

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 1627/19
Applicant: HUSSEIN ZEHOOR
Respondent: KAMEL MOURAD
Date of Determination: 4 July 2019
Citation: [2019] NSWCC 233

The Commission determines:

1. Award in favour of the respondents.

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

Ross Bell
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 ROSS BELL, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. This Application to Resolve a Dispute is in respect of a claim for injury to the lumbar spine in two incidents with the respondent; early January 2016, and February 2016. The insurer denied the claim in a notice dated 4 July 2018.

ISSUES FOR DETERMINATION

2. The following issues remain in dispute:
 - (a) Whether Mr Zehour is a worker or deemed worker for the purposes of the Act (ss 4 and 5 of the *Workers Compensation Act 1987* (the 1987 Act) and Schedule 1 of the *Workplace Injury Management and Workers Compensation Act 1998*;
 - (b) Whether Mr Zehour suffered injury arising out of or in the course of his employment with the respondent. (s 4 1987 Act)

PROCEDURE BEFORE THE COMMISSION

3. 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. The parties were informed of my intention to determine the dispute without holding a conciliation conference or arbitration hearing.
4. The parties attended a conciliation conference and arbitration hearing on 6 June 2019. 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

Oral Evidence

5. There was no oral evidence adduced.

Documentary Evidence

6. The following documents were in evidence before the Commission and I have taken them into account in making this determination:
 - (a) Application to Resolve a Dispute and annexed documents.
 - (b) Reply and annexed documents.
 - (c) Application to Admit Late Documents dated 28 May 2019 with Factual Investigation Report of Lee Kelly Commercial Investigations dated 7 May 2019.

- (d) Page of clinical notes replacing blank page 85 of the annexures to the Reply, "Progress/Clinical Notes" commencing with the entry for 16 October 2016 which was tendered and admitted at the conciliation/arbitration.

Documents relevant to the issue of whether Mr Zehour was a "worker" as defined in s 4 of the 1987 Act

7. Mr Zehour's statement dated 2 April 2019 sets out his background. He was born in Australia and then moved to Lebanon at age four, and returned to Australia at age 16 in approximately 1997. He worked as a barber until 2013 when he became full-time carer for his cousin, a paraplegic. He was on CentreLink payments doing this until 2015 when he began looking for work as a barber, but finding work was difficult.

8. Mr Zehour goes on,

"8. I continued to apply for jobs online for approximately 1 week before Kamel Mourad approached me in my home in December 2015. Kamel was looking for workers and knew that I was unemployed at the time. He told me it was a job which required me to work 7 days a week for the next 7 weeks and in exchange for undertaking the duties instructed of me, I would be paid a base of \$500 a week plus superannuation. He told me to provide him with my Tax File Number and he would organise an accountant to see to my tax and superannuation. Mr Mourad told me he would pay me on a weekly basis, on either the Monday or the Friday. I accepted Mr Mourad's offer and he asked me to start from 9am each day until 5:30pm. My ex-wife, Nancy was present at the time of this conversation.

9. I commenced working for Mr Mourad in January 2016 and gave him my tax file number on my first day of work."

9. Mr Zehour states that because his carer's pension had ceased and he could not find work as a barber, he was concerned about being able to support his family and pay the rent. He was therefore pleased to receive the offer of a job from Mr Mourad.
10. Mr Zehour describes the nature of the work, with lifting and carrying food and cooking materials in and out of the warehouse, and deliveries. He states that Mr Mourad made three payments of \$500 to him, and that he raised the non-payment of further wages owed with Mr Mourad
11. Mr Zehour states that on 12 February 2016, he was instructed by Mr Mourad to deliver stock to a customer at his home, and that he went with another worker, Mr Kamal Mourad's son, Hassan Mourad.
12. Mr Zehour also made a statement to the insurer's investigator on 13 March 2018 which on the issue of employment is generally consistent with the later statement on the employment issue. An exception is his statement that Mr Mourad paid him \$500 seven times as opposed to the three times alleged in the later statement.
13. Mr Zehour's former spouse Ms Nancy Mourad says in her statement of 14 February 2019, "I was married to Hussein Zehour. Hussein and I separated in December 2018." She says that in December 2015 she took a telephone call on their landline from Mr Kamel Mourad asking for Mr Hussein with words to the effect of, "I need to speak to Hussein Zehour. I know he is not working and I want him to work for me." She states that she told Mr Mourad that Mr Zehour was not at home. She reports that Mr Mourad later arrived at their home and spoke with Mr Zehour.

14. Ms Mourad goes on to recount the conversation between Mr Zehour and Mr Mourad about offering Mr Zehour work at the rate of \$500 per week for the period of the work unloading containers of oil and other material and delivering it to customers over a period of three months. She states that Mr Mourad told Mr Zehour to get his tax file number for Mr Mourad's accountant. She also says that Mr Mourad said he needed Mr Zehour to start work at 6:30 am and work seven days.
15. She describes a visit to the workplace with Mr Zehour's breakfast, where she recalls seeing Mr Mourad instructing three or four other workers where to put gallons of oil, olives and other foods, and what goods to give to customers.
16. Ms Mourad says she understood Mr Zehour to be an employee of Mr Mourad's business and not a volunteer. She says that she is sure that Mr Zehour would not have accepted as they were struggling financially, and it was important for Mr Zehour to find paid employment.
17. Mr Kamal Mourad has two statements. In the statement to police on 17 February 2016, Mr Mourad said that he was "... the owner of a brokerage business that imports olives, olive oil and herbs and spices from Lebanon. I get it to Australia, and then send the goods to the families who make orders." He goes on to state that he casually employed several family members, including Mr Zehour. He states that the job was for one month per year, as it is seasonal.
18. Mr Mourad goes on to state that a delivery of \$500 worth of stock was made to a customer on 12 February 2016 by his son Hassan Mourad and Mr Zehour.
19. He also states that on Monday 15 February 2016, he paid the applicant \$500 for the week before. He states that he would in a normal situation have paid the applicant in food goods, but that he knew he needed the money and therefore paid him in cash.
20. In his later statement, to the investigators in this claim, on 22 March 2018, Mr Mourad says that he does,

"... not have an official business. People in Lebanon will send goods, such as olive oil, to family members in Australia and through me. The olive oil is hand-made, done by family members. Sometimes they made things at home and they would send it to their children. Sometimes I would import goods from different suppliers and [sell] them myself."
21. Mr Mourad says he has an ABN and "customs number" and that he imports around 10,000 litres of olive oil a year. He says that the applicant has never worked for him and he has never paid him for any work.
22. The unsigned statement of Mr Mourad's daughter Bouphana Matar and that of his son Hassan Mourad are of very limited probative value. Neither was available to give oral evidence if required, or even to sign their statements. There is reference in each to payment to Mr Zehour by Mr Mourad on one occasion, although this is hearsay.
23. The letter of Kelly Commercial Investigations dated 7 May 2019 reports to the respondent's solicitors that Mr Mourad, and his two children who have unsigned statements in evidence, "declined to co-operate" in providing further evidence.

Reliability of statements of the applicant and Mr Kamel Mourad

24. The reliability of the statements of both Mr Zehour and Mr Kalam Mourad was raised in submissions. There was no application for cross-examination or examination in chief of any witness at the hearing. The issues were clear and it was apparent that the parties were content for the matter to be determined without oral evidence.

25. The issue of conflict and violence between Mr Zehour and Mr Kamel Mourad means the statements from them about each other must be treated with caution.
26. There are quite pronounced inconsistencies between Mr Mourad's two statements. The first was to the police in the context of the arrest and charging of Mr Zehour after the confrontation and assault. The later statement was made to an investigator in relation to the claim of injury. Mr Mourad says in his second statement that the discrepancies might be due to translation issues with the first statement, but the statement was signed by Mr Mourad, presumably after the contents were checked by him. There are too many direct statements about the existence of his business and payment made to Mr Zehour for these to be put down to mere translation errors.
27. My view is that Mr Kamal Mourad's second statement is self-serving and intentionally vague on key points which were clear in the first statement on the issues about the business and whether Mr Zehour was an employee. I do not find Mr Mourad a reliable witness in this regard.
28. The Respondent raises inconsistencies in Mr Zehour's evidence as to how many times he was paid \$500 by Mr Mourad. In his first statement, he says he was paid that amount seven times but in the later statement he says this occurred three times. Mr Mourad says he made one payment of \$500 to Mr Zehour. The respondent also submits that Mr Zehour says his hours were 9:00 am to 5:30 pm seven days per week, but Ms Nancy Mourad says Mr Mourad said it was a 6:30 start.
29. The variation in Mr Zehour's recollection as to how many times he was paid \$500 for the work is of some concern in assessing Mr Zehour's reliability as a witness.
30. Ms Mourad states she was listening in on the conversation from another part of the dwelling. She may have misheard the detail as to the commencement time of 6:30 am. Ms Mourad and Mr Zehour had separated by the time of her statement which gives a degree of independence to what she says, and her recollection accords overall with what Mr Zehour says about the agreement to work for Mr Mourad. This assists Mr Zehour's claim to have been a worker employed by Mr Mourad.
31. Mr Zehour's reliability as a witness is discussed further below regarding the issue of injury on which I find his statements to lack credibility.

Whether Mr Zehour is a "worker" for the purposes of the Acts

32. I note that, apart from Mr Mourad's blanket denial in his second statement that he employed Mr Zehour, there is nothing from the respondent to challenge Ms Nancy Mourad's statement; for example, the circumstances of Mr Kamal Mourad's visit to see Mr Zehour at home. Mr Mourad told the police he paid Mr Zehour \$500.00 for a week's work. However, in his second statement says he did not pay him at all; and nor did Mr Zehour do any work for him. I do not accept these assertions of Mr Mourad in his second statement.
33. The statement of Ms Nancy Mourad and Mr Kamel Mourad's first statement to the police are sufficient to establish that there was a contract of employment settled at Mr Zehour's home when he was visited by Mr Mourad in December 2015. I find there was a clear intention to enter into a contractual arrangement together with offer and acceptance.
34. This was then confirmed by the work done by Mr Zehour in January and February 2016 including a delivery with Mr Mourad's son and the payment to Mr Zehour of at least one week's pay of \$500.

35. As I have found above, the statements of Mr Mourad's children are of little value, but they are consistent with Mr Mourad's first statement as to having paid Mr Zehour for work done.
36. For these reasons I find that Mr Zehour was a worker for the purposes of s 4 of the 1987 Act.

Did Mr Zehour suffer injury in the course of his employment with the respondent?

Relevant documents

37. Mr Zehour says in his 13 March 2018 statement that,

"The first incident occurred in early January 2016, when [I was lifting] a big box about one metre square. It was about 65 kg. That box had flour, beans and other raw cooking materials. I was taking it from the container into the warehouse.

I put my foot my left foot on the first step, which was the box, then when I went to put my right foot on the second step inside the warehouse and the box that was being used as a step moved and I fell down. I fell down to the right. I was in pain after I fell. I had lower back pain.

No one gave me any assistance or took me to the doctor. Everyone was busy doing their work. I reported it to Kamel Mourad. He did not care. He told me to take a break for a couple of minutes.

Then, after that I felt constant lower back pain. I told Kamel Mourad that I had a sore back but he always said I felt sore because I had never worked a job like this before.

On 14 February 2016, I was manually delivering from the warehouse to people's cars. The customers come and collect deliveries. My back was sore and I was unstable because of it. I was carrying two 20-litre containers full of olive oil and olives and herbs, one in each hand, out to a customer's car. I went to step out of the warehouse. I put my foot on the box and, because the box was unstable, I fell over. I injured my shins when I fell. I still have the scars.

After that fall I did not want to work there anymore. Kamel Mourad said he was not going to pay me. I knew there was one of the customers who owed Kamel Mourad \$500.00 so I went and collected that because that customer rang me up and told me to go and collect it.

I told Kamel Mourad that I had collected the money. Then Kamel Mourad kept ringing my phone. Then I got angry because I was busy. I think I was at the doctor's at Rockdale. I said to give me a couple of hours. Kamel Mourad kept ringing me and abusing me.

Then I went to see him to give him the money. I was angry because all he cared about was work and business and did not care about me. I had a knife on me and I wanted to kill him with the knife. His son went witness against me. When I was getting in the car he hit himself with the door. He said that I hit him there. I was sentenced to three years. I went to jail for 18 months."

38. In the later statement, Mr Zehour gives a similar account of the alleged falls. Mr Mourad denies any knowledge of Mr Zehour injuring himself at his premises. Ms Nancy Mourad does not comment as to any knowledge of an injury to Mr Zehour.
39. There are prison medical records including a Justice Health & Forensic Mental Health Network "Reception Screening Assessment" of 18 February 2016 which records "backpain".
40. A page accepted as being what blank page 85 of the Reply annexures should show was tendered at hearing, which is Progress/Clinical Notes of 16 October 2016 with nurse entry (emphasis added), "review of patient with ongoing lumbar back pain – put on my list by mistake - Works in prison as a painter, **does not remember injuring his back**, has tried Panadol, Panadeine, Nurofen with no effect - Has no D&A issues - Has not had a back x-ray – plan refer to GP". (I infer that "D&A" refers to "Drug and Alcohol.")
41. The records of Dr Ismail after Mr Zehour's release from prison commence from the entry on 19 June 2017, "Just came out of jail, severe lower back ... Tender lower back reduced ROM ... ?Disc bulge ... analgesia/ Refer for CT scan ..."
42. On 20 June 2017, Dr Ismael reports the CT results, "CT Lower spine showed L5/S1 disc Bulge Complicated by S1 NRC". Other consultations regarding the back followed over the next year or so.
43. The first note as to the cause was on 10 August 2018, "severe pain lower back. (Patient stated had a fall at work early 01/2016 and 8/2/2016")
44. The note for 30 August 2018 reports, MRI Lumbar spine showed L3/4, L4/5-disc bulge"

Discussion

45. As noted above, the violent assault by the applicant on Mr Kamal Mourad, also involving his son, means to me that the statements of each of them on the issue must be treated with care. The unsigned statements of Bouphane Mater and Hassan Mourad are of little value on this issue of dispute for the same reasons discussed above.
46. Ms Mourad's statement is silent on this issue. Given her detailed account of the process of employment, it is significant that there is complete silence from her as to whether Mr Zehour said anything to her about the two alleged falls at work. It can be inferred that had there been any conversation about injury at work that Ms Mourad would have been asked about it for the purposes of the proceedings. That she has not provided any statement about either allegation of injury does not assist Mr Zehour.
47. Mr Zehour states that he had two falls at the respondent's dock, one in "early" January 2016 and one in February 2016, with several different dates appearing in the histories and statements. There are no statements from witnesses to either alleged fall. Mr Zehour says he told Mr Mourad about the fall. Mr Mourad flatly denies this.
48. Mr Zehour says in the first statement that after the fall in January. "Then after that I felt constant lower back pain." There is no medical evidence of any visit to a doctor following the first fall he alleges.
49. Mr Zehour states that he attempted to attend his general practitioner, Dr Ismail, because of his back pain after the second fall and there were no appointments available. This was supposedly immediately before the physical altercation with Mr Mourad and Hassan Mourad, after which he was taken into custody by police. This may have been on 16 February 2016.

50. Being taken into custody was submitted by Mr Zehour's representative to be the explanation as to why there is no contemporaneous record of a consultation about the injury with the general practitioner.
51. I do not find Mr Zehour's evidence convincing on the sequence of events on his final day at the employment; that is the day of the confrontation with Mr Mourad and his son. He says that when Mr Mourad was trying to contact him about the money he had collected directly from a customer,
- "Then Kamel Mourad kept ringing my phone. Then I got angry because I was busy. I think I was at the doctor's at Rockdale. I said to give me a couple of hours. Kamel Mourad kept ringing me and abusing me."
52. It is unconvincing that Mr Zehour was unsure as to where he was on the last day of work with Mr Mourad at the time of his first statement but was sure of the details by the time of the later one, with details which suit the purposes of the claim. He says he could not get in to see the doctor, but there is no evidence that Mr Zehour made an appointment for another time.
53. The prison Justice Health & Forensic Mental Health Network "Reception Screening Assessment" of 18 February 2016 includes under "Other Medical Issues" the comment "backpain". There is a clinical note for 24 April 2016 which mentions medication for back pain, and there are regular further mentions of back pain in the notes following. There is no doubt that Mr Zehour complained of back pain and I have no trouble accepting on the evidence of complaint and the later investigations that there is pathology in the lumbar spine. The issue is whether there is a connection between the back condition and any work incident.
54. The respondent submits that the mention of previous medication being given to Mr Zehour before 24 April 2016 is significant. The clinical note for that date records that Mr Zehour "was given Panadol, however [he] became aggressive [and] abusive because medication is different from the last time. [Mr Zehour] was requested to leave the clinic". There is no previous entry in the records referring to any medication being given to Mr Zehour for back pain. However, I do not draw any conclusion from this as it is possible he was given medication without an entry being made.
55. On 8 September 2016, a medical certificate recommended a board base to be placed under Mr Zehour's mattress for back pain.
56. The submission of the respondent is that it is significant there is no mention of the cause of back pain in any of the prison clinical notes. The entry for 10 October 2016 records what must be inferred is in answer to direct questions asked by the nurse to which she recorded, "Works in prison as a painter, does not remember injuring his back, has tried, Panadol, Panadeine, Nurofen with no effect – has no D&A issues – has not had a back x-ray". Given what Mr Zehour says about frank incidents of injury and the symptoms after the February 2016 incident that forced him to attempt to see Dr Ismail, it is not helpful to his allegation of injury that this note is recorded. The entry is in the context of a history being taken by the nurse about the back symptoms. As submitted for Mr Zehour, care must be taken not to place too much weight on clinical notes.¹ There was no imperative for the prison medical staff to delve into causation any more than, say, hospital staff, but the note is quite clear and it is consistent with there being no mention of causation from the time of the first alleged fall in January 2016 through the entire period of imprisonment and beyond.

¹ *King v Collins* [2007] NSWCA; *Davis v Council of the City of Wagga Wagga* [2004] NSWCA; *Nominal Defendant v Clancy* [2007] NSWCA 349; *Mason v Demasi* [2009] NSWCA 227

57. On release from prison in mid-2017, Mr Zehour attended Dr Ismail, and his notes are extracted in part above. These notes record the back symptoms but again make no reference to a cause until 10 August 2018 when there is a note of Mr Zehour referring to work injuries in January and February 2016.
58. Dr Conrad attributes the back pathology to the history given by Mr Zehour who also denied any earlier problems with his back for which he would have seen doctors. Dr Conrad took a history of injury from Mr Zehour which differs from the account in his statements. Dr Conrad records an attempt to see the general practitioner after the first alleged fall in January 2016,
- “Mr Zehour advised that he tried to go and see a General Practitioner, but was told that he was busy and could not get an [appointment] until the next day. He says that he was not able to see a General Practitioner for various reasons but he continued taking tablets for pain and continued working in pain until his second accident on 14 February 2016.”
59. Dr Conrad took the history that after the second fall in February 2016 and Mr Zehour “... did not see a doctor”. Mr Zehour in his statements is quite vague on the point, but he associates the inability to get an appointment with Dr Ismail with the second alleged fall just before the physical confrontation with Mr Mourad and his son in February 2016. The differences in the history given to Dr Conrad compared with Mr Zehour’s statements add to the difficulty of establishing the factual base.
60. Apart from the silence of his then wife about it, it is surprising that there is no evidence from any other witness to Mr Zehour’s falls, or from anyone he might have told about it at the time. He addresses this in his statement of 13 March 2018,
- “Apart from the witnesses immediately involved, who I have already mentioned in this statement, others working in the area at that time who may be aware of my injury are: there was a lady present but I cannot recall her name. All the people there are members of Kamel Mourad's family, so they are not going to help me.”
61. It is surprising that given the alleged degree of pain in January 2016 that Mr Zehour told no one about the incident, including his wife. In the absence of any independent evidence Mr Zehour must rely on only his own allegation of injury in the manner he describes in his statements and as presented to Dr Ismael and Dr Conrad much later. I consider this insufficient to allow a finding in Mr Zehour’s favour.
62. As is submitted for Mr Zehour, the whole of the evidence must be considered. The lack of contemporaneous evidence about the falls is one thing, but the remaining evidentiary picture is blurred for Mr Zehour. There is total disagreement between his statement and that of Mr Mourad. As I have discussed above, the evidence of the violence of Mr Zehour towards Mr Mourad and its aftermath dictates that their respective statements require caution. The medical evidence before 10 August 2018 is entirely lacking support for any work injury suffered by Mr Zehour. The prison records are quite comprehensive and are commensurate with notes that might be taken at any medical facility but are bereft of any reference to work incidents as the cause of the back condition. The only reference to how it might have happened is in the clinical note indicating that when asked by a nurse Mr Zehour said he “does not remember injuring his back”.

63. For Mr Zehour to be successful there must be a finding of fact that he suffered the incidents of injury he alleges. There must be a common sense chain of causation connecting the back condition to a work injury². I am unable to make a factual finding that Mr Zehour suffered the falls he alleges on all the evidence. I find his own evidence unconvincing as to the alleged incidents of injury for the reasons given above. Mr Zehour has not discharged the onus of proof as to injury on the balance of probabilities.

SUMMARY

64. For these reasons there is to be an award in favour of the respondent in respect of the allegations of injury.

² *Kooragang Cement Pty Ltd v Bates*
(1994) 35 NSWLR 452