

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 2218/19
Applicant: Mohammed Naem
Respondent: Ram Dubey
Date of Determination: 30 October 2019
Citation: [2019] NSWCC 353

The Commission determines:

1. Award for the respondent.

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

Cameron Burge
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 CAMERON BURGE, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Mohammed Naem (the applicant) brings a claim for weekly compensation, medical expenses and permanent impairment compensation in relation to an injury which allegedly took place on 24 January 2012 at premises owned by Mr Ram Dubey (the respondent).
2. The respondent denies he ever employed the applicant and also places in issue whether an injury took place. He says he received no notice of the claim within time, and denies the applicant has suffered any incapacity.
3. The applicant states he began labouring work for the respondent on the house which the respondent was renovating as an owner/builder. He states the respondent agreed to pay him \$250 per day and would call him when needed. The payment was to be made in cash.
4. According to the applicant, he commenced work on 24 January 2012 and on that very day he tripped over some debris on the building site while carrying fibro boards and fractured his right wrist.
5. The applicant says that while he worked on the site, he took instructions from the respondent and not from any other workers who were present. For his part, the respondent denies this is the case and says he retained Mr Surendra Singh who was known as a carpenter, and Mr Singh in turn employed the applicant and another worker on the site. The respondent said Mr Singh would order materials for the work which needed to be done and the respondent would in turn reimburse him.
6. The respondent says he met Mr Singh and the applicant at a meeting at a mutual friend's house in Oatley. He says Mr Singh was the "boss" and it was he the respondent agreed to pay. He said he negotiated daily rates with Mr Singh and those rates were \$350 for Mr Singh's own labour, \$250 for the applicant and \$200 for a Mr Chandra, who was also working on the site.
7. The respondent says he agreed that these monies would be paid at a daily rate on a casual basis. He says he paid the workers every Friday in cash for the days they physically worked.
8. The applicant submitted a claim form in March 2012, which the respondent says was the first notification he received about any alleged injury. On 8 May 2012, the respondent's insurer issued a section 74 notice denying liability on the basis that the applicant was not a worker and did not suffer any injury arising out of any employment with the respondent.
9. A further section 74 notice was issued in response to the applicant's claim on 13 September 2018. It maintained the denial of liability from the previous section 74 notice and also alleged the applicant had failed to provide particulars of his claim as required pursuant to section 282 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act).
10. The applicant's attorneys commenced proceedings by way of Application to Resolve a Dispute (the Application) on 8 May 2019. A Reply was lodged to the Application, and on 9 September 2019 the parties attended a hearing before me. At that hearing, they were unable to resolve their differences and accordingly the matter proceeded to hearing.

ISSUES FOR DETERMINATION

11. The parties agree that the following issues remain in dispute:
 - (a) Whether the applicant was a worker or deemed worker as those terms are defined in the relevant legislation;

- (b) Whether the applicant suffered an injury in the course of or arising out of his employment with the respondent;
- (c) Whether the applicant provided any and/or timely notice of his injury as required by the relevant legislation;
- (d) Whether the applicant suffered any incapacity for employment as a result of the alleged injury.

PROCEDURE BEFORE THE COMMISSION

12. As already noted, the parties attended a hearing on 9 September 2019. At the hearing, Mr B Carney of counsel appeared for the applicant and Mr F Doak of counsel appeared for the respondent.

EVIDENCE

Documentary Evidence

13. The following documents were in evidence before the Commission and taken into account in making this determination:
- (a) The Application and attached documents;
 - (b) The Reply and attached documents;
 - (c) The respondent's Application to Admit Late Documents dated 10 September 2019, filed in accordance with a direction made by consent at the hearing.

Oral Evidence

14. There was no oral evidence called at the hearing.

SUBMISSIONS

The Applicant's Submissions

15. Mr Carney submitted there was no dispute the applicant was to be paid \$250 per day. He took the Commission to the applicant's statements which are found from page 9 of the Application. He noted the applicant had suffered a previous back injury whilst employed with BHP. At page 10, Mr Carney noted the applicant recounts the history of the injury as follows:

"I started on 24 January 2012. On that day I was lifting a 1200 x 2400 x 30 ML sheet of compressed fibro cement when I tripped over debris on the building site and fell. I suffered a fracture to my right arm.

13. I attended the Bankstown Hospital. It was necessary for me to have surgery and I came to surgery under the hand of Dr Konidaris. I was discharged on 27 January 2012.

14. My arm gradually got better. It was in a cast for about eight weeks. After the cast was removed I had physiotherapy for three months. It gradually got better. I'd say it was in a reasonable state after six months, not long after I stopped the physiotherapy."

16. Mr Carney noted the applicant found another job with an organisation called Truck Transmissions in February 2014. That job entails him carrying out clerical work and delivering parts, for which he is paid \$15.30 per hour and works 15 hours per week.
17. Mr Carney submitted it was significant the applicant referred to both Mr Singh and Mr Chandra as fellow labourers on the respondent's worksite. He said the applicant had been consistent at all times in maintaining he took instruction from the respondent rather than from either Mr Singh or Mr Chandra.
18. Dealing with the respondent's evidence, Mr Carney submitted there was nothing in his statement which contradicted the assertion that the applicant, Mr Singh and Mr Chandra were employees. Mr Carney submitted that whilst the respondent says Mr Singh was the "boss", it was the respondent who paid the labourers. There is no evidence that Mr Singh was given the money by the respondent to in turn pay the others.
19. Mr Carney also took the Commission to Mr Chandra's statement at page 49 of the Reply, and in particular to the evidence that Mrs Dubey was often supervising and paying the workers at the site. He submitted it was significant there was no suggestion from Mr Chandra that he was employed by Mr Singh, rather all of the evidence aside from the respondent's statement points to the men being employed by the respondent. Mr Carney also referred to the respondent's evidence to the effect that he retained other workers from labour hire companies and submitted this was consistent with the respondent being a supervisor on the site rather than Mr Singh or, indeed, anyone else.
20. In summary, Mr Carney submitted the evidence for the applicant being a worker is overwhelming, and there was nothing to suggest anything other than the respondent being responsible for paying him.
21. In relation to injury, Mr Carney submitted it was clear the applicant had tripped over at work. He noted there were contemporaneous hospital records referring to an injury, and that it was common sense fibro sheets needed to be moved inside and could not be left outside in the weather. There was no evidence, Mr Carney submitted, put forward by the respondent which in any way suggested the fact that the applicant's fall had been contrived.
22. In relation to incapacity, Mr Carney noted the applicant's evidence was he could work approximately 15 hours per week before the incident at issue. Moreover, the applicant was in receipt of \$225 per week once he commenced working with Truck Transmissions. Mr Carney submitted that is good evidence of the applicant's post-employment capacity, and that accordingly the claim for weekly benefits would be between \$250 to \$275 per week and would be for a closed period which ended on 23 July 2014.
23. In relation to the claim for medical expenses, Mr Carney sought a general order for section 60 expenses up to 1 July 2016. He submitted the claim for lump sum compensation should be referred to an Approved Medical Specialist (AMS) to assess the degree of whole person impairment arising from the alleged injury. He noted the respondent had placed the question of the whole person impairment threshold in issue.

The Respondent's Submissions

24. For the respondent, Mr Doak submitted the respondent's evidence was clear in stating he did not directly employ anyone. He said the effect of the respondent's statement is he clearly thought he was taking on Mr Singh and labourers who were retained by Mr Singh.
25. Mr Doak noted that when Mr Singh was not at work, neither the applicant nor Mr Chandra would turn up and this was consistent with Mr Singh being responsible for the employment of the labourers rather than the respondent. In summary, Mr Doak submitted the Commission could not be satisfied that the respondent employed the applicant at all.

26. Mr Doak submitted the fact of payment by the respondent for the applicant's labour is not conclusive of the nature of their relationship, and there was virtually no evidence of any control of the applicant by the respondent. Likewise, Mr Doak submitted Mr Chandra's evidence to the effect the respondent wanted the work hurried up is in no way consistent with or indicative of an employer/employee relationship. In summary, he submitted the applicant's case falls short of establishing employment and that he was a worker for the purposes of the *Workers Compensation Act 1987* (the 1987 Act).
27. If Mr Singh in fact employed the applicant, Mr Doak submitted a question would then arise as to whether section 20 of the 1987 Act would apply, however, there is no evidence to support any application under that section.
28. In relation to injury, Mr Doak noted the respondent was unaware of the injury having taken place. He asked the Commission to take into account the respondent's evidence that the workers had told him they were also working on other jobs elsewhere. Mr Doak noted that evidence was unchallenged and looms large given the history of injury is inconsistent.
29. Mr Doak took the Commission to the original claim form found at page 15 of the Application which provided a history of the applicant carrying fibro board and another worker "dropping the other end, weight came on me and I fell" and contrasted this with the Zurich claim form which had been submitted in February 2012 and stated the applicant tripped and fell, with no reference to any other worker being present. Mr Doak submitted Mr Chandra's statement contains an element of construction to it and was not reliable.
30. Importantly, Mr Doak noted the alleged time of injury was 4pm on 21 January 2012, however, there was no evidence of a hospital attendance until 9pm that night. The history contained within the hospital notes was the fracture took place "today evening". He submitted that if the applicant had indeed hurt himself in the manner alleged at 4pm, it is not believable that he would've waited until 9pm to present to hospital. Mr Doak submitted the time and presentation at the hospital and the reference to "today evening" is consistent with the applicant's injury having taken place at the other job to which and the other workers had referred. I note, however, that if this was the case it seems odd that the applicant would not have submitted a claim on that potential employer.
31. In relation to incapacity, Mr Doak submitted it was unlikely the applicant had commenced work on the date he injured himself. He submitted that on the basis of both Mr Chandra's and the respondent's evidence, the applicant had been working on site since 7 December 2011. Mr Doak submitted it was obvious the applicant had not declared his income from working with the respondent, as his tax return for the financial year ending 30 June 2012 only lists Centrelink as his form of income. Mr Doak submitted the Commission would not accept the applicant had been working fulltime at \$250 per day, but rather more along the lines of two days per week at that rate. He noted by 2014, the applicant was back at work and submitted any claim for weekly benefits would be a closed period ending around that time.

Applicant's submissions in reply

32. In reply, Mr Carney submitted the respondent's own evidence is he often went to the building site to inspect the progress of the work, and that he hired people from labour hire companies to carry out other tasks. Such evidence is, he submitted, consistent with the respondent having a large degree of control over the applicant.
33. In terms of the history of the accident at issue, Mr Carney noted support for the applicant's version of events is provided by Mr Chandra, who was present at the time. He noted not one of the men who were allegedly present at the time of the accident has provided a statement for the respondent to suggest the incident did not take place.

34. Mr Carney submitted the fact the applicant was injured at 4pm and presented to hospital at 9pm the same day is perfectly consistent with the applicant having been driven home as set out in Mr Chandra's statement, then attending hospital later the same evening. Such a short delay is, Mr Carney submitted, hardly sinister, and does not require explanation by the applicant.

DISCUSSION

Worker

35. An applicant bears the onus of proving they are a worker or deemed worker within the meaning of the relevant legislation. The workers compensation legislation provides that a "worker" is entitled to benefits. The entitlement is contained in s 9 of the 1987 Act, which provides:

"A worker who has received an injury ... shall receive compensation from the worker's employer ..."

36. The first step is to establish whether the injured person was a "worker". "Worker" is defined in section 4 of the 1998 Act as follows:

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

37. The essential feature of the definition in section 4 is the "contract of service" between the "employer" and the "worker". This relationship must be distinguished from that of the "contract for services", which is generally referred to as the rendering of services by an independent contractor. Put simply, the difference is between a person who serves his employer in the employer's business and a person who carries on a trade or business of his own. As noted, the onus is on the worker to prove the employment contract.
38. It is often unclear whether a relationship is one of employment. There exist, however, a number of criteria, or indicia, by which to gauge whether an employment relationship exists. The facts in each case must be carefully considered in order to balance the indicia both for and against a contract of employment.
39. The principal criterion remains the employer's right of control of the person engaged but it is not the sole determinant. In more recent times, the courts have favoured looking at a variety of criteria. As Ipp JA said in *Boylan Nominees Pty Ltd t/as Quirks Refrigeration v Sweeney* [2005] NSWCA 8:

"The control test remains important and it is appropriate, in the first instance, to have regard to it (albeit that it is by no means conclusive) because, as Wilson and Dawson JJ said in *Stevens v Brodribb Sawmilling Company Pty Ltd* [1986] HCA 1; (1986) 160 CLR 16 (at 36):

"[I]t remains the surest guide to whether a person is contracting independently or serving as an employee." (at [54])

40. There is a long line of authority as to the matters which should be taken into consideration when determining whether someone is an employee or a contractor. In the leading case of *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] HCA 1; (1986) 160 CLR 16 (*Stevens*), the High Court set out a number of relevant indicia. These include, but are not limited to, the following:

- (a) The mode of remuneration;
- (b) The provision and maintenance of equipment;
- (c) The obligation to work;
- (d) The timetable of work and provision for holidays;
- (e) The deduction of income tax;
- (f) The right to delegate work;
- (g) The right to dismiss the person;
- (h) The right to dictate the hours of work, place of work and the like, and
- (i) The right to the exclusive services of the person engaged.

41. As can be seen from cases such as *Hollis v Vabu Pty Ltd* [2001] HCA 44; (2001) 207 CLR 21, the task of determining whether someone is an employee or a contractor is often not straightforward. That is the case in this matter.

42. In my view, the difficulty faced by the applicant in this matter is the lack of evidence relating to the relevant indicia for determining the nature of his relationship with the respondent. The applicant's evidence on the relationship in his first statement is as follows:

- "10. I know Ram Dubey through a friend. He was building a house for himself and he wanted someone to do some labouring. Since I am allowed to work 15 hours a week, I agreed to work for him.
- 11. He was going to pay me \$250.00 a day in my hand to do the labouring. He was just going to call me when he needed me.
- 12. There were other labourers on site that I knew namely Sorinda Singh and Mukesh Chandra, all three of us were doing labouring work while I was on Ram Dubey's site. At all times I took instruction from Ram Dubey. I did not take instruction from either Sorinda Singh or Mukesh Chandra, just as I was not paid by anyone but Ram Dubey.
- 13. I started on 24 January 2012. On that day I was lifting a 1200 x 2400 x 30 ml sheet of compressed fibro cement when I tripped over debris on the building site and fell. I suffered a fracture to my right arm. I also injured my right shoulder and right knee."

43. Mr Chandra provided the following evidence relevant to the issue of worker/ employment:

- "11. The owner of 11 Meadow Street Concord, Mr Dubey contacted one of his friends in Oatley, named Munesh, who we had done work for in the past. Munesh's wife, is the main architect for Mr Dubey's job in Concord.
- 12. I received my okay to work on this job through Mohammed.
- 13. On site, we had me, Surendar, Ricky, and another man hired by Mr Dubey.
- 14. My role was as a general hand. I was involved in demolition, removing asbestos, heavy wood, walking and digging under the floor for piers, handling of building materials, etc. There was no scaffolding on-site, and I worked over 4 metres. We told the owner about this and he ignored the requests until much later.
- 15. Mr and Mrs Dubey kept pressuring us to produce results, as they wanted to move in by a particular date. Mrs Dubey was the supervisor on site.
- 16. At one time we did ask if Mrs Dubey had insurance, and they said, "no we have no insurance, only house insurance". Mr Dubey also said this, and it was our generally understanding on-site.

17. Mohammed is also a plumber and we have worked together as a team in the past. But on this job, he was just a general hand like my, until the plumbing work was to be done.
18. We worked Monday to Friday, sometimes Saturday, and I received \$200 per day cash in hand.
19. There was no signed contract for this job.
20. I do not have my own Workers Compensation Insurance.
21. I work as an individual, with cash on hand basis. I do not hold any work-related insurance.
22. My boss on this job was Mrs Ram Dubey...
35. We were told on a daily basis what we had to do on-site by Mrs Dubey. The owners made up some reason, like them not being ready to proceed and having to go to Melbourne. The work ended then, because we couldn't work on this basis...
37. The owner's [sic] ordered the compressed fibro that was delivered on the day Mohammed was hurt. The fibro was to be used for the flooring. Mrs Dubey was the one who instructed us to move the fibro from the front yard, inside the boundary, into the house.
38. Mrs Dubey was on site every day that I was working. She didn't perform manual work, but was present at the house.
39. Both Mr and Mrs Dubey appeared to be very ignorant regarding the building process. I understood they were owner-builders."
44. There was no statement from Mr Singh.
45. The respondent's evidence concerning the question of worker in his first statement is as follows:
 - "8. I began the renovations on the 7th of December 2011. I have an Owner Builders licence, which I received around the end of November 2011 which relates to 11 Meadow Street, Concord. I did an on-line course and a one day Safety Course, which is compulsory for owner-builders...
 11. I have plans approved by council to do the work. I organised all the materials and had them delivered on site as necessary.
 11. [sic – duplicate number in the statement] Through a friend of mine, who renovated his home a couple of years ago, I was recommended to speak with Surinder Singh, phone 0406994331, who was apparently a carpenter and the "boss". I rang him and arranged a meeting at my friend's house in Oatley. Also at the meeting was Mohammed Naem, his helper. I got Mohammed's phone number as 0423641117.
 12. At the meeting I showed them plans and we a casual daily rate of \$350 for Surinder, \$250 for Mohmamed, and \$200 for another helper Mukesh Chandra.

13. It was clear at the meeting that Surinder was the boss, and the other two men were his helpers. These men had previously worked together on renovating my friend's house (my friend is an architect and seemed happy with their work) and I got the impression that they had worked together a lot and over a long period.
14. Surinder Singh is about 60 years of age and from Fiji. Mohammed Naem and Mukesh Chandra are both about 55 years of age and from Fiji also.
15. I gave Surinder a copy of the plans and we agreed on a casual work arrangement, being paid on a daily rate only. No sick leave or permanency at all. The men didn't want any form of written agreement and wanted to be paid in cash only. I am a novice in this field, so I agreed with these terms.
16. I didn't discuss these men's training, qualifications or licences held. But Surinder appears to know his job, and the other two men are just labourers.
17. I got approval on the 5th of December 2011 and told the neighbours about the work on that day. All three men then commenced work on the 7th of December 2011. They worked Monday to Friday, starting about 8am and finishing about 4pm.
18. I work Monday to Friday in the city, so I only visited the site in the evening and early morning. So, I didn't see the men working during the day. I was living at Matraville at the time, so usually my wife and I would drive from Matraville to Concord about 7pm at night to inspect the day's work.
19. The work was progress [sic] well and I paid the men every Friday. I only paid for the day's worked, so if they didn't work a particular day or full day, they weren't paid. I would attend the site about 4pm on Friday and all three men were there when I paid them cash.
20. Work progressed until the end of January 2012....
22. Towards the end of January 2012 most of the demolition had been done and Surinder told me his knee was hurting, following some knee surgery he had for a previous injury. I was also aware that Mukesh Chandra had a deformed hand from some old injury or birth defect, so couldn't really lift anything. So, when Surinder told me his knee was causing him problems and he was seeing his doctor, he took a few days off and when he didn't attend the other men didn't attend either.
23. I rang Surinder about his time off and he said, "I don't really think I can work, because my knee is hurting and a retired". I said, "I'll get a carpenter". He didn't seem upset and replied something like, "these people will get job elsewhere, and I don't need to work" (he was referring to Mohammed and Mukesh).
24. So, I decided to engage another carpenter, Rick who had continued working well on the house. I have since had to employ an electrician and plumber...
30. Mohammed and Mukesh did say all the time that they had to go to work at their other job, which they were doing at night. I don't know where the other job was or what it involved.
31. At no time did Surinder, Mohammed or Mukesh report any injury to me.
32. During the work, also I remember all three men saying to me, when I visited, not to come onto the site as they had "safety cards".

46. In his second statement, sworn after that of the applicant and Mr Chandra, the respondent made the following comments:

- “11. My wife and I are not builders and we do not have a lot of knowledge about building.
12. My wife was never the supervisor on the site. Although these persons who worked there may say that she told them what to do with their work, she did not. She was looking at the work to see how it was going, but not directing their work.
13. We were not living there at the time and we visited maybe twice or 3 times per week. My wife would not go as much as that, maybe once a week.
14. The other reason I went was to pay them their money for their work.
15. In regard to Mr Chandra talking about this fellow named Ricky and another fellow who was working them, I don't know about that. I do recall a 4th person early on, but he left and I never knew who he was. If they had a person called Ricky working with them, I did not know him either.
16. The Rick that I know was a neighbour and I did not know his last name. We just talked occasionally and he had a look at how the building was at times and we spoke about it.
17. He has moved since then and I don't have any contacts for him. I don't know his last name. He lived at number 8 Meadow Street...
28. My wife Usha was not there every day and she was not directing their work, nor was I.
29. From all I knew, Surendra Singh was in charge of Mr Chandra and Mr Naem. He told me that he was retired and was doing this job for something to do. I think he was over 60 at the time.
30. All I know about the fibro sheeting is that we bought it through Surender and it was delivered and it was in the front yard. I don't know anything about having to move it inside because of bad weather.
31. He would order the materials and I would pay for them...
34. In regard to my wife, Usha being on site every day and telling the men what to do on a daily basis, that is completely untrue. Usha was not there every day, as we were living in Matraville. She went there every week, mostly once or twice a week to check how things were going. As for her being able to tell them what to do, she knows nothing about building and less than me, which is not very much.
35. In regard to the council coming and closing the site down, that never happened and it is totally wrong. We had the inspector come and check on progress but there was never any problem and it was all certified ok at the end.
36. We never had any contact from work cover except for the call from them about 2 months later, when Mr Chandra put in his claim of injury to them.
37. When they stopped working, it was not because of me. Surendra, who was in charge, told me he had a doctor's appointment and would not be able to work because of his knees. He said that the others can't work if he is not there, because he is their boss.

38. He never mentioned it was because of anything that happened at the site.

39. We left it at that and I got other people to finish the work.”

47. A transcript of a telephone conversation between Mrs Dubey and the insurer’s investigator was attached to the Reply. I attribute less weight to it than the sworn statements in this matter, however, it is in evidence without objection and accordingly requires consideration. The conversation is recorded by the investigator as follows:

“I said, "There are a few questions that I would like to ask you. At this stage I don't think it will be necessary for me to see you and obtain a typed written statement like I did with your husband. I will just let QBE know your verbal responses to these questions and they can decide if they need a typed written statement in the future".

She said, "Okay".

I said, "Were you present on or about the 23rd or 24th of January 2012 when Mohammed Naem reports that he slipped and injured his arm?"

She said, "I can't remember. Surrender [sic] was responsible for everything, I would just occasionally visit the house and see what was going on".

I said, "Were you aware around that day, or the 23rd or 24th of January 2012, of a truck delivering compressed fibro sheeting?"

She said, "Surrender [sic] ordered everything and we would just pay. He would ask for my card number or my husband's card number, I don't know what was delivered and I don't even know what was needed"...

I said, "Did you instruct or direct Mohammed Naem, Mukesh Chandra or any other worker to move the compressed fibro sheeting from where the truck delivered it in the front yard, to inside the house?"

She said, "No. It was not my job. Surrender [sic] was responsible for all the work, materials and everything. I wouldn't even know why that would be done".”

48. Attached to the AALD are the applicant’s banking records. They show some purchases from plumbing supply businesses in moderate amounts during the period when he was engaged in work at the respondent’s site. Mr Doak submitted they are indicative of the applicant engaging in other work at that time, noting he was not retained as plumber on the job at issue. Mr Carney submitted they were so sporadic and in such amounts as to be inconclusive in nature. I accept Mr Carney’s submission in that regard.
49. That is the totality of the evidence relating to the issue of worker.
50. In my view, whilst there is some evidence suggestive of an employment relationship, such as weekly payment at a regular daily rate, the balance of the evidence is insufficient to satisfy the applicant’s onus of proof. It is not necessary for an applicant to satisfy the Commission to a scientific certainty of a relevant fact or circumstance; however, it is necessary to examine the relevant evidence and conduct an exercise in fact-finding to determine whether the relevant standard has been met.
51. In this instance, I cannot be satisfied the relationship between the applicant and respondent is that of employee and employer. When one examines the *Stevens v Brodrigg* indicia set out above, there is a paucity of evidence which would satisfy me the applicant was employed by the respondent. Whilst the regular mode of remuneration may be suggestive of employment, there is no evidence from the applicant as to:

- (a) who provided equipment on site;
- (b) whether the applicant had an obligation to work for the respondent;
- (c) the timetable of work and provision for holidays;
- (d) the right to delegate work;
- (e) the right to dismiss the applicant;
- (f) the right to dictate the hours of work, place of work and the like, and
- (g) the right to the exclusive services of the person engaged.

Indeed, to the extent there is evidence surrounding these indicia, the evidence is so conflicted for the most part that I cannot be satisfied the applicant falls within the definition of worker.

52. In my view, the applicant's comment in paragraph 13 of his first statement that "I started on 24 January 2012" is not necessarily suggestive of that date being his first on the site. Rather, that statement is equally suggestive of the applicant simply referring to his having attended work on that date, among others. The latter interpretation is also consistent with the other evidence in this matter that the applicant and his fellow labourers had been on site since December 2011.
53. The applicant's evidence surrounding the important indicia of control is also conflicted. On the one part, he states "At all times I took instructions from [the respondent]" and was not paid by anyone but him. By contrast, Mr Chandra (on whose statement the applicant also relies) says the respondent's wife was the "supervisor on site" and that "my boss on this job was Mrs Ram Dubey" who told Mr Chandra and the applicant what they had to do on-site on a daily basis, including telling the applicant and Mr Chandra to move the fibro sheeting, which was the task the applicant was engaged in when his alleged injury took place.
54. I consider the discrepancy in the evidence between the applicant and Mr Chandra important, given the element of control is an important indicium in establishing the nature of a working relationship.
55. The fact Mr Singh has not provided a statement is also regrettable, though neither party sought to criticise the other over the omission of any evidence from him, and I do not draw any adverse inference against either party. I note the respondent's investigator attempted to speak with Mr Singh, however, he "refused to take part in any statement, and in relation to the applicant's alleged injury said, "I didn't see anything, I was on the other side of the house.""
56. Nevertheless, the applicant must prove his case. As noted, the discrepancy between his evidence and that of Mr Chandra is significant, because it seems to me that if Mrs Dubey was in fact supervising the applicant and Mr Chandra on a daily basis, then the applicant would have said as much in his statements. Likewise, Mr Chandra makes no mention of the respondent being on site and supervising the labourers, which one would expect him to if the applicant's evidence was accurate.
57. Moreover, indicia such as provision for holidays, dictating hours of work and the right to exclusive services of the applicant are, to the extent they are dealt with in the evidence, equally suggestive of a relationship of contractor as they are employee.
58. The applicant's own evidence is he was only paid for actual days in attendance and the respondent was "just going to call me when he needed me." Without more, such evidence is, in my opinion, equally suggestive of a principal-contractor relationship as it is that of employer-employee. Certainly, it does not suggest the respondent had exclusive use of the applicant's labour for the duration of the work on-site.

59. There is no evidence as to the setting of work hours, only that the applicant was to be paid weekly each Friday for the days he actually worked in any given week.
60. For his part, the respondent admits to paying the applicant, Mr Chandra and Mr Singh on a weekly basis, however, he says his wife only attended the site approximately once per week on average, and that he and Mrs Dubey were living in a different suburb at the time of the works. He says he would attend the site mostly after hours to see how the work was progressing, however, he was employed full-time in another job and was not on site regularly while work was being carried out. He says neither he nor his wife supervised the work being carried out, or directed the applicant on the tasks he was to perform. Rather, the respondent says Mr Singh was “the boss” and seemed to be in charge of the other labourers.
61. In summary, I find the evidence in this matter is not sufficient to persuade me on the balance of probabilities that the applicant was a worker employed by the respondent. The disparity in the evidence from various witnesses is such that, in my view the applicant has not discharged the onus of proof in establishing an employment relationship between him and the respondent.
62. In relation to the operation of section 20 of the 1987 Act, I note there is insufficient evidence to satisfy me that the circumstances of the matter support a finding the applicant was employed by Mr Singh, or that Mr Singh did not have relevant insurance. I also note this issue was raised only as an aside by Mr Doak, and was not pursued as a basis of claim by the applicant during the hearing.
63. Having found there is no employment relationship between the parties, it is not necessary to determine whether the applicant suffered an injury as alleged or to determine the level of any incapacity.

SUMMARY

64. For the above reasons, there will be an award for the respondent.

