

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 5207/19
First Applicant: Ibtisam Al Oudah
Second Applicant: Fatima Al Oudah by her tutor Ibtisam Al Oudah
Third Applicant: Ali Al Oudah by her tutor Ibtisam Al OHudah
Fourth Applicant: Zaid Al Oudah
Fifth Applicant: Rasmiya Al Oudah
First Respondent: I-Move Group Pty Ltd
Second Respondent: Nooraldin Al Majeed (deceased)
Third Respondent: Workers Compensation Nominal Insurer

Date of Determination: 23 March 2020
Citation: [2020] NSWCC 84

The Commission determines:

1. The deceased, Hamad Al Oudah, suffered injury on 20 July 2017 arising out of or in the course of his employment with the first respondent, I-Move, as a result on which he died on that day.
2. The first to fifth applicants were wholly or partly dependent for support on the deceased at the time of his death.
3. There are no other persons who were wholly or partly dependent for support on the deceased at the time of his death.
4. The lump sum death benefit of \$775,600 payable pursuant to s 25 of the *Workers Compensation Act 1987* as a result of the death of the deceased is to be apportioned as follows:
 - (a) first applicant: \$400,600;
 - (b) second applicant: \$130,000;
 - (c) third applicant: 145,000;
 - (d) fourth applicant: \$50,000'
 - (e) fifth applicant: \$50,000.
5. The third respondent is to pay to the first, fourth and fifth applicants the lump sum death benefits apportioned to them.
6. The third respondent is to pay to the NSW Trustee in accordance with s 85(1)(c) and (2) of the *Workers Compensation Act 1987* the lump sum death benefits apportioned to the second and third applicants.
7. The third respondent is to pay the weekly amounts of compensation payable pursuant to s 25(1)(b) of the *Workers Compensation Act 1987* in respect of the second and third applicants to the first applicant.
8. The Nominal Insurer is to pay to the fourth applicant the sum of \$9,500 for funeral expenses.

9. The applicants have leave to approach the Registrar for a further telephone conference in respect of a claim for interest pursuant to s 109 of the *Workplace Injury Management and Workers Compensation Act 1998*.

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

Brett Batchelor
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 BRETT BATCHELOR, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Hamad Al Oudah (the deceased/Hamad) died on 20 July 2017 whilst driving a furniture removals truck which crashed off Thunderbolts Way Giro, near Gloucester NSW, and caught fire. Seated next to him at the time of the crash was the second respondent, Nooraldin Al Majeed (Nooraldin) who also died in the crash.
2. The first applicant is the deceased's widow (Ibtisam). The second and third applicants are his infant daughter Fatima and infant son Ali who reside in Iraq with their mother Ibtisam.
3. The fourth applicant, Zaid, is the deceased's father and the fifth applicant is the deceased's mother, Rasmiya, both of whom reside in a suburb of Sydney.
4. The applicants claim the lump sum death benefit pursuant to s 25(1)(a) of the *Workers Compensation Act 1987* (the 1987 Act), and also claim weekly payments from 20 July 2017 for Fatima and Ali pursuant to s 25(1)(b) of that Act.
5. The applicants claim that Hamad was employed by the first respondent, I-Move Group Pty Ltd (I-Move), as a driver/furniture removalist at the time of his death. I-Move was at that time uninsured for the purposes of workers compensation. The third respondent, the Workers Compensation Nominal Insurer (the Nominal Insurer), subject to apportionment of the lump sum death benefit by the Commission accepts liability for the claims of the applicants; that is, the third respondent accepts that Hamad was employed by the I-Move at the time of his death. In the alternative, in the event that there is a finding that the deceased was not so employed, the applicants claim that the deceased was employed by the Nooraldin at the time that both he and the Hamad were killed in the truck crash. The Nominal Insurer denies liability for this alternative claim.

ISSUES FOR DETERMINATION

6. The parties agree that the following issues remain in dispute:
 - (a) As between I-Move and the Nominal Insurer, was Hamad employed by I-Move or Nooraldin as at the date of death of Hamad and Nooraldin on 20 July 2017?
 - (b) As between the applicants and the Nominal Insurer, and Nooraldin, if there is a finding that Hamad was not employed by I-Move on 20 July 2017, was he employed by Nooraldin on that date?
 - (c) In the event that there is a finding that Hamad was employed either by I-Move or Nooraldin as at 20 July 2017, how is the lump sum death benefit to be apportioned between the applicants?
 - (d) In the event that there is a finding that Hamad was employed either by I-Move or Nooraldin as at 20 July 2017, to whom are the weekly payments in respect of Fatima and Ali to be paid?
7. On 8 November 2019, when the Nominal Insurer was joined as third respondent in the proceedings, it was noted by the Commission that in the event that Nooraldin is found to be the employer of Hamad at the time of his death, and if there is no evidence to show that the Nooraldin was at that time an exempt employer, the Nominal Insurer will meet any award made against Nooraldin. If there is evidence to show that Nooraldin was an exempt employer at the time of the death of Hamad, Employers Mutual Limited may need to be joined into the proceedings.

8. There is no evidence to show that Nooraldin was an exempt employer at the time of his and Hamad's death.

PROCEDURE BEFORE THE COMMISSION

9. The parties attended a hearing on 23 January 2020. 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.
10. The parties were represented at the hearing as follows:
- (a) first applicant: Mr P Perry of counsel instructed by Mr S Maxwell;
 - (b) second and third applicants: Mr P Stockley of counsel;
 - (c) fourth and fifth applicants: Mr L Robison of counsel instructed by Mr D Kennedy. Both the fourth and fifth applicants were present;
 - (d) first respondent: Mr B McManamey of counsel;
 - (e) second respondent (deceased): unrepresented;
 - (f) third respondent: Mr S Grant of counsel.

EVIDENCE

Documentary evidence

11. The following documents were in evidence before the Commission and taken into account in making this determination:
- (a) Application in Respect of Death of Worker in matter number 5209/19. Pursuant to direction made at a telephone conference on 7 November 2019, that matter is to be heard together with the current matter, number 5207/19;
 - (b) Application in Respect of Death of Worker, matter number 5207/10 (the Application);
 - (c) Reply lodged by first respondent (first respondent's Reply);
 - (d) Reply lodged by the third respondent (third respondent's Reply);
 - (e) Notice for production served by the third respondent on the first respondent on 6 January 2020 requiring production of the following documents:
 - (i) "Copies of documentation recording employment of all employees of I-Move Group Pty Ltd or associated companies for the period 1 January 2016 to 21 July 2017, including but not limited to – letters of offer of employment, letters confirming employment, employment agreements/contracts, employee lists etc."

- (ii) “Copies of all documentation relating to employment by I-Move Group Pty Ltd or associated companies of Nooraldin Al Majeed (also referred to as Almajeed and Al Majid) including but not limited to – letters of offer of employment, letters confirming employment, employment agreements/contracts, payslips etc.”

(exhibit “A” in the third respondent’s case. This document was originally marked for identification, and later admitted into evidence on the application of the third respondent, over the objection of the first respondent.)

12. Counsel for the third respondent made a call for a response to the notice for production. Counsel for I-Move stated that there were no documents to produce in response to the call.

Oral evidence

13. There was no application to adduce any oral evidence or to cross-examine any of the parties or officers of I-Move.

OUTLINE OF THE PARTIES’ CASES ON LIABILITY

Applicants

14. Based principally upon the evidence of Zaid in his statutory declaration dated 15 May 2018¹ and upon the evidence of Senior Constable Robin Crick in his statement dated 17 August 2017², together with inferences to be drawn from other evidence, namely:
- (a) of Taif Al Hadeethi (Taif), who was Operations Manager of I-Move as at 20 July 2017 and became sole director of that company on 23 January 2018, in his statement dated 20 February 2019³;
 - (b) Lyn Jordan, grandmother of Chris Jordan, in her statement dated 4 December 2017⁴;
 - (c) Jesse Wilson, partner of Chris Jordan, in her statement dated 10 January 2018⁵, and
 - (d) Lisa Groth, Senior Case Manager icare workers insurance, in a file note dated 28 September 2017 of a telephone conversation that she had on that day with Shareef Al Hadeethi (Shareef) who was the sole director of I-Move as at 20 July 2017⁶,

the applicants say that Hamad was an employee of I-Move when he was killed in the truck crash on 20 July 2017.

15. The applicants say that I-Move contracted with Jesse Wilson and/or her partner Chris Jordan to move their furniture and belongings from an address in Toowoomba to Melbourne, and that I-Move was in the process of performing this contract when the truck driven by Hamad, with Nooradin sitting beside him, crashed on 20 July 2017.

¹ Application p 151.

² Application p 20.

³ Application p 339.

⁴ Application p 112.

⁵ Application p 126.

⁶ Application p 92.

16. Alternatively, the applicants submit that if Hamad was not an employee of I-Move at the time of his death, he was an employee of Nooraldin. They say that, in view of Hamad's work history in Australia and his obligation and wish to support his wife and children in Iraq, it is unlikely that he would have undertaken the trip to Toowoomba for no reward. In this alternative scenario, the applicants say that Nooraldin subcontracted with I-Move to move the Jordans' furniture to Melbourne and employed Hamad as his driver and assistant.

First and third respondents

17. I-Move's case is that Hamad was at no time employed by it, and that there is sufficient evidence to ground a finding that he was employed by Nooraldin at the time of the crash on 20 July 2017. The Nominal Insurer accepts that Hamad was employed by I-Move, but denies he was employed by Nooraldin.

SUBMISSIONS ON LIABILITY AND APPORTIONMENT

18. The submissions are recorded in the transcript of the hearing of 23 January 2020 (T), supplemented by written submissions:
- (a) from all applicants jointly in respect of liability, in reply to the first respondent's submissions (applicants' joint submissions in reply);
 - (b) separately from:
 - (i) the first applicant;
 - (ii) the second and third applicants, and
 - (iii) the fourth and fifth applicants,in respect apportionment of the lump sum death benefit, and
 - (c) from the first respondent in reply to the oral submissions of the third respondent.

Applicants

19. The first applicant, Ibtisam, notes that as at the date of the accident on 20 July 2017 Shareef was the sole director of I-Move and that Taif appeared to be the operations manager employed by the newly formed company. She notes that Taif's assertion, that Shareef's role in the company's operations as at the date of the accident was minimal, appears to be contestable in light of Shareef's telephone conversation with Senior Constable Crick on 20 July 2017.
20. The contract between I-Move and "Mrs Jordan"⁷ is relied upon, as is what Lyn Jordan and her husband Brian observed at about 5.15 pm on 19 July 2017 when her grandson's furniture was moved out of the address at 91 Glendale Road Toowoomba.
21. Ibtisam submits that having regard to the evidence of Hamad's employment history, given by Zaid, of:
- (a) four months' work as a furniture removalist before he joined a company known as Furniture Removal Services Pty Ltd (FRS);
 - (b) his subsequent work with FRS from December 2016 until the time he joined I-Move,
- and that

⁷ T p 10.20.

- (c) Taif suggested to Hamad that he should leave FRS and come and work with his new company, I-Move (which had only been incorporated in April 2017), and
- (d) Hamad told his father that he would take up the suggestion of Taif,

there is a strong suggestion that Hamad was very keen to obtain employment and that he would think carefully before leaving one employment (with FRS) and move to employment with another company, I-Move, at the suggestion of its operations manager.

- 22. Ibtisam also submits that the evidence of what Shareef said to Constable Crick on 17 August 2017 in respect of Hamad's employment with I-Move is to be preferred to that of Taif, whose statement was not made until 21 February 2019.
- 23. Finally Ibtisam also relies upon the evidence of Jesse Wilson at [10] in her statement dated 10 January 2018 in respect of a telephone call she received from a representative of I-Move on the morning of 20 July 2017 informing her of the truck crash, and at [11] in respect of a further conversation later that afternoon with "Melissa" when Ms Wilson phoned I-Move. In that further conversation, "Melissa" is stated by Ms Wilson as referring to the two men who died in the accident as "...our best employees."⁸ Counsel for Ibtisam submits that, although Ms Wilson refers to speaking with "...Melissa, one of their representatives", the difference between that name and the name "Alina", who is the employee of I-Move who Taif refers to in his statement as performing an administrative role with the company, is in the circumstances understandable. The submission is that there is a powerful inference that the person who picked up the phone when Ms Wilson phoned I-Move later in the afternoon of 20 July 2017 was Alima Alenchook [sic, Atenchuk]⁹.
- 24. The first applicant also submits that the response of "Melissa" to the enquiry of Jesse Wilson in her telephone call to I-Move later in the afternoon of 20 July 2017 is consistent with what Shareef said to Senior Constable Crick that he was a member of the family that owned the crashed truck and employed the two deceased.
- 25. Counsel for the second and third respondents adopts the submissions of Ibtisam, and notes in particular that, having regard to the statement of Taif given on 21 February 2019, the one thing that is uncontroversial is that I-Move was uninsured, and no explanation has been provided as to why it was so.
- 26. On behalf of the second and third respondents their counsel also draws attention to the record of the telephone conversation between Lisa Groth and Shareef on 28 September 2019 (referred to above at [14(d)] above), and "...the most evasive and ludicrous response from Shareef to the legitimate questions that were being directed to him by Ms Groth."¹⁰ It is submitted that the conversation, of itself, proves nothing but it is part of the web of material which will have to be taken into account when the weight of the very recent assertion on behalf of I-Move is considered. That assertion is that Hamad was not an employee of I-Move.
- 27. The second and third respondents also draw attention to the spreadsheets attached to Taif's statement¹¹ where the relevant job appears¹².

⁸ Application p 127.

⁹ T p 47.05.

¹⁰ T p 24.30-25.05.

¹¹ From Application p 345.

¹² Application p 348.

28. The fourth and fifth applicants adopt the submissions of the first, second and third respondents. They also submit that there is no dispute to be resolved between the applicants and the Nominal Insurer on the question of whether Hamad was employed by I-Move, and the issue would not be before the Commission unless and until such time as the Nominal Insurer issues a certificate under s 145 of the 1987 Act which is subsequently challenged. The fourth and fifth respondents therefore submit that it is not open to the Commission to resolve the issue of the Hamad's employment by I-Move as between the applicants and the Nominal Insurer.

First respondent

29. The first respondent submits that the issue adverted to in [28] above is properly before the Commission in the current proceedings, as the legislation directs the Commission to join the (putative) employer as well as iCare, and that there is no doubt that the Commission has jurisdiction to determine the issue of whether or not Hamad was employed by I-Move as at 20 July 2017 in the current proceedings.
30. I-Move submits that what one makes of the admission by the Nominal Insurer (iCare) is a matter dealt with by the Nominal Insurer and the other parties. I-Move does not dispute that it had a contract with Mr Jordan for the removal of their property, nor does it dispute that Hamad and Nooraldin attended at the Jordans' property as a consequence of that contract. The question for determination is the relationship between I-Move, Nooraldin and Hamas.
31. I-Move submits that the statements relied upon by the applicants are simply bald statements about the relationship between Hamad and I-Move, made without detail to understand the nuances of what must be established to prove on the balance of probabilities, that there was in fact a contract of master and servant between Hamad and I-Move. The first respondent submits that the only direct evidence on this issue is that of Taif.
32. I-Move notes that the truck involved in the fatal accident on 20 July 2017 was owned by Ramzi Shareef Al Adeefi (Ramzi), the father of both Taif and Shareef. I-Move submits that the fact that it was not the owner of the truck is the first of the powerful indicators that the relationship between it and Nooraldin was one of contractor.
33. I-Move notes that it did not provide any equipment for the contract, in fact nothing other than the address of the contact at which the furniture was to be loaded.
34. I-Move submits that nowhere in the spreadsheets attached to Taif's statement does the name Hamad appear, so that in terms of documentary evidence, there is nothing of Hamad ever working for it; no deposits in bank accounts, no payslips, no tax returns, and this is entirely consistent with what Taif says. That is, I-Move never employed Hamad.
35. With reference to Taif's statement, I-Move acknowledges that the reference to "Mico" in the spreadsheets is a reference to another contractor which it used a lot. It also acknowledges that Nooraldin is also referred to as "Noah."
36. I-Move relies upon what Taif says in his statement at [41]-[47]¹³ in support of its submission that Nooraldin contacted I-Move to enquire if there were any jobs he could do in Queensland. It is not known what took Nooraldin to Queensland in the first place. The spread sheets do not disclose any job of I-Move's that involved removals from Sydney to Queensland leading up to the accident.

¹³ Application p 343.

37. I-Move also refers to the statement of Lyn Jordan and the phone call made by her husband, Brian, to it following the failure of removalists to arrive to pick up the furniture on the originally arranged day of 19 July 2017¹⁴. I-Move submits that the statement of Lyn Jordan at [24] can be given no weight, as her conclusion that the truck was owned by I-Move is wrong, the address at which the two men attended does not tell anything about the employment relationship, the period of time that the two men worked is consistent with a subcontract to move furniture and the fact that no money changed hands on the day of the move is also consistent with a subcontract.
38. I-Move also submits that nothing can be gleaned from the statement of Senior Constable Crick as to the relationship between it and Hamad, where he relates the contents of a conversation that he had with Shareef. The fact that Shareef is reported by Senior Constable Crick to have said words to the effect that he was a member of the family that owned the removalist company that owned the crashed truck and employed the two deceased gives no insight into the true nature of the contractual relationship between the two, and that the use of the term “employed by” can cover a wide range of circumstances.
39. I-Move also relies upon the record of a telephone conversation between Lisa Groth and Shareef on 15 September 2017¹⁵ in which Shareef concedes that he owned I-Move but did not own the truck or employ the two people in it.
40. I-Move also submits that the statement of Zaid, Hamad’s father, does not assist the applicants in showing that Hamad was an employee of I-Move at the time of the accident. In particular, Zaid refers to the first job that he says that Hamad carried out for I-Move on 13 July 2017 to Wagga Wagga, which is not recorded in the spreadsheets. These sheets do refer to a job on 17 July 2017 when Hamad was travelling with Nooraldin, which I-Move submits is consistent with Hamad not being an employee of I-Move at that time.
41. I-Move submits that there is considerable merit in the alternative submission put forward by the first applicant that, at the time of the crash, Hamad was employed by Nooraldin. That is consistent with the fact that Nooraldin, as a subcontractor to I-Move, did not drive and would have to employ a driver.

Third respondent

42. The Nominal Insurer submits that, the Commission should not accept what Taif says in his evidence in respect of Hamad’s alleged employment by I-Move simply because there were no documents produced in response to the notice for production - exhibit “A”. The Nominal Insurer submits that Taif had ample opportunity to put on evidence in response to what is said by various people. An example is given of the evidence of Jesse Wilson, referred to in [23] above, of the telephone call Ms Wilson made to I-Move later in the afternoon of 20 July 2017 when she apparently spoke to Melissa.
43. The Nominal Insurer adopts the submissions made by the applicants with regard to the employment of Hamad by I-Move. It also cites the failure of I-Move to produce the wage records of its employees. One such employee was Alima Atenchuk, the person referred to by Taif as performing an administrative role with the company. It is submitted that wage records of Taif himself should also have been produced, as he was described as being the operations manager of the company at the time of the subject accident.
44. The Nominal Insurer submits that if the wage records of the company had been produced and there was no reference therein to Hamad, that might have been supportive of the first respondent’s position that Hamad was not an employee of I-Move. However no records were produced.

¹⁴ Application p 112 at [9]-[13].

¹⁵ Application p 80.

45. The Nominal Insurer submits that it is significant that there is no statement from Shareef, who was a director of I-Move at the time of the subject accident, or from the one person who is known to be an employee of the company at that time, said by Taif to be Alima Atenchuk. The respondent submits that Shareef was the only person who could refute what was recorded by Senior Constable Crick as to what he was told by Shareef in respect of Hamad's employment by I-Move.
46. The Nominal Insurer submits that the use by I-Move of a casual employee such as Hamad was probably not surprising in view of the fact that I-Move was in its early stages and used contractors and casual employees. The third respondent notes Taif's evidence at [29] of his statement that on occasions when either he, or his father who owned the truck, would do a particular job because there was no contractor available to do the job, those jobs would not be put through the books because he considered himself a working director.
47. The Nominal Insurer draws attention to [8] of Senior Constable Crick's statement to emphasise that the only person who could refute what is recorded therein in respect of I-Move employing the two deceased at the time of the truck crash is Shareef. Taif was not in a position to refute that statement. It is also not surprising that Nooraldin, referred in Senior Constable's Crick's statement as Noah, could also have been a casual employee of I-Move. He was known to Taif and his father who owned the truck and lived in the same area. What would be surprising, according to the third respondent, would be for Taif's father to loan his truck to Nooraldin if he was operating an independent business separate to that of I-Move. It would be more likely that Taif's father would lend his truck to someone connected with I-Move.
48. The Nominal Insurer also relies on the nature of the work performed by furniture removalists, and the fact that it is essentially a two man job. Therefore it is not surprising that I-Move would send two persons to do the job.
49. The Nominal Insurer highlights the lack of documentation to show that Nooraldin was subcontracting to I-Move. The lack of any uniforms with logos thereon, either in referring to I-Move or Nooraldin, is noted. It submits that there is no evidence that Nooraldin was engaged in his own business as a removalist at the time of the accident.
50. The Nominal Insurer submits that in view of Hamad's circumstances, it is unlikely that he would leave secure employment with a previous employer to one which was not secure. This submission is in the context of Hamad sending money home to his family (in Iraq).

Applicants' joint submissions in reply

51. The applicants submit that the third respondent, the Nominal Insurer, as administrator of the uninsured liability scheme, has made a specific concession that it has a liability to the dependants of Hamad. This is because of the concession made by the Nominal Insurer that Hamad was at the time of his death employed by I-Move. This concession is entirely consistent with the statement made by Shareef in his telephone call (to Senior Constable Crick) on 20 July 2017.
52. This evidence is to be considered having regard to the fact that it was Shareef who set up the business of I-Move in April 2017 and operated it from that time. This is known from the statement of Taif. Shareef was I-Move's sole director at the time of the death of Hamad, and was clearly in a position to know, and inform the police, that Hamad and Nooraldin were employees of the business at that time. This is consistent with the female who answered the telephone call from Jesse Wilson to I-Move on the afternoon of 20 July 2017. The applicants submit that it is much more likely than not that Alina (Atenchuk) answered Jessie Wilson's call on 20 July 2017 and gave her the information recorded at [11] of her statement. That information was identical to that given by Shareef to Senior Constable Crick on 20 July 2017.

53. The applicants also rely on the evidence of Lynn Jordan at [9] in her statement dated 4 December 2017, where she relates the she and her husband were told by phone on 18 July 2017 that I-Move would send new drivers who would arrive at 10.00 am the next day, Wednesday 19 July 2017. This evidence is submitted to be consistent with both Hamad and Nooraldin being workers employed by I-Move.
54. The fact that the truck involved in the accident being owned by Shareef Taif's father is not inconsistent with Hamad and Nooraldin being employed by I-Move. It is submitted that it is commonplace for businesses to hire vehicles, lease vehicles or borrow vehicles for the purpose of the business. An employee may well be directed to drive or ride in such a vehicle. He or she is no less an employee for that.
55. The case of the applicants' alternative submission, that Nooraldin was Hamad's employer at the time of the accident, is addressed. The applicants submit that if Taif's statement is accepted, then I-Move's undertaking to move furniture from the home of Lynn and Brian Jordan was a contract with the Jordans which had been subcontracted to Nooraldin, who is it accepted, was uninsured. It is also accepted that Nooraldin lacked a licence to drive the vehicle which, on the evidence, he borrowed from Taif's father.
56. The applicants submit that the conclusion from Taif's statement is then that Nooraldin undertook two jobs with the truck, one to convey goods to Queensland, and probably later, the second to take over, pursuant to subcontract, I-Move's contract with the Jordans.
57. The applicants submit that Hamad was very much in need of money for his personal circumstances and, in particular, to support his wife and children. Therefore there is no likelihood whatever that he would have undertaken to drive Nooraldin to Queensland and back, and perform heavy work as a removalist, other than for payment. The applicants note Hamad's history of other employment in which Hamad been engaged for other employers prior to the events giving rise to the current claim.
58. The applicants therefore submit that, if the statement of Taif is accepted, there is overwhelming evidence that:
- (a) Nooraldin had undertaken a subcontract, and
 - (b) he had engaged Hamad as a casual employee to drive the vehicle.
59. The applicants draw attention to ss 142B and 145 of the 1987 Act. They submit that reading s 142B as a whole it would appear that the only grant of jurisdiction to the Commission in s 142B(2) is to confirm the jurisdiction that the Commission has in any event under s 145, namely to entertain applications for relief by uninsured employers in respect of reimbursement of the Insurance Fund established by s 154D of the 1987 Act when a certificate requiring an employer to do so has been issued. In this case no payment of compensation has been made and no certificate has been issued. Therefore there is no s 145 jurisdiction presently enlivened.
60. However, as I-Move is a party to the proceedings, the applicants do not object to it advancing any case that it wishes to, save that any issues in that regard operate only between it and the other respondents, Nooraldin and the Nominal Insurer.
61. The applicants refer to the letter dated 6 August 2018¹⁶ containing admissions that:
- (a) the deceased worker Hamad was employed by I-Move at the time of his compensable injury, namely death, and

¹⁶ Application p 193.

- (b) Hamad's estate is entitled to the lump sum death benefit, funeral expenses and weekly compensation to child dependants.

62. The applicants submit that the dependants of Hamad are entitled to know the issues that are before the Commission before the hearing. Therefore, from the letter mentioned in [61] above, the applicants could only have come to the Commission in the understanding that they did not need to prove any of the elements of a death claim as between themselves and the Nominal Insurer. Rather than there being a notice of declinature by the Nominal Insurer before the Commission, there was an admissions notice. Further, no leave was sought by the Nominal Insurer pursuant to s 289A(4) of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) to depart from the admissions made in the letter dated 6 August 2018 referred to in [61] above¹⁷.
63. In the alternative, the applicants submit that at the very least, the admissions made by the Nominal Insurer have a strong evidentiary value which should be taken into account in the fact finding process of determining the question of the identity of Hamad's employer.

First respondent's submissions in reply to the oral submissions of the third respondent

64. I-Move refutes the suggestion of the Nominal Insurer that weight should be placed on the statement of Senior Constable Crick because it was contemporaneous with the events of 20 July 2017. I-Move submits that whilst the Senior Constable recounts the conversation that he had with Shareef on the afternoon of 20 July 2017, his statement was not made until 17 August 2017, some four weeks later. As the applicant(s) have not sought to rely upon any contemporaneous note by the Senior Constable, his statement can be no more than his recollection one month later. In any event, according to I-Move, it is noted that the Senior Constable Crick made no enquiry about the true relationship between it and Hamad. The statement is no more than his recollection of how he interpreted the conversation, remembering that the employment status of the deceased was of no concern to the Senior Constable.
65. I-Move rejects the submission by the Nominal Insurer that there is no evidence of Shareef refuting the evidence recorded by Senior Constable Crick and draws attention to the conversation between Lisa Groth and Shareef on or about 15 September 2017, when he advised that he was not the employer of either Hamad or Nooraldin¹⁸. I-Move submits that this is a clear refutation of what was supposed to have been said to Senior Constable Crick.
66. I-Move also takes issue with the history of Hamad's employment given by his father, Zaid, in his statement dated 15 August 2018. It submits that no detail is provided of the basis on which Hamad had been working for FRS and that this employment was "secure", and one that Hamad would not have given up unless he was offered secure employment with I-Move. I-Move submits that the most that can be said about Hamad's employment with FRS is that he did interstate trips with it for which he was paid. There is no evidence about how many trips he had done, and it is quite possible that the work was intermittent in nature.
67. I-Move submits that, ultimately, Zaid has no knowledge of the relationship between Hamad and FRS or I-Move, which is consistent with the record of the coroner listing Hamad's usual occupation as "UNKNOWN"¹⁹.
68. I-Move submits that there is no evidence to support a conclusion that Hamad was employed by it. There is however evidence which would allow a conclusion that Hamad was employed by Nooraldin.

¹⁷ See *Mateus v Zodune Pty Ltd t/as Tempo Cleaning Services* [2007] NSWCCPD 227.

¹⁸ Application p 80.

¹⁹ Application p 48.

FINDINGS AND REASONS

69. It is convenient to deal with the issue of liability before the issue of apportionment of the lump sum death benefit.

Proof of Hamad's employment status

70. The applicants submit that there is no issue between themselves and the Nominal Insurer that Hamad was employed by I-Move when he died on 20 July 2017 by virtue of the admissions made by that Insurer in the letter dated 6 August 2018 referred to in [61] above. That is correct. Further, there is no issue between the applicants and the Nominal Insurer that Hamad's dependants are entitled to the benefits referred to in s 25 of the 1987 Act referred to in that letter.

71. Section 25(1) of the 1987 Act provides:

- “(1) If death results from an injury, the amount of compensation payable by the employer under this Act shall be—
- (a) the amount of \$750,000 (the ***lump sum death benefit***), which is to be apportioned among any dependants who are wholly or partly dependent for support on the worker or (if there are no such dependants) paid to the worker's legal personal representative, and
 - (b) in addition, an amount of \$66.60 per week in respect of—
 - (i) each dependent child of the worker under the age of 16 years, and
 - (ii) each dependent child of the worker being a student over the age of 16 years but under the age of 21 years.”

72. Section 4(1)(a) of the 1987 Act defines ***injury*** as follows:

“injury—

- (a) means personal injury arising out of or in the course of employment,”

73. There is no doubt that Hamad suffered significant injuries in the crash of the truck he was driving on 20 July 2017 which caused his death. However if such injuries were not arising out of or in the course of his employment either with I-Move or Nooraldin, there is no entitlement for his dependants to receive the compensation referred to in s 25(1).

74. Section 142B of the 1987 Act is as follows:

“142B Proceedings before Commission on claim for compensation

- (1) On an application to the Commission for a determination of a claim for compensation under this Division, or on the commencement of proceedings in a court in respect of a claim for work injury damages under this Division—
 - (a) the applicant must name the employer by whom the applicant alleges compensation is payable and the Nominal Insurer as respondents to, or defendants in, the proceedings, and
 - (b) the Nominal Insurer may, by service of a notice on any person who, in the opinion of the Nominal Insurer, may be liable to pay to the applicant compensation under this Act (or may have insured that liability), join that person as a party to the proceedings.

(2) The Commission may make orders providing for the reimbursement of the Insurance Fund under section 145.”

75. In the Application registered in the current proceedings on 4 October 2019, the applicants complied with their obligation under s 142B(1) to name the employers by whom they alleged compensation is payable, that is compensation under s 25. These were I-Move and Nooraldin. They did not name as a respondent the Nominal Insurer. It was joined as the third respondent pursuant to a direction made on 8 November 2019.
76. The applicants submit that, s 142B read as a whole, is procedural only, with subsection (2) merely confirming the jurisdiction that the Commission has in any event under s 145. Section 145(1) enables the Nominal Insurer to serve on a person who, in its opinion, was—
- “(a) in respect of an injured worker to or in respect of whom a payment has been made by the Nominal Insurer in respect of a claim under this Division, an employer at the relevant time, or
 - (b) an insurer under this Act of such an employer,
- a notice requiring that person, within a period specified in the notice, to reimburse the Insurance Fund an amount (not being an amount exceeding the amount of the payment made) specified in the notice.”
77. No compensation has been paid to the dependants of Hamad and no s 145 notice has been issued by the Nominal Insurer.
78. I do not agree that s 142B is procedural only. Subsection (1)(a) provides that the applicant *must* (emphasis added) name the employer by whom the applicant alleges compensation is payable. Subsection (1)(b) provides that the Nominal Insurer *may* (emphasis added) by service of a notice on a person on whom, in its opinion may be liable to pay to the applicant compensation under the 1987 Act (or may have insured that liability), join that person as a party to the proceedings. Pursuant to subsection (2) the Commission may make orders providing for the reimbursement of the Insurance Fund under section 145. The Nominal Insurer has not made an application for such an order in the current proceedings.
79. Subsection (1)(a) of s 142B places an obligation on an applicant. Subsection (1)(b) provides the Nominal Insurer with a discretion to serve the notice referred to therein. Subsection (2) provides the Commission with jurisdiction to make orders referred to in s 145.
80. The applicants are not in dispute with the Nominal Insurer. However they do have to prove that Hamad was either employed by I-Move or Nooraldin at the time of his death on 20 July 2017 in order to demonstrate an entitlement to the compensation provided for in s 25 of the 1987 Act. The detailed submissions of Ibtisam, summarised above at [19]-[25] and adopted by the second to fifth respondents at [26]-[28] and also referred to at [51]-[58], address this issue.
81. I accept the alternative submission of the applicants that the admissions made by the Nominal Insurer have an evidentiary value which should be taken into account in the fact finding process of determining the question of Hamad’s employer.

Contract for removal by I-Move

82. I-Move does not dispute that there was a contract between it and the Jordans for the removal of their property from Queensland and that Hamad and Nooraldin attended to pick up the Jordans’ property as a consequence of that contract²⁰. The contract was between Christopher Jordan and I-Move, as evidenced by a confirmation email sent by “Shannon” of

²⁰ T p 29.30.

I-Move to “Christopher” on 17 July 2017²¹. That email confirms contact details as “Lynne” and “Christopher”, receipt of the deposit of \$400, includes the inventory of items being moved and sets out the terms and conditions of the agreement between the parties.

83. Under “INSURANCE, LIABILITY AND SPECIAL ARRANGEMENTS” in the agreement Christopher is advised that

“You are automatically covered for:

....

+ Workers Compensation

(covers the removalist in case of personal injury)

+ Handling and Packaging Insurance

(when your goods are pre-packed into boxes by our team)”²²

84. This move is referred to in the spreadsheet attached to the statement of Taif dated 21 February 2019 as “Trip 34” in respect of dates 17/18 July 2017. I infer that the “Lynne” referred to in the last entry in respect of that trip dated 18 July 2017 is Lynn Jordan, whose statement dated 4 December 2017 is in evidence. In that statement Ms Jordan gives details of the arrangements made by her son, Chris, with I-Move for the removal of Chris’s furniture and belongings to Melbourne. She also gives details of the attendance of Hamad and Nooraldin at the pickup address at 91 Glendale Road Toowoomba at 5.15 pm on 19 July 2017 when they confirmed that they were from I-Move and were in a white unmarked truck driven by Hamad. They loaded the truck over the next two hours.

Was Hamad employed by I-Move?

85. The evidence relied upon in support of the submission that Hamad was employed by I-Move on 20 July 2017 is as follows.

Jesse Wilson

86. Christopher Jordan’s partner, Jesse Wilson, has supplied a statement dated 10 January 2018 relevant paragraphs [10] and [11] of which are referred to at [23] above. She refers to a telephone conversation with Melissa at I-Move on the afternoon of 20 July 2017. Notwithstanding the submission of I-Move that Ms Wilson could not have spoken to Melissa, as the only employee of I-Move at that time was Alina Atenchuk, I am satisfied that Ms Wilson did speak to Ms Atenchuk in that call. The confusion in names was understandable. I also accept that Ms Atenchuk said that the company had shut down for the day as they were “...in mourning for two of our employees, they were our best employees” (emphasis in original). That statement, having regard to the occurrence of the truck crash on the day and the familiarity between the personnel of I-Move and Hamad and Nooraldin, has a ring of truth.

87. It is also relevant that the only evidence lodged on behalf of I-Move is Taif’s statement dated 21 February 2019. There is no statement from either Ms Atenchuk, or Shareef, who was the sole director of I-Move at the time of the crash.

Senior Constable Crick

88. The statement of Senior Constable Crick dated 17 August 2017 is in my view reasonably contemporaneous with the events of 20 July 2017. Counsel for I-Move cast some doubt of the accuracy of the contents thereof because of the failure of the applicants to have in evidence the Senior Constable’s notebook in which the conversation was recorded. On the

²¹ Application p 135.

²² Application p 138.

other hand, it was submitted on behalf of the applicants that the Senior Constable was obviously an experienced policeman well versed in recording evidence, and that what he recorded in his statement accurately reflected what Shareef told him in the telephone call between the two on the day of the crash. Shareef told Senior Constable Crick that he was a member of the family that owned the removalist company that owned the crashed truck and employed the two deceased. I think that the Senior Constable accurately recorded and included in his statement what he was told. There is no other evidence to gainsay this. I-Move submits that the policeman had no insight into the nature of the employment relationship between Hamad and I-Move nor did he enquire into it. That may be the case. However, this evidence can be considered along with all of the other evidence on the employment issue.

89. It is accurate that Shareef was a member of the family that owned the removalist company (he was the sole director at that time), although it is not accurate that the company owned the truck. That was owned by the father of Taif and Shareef.

Zaid Al Oudah

90. In his statutory declaration dated 15 May 2018 Zaid provides evidence of his son Hamad's situation in Australia leading up to and at the time of the accident. Hamad was at that time in Australia illegally, having failed in his application for a protection visa, in an appeal to the Refugee Review Tribunal to have the decision not to grant him such a visa overturned and also in an application to the Minister for Immigration to have the decision overturned. I accept Zaid's evidence that, while Hamad was in Australia, he was determined to work to help support his family in Australia and his wife and children in Iraq. He wanted eventually to bring his wife and children to Australia. That is understandable.
91. Zaid's summary of Hamad's work history in Australia is criticised by counsel for I-Move as supplying no detail of the conditions or status under which Hamad was engaged for the two previous companies for which he worked as a removalist from 2016 onwards. That is also understandable. However I accept that Hamad was keen to earn income for the reasons given by Zaid, and that if his engagement with FRS immediately before he became engaged with I-Move was as an employee, he would not have left that company unless there was a prospect of the receipt of regular income from his new situation with I-Move. For this reason I also find that Hamad did not undertake the trip to Queensland with Nooraldin gratuitously, and that it was in the expectation of receipt of remuneration either from I-Move or Nooraldin.
92. Zaid has also given evidence of the contact between Taif and Hamad leading up to Hamad's engagement with I-Move. He says that Hamad had previously worked with Taif at the first furniture removalist company he had worked at. As they were neighbours, Hamad knew Taif well and felt that it would be good for him to leave FRS and work for Taif. Zaid then refers to the first trip that Hamad did with I-Move to Wagga Wagga on 13 July 2017 and the drive to Toowoomba, Queensland on 17 July 2017.
93. In his statement dated 21 February 2019 Taif says at [39]-[40] that he knew Hamad casually because they lived in the same street, that they were not close friends and that he knew that Hamad and Nooraldin were friends. He said that I-Move had never contracted with Hamad or employed him.
94. This evidence is to be contrasted with that apparently obtained by the investigator engaged by the solicitor for the Nominal Insurer, Andrew Hanigan of Lee Kelly Commercial Investigations. There is a report of Mr Hanigan dated 30 January 2018²³, which includes at [2] results of telephone enquiries made by the investigators of Taif (described therein as Taif Al-Hadeethi). It appears from those enquiries, as reported to the solicitor for the Nominal Insurer, that:

²³ Application p 130.

- (a) Taif advised at that time that he did not know Taif or Nooraldin (at [3.2]);
- (b) this was reiterated at [2.7];
- (c) during continued conversations with Taif he advised that he did in fact know Hamad and Nooraldin (at [2.8]);
- (d) Taif advised that the insured had employed Hamad ('Mr Al Oudah') for up to one and a half years prior to the accident (at [2.9]);
- (e) he further advised that Hamad had a poor understanding of the English language and that the insured had decided not to continue employing him (at [2.10]);
- (f) Nooraldin had been living with him at 25 Phoenix Crescent Casula (at [2.11]);
- (g) Hamad and Nooraldin were not employed by the insured at the date of the accident (at [2.12]), and
- (h) Hamad and Nooraldin often worked for other companies and often borrowed the vehicle with registration CM36RS for their own purpose with his consent (at [2.13]).

95. This evidence must be treated with great caution. There is no indication that Andrew Hanigan, who signed the report as Managing Director of Lee Kelly Commercial Investigations, actually spoke to Taif. It appears that he may have been reporting on what another investigator of the firm, Steve Pefkos, reported²⁴. Thus what is stated could be hearsay upon hearsay. The report gives the results of enquiries only. However it is difficult to conceive as to why an inaccurate or incorrect report would be provided by a firm of commercial investigators to a solicitor who commissioned the report.
96. The report contains inconsistencies as to what Taif allegedly said about his knowledge of Hamad and Nooraldin, contains a statement that the insured employed Hamad for up to one and a half years prior to the accident and confirms that Nooraldin had been living with Taif at his premises at 25 Phoenix Crescent Casula NSW 2150.
97. There is a clear inference that reference to "the insured" in the Lee Kelly report is to I-Move. This is apparent from the letter to I-Move dated 23 January 2018 from Hall & Wilcox to I-Move, referred to above at [94], in which they state that they are acting for icare Workers Insurance in relation to Hamad's death on 20 July 2017.
98. Senior Constable Crick confirms at [4] in his statement dated 17 August 2017 the correct registration number of the truck, CM36RS which was involved in the accident.
99. I therefore conclude that the evidence of Taif in his statement dated 21 February 2019 must be treated with caution, particularly having regard to the late date on which it was given and the other evidence I have referred to above. I think the evidence which is more contemporaneous to the events of 20 July 2017 is to be preferred.
100. I-Move relies upon the evidence of Taif in his statement referred to above to demonstrate that Hamad was not its employee as at 20 July 2017. It also relies upon the evidence of Shareef.

²⁴ See registered letter dated 10 January 2018 Hall & Wilcox to I-Move, Application p 129.

Taif Al Hadeethi

101. In his statement, Taif gives evidence of the history of I-Move from the date its business commenced in about April 2017. He was the operations manager and Shareef the sole director until on or about 23 January 2018, when he resigned and Taif was appointed as a director. Taif says that Shareef's role was almost non-existent, he being hardly, if ever, involved in the business operations. He says that I-Move's only employee for many months from when it began operations was Alina Atenchuk, who performed an administrative role including managing accounts, managing inquiries, answering phones and emails. It appears that another person on behalf of I-Move, Shannon, signed the booking confirmation forwarded to Christopher on 17 July 2017 (see [82] above). Her role is not referred to by Taif.
102. Taif then refers to the day to day operations of I-Move, the business model, the normal process of booking and allocating work involving the use of a Microsoft Excel spreadsheet and the fact that Alina Atenchuk managed the spreadsheet until about a year prior to the date of the statement when she left and another person was employed as account manager.
103. A copy of a printout of a sample part of a spreadsheet is attached to Taif's statement which includes the relevant Trip 34 to Queensland²⁵. The last entry for that job is clearly in respect of the contract between I-Move and Chris Jordan. It lists a pick-up address in Queensland, a destination address in Northern Victoria, the contract price of \$2,580 and deposit of \$400. These details are consistent with the agreement referred to in [82] above. The last column of the spreadsheet lists the driver for the job as "Noah (changed from Miko)". It is acknowledged by I-Move that "Noah" refers to Nooraldin. At [33] of his statement Taif says that "At present" he estimates that he would use a casual driver about two, sometimes three times a week. At [34] of his statement, Taif confirms that the main contractor he uses is a firm "Miko-1". Later in the statement at [40], Taif says that I-Move has never contracted with Hamad or employed him. If that is correct, it is at odds with what is reported by Andrew Hanigan referred to at [94(d)] above.
104. Taif goes on to give evidence in respect of Nooraldin borrowing the truck owned by Taif's father for the trip to Queensland, at [47] about a possible job from Toowoomba to Sydney originally intended for Miko 1 to carry out, and Nooraldin's reply that he could do the job. Price was not discussed. That was the last time that Taif spoke to Nooraldin.
105. I note from the spreadsheet that "Noah (changed from Miko)" is listed therein as the driver in respect of Trip 34 for five other jobs, including one "NSW-TBC", in addition to the job for the Christopher Jordan. Taif's evidence at [47] of his statement seems to be inconsistent with these entries in the spreadsheet.
106. Apart from noting that Noah (Nooraldin) was the driver for Trip 34 (which is not correct), I do not find the spreadsheet of assistance in determining the issue of whether Hamad was an employee of I-Move at the time of the crash. He was the driver of the truck on 20 July 2017.

Shareef Ramzi Al-Hadeethi

107. There is no statement from Shareef. However Ms Groth spoke to him on two occasions, 15 and 28 September 2017. File notes by Ms Groth of these two conversations are in evidence²⁶. In the first, referred to above at [65], Shareef advised that he was not the employer; he did not employ Hamad or any other person in the truck. He went on to say that he thinks that Hamad was helping out someone who had broken his leg, that that's all he knew.

²⁵ Application p 348.

²⁶ Application pp 80 & 92.

108. Shareef refers to “he” not being the employer. If he is referring to I-Move, that would indicate more involvement in the running of the company than Taif has indicated in his statement. It is consistent with what Shareef said to Senior Constable Crick on the day of the accident.
109. The note of the second conversation recorded by Ms Groth on 28 September 2017 only has to be read to realise how utterly “evasive and ludicrous” (as submitted by counsel for the second and third respondents²⁷) was Shareef’s response to legitimate questions that were being directed to him by Ms Groth. As also submitted by Mr Stockley, that in itself proves nothing, but is part of the material which must be taken into account when considering the recent assertion by I-Move that there was an entirely different arrangement than that asserted by the applicants in the case.
110. In the file note Shareef is recorded, among other things, as saying that he had been told by “his police” not to talk to anyone. He advised that:
- (a) the “blkies” work in all areas of NSW government and may call to try and get information;
 - (b) he would sue Ms Groth if the claim was accepted. Ms Groth asked Shareef not to threaten her and that she had spoken to him a couple of weeks ago regarding completion of 141 documents, and
 - (c) Hamad had committed suicide and had killed his cousin (the other occupant of the truck). He was wanting to seek retribution for the death of his cousin.
111. Having regard to the reaction of Shareef to Ms Groth’s enquiry of him on 28 September 2017, I prefer the evidence as to what Senior Constable Crick recorded as what was said by Shareef on 20 July 2017 to what he told Ms Groth on 15 September 2017.
112. I-Move submitted that there is no documentary evidence, such as bank accounts, payslips or tax returns to substantiate Hamad’s alleged employment by it. Having regard to Hamad’s status in Australia and the nature of the work in which he was involved, I do not think that this is surprising. It would be surprising if he lodged a tax return or maintained a bank account.
113. I accept the submission of the Nominal Insurer that the failure of I-Move to produce any documentation in response to the notice for production served on I-Move on 6 January 2020 (exhibit “A” - see [42]-[43] above) does not assist I-Move’s case. No employment records were produced for Alina Atenchuk, who it is not disputed, was employed by the company as at the date of the accident, nor for Taif himself, who was the operations manager.
114. The only records of I-Move in evidence are the spreadsheets attached to Taif’s statement. There is also in evidence a copy of the agreement between Christopher Jordan and I-Move for removal of his furniture and belongings from Queensland to Victoria. This agreement was put into evidence by the applicants. The failure of I-Move to put into evidence any other company records does not assist I-Move. The agreement, referred to in [82]-[83] above, covers Christopher Jordan for workers compensation and appears to contemplate that workers will be employed by I-Move in the performance of the agreement.
115. In my view there is sufficient evidence to find that Hamad was an employee of I-Move as at the date he was killed in the truck crash on 20 July 2017. I make this finding based on:
- (a) the evidence of Senior Constable Crick of what Shareef told him on 20 July 2017 in respect of Hamad’s employment by I-Move, and that he (Shareef) was a member of the family that owned the removalist company;

²⁷ T p 24.30-p 25.

- (b) the evidence of Zaid in respect of Hamad's work history, his desire to earn income to help support his family in Australia and wife and children in Iraq;
- (c) the unlikelihood that Hamad would have undertaken the trip to Queensland for no remuneration;
- (d) the description of Nooraldin as "driver" in the spreadsheet attached to Taif's statement, with no other indication as to his status either as a contractor or employee;
- (e) the fact that Nooraldin was unlicensed to drive the truck meant that it was necessary for there to be a driver of the truck;
- (f) the information that Jesse Wilson received from "Melissa" when she phoned I-Move on the afternoon of 20 July 2017;
- (g) my finding that Shareef was probably more involved in the running of I-Move than Taif stated in his evidence;
- (h) the failure of Shareef to put on any evidence in the form of a statement, and the doubt cast upon his evidence to Ms Groth in the telephone conversation between the two of them on 15 September 2017, and by the nature of the statements he made to Ms Groth on 28 September 2017;
- (i) the failure of I-Move to respond to the notice for production served on it on 6 January 2020 by the Nominal Insurer;
- (j) the terms of the agreement between Christopher Jordan and I-Move referred to in [82]-[83] above, and
- (k) my preference to accept the evidence contemporaneous to the fatal accident on 20 July 2017 in preference to that given by Taif in his statement dated 21 February 2019.

116. I find that Hamad suffered injury arising out of or in the course of his employment with I-Move on 20 July 2017 as a result of which he died on that day. His dependants are therefore entitled to the benefits provided for in s 25 of the 1987 Act, liability for which has been accepted by the Nominal Insurer.

117. In view of this finding it is not necessary to consider the alternative submission of the applicants that Hamad was employed by Nooraldin, who was a subcontractor to I-Move, at the time of the crash on 20 July 2017.

Apportionment

118. According to the written submissions on apportionment referred to in [18(b)] above, the applicants, with the exception of the fourth and fifth applicants, are substantially in agreement as to the apportionment of the lump sum death benefit. The first to third applicants differ from what is proposed by Zaid in his statutory declaration dated 15 May 2018. Zaid's proposal for apportionment is:

Family member	Amount apportioned
Ibtisam	\$250,600 (32.32%)
Ali (aged 5 years at date of death of Hamad)	\$145,000 (18.7%)
Fatima (aged 9 years at date of death of Hamad)	\$130,000 (17.76%)
Rasmiya	\$125,000 (16.11%)
Zaid	\$125,000 (16.11%)
Total	\$775,600 (100%)

119. Zaid asserts that “it is the family’s wish” that apportionment be as set out above²⁸.
120. The proposals of the first three applicants as compared to the proposal of the fourth and fifth applicants are as follows:

Proposal	Ibtisam	Ali	Fatima	Rasmiya	Zaid
1 st Applicant	\$400,600	\$145,000	\$130,000	\$50,000	\$50,000
2nd and 3rd applicants	\$414,842	\$130,378	\$130,378	\$50,000	\$50,000
4 th and 5 th applicants	\$250,600	\$145,000	\$130,000	\$125,000	\$125,000

121. All submissions contain an acknowledgement that Hamad’s widow and children should receive considerably more than his parents, with the fourth and fifth applicants submitting that, together, the first to third applicants receive more than double the amount that they receive pursuant to their proposal for apportionment. It is acknowledged by the fourth and fifth applicants that the fact that the first to third applicants live in difficult circumstances in Iraq should not be ignored, but submitted that anything less than what is contemplated for the fourth and fifth applicants would overlook the dependency which they had on Hamad and the tragedy they have suffered in their son predeceasing them.
122. Whilst the degree of dependency which Rasmiya and Zaid had on Hamad as at the date of his death is obviously to be taken into account in apportioning the lump sum death benefit, the tragedy of his passing whilst no doubt very real and ongoing, is not relevant for the purpose of this exercise.
123. The fourth and fifth applicants note that they are of modest means and are now deprived of the support previously enjoyed from their son. Zaid is on a disability pension and Rasmiya on a carer’s pension for this reason. They submit that, before he died, Hamad provided them with a significant level of assistance as particularised in submissions.
124. On the other hand the first applicant submits that Hamad’s parents provided him with accommodation, and it might well be argued that the support he provided them (which is acknowledged) was no more than the rental value of the accommodation provided.

²⁸ Application p 165.

125. More importantly Ibtisam submits that it is unlikely that Hamad would, had he survived, have remained for any significant further time in Australia given the lack of legitimacy of his presence in the country. This submission is endorsed by the second and third applicants and has merit. If Hamad was either deported or voluntarily left Australia, his employment prospects in Iraq or any other country to which he travelled would be questionable at least, and probably casual and uncertain at best. The second and third applicants submit that Hamad's capacity to provide for his dependants would probably be extinguished once he was forced to leave Australia.
126. Ibtisam submits that there is strong support in Zaid's declaration for the proposition that she was totally dependent for support on Hamad at the time of his death and would continue to be so for the rest of her life. She does not work, as her father will not allow her to join the workforce as it is against their culture, and it is unlikely that she will remarry. I accept this submission. Ibtisam's submission as to the appropriate apportionment in favour of her and her children is set out above at [120].
127. The second and third applicants note that the available facts regarding Hamad and his likely future prospects are scant and are to be gleaned from Zaid's statutory declaration. They submit that there is every likelihood that the ambit of the combined injuries to the dependants, in economic terms, would be far less than the capital sum payable pursuant to s 25 of the 1987 Act. Therefore, an assessment of apportionment using traditional Lord Campbell's Act methodology is not available
128. The second and third applicants note that Zaid and Rasmiya have six surviving adult children, and that other than their countries of residence and the fact that they were not dependent on Zaid and Rasmiya, Zaid tells nothing about their circumstances and the extent to which he might have derived support from them. This is correct.
129. Whilst it can be concluded that Zaid and Rasmiya had some expectation of support on Hamad at the time of his death, the second and third applicants submit that this would have been modest and for a limited duration. I accept this submission.
130. The legal and moral obligation on Hamad to support his wife for the rest of his working life, and to support his children until they attained their majority and some degree of independence, is stressed. This is self-evident.
131. The second and third applicants note that Hamad was 32 at the date of his death, and therefore had a working life of 35 years before him. That is the period of dependency to which his wife, in normal circumstances, could look. Having regard to their ages, each of Fatima and Ali had 12 to 16 years of dependency to look to before attaining their independence.
132. The second and third applicants assess the relative merits of the widow and parents' competing claims on the basis of a very generous assumption in the parents' favour of an expectation of support of \$50 per week each for the next 30 years, using the 5% tables (x 822) That would result in a figure for Zaid and Rasmiya of \$41,400. If Ibtisam had a legitimate expectation of \$400 per week in support for the 35 years, the same exercise results in a capital sum of \$350,240. These calculations are submitted to support the apportionment proposed by the second and third applicants.
133. The second and third applicants propose an apportionment very similar to that proposed by the first applicant, with the exception that both Fatima and Ali are treated equally in terms of apportionment ("given the broad brush approach that is required"²⁹), whereas Ibtisam proposes that Ali should receive a greater amount because of his younger age, with the additional amount of \$15,000 apportioned to Ali correspondingly reducing the amount to her. I think that Ibtisam's proposal is appropriate.

²⁹ See [16] of second and third applicants' submissions on apportionment.

134. The lump sum death benefit will be apportioned in accordance with the submissions of Ibtisam, the first applicant, referred to in [120] above.
135. Having regard to the evidence of Zaid in his statutory declaration dated 15 May 2018, and his second statutory declaration dated 27 June 2018³⁰ I am satisfied that no persons other than the first to fifth applicants were wholly or partly dependent for support on Hamad at the time of his death.

Interest

136. At [26]-[28] in the applicants' joint submissions in reply, the jurisdiction of the Commission to award interest pursuant to s 109 of the 1998 Act is discussed. It is submitted that the rates applicable in the Supreme Court would be appropriate. The applicants submit that such an approach was adopted in *Hallman v National Mutual Life Association of Australia Limited*³¹ and that in the Supreme Court the power to award pre-judgment interest is found in s 100 of the *Civil Procedure Act 2005*, and rule 6.12 (7)(b) of the *Uniform Civil Procedure Rules 2005* allows the Court to specify the rate. Supreme Court Practice Note SC Gen 16 sets out the rate, namely, the Reserve Bank of Australia cash rate plus 4%.
137. The question of an award of interest in the current proceedings is difficult. An "Uninsured liabilities Worker claim form" dated 5 September 2017³² signed by Zain Zayed (brother of the deceased) is in evidence. Also in evidence are letters of claim (x3) sent on behalf of all applicants dated 2 July 2019 from Sanford Legal to:

- (a) ICare Workers Insurance (x2)³³, and
- (b) Alvaro Edwards Solicitors (the solicitors for the first respondent)³⁴,

naming I-Move as first respondent and Nooraldin as second respondent. As noted above at [75], the third respondent was joined on 8 November 2019.

138. These proceedings represent the third time that the applicants' claim has been before the Commission. As far as I can see the history of the applicants' earlier applications is as follows:
- (a) matter number 3557/18 was discontinued before Senior Arbitrator Glen Capel on 10 August 2018³⁵;
 - (b) matter number 5508/19 was discontinued before me on 20 March 2019³⁶, and
 - (c) this matter was the subject of a telephone conference on 6 November 2019 following which Notations and Directions were issued on 8 November 2019 noting that:
 - (i) pursuant to direction made by the Commission on 8 October 2019 this matter was to be heard with matter number 5209/19,

and directing that

³⁰ Application p 260.

³¹ [2018] NSWCCPD 20.

³² Application p 72.

³³ Application pp 351 and 356.

³⁴ Application p 361.

³⁵ See Certificate of Determination – Consent Orders, Application p 264.

³⁶ See Direction and Notations, Application p 349;

- (ii) the Nominal Insurer was joined as the third respondent, and
- (iii) the matter was stood over for conciliation/arbitration on 23 January 2020.

139. No claim for interest was made in the documents lodged in the current proceedings. It is not apparent from the evidence if such a claim was made in matter number 5508/19 or 3557/18. The first reference to such a claim in the current proceedings is in the applicants' joint submissions in reply referred to above at [136].
140. I think that the first and third respondents should be allowed to make submissions on the applicants' claim for interest before a decision is made if the Commission is to exercise its discretion under s 109 of the 1998 Act. Accordingly, if the applicants wish to proceed with their claim for interest, they will be given leave to approach the Registrar for a further telephone conference to set a timetable for submissions.

Weekly payments

141. Part 1 of the Application contains a claim by the second and third applicants for weekly amounts of compensation under s 25(1)(b) and/or orders under s 31 of the 1987 Act in addition to the claim for lump sum compensation. The Nominal Insurer does not dispute its liability to make such payments, and an order for the payment of this compensation will be made.

Funeral expenses

142. The Nominal Insurer does not dispute its liability to pay for funeral expenses up to \$15,000, although these are not claimed in the Application. At [25] of the applicants' joint submissions in reply, all of the applicants seek payment of such expenses in the sum of \$9,500. At [72] of his statutory declaration dated 15 May 2018, Zaid states that "We paid \$9,500 to Al-Zahra Funeral Services" for Hamad's funeral arrangements, burial and headstone, and attaches a receipt for the payment this sum to his declaration. An order for payment of such expenses will be made.

Summary

143. The deceased suffered injury on 20 July 2017 arising out of or in the course of his employment with the first respondent, I-Move, as a result on which he died on that day.
144. The first to fifth applicants were wholly or partly dependent for support on Hamad at the time of his death.
145. There are no other persons who were wholly or partly dependent for support on Hamad at the time of his death.
146. The lump sum death benefit of \$775,600 payable pursuant to s 25 of the 1987 Act as a result of the death of the deceased is to be apportioned as follows:
- (a) the first applicant - \$400,600;
 - (b) the second applicant - \$130,000;
 - (c) the third applicant - \$145,000;
 - (d) the fourth applicant - \$50,000, and
 - (e) the fifth applicant - \$50,000.
147. The Nominal Insurer is to pay to the first, fourth and fifth applicants the lump sum death benefits apportioned to them.

148. The Nominal Insurer is to pay to the NSW Trustee in accordance with s 85(1)(c) and (2) of the 1987 Act the lump sum death benefits apportioned to the second and third applicants.
149. The Nominal Insurer is to pay the weekly amounts of compensation payable under s 25(1)(b) of the 1987 Act in respect of the second and third applicants to the first applicant pursuant to s 31(1)(a) of the 1987 Act.
150. The Nominal Insurer is to pay to the fourth applicant the sum of \$9,500 for funeral expenses.
151. The applicants have leave to approach the Registrar for a further telephone conference in respect of a claim for interest pursuant to s 109 of the 1998 Act.

