WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **5255/19**
Applicant: **Sohrab Waseeq**
Respondent: **Hue Painting Group Pty Ltd**
Date of Determination: **17 January 2020**
Citation: **[2020] NSWWCC 22**

The Commission determines:

1. At all material times the applicant was employed by the respondent pursuant to a contract of service.

2. The applicant suffered injury to his low back arising out of and in the course of his employment and to which his employment was a substantial contributing factor on and before 15 April 2019.

3. That from 16 April 2019 until 13 October 2019, the applicant had no current earning capacity. From 14 October 2019, he could perform suitable employment as that phrase is defined in section 32A of the *Workers Compensation Act 1987*.

4. At all material times the applicant's PIAWE was the sum of $1,520.

5. From 14 October 2019 the applicant was able to earn the sum of $740.80 a week i.e. the minimum wage at that time.

6. Award for the applicant as follows:

    (a) $1,444 per week from 16 April 2019 to 16 July 2019;

    (b) $1,216 per week from 17 July 2019 to 13 October 2019, and

    (c) $475.20 per week from 14 October 2019 to date and continuing until same is suspended or terminated in accordance with the weekly payment provisions of the *Workers Compensation Act 1987*.

7. Liberty to apply in respect of the above calculations.

8. Respondent to pay the applicant's Hospital and medical expenses pursuant to section 60.

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

Paul Sweeney
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 PAUL SWEENEY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A MacLeod

Ann MacLeod
Acting Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

INTRODUCTION

1. On 27 March 2019, Sohrab Waseeq (the applicant) saw Dr Muhammad Virk, his general practitioner, at the NAS Advanced Medical Centre at Auburn and complained of pain and restricted movement of his lumbar spine. Over the ensuing months, he saw doctors at that practice on several occasions and complained of back and left leg pain. It is likely that his lumbar symptoms were caused by a lumbar disc lesion.

2. For some time prior to 16 April 2019, the applicant performed painting work at premises in the Sydney metropolitan area for Hue Painting Group Pty Ltd (the respondent). He has not worked since that date.

3. The applicant alleges that the symptoms in his low back were caused or materially aggravated by work which he performed for the respondent pursuant to a contract of service or, alternatively, as a deemed worker pursuant to Clause 2 of Schedule 1 of the *Workplace Injury Management and Workers Compensation Act* 1998 (the 1998 Act). He alleges that he has been incapacitated for work since 16 April 2019 as a result of the injury to his back.

4. The respondent denies that it employed the applicant or that Sch 1.2 of the 1998 Act is operative in this case. It also denies that the applicant suffered injury to his low back at work or that he is incapacitated for work by reason of such an injury.

PROCEDURE BEFORE THE COMMISSION

5. When the matter came on for conciliation and arbitration on 20 December 2019, Mr Carney of counsel appeared for the applicant and Mr Parker of counsel appeared for the respondent. While there were extensive negotiations during the conciliation phase of the matter, I was ultimately informed that the parties were unable to reach a mutually satisfactory resolution of the dispute. I am satisfied that the parties, who were represented by very experienced counsel, had ample opportunity to explore settlement but were unable to reach an agreed resolution of the dispute.

6. At the commencement of the arbitration hearing, Mr Parker stated that the issues for determination were as follows:

    (a) whether the applicant was a worker or deemed worker in the employ of the respondent;

    (b) whether the applicant suffered injury to his back arising out of and in the course of his employment, and

    (c) whether the applicant was incapacitated for work as a result of that injury and, if so, the extent of the incapacity.

7. During the conciliation it was agreed that the applicant's pre-injury average weekly earnings (PIAWE) was $1,520. It was also accepted that the applicant put his case that he was a worker on the dual basis of a common law contract of service and pursuant to Sch1.2 of the 1998 Act.

DOCUMENTS

8. The documents before the Commission are as follows:

    (a) The Application to Resolve a Dispute (the Application) and the documents attached;

    (b) The Reply and the documents attached;

(c) Applications to Admit Late Documents dated 29 October 2019, 5 December 2019, 17 December 2019 and 10 December 2019.

9. There was no objection to the above material apart from the report of Dr Nosir, dated 28 November 2019. Mr Parker objected to the tender of that document on the basis that it had been served late; some 10 days prior to the hearing. Mr parker argued that the respondent had lost the opportunity to obtain an explanatory report from Dr Nosir or to issue a Direction for him to attend the Commission for cross examination.

10. As I thought there was some merit in Mr Parker's application, I ruled that I would admit the report but reserve the question of whether the respondent should have an adjournment to the conclusion of submissions.

11. At the conclusion of submissions, I revisited the issue of an appropriate response to the admission of Dr Nosir's report. Although I was minded to grant an adjournment, if it was sought by Mr Parker, no such application was made.

12. There was no application to adduce further written or oral evidence. Rather, the parties indicated that they were content for the matter to proceed on the basis of submissions addressing the documentary evidence.

SUBMISSIONS

13. The submissions of the parties are recorded, and I do not propose to reiterate those submissions in these short reasons. I will, however, attempt to address the main thrust of counsel's argument in resolving the issues in dispute. I should note that Mr Parker referred to several of the leading cases on employment including *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 (*Stevens*), *Vacik Distributors Pty Ltd v Kelly* (1995) 12 NSWCCR 30, *Vabu Pty Ltd v FCT* (1996) 33 ATR 537and Sweeney *v Boylan Nominees Pty Ltd* [2006] HCA 19.

14. I propose to deal with the question of employment before considering the remaining issues in the case. In order to understand the submissions of the parties and the way in which the Commission has resolved the issue, it is necessary to set out aspects of the evidence of the applicant and of Younos Nazari and Yahya Yunespour, the directors of the respondent company. What follows is not intended to be a comprehensive survey of their evidence. Rather, I set out the salient points that are relevant to the issues which the Commission must determine.

15. The applicant's evidence is found in an initial statement of 19 August 2019 and in two short supplementary statements. By his primary statement, the applicant says that he has worked as a "self-employed" painter since 2007. He says that:

> "I was in and out of work and intermittently on Centrelink benefits. In the month leading up to my injury I was working with Hue Painting Group Pty Ltd".

His work for the respondent involved repetitive bending, working in awkward positions from a scaffold and the manoeuvring of drums of paint which weighed approximately 15 kilograms.

16. The applicant says that he attended Dr Virk on 27 March 2019 and complained of low back and buttock pain. He says that he attended Dr Bulbulia, at the same surgery, on 16 April 2019 and "explained" to him what had occurred at work the previous day.

17. The applicant says that the treatment prescribed by these medical practitioners has only been of temporary benefit. He continues to find it difficult to bend, sit or stand for extended periods of time. He says that as he is unable to walk or stand for extended periods he has been "unable to return to any form of employment".

18. The applicant acknowledges that he has an ABN but states that he does not have a "business name, nor do I advertise my services". He says that at the time of his injury he was working exclusively for the respondent. He had been referred to that company by a friend who was working there. He contacted Younes, who offered him a job and was "asked to start the following day". Younes is, almost certainly, Mr Nazari, one of the directors of the respondent.

19. The applicant says that he worked Monday to Saturday 7.00 am to 3.00 pm every week. He says that there was the possibility of overtime during busy weeks. Younes would direct what tasks to be undertaken. In respect of pay, he would invoice the respondent fortnightly and would be paid at an hourly rate of $37.50 which was $300 per day. This money was deposited into his personal bank account by the respondent.

20. The applicant says that he was responsible for paying his own tax and he was not paid superannuation. The respondent supplied all the paint, paint brushes and equipment on the job site he was not required to use his personal tools. Further, during the time that he worked for the respondent he did not undertake work with any other employer.

21. By a supplementary statement of 5 December 2019, the applicant sets out part of his work history. He also addresses his ongoing medical treatment. He says that he continues to have severe pain in his back. He says that his back pain "is so bad it wakes me up from sleep". He then outlines several disabilities associated with his back pain.

22. By a further statement of 17 December 2019, the applicant says that he applied for an ABN because a friend told him that he "needed an ABN to work in the building and construction industry". He says most of the jobs he has undertaken required him to work under his own ABN. He says that he has not acted as a head contractor or employed anyone to assist him. He reiterates that he has never advertised for painting or construction work and has "only ever gotten work through labour hire companies or through friends."

THE EVIDENCE OF YUNOS NAZARI

23. Mr Nazari is one of the directors of the respondent company. He provided a signed statement dated 22 October 2019. At that time the respondent had one employee. It provided painting services to a company known as Core Build Services Pty Ltd, which, in turn, provided Hebel render and painting services. Mr Nazari does not state the date upon which the applicant first performed painting work for the respondent. But the author of the factual investigation report to which the statement is attached says that he was told that the applicant worked for a period of 15 days.

24. Mr Nazari states that there was no written contract of employment. The applicant was "required to work for the company but was not allowed to subcontract and work given to him to anyone else [sic]. He had to do the work himself."

25. Mr Nazari states that the applicant was not paid under an award. Rather, he was paid $300 per day and "he was to take care of tax and superannuation". He was paid for work done every fortnight on presentation of an invoice stating the hours of work. Payment was by direct debit into a bank account. Mr Nazari continues:

> "Mr Waseeq was paid at a daily rate, on jobs that he worked for the company. He was employed on a casual arrangement and would be asked to work, when we had a job."

Mr Nazari would send him a text message if the respondent had work available.

26. In respect of hours worked, Mr Nazari states that the applicant would normally start at 7.00 am and would work until 3.00 pm, although if he finished earlier, he could leave at 1.00 pm. There were no set hours of work each week.

27. The witness recounts that he worked on site at 10 Peregrine Drive, Greenhills Beach, where the applicant asserts that he was injured. He says this:

> "We had three employees on that job, including Mr Waseeq. I was working on that site, and the other employee was Abdul. Mr Waseeq was paid at the same rate as Abdul".

28. Mr Nazari states that the applicant was required to carry out painting duties on site "and all related tasks." These tasks would include mixing paints. However, he would not have been required to unload tins of paint as "the paints were always on site." Core Build provided the paint and Hue Painting:

> "provided all the equipment required on the job, such as masking tape, drop sheets, paint brushes and rollers. Mr Waseeq would not have provided any equipment of his own on that job."

29. Mr Nazari states that while he worked on the site, he would also supervise Abdul and Mr Waseeq "and made sure that they were doing a good job". He states that the applicant worked with experienced staff, as the respondent normally had two painters working together on each job.

30. Mr Nazari says that he only became aware that the applicant alleged he sustained an injury "some months after the date of injury". He says that he worked with the applicant on the job at Greenhills Beach and was unaware of him suffering an injury to his back.

YAHYA YUNESPOUR

31. Mr Yunespour states that he was told that the applicant was available for work as a painter by friends. During a telephone call Mr Yunespour told him that he would be paid "$300.00 per day, for days that he worked". There was no discussion as to the quantity or the duration of the work that may have been available.

32. The witness gives an account of the nature of the applicant's work which is similar to that given by Mr Nazari. He states that the respondent provided all the equipment and materials required to carry out the painting job. Core Build provided the paints.

33. In respect of the nature of the physical activity undertaken by the applicant, he acknowledges that the applicant was required to carry out all tasks related to painting. He continues:

> "His tasks would have included mixing the paints, but the paints were already on site, as they were provided by Core Build. He would not have been required to unload the tins of paint from the truck.
>
> Core Build provided the paint and Hue Painting provided all of the equipment required on the job".

34. The applicant was not required to provide any equipment of his own. He was supervised on the job by Mr Nazari who:

> "would have been telling Mr Waseeq and Abdul what they were to do on that job."

35. The witness says that it was necessary to pour the paint into a roller tray. This was done either by lifting the tin, or by putting the roller tray next to the tin of paint and then just tipping the paint into the tray. He says that the applicant would have "only done a maximum of three tins a day" as the respondent would use a maximum of six tins of paint a day on a job although, "usually only four or five".

36. The witness says that at the conclusion of the job at Greenhill's Beach, he telephoned the applicant and told him that the respondent "did not have any more work for him". He was told that if more work became available, he may be offered the work. The witness continues:

> "He said nothing to me during that phone call about any injury."

37. Mr Yunespour says that two or three months after the applicant ceased work for the respondent, he received a letter from an insurer in respect of the alleged injury. He rang the applicant at that time who told him that he hurt his back "when I was working with Younes". Mr Yunespour reiterates that the applicant said nothing to indicate that he suffered an injury during the time that he worked for the respondent.

DISCUSSION ON THE ISSUE OF EMPLOYMENT

38. It is unnecessary to rehearse the various attempts made by the courts to provide a practical definition of a contract of service during the last century. Whilst each of the tests set out multiple criteria, the early emphasis was on the degree of control or, at least, the right to control the way the alleged employee performed the work. Subsequently, the English Courts resorted to an inquiry as to whether the alleged employee was "part and parcel" of the organisation, although that test was never completely accepted in Australia. Ultimately, the High Court of Australia instructed Australian courts to weigh the various indicia of the contract for the purposes of determining the issue.

39. In *Stevens*, Deane J said this:

> "The distinction between 'employee' and 'independent contractor' has become an increasingly amorphous one as the single test of the presence or absence of control has been submerged in a circumfluence of competing criteria and indicia."

40. If that formulation is of little practical assistance to lawyers in advising clients or to arbitrators in determining the issue, the judgment of Wilson and Dawson JJ offers more insight. After considering the case law, they said this:

> "The modern approach is, however, to have regard to a variety of criteria. This approach is not without its difficulties because not all of the accepted criteria provide a relevant test in all circumstances and none is conclusive. Moreover, the relationship itself remains largely undefined as a legal concept except in terms of the various criteria, the relevance of which may vary according to the circumstances."

41. While the control test remained important, other indicia, including the right to have a particular person do the work, the right to suspend or dismiss the person engaged, the right to the exclusive services of the person engaged and the right to dictate the place of work, hours of work were also of importance. Equally, the provision of equipment, the creation of good will or saleable assets in the course of the alleged employment, the payment of business expenses from income and the method of remuneration were relevant.

42. The decision in *Stevens* and the subsequent caselaw highlight additional indicia including the provision of superannuation, the payment of various kinds of leave, the payment of insurance and, of course, where the contract is wholly or partly in writing the language of the contract. The latter must remain of fundamental importance, although the recent case law establishes that the post-contractual actions of the parties can be proven in evidence to establish the nature of the relationship and whether it is one of service or for services.

43. Thus, the description of the relationship in the contract is important but not decisive. In these latter respects, the construction of an employment contract may be distinguishable from the general rules for construction of contracts, but it is unnecessary to determine this point. Generally, in commercial contracts, events occurring after the time of the execution of the contract are only admissible if they prove the surrounding circumstances at the time the

written contract was executed. As there is no written contract in this case, it might be said that all subsequent relevant conduct of the parties is evidence which is probative of surrounding circumstances at the time of the execution of the contract: see *Franklins Pty Ltd v Metcash Trading Ltd* [2009] NSWCA 407 (16 December 2009).

44. At the arbitration hearing, I raised with the parties the "focal point" or "entrepreneur" test considered by the Commission in a series of relatively recent cases, commencing with *Malivanek v Ring Group Pty Ltd* [2014] NSWWCCPD 4. In that case, Roche DP considered the reasoning of the High Court in *Hollis v Vabu Pty Ltd* [2001] 207 CLR 21 (Hollis) as interpreted by Bromberg J in the Federal Court in *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* [2011] FCA 366 (*On Call Interpreters*) and the Full Court of the Federal Court in *Ace Insurance Limited v Trifunovski* [2013] FCAFC (*Ace Insurance*).

45. This test has been variously described in the case law as "intuitive", the "smell" test and, what is presumably a variation of the "duck" test, namely the "elephant test". Obviously, a resort to intuition and to impression can strip away arcane legal rules and permit a trier of fact to rapidly reach a conclusion by considering the characteristics of the employment contract. But I doubt that this approach greatly assists in ascertaining whether there is a contract of service or for services as I have reservations whether "impression" can have a significant role to play in the construction of contracts. As far as I can ascertain, the application of the "entrepreneur" test merely assists in considering the conventional indicia of employment. Identifying and balancing of the competing indicia remains an essential aspect of determining whether the contract is of service or for services. At least, that was the approach of the High Court of Australia in *Hollis*.

46. Curiously, in their respective witness statements the applicant has described himself as "self-employed" and the directors of the respondent have referred to him as an employee. Whether this reflects the real view of the parties as to the nature of the contract or simply a lack of understanding on the part of those who prepared the respective statements is not clear. In any event, the subjective view of the parties as to the nature of their relationship is not determinative of the outcome of the worker issue.

47. In addition to the statements, the evidence contains financial material produced by the applicant including tax invoices which he submitted to the respondent. There is also the applicant's tax return for the financial year ending 30 June 2019. It discloses income from the business of house painting of $34,855. It also discloses deductions of $7,567 of which $4,669 relates to the applicant's motor vehicle. There are depreciation expenses claimed of $1,320, presumably for the applicant's tools of trade, mobile telephone and the like. This evidence is ambiguous and is of limited assistance in resolving the employment issue.

48. In my opinion, balancing the indicia in this case leads inexorably to the conclusion that the applicant was a worker employed by the respondent at the time of his alleged injury. As is often the case some of the indicia tend towards the conclusion that the applicant was self-employed. For example, the respondent's payment of the applicant upon receipt of invoice and its failure to retain amounts under the superannuation guarantee levy or to deduct amounts for taxation are more consistent with a contract for services. However, many of the indicia point decisively to the opposite conclusion

49. Plainly, the respondent not only had the right to control but exercised that right. The respondent dictated where the applicant was to work on any particular day. Mr Nazari supervised him on site to ensure that he was doing "a good job". He had to perform the work himself and was not allowed to have anyone else perform the work. There was a prohibition on delegating the work. The caselaw makes clear that the right to control and a preclusion of delegation are significant milestones in the direction which leads to a conclusion of employment.

50. Similarly, the evidence is unequivocal that the respondent provided either directly, or through its contractual relationship with Core Build, the paint and equipment that the applicant required to carry out his work. It is not a case where the applicant was required to have a vehicle or to provide ladders, scaffolding, etcetera with which to carry out his work.

51. Thirdly, the applicant was paid on a daily basis and not for performing a particular task. The amount of $300 per day, when one bears in mind that the applicant worked on a casual basis and was not paid sick leave, holiday pay or superannuation does not suggest that there was any element of profit in this payment. The Commission's residual knowledge of wage rates in the community can be invoked to establish that it is not uncommon for experienced painters in the metropolitan area to be paid $35 per hour. The payments made to the applicant by the respondent are, therefore, characteristic of a casual wage rather than a payment made to a self-employed painter.

52. The applicant's taxation return refers to him as operating a business. Otherwise, the taxation return is not inconsistent with employment. Apart from the depreciation of the applicant's vehicle, the ratio of deductions to income derived from painting is not of itself suggestive of the applicant carrying on a business.

53. If one views the proven facts through the lens of the "entrepreneur test", employed by Bromberg J in the *On Call Interpreters* case or in the manner suggested by Buchanan J, in the *Ace Insurance* case, they emphatically reveal that the applicant was providing the work as a manifestation of the respondent's business. He was not performing the work as an entrepreneur who owns or operates a business of his own.

54. I appreciate that the building industry is one where the line between employees and contractors is blurred. Workers often need an ABN to obtain employment. It is obviously advantageous for small employers to make a daily payment rather than engage in the burdensome administrative chores of paying taxation and retaining superannuation. But the facts here fall clearly on the contract of service side of the line.

55. The evidence of the directors, which seems to me quite straight forward, suggests that they did hire employees from time to time and that they considered that the gentleman who was working with the applicant at his last place of employment was an employee.

56. As I have reached the conclusion that the applicant is unambiguously a worker, I do not propose to address the issue of deemed worker. Patently, however, the evidence does not establish that the applicant was carrying on a business in his own right.

INJURY

57. In addition to the evidence of the applicant and the directors of the respondent company, it is appropriate to consider the relevant lay and medical evidence before embarking on a determination of the injury issue. That includes the clinical notes of the NAS Advanced Medical Centre at Auburn, the report of Dr Nosir, the reports of Dr McKechnie and the opinion of Dr Vote who provided a report on behalf of the applicant solicitors. I note that the respondent did not qualify a doctor to comment on the issues of injury or incapacity.

58. By an unsigned and undated workers injury claim form attached to the Application, the date of injury is given as 15 April 2019. In response to the question of "what task were you doing when you were injured?" the response is:

> "Mixing the paint and painting outside the houses.
>
> Mixing the 15L paint buckets and painting on scaffold."

The time of the injury is said to be 2 pm. I was not referred to this document during argument.

59. The relevant entries in the medical record commence in late March 2019.The applicant attended Dr Virk on the evening of 27 March 2019. He complained of back ache “after sitting longer periods yesterday”. He was advised to avoid bending and pushing and prescribed Voltaren Rapid tablets.

60. The next relevant consultation is with Dr Bulbulia on 16 April 2019 when the applicant complained of left sciatic pain. Once again, he was prescribed Voltaren and an x-ray of his lumbosacral spine was requested by the doctor. The report of the x-ray by Dr Khalil stated that the applicant suffered L5/S1 spondylosis. It was suggested that if there was a clinical suspicion of nerve root compression then further investigation by CT or MRI should take place.

61. In the afternoon of 16 April 2019, the applicant saw Dr Islam who referred the applicant for a CT scan of his lumbar spine. On the following day, Dr Bulbulia saw the applicant in consultation and referred to the CT scan report. He prescribed Tramadol and referred the applicant for a cortisone injection.

62. Dr Bulbulia saw the applicant again on 7 May 2019 and issued a Centrelink medical certificate. He noted that the applicant had received a cortisone injection. On 30 May 2019, Dr Islam noted that the applicant was having left sided sciatica. The doctor was reluctant to prescribe further Tramadol or to refer the applicant for a third cortisone injection.

63. On 11 June 2019, Dr Bulbulia recorded the following:

> “surgery consultation
> additional history
> injured his back at work on the 16 April 2019
> work as a painter and is required to lift 15kg paint drum
> e/b Hue Painting Group P/L in Guildford”

Dr Bulbulia prescribed Panadol tablets. He issued a WorkCover medical certificate certifying the applicant unfit for work from 16 April 19 to 30 June 2019.

64. On 25 June 2019, the applicant submitted a claim form to EML, the respondent’s workers compensation insurer, presumably the one attached to the Application.

DR NOSIR

65. Dr Nosir provided a report to the applicant’s solicitors on 28 November 2019. It records the applicant’s consultations at the practice throughout 2019, commencing with the consultation of 27 March 2019. Dr Nosir records that the history given by the applicant at the medical centre was as follows:

> “He stated that on 15/04/2019 he was painting outside a house and he was mixing paint and he felt severe back ache and it kept on getting worse that day. He also stated that on 27/03/2019 he was working and resting to have lunch when he stood and felt severe back ache.”

66. The doctor expressed the opinion that the applicant sustained injury to his back as a result of his work. He thought that the applicant was “currently unfit for work” and was to continue conservative treatment by way of analgesics and physiotherapy.

DR McKechnie

67. Dr McKechnie saw the applicant at the request of Dr Nosir on 9 September 2019. He recorded that the applicant initially suffered back pain at work on 27 March 2019. Then, on 15 April 2019, he developed severe lower back pain radiating through the left leg into the foot with distal numbness.

68. Dr McKechnie noted that a CT scan suggested lumbar disc protrusion with the L4/5-disc protrusion causing nerve root impingement. He arranged for the applicant to undergo a further MRI scan.

69. Dr McKechnie reviewed the applicant on 14 October 2019 and noted that he was still complaining of back pain. He recorded that the MRI of the lumbar spine demonstrates:

> "a small left L4/5 extra foraminal disc protrusion causing mild impingement upon the left L4 nerve root."

He recommended that the applicant undergo conservative nonoperative treatment. He commenced him on Lyrica and suggested that he have further physiotherapy and core strengthening exercise. He stated that he should avoid heavy lifting at this stage and return for review in the new year.

DR VOTE

70. Dr Vote saw the applicant at the request of his solicitors on 2 September 2019. He noted that the applicant began to experience low back pain in mid March after which he consulted a doctor. The pain worsened dramatically on or about 15 April 2019 when the applicant was repetitively lifting quite heavy tins of paint. Dr Vote observed clinical signs of nerve root compression on clinical examination including an absent left ankle jerk. He recorded that the applicant had "back ache since March and evidence of an acute disc prolapse since April". On the basis of his history the doctor recorded that the applicant almost certainly sustained a disc rupture in the course of his employment on 15 April 2019 as a result of lifting repetitively.

71. Dr Vote stated that the applicant was unable to perform any work whatsoever. He thought that a microdiscectomy may be appropriate.

72. In contrast to the dispute as to employment, I have found the injury issue difficult. There is no reason why I should not accept the evidence of the directors of the respondent company that they were not told that the applicant suffered injury in the course of his employment with the respondent. The applicant does not directly contradict this evidence in his signed statement, although he does suggest in his unsigned claim form that he had attempted to contact his employer after the cessation of work without success.

73. There is a possible partial explanation of his failure to report an injury at work in his initial statement. The applicant says that his claim was lodged late because he was "unaware after sustaining my injuries that I could be compensated". He says that a friend suggested that he instruct lawyers and bring a worker's compensation claim and that he then contacted his current solicitors on 26 April 2019. That, however, does not entirely explain why he remained silent after sustaining a disabling injury.

74. The contemporaneous medical evidence is also inconsistent with the applicant's account of how he sustained injury. The applicant saw Dr Virk on 27 March 2019 and complained that he sustained injury on the previous day "after sitting longer periods". The note does not contain any hint that the applicant's employment related to his work. It is likely, however, that the applicant was working for the respondent at that time as a painter.

75. The applicant next saw a doctor on 16 April 2016, shortly after he ceased work and complained of left sciatica. Although he saw medical practitioners on several occasions after that consultation, it was not until 11 June 2013 that Dr Bulbulia records that he was given the additional history at a consultation that the applicant injured his back at work on 15 April 2019. He also, of course, recorded that the applicant was required to lift 15 kilogram paint drums at work. Following, this consultation the doctor apparently issued the certificate of capacity, which certified the applicant unfit for work from 16 April 2019 to 30 June 2019.

76. Thirdly, the evidence that the applicant was required to repetitively lift heavy drums is disputed by the respondent. Mr Yunespour states that the applicant would have been required to lift a maximum of three tins a day while working for the respondent. He states that the painters were able to put the roller tray next to the tin and tip the paint into the tray, rather than lifting the tin.

77. These difficulties in the applicant's case are compounded by the fact that he gives no clear account of the circumstances of the onset of his back pain in his written evidence. I appreciate that "injury" was first raised at the telephone conference, but the absence of direct evidence on the point creates difficulty.

78. Equally, there are aspects of the evidence, extraneous to the applicant's account, which are consistent with his assertions. Obviously, the applicant was performing work as a painter for the respondent in the days before his attendance on a medical practitioner on 27 March 2019 complaining of back pain. Certainly, the applicant continued to work as a painter up until the day before his consultation with Dr Bulbullia on 16 April 2019. It is accepted that work involves some lifting and a good deal of bending, although the extent of lifting is hotly disputed.

79. Undoubtedly, the applicant had symptoms consistent with a disc lesion on 16 April 2019. That opinion is shared by all medical practitioners in the case. There is no suggestion that the applicant had back symptoms prior to his work for the respondent. Thus, the chronology of the development of back symptoms is largely consistent with the applicant's allegations of injury.

80. Many of the inconsistencies in the evidence essentially go to the reliability of the applicant's evidence. I am reluctant to find that the whole of the applicant's evidence is unreliable in the circumstances that I have discussed above. I doubt that the evidence taken as a whole is enough to comprehensively impugn the applicant's credit. It is plausible that the applicant's assertion in his claim form that he was unaware of his entitlement to compensation until a conversation with a friend may account for his failure to report back injury promptly to his employer and to his doctor.

81. The inconsistencies may have provided a basis to cross-examine the applicant on his credit, but no application was made for cross examination. I do not suggest that cross-examination is a necessary pre-requisite for an adverse finding on credit. Generally, an applicant will be expected to deal with inconsistencies in writing. But in some cases, where the evidence on an issue going to credit is ambiguous, it may be difficult to make an adverse finding, in the absence of cross-examination.

82. It is true, as Mr Parker argued, that the history recorded by Dr Nosir in his brief report is different to that recorded in the clinical notes of the practice on 27 March 2019 and 16 April 2019. I suspect that Dr Nosir's history drew on subsequent clinical notes or what the doctor had been told by the applicant sometime after 16 April. That being so, the accuracy or otherwise of the history also raises the issue of the applicant's reliability. As I have concluded that I should accept the applicant's evidence as to the onset of his back pain at work, it follows that I regard Dr Nosir as having a reasonably accurate history of the events of 26 March 2019 and 15 April 2019.

83. In those circumstances, one can accept that the applicant suffered a lesion to his lumbar as a result of painting work, which undoubtedly involved mixing painting including lifting paint containers from time to time, on and before 15 April 2019. I appreciate that the history recorded by Dr Nosir is different to that recorded by Dr Vote, who relied on "repetitive" lifting of paint containers as a cause of injury. But it is reasonably close to the evidence contained in the applicant's claim form and, in my opinion, it is a more likely account of what occurred on 26 March and 15 April 2019.

84. I propose to find that the applicant suffered injury to his back as a consequence of his work for the respondent on and before 15 April 2019.

Incapacity

85. The evidence in relation to incapacity is equally sparse. Once again, the respondent did not tender evidence which addressed the issue. There is a certificate of Dr Bulbulia, which certifies the applicant unfit to 30 June 2019. That certificate, however, was backdated to the 16th April 2019, some eight weeks earlier when the doctor received the "additional history" of injury.

86. The only subsequent medical evidence is that of Dr Vote and Dr McKechnie. Dr McKechnie saw the applicant on 14 October 2019, he recorded that the applicant "should avoid heavy lifting at this stage". I would infer from this statement that Dr McKechnie thought that the applicant had a capacity for work. Importantly, he did not find any "motor or sensory disturbance" on examination of the applicant. This contrasts with the earlier examination of Dr Vote.

87. Doing the best I can on slender evidence, I have reached the conclusion on the balance of probabilities that the applicant had no current earning capacity from 16 April 2019 to 14 October 2019. Thereafter, he was able to perform light to moderate physical work, which did not involve heavy lifting and repetitive bending. He has not proven that he had no earning capacity after that date.

88. The applicant is a presentable young man. He told me at the conciliation conference that his oral English was reasonable. There is, therefore, no reason why he should not be able to perform light courier work or light unskilled factory work. I am aware that the applicant may not quickly obtain such work. But there are clearly jobs that are within his capacity available in the labour market. I accept that the only work available to the applicant would be of a menial kind that paid the minimum wage.

89. Accordingly, I find that at all material times the applicant's PIAWE was the sum of $1,520. From 16 April 2019 until 13 October 2019, the applicant had no current earning capacity. From 14 October 2019, he was able to earn the sum of $740.80 a week i.e. the minimum wage at that time.

90. I propose to make an award for the applicant as follows:

    (a) $1,444 per week from 16 April 2019 to 16 July 2019;

    (b) $1,216 per week from 17 July 2019 to 13 October 2019, and

    (c) $475.20 per week from 14 October 2019 to date and continuing until same is suspended or terminated in accordance with the weekly payment's provisions of the 1987 Act.

91. I propose to grant the parties liberty to apply in respect of the above calculations. I make an award for the applicant pursuant to section 60 in respect of the injury to his low back.