

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 3244/20
Applicant: Thomas Kershaw
Respondent: Sydney Metro Roofing Pty Ltd
Date of Determination: 14 September 2020
Citation: [2020] NSWCC 320

The Commission finds:

1. The applicant was injured at the respondent's worksite on 3 October 2019.
2. The applicant was not an employee of the respondent at any time. I am satisfied that the applicant through his business, contracted his services to the respondent.

The Commission orders:

- (a) There will accordingly be 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.

L Golic

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



STATEMENT OF REASONS

BACKGROUND

1. Thomas Kershaw, the applicant, brings an action against Sydney Metro Roofing Pty Ltd, the respondent, for weekly payments of compensation arising from an injury sustained on 3 October 2019.
2. Dispute notices were issued on 18 November 2019 and 3 January 2020.
3. An Application to Resolve a Dispute (ARD) and Reply were duly lodged and served.

ISSUES FOR DETERMINATION

4. The parties agree that the following issues remain in dispute:
 - (a) was Mr Kershaw a worker, and?
 - (b) if so, what was the appropriate pre-injury average weekly earnings (PIAWE).

PROCEDURE BEFORE THE COMMISSION

5. The matter was heard by way of teleconference conciliation and arbitration on 3 August 2020. The applicant was represented by Mr Bruce McManamey of counsel instructed by Ms Chantille Khoury of Law Partners Personal Injury Lawyers. The respondent was represented by Mr Paul Stockley of counsel instructed by Mr John Turner from Messrs Sparke Helmore 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

6. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) ARD and attached documents, and
 - (b) Reply and attached documents.

Oral evidence

7. No application was made with regard to oral evidence.

FINDINGS AND REASONS

8. Mr Kershaw was born in 1990. He had been working as a subcontractor through his own business entitled Hybrid Roofing prior to the events under consideration. An extract from the Australian Business Register showed that Mr Kershaw had been operating as "individual/sole trader" and had been registered from 13 July 2018 for a goods and services tax. The entry confirmed that from 15 November 2018 Mr Kershaw's business name had been "HybridRoofing".¹

¹ Reply page 42.

9. The respondent also lodged the historical details supplied under the ABN, which showed that an ABN had been active between 29 July 2008 and 23 October 2014, and then was currently active from 13 July 2018 under the business name of HybridRoofing.

Statements

10. Statements were made by Mr Kershaw and by Mr Krstanovski, who was a director of the respondent company. Mr Kershaw made statements on 6 December 2019, 4 March 2020 and 27 May 2020. Mr Krstanovski's statements were dated 16 January 2020 and 4 May 2019. A statement was also made by Mr James Lewis dated 3 February 2020.
11. In his statement of 6 December 2019, Mr Kershaw set out his employment history for the five years prior to his arrangement with the respondent²:

"Employment History

8. To the best of my recollection, in the five years prior to my injury, my employment history is as follows:
- a. From late 2015 to late 2017, I worked as a roofer for Platinum Roofing and Construction.
 - b. Throughout 2017, I took a break from full time work and began subcontracting through my own business, HybridRoofing.
 - c. From 2018 to early 2019, I worked for Sydney Roofing and Construction on a full time basis.
 - d. From early 2019 to October 2019, I sub-contracted work through my own business, HybridRoofing."
12. Mr Krstanovski, as indicated, was the director of the respondent company. In his statement of 4 May 2020, he said:³
- "...The company has been in operation for the past two and a half years. I have three permanent employees in the company including myself and my wife Lina. At different times I employ contractors or sub-contractors depending on the size of the job we are working on at the time. They have their own insurance cover."
13. Mr Krstanovski stated that at the relevant time his company was engaged in a job at Milperra Public School.
14. Mr Kershaw claimed in his statement of 6 December 2019 that:⁴
- "In late September 2019, I was contacted by Dean Krstanovski, who said that he had some work for me and my crew regarding a roofing job at Milperra Primary School. I was eager to get some consistent work so I took him up on this offer. Our initial agreement was that he would subcontract me, under my business name Hybrid Roofing."
15. Mr Krstanovski agreed in his statement of 4 May 2020, saying that he had been talking to Mr Kershaw on Facebook for a few months and Mr Kershaw had at different times asked Mr Krstanovski if he had any work, "but I had always been right with my own guys."⁵

² ARD page 1.

³ Reply page 26 [8].

⁴ ARD page 2 [9].

⁵ Reply page 26.

16. Mr Krstanovski said:⁶

“On 30 September 2019 [Mr Kershaw] messaged me asking if I had any work for three men two tradies and a labourer. I had a discussion with him on Facebook and discussed payment and asked when he could start and he said he had two jobs 30 and 1 October 2019. I provided him with the job details and asked for his licenses and white card. I am able to provide you with a copy of the Facebook entry. I also had a telephone conversation with him on the night before he started because my wife insisted I ask him for his insurances. He said he would send them over to me. His other paperwork arrived but the insurance cover did not.”

17. Mr Kershaw alleged that when he arrived to commence work on 2 October 2019, “one of the guys in my crew did not arrive, so it was just me and my colleague named James Lewis.”⁷ He said that a conversation ensued with Mr Krstanovski, in which Mr Krstanovski stated that “the job was bigger than he thought, that his team had made some mistakes which required fixing, and that “we” were going to have to fix the mistakes.”

18. Mr Kershaw then said:

“11. Dean considered myself and James to be reliable and hard workers. In light of this, the size of the job at Milperra Primary School along with further projects he had coming up, Dean offered me and James full time positions with Sydney Metro Roofing Pty Ltd. He advised that he had a number of jobs over the next year and that this would be a better arrangement than having to repeatedly enlist me as a subcontractor.

12. Consequently, on 2 October 2019, I commenced employment with Sydney Metro Roofing Pty Ltd. Although there were no written contracts drawn up at that stage, Dean told me that I would be working as a roofer on a full time basis, working for about 38 hours per week. I was going to be paid \$550.00 for each day I worked which would be paid to be by bank transfer. We had planned to sit down together and discuss the finer details regarding payment the following afternoon, however, by this stage I had injured myself and we did not get the opportunity to do so.”

19. A statement was also tendered from Mr Lewis, dated 3 February 2020.⁸ He said that he arrived about 20 minutes after Mr Kershaw on 2 October 2019. He said that later in the day he overheard a conversation between Mr Kershaw and Mr Krstanovski. He said:⁹

“At that point, Dean and Tom were working on the roof and I was on the ground. Despite me being on the ground, I could hear the conversation clearly and I was participating in that conversation. Dean told Tom and I that there was enough work at Milperra School for us to work 6 days a week from Monday to Saturday for the next 2 weeks straight at least on that job and that he could keep us employed with him on a full time basis working 5-6 days per week for at least the next 6 to 12 months with all the other schools and all this other work at other various sites that he had contracts for and if we could stick around, that would be great as he was flat out. He also mentioned that it was hard to find good workers so he wanted us to work with him for the long term. We both indicated to him that we wished to keep working with him for as long as the work was available.”

⁶ Reply pages 26/27.

⁷ ARD page 2 [10].

⁸ ARD page 13 .

⁹ ARD pages 13/14.

20. On 4 March 2020, Mr Kershaw made a supplementary statement. He said that he had read Mr Lewis' statement. He said:¹⁰

“5. I confirm that I do have a strong recollection of this discussion taking place at about 1:00pm (as described by James) with Dean and myself on the roof and James on the ground on site at the school. This discussion, in my view, was a confirmation by Dean Krstanovski as to the longevity of my employment with him. During that particular discussion, I too (as well as James) confirmed that I would work for Dean for as long as he could offer me work. This conversation went on for 5-10 minutes. I was told by Dean that he had enough work to keep both James and myself working full time at Milperra School for us to work 6 days a week from Monday to Saturday for the next 2 weeks straight at least on that job and that he could keep us employed with him on a full time basis working 5-6 days per week for at least the next 6 to 12 months with all the other schools and all this other work at other various sites he had contracts for. This conversation lasted 5 to 10 minutes.

6. Earlier that same day, just before we started work, James, Dean and myself were standing at the bus stop across the road from the school. A couple of other Dean s workers were also present, although not really part of our discussion. Some of us were having a cigarette.

7. During the time we were standing at the bus stop, Dean asked me whether I had any plans for work over the coming months as he had lots of work on and could keep us working for at least the next several months. I confirmed to Dean that I had no other work on and that I was free to work for as long as he could offer me work. Whilst this personal exchange was within earshot of James Lewis, I don t know if he actually heard the conversation. This preliminary discussion with Dean only lasted about a minute as we needed to start work for the day. He told me he would talk about it in greater detail later, which he did at approx. 1:00pm that day as described above.”

21. Mr Krstanovski's description of the nature of the contract was firstly contained in his statement of 16 January 2020. He said:¹¹

“43. My initial conversation with Mr Kershaw was to offer to engage him and two of his employees for a specific period to assist in the replacement of the roof of the Milperra Public School. That job was to take two days. At the conclusion of that job I would have assessed his work performance and if I was satisfied I would have considered engaging him again as a contractor on other jobs because I had a lot of work on and coming up. As he suffered an injury on the second day I never had to make that decision.

44. I understand Mr Kershaw has alleged I offered him full time work and that I had months of work for him. That information is not correct, I was quite busy at the time and I may have engaged him again but I certainly did not at any time offer him full time employment.

45. He had informed me that he had his own business Hybrid Roofing and I was engaging him as a contractor with his own insurances as evidenced by the SMS messages between the two of us. He was also bringing his own team of workers and quoted me \$1,250.00 per day for himself and the two other workers and an invoice that he eventually sent inclusive of GST.”

¹⁰ ARD pages 9/10.

¹¹ Reply page 30.

22. When the contents of Mr Lewis' statement were made known to him, Mr Krstanovski made a supplementary statement on 4 May 2020.¹² He said he had never met either Mr Kershaw or Mr Lewis prior to 2 October 2019, and that Mr Kershaw had contacted him in September 2019 in answer to a Facebook page the respondent maintained which sought roofing tradesmen. Mr Krstanovski said at [20]:

"Prior to 2 October 2019 I did not have any knowledge of Mr Kershaw and/or James Lewis work history, skill, reliability or ability. My only knowledge was from the Text messages he sent me on 30 September 2019 in relation to how many sheets (of roofing iron) he could put on in a day and he said 250 a day plus. From my observation of his work on 2 October 2019 he was never going to lay 250 in a day"

23. Mr Krstanovski said that the reason he sought to engage Mr Kershaw and his crew was because he had three of his apprentices away doing their TAFE course, which was a three weekly event, between 2 and 4 October 2019. Mr Kershaw was there to replace the three apprentices for those days, Mr Krstanovski said, and he refuted Mr Kershaw's suggestion that he had hired them to "save the day," as had been suggested by Mr Kershaw. Whilst the head contractor did require a small job to be rectified, Mr Krstanovski said that it required the removal of plastic from under about fifteen sheets. Mr Krstanovski was unsure whether Mr Kershaw had in fact worked on that job, which he said took place shortly after 1pm on 2 October 2019.

24. With regard to the alleged conversation on 2 October 2019, Mr Krstanovski said:¹³

"When Mr Kershaw arrived on the job on 2 October 2019 I said 'Hi how are you going.' He said 'Okay, have you got much on after this' I said 'yes I've got a bit on.' From that point I handed him over to my supervisor Aaron and he went off and started work. There was never any discussion about full time work with me, I had only engaged him to the two days 2nd and 3rd October 2019. On 15 October 2019 he sent a Contractors Agreement [sic. Subcontractor's Statement] showing he had been engaged from 3rd to the 4th October 2019 inclusive. I am able to provide a copy of that document. The dates are wrong but he filled it out and it shows he was only being engaged for two days."

25. The contractor's agreement will be considered later in these reasons.

26. Mr Krstanovski denied having any conversation with Mr Kershaw on a roof, saying that there was a 6-7 metre drop from the roof to the ground. He said at [32]:

"In relation to any conversations between myself, Mr Kershaw and Mr Lewis in respect to their employment as workers and the basis and terms of their employment, I never had a conversation with either Mr Kershaw or Mr Lewis about employment other than with Mr Kershaw about his working as a contractor with his own crew for two days 2 and 3 October 2019."

27. In a third statement of 27 May 2020 Mr Kershaw explained that his reaching out to Mr Krstanovski in the first text message was in response to a Facebook page he had seen looking for labour. He conceded that the "crew of 3" included himself and James Lewis as roof tradies and Beau Mason as the labourer. He said that the reference to the rate of pay and GST was the agreed rate for the three workers.

28. Mr Kershaw said he had seen the incident report dated 3 October 2019 but said that he had never seen it before his solicitors showed it to him and neither did he have any involvement in its completion.

¹² Reply page 19.

¹³ Reply pages 22-23.

29. Mr Kershaw attempted to explain the ambiguous statements that appeared amongst the text messages.

The text messages

30. Both counsel in their submissions referred in some detail to the text messages that were before the Commission. Both counsel relied on their content as providing contemporaneous support for their diametrically opposed standpoints. It is clear that both counsel appreciated the probative value of such contemporaneous evidence. It is accordingly necessary to reproduce some (but not all) of the texted conversation.

30 September - 2 October 2019

31. The opening page records a text conversation dated 30 September 2019 at 9:47am¹⁴:

“Mr Kershaw: Hey bro you need boys for re-roofs?
Mr Krstanovski: Yeah bro
How many bro
Mr Kershaw: crew of 3
Mr Krstanovski: how many can you snack a day
Smack
And what’s the rates for a day bro
Mr Kershaw: 250 plus man
Depending how access is
And \$1250 a day inc gst
2 trades and labourer”

32. The text messages showed photographs being sent of a work site from Mr Krstanovski who accepted the quote given by Mr Kershaw.

“Mr Krstanovski: I’ll pay that bro I’m happy book
me in for the next month lol
Mr Kershaw: That’s cream
Mr Krstanovski: Does everyone have working at heights
Mr Kershaw: Done and yep
Mr Krstanovski: Sweet when can you start brother
Mr Kershaw: I’ve got a small job to finish up
today and tomorrow and after
that I’m yours for as long as you need brother
Mr Krstanovski: Sweet book ya bro”

33. Mr Krstanovski advised of work at Milperra, Bass Hill and Engadine and that they were all schools.

¹⁴ ARD page 262.

34. Mr Kershaw replied at that stage:¹⁵
- “Yeah, mate. Sweet as man. No dramas”
35. To which Mr Krstanovski said:
- “Work as long as we do right we're good bro.”
36. The next set of texts were dated 30 September 2019 at 10:02 which started with a video chat and then an invitation from Mr Krstanovski for Mr Kershaw:
- “Send me licenses bro. What card front and back and selfie of you and your boys”.
37. Mr Kershaw answered:
- “Will get boys to send thru shortly man”.
38. Mr Krstanovski responded:
- “too easy bro so I can get everyone inducted so I got two different blokes and we can send boys wherever needed”.
39. In response to a query from Mr Krstanovski at 11:46 Mr Kershaw said¹⁶:
- “Nah just a few weekends here and there man. I like working too much but sometimes over killing”
40. Mr Krstanovski then responded:
- “Oh yeah for sure bro. I'm just taking this shit while its here but should be long term but yeah crack the hours until Christmas so everyone is enjoying to chrissie lol
- Im the same man
- With you boys prob got 20 boys.”
41. Conversation then followed about the number of boys Mr Krstanovski was using and he said:
- “Lots of subbies bro but better pay good rates counts don't [expletive deleted] around”¹⁷
42. The text then shows photographs of James Lewis together with a WorkCover occupational health and safety general induction certificate with Mr Lewis's name on it that was sent to Mr Krstanovski on 30 September 2019 at 18:52 hrs together with a photograph of Mr Kershaw. The photographs were affixed to verification of competency certificates and at 19:12 hrs further documents were sent in the name of Beau Mason again showing a verification of competency certificate together with a work health and safety general construction induction certificate and provisional drivers licence.
43. At 10:09 on 1 October 2019 the text showed that Mr Kershaw contacted Mr Krstanovski saying:
- “Just double checking everything is OK for tomorrow start bro”

¹⁵ ARD page 265.

¹⁶ ARD page 268.

¹⁷ ARD page 269.

44. At 7.08 on 2 October 2019 Mr Kershaw texted Mr Krstanovski saying:

“Just having a cig waiting on one more boy to rock up bro”

3 - 8 October 2019

45. At 8.01 on 3 October 2019 Mr Krstanovski texted Mr Kershaw asking to see if he was OK and getting the answer “no”.

46. The next set of text messages were as follows:

Mr Krstanovski: What happened bro. call me

Mr Kershaw: No. moved one sheet and [expletive deleted]

Mr Krstanovski: [Expletive deleted] bro

Mr Kershaw: I'm probs losing my career can't feel my thumb

Mr Krstanovski: Is all ur insurance up to date bro

Mr Kershaw: Nah man I'm [expletives deleted] it was due last month. I didn't have funds to pay n coz this is my left hand and they wont pay me anyways previous injury

Mr Krstanovski: [Expletives deleted] bro they will find a way out of everything. Insurance is like car warranty not worth shit anymore....

Mr Krstanovski: you never got a letter saying it was overdue bro

Mr Kershaw: Its in my contract yeah I did

Mr Krstanovski: Say you didn't bro”

47. Mr Kershaw indicated that he was in too much pain to speak more at that point.

48. Mr Krstanovski said:

“Need to come up with a plan of attack I need you on phone for two minutes.”

Mr Kershaw: Bro I need to make sure I'm not losing my thumb first before anything the paper work can wait”

49. At 9.02 Mr Krstanovski texted:

“Are you going through workcover bro”

50. The answer came back:

“You'll get [expletive deleted] if I do.

I don't know man if I can't work again I'm guna have to do something coz this could be the end of it... My career roofing I might be able to supervise ect Liverpool”

51. Mr Krstanovski asked:

“Did you tell these guys you done it at home?”

52. Mr Kershaw replied:

"i told em I done it with sheet metal"

53. Mr Krstanovski answered:

"What loading sheets on way to work or some Shit Just so I know what to tell these guys I'm onsite now bro"

54. At 14:20 hrs there was an audio call between Mr Kershaw and Mr Krstanovski for 15 seconds and at 14:31 hrs Mr Krstanovski texted Mr Kershaw saying:

"Hey bro how did you go with your insurances could you send them over please"

Mr Kershaw: "No good man they cancelled my policy"

Mr Krstanovski: "When was your policy cancelled mate. I thought you said it was valid until 16th of Nov"

Mr Kershaw: "21 Sept they cancelled"

Mr Krstanovski: "So whats the plan bro"

Mr Kershaw: "I need surgery and I'm freaking out about it big time"

Mr Krstanovski: "I know bro you hit me for subbie work we spoke and asked if you had everything sorted bro otherwise I wouldn't off risked"

Mr Kershaw: "I hadn't sent through any details yet or anything if I'd known it was out I would of paid it or we wouldn't of been able to be on site I wouldn't of either but at the end of the day no one should of been on that roof this morning especially doing what we were I'm not here to [expletive deleted] anyone over it's not in my books to do that I only just opened the letter from the insurance today saying it was cancelled as of 21st last month Not even 14 days has past"

Mr Krstanovski: "Send me an invoice so I can pay you also man"

Mr Kershaw: "What's email ect for me man and did you get Lewis working with you bro?"

Mr Krstanovski: "I don't have Lewis details we lost that contract im sure"

Mr Kershaw: "Oh ok thought use linked up"

Mr Krstanovski: "Nah bro how lol"

55. On 4 October 2019 at 18:15, a further exchange of texts revealed that Mr Krstanovski appeared to have lost his contract with the school as Mr Kershaw asked whether he had much work going and he answered:

"[expletive deleted] zero now bro. im proper" [expletive deleted]

56. On 8 October 2019 at 13:34 hrs, Mr Kershaw enquired as to who he was to send the invoice to etc. he said:

“What your email bro n company so I can send invoice man Lewis hitting me up about pays”

57. Mr Krstanovski replied with the email address of his company.

10 October – 19 November 2019

58. On 10 October, the respondent emailed Mr Kershaw from a different number to that of Mr Krstanovski, advising that a doctor’s clinic in Blacktown had asked for payment on the assumption that Mr Kershaw was his employee. Mr Krstanovski said:¹⁸

“...please rectify this issue immediately as you are your own business and only worked a day with us on a subcontractor basis....”

59. On 17 October 2019, Mr Kershaw sent a long text accusing Mr Krstanovski of telling “us” to get on the roof and did not tell them to be at the site at 6:30. Mr Kershaw complained that the supervisors should have had a tool box talk with “us” even though “we” were late by 20 minutes.

60. He also alleged that Mr Krstanovski should have got “us” to sign toolbox talk about the wet roof and all other things.

61. Mr Kershaw then said¹⁹:

“When the other guy [presumably Mr Mason] didn’t show up for work it as initially agreed we agreed to work with you and that was verbal between me and Lewis. You mentioned that your insurance wasn’t up to date by two years. At no point was I made to be a business or ask for subcontractors statements prior to work only to send through ID and pictures so that you could get us inducted.... ? [sic].

As soon as you heard I hurt myself you tried to change how it happened on incident report and even lie to whoever at site, about how it happened, and say we weren’t on the wet roof and how I’m liable for doing so, so you told us to get the job done because your boys [expletive deleted] it up the day before.”

62. Mr Kershaw then said:

“wont pay me and wont take liability [expletive deleted] grub [expletive deleted]. I’ll put you up on grubs who don’t pay and let everyone know how you left me in the dark dog”.

63. On 19 November at 7.04 am, Mr Kershaw said:

“guna pay your workers or I’m guna take it further? Up to you”

¹⁸ ARD page 302.

¹⁹ ARD page 299.

Emails

64. Against this background some emails ensued from 16 October 2019, beginning with a request from Mr Krstanovski to Mr Kershaw for completion of a subcontractor's statement.²⁰ Mr Kershaw's response said:²¹

"I'm a sole trader, and I don't employ anyone ? [sic]. I do not pay Workers comp...."

65. This prompted a long email from Mr Krstanovski that evening, during which he said:

"I am genuinely at a loss for words and cannot comprehend your reasoning behind your newest claim that you are now a sole trader that has no employees considering you are fully aware of our discussions and arrangements that were made in writing as well as the fact that you came to site with an employee."

Subcontractor's statement

66. The Subcontractor's Statement was sent to Mr Krstanovski on 15 October 2019 along with an invoice on HybridRoofing letterhead claiming an amount of \$605 inclusive of GST, and indicating the bank details of HybridRoofing. The Agreement and invoice were dated 14 October 2019, and the Agreement was signed by Mr Kershaw.²²
67. Mr Kershaw indicated on the form that HybridRoofing was the subcontractor which entered into a contract with Sydney Metro Roofing Pty Ltd for work between 3 October and 4 October 2019. Mr Kershaw declared that he was an authorised person in a position to know the truth of the matters contained within the statement. He then declared that he had not employed or engaged workers or subcontractors during the period of the contract and was exempt for workers compensation purposes.
68. The effect of this declaration was that Mr Kershaw was not required to declare that workers compensation premiums had been paid, nor to provide a certificate of currency. Neither was he required to declare that all remuneration for work done under the contract by employees had been paid.

Claim form

69. An incident form was tendered which was dated 3 October 2019.²³ The form was not reproduced in its entirety, but it did show that Mr Kershaw was therein described as a "contractor."

SUBMISSIONS

Mr Stockley

70. Mr Stockley submitted that there was no controversy about the circumstances under which Mr Kershaw commenced his engagement with the respondent, except that the agreement was for Mr Kershaw to supply two tradies and a labourer, whereas when he arrived on site the only person he had with him was Mr James Lewis.
71. Mr Stockley referred to a number of matters which indicated that this agreement pertained at all material times. They are incorporated in my reasons below.

²⁰ Reply page 18.

²¹ Reply page 18.

²² Reply page 13.

²³ Reply page 6.

72. Mr Stockley concluded by submitting that the applicant's account was inherently improbable and that of the respondent entirely plausible. He submitted that the applicant had failed to discharge his onus.

Mr McManamey

73. Mr McManamey said there was no suggestion that Mr Kershaw was claiming that he was a deemed worker, but he submitted that on any construct of the evidence the applicant would be found to be a worker.
74. He submitted that, from an objective standpoint, the exchanges of text messages did not have the look of communications between a contractor and a subcontractor, due to the familiarity of the language used. He submitted that within the texts it was suggested that Mr Kershaw be booked in for work for about one month which was reduced to two days and then some question as to whether there were three days.
75. Mr McManamey referred to the text exchanges where Mr Krstanovski accepted the quote given to him at the start of text messages of \$1,250 per day including GST, two trades and labourer.
76. Mr Krstanovski's response ("I'll pay that bro I'm happy book me in for the next month lol") was said to imply that an intention had been formed to create an employer/employee relationship.
77. Mr Krstanovski's mentioning the other jobs he then had lined up was a further indication that there was an intention by him to employ Mr Kershaw because, it was put, there was no mention of a contract or subcontractor within the exchange.
78. Mr McManamey submitted that the objective evidence showed that Mr Kershaw was under the control of the respondent. He was told when to work, he was told what time he had to start and he was told he had to do a toolbox meeting, he was told he was subject to the demands of Aaron, the supervisor, and that tools were supplied by the respondent. There was an agreed amount for payment to three people and although Mr Kershaw had an ABN the contract entity was with Mr Kershaw himself, as the entity HybridRoofing had no legal status.
79. Mr McManamey referred to Mr Kershaw's assertion that he was offered work before he even started and said that the evidence of Mr Lewis explained this situation, as it gave the context of the conversation regarding the detail of future employment that was discussed at 1.00 pm.
80. Mr McManamey said that in any event there had to be a renegotiation as the quote had been for three people and only two people had turned up. That meant that the amount of \$550 per day was agreed and consistent with Mr Lewis's evidence that he expected to earn between \$450 - \$550 per day. As I understood Mr McManamey, he submitted that the amount Mr Lewis said he planned to charge, had the discussion reached that point, was the amount invoiced by Mr Kershaw as a subcontractor in his 14 October 2019 invoice. This was consistent with the proposition that each side was intending to create a master and servant relationship – an inference I could draw using the background of the text messages that spoke of plenty of work available.
81. As to what insurance was being discussed in the text exchange when Mr Krstanovski asked for insurances up to date, Mr McManamey suggested that the topic may have been income protection cover. He submitted it could not be workers compensation because Mr Krstanovski was a sole trader.

82. Mr McManamey submitted that I could draw an inference that Mr Krstanovski raised the question straight away because he was concerned that he might be asked to pay the insurance. “Can I shuffle insurance onto you” was the inference I was asked to draw from Mr Krstanovski’s text.
83. Mr McManamey submitted that the inference that could be drawn was that Mr Krstanovski wanted Mr Kershaw to tell a different story. The fact that Mr Kershaw had said it was dangerous to go up on the roof because it was wet meant that there would be trouble with WorkSafe. The obvious way to avoid liability was to say that Mr Kershaw was a contractor.
84. The text at 9.02²⁴ on 3 October was very significant, Mr McManamey argued, as Mr Krstanovski mentioned WorkCover. Mr McManamey asked rhetorically why Mr Krstanovski would raise that subject unless he was aware that he had employed Mr Kershaw. Counsel said implicit in that exchange was that Mr Krstanovski understood what would happen when Mr Kershaw did not respond that he was going through WorkCover.
85. Like Mr Stockley, Mr McManamey urged me to look at the exchanges. He submitted that Mr Krstanovski’s comments about Mr Kershaw “hitting me for subbie work” was inconsistent with what had happened before the accident. Mr McManamey assumed that I accepted Mr Kershaw’s evidence in that regard.
86. Mr McManamey submitted that I could infer from the reference to Mr Lewis’s details and the assumption made by Mr Kershaw that Mr Lewis and Mr Krstanovski had “linked up,” that Mr Krstanovski had employed Mr Lewis. This was confirmed by his comment “Nah bro how lol”.
87. I interpose to observe that I had difficulty following Mr McManamey’s argument in that regard. The most logical interpretation of that statement was, “No mate, how could I contact him, laugh out loud” – that is to say, a denial that there was an employment contract between he and Mr Lewis.
88. Mr McManamey submitted that the contents of the Subcontractor’s Statement was wide enough to include Mr Kershaw as an employee, because the only declaration that had been filled out was that Mr Kershaw not engage workers. The declarations that he thereby avoided making regarding workers compensation insurance and the like were “nonsense,” Mr McManamey asserted.
89. The Subcontractor’s Statement was supposed to be completed prior to the commencement of work, Mr McManamey said, and the only relevant fact that emerged from its completion on 14 October 2019 was that Mr Kershaw would not be paid if he did not sign.
90. Mr McManamey submitted that the absence of evidence from the supervisor Aaron was of such significance that I would draw a *Jones v Dunkel* inference that his evidence would not assist. I decline to do so. The evidence does not compel an explanation as to the absence of the supervisor’s testimony in view of the conclusiveness of other evidence, as will be shown below.

Mr Stockley

91. In response Mr Stockley submitted that Mr McManamey’s hypotheses were entirely inconsistent with the objective facts. The onus was on the applicant to clarify the contradictions and inconsistencies in the evidence and he had not done so.

²⁴ ARD page 281.

Judgment

92. The definition of ‘worker’ in s 4 of the 1998 Act relevantly provides:

“**worker** means a person who has entered into or works under a contract of service or a training contract with an employer (whether by way of manual labour, clerical work or otherwise, and whether the contract is expressed or implied, and whether the contract is oral or in writing).”

93. It is usual in cases regarding the question of whether a person enters into a contract of service or services to consider the indicia relating to the contract. Such issues as:

- The method of remuneration
 - The set hours of work
 - The degree of control exercised
 - The right to delegate, and
 - The entrepreneur test
- are usually considered in detail.²⁵

94. In the present case such an exhaustive analysis is not required. It is common ground that when Mr Kershaw and Mr Lewis attended the worksite on 2 October 2019 the relationship between the respondent and Mr Kershaw was intended to be a contract for services. This was confirmed in the statements of both Mr Kershaw and Mr Krstanovski.

95. The contemporaneous text messages for the period 30 September to 2 October 2019 also make that agreement clear. Remuneration was agreed at \$1,250 day including GST, and the amount was to cover two tradesmen and a labourer. The quote from Mr Kershaw within the text message indicated another amount of “250 plus...” which Mr Kershaw explained in his third statement was the number of square metres “we” could lay per day.

96. At issue in this case is whether there was an oral agreement between the respondent and Mr Kershaw before work started on 2 October 2019 to convert Mr Kershaw’s status (and that of Mr Lewis) from contractor to employee. The case must be decided on an evaluation of the evidence regarding that alleged oral agreement, as Mr Kershaw was badly injured at the start of the second day’s work. Consequently the evidence regarding indicia is somewhat neutral.

97. The text exchanges were expressed in colloquial terms, and involved a lot of chat, if I may use that phrase, as to each protagonist’s situation. During that chat Mr Krstanovski revealed that he had a lot of work (“book me in for the next month lol”) which should last (“..should be long term...crack the hours until Christmas”), and it may be that those comments formed the basis of the later attempt by Messrs Kershaw and Lewis to claim that their status had changed to become employees. However, Mr Krstanovski spoke only in terms of subcontracting (“Lots of subbies bro but better pay good rates counts don’t [expletive deleted] around”).

98. The respondent itself was subcontracted to a head contractor based in Queensland, and the respondent appeared to have the control of the work to be done and the hours to be worked. It is accordingly correct as submitted by Mr McManamey that Mr Kershaw was directed by the supervisor Aaron as to where he should perform his work. That does not assist Mr Kershaw’s case however, as the same control was to be exercised over Mr Kershaw and

²⁵ See eg *Marinic v RPC Interiors Management Pty Ltd* [2019] NSWCCPD 11.

his “crew” as a subcontractor, and indeed Mr Krstanovski’s account was that he said hello to Mr Kershaw and then handed him over to his supervisor Aaron to start work as a contractor.

99. Regarding remuneration, the only evidence that Mr Kershaw was paid for his work is that on 14 October 2019 Mr Kershaw invoiced the respondent on HybridRoofing letterhead indicating payment should be made to a Hybridroofing bank account. That invoice was accompanied by the Subcontractors Statement in which Mr Kershaw declared that HybridRoofing had entered into a contract with the respondent for work between 3 and 4 October 2019. Submissions were made regarding the \$605 that was invoiced in an attempt to describe it as wages. However the invoice included an amount for GST and the effect of the Subcontractors Statement satisfy me that the remuneration was paid pursuant to a contract for services.
100. Mr Kershaw’s allegation that an oral agreement had been reached prior to the start of work on 2 October 2019 raised a number of issues. Firstly, it was denied by Mr Krstanovski in his statement, and secondly the text messages that followed immediately after the accident did not support Mr Kershaw’s contention.
101. At 8.01 in the morning Mr Krstanovski was alerted that the injury suffered by Mr Kershaw was serious, as he was told by Mr Kershaw that he (Mr Kershaw) could not feel his thumb. Mr Krstanovski’s first question was as to whether all Mr Kershaw’s insurance was up-to-date. Mr Kershaw’s answer was that it was not and that it was due “last month.” Mr Kershaw said that he did not have the funds to pay.
102. Mr Krstanovski asked whether Mr Kershaw had received a letter advising him that his insurance was overdue to which Mr Kershaw responded that he did receive such a letter. Mr Krstanovski’s responses at that stage I found to be sympathetic (“say you didn’t bro”).
103. By 9.02 the texts showed that Mr Krstanovski had spoken to Aaron and was aware of the circumstances of the injury. He then asked Mr Kershaw if he was “going through WorkCover.” Mr Kershaw’s response was that Mr Krstanovski would get done over if he did, but put a little more colloquially.
104. Mr Krstanovski also appeared to be trying to help when he inquired whether Mr Kershaw had told “these guys” he had “done it” at home or loading sheets on the way to work “or some shit” so he knew what to tell his “guys” as Mr Krstanovski was on site.
105. Submissions were made that it did not necessarily follow that the text conversation concerning the unpaid insurance related to workers compensation insurance. It was suggested that it might concern income protection. There was no response by Mr Krstanovski to Mr Kershaw’s threat regarding whether he was “going through WorkCover.” The text messages exchanged at that point demonstrate that both parties were concerned by the implications of what had happened (“need to come up with a plan of attack”) and the seriousness of the injury (“need to make sure I’m not losing my thumb...”).
106. It became clear however in the exchange of messages at 14:31 hours, following a 15 second telephone conversation between Mr Kershaw and Mr Krstanovski at 14.20, Mr Krstanovski asked how Mr Kershaw had gone with his insurances, and asked for him to send them over. The texts show that Mr Kershaw then advised that his policy had been cancelled since 21 September. Mr Krstanovski responded that he thought Mr Kershaw had told him that the insurance was valid until 16 November. It may be that the telephone conversation at 14:20 was about Mr Kershaw’s insurance, and it may be that the insurance concerned was Mr Kershaw’s workers compensation insurance.

107. This was further clarified by Mr Kershaw himself. When Mr Krstanovski texted him that he had asked for subcontract work (“you hit me for subbie work”) Mr Kershaw responded, to repeat:
- “I hadn’t sent through any details yet or anything if I’d known it was out I would have paid it or we wouldn’t of been able to be on site I wouldn’t of either.... I only just opened the letter from the insurance today saying it was cancelled as of 21st last month.”
108. That was the opportunity Mr Kershaw had, on the day of the injury, to remind Mr Krstanovski of their two conversations in which the nature of the contract was changed to a contract of service, that is to say, employment. Mr Kershaw’s failure to do so I find significant, and an admission that he knew he had been engaged as a contractor.
109. I have reproduced Mr McManamey’s argument in some detail, and I think it fair to say that he has advanced all possible arguments to establish Mr Kershaw’s case. I have considered those submissions in my determination and, with respect, none of them have displaced the overwhelming probative weight of the respondent’s evidence.
110. The assertions made by Mr Kershaw in his statements and texts that his status changed on the first day of work, have been disproved by the contemporaneous evidence which I have just considered. The first attempt to establish alternative facts appeared in Mr Kershaw’s text of 17 October 2019 (“..we agreed to work with you and that was verbal between me and Lewis...at no point was I made to be a business...”). This attempt however rapidly came undone when the inherent contradiction contained in his first statement of 6 December 2019 became apparent. How could Mr Krstanovski consider that Mr Kershaw and Mr Lewis were reliable and hard workers, when he had first met them just before work started?
111. The second attempt came from Mr Lewis, some two months later, in his statement of 3 February 2020. His input into the story also had an inherent contradiction. If Mr Kershaw and Mr Krstanovski had held a 5 to 10 minute conversation so loudly that Mr Lewis could hear them 6 to 7 m below, why did Mr Kershaw not mention that in his earlier statement?
112. (I accept Mr Krstanovski’s evidence that there was 6 to 7 m from the roof to the ground, it being the only evidence available.)
113. This contradiction led to the filing of the second statement from Mr Kershaw of 4 March 2020. Although he said he had a “strong recollection” of the conversation, he failed to explain why he had not mentioned it in his first statement.
114. Whilst Mr Kershaw may have sent the invoice and the Subcontractors Statement which he dated 14 October 2019 so that he could get paid, nonetheless in doing so he admitted that he was a contractor, notwithstanding that he avoided having to make declarations about workers compensation insurance cover and employing other workers. It was clear that Mr Kershaw was employing other workers in the form of Mr Lewis and Mr Butler, and I am not satisfied that he was telling the truth in that declaration. Moreover, his declaration contradicted his current allegations. Mr Kershaw had not at that stage alleged that there had been an oral agreement to change his status, which he did three days later. His readiness to adopt a contrary stance to suit the exigencies of the moment does not reflect well on his credit, and neither does the deception contained in the Subcontractor’s Statement.
115. I do not accept the evidence of Mr Lewis. It does not explain why he did not approach Mr Krstanovski to get his pay if he assumed he was an employee of the respondent. Further, it is not plausible that a conversation of that relevance would have been forgotten by Mr Kershaw - particularly as it apparently lasted for 5-10 minutes, which is a very long conversation indeed. Mr Lewis even said he was participating in the conversation but did not explain how that was possible when he was 6-7m below Mr Kershaw and Mr Krstanovski up on the roof.

116. The applicant was required to prove his case on the balance of probabilities, to the point where I felt a sense of persuasion of his case²⁶. I do not. The applicant has failed to satisfy his onus.

SUMMARY

117. For these reasons I find that the applicant was injured at the respondent's worksite on 3 October 2019.

118. I find that the applicant was not an employee of the respondent at any time. I am satisfied that the applicant through his business contracted his services to the respondent.

119. There will accordingly be an award for the respondent.

²⁶ *Department of Education and Training v Ireland* [2008] NSWCCPD 134.