken by surprise as he had already been made aware of the respondent's concerns.

Discussion

105. The onus of proof lies upon an applicant. In *Morkos v Primo Retail Pty Ltd*²⁵ Senior Arbitrator Capel summarised the relevant authorities. He said from [134]:

"The issue of causation must be determined based on the facts in each case. The accepted view regarding causation is set out in *Kooragang Cement Pty Ltd v Bates*²⁶ where Kirby J stated:

'The result of the cases is that each case where causation is in issue in a workers compensation claim must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase 'results from' is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent injury or death, will not, of itself, be sufficient to establish that such incapacity or death 'results from' a work injury. What is required is a common sense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation'."

²⁵ [2020] NSWCC 65.

²⁶ (1994) 35 NSWLR 452; 10 NSWCCR 796 (*Kooragang*) [463].

106. In *Department of Education & Training v Ireland*,²⁷ President Keating considered the principles regarding the discharge of the onus of proof. He stated:

“The principles relevant to the discharge of the onus of proof were discussed in *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246 (16 October 2008) (*Nguyen*) where McDougall J (McColl and Bell JJA agreeing) said at [44] – [48]:

- ‘44. A number of cases, of high authority, insist that for a tribunal of fact to be satisfied, on the balance of probabilities, of the existence of a fact, it must feel an actual persuasion of the existence of that fact. See Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336. His Honour’s statement was approved by the majority (Dixon, Evatt and McTiernan JJ) in *Helton v Allen* (1940) 63 CLR 691 at 712.
45. Dixon CJ put the matter in different words, although to similar effect, in *Jones v Dunkel* (1959) 101 CLR 298 at 305 where his Honour said that ‘[t]he facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied’. Although his Honour dissented in the outcome of that case, the words that I have quoted were cited with approval by the majority (Stephen, Mason, Aickin and Wilson JJ) in *West v Government Insurance Office of NSW* (1981) 148 CLR 62 at 66. See also Stephen J in *Girlock (Sales) Pty Limited v Hurrell* (1982) 149 CLR 155 at 161–162, and Mason J (with whom Brennan J agreed) in the same case at 168.
46. It is clear, in particular from *West* and *Girlock*, that the requirement for actual satisfaction as to the occurrence or existence of a fact is one of general application, and not limited to cases where the fact in question, if found, might reflect adversely on the character of a party or witness.
47. In *Malec v JC Hutton Pty Limited* (1990) 169 CLR 638 Deane, Gaudron and McHugh JJ said at 642-643:

“A common law court determines on the balance of probabilities whether an event has occurred. If the probability of the event having occurred is greater than it not having occurred, the occurrence of the event is treated as certain; if the probability of it having occurred is less than it not having occurred, it is treated as not having occurred.”
48. On analysis, I think, what their Honours said is not inconsistent with the requirement that the tribunal of fact be actually persuaded of the occurrence or existence of the fact before it can be found. On their Honours’ approach, what is required is a determination of the respective probabilities of the event’s having occurred or not occurred. There is nothing in that analysis to suggest that the determination in favour of probability of occurrence should not require some sense of actual persuasion.”²⁸

107. There are unusual factors about this matter that put it in a different category to most cases where the credit of the claimant is put in issue. Mr Morgan relied on them to explain the more curious inconsistencies and behaviour of Mr Zubary.

²⁷ [2008] NSWCCPD 132 (*Ireland*).

²⁸ *Ireland* [89].

108. Mr Zubary's formal education ceased when he completed Year 9 when he was in Iraq. Neither Mr Zubary nor Mr Al Hadedy could speak much English at all and one has sympathy for a person in Mr Zubary's position who has come to this country as an asylum seeker, having made his way in what must have been a difficult and dangerous journey from his homeland in Iraq. His refugee status apparently made him ineligible for Centrelink payments and one can understand his hesitancy in potentially placing his employment in jeopardy by making a complaint.
109. It also needs to be borne in mind that Mr Zubary's injury does have a measure of support in that it is common ground that Mr Zubary suffers from an unusual pathological symptomatology for someone of such young years. Further, as submitted by Mr Morgan, the detail of the injury itself was very particular, and quite consistent with the mechanism by which an injury such as Mr Zubary's back injury might have been caused.
110. Mr Morgan's reliance on the examination findings by Dr Panjraton that Mr Zubary seemed to be in pain and discomfort, and was limping on his right leg does not assist regarding the question of causation. It is foreseeable that Mr Zubary's pathology might have caused symptoms for reasons other than an injury at work. The symptoms may well have been of gradual onset and may well have occurred at a later time than Mr Zubary alleged.
111. Mr Morgan observed that no evidence has been lodged from the employer regarding the allegations Mr Zubary has made. This, however, is of little comfort to Mr Zubary, as he says himself that he did not complain to anyone about his symptoms in the period between 20 February 2019 and 5 March 2019 when he was let go.
112. Dr Stephen's summation of Mr Zubary's complaints was scathing. Dr Stephen found Mr Zubary's presentation to be somewhat histrionic, reporting "rather exaggerated tenderness", and "flagrant inconsistencies" on examination. It is not unusual in this jurisdiction for claimants, when being examined by medical practitioners retained for the insurer, to become somewhat florid in their presentation.
113. I do not regard Dr Stephen's comments as being reasons that I should not accept that Mr Zubary has any symptoms at all. The imaging has demonstrated an unusual pathological finding in Mr Zubary's lumbosacral spine. Dr Stephen acknowledged that himself, describing it as an unusual degree of degenerative change in both the cervical and lumbosacral areas of the spine, and noting the disc prolapse seen on MRI scanning. I note in passing that Dr Stephen thought the prolapse was "adjacent" as a right S1 nerve root, whereas the radiologist Dr Lee found that it was in fact contacting that nerve root.
114. Thus I am satisfied that Mr Zubary does suffer from symptoms caused by his unusual pathological condition. However, I have no sense of persuasion that it was his workplace circumstances that rendered his pathological condition symptomatic. Although Mr Morgan submitted that the respondent had not put on any evidence regarding the circumstances of the alleged injury, there has been a denial from Mrs Marques, whom I infer was an officer of the employer who had managed to establish, prior to the records of the company becoming unavailable due to its being put in liquidation, that no record of injury appeared. This is hardly surprising, as Mr Zubary said he made no record.
115. Mr Morgan's reference to the summary of treatment recorded by Dr Panjraton as being consistent with the clinical notes, does not advance his case very far. That is because the clinical notes do no more than demonstrate that whilst Mr Zubary was with Fairfield Chase Medical and Dental Centre, he complained of a number of problems, but not his back injury. Further, the clinical notes from Workers Doctor recorded a consistent history of symptomatology, but were of no assistance regarding the cause of Mr Zubary's back or neck pain, as Dr Lim and other GPs at that practice were reliant on the accuracy of the history given to them some six months after the alleged injury, and in the face of an absence of complaint to the practitioners at Fairfield Chase Medical and Dental Centre.

116. I note the content of Mr Zubary's second statement of 10 March 2020. Mr Zubary's denial that he complained about low back pain on 22 February 2018, I find difficult to accept. The entry by Dr Yehia was not just of lower back pain but also specifically recounted radicular pain to the sides and the back of the legs. It is difficult to imagine a busy GP entering a false entry in the clinical notes.
117. It very well may be that Mr Zubary made that complaint, but that he has subsequently forgotten about it. There was only the one entry about his lower back pain, and the requested x-ray of the lumbosacral spine was never taken. Mr Zubary has pathology in his spine that Dr Stephen accepted was unusual for someone of his young years, and it would be unsurprising if that pathology had not caused symptoms in the past.
118. What is surprising is that Mr Zubary insisted in his statement of 10 March 2020 that he had never made such a complaint. It is difficult to understand what Mr Zubary expected Dr Yehia to do or say, had he been successful in confronting her. There is no inference available that the mere fact of his attendance at the medical practice where she used to work would give rise to a finding that she had either been mistaken or malevolent in making that entry.
119. Mr Zubary's supplementary statement of 10 March 2020 did not refer to any further treatment he may or may not have been having. In his earlier statement of 3 October 2019, he mentioned that he was to see Dr Singh, but no further evidence was given as to subsequent treatment. I note that on three separate occasions further imaging was requested – 22 February 2018 (clinical notes), 25 November 2019 (Dr Panjraton) and 17 March 2020 (Dr Singh) – but that there is no record of it being obtained. The impression given by Mr Zubary's history is that he was not interested in having his condition treated. He did not have the recommended injection Dr Singh prescribed in September or October of 2019, he did not have any of the requested further imaging carried out, and he did not bother to give an update of his treatment in his supplementary statement of 10 March 2020, which might reasonably have been expected.
120. I was not assisted by Mr Al Hadedy's evidence. As I indicated, in cross-examination I found him co-operative, but the lack of consistency between the evidence he gave in person and his statement contributed little to the case. He did say that he was told that Mr Zubary had been injured at work, however the contrast between his statement, which asserted Mr Al Hadedy had been told on 20 February 2019 and his oral evidence that said Mr Al Hadedy did not discover for 10 days that it was a work injury made either proposition debatable, and it raises the question as to why Mr Zubary did not earlier tell Mr Al Hadedy that his condition had been caused by a work injury.
121. I now turn to the inconsistencies within the evidence.
122. Firstly, Mr Zubary alleged that he worked after suffering his injury on 20 February 2019 until 5 March 2019, when one of the foremen terminated his employment. The reason recorded by Dr Panjraton was that Mr Zubary could not manage the normal duties required of him. Mr Zubary did not make that claim in his statement, but clearly inferred it by the juxtaposition of his allegation that he was suffering at work and that he was not able to attend work on three or four occasions.
123. The three certificates issued by the local doctors on 6 February 2019, 25 February 2019 and 4 March 2019 demonstrated that Mr Zubary was not being truthful in that claim, as the clinical notes showed that they were issued because Mr Zubary had been suffering flu like symptoms on each occasion.
124. Secondly, Mr Zubary's explanation for not complaining about his injuries (which at that time included the cervical spine) was given in his statement as his fear about "potential bad news" from his doctors, and he said he did not seek any medical help between 5 March 2019 and 1 August 2019. Mr Zubary was not being truthful in that claim either, as the clinical records showed that he attended his local doctors on 13 April 2019, 15 April 2019 and 23 July 2019, again for flu like symptoms.

125. Thirdly, as to his fear of “potential bad news” it is not plausible that if Mr Zubary was in serious pain he would not wish to seek treatment, regardless of the cause. If Mr Zubary had, for instance, broken a bone, was he suggesting that he would not attend a doctor for fear that he would be told it was broken? Such a proposition is untenable.
126. If Mr Al Hadedy had been correct in his supporting statement that Mr Zubary was “screaming in pain at night,” it is implausible that Mr Zubary would have refrained from seeking medical attention.
127. Fourthly, Mr Zubary was also quoted by Dr Panjraton as saying that he was apprehensive of any unknown consequences, being unfamiliar with the system, so he did not complain to his doctors. That assertion is also difficult to accept.
128. I take into account the fact that Mr Zubary may have been more confident when he discovered the medical practice called “Workers Doctor” and that by that time he had been advised by his friends and family to see Dr Lim. The fact that Dr Lim had him sign a claim form at the time of consultation does give some credence to Mr Zubary’s explanation that he was concerned about the process of claiming workers compensation. However the delay in seeing The Workers Doctor could equally be explained by a later reconstruction of events by Mr Zubary. He may well have become convinced that his explanation of the injury was as he described it to Dr Lim, but there is no corroborative contemporaneous support for that account.
129. Fifthly, if Mr Zubary was unfamiliar with the system, he was certainly not unfamiliar with his local medical practice, which he had been using since 2013. He was also happy to discuss his prior work injury in 2016, when his fingernail required treatment, and his 2015 right shoulder injury. It is not plausible that Mr Zubary refrained from complaining to his local doctors because he was unfamiliar with the system. His expressed reluctance to complain about his injuries to his GP loses probative weight in the light of those entries
130. Sixthly, a further reason proffered on Mr Zubary’s behalf was by Mr Al Hadedy that there was a language barrier between Mr Zubary and his doctor. I have grave reservations as to the contents of Mr Al Hadedy’s statement in any event, but note that there was no mention of any such difficulty in the six year history of Mr Zubary’s not infrequent attendances on Fairfield Chase Medical and Dental Centre.
131. The most damaging piece of evidence to Mr Zubary’s case, however, and the one that has caused me to have no sense of persuasion that he sustained an injury on 20 February 2019 was the note made by Dr Yehia on 22 August 2019. She said that Mr Zubary had presented at her practice on five occasions between 25 February 2019 and 23 July 2019 without mentioning the alleged injury, but on 22 August 2019 alleged that he had injured his neck and shoulder pain on 20 February 2019, and had been dismissed from work on 5 March 2019 because of pain.
132. There is always a danger in making decisions regarding causation on the basis of entries within clinical notes, which has been remarked on in the superior Courts and tribunals.²⁹ However, an entry such as that does disclose that Dr Yehia thought it of such importance that the lack of complaint should be noted. I infer that Dr Yehia went to the trouble of making that entry because she had some reservations as to the motives Mr Zubary would have for withholding that complaint from his local doctors, who had been treating him since 24 June 2013.
133. In view of my determination, there is no need to consider Mr Morgan’s submissions regarding notice and claim pursuant to ss 254 and 261 of the 1998 Act.

²⁹ See e.g. *Mason v Demasi*[2009] NSW CA 227 per Basten JA at [2]; *Qannadian v Bartter Enterprises Pty Limited*[2016] NSWCCPD 50 per President Judge Keating at [35].

SUMMARY

134. For the above reasons, the applicant has failed to satisfy his onus.

135. There will be an award for the respondent.

