WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number:	**1369/20**
Applicant:	**Jungiang Huang**
First Respondent:	**Dong Lin aka Weidong Lin**
Second Respondent:	**Michael Aleksandroff t/as 178 Bricklayers**
Third Respondent:	**Thanh Toan Nguyen**
Fourth Respondent:	**Workers Compensation Nominal Insurer**
Date of Determination:	**21 August 2020**
Citation No:	**[2021] NSWWCC 36**

The Commission determines:

1. By and with the consent of the fourth respondent, the applicant be given leave to rely upon an Amended Application for Determination (including schedules A-D thereto, each schedule delineating claims against each of the four respondents) (the ARD).

2. By and with the consent of the fourth respondent, the ARD is amended to include a claim for a general order under s 60 of the *Workers Compensation Act 1987* (the 1987 Act).

3. Pursuant to s 5 Schedule 1 Clause 2A of the *Workplace Injury Management and Workers Compensation Act 1998*, the applicant is taken to be a worker employed by the first respondent during the performance of the work the applicant carried out at the building site at 113 Wilson Road Bonnyrigg Heights, New South Wales on 17 December 2015.

4. At all material times, the first respondent was uninsured within the meaning of Part 4 Division 6 of the 1987 Act.

5. The fourth respondent is to pay the applicant weekly payments of compensation under the 1987 Act as follows:

    (a) $1,187.50 per week between 18 December 2015 and 18 March 2016 (pursuant to s 36);
    (b) $1,000 per week between 19 March 2016 and 20 November 2016 (pursuant to s 37);
    (c) $840 per week between 21 November 2016 and 31 March 2017 (pursuant to s 37);
    (d) $1,000 per week between 1 April 2017 and 1 June 2017 (pursuant to s 37), and
    (e) $840 per week between 2 June 2017 and 18 June 2018 (pursuant to s 37).

6. The fourth respondent is to pay the applicant's medical or hospital and rehabilitation etc expenses by way of general order pursuant to s 60 of the 1987 Act.

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

Michael Perry
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 MICHAEL PERRY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

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

STATEMENT OF REASONS

BACKGROUND

1. Jungiang Huang (the applicant) brings proceedings by way of Application to Resolve a Dispute (ARD) arising out of injuries to his right leg occurring on a building site at 113 Wilson Road, Bonnyrigg Heights, NSW (the site) on 17 December 2015.

2. Dong Lin aka Weidong Lin (Lin) is named as the first respondent on the ultimate basis (applicant's written submissions "AS" para 4.5 and footnote 41) that the applicant should be taken to be employed by him pursuant to s 5 Schedule 1 clause 2A (Contractors under labour hire services arrangements "clause 2A") of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act). Michael Aleksandroff trading as *178 Bricklaying* (Michael) is named as second respondent on the ultimate (AS para 4.7) basis that the applicant should be taken to be employed by him by s 5 Schedule 1 clause 2 of the 1998 Act (Sch. 1 Cl.2). Thanh Toan Nguyen (Nguyen) is named as third respondent on the basis that he was the principal contractor responsible for the control and management of the site and liable to pay compensation to the applicant under s 20 of the 1987 Act (s 20).

3. The Workers Compensation Nominal Insurer (the nominal insurer) is named as fourth respondent on the basis of Part 4 Division 6 of the 1987 Act applying, as each other named respondent was uninsured. There is no issue that the first three respondents were uninsured.

4. The applicant has ultimately claimed for compensation under the 1987 Act for weekly payments between 18 December 2017 and 18 March 2018 (s 36) and between 19 March 2018 and 18 June 2018 (s 37) and by way of general award under s 60 of the 1987 Act (AS 1.1). This must be erroneous and I presume the claim should be from 18 December 2015 to 18 March 2016 (s 36) then 19 March 2016 and 18 June 2018 (s 37).

ISSUES FOR DETERMINATION

5. The following issues remain in dispute:

    (a) Whether the applicant had the necessary legal permission to commence employment;

    (b) Whether the applicant was a worker for the purposes of the 1987 and/or 1998 Acts; including whether any such employer has been named as a respondent;

    (c) The applicant's entitlement to weekly compensation (including the adequacy of the evidence and question of illegality regarding his earnings and the nature and extent of current work capacity (CWC);

    (d) Whether the applicant has validly given notice of, or made a claim for, his injury.

PROCEDURE BEFORE THE COMMISSION

6. At a telephone conference (TC) on 8 April 2020, Mr Hallion of counsel, instructed by Mr Lui, solicitor, appeared for the applicant. Mr Studdert, solicitor attended with respect to Lin, the only named respondent. Mr Hallion said two further potential employers needed to be named as respondents. Mr Studdert repeated the claim made in the reply that the nominal insurer should be joined to the proceeding. I expressed concern about the ability of the case to be set down for arbitration in given there may be two persons who have not yet been named or joined and queried whether discontinuance was appropriate. Mr Studdert said the nominal

insurer wanted the case to proceed, nevertheless. Both parties noted the case had been before the commission on at least one previous occasion, had been discontinued, and had an overly lengthy history. I then directed it be listed for conciliation and arbitration, and that the applicant lodge and serve an amended ARD. I also directed the parties have leave to request a further TC for the purpose of allowing further named respondents to be heard on the adequacy of the directions, despite Mr Studdert implying that the Nominal Insurer was prepared to be the insurer for each of the first three respondents.

7. A Conciliation and Arbitration was held on 9 June 2020. Mr Hallion, instructed by Mr Lui, again appeared for the applicant. Mr Allen Parker of counsel, instructed by Ms Patricia De Souza, solicitor, appeared for the nominal insurer. There was no appearance for any other respondent. I repeated my concern about the recent amendment with respect to Michael and Nguyen. Mr Hallion conceded those respondents had not been served. He submitted it was only necessary to name them in the amended ARD and that such course was consistent with *Workers Compensation Nominal Insurer v Howard* [2011] NSWWCCPD 37. The nominal insurer did not dispute that *Howard* stood for such proposition and, implicitly, applied to the present circumstances. The respondent did not otherwise express concern about the ability of the case to satisfactorily proceed – except that such a concern was expressed in relation to the application not having named the person known as "Jimmy" (Jimmy).

8. Mr Hallion also made an application to amend the amended ARD to include a claim for medical and the like expenses pursuant to s 60 of the 1987 Act. There was no objection to such amendment and an order was made accordingly.

9. I am satisfied the parties understand the nature of the application and legal implications of any assertion made in the information. I have used my best endeavours to bring them to a settlement acceptable to all of them. I am satisfied they have had sufficient opportunity to explore settlement and have been unable to reach an agreed resolution of the dispute.

10. During arbitration, Mr Hallion attempted to rely on a supplementary statement of the applicant of 18 November 2019. This had not been included in the documents otherwise lodged in these proceedings. The document had been in evidence in previous proceedings between the parties which proceedings, I was told, had been discontinued. I asked Mr Parker if he could identify any prejudice and he stated he was presently unable to see such prejudice. I provisionally admitted the statement subject to any submission as to whether and why the statement should or should not be admitted. The nominal insurer subsequently made no submission that the statement should not be admitted.

EVIDENCE

Documentary Evidence

11. The following documents were in evidence before the Commission and taken into account in making this determination:

    (a) ARD and attached documents;

    (b) Amended ARD and attached documents;

    (c) Applicant's application to admit late documents "ALD" (supplementary statement of applicant 2 June 2020), and

    (d) Reply and attached documents.

Applicant's Statements

12. The applicant has made three statements. The first, on 12 July 2019, was signed with him having the benefit of a Mandarin interpreter. He was born in China and is now 58 years of age. He left school aged 14 and worked on an apple farm. He commenced working as a bricklayer at age 22 and later commenced his own business in wholesale of fruit. In 2009, he returned to work as a bricklayer. He came to Australia later that year. He applied for refugee status. At the time of this statement, he was on a protective visa pending final determination of his refugee status. There is no evidence or submission about a change to that status.

13. He found work in Australia as a bricklayer, working for subcontractors and was paid cash to work at various building sites and worked always for subcontractors of Chinese background. He only recalled one occasion in the early stages of his work when he was requested by a subcontractor to provide an ABN. He did not understand the benefit as he was always paid cash based on a daily rate and was never asked to submit an invoice. He was never given a payslip and never requested to provide a receipt, nor did he ever apply for or asked to provide a Tax File Number. He was contacted by the various subcontractors who would ask him to work. They would then pick him up and take him to the job and pay him cash. He never advertised for work. He received it by word of mouth or just by being on a building site. He was an experienced bricklayer but worked under the direction of others and had only ever been engaged to work as a bricklayer through a subcontractor. He has very limited English skills and has difficulty communicating with anyone other than Chinese speakers.

14. On site he worked as directed and was never involved in planning or directing others as to how work would be carried out. He commenced and finished and took breaks as he was directed by the subcontractor he was working for. He was paid $350 a day which "was the going rate for a bricklayer working for a subcontractor in the Chinese community". The only tool he owned was a trowel. All other material was provided by whoever he was working for. He did not have a uniform. He wore his own clothes and footwear.

15. In about 2013, he commenced working for Lin, who had enough work for him for about 45 to 50 hours a week. Lin would pick him up from his home and take him to the particular building site. The applicant did not know where "we would be working or for whom … was paid cash initially on a weekly basis but then had problems being paid at times".

16. On or about 16 December 2015, "Lin was contacted by a person I came to know as Michael" who asked him to carry out bricklaying at the site. He recalls this day; he was working with Lin building a house at Maroubra, but the "…work arrangements were a little unclear … may have been contacted by Michael or Michael through … Lin, but in any event I was told I would be working at Bonnyrigg … on 17 December 2015 on a job being run by Michael and Jimmy … for about one week" (ARD 213).

17. He was picked up the next day by Lin to go to the site. Lin told him, the previous day when they were working together at Maroubra, about the work the following day. Lin had his own vehicle, a Ford ute, which he used in his business to transport tools and materials. It had a cabin which could fit about five workers in it.

18. On 17 December 2015, Lin picked the applicant up at his Campsie home and said words to the effect of "*today we are going to Michael and Jimmy's".* There were about five people in Mr Lin's vehicle including the applicant. He knew three of them – Hong, Yu, and Zhou. All five worked at the site that day. When they arrived, Jimmy and Michael were already on site and had commenced bricklaying. Lin left the applicant and the other four workers "and went somewhere else but returned later in the day" (ARD 214). The building on the site was half-constructed around which was a scaffold.

19. There was a gate which had to be opened to enable the workers to gain entry to the site. Either Michael or Jimmy gave such entry. The applicant cannot recall which of the two did so. He recalls three or four Vietnamese workers otherwise working on bricklaying. They were a different bricklaying gang. After commencing, Jimmy, Michael and Zhou were preparing mortar when "I was directed by Jimmy or Michael, along with Hong, to go up onto the scaffold where the bricklaying was to be done".

20. There were no bricks on the second level of the building, nor any mechanical lift or belt to move the bricks from the ground onto the work platform. Therefore, the first job was to manually hand up the bricks using a human chain from one worker to another. The bricks were handed up to the applicant and he passed them up to where his gang was working on the third level. At about 3pm, he was still doing that work when he moved onto a different scaffold to help Lin – who by that time had returned to the site and commenced assisting the gang. At about the time the applicant moved to a different scaffold, Lin started a telephone call and was walking away from the applicant as the applicant moved to the different scaffold to help Lin. The applicant picked up the first brick and was trying to spread mortar with his trowel, when "the scaffold platform under me collapsed…" (ARD 214). He fell about 2 metres through the scaffold and landed on his right knee on the second level of the building below.

21. The applicant was lifted from the second level to the ground and then carried into Michael's car, and "… taken to Michael's house… transferred into Michael's mother's car and was driven to Canterbury Hospital …" (ARD 215). During the journey, Michael told the applicant: not to worry. The conversation was in Mandarin. Michael said words to the effect "*Don't worry everything will go through insurance".* When the applicant was registered at the hospital, Michael showed the hospital staff his licence "…as I had no identity with me …". He was admitted and stayed overnight and discharged the next day. He was asked to come back again on 24 December 2015 to have the operation.

22. Since his injury, the applicant has seen records of the Hospital and noted:

> "…Michael while acting as my interpreter told the hospital … and doctor that I was a cleaner visiting from China and … injured my knee when I fell down 10 steps .. this was not true … I now believe the reason for taking me to … Hospital was to conceal … I had been working on a building site … and … neither the owner builder of the site nor Mr Lin had any type of insurance to cover workers working at the site … and … Michael paid $12,000 in cash to enable me to have the operation …"

23. After returning home from hospital on 25 December 2015, the applicant's nephew (Xue) took care of him, doing all housework, laundry and providing assistance to help him with daily activities. Xue also paid all household expenses, rent and utility bills. The applicant also received financial assistance from his "church friends".

24. Before the injury, Lin owed the applicant $16,500 for two months' unpaid wages. About a week after discharge from hospital, about 1 January 2016, Lin visited the applicant at home and gave him $2,000 saying, in Mandarin, words to the effect of "I give you $2,000 … rest I will give you later … will pay back $1,000 or $1,500 per month … insurer will pay you wages you lost. You will be paid … do not … worry." However, after his accident, he was "never told by Mr Lin or Michael what I had to do to claim on the insurance which they said they had, nor was I ever told they had not claimed on my behalf (ARD 216)."

25. In about February 2016, the applicant then contacted Lin, not having received contact from an insurer, or a payment, and was told that Lin would contact Michael. Shortly after that, Lin called the applicant to let him know that he "…had an argument with Michael and that Michael would not answer Mr Lin's calls anymore". Lin told the applicant that "Michael did not want to know anything about my claim and had done nothing about it … I said to … Lin … I had to get a lawyer … (he) … replied in Chinese with words to the effect '*Yes, you can see your lawyer and you can sue him if you want to'* …."

26. Soon thereafter, probably in February 2016, the applicant called Lin again and asked him for money to pay rent and other expenses. Lin gave him $1,000 and acknowledged he still owed the applicant "$13,000 plus". From then on, he paid the applicant $1,000 in cash at the end of each calendar month, but not regularly. If "he forgot about it I would call him up … by April 2017 … Lin had paid me all the outstanding wages but an additional $1,500 as compensation of late wages payment".

27. In April 2016, the applicant's church pastor (Wang) introduced him to a Vietnamese lawyer called Mary at Cabramatta. After about a month, she had not done anything so he changed to another firm of solicitors, Wyatts Lawyers.

28. By about October or November 2016, the applicant's condition had improved, but he was still on crutches. About this time, he tried to look for light duty work as he was unable to meet living expenses. He found a job as a painter working two half days for about 10 hours a week, being paid $200 cash. He found this difficult. In November 2018, he attempted to return to work as a bricklayer. He took pain killers but was only able to work two or three half days a week and would be in pain and exhausted. He required constant breaks and was receiving $130 for a half day "which is far less than the pre-injury daily wage of $350 and only offered work by Mr Lin … eventually Mr Lin was no longer prepared to employ me as I had become slow and needed constant breaks".

29. After his return to work as a bricklayer, the applicant felt his right knee had lost strength, and he found he was placing pressure on the left side of his body to balance himself, and that because "I have altered my walk and favoured my right leg over my left, I believe it has caused damage to my left knee as well". The applicant has never worked in an office and his only work has involved him using "my strength and doing physical type activities".

30. Wyatt Lawyers commenced proceedings on behalf of the applicant in the District Court of NSW, seeking damages "against the holder of the owner permit at the building site". Those solicitors stopped acting for him in April 2019, during the course of those proceedings. Thereafter, the applicant consulted his present solicitor in about June 2019 who advised him that he could and should make a claim for workers compensation and "up until seeing Mr Liu I was ignorant of my entitlement to claim workers compensation or that I could make a claim where my employer did not have insurance … never told by anyone that I could make a claim or what I had to do to make a claim …"

31. The applicant made a supplementary statement on 2 June 2020 (ALD), noting that Lin approached him at the end of December 2018 and offered to "employ" him over 2-3 days per week working between 10 and 13 hours per week doing half days. He returned to work as a bricklayer but was very restricted and unable to work as he had previously been able to. Before his injury he was able to lay about 40 to 50 bricks per hour on a residential house but could only do about half that subsequently. By February 2019, Lin stopped offering him work as he was too slow. The applicant believed "the job was really a light duties job … believe I was only kept on because … Dong felt some responsibility for my circumstances … during this time … (he) … paid me in cash about $28.99 per hour … average … $320 per week…"

32. I expected a third statement of the applicant would be lodged; the 18 November 2019 statement referred to at para 10 above. The 10 June 2020 direction noted leave was given for the lodging of such statement. But no such statement was lodged. However, the AS indicates this statement only attaches some receipts issued by the Hospital of payments to it with respect to the applicant's treatment. The applicant says these documents are necessary partly for the purpose of gaining context to the statement by Michael – that he "did not make any payments for the applicant's medical expenses including the invoices for medical records listed in (a)-(e) in the applicant's statement dated 18 November 2019" (Reply 1). The AS (2.1 -2.4) address the admissibility of his 18 November 2019 statement: essentially to say that those hospital receipts were relevant and provided probative evidence of a fact in issue, being the second respondent's involvement at Canterbury Hospital and pre-payments of the applicant's treatment. There have been no submissions in response.

Canterbury Hospital clinical notes

33. These notes relevantly show the applicant was admitted to the hospital on 17 December 2015 at about 4.30pm, bought in by Michael who is named on the registration form as "next of kin" (ARD 137). The history taken at triage is "fall from top of 10 steps … pain and swelling … R knee … had a single beer, witnessed by friend …" A nursing note on 17 December 2015 at 5.10pm refers to "Pt brought in by family friend … due to a fall down 10 steps … friend gave 2x Nurofen prior to visit … friend in attendance to translate". Then, at 19.50 hours, the notes read "Family friend Michael gone home … ring him on his mobile when orthopods arrive … he will translate …" At 20.30 hours, the notes read "… ortho reg spoke to… friend Michael … explained plan". At about 20.48 hours, the notes continue:

> "… slipped down stairs today … had several beers that evening … 'visiting' from China … long discussion with close friend – Michael … explained … Huang will need surgery but will have to pay upfront … unsure of exact cost currently … likely to be $5-$10k … suggested returning to China … pt not going back … suggested finding … insurance … suggested possibility of non-op management … Michael is willing to pay some money upfront … D /W Dr Qurashi – willing to operate once financials resolved …" (ARD 98-99)

34. Surgery in the nature of open reduction and internal fixation of the applicant's right tibial plateau fracture was carried out by Dr Qurashi, orthopaedic surgeon on 24 December 2015. The applicant was discharged from hospital on 25 December 2015.

The First Respondent (Lin)

35. Lin signed a statement on 9 August 2019, with the benefit of an interpreter translating it into the Mandarin language (ARD 241-246). He first met the applicant about five or six years before at "one of the work sites we worked on together". Lin did work on the site. He did so as a bricklayer. He found out about that work from:

> "a person named Michael … do not know his last name … worked at that property for about 2 to 3 days … first met Michael about 6 years ago … used to have his number in my old phone but I changed phones a few times since then and I don't have old phones anymore so I don't have his number anymore … not spoken to Michael since 2015 … called him a few times after … Huang was injured … but … he did not return my calls …"

36. Michael would call Lin, let him know about work and Lin would go to the address. He worked for Michael on different jobs for one and a half years – but only about three or four times. They were mostly private houses. He cannot remember any of the other addresses where he worked for Michael. After finishing each job, Michael would pay him cash :

> "… he would just hand me cash money direct … I never gave an account to Michael … he did not talk to me about me paying any tax on the money or me paying any tax … did not sign any paperwork for Michael … I do not have an (ABN) … do not have my own business".

37. Lin introduced the applicant to Michael when "we had worked together at other worksites before Bonnyrigg". In relation to work at the site, he could not remember if he called the applicant or whether the applicant called him, however he did tell the applicant about "Michael wanting workers at … Bonnyrigg … Michael gave me the money to pay … Huang … did not keep any of that … for myself … I got paid a bit more than … Huang because I picked him up from Campsie and drove him to … Bonnyrigg …"

38. Michael was working on the site when the applicant was injured and Lin saw Michael drive the applicant away. Lin kept on working. He does not know either Nguyen or Luong.

39. There is another piece of evidence attributing statements to Lin – a document entered by Sharon Barnsley of iCare on 2 July 2019 at 12.35pm. It is asserted in that document that she had a telephone conversation the day before, with the benefit of a Mandarin interpreter, with Lin. Ms Barnsley put to Lin that the applicant had said that Mr Lin "may be his employer". Lin denied he was the employer, however he had worked together with the applicant "for Michael". Asked whether the applicant and Lin were employed by Michael as employees or contractors, Mr Lin said they were not contractors, "Michael just asked them to work a few days for him … a long time ago … thinks they worked one or two days".

40. There is a second statement from Lin of 8 November 2019 (Reply 2-7) signed with the benefit of a Mandarin interpreter. In response to the applicant's statement that Lin "may have worked regularly for me and that I would transport him to and from the worksites", he stated:

> "… I did work at more than the … Bonnyrigg site with … Huang, and I did give him lifts to some sites … but … Huang didn't just work under me, he worked for other people … I hadn't worked with him for a few weeks, before we worked at Bonnyrigg together … the accident happened on our first day … Huang did not work for me, and I did not work with him at any time for 5-6 days per week, for 45-50 hours per week … Huang worked for different people … we were only co-workers … have known him since about 2013 … would let him know if there was any work available and I would give him a lift to a site .. I was just helping him by giving him a lift in my car … no long term fixed arrangement … did not employ him … depending on the site, we might sometimes have worked together for 5 days, but sometimes I didn't work with him on any sites for 2 or 3 weeks. If he has said he worked for me for 45-50 hours per week … is not true and correct … we would only work together occasionally and maybe 4-5 days together … not a regular occurrence …"

41. As to the applicant's statements about the way he was paid and who paid him, Lin stated:

> "When … Huang worked on other sites, he was not paid by me … people he was working for at those sites would pay him … I did not pay … Huang any money on behalf of other people … only paid him when we were both working for Michael … worked with … Huang a few times on other sites and Michael gave me money to give to … Huang for the work … Huang did for Michael at those sites … cannot remember those addresses … it was too long ago … he could say no to working on sites with me as a co-worker and I often worked without … Huang … if Huang had no work at other places, he would call me and ask me if I knew of any work … I did not get paid annual leave … don't know about annual leave for … Huang … did not speak to … Huang about tax … just gave him whatever money Michael gave me to give him for the work … Huang did for Michael …"

42. As to control and direction of the applicant in his daily duties, Lin stated:

> "This would normally be done by the *subcontractor for the site*, for example *Michael for the site at Bonnyrigg* … I did not tell Huang what work he had to do, that was not my job, we are both workers … only the person who hire us both can instruct us …"(emphasis added).

43. Lin conceded he was paid "about $20 extra but …only because I had my own car and could get to the worksites without needing a lift from anyone … different subcontractors would pay that money to me … but … not … regularly, sometimes they did …sometimes … not …"

The Second Respondent (Michael) - Statements 10 November and 10 December 2019

44. Michael stated he was an Australian citizen and a sole trader bricklayer with no employees. He was subcontracted to do bricklaying work at the site by "a man named Jimmy around December 2015 … Jimmy was in control of the site … paid me $250 for my work each of the two days I was at the … site". Michael knew Lin because he "… subcontracted me to do some bricklaying work a few weeks earlier at a Hurstville site … Lin paid me for my Hurstville site work … Jimmy and Lin are friends … Jimmy contracted … Lin to work at (the site) …"

45. Michael said he was "at most a Mandarin translator" on the site to the applicant, and was not his employer, supervisor or site manager in any way, nor did he give him any money. He alleges "Lin paid the applicant a wage and both Jimmy and … Lin paid the applicant some money to cover the applicant's hospital bills". Michael stated that when the applicant fell off the scaffold, no one else was willing to drive him to the hospital. Michael's mother lived nearby. He called her to come to the site to drive the applicant to the hospital. When she arrived, she and Michael decided he would drive her car to the hospital:

> "…because I did not want to dirty my new … Rav4 motor vehicle … applicant asked me to drive him to Canterbury Hospital because his relatives live nearby that hospital … as requested by the applicant, I translated to the hospital that the accident was related to the applicant falling down the stairs … was not my statement and I knew this was untrue but this is what the applicant told me to tell the hospital … and I just acted as a translator … I believe the applicant, Lin and Jimmy may not have permits to work or have any registered ABN … believe Jimmy is an illegal immigrant and cannot be found … I am now targeted because I am an Australian citizen who helped the applicant in good samaritan [sic]…"

46. In the 10 December 2019 statement (Reply 1), Michael denied telling the applicant that his insurance was going to cover the medical expenses. He also stated that the hospital records have his address and number for the applicant's admission to the hospital as he :

> " used my ID to help admit the applicant for medical treatment … because … applicant did not have his ID on him … provided my ID solely for his admission into the hospital and not because I was affiliated with him in any way … at this point … realised … applicant may not have working permits and … not covered by Medicare … did not make any payments for the applicant's medical expenses … volunteered to drive … applicant to … hospital out of kindness because … Lin and Jimmy would not help the applicant… when the accident occurred … because they knew … applicant working illegally and wanted to avoid any liability resulting from an injured illegal employee …"

47. The nominal insurer issued a notice under s 141 (2) of the 1987 Act (s 141 notice) to Michael. That notice asserted a suspicion that Michael "may have been the employer" of the applicant on 17 December 2015 and required him to complete certain questions. Michael omitted to answer most of these questions or stated that he was not the employer of the applicant, indicating he had no knowledge of any such answers. He did specifically deny that he, or his insurer, had made any payments in relation to the injury to the applicant. He wrote:

> "… out of kindness I took him to …hostipal cause his own boss wouldnt … I dont why his saying Im his boss … Ive never seen him before prior to this claim Ive done my own research his boss name is Shaoqiu Li … witness Danny 0413772722 Jimmy 0406362835 won't talk English … [sic]"

Statement of Chang Liu

48. Mr Liu is the applicant's present solicitor. He states that the applicant asked him, in April 2019, whether he could appear in a District Court case as his former solicitor (Wyatt Lawyers) ceased to act for him. The action had been brought against Luong and related to the injuries he sustained at the site on 17 December 2015. Mr Liu agreed to take over that case. In May 2019, Mr Liu's firm notified iCare and "filed workers injury claim form together with supporting documents". Mr Liu nominated Lin, "who denied he was the employer of the worker at the time of the worker sustaining injury". Mr Liu stated that "we could not contact with Michael or Jimmy at all on 0438 972 277".

Wei Yu Dong (Yu)

49. Yu made a statement on 22 October 2019 with the benefit of a Mandarin interpreter. He came to Australia in about 2011 and since then had been working as a bricklayer. On about 17 December 2015, Lin drove Zhao, Chen and the applicant to the site. They commenced working at 7am. He said he "only worked 1 day on that site as Huang suffered injury on that day". He stated that the injury occurred at or around 3pm when the applicant fell down after the scaffold, he stood on collapsed, falling from the third level of the scaffold to the second level. Afterwards, he said "Jimmy paid me in cash of $250 for that day work" (ARD 268).

Statement of Hongbin Zhao (Zhao)

50. Zhao made a statement on 22 October 2019 with the benefit of a Mandarin interpreter. He came to Australia in April 2015 from China. He stated that on or before 17 December 2015, Lin "asked us to help Michael and Jimmy … work at … site … Lin drove Yu … Huang … Chen and me to the site …" He stated that "Jimmy paid me in cash of $180 for that day … Lin then drove Yu, Chen and me back to Campsie …"

Report of Dr Andrew Porteous, occupational physician, dated 5 August 2019

51. Dr Porteous was engaged by the applicant's solicitors for the purposes of a forensic report and examined the applicant on 2 August 2019 with the benefit of an interpreter. He recorded that the applicant complained of continuing right knee pain that increased with activity and was very restricting, as well as continuing lumbar back and hip pain, particularly in cold weather and with prolonged sitting, bending and lifting, as well as continuing left lateral ankle pain after sustained periods of walking.

52. The applicant provided a history of being off work for two years, then going back to work doing occasional night duties, cleaning sites and sometimes half a day a week or one day a week or two days a week – to pay the rent. This increased his pain. He denied previous lumbar, back, knee or ankle pain or other accidents. Dr Porteous noted the applicant had worked for about 20 years as a fruit and vegetable buyer and transporter after leaving school in China. He also recorded the applicant's history of coming to Australia on 29 September 2009, then starting work as a bricklayer in 2010. The applicant's only work was light duties between a half and two days per week, and this was increasing his symptoms.

53. Dr Porteous found the applicant had a substantial injury to his right knee with a surgically treated fracture. He also noted likely soft tissue strains in the lumbar spine and left ankle. Those injuries are not relied upon in the case. He also found the applicant:

> "totally incapacitated from the work he has done in the past, including fruit purchasing and wholesaling and bricklaying … these all involve work activity he is incapacitated from … if … had to compete in the open market … with 'able bodied' persons for jobs, his reduced … work capacity … pain and

> restriction and reduced productivity would currently, in reality, mean he will not get work in any of the work he has training and experience in and not always be able to successfully compete with 'able bodied' persons for jobs … limited English even further compounds finding any work … since the accident … has had substantially reduced work capacity and employment options and will, in reality … more likely … frequently be without work now long term … (ARD 236)".

54. Dr Porteous noted a history that the applicant was off work two years and since then had been getting intermittent part time cleaning work at building sites (up to two days a week) which he "could just manage although it increases the pain". The doctor also found the applicant requires ongoing treatment including pain relief, attendances on treating doctors, future surgery at or about his right knee area, and physiotherapy.

Oral Evidence

55. Neither the plaintiff or the nominal insurer sought to adduce any oral evidence or cross examine any witness.

Written submissions for the Applicant (AS)

56. There is no issue that Lin, Michael and Nguyen, at the time of the applicant's injury did not hold a statutory workers compensation policy, therefore, satisfying s 140(1)(a) of the 1987 Act. If the Commission is not satisfied that any of the named respondents were liable, compensation would still be payable under s 140(1)(b) upon the basis that after due search and enquiry, the applicant has been unable to identify the relevant employer.

57. The procedural jurisdictional precondition under s 142(b)(1)(a) of the 1987 Act is satisfied to enliven the Commission's jurisdiction under Part 4 through the naming of the putative employers, and s 20 principal, as respondents against whom compensation is payable. It is then for the nominal insurer to join a party to the proceedings, that joinder being a jurisdictional precondition to the exercising of the Commission's jurisdiction under s 142(b)(2) of the 1987 Act to the ordering of reimbursement under s 145 of the 1987 Act.

58. The applicant stated he usually worked for Lin up to five to six days per week for between 45 to 60 hours a week. He did not work exclusively for Lin, and on occasions he also worked for other bricklaying subcontractors. But that work was arranged through Lin who would transport him to those jobs. The applicant did not carry on a business but provided his labour to subcontractors who secured the work and under whom he worked and was paid. The applicant says the subcontractor in charge was Michael and that he had been driven to the site by Lin with three other Chinese workers. On arrival at the site, access was given by Michael. The work was being undertaken for Luong by Nguyen. Luong stated she engaged Nguyen to manage and control the construction work on the site, and she did not engage subcontractors.

59. Michael nominated three witnesses in the s 141 notice – Shaoqiuli, Danny and Jimmy, for whom mobile phone numbers were provided. None of these witnesses were prepared to corroborate Michael's denial of having engaged the applicant when requested to during the investigation (ARD 40-41). There is no evidence from "Jimmy" – who Michael asserts paid for the applicant's medical treatment, and who had a subcontracting arrangement with Lin (ARD 378). The Commission should have little confidence in Michael's accounts in the absence of the nominal insurer attempting to have "these critical witnesses … attend and give oral … or …documentary evidence corroborative … (of) … the positions contended for …" (AS 3.6).

60. The applicant has given credible evidence about the circumstances of his injury and his attendance at the hospital, and that he relied upon Michael while there. Michael concedes the history of falling down the stairs being false but says he did so on instructions of the applicant who wished to conceal he was working. Such version is glaringly improbable. Michael's account also involves, inexplicably, his mother driving her vehicle to the site, transferring the applicant, before driving 45 minutes to the Hospital rather than the nearest facility at Campbelltown Emergency. Michael's statement that he misled hospital staff about how the accident occurred because the applicant asked him to do so as the applicant was working illegally does not explain why he highlighted the applicant's personal culpability by suggesting the applicant had drunk excess alcohol. This is implausible. The applicant's denial that such is the case is plausible – including that Michael was trying to conceal the work injury because Michael had no relevant insurance.

61. The hospital notes show a consistent feature of Michael's presence there. His details were given as next of kin, his address was given as the applicant's address, and his mobile number was also given as the contact person. The hospital notes are also consistent with Michael paying for the applicant's treatment there.

62. Michael's denial in the s 141 notice of ever working with the applicant before the day of the injury is inconsistent with the evidence from the applicant and Lin. It is also inconsistent with his own statement, of 10 November 2019, confirming that Lin would call him, and that Lin had introduced the applicant and other workers to Michael for whom he had worked three or four times before. But Lin states that Michael would give him money to pay the applicant and that he got "*paid a bit more … because I picked him up … and drove him … to do the work …*" The arrangement between Lin and Michael takes on a commercial flavour in the statements of Yu and Zhao, both of whom state that Lin approached them to work at the site for Michael and drove them to the site, presumably consistent with the arrangement between Lin and Michael, Lin was "paid extra" for what he suggests is the use of his car.

63. The applicant says he obtained work at various construction sites through Lin, with whom he would travel to the sites. Lin used a work vehicle in which he carried tools and on the day of the injury transported four workers, excluding himself, to work at the site. The applicant only owned a trowel and did not conduct a business. He was at the site for about one week on a job being run by Michael and Jimmy.

64. The applicant's primary argument was that he had been engaged by Michael under a contract to perform bricklaying at the site for about one week. The work the applicant was carrying out at the time was not incidental to a business or trade carried on by him. He was under the control and direction of Michael. This is consistent with the applicant being transported by Michael to hospital, and Michael likely paying the hospital expenses.

65. Lin also nominates Michael as the employer. Michael nominates Lin, or alternatively Jimmy, as the employer; but he does not make an effort to involve Jimmy in the proceedings. Lin played an intermediary role on the day, approaching at least three of the workers present on the site to work that day and transporting them to the site where they then worked under Michael. Lin had left the site before returning that afternoon. Lin states he paid the applicant after having received the money from Michael. Lin also states he got paid even though the applicant states that Lin left the site for work elsewhere and only returned after lunch – inconsistent with a person engaged to perform bricklaying service and consistent with a person operating as some form of intermediary.

66. While the evidence does not support a contract that day between the applicant and Lin, it does support a hire arrangement between Lin and Michael under which the applicant could still be found to be a deemed worker of Lin under clause 2A. In this regard, the "engagement of the applicant was probably through (Lin) … to perform work for (Michael)". Consistent with that arrangement, Michael paid the applicant for the day and assumed responsibility for the applicant's medical treatment.

67. Nguyen had control and management of the site and Luong had information and belief that Lin and Michael were on the site as subcontractors indicates a relationship for the purposes of s 138. This would operate to include Nguyen as a principal and be treated as an employer. If so, s 140(5)1987 Act provides that where a person is entitled to claim against a s 20 principal and that principal is uninsured, a claim can proceed against the nominal insurer.

68. In *Shao Wen Zheng v Guo Yong Yang & Ors* [2008] NSWWCCPD144, Deputy President Roche at [80] identified the following things to be established for a party to rely on s 20 being:

    (a) A contract between a "principal" and a "contractor".
    (b) The principal contracted in the course of or for the purpose of his trade or business.
    (c) The contract is for the execution of work (by or under) the contractor of "the whole or part of any work undertaken by the principal.
    (d) A worker employed in the execution of the work received an injury, and
    (e) The contractor does not have relevant insurance at the time of the injury.

69. There is evidence from Luong "on information and belief that… (Lin and Michael)… were both subcontractors on the site engaged to perform bricklaying". There is no evidence of other parties at the site performing subcontracting bricklaying other than Michael.

70. Part 4 of the 1987 Act does not restrict the number of parties or make mutually exclusive the circumstances against whom a worker can succeed and it is open for the Commission to find the applicant succeeds against all three respondents or alternatively under s 140(1)(b) of the 1987 Act upon the basis that the applicant was a worker but the employer's identity or whereabouts after due search and enquiry cannot be identified.

71. The only evidence addressing the applicant's work capacity is from the applicant himself and Dr Porteous. Such evidence supports the applicant being totally incapacitated for his former duties "and the extent to which any theoretical residual capacity is retained that cannot be exercised in the … opinion of Dr … Porteous … until such time as vocational and rehabilitation assessment along with treatment has been undertaken …"

72. The applicant also could not have returned to his former employment without substantial risk of injury therefore s 47 of the 1987 Act applies. This operates "to preclude the applicant ... being able to undertake … pre-injury duties in the construction work or in effect any employment of a physical nature …" It follows that the applicant has "no current work capacity" for the purposes of the meaning of "current work capacity" and "no current work capacity" in Schedule 3 clauses 8-9 of the 1987 Act.

73. Dr Porteous supports a finding of no CWC for the applicant; any references to the applicant being capable of doing light duties "is in the nature of a make-up job to assist in the sense discussed in *Dewar* or akin to s 49 compliance that is made up or artificial and … do not exist in any labour market in Australia …" (*Wollongong Nursing Home Limited v Dewar* [2014] NSWWCCPD at [60] (*Dewar*)).

74. The applicant did try, and fail, various times to return to work. Firstly in November 2016 doing light duties when he was still on crutches. He could not manage that. Further attempt was made in November 2018, resulting in exacerbation of pain requiring days off work, and his ability to perform the work resulted in him not being offered it. This work appeared to have been from Lin. The applicant could not manage it, and it was eventually withdrawn.

75. It is acknowledged that although some of the restrictions Dr Porteous placed on the applicant "might be seen as a result of conditions that have, through inadvertence, not been specifically pleaded … they are peripheral and not significant given the overall disability due to the right leg injury."

76. To the extent the applicant is not accepted as being totally incapacitated, he should be deemed to be totally incapacitated under s 47 1998 Act on the basis of the assessment of Dr Porteous. Even ignoring s 47 of the 1987 Act, the lay and expert evidence is supportive of a finding that the first limb under the definition of "*inability arising from an injury … that the worker is not … able to return to work … in the worker's pre-injury employment"* is satisfied.

77. Consideration should be given to the worker's capacity to undertake not only pre-injury duties but also suitable employment irrespective of its availability (*Mid North Coast Local Health District v De Boer* [2013] NSWWCCPD41 particularly at [58] to [60]). Satisfaction of the second limb of no CWC involves a "realistic assessment" of the factors found in s 32 of the 1987 Act. As to s 32A(a)(i) of the 1987 Act (details provided in medical information including … certificate of incapacity ..), the applicant was certified by Dr Lim as having no work capacity up to 1 June 2017. It can also be inferred this doctor certified the applicant having no CWC until September 2017. The applicant did not attend for treatment then until 2018. This should not give rise to adverse inference given evidence of his impecuniosity and reliance on friends and charities. Medical certification is just one of the s 32A factors and any lacuna in the evidence in this respect is dealt with in the report of Dr Porteous.

78. The s 3 2A(a)(iii) factor – "… plan or document prepared as part of … return to work planning process … including … injury management plan …" is relevant. The applicant's attempts to rehabilitate himself are relevant too. There is no injury management plan or access to treatment that he has been provided with. Dr Porteous assessed the applicant over 12 months after the relevant weekly payment period and states, in August 2019, a precondition of any safe attempt to any available employment market should involve a regime requiring ergonomic advice, functional assessment and development of a vocational rehabilitation plan and re-training. None of that has been available to the applicant, and he has even struggled to obtain "rudimentary medical treatment". Therefore, he is unable to earn anything in suitable employment. There is no competing medical position or evidence from the nominal insurer.

79. As to the pre-injury average weekly earnings (PIAWE), the nominal insurer has not filed a wage schedule. The nominated figure is based on the evidence of the applicant of being paid $350 per day. There is no evidence to challenge that. Both Lin and Michael provided statements commenting on various aspects of the applicant's evidence but not his evidence of earnings. There is no challenge to the applicant's evidence and an inference is to be drawn that any such evidence would not have advanced the nominal insurer's case on the relevant PIAWE. It is conceded there is other direct evidence of earnings of other bricklayers at the site being paid $250 per day. The relevant award shows a bricklayer earning a base hourly rate of $31.24 for a 37-hour week plus various hourly allowances and overtime doing Saturday work. The aggregate of these hourly rates before allowances is $1,459 and "which the applicant would as an alternative give a PIAWE of $1,500".

80. The applicant was not aware of his injury within the meaning of s 261(6) of the 1998 Act, on the basis that "awareness … involves both knowledge of the injurious event and the legal implications … in the context of a denial of any employment …". Alternatively, reliance is put on s 261(4) – on the basis that the failure to make a claim within the requisite time was occasioned by his ignorance and the mistakes of his former solicitors to do all things necessary to advance the claim. He also suffers serious and permanent disablement within the meaning of s 261(4)(b).

Submissions for the Nominal Insurer (SNI)

81. As the nominal insurer "may commence proceedings against an alleged employer to recover … payments of compensation ordered against it … it is obviously a duty … not to allege a party is an employer unless there is overwhelming evidence to that effect …" There are "major issues in respect of the credit of all parties including the applicant… it appears the applicant did not have the necessary legal permission to commence employment…"; he alleges that since 2013 he was working six days a week being paid $350 per day in cash, and provides no income tax returns or other financial records to support his allegations.

82. The identity of "any employer is obviously difficult". It is open to the Commission to find that the applicant was "in effect … *running his own business as a bricklayer* …" This "of course would be consistent with the allegation made by the second respondent that he was told to tell the hospital that the accident was "related to the applicant falling down the stairs".

83. There is also frequent mention of "Jimmy" as the applicant's employer "though it does not appear that '*Jimmy'* has been made a party to the proceedings".

84. The applicant relies upon interrogatories in the District Court proceedings "though the pleadings themselves, their allegations and any other further material relating to those proceedings is not provided in the ARD". Accordingly, the Commission cannot be satisfied that the applicant can be regarded as an employee. In the alternative, a potential employer "Jimmy" has not been nominated by the applicant.

85. The applicant obviously would have been totally incapacitated for his work "for a period of time". The issue (with respect to quantum) is the extent of the period of that total incapacity and the applicant's entitlement to compensation after that date. A second issue on quantum is the extent of the incapacity relating to the injury as alleged – and to what extent the incapacity "relates to other disabilities". After the certificate of Dr Lin (ARD 188) there is an absence of medical evidence in relation to incapacity post 20 September 2016. The report of Dr Porteous is ambiguous when he notes "… he said apart from having light duties … he can take his time with it and it does increase his symptoms, between half and 2 days a week, he is not getting any other work [sic]".

86. As the applicant has no "*work permit*", his ability to earn "would be nil".

Submissions in reply for applicant (ASR)

87. Regardless of which of the first three respondents the Commission may find has a liability, it can still be found "that the applicant was a worker and on the evidence … has been unable, after due search and enquiry, to identify the relevant employer … so as to satisfy the alternative avenue for recovery under s140(1)(b) 1987 Act".

88. The SNI in relation to the applicant's credit appear to be breaches of immigration and subsequent tax law. To the extent such SNI has any force, it must be directed to illegality which is not an issue before the Commission. The applicant's entitlement does not depend in this case on unlawful conduct but the "statutory mandate under the 1987 Act that an injured worker be compensated in circumstances of no current work capacity or where the current work capacity for suitable employment results in a loss" (*Singh v TAJ (Sydney) Pty Limited* [2006] NSWCA330 at [58] – "Singh").

89. Lin and Michael give conflicting accounts about whether the applicant was engaged by either of them to carry out the bricklaying under their control and direction. The only evidence of independence of the applicant is that he used his own trowel.

90. In relation to Jimmy, and the SNI that the applicant has failed to name that person contrary to the requirement for the purposes of s 142(1)(a) of the 1987 Act, there is no impediment to the applicant relying in the alternative under s 140(1)(b) of the 1987 Act "which will apply where the applicant … has been unable after due search and enquiry to identify the relevant employer …" The SNI in respect of "*Jimmy*" should be treated as a concession that there was at the time of the injury a relevant putative employer known as "*Jimmy*" who the applicant has been unable to identify.

91. As to the SNI regarding incapacity, the applicant adheres to the AS. He also adheres to the AS in relation to the SNI regarding the lack of a "work permit" resulting in the ability to earn being "nil". The appropriate guidance with respect to capacity for work and "suitable employment" is found in s 32A of the 1987 Act.

FINDINGS AND REASONS

Issue 1 – Whether the applicant had the necessary legal permission to commence employment

92. The precise issue the respondent raises in this regard is not totally clear. The question of whether the applicant did have the "necessary legal permission to commence employment" is raised in the context, as an example, of there being "major issues in respect of the credit of all parties including the applicant". But the question of "illegality" is also not a matter raised in the s 78 notice. The AS asserted that illegality was not an issue. While there are various suggestions or conclusory assertions made about the applicant not having legal permission to work, the evidence is not satisfactory in that regard. For example, Michael purports to attribute, to Lin and Jimmy, the motive of wanting to avoid liability resulting from the "applicant working illegally" and being injured to explain why they would not help him, including taking him to hospital, on the day of the injury.

93. Accordingly, to the extent that there may be a SNI that the applicant did not have the necessary legal permission to commence employment – being relevant to his ability to be classified as an employee or worker for the purposes of the 1987 and/or 1998 Acts - I do not accept it. Such an issue ought to have been raised in the s 78 notice or by way of application under s 289A of the 1998 Act. There was no such notice in either case. But even if I were to find the applicant was engaged in illegal employment, I would have exercised my discretion under s 24 of the 1987 Act to deal with it as if there were a valid contract (*Singh*; *Nonferral (NSW) Pty Ltd v Taufia* (1998) 43NSWLR312; (1998) 16NSWCCR130) (*Taufia*).

94. The legislature's enactment of s 24 of the 1987 Act indicates it foreshadowed that in certain cases it would be appropriate to overlook illegality. Other reasons why I would have exercised that discretion are that the work undertaken by the applicant was not of itself illegal and he was a person who was on a protective visa pending final determination of his refugee status. For reasons also to be developed later in dealing with the applicant's evidence overall, I also accept and take into account that he had limited English skills, was dependant to a significant extent on other Mandarin-speaking members of the Chinese community he mixed with, both locally and in the course of his work, and he did not intend to disadvantage any person by undertaking the relevant work (see Shephard AJA decision in *Taufia*).

Issue 2 – Was the applicant a worker under the 1987 and or 1998 Acts, and if so, by who?

As to Lin

95. AS 4.5 states that while the evidence does not support a contract on the day of the injury between the applicant and Lin, it does support a hire arrangement between Lin and Michael. This submission mistakes the relevant parties to a labour hire services contract within the meaning of clause 2A. But I do not take it as a concession that such a (labour hire services) contract is not relied on. AS 4.5 goes on to state that as a result of that hire arrangement, the applicant "could still be found to be a deemed worker" of Lin under Sch. 1 Cl.2. This is another error, probably typographical. Clearly enough, the intention was and is to rely upon clause 2A (see also AS footnote 41).

96. AS 4.7 also contains this unusual concession (for a bricklayer's case) concession:

> "The totality of the evidence …in particular that the applicant alternated working between the first and second respondents is indicative of the applicant falling into… a class of deemed worker under… Schedule 1, Clause 2… rather than under a s 4 1998 act worker…"

97. I can only take this as the applicant conceding that he has not entered into a contract of service with any person in relation to the work he performed at the site. I am bound by this concession (*Smits v Roach* [2006] HCA 36; 227 CLR 423 at [46]; *XCI Pty Ltd (in liq) v Thompson* [2016] NSWCCPD 58 at [169 -171]). But it is necessary to examine the scope of it. It is not totally clear what its basis is, either as to the comments *"totality of the evidence*" or "*the applicant alternated working between"* (Lin and Michael). But relevantly, I believe it is clear enough that it does not include a concession that the work performed by the applicant on 17 December 2015 was incidental to a trade or business he then regularly carried on - for the purposes clause 2A and Sch.1 Cl.2 . This can be gleaned from the submissions *read as a whole*. For example, ASR 2.3 submits that "the only evidence vaguely intimating some independence of the applicant…to support the applicant was '*running his own business*' is his evidence that he used his own trowel…". Also, AS 4.1, leading up, and giving context, to AS 4.5 and 4.7, states:

> "… the evidence establishes the applicant… on the day he was injured… engaged by (Michael)… or under a contract to perform bricklaying at the site… evidence also established that at the time the contract was not incidental to a business or trade carried on by the applicant who was under the control and direction of the second respondent…"

98. Earlier (at AS 3.1), the relevant evidence was summarised as follows :

> "… He usually worked for the first respondent up to 5-6 days per week for 45 to 60 hours a week…did not work exclusively for the first respondent and on occasions also worked for other bricklaying subcontractors however that work was arranged through the first respondent who would transport him to those jobs… *applicant did not carry on a business but provided his labour to subcontractors who secured the work and under whom he worked and was paid*…(emphasis added)"..

99. Clause 2A defines, relevantly, a "labour hire services contract" as meaning:

> "(1) … a contract *or arrangement* (emphasis added) … under which a person is provided with services to facilitate the performance of work by the person, such as the following …
>
> a) services for finding work for the person,
> b) services for payment for work performed by the person…"

100. Neither party provided authority to assist in the construction of Clause 2A. It was part of the *Workers Compensation Legislation Amendment (Miscellaneous Provisions) Act 2005.* The second reading speech of the bill was read by Minister David Campbell. Relevantly, it reads:

> "… is aimed at clarifying outworker and labour hire deemed worker provisions … based on recommendations of the Hon. Dr James Macken AM, former judge of the Industrial Commission of NSW in his capacity as facilitator of an advisory panel of employer and employee representatives who reviewed submissions made in response to a WorkCover discussion paper entitled 'Definition of Worker' issued in January … this year … refines the deemed worker provisions to improve clarity without changing the scope of the individuals to be generally covered … includes a provision concerning 'contractors under labour hire service arrangements' confirming that a labour hire agency is the employer of labour hire workers, even if they have signed a contract for services, unless they are conducting a genuine business or trade … will cover the 'Odco' type arrangement that has been promoted as a means of reclassifying workers as independent contractors to avoid attracting 'worker' status and to evade premiums. The type of contract or arrangement to which this provision will apply is one which can involve the labour hire agency providing services to a contractor such as: services for finding work for the person; services for payment for work performed by the person; and services for insurance coverage in connection with any such work. *These are indicative criteria only* … (emphasis added)"

101. As is often the case, this second reading speech is of limited assistance in construing clause 2A (see e.g. *Harrison v Melhem* [2008] NSWCA 67; 72 NSWLR 380 at [12]). I note the "Four basic principles" referred to in *Police Association of NSW v State of NSW* [2020] NSWCA 3 at [86] as noted by Deputy President Michael Snell in *AV v AW* [2020] NSWWCCPD9 at [67].

102. For context, Clause 2A immediately follows Sch. 1 Cl. 2. Relevantly, Sch. 1 Cl.2 provides:

> "… Where a contract … to perform any work exceeding $10 in value (not … work incidental to a trade or business regularly carried on by the contractor in the contractor's own name, or under a business or firm name) or … is made with the contractor, who neither sublets the contract nor employs any worker, the contractor is, for the purposes of this Act, taken to be a worker employed by the person who made the contract with the contractor …"

103. Both clauses contain essentially the same language – except that clause 2A:

    (a) Is limited to a particular type of contract, namely a "labour hire services contract".

    (b) Clause 2A extends the meaning of a "labour hire services contract" to include an *arrangement*, as well as a contract.

104. As indicated in the Minister's speech, the background to the introduction of clause 2A broadly relates to a concern to clarify the intention of the legislature to extend the deeming of employment for contractors to those workers providing services under a labour hire service agreement. The words of the provision show that "a labour hire agency" (Clause 2A(2)) includes in effect any person who or which has provided services to another person to facilitate the performance of work by that other person (such as the services referred to in para 100 above). But as emphasised from the second reading speech, those are "indicative criteria only". I do not come to that conclusion simply by reference to the speech. That reference is also consistent with a plain reading of the relevant words of the provision, i.e. "<u>such as</u> the following services …" (clause 2A(1)).

105. In my opinion, Lin did provide services to the applicant to facilitate the performance of work by the applicant (at least during the work the applicant performed at the site when injured on 17 December 2015), such as the services referred to in clause 2A(1)(a) and (b) as noted in para 99 above and I so find. Lin also provided the applicant with a further service to facilitate the performance of that work; namely, transporting him to the site.

106. Clause 2A(2) then relevantly provides:

> "… if … (a) a person … '**a labour hire agency**' under a labour hire services contract with another person ("**a contractor**") arranges for the contractor to perform work for a third person ("**the host employer**"), and
>
> (b) the work performed is not incidental to a trade or business regularly carried on by the contactor in the contractor's own name or under a business or firm name, and
>
> (c) the contractor neither employs any worker nor subcontracts with any person, to perform any of that work, and
>
> (d) the labour hire agency provides services to the contractor under the labour hire services contract during the performance of that work … the contractor is, for the purposes of this Act, taken to be a worker employed by the labour hire agency while performing that work."

107. In my opinion, Lin should be classified, by the definition in clause 2A(2)(a), as a labour hire agency because he did provide the services to the applicant referred to in para 105 above; and I so find. I also find that Lin arranged for the applicant ("a contractor" for the purposes of clause 2A) to perform work for Michael ("the host employer" for the purposes of clause 2A) and that Lin did provide those services to the applicant under the labour hire services contract during the performance of that work: namely, the work carried out by the applicant under the control and direction of Michael at the site on 17 December 2015.

108. I accept the applicant's evidence that he commenced working with Lin from about 2013 and that Lin had a consistent supply of bricklaying work for him over the two years or so up to 17 December 2015. The applicant says there was enough work for about 45 to 50 hours a week. Lin does not totally agree with that. He says the reference to 45-50 hours a week is not true and correct and they would only work together occasionally and " …maybe 4-5 days together … was not a regular occurrence…" (Reply 4).

109. However, I need to be cautious with Lin's evidence, given conflicts or inconsistencies surrounding it. For example, Michael alleges that Jimmy and Lin are friends and that Jimmy contracted Lin to work at the site, and that Jimmy paid him $250 cash for each of the two days he worked at the site. This may be consistent with both Yu and Zhao stating that Jimmy paid them $250 and $180 respectively for their work on 17 December 2015. But for the reasons below, I also need to exercise much caution with Michael's evidence.

110. The applicant's evidence is that Lin told him the job was being run by Michael and Jimmy. There is also a conflict between Lin and Michael about who employed the applicant. Michael states it was Lin. Lin states it was Michael.

111. I also need to treat the applicant's evidence with some caution. He has produced no evidence that he has compiled with the tax laws or obligations in respect of the work he did between 2009 and 2015 - though that feeds back into the "illegality" question as well. There is also a potential conflict between the applicant's assertion that he was paid $350 a day which he said "was the going rate for a bricklayer working for a subcontractor in the Chinese community", given that Yu and Michael have stated that Jimmy paid them $250 for the work on 17 December 2015. Again, that conflict is not easy to resolve.

112. In the main, I believe the applicant has done his best to tell the truth and, and I prefer his evidence over both Michael's and Lin's evidence. I think it likely that Lin has tried to minimise his involvement in the work arrangements involving the applicant and other workers, including Zhao and Yu. Lin stated he "got paid a bit more than" the applicant because he "picked him up from Campsie and drove him to Bonnyrigg…" He also stated he "would give (the applicant) a lift to the site … just helping him by giving him a lift in my car … no long term fixed arrangement …" He conceded he was paid "about $20 extra … only because I had my own car and could get to the worksites without needing a lift from anyone … different subcontractors would pay that money to me … but … not … regularly …"

113. In contrast, the applicant stated that from 2013, Lin would generally pick him up from his home and take him to a particular building site. The applicant did not know where they would be working or for who they were working for, and that Lin did so with his "own vehicle, a Ford ute which he used in his business to transport tools and materials … had a cabin which could fit about 5 workers in it…"

114. This evidence from the applicant is plausible. Lin's vehicle is likely to have been something more than what he described as his "own car … and could get to … sites without needing a lift …". I accept it was more in the nature of a business vehicle. Five workers were in Lin's ute on 17 December 2015. I don't think the situation is as simple as what Lin described when he stated, "I was just helping him (the applicant) by giving him a lift in my car … no long-term fixed arrangement …". I think it more plausible that there was a long term, ongoing, and consistent arrangement in this regard. So much is at least implicit in the applicant's evidence.

115. On the other hand, I do accept Lin's evidence that the applicant worked for other subcontractors. At least expressly, the applicant does not say otherwise. AS 3.1 concedes as much. But taking all of the evidence into account, I believe there was still regularity and consistency in the work being provided by Lin to the applicant.

116. I also think the applicant's evidence is plausible when he states that he was working with Lin on a site at Maroubra on or about 16 December 2015 and it was the following day that they went to work at the site. That has the ring of truth about it. It follows that I do not accept the evidence of Lin that he had not worked with the applicant "for a few weeks before we worked at Bonnyrigg together". The applicant states (ARD 213) it was from this time he "came to know" Michael. Contrary to AS 3.14, Michael's denial that he had worked with the applicant before the accident day is not inconsistent with the applicant's evidence. But it is another inconsistency with Lin's evidence who states he had introduced the applicant to Michael on previous occasions (ARD 244).

117. At best, the evidence is unclear as to whether Lin controlled, in any significant way, the work the applicant was carrying out on the site on 17 December 2015. Lin has stated that it was Michael who controlled the applicant in his daily duties at the site. In this regard, the applicant has stated that he was told by Lin that "the job was being run by Michael and Jimmy … either Michael or Jimmy gave (gate) entry … directed by Jimmy or Michael to go up onto the scaffold…"

118. Any unsatisfactory aspects of the applicant's taxation (or "*work permit*") affairs are insufficient to cause me to not prefer his evidence over the evidence of Lin and Michael.

119. I believe the arrangement between Lin and the applicant was regular, lasting from 2013 until 17 December 2015. Consistent with such a view is the concession by Lin that "different subcontractors would pay that ($20 extra – see para 43 above) money to me … but … not regularly, sometimes they did … sometimes … not …"

120. The applicant has stated that after he commenced working with Lin in about 2013, Lin would pick him up from his home and take him to the particular building site. I infer from this that the arrangement in relation to transport on 17 December 2015 was part of a pattern that had existed regularly, or at least episodically, since 2013. I infer that part of the arrangement was that Lin would drive the applicant, and at least some of the other workers who he transported to the site on 17 December 2015, back to Campsie at the end of the day. That did not occur with the applicant because he was taken to the hospital. However, Zhao states that Lin drove Yu, Chen and Zhao back to Campsie.

121. Lin also provided services for the applicant to facilitate the performance of the applicant's work with Michael on 17 December 2015. The applicant states that Lin was contacted by Michael on about 16 December 2015 and although the work arrangements "were a little unclear", and he "may have been contacted by Michael or Michael through … Lin", in any event, he was told he would be working at Bonnyrigg on a job being run by Michael. Lin could not remember whether he called the applicant or whether the applicant called him, but does say he did tell the applicant about Michael wanting workers at Bonnyrigg.

122. Taking all that material into account, it is likely that Michael contacted Lin looking for bricklaying assistance in relation to work at the site on 17 December 2015, and Lin arranged for the applicant to do that work for Michael as well. In my opinion, this equated to the applicant being provided with services by Lin where Lin found work for the applicant. This was part of a pattern, and consistent with the applicant's evidence about what had occurred in the relationship since about 2013. Lin states that he did work with the applicant "at more than the … Bonnyrigg site", and he did give the applicant "lifts to some sites", but that the applicant did not "just work under me, he worked for other people". But this does not militate against a conclusion that there was an arrangement between Lin and the applicant which constituted a labour hire services contract within the meaning of clause 2A – in relation to and during the performance of the work the applicant performed at the site on 17 December 2015. That was an arrangement for that particular work and or was part of a wider and longer standing arrangement where the same services were provided for the applicant by Lin since 2013. That arrangement also included services provided for the applicant by Lin in relation to payment for work performed by the applicant. Lin and the applicant agree that Michael did not pay the applicant directly.

123. Lin states that he did not pay the applicant any money on behalf of other people other than when they were both working for Michael. I do not accept this statement as correct as it is inconsistent with the applicant's evidence that Lin owed the applicant $16,500 for two months' unpaid wages just before the accident - and I prefer the applicant's evidence. He provides significant detail, stating that a week after discharge from hospital when Lin visited him at home and gave him $2,000; and Lin then stating he would pay back the remaining amount on a monthly basis thereafter. The applicant says when he had not received payments or contacts from an insurer by February 2016, Lin called him to say he had an argument with Michael and Michael would not answer his calls anymore.

124. This has some symmetry with Lin's statement that he first met Michael in about 2013 but had not spoken to him since 2015 in circumstances where he had called Michael a few times after the applicant's injury but Michael did not return his calls. Also, Lin's November 2019 statement does not traverse the applicant's statement about Lin owing him money and the arrangements to attempt to pay him back. Similarly, the applicant's statement that Lin gave him $1,000 to pay rent, acknowledging that he still owed the applicant about $13,000 (implicitly in respect of outstanding remuneration for work performed by the applicant) is not traversed by Lin. This also applies to the applicant's statement that Lin then paid him $1,000 in cash from time to time up until April 2016 where all outstanding "wages" were paid.

125. This evidence persuades me that Lin provided services, pursuant to a labour hire services contract for the payment for work performed by the applicant. I do not construe clause 2A to necessarily require that the payment be in relation to work being performed for Lin. Clause 2A(1)(b) refers to such payment for work performed "*by* the person (emphasis added)". This would include work performed for the "subcontractor", Michael, on 17 December 2015. This pattern is consistent with the statement by the applicant that when he started working with (he describes it as "for") Lin in about 2013, Lin would pick him up from his home, take him to a particular site, the applicant did not know where they would be working, or for whom, and he was paid cash initially on a weekly basis, but then had problems being paid at times. Taking all the evidence into account, despite its various inconsistencies, I do find it likely that Michael was the person the work – by the applicant - was to be performed for within the meaning of clause 2A (2)(a). The statements of both Lin and the applicant are consistent with that finding. Any other inference, such as that person being Jimmy, can only be speculation - or an inference that is less likely than the one I have found. It may be, for example, there would be some basis for Yu and Zhao being found to be employed by Jimmy – because there is evidence that Jimmy paid them. Of course, that would not be the only such factor. But it illustrates the lack of any adequate evidence to make a finding that the work by the applicant was to be performed for Jimmy.

126. I also note Lin's evidence that the applicant did not "just work under me … worked for other people … I hadn't worked with him for a few weeks ..." To some extent, that appears to have been so; and the AS concede that. But the evidence does not go so far as to persuade me that Lin's communication to the applicant that there was work available at the site meant that Lin was doing anything more than providing services to the applicant by way of finding work for him, transporting him to and from that work and being the intermediary in the payment of remuneration for that work. There can be little doubt that Lin provided services to the applicant by way of finding work. So much is essentially conceded by Lin when he stated "if Huang had no work at other places, he would call me and ask me if I knew of any work …" That is what occurred during the performance of the applicant's work on 17 December 2015. The same applies to the services provided by Lin to facilitate the applicant's work during that time with respect to "payment for work" and the transport to and from the site.

127. Lin also ferried the applicant, as well as other workers, in his Ford ute, to the site. I am also in little or no doubt that Lin provided the services identified under the labour hire services contract during the performance of the work the applicant did at the site on that day (clause 2A(2)(d)).

128. There is no doubt the applicant neither employed any worker, nor subcontracted with any person to perform any of the work he performed at the site on 17 December 2015 (clause 2A(2)(c)). There is no evidence of any such matter nor a submission to suggest otherwise.

129. This leaves the question of whether or not the work performed by the applicant at the site on 17 December 2015 was incidental to a trade or business regularly carried on by him in his own name or under a business or firm name. The respondent submitted that "it is open to the Commission to find that in fact the applicant was in effect 'running his own business as a bricklayer' …" (SNI 6). The applicant submitted "the only evidence vaguely intimating some independence … to support the (SNI) that (he) was '*running his own business'* is his evidence that he used his own trowel …" (ASR 2.3).

130. In my opinion, the work performed by the applicant under the labour hire services contract with Lin was not incidental to a trade or business regularly carried on by the applicant in his own name or under a business or firm name. In my opinion, the applicant's relationship with Lin was "special or particular" at all times (*Humberstone v Northern Timber Mills* [1949] HCA49; (1949) 79CLR389 at [401-402]).

131. For the purposes of clause 2A(2)(b), it is clear enough that the applicant was working for "various subcontractors" at "various building sites" up to 2013. That he did not advertise, or, apparently, comply with taxation obligations does not mean or result in a finding that he was not carrying on a trade or business in his own name. I believe he was carrying on a trade, namely bricklaying, and, I infer, he was using his name. That he only received his work through word of mouth and or from contractors of Chinese background does not change that. (*Higgins v Jackson & Ors* [1976] HCA37; (1976) 135CLR174).

132. In about 2013, he commenced his relationship with Lin and he says that Lin had enough work for him for about 45 to 50 hours per week. The applicant did not know where "we would be working or for whom … was paid cash initially on a weekly basis but then had problems being paid at times". At one level this may have been a different dynamic to what had existed previously; when he worked for various subcontractors, those subcontractors would ask him to work, and they would take him to the job and pay him cash. From 2013, Lin was able to find the applicant a great deal more work than he had in the past. And it was Lin from this time who picked the applicant up from his home and took him to the various sites; rather than the various subcontractors who did that, and also directly pay the applicant, before.

133. While I am left to draw some inferences, I need to do so on a likely basis. For example, in relation to the payments for his work, his difficulties or problems "being paid at times" relate to the involvement of Lin in the applicant's work. It is not totally clear how often Lin was the intermediary for the payment of the applicant's remuneration. However, there must have been some substantial involvement by Lin in this aspect having regard to the applicant's statements that Lin owed him $16,500 for two months' unpaid wages. The applicant also said he was paid cash initially on a weekly basis before stating that he had problems being paid at times. I find this evidence from the applicant rings true. He concedes Lin ended up paying him all the outstanding wages, and adds that Lin provided him with work when he tried to return to work post-injury. There is no response by Lin to these statements.

134. However, there is no statement from the applicant to the effect that he was not doing some other work for other "various subcontractors" for the period during 2013 and 17 December 2015 and so much is conceded. But even if that is so, it does not change my conclusion about the relationship between the applicant and Lin being "special or particular" in the *Humberstone* sense. This is because I do not believe, for the purposes of the application of clause 2A(2)(b), the applicant was in fact regularly carrying on a trade or business. At this stage, I will not repeat the evidence upon which I rely to support that conclusion - I have summarised it at paras 12-20 above, and it appears in paras 5-28 of his statement (ARD 212-214). Taking all such matters into account, putting aside the lack of financial or taxation records and advertising, and the fact that he relied upon work by word of mouth, I am in no doubt that, "… viewed as a 'practical matter' …", he was not, at any time during that period, performing work as an entrepreneur who owned and operated a business. He was not working in and for his own business as a representative of that business. He was working for various other businesses, which or who had contracted to receive the work; i.e. the various subcontractor bricklayers he refers to in his statement. He was always ferried around to get to and from the sites, he was never directly engaged by anyone to work for them - except "always … through a subcontractor". He always worked as directed and was never involved in planning or directing others as to how work would be carried out. He commenced and finished and took breaks as he was directed by the subcontractors he was working for. He was paid a daily rate, not piece rates or on a task related basis.

135. It can also be at least inferred that he had no right during that period, and particularly on the day of the injury, to delegate any work. And it is clear that he was controlled and directed by subcontractors or others. This was the case on 17 December 2015 by Michael or Jimmy. It is likely that Lin did not have exclusive rights to the applicant's services and this is a factor pointing against the applicant regularly carrying on his own business. However, I infer that the applicant had an obligation to work for Lin, at least on 17 December 2015. I accept his evidence that "on or about 16 December 2015 … Lin was contacted by … Michael and asked to carry out bricklaying … at Bonnyrigg … on the day I recall I was working with … Lin at Maroubra … *I was told I would be working* (emphasis added) at Bonnyrigg … on 17 December 2015 …" (*On Call Interpreters & Translators Agency Pty Ltd v Commissioner of Taxation (No. 3)* [2011] FCA366; 214FCR82; 279ALR341; 83ATR137).

136. I appreciate that despite the applicant not claiming to be a worker under s 4 of the 1998 Act, I have analysed the question of whether he was relevantly performing work which was not incidental to a trade or business he regularly carried on in essentially the same way as one would if analysing a contract for service. Nevertheless, it is clear that the applicant did not eschew a claim that he was a deemed worker under either clause 2A or Schedule 1 clause 2. And it is equally clear that he was pressing the argument that he was not regularly carrying on (or "*running*") a trade or business. I note s 354 of the 1998 Act requires the Commission to act according to the substantial merits of the case without regard to technicalities or legal forms. There cannot have been any prejudice to the respondent in this regard. It was in receipt of the applicant's submissions at the time of the SNI and a submission was made that "the Commission could not be satisfied that the applicant can be regarded as an employee".

137. If my finding that the applicant was not at any relevant time carrying on a business is wrong, I would alternatively base my conclusion that clause 2A is triggered on the basis that while any such trade or business was clearly carried on *regularly* up to 2013, I would find that it was not done regularly once the applicant commenced his relationship with Lin about 2013 while it is conceded (AS 3.1) that the applicant "did not work exclusively for the first respondent", it was only conceded that he would work for other bricklayers "on occasions".

138. The words "not incidental to a trade or business regularly carried on by a contractor…" form a single concept, rather than the sum of several separate components (*Turner v Stewardson* [1961] WCR (NSW) 169; [1962] NSWR 136). There are further reasons to support my conclusion that the applicant is a deemed worker within the meaning of clause 2A. Firstly, he did not employ any workers on 17 December 2015. Nor did he employ workers at any other time. There is also no evidence that the applicant had any tangible assets, other than his trowel, that were used by or in support of any business. Nor did he have a vehicle to convey himself to his work.

As to Michael

139. Michael's denial of making any payments for the applicant's medical expenses is difficult to accept given what appears in the hospital clinical notes – including that he was "willing to pay some money upfront". I do not accept his evidence in this respect. He says, "Lin paid the applicant money to cover the hospital bills". I prefer the evidence of the applicant to Michael. If, indeed, the applicant was paid by Lin to cover the hospital bills, such information is likely to have appeared in the applicant's statement. He seems to have no motive to omit such information, particularly given that has stated Lin owed him money in respect of outstanding wages. The hospital notes show hospital staff expected Michael was going to pay the money. However, even though the applicant's 18 November 2019 statement includes the hospital invoices, that statement was not lodged, and the only inference I am able to draw from what that statement relevantly contained is what appears in the AS para 3.13, namely, it was noted that Michael was willing to pay those fees. There is no reference to Lin or Jimmy in the hospital notes, and cash payments were received. There is no SNI disputing this. But the evidence does not allow me to properly conclude whether Michael was acting on behalf of another person in this respect.

140. Michael says he was merely "at most a Mandarin translator" on the site. This seems implausible. The applicant has given two pieces of evidence about Michael's role on site; firstly, "…entry (through a gate) was given ... by either Michael or Jimmy I can't recall…"; and secondly, "…When we commenced work, Jimmy, Michael and Zhou were preparing the mortar … and I was directed by Jimmy or Michael along with Hong to go up onto the scaffold…". I accept the applicant's evidence in this respect. But it only goes so far as to show Michael was more than a translator on site. It is otherwise unclear as to the extent of the respective roles of Michael and Jimmy.

141. Because the applicant and Lin do not say Michael directly paid the applicant, I do accept Michael's evidence in that respect – to the extent that this refers to direct payments at any time. Otherwise, because of the inconsistencies already identified with Michael's evidence, I need to exercise much caution with it. I am unable to accept Michael's evidence, except where it is otherwise corroborated – and persuasively so.

142. Michael has made these other allegations:

    (a) Jimmy was in control of the site.
    (b) Jimmy and Lin are friends, and Jimmy contracted Lin to work at the site: and that Jimmy paid Michael $250 for his work on the two days he was at the site.
    (c) Lin paid the applicant a wage.
    (d) Both Jimmy and Lin paid the applicant money to cover the applicant's hospital bills.
    (e) He was told by the applicant that he should mislead hospital staff by telling them an untruth – namely, the applicant fell downstairs on 17 December 2015.

143. I certainly do not accept Michael's allegation that he was told by the applicant to mislead hospital staff. I prefer the applicant's evidence over Michael's evidence as noted earlier. It follows that I also do not accept that Jimmy and Lin paid the applicant money to cover the hospital bills, as Michael alleges in (d) above. Otherwise, while I doubt Michael's word, it is not necessary that I make findings in relation the allegations in (a), (b) and (c) in para 142 above. Despite me having little, if any, confidence in the uncorroborated evidence of Michael, the evidence overall does not persuade me that the applicant was deemed to be an employee of Michael. I do not agree with AS 4.1 – that "the evidence establishes the applicant was on the day he was injured … engaged by the second defendant [sic] under a contract to perform bricklaying at the site for about one week …". There is no adequate evidence, or submission, to actually persuade me that there was a contract between the applicant and Michael.

144. In coming to that conclusion, I bear in mind the appropriate test is to identify the existence of a contract by reference to an objective assessment of the state of affairs between the parties and it is not necessary to identify a precise offer or a precise acceptance, nor a precise time at which an offer or acceptance can be identified, and that a contractual arrangement can be inferred from the conduct of the parties. Nevertheless, even on the applicant's own evidence, he cannot say whether he was contacted by Michael or the contact with Michael was "through … Lin". The applicant was not directly paid by Michael. In this regard – compared to both Yu and Zhao stating that Jimmy paid them $250 and $180 respectively for the work on 17 December 2015. Yu was a bricklayer and Zhao was a labourer. Both Yu and Zhao also state that at the end of that day, Lin drove them, and Chen, back to Campsie.

As to Nguyen

145. The SNI do not appear, at least expressly, to deal with the case against Nguyen. The SNI rather focus on whether "the applicant can be regarded as an employee or in the alternative, that a potential employer (Jimmy) has not been nominated by the applicant". Also, SNI para 9 appears to take issue with the reliance by the applicant upon the interrogatories – a document which is relied upon by the applicant for the essential purpose of attempting to show Luong had "on information and belief stated that (Lin and Michael) were on the site as subcontractors indicates a relationship that … would operate to include (Nguyen) as a principal and be treated as an employer…". But the relevant response by Luong to the interrogatory only goes so far as to state that her legal representatives have made some enquiries about the contractors who attended the site during the relevant period; and there was advice that the names of those contractor include Michael and Lin.

146. This is clearly inadequate evidence upon which to ground a case against Nguyen. The basic requirement to trigger s 20 of the 1987 Act is that the principal (assuming that is Nguyen) contracts with someone else, the "contractor", who is not insured, or a self-insurer, in the course of or for the purposes of the principal's trade or business, for the execution of part or whole of the work undertaken by the principal. I agree with the implicit concern expressed in SNI para 9. I bear in mind that the test to identify the existence of a contract is by reference to an objective assessment of the state of affairs between the parties, and it is not necessary to identify a precise offer or precise acceptance, nor a precise time at which an offer or acceptance can be identified, and that a contractual arrangement can be inferred from the conduct of the parties.

147. But here, I need to be persuaded that Nguyen was not only the principal, but he also, in the course of or for the purpose of his trade or business, contracted with a contractor. While the applicant need not be employed by the person with whom the principal has contracted, and deemed employment is sufficient, the difficulty here is that, again, there is inadequate evidence to show that there was such a contract. If there is such evidence, it is wholly inadequate. The highest the evidence goes here is Luong providing second hand hearsay: giving her "belief" on the basis of some enquiries apparently carried out by her legal advisors; details of which are not provided. AS 4.10 also inaccurately asserts there is no evidence of any other parties at the site performing sub-contracting bricklaying other than Michael. This ignores the potential for Lin (who Luong did mention), and or Jimmy, to fit that description.

148. Procedure in the Commission is to be conducted with as little formality and technicality as proper consideration of a matter permits. But conclusions still need to be drawn from satisfactory material, in the probative sense, to ensure they are not seen to be capricious, arbitrary or without proper foundation or material (*OneSteel Reinforcing Pty Ltd v Sutton* [2012] NSWCA282 at [2] (*OneSteel*)). Accordingly, I reject the submissions that Nguyen was a principal for the purposes of s 20 of the 1987 Act.

As to Jimmy

149. Lin states that Michael had the control and direction of the applicant in his daily duties at the site. But Michael told an investigator for the nominal insurer, on 22 June 2016, that the applicant was "employed by a male called 'Adong'" who was known as 'Jimmy' and also provided the name of a witness called "Danny" who could verify this information. But he could not provide surnames, nor could he remember the address of the site. He could not meet to provide a statement then because he was travelling to Europe the following day for three weeks. The investigator made repeated calls to Danny without any response. After repeated attempts, on 12 July 2016, the investigator spoke to a "Jimmy" on the mobile phone number provided by Michael. That person appeared to have difficulty conversing in English, put a female on the phone to continue the call, said that Jimmy would call back. But no call was received by the time of the investigator's report on 3 August 2016 (Reply 33).

150. Have already made a finding that the evidence is not adequate to allow me to make a finding that the applicant entered into a contract with Michael. *A fortiori*, the same applies to Jimmy. In his case, there is no evidence that he contracted with the applicant, perhaps except to the extent that the applicant says that it was either he or Michael who directed him to go up onto the scaffold (ARD 214). Otherwise, the highest the evidence gets in this respect is that Lin told the applicant that he would be working "on a job being run by Michael and Jimmy". As noted earlier, I need to bear in mind the principles in *OneSteel*.

Issue 3 – The applicant's entitlement to weekly compensation

151. I accept the AS insofar as they point out that s 32A of the 1987 Act, and the principles in *Dewar*, should be applied in assessing this issue, and in particular the CWC question. It is also clear that the applicant was not, during the period of the claim, fit for his pre-injury work, or for work he had done in the past, including fruit purchasing, wholesaling and bricklaying, as these all involve work activity he is incapacitated from.

152. The basis for this is the opinion of Dr Porteous (ARD 236) who described a total incapacity for that type of work. The SNI puts that there is an absence of medical evidence in relation to incapacity post 20 September 2016. But there are also medical certificate from Dr Lin, certifying no CWC, between 21 September 2016 and 20 November 2016 and then between 1 April 2017 to 1 June 2017.

153. The applicant stated (ARD 217) that in October or November 2016, he commenced painting work – and "managed to work two half days for about 10 hours per week … with the pay of $200 in cash … struggled with the work but was desperate because of my financial situation … in November 2018 I attempted to return to work as a bricklayer …" However, November 2018 is outside the period of the claim.

154. Dr Porteous has taken a history that the applicant "was off for 2 years, he stated, and then is getting intermittent casual part time cleaning at building sites, which he said he can just manage, although it increases his right knee pain". But, remembering that I need to exercise some caution with the applicant's evidence, I am concerned about the accuracy of this history. The applicant's statement about the painting work he returned to in October or November 2016 does not at all make it clear, contrary to AS 5.5, that this was a "failed attempt… to return to work firstly in November 2016 doing light duties when he was still on crutches which he couldn't manage". It may also be capable of being read as him continuing to receive $200 per week until November 2018.

155. However, given the history taken by Dr Porteous about the applicant being off work for two years and the lack of any clear submission by the respondent to the contrary, I will assume this return to work was temporary. But it is not clear for how long, and there is not a submission about that either. If it is submitted that I should infer that para 55 of the applicant's statement means that I should infer he only earned a totality of $200, I am unable to do so on a likely basis. Noticing that there appears to be a gap in the medical certification between 21 November 2016 – about the same time as the applicant stated he started painting work earning $200 cash per week – and 31 March 2017, I find that the applicant did have a CWC to perform that painting work he refers to in his statement between 21 November 2016 and 31 March 2017. I do so on the basis that the applicant has not proved he had no CWC during that period.

156. There is medical certification from Dr Lin from 1 April 2017 until 1 June 2017. In all the circumstances, I am prepared to accept there was no CWC during that period of medical certification. But I reject the submission that I can infer from the 17 June 2017 clinical note of Dr Lin (ARD 178) that he issued a further certificate. I have read that note and cannot see how it can be inferred. As a result, for the balance of the closed period up to 18 June 2018,

I find the applicant has failed to prove he had no CWC, and that he did have a CWC of $200 per week. I think this represents a realistic assessment of the matters I am required to take into account under s 32A (a) and (b). When Dr Porteous saw the applicant in August 2019, over 12 months after the period of the weekly payments claim closed, he reported that the applicant told him that he was getting intermittent casual part-time cleaning at building sites, which "he can just manage, although it increases his right knee pain". It can be inferred that this had been the case from about the end of 2017 given the history about the applicant being off work for about two years. Taking into account likely imprecision with dates in this history, it seems to me that if the applicant had not commenced at cleaning work before the end of 2017, he has not proved that he did not have a CWC after 1 June 2017.

157. I think this is realistic, including because he has obtained this cleaning work around building sites. I infer that he likely has good connections around building sites involving subcontractors of Chinese background, including Lin.

158. Therefore, I accept that the combination of the seriousness of the applicant's injuries, the medical information, the worker's age, education, skills and work experience, were such that there was no real job he was able to do from 18 December 2015 until 21 November 2016 and 1 April 2017 to 1 June 2017. Thereafter, I do not agree with the AS that there was no real job in the *Dewar* sense. I find the applicant had a CWC to perform the painting or cleaning work referred to above during the period from, say, 17 December 2017 until 19 March 2018. I reject the AS to the extent they suggest a finding under s 47 of the 1987 Act results, in all the circumstances of this case, in the applicant having no CWC.

159. As to the PIAWE, I again have to be careful about happily accepting the applicant's assertion that the daily rate he was receiving was $350. While I have been unable to accept the evidence of Michael without corroboration, his evidence that he was paid $250 as a daily rate is consistent with what Zhao has stated he received as a daily rate. Therefore, exercising that caution with the applicant's evidence, I find a daily rate of $250 for five days per week as a gross figure. I appreciate by allowing only five days this is at the bottom of the range of what the applicant said he was working – five to six days per week for 45 to 50 hours. However, I have earlier expressed concerns about whether that amount of days or hours were still relevant by December 2015 – at least with Lin. Again, that is not clear. It is also not totally clear about how much work was being performed for other subcontractors. The AS put no more precisely than "on occasions".

160. In relation to SNI16 I do not agree that the applicant's "ability to earn but for the injury would be nil". Clearly, this would be contrary to the decision in *Singh.*

Issue 4 – Notice and Claim

161. These were issues raised in the s 78 notice and addressed by the applicant at AS 7.1-7.5. I do not accept the submission for the applicant that "awareness … involved both knowledge of the injurious event and the legal implications …" After receiving AS, the respondent made no submission about this issue in the SNI. Assuming this is a concession, it is a proper one and represents the finding that would have been made, and I do make. Firstly, any failure by the applicant to give notice of injury as required by s 254 of the 1998 Act is not a bar to the recovery of compensation by him because the respondent is not prejudiced and any such failure was occasioned by ignorance or mistake.

162. I also make a finding that any failure to make a claim within the period required by s 261 of the 1998 Act is not a bar to the recovery of compensation by the applicant on the basis that any such failure was occasioned by his ignorance or mistake and such claim is in respect of an injury which has resulted in his serious and permanent disablement within the meaning of that section. I accept the submissions at AS 7.1, 7.3 and 7.4-7.5.

Summary

163. I find the applicant is taken to be a worker employed by the first respondent during the performance of the work the applicant carried out at the site on 17 December 2015 pursuant to clause 2A.

164. The fourth respondent is to pay the applicant weekly payments of compensation under the 1987 Act as follows:

    (a) $1,187.50 per week between 18 December 2015 and 18 March 2016 (pursuant to s 36);
    (b) $1,000 per week between 19 March 2016 and 20 November 2016 (pursuant to s 37);
    (c) $840 per week between 21 November 2016 and 31 March 2017 (pursuant to s 37);
    (d) $1000 per week between 1 April 2017 and 1 June 2017 (pursuant to s 37), and
    (e) $840 per week between 2 June 2017 and 18 June 2018 (pursuant to s 37).

165. The respondent is to pay the applicant's medical or hospital and rehabilitation etc expenses by way of general order pursuant to s 60 of the 1987 Act.