

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 3936/19
Applicant: Reza Abid
Respondent: Tom Thomas
Date of Determination: 10 July 2020
Citation: [2020] NSWCC 231

The Commission determines:

1. The applicant sustained injury to his right arm, lower back and neck in the course of his employment with the respondent on 30 November 2018.
2. The applicant had no current work capacity from 3 December 2018 to 14 November 2019.

The Commission orders:

1. The respondent is to pay the applicant weekly payments of compensation as follows:
 - (a) \$1,306.25 per week from 3 December 2018 to 2 March 2019 pursuant to section 36 of the 1987 Act, and
 - (b) \$1,100 per week from 3 March 2019 to 14 November 2019 pursuant to section 37 of the 1987 Act.

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

John Isaksen
Arbitrator

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF JOHN ISAKSEN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. The applicant, Reza Abid, sustained a comminuted fracture of the right distal radius on 30 November 2018 when he fell from a ladder at a residence at Casula.
2. The applicant underwent surgery later that day at Liverpool Hospital to repair the fracture.
3. The applicant claims that at the time of this injury he was employed by the respondent, Tom Thomas.
4. The applicant claims that he commenced employment with the respondent on 13 September 2019 and was paid \$1,500 per week, representing \$250 per day for six days of work per week, until he sustained injury on 30 November 2018.
5. The applicant claims that in addition to the injury he sustained to his right arm, he also sustained injuries to his neck, back, right shoulder, and right leg due to him falling on the right side of his body.
6. The applicant claims that he has had no current work capacity since 30 November 2018 as a result of this injury.
7. The applicant has been referred for further surgery by way of a fusion to his right wrist due to a malunion of the right distal radius.
8. The respondent denies that he employed the applicant on 30 November 2018 or at all.

ISSUES FOR DETERMINATION

9. The parties agree that the following issues remain in dispute:
 - (a) whether the applicant was a worker at the time of the incident on 30 November 2018 (section 4 of the *Workplace Management and Workers Compensation Act 1998* (the 1998 Act);
 - (b) whether the applicant sustained injury arising out of or in the course of his employment with the respondent (section 4 of the *Workers Compensation Act 1987* (the 1987 Act), and
 - (c) the extent of any incapacity of the applicant following the incident on 30 November 2018 (section 32A of the 1987 Act).

PROCEDURE BEFORE THE COMMISSION

10. The parties attended a hearing on 30 October 2019 and 23 June 2020. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.
11. Mr Petrie appeared for the applicant, instructed by Ms David and Ms Said. Ms Balendra appeared for the respondent, instructed by Ms Thompson.

12. The hearing was not completed on 30 October 2019 as it became necessary for a number of witnesses to be the subject of cross examination. The further hearing was delayed due to the applicant being incarcerated for over two months and then the effects of the coronavirus pandemic.
13. The submissions of the parties at the arbitration were recorded and I do not propose to reiterate each of them in these reasons. I will, however, refer to the general thrust of those submissions in my decision.

EVIDENCE

Documentary evidence

14. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application to Resolve a Dispute (ARD) and attached documents;
 - (b) Reply and attached documents;
 - (c) Application to Admit Late Documents filed by the applicant on 10 September 2019;
 - (d) Application to Admit Late Documents filed by the applicant on 15 October 2019;
 - (e) Application to Admit Late Documents filed by the respondent on 23 October 2019;
 - (f) clinical notes from Westmead Hospital, which included a report from Ms Radhakrishnan, Staff Specialist Rehabilitation Medicine dated 24 September 2019;
 - (g) a further statement from the applicant dated 30 October 2019;
 - (h) a photo of the applicant in the respondent's premises;
 - (i) financial records of the applicant in response to a Notice for Production;
 - (j) financial records of the respondent in response to a Direction for Production, and
 - (k) Application to Admit Late Documents filed by the respondent on 25 June 2020.

Oral evidence

15. Due to the highly contested facts in this dispute, leave was granted to the respondent to cross examine the following:
 - (a) the applicant, Reza Abid;
 - (b) Dina Sulaiman;
 - (c) Ayat Mohammadi, and
 - (d) Mohammad Kamran.

16. Leave was granted to the applicant to cross examine the following:

- (a) the respondent, Tom Thomas, and
- (b) Leba Hobaiter.

FINDINGS AND REASONS

The applicant's case

The applicant's evidence

17. The applicant has provided statements dated 27 February 2019, 31 July 2019 and 30 October 2019, and gave oral evidence on 30 October 2019 and 23 June 2020.
18. In his statement dated 27 February 2019, the applicant states that he arrived in Australia as a Kurdish refugee with his wife and son in April 2016.
19. The applicant states that in February 2017 he became a carer for a friend, Najam, who later moved into the same house that was rented by the applicant and his family. The applicant states that he told Najam that if he found a full-time job he would resign as a carer but would be happy to provide gratuitous assistance to Najam outside of work hours.
20. The applicant states that at about the end of September 2018 he was referred to a factory in Hassell Street Wetherill Park where he might be able to obtain work as a welder. He states that when he went to this factory, he met a person who he now knows as Tom Thomas. He states that he realised Mr Thomas was Kurdish and Mr Thomas agreed to employ him and asked the applicant to start work the next day at 8.00 am.
21. The applicant states that on the following day he went to the factory site and worked all day as a welder. He states that at the end of the first day Mr Thomas gave him \$500 and said to the applicant that he would pay his wage this Saturday and that he wanted the applicant to work on a Saturday.
22. The applicant states that he returned to work the next day and continue to work until Saturday and was paid an amount that was equal to \$250 per day.
23. In his subsequent statement dated 31 July 2019, the applicant states that upon review of his telephone records, he began work for the respondent on 13 September 2018.
24. The applicant states that he continued to work for Mr Thomas for a couple of weeks. He states that he then approached Mr Thomas and said to him:
- “Tom, I wanted to talk to you about my job. I want to work full-time and on a permanent basis. At the moment, I’m able to work 25 hours a week because I am a carer. I don’t know what to do with Centrelink until you make it clear to me what my employment situation is in this job.”
25. The applicant states that Mr Thomas took the applicant to see a lady in their accounts department who suggested that the applicant see an employment agency who could employ the applicant on a subsidised basis and that the respondent might be able to get some money from Centrelink for a period because the applicant was employed with them.

26. The applicant states that he was not aware of any such employment agencies. A friend referred him to a person called Ali at a job seeking agency in Parramatta. He states that he spoke to Ali by phone and arranged to meet him that Friday. The applicant states that he tried to locate the address of this agency on the Friday but became lost and was unsuccessful in contacting this man.
27. The applicant states that he informed Mr Thomas of what occurred on the following Monday and asked if the accounts lady could introduce him to an employment agency. He states that he said to Mr Thomas: "I really would like this matter to be sorted out so I can have certainty about my employment position and I can then approach Centrelink."
28. The applicant states that he continued to speak to Mr Thomas about his employment position from time to time and Mr Thomas would reply with words to the effect of "wait", "I am still trying to test you for the job", "there is still so much that you need to learn", "give me a bit of time", and "I don't want you to rely on this job yet."
29. The applicant states that about a month or so later Mr Thomas said to the applicant that he was working on getting a big contract and if he got that contract, the applicant would be "definitely formally employed." The applicant states that in mid-November 2018 he was informed by Mr Thomas that the business had been successful in getting that contract which would be for a few months.
30. The applicant states that he now felt confident that he would have a job for at least another few months and intended to attend the Centrelink office at Merrylands on the afternoon of 30 November 2018, as he expected to finish work that day at about 1.30 pm.
31. The applicant states that during his employment with the respondent he was paid \$250 per day, and on an average of six days of work per week, he received \$1500 cash every week. The applicant states:

"I did not deposit that money into my account in its totality because I used that to pay rent every week at \$500 per week and other household expenses including food, transport, three mobile phones, electricity, insurances for two cars, Internet and various other necessary expenses. Sometimes I deposited any excess cash that was not instantly required into my bank account."
32. The applicant states that on 30 November 2018 Mr Thomas drove the applicant and another employee whom the applicant knows as "Labba" to a residence at 3 Lakewood Crescent, Casula, to complete the construction of a pergola. He states that they had attended the property about a week before to erect the main part of the pergola and were now returning to place the colourbond sheets on the pergola.
33. The applicant states that at some stage in the morning Mr Thomas left the premises, and that he and Labba continued to work on the ceiling of the pergola. He states that he was working on the ceiling of the pergola but volunteered to go back down to get some more screws for the sheets. He states that the ladder that was used to access the top of the pergola was A-shaped and about 2 metres high. He states that the ladder did not reach the pergola level and he had to sit on the edge of the pergola and put his right foot on top of the ladder in order to descend. The applicant states that as he turned his body to go down the ladder, the ladder moved and dropped, causing him to fall to the ground on his right side. He states that he realised straight away that he had broken his right wrist.
34. The applicant states that he yelled out for help and Labba and the owner of the house came to his aid. He states that after a long period of time, which seemed to him like an hour or more, Mr Thomas arrived at the property and asked the applicant to board a car, which the applicant understood belonged to the house owner. The applicant states Mr Thomas said to him words to the effect of: "Don't tell them you fell at work because you would get into big trouble; tell them you fell at home. Let me do the talking."

35. The applicant states he was taken to Liverpool Hospital and underwent surgery. He states that after the surgery as the applicant was sitting in what he believed was the discharge lounge, Mr Thomas approached him and gave him some cash. The applicant states that he counted the cash and it was \$1400.
36. The applicant states that on the following Tuesday he went back to the respondent's premises at Wetherill Park and Mr Thomas said to him:

"Give yourself a week. Get a bit better and come and sit at the factory premises, you don't need to do anything, just sit here. Don't worry I will help you through this. You won't lose anything."
37. The applicant states that on that same day he was invited by Mr Thomas to accompany him to a property at Bella Vista to do some measurements and Mr Thomas gave him \$600. without explaining what that money was for.
38. The applicant states the following week he returned to work at the premises at Wetherill Park and sat there and occasionally helped with some light work. At the end of that week Mr Thomas gave the applicant \$900 and said to him "this is the balance of the 1 week pay."
39. The applicant states on the following Monday he again attended the premises at Wetherill Park and went with Mr Thomas and Labba to a site at Granville. He states that he was assisting them in installing a glass panel into a balustrade staircase, but the panel broke and Mr Thomas blamed him for this. The applicant states that it became obvious to him that Mr Thomas did not want him and that Mr Thomas was insulting the applicant and speaking to him in a very derogatory manner. He states that Mr Thomas never called him again to go back to work.
40. In his second statement dated 31 July 2019, the applicant annexes photos from 10 different sites where the applicant states that he worked at the direction of the respondent, being:
 - (a) installing external stair railings at 314 Excelsior Street, Guildford, on about 20 September 2018. The applicant states that this was the same site which he attended with Mr Thomas and Labba after his injury and where he was blamed for breaking the glass panel;
 - (b) installing fencing at 599 Victoria Road, Ermington Park on about 15 October 2018;
 - (c) installing a pergola/verandah at 9 Brabyn Street, Fairfield West, on about 25 October 2018;
 - (d) installing a metal staircase at 24 Stiller Place, Greenacre, on about 26 October 2018;
 - (e) installing a metal staircase and hand railings at 19 Thompson Street, Marrickville, on about 29 October 2018;
 - (f) installing an iron metal staircase at 20 Tugela Rise, Edmondson Park, on about 9 November 2018;
 - (g) installing iron gates at 4 Dalton Terrace, Harrington Park, on about 13 November 2018;
 - (h) installing gates at 32 Burdekin Crescent, St Ives, on or about 16 November 2018. The applicant states that he also worked on that site for two days around 31 October 2019 and has included a copy of a text message from Mr Thomas that contains the address for the St Ives worksite;

- (i) installing awnings at 118 Queen Street, Beaconsfield, on about 27 November 2018, and
- (j) installing an outdoor gate at 8 Telford Place, Prairiewood, on about 29 November 2019.

41. The applicant states that the photos that he has included in this statement are only samples of some of the jobs he attended for the respondent. He states that stair frames, steel stair cases, balustrades, fences, pergolas, gates, and awnings would be manufactured at the factory at Wetherill Park and delivered to various sites for installation.
42. The applicant also annexes to the statement a copy of a record of his telephone calls between 17 September 2018 and 11 December 2018 and has highlighted those calls he made to Mr Thomas.
43. In his third statement dated 30 October 2019, the applicant sets out details of his medical treatment since the injury he sustained on 30 November 2018. He states that he attended his general practitioner, Dr Mostaphazadeh, on 6 December 2018 and told that doctor that he had pain in his neck, back, right shoulder, right wrist and right leg.
44. The applicant states that he attended the Westmead Hospital Hand Clinic on or about 7 February 2019. He states that he was advised to obtain a referral to a specialist, Dr Simon Chan. He states that he saw Dr Chan in mid-April 2019 and that Dr Chan has recommended further surgery on his right wrist.
45. The applicant states that he has seen psychologists on three or four occasions since 30 November 2018.
46. The applicant states that he is taking Tramadol five to six times per day in an effort to manage his pain. He states that he cannot afford other types of treatment, including surgery and pain management therapy, because his claim has been denied by the insurer of the respondent.
47. The applicant gave evidence that a steel stairway that he has been photographed on at the respondent's premises was the stairway that is in the photograph at the premises at 23 Thompson Street Marrickville on 29 October 2018. The applicant states that he was working on that stairway at the respondent's factory at Wetherill Park.
48. The applicant was cross examined by Ms Balendra. The applicant said that he had a Commonwealth Bank account and an ANZ bank account, but he only used the Commonwealth Bank account for shopping and purchases. The applicant was asked about his statement that when working for the respondent he sometimes put any excess cash that was not instantly required into his bank account and he said: "Yes...if I have excess amount I put it in my account."
49. The applicant was asked about what his wages were spent on. The applicant said that he gave the cash from his work to his wife, Dina Sulaiman. He said that he understood that his wife used the money for household expenses and the repayment of a loan of \$8,000 made to him by a friend, Ayat Mohammadi. He also said that his wife bought a bracelet or bracelets and thought the cost was about \$2,000.

Other lay evidence relied upon by the applicant

50. Dina Sulaiman, the wife of the applicant, has provided a statement dated 31 July 2019.

51. Ms Sulaiman states that in September 2018 the applicant said to her one evening that he had been directed to a factory and found he had worked with the brother of the person who ran this factory and that this person had agreed to try out the applicant for work.
52. Ms Sulaiman states the applicant began to work full time and sometimes on Saturday. She states that the applicant would leave home at 6.00 am when working at a site, and leave home at 8.00 am if working at the factory.
53. Ms Sulaiman states that from time to time the applicant would say things such as:

"I am really happy in this job. The boss is really happy with me", "I have introduced customers to him, he will be happy with that because his business is doing better"; "I have approached him to make me a permanent worker so that I can inform Centre/ink about this job and he has told me that he will notify me soon, I believe he will make me a permanent employee"; "we had a very big day at work today, I am very tired."
54. Ms Sulaiman states that she met Tom Thomas at Liverpool Hospital after she received a phone call regarding the applicant's accident. She states that Mr Thomas introduced himself as "Khatib" and that he was "Reza's employer."
55. Ms Sulaiman states that sometime later she was in the recovery room and Mr Thomas and Ayat Mohammadi helped the applicant to dress. She states that she then saw Mr Thomas pull out a bundle of money and place it in the applicant's pocket. She states that the applicant said it was money for the work that he had done that week.
56. Ms Sulaiman states that the applicant worked for the respondent for about one week after the accident and the applicant then said that Mr Thomas did not want the applicant to work for him anymore.
57. Dina Sulaiman was cross examined by Ms Balendra. Ms Sulaiman said that the applicant was paid each week in cash, sometimes on a Friday and sometimes on a Saturday, and he would give the cash to her. She states that she would use the money on everything that was needed at the time including clothes and things for the home. She said that she also used the money to pay off a \$8,000 debt to Ayat Mohammadi.
58. Ms Sulaiman said that the first time she met Mr Thomas was at the hospital on 30 November on the day of the applicant's injury. She said that Mr Thomas said to her: "Don't worry, he'll be looked after, everything is going to be fine" and that Mr Thomas said that he was the person that the applicant was working for. Ms Sulaiman said that she saw Mr Thomas place money in the applicant's pocket at the hospital and that Mr Thomas said that is was this week's payment.
59. Ayat Mohammadi has provided a statement dated 9 April 2019.
60. Mr Mohammadi states that he is a long-time friend of the applicant. He states that he attended Liverpool Hospital in the evening of 30 November 2018, after he received a text from the applicant at about 12.50 pm that day that the applicant had fallen from a ladder.
61. Mr Mohammadi states that Ms Sulaiman pointed out Mr Thomas as the applicant's employer. He states that at about 8.00 pm he was with the applicant when Mr Thomas pulled some cash out of his pocket .and gave it to the applicant. He states that he saw the applicant count out \$1,400 in cash. Mr Mohammadi states that he said to the applicant that: "You have a very good employer" and the applicant replied that the money was for the work he did that week.

62. Ayat Mohammadi was cross examined by Ms Balendra. Mr Mohammadi said that at the hospital Mr Thomas said to him: "I am Khatab, nice to meet you, I am the boss of Reza." He said he saw Mr Thomas put cash in the applicant's hand and that the applicant counted the cash to \$1,400.
63. Mohammed Kamran has provided a statement dated 12 April 2019.
64. Mr Kamran is also a long-time friend of the applicant. He states that in about October 2018 he was told by the applicant that he was working and being paid \$250 per day. He states that on one occasion the applicant told him to go to his workplace at Wetherill Park where the applicant could do some welding work to fix a cement mixer drill that had been broken. He states that the applicant fixed his drill but that he did not pay any money to the applicant because it was a small job and the applicant was helping out as a friend.
65. Mr Kamran states that about two weeks later on a Saturday he again attended the Wetherill Park premises and saw the applicant working on a set of metal stairs. He states that he sat there for about half an hour waiting for the applicant to finish. Mr Kamran states that Mr Thomas arrived and the applicant introduced Mr Thomas as his boss. Mr Kamran states that he saw Mr Thomas pay a bundle of \$100 notes to the applicant.
66. Mr Kamran states that there was a further occasion on a weekday when he went to the Wetherill Park premises to see if there was any leftover aluminium that Mr Thomas had previously offered Mr Kamran. He states that he noticed the applicant working inside the factory and was very busy.
67. Mr Kamran states that he again attended the Wetherill Park premises about two weeks after he learned of the applicant's injury, and saw the applicant holding one end of an aluminium ladder with an older gentleman holding the other end of the ladder. Mr Kamran states that he had met the older man before at the premises, He states that the applicant told him that Mr Thomas wanted the applicant to continue to work on smaller jobs.
68. Mohammad Kamran was cross examined by Ms Balendra. Mr Kamran said that the applicant introduced Mr Thomas as his employer when Mr Kamran visited the Wetherill Park premises. In answer to a question that Mr Thomas said to Mr Kamran that he was the applicant's employer, Mr Kamran said: "Who says so? Of course no one says."
69. Yadollah Paryab has provided a statement dated 15 April 2019. Mr Paryab was issued with a Summons to Attend before the Commission on 23 June 2020 but did not appear.
70. Mr Paryab states that he first met the applicant in 2017 on a renovation site. He states that towards the end of 2018 he saw the applicant at a factory site at Wetherill Park and saw that the applicant's right hand was in plaster. He states that he asked the applicant what happened and the applicant replied that he was at work when he fell from a ladder and hurt himself.
71. A statement has been provided by Afshin Geravandi, dated 31 July 2019. Mr Geravandi states that sometime in about September or October 2018 he gave the applicant a lift to the factory that the applicant said he worked at in Hassell Street, Wetherill Park.
72. Mr Geravandi also states that on a later date he drove a friend, Hossein, to the same Wetherill Park premises to get some welding work done on some shelves. He states that the applicant was at the premises, was wearing work clothes, and undertook the welding work required in about 10 minutes, for which he did not charge a fee.
73. There is a signed but undated statement from Alexander Donev in evidence. Mr Donev states that he lives at 38 St Andrews Boulevard, Casula. He states that he can see the back of the property at 3 Lakewood Crescent, Casula, because his property is on higher ground.

74. Mr Donev states that on a day at the end of November 2018 he was on his verandah with his wife and could see two men working on top of a pergola and that they were fixing colourbond sheets onto it. Mr Donev states:

“I saw a ladder that was close to the back verandah. I then saw one of the workers and the next thing I heard was a scream of ‘ahhhhhhhh, help me, help me.’”

75. Mr Donev states that he did not go to the neighbour’s house and did not know the person who had fallen. He states that on the evening of 20 February 2019, a person came to his house and introduced himself as Reza and Mr Donev recognized him to be the person who had fallen off the pergola.

The medical evidence

76. The clinical notes from Liverpool Hospital, where the applicant was admitted and underwent surgery on 30 November 2018, are in evidence. The notes indicate that the applicant attended the hospital at around 10.00 am.
77. The brief history of injury that is recorded in the notes is that the applicant fell about two metres off a ladder. The notes also record the injury being isolated to the right distal radius. The notes also refer to a Persian interpreter being required to clarify points of history but I could not locate any further details of the history of injury in the clinical notes.
78. The clinical notes also include an x-ray report which records a comminuted fracture of the right distal radius with dorsal angulation and medial displacement of the distal fragments, and a further fracture through the base of the ulnar styloid with medial displacement of the separated fragment.
79. The notes confirm that surgery was performed on 30 November 2018 by way of an internal fixation of the right distal radius performed by Dr Dave.
80. Dr Dave has provided a report subsequent to that surgery, dated 17 December 2018. Dr Dave writes that the applicant came to see him that day and that the applicant is “not working.” Dr Dave takes a history of the applicant carrying power tools on a ladder when he fell and sustained injury. He recalled that the applicant is doing well post operatively.
81. In a form completed by Dr Mostaphazadeh at the request of Employers Mutual on 31 January 2019, there is a diagnosis of right distal radius ORIF and neck and back pain from the injury on 30 November 2018. Dr Mostaphazadeh records those injuries occurred when the applicant “fell down at work.”
82. An x-ray report of the neck dated 29 January 2019 records the vertebral body and disc heights being maintained. A CT scan of the lumbar spine taken at the same time records minor disc bulging.
83. Clinical notes from Westmead Hospital record that the applicant attended the Hand Therapy Outpatient Clinic on six occasions between 18 January 2019 and 26 March 2019. A CT scan of the right wrist taken on 15 March 2019 records some residual lucency at the ulnar margin of the joint but for the most part there does appear to be good osseous union across the fracture.
84. There is no report from Dr Chan in evidence but there is a recommendation signed by Dr Chan and dated 8 April 2019 for removal of the plate and screws in the right wrist and a right wrist fusion due to right distal radial malunion.

85. There is a report from Ms Radhakrishnan, Staff Specialist Rehabilitation Medicine at Westmead Hospital, dated 24 September 2019, which records the applicant as having right sided nociplastic wrist pain, and right elbow, shoulder, neck, low back and ankle pain, most likely from sensitisation. It is recorded that the applicant reports the intensity of pain as "10/10."
86. Ms Radhakrishnan records that she did not undertake an examination as the applicant was not happy for one to occur. The notes from Westmead Hospital which accompany this report record the applicant displaying numerous pain behaviours such as guarding and reluctance to move the right hand.
87. Ms Radhakrishnan records that the applicant is no longer able to do household chores and gardening. She records the applicant believes that the hand therapy which the applicant underwent at Westmead Hospital has made his fracture and healing worse.
88. Ms Radhakrishnan writes that she is concerned about the amount of Tramadol that the applicant is taking. She records the applicant taking 5 to 6 tablets per day at 200mgs, being well above the normally recommended dose on a background of reported seizures. She did not recommend further appointments for pain management as she concluded that the applicant was unwilling to engage in a multidisciplinary pain management model.
89. Dr Mostaphazadeh has provided Certificates of Capacity from 24 January 2019 to 24 July 2019 certifying the applicant as having no current work capacity. The first Certificate only referred to "Right distal radius ORIF", but from 21 February 2019 injury to back, right shoulder, right leg pain and neck pain are added to the Certificates.

The respondent's case

90. Tom Thomas has provided statements dated 18 February 2019, 30 September 2019 and 7 November 2019.
91. In his statement dated 18 February 2019, Mr Thomas states that he is the sole director and shareholder of TDA Industries Pty Limited. He states that the business of the company is that of metal fabrication. He states that he has one part time employee, Labi Hobaiter.
92. Mr Thomas states that he had known the applicant for three months at the time he made this statement. He states that the applicant is a friend of his brother, who lives in Iran. He states that the applicant would frequently come to his warehouse and drink coffee. He states that the applicant would often take photos in his warehouse and when Mr Thomas asked him about this, the applicant said words to the effect: "Don't worry I just send them to my family overseas." Mr Thomas states that he was suspicious of the applicant's activities.
93. Mr Thomas states that around 26 October 2018 he received a phone call from Mr Hobaiter and was told that the applicant had fallen over at a customer's work site at 3 Lakewood Crescent, Casula. He states that he told Mr Hobaiter to call an ambulance but otherwise he considered the event had nothing to do with him.
94. Mr Thomas states that the claim made by the applicant is fraudulent and that he never employed the applicant. He also states:

"I only know that the Claimant is Iranian but has purported to be Iraqi so he could gain entry to Australia. This is also a fraud. I am also aware that the Claimant has a 'carer' status, allegedly caring for his brother. This I believe is also fraudulent. Everything I know about the Claimant is fraudulent. He cannot even speak Arabic as he his Iranian. He only speaks Persian."

95. In his statement dated 30 September 2019, Mr Thomas states that the applicant would just hang around outside his Wetherill Park premises and sometimes come in for coffee and they would talk. He states:
- “He would follow me around to job sites. He would turn up there, and take the photo of himself. He came to my workshop one day and sat in the chair and took the photo of himself, then left.”
96. Mr Thomas states that the applicant did not work at any of the sites listed by the applicant in his statement dated 31 July 2019. He states that the applicant just followed him there and took a photo of himself.
97. Mr Thomas states that he never sent a message to the applicant asking the applicant to work for him. He states that sometimes the applicant would phone him and there would be a quick phone call and Mr Thomas would tell the applicant if he was at the factory or give the applicant the address of a work site. He states: “He would show up, and then leave 10 minutes later, he would talk to me, something boring, waste my time, and that’s it.”
98. Mr Thomas states that on the morning the applicant sustained his injury, the applicant had rung him and he gave the applicant the address of the site at Casula. He states that Mr Hobaiter rang him and said the applicant had fallen off the ladder. He states that the applicant should not have been on the ladder.
99. Mr Thomas states that he went back to the Casula site and took the applicant to hospital. He states that there were other people at the hospital, including perhaps his wife, but he never spoke to them.
100. Mr Thomas states that he did not give any money to the applicant at hospital and that the applicant and his wife are just liars.
101. Mr Thomas states that his friend, Ben Carli, told him sometime after the applicant’s injury that the applicant had told Mr Carli that the applicant would give Mr Thomas \$8,000 if Mr Thomas said that the applicant worked for him.
102. In regard to the 10 different sites where the applicant states that he worked at the direction of the respondent, Mr Thomas initially states that the photos from sites at Ermington Park, Guildford, Prairiewood and Marrickville were not his jobs. He does concede that the photos from sites at Harrington Park, Fairfield West, St Ives and Beaconsfield were his jobs.
103. In a third statement dated 7 November 2019, Mr Thomas states that all of the photos attached to the applicant’s statement were of his job sites.
104. Mr Thomas was cross examined by Mr Petrie. Mr Thomas said that the jobs he did were paid for in cash or bank transfer, and sometimes by cheque. He said the finances of his business were handled by his wife as he does not do the office work.
105. Mr Thomas said that the applicant would ring him and ask where he was, and the applicant would turn up at work sites that Mr Thomas was working at. He said that he thought the applicant wanted to open his own business and that the applicant wanted to see how a job was done and to take photos. Mr Thomas also said in regard to the applicant:
- “He’s bored, and he would finish work, and sometime he ring me, say, ‘Where are you?’, I say, me, in the factory. He say, ‘OK, I come to you and coffee with you bros.’”

106. Mr Thomas said that the applicant would sometimes ring two or three days before the day when the applicant actually turned up at a job site that Mr Thomas was working on.
107. Mr Thomas said that on 30 November 2018 the applicant rang him at exactly 8.30 am while Mr Thomas was driving to the Casula site, even though the applicant's phone records do not show a call to Mr Thomas at that time.
108. Mr Thomas denied that he gave any money to the applicant at Liverpool Hospital on 30 November 2019.
109. Mr Thomas said that the handwriting on the photos taken by the applicant which is in his statement dated 30 October 2019 is his own, but it was his wife who initially told him which of those photos depicted jobs undertaken by the respondent. Mr Thomas confirmed that all the job sites set out in the photos taken by the applicant were his jobs.
110. Mr Thomas said he took the photo of the applicant standing on some stairs in his workshop and holding an oxyacetylene torch, but that the applicant was not working for him.
111. Leba Hobaiter has provided statements dated 19 February 2019 and 3 October 2019.
112. In his first statement, Mr Hobaiter states that he works two hours per day for five days a week for the respondent and is paid \$21 per hour. He states that he is the only employee of TDA Industries. He states that he mostly works at the workshop at Wetherill Park but sometimes goes to work sites and drives the work truck.
113. Mr Hobaiter states that for about two or three months the applicant would come around to the Wetherill Park premises. He states that the applicant would just drop in and talk, and sometimes the applicant would hand a tool to him. He states that the applicant said: "I just want to watch and learn."
114. Mr Hobaiter states that in late October 2018 he was at a site at Casula to work on a pergola when the applicant turned up. He states that he suddenly saw the applicant on the upper level and said to him to "get down now." He states that to get the applicant down he said something like: "Go down and throw me the screws." Mr Hobaiter states that the applicant climbed down the ladder but he heard the ladder move and fall. He states that he saw the applicant on the ground, holding his right arm.
115. Mr Hobaiter states that he called the owner of the premises. He states that he asked the applicant if he wanted an ambulance but the applicant refused and said he would wait for Mr Thomas. He states that he rang Mr Thomas, who then came to the Casula site and took the applicant to hospital.
116. In his second statement, Mr Hobaiter states that the applicant followed Mr Thomas and himself to job sites and took photos. He states that he never saw Mr Thomas giving the applicant any money.
117. Mr Hobaiter states that he arrived at the Casula site with Mr Thomas at around 10.30 am. He states that when he was at the Casula site he does not remember seeing anyone on any verandah around the property that he was working on.
118. Mr Hobaiter was cross examined by Mr Petrie. Mr Hobaiter was asked about the time when he and Mr Thomas arrived at the Casula site on 30 November 2018 and Mr Hobaiter said it was after 8.30 am and that he could not remember the time when he gave his second statement in October 2019.

119. Mr Hobaiter said that he was just putting screws into the sheets for the pergola, which he could do alone. He said that the applicant got on to the edge of the roof but did not go on the roof.
120. Mr Hobaiter said that the applicant did not work for three months for Mr Thomas but that sometimes the applicant would do a little thing for himself, such as a bracket.
121. Mr Hobaiter said that he was not present when the photograph was taken of the applicant standing on a set of stairs with an oxyacetylene torch in his hands.
122. Ahmed Hussein has provided a statement dated 18 February 2019. Mr Hussein states that his business had a unit close to the premises used by the respondent at Wetherill Park and he has known Mr Thomas for about seven years.
123. Mr Hussein states that the applicant would often be at the respondent's premises. He states that the applicant did not do anything except smoke cigarettes, drink coffee and take photographs. He states that the applicant was always dressed in work gear but he never worked. He states that he was aware that the applicant was never an employee of Mr Thomas as Mr Thomas had only one part time employee.
124. Stephen Pollard has provided a statement dated 24 September 2019. He states that he used to work at the unit next to the one occupied by Mr Thomas.
125. Mr Pollard refers to a man who would sit outside the unit which Mr Pollard worked. He states that this man drank coffee and was on his own. He states that the man never wore work gear. He states that this man was never there in the morning but sometimes in the afternoon.
126. There is in evidence an unsigned statement of Ben Carlos. Mr Carlos states that he met the applicant one day when he visited Mr Thomas' premises at Wetherill Park. He states that he has known Mr Thomas for 35 years.
127. Mr Carlos states that the applicant rang him sometime after he fell from the ladder and wanted Mr Thomas to say that the applicant was working for him. He states that he spoke to Mr Thomas and Mr Thomas said that the applicant does not work for him.

Determination

128. This has been a difficult dispute to determine. As Mr Petrie observed at the outset of his submissions, there is the applicant and a number of friends who support his claim, and there is the respondent with a number of his own friends who support his defence.
129. Both the applicant and Mr Thomas provide evidence which is of concern.
130. In regard to the applicant, there is a contradiction between his statement that he deposited any excess cash he had from his wages into his bank account, and the evidence which he gave under cross examination that he gave all of his wages to his wife. The applicant was questioned at length by Ms Balendra in regard to how his wages were spent and I found the applicant at times to be evasive in his answers and dismissive of what was being put to him by Ms Balendra. The answer given by the applicant that: "...if I have excess amount I put it in my account", seemed to me to be an attempt by the applicant to remedy the written evidence he had previously given.
131. On this issue I also note that the one bank account which the applicant said he used, being a Commonwealth Bank account, does not identify any cash deposits during the relevant period of alleged employment.

132. Of particular concern is that if the applicant is to be believed, he continued to receive Centrelink benefits by way of a carer's pension for almost three months after he commenced receiving wages of \$1,500 per week. Although he provides an explanation for not contacting Centrelink to inform them of his employment, he still had an obligation to inform Centrelink of monies that he was receiving. The applicant's bank records reveal that he was receiving \$379 per week in Centrelink benefits at the time he sustained his injury. By sheer coincidence it seems, the applicant was intending to go to Centrelink on the very day he sustained injury.
133. In regard to Mr Thomas, there is a contradiction between his initial identification of those job sites which he states that he did not work on, and his later statement and confirmation in cross examination that his business had undertaken work on all of the sites depicted in the photos. He explained that it was his wife who initially identified those sites but there is no evidence that his wife visited any of those sites, whereas Mr Thomas would have visited at least some of them.
134. Mr Thomas does not really explain the relationship which formed between himself and the applicant. He states that he was suspicious of the applicant's activities but does not explain why he continued to allow the applicant to attend his factory and have coffee with him. Nor does he explain the ongoing phone calls between the two of them. I counted 47 phone calls made by the applicant to Mr Thomas between 17 September 2018 and 30 November 2018, although some of those calls were only of a few seconds duration and would suggest missed calls. Nonetheless, there was a bond between the applicant and Mr Thomas during this time which is not adequately explained by Mr Thomas.
135. Mr Thomas also does not adequately explain how the applicant came to be photographed in the Wetherill Park premises, standing on stairs that look to be under construction, with the applicant holding an oxyacetylene torch.
136. Mr Thomas said in cross examination that the applicant rang him at exactly 8.30 am on 30 November 2018, when no such record appears on the applicant's phone records. Ms Balendra suggested that the applicant might have more than one mobile phone, and I note in his statement his household expenses included three mobile phones. Mr Petrie has responded that the applicant has provided "my telephone logs" in his statement dated 31 July 2019, and it was not never put to the applicant in cross examination that he had another phone.
137. In this scenario of claims and counter claims, there is some evidence which stands out as giving some strength to each party's respective positions.
138. The applicant has not just provided photos of some 10 sites that he claims he worked at for the respondent, but has also provided some details of the actual work he did at some of those sites. By way of example, the applicant states that he worked with Mr Hobaiter and a casual labourer (whose name he could not recall) at a site at St Ives for two days to reinforce some fence posts and that he returned on another day to install one of the gates.
139. I do not accept the criticism of Mr Thomas that was made by Mr Petrie in his submissions that Mr Thomas kept changing his story as he was presented with more evidence. It was the applicant who provided far more extensive details of his alleged employment in his second statement dated 31 July 2019, just one week before the ARD was filed, and Mr Thomas was entitled to respond to that. However, having been presented with that additional evidence, Mr Thomas chose not to address particular instances of work that the applicant claims he undertook for the respondent and, as I have already noted, changed his evidence regarding the photos that were in the applicant's second statement.

140. There is also the submission made by Mr Petrie that there were only two days, being 25 October 2018 and 16 November 2018, when the applicant made phone calls to Mr Thomas, which casts doubt on the evidence of Mr Thomas that the applicant was only attending a work site once he had rung Mr Thomas and was told of the address.
141. On my analysis of the phone records, the applicant also made phone calls to Mr Thomas on the mornings of 29, 30 and 31 October 2018, and the applicant states that on or around 31 October 2018 he worked at a property at St Ives with Mr Thomas, Mr Hobaiter and a casual labourer. The phone logs also record that the applicant made a phone call to Mr Thomas on the day before he claims to have worked at a property at Ermington Park on 20 September 2018.
142. So from analysis there were more than two occasions when the applicant rang Mr Thomas close to the time when the applicant claims to have worked at sites for the respondent, but that still leaves another six occasions where there is no evidence of a phone call being made by the applicant that is consistent with the evidence of Mr Thomas.
143. There is also the evidence of Alexander Donev, whom Mr Petrie describes as the only independent witness in this dispute. Mr Donev states that he could see the rear of the premises where the applicant was injured because his own property is on higher ground. Some three months after the applicant's accident, Mr Donev recognises the applicant as one of two persons working on the pergola and who fell as he was climbing down a ladder.
144. Although the respondent requested and was granted leave to cross examine the applicant, his wife, and three of his friends, there was no application made to cross examine Mr Donev, and no additional evidence was forthcoming from Mr Donev.
145. In regard to the respondent's position, Mr Hobaiter is adamant that the applicant never worked for the respondent. His evidence that the applicant was just hanging around the Wetherill Park premises and occasionally handed Mr Hobaiter a tool or did a small job himself, is consistent with a person who was otherwise unemployed but wanted to keep an interest in his trade as a welder.
146. I would agree with Ms Balendra that Mr Hobaiter did present as a witness of truth and gave his evidence in a straightforward manner. He was questioned about his hours and times of work, but I accept that he was working 10 hours per week for the respondent and that he varied the times and days that he worked to suit the mutual convenience of himself and Mr Thomas.
147. I acknowledge Ms Balendra's submission that even if the applicant did the odd job at the respondent's premises as witnessed by others, there is no indicia of employment which the applicant bears the onus of proving.
148. In *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; 63 ALR 513 (*Stevens*), Mason J said at [9]:
- “... the existence of control, whilst significant, is not the sole criterion by which to gauge whether a relationship is one of employment. The approach of this Court has been to regard it as merely one of a number of *indicia* which must be considered in the determination of the question... Other relevant matters include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee.”
149. Unfortunately, in this dispute there is no indicia which can be regarded as common ground between the parties.

150. It is difficult to envisage what further evidence the applicant could provide to prove his employment with the respondent where he was paid cash and not provided with a pay slip or any document that confirmed his engagement with the respondent. I agree with the submission made by Mr Petrie that the available evidence reveals that the respondent was running a cash affair. That is borne out by the lack of financial records produced by the respondent in response to a Direction for Production and the one page document dated 18 November 2019 which stated that Mr Hobaiter worked from 1 September 2018 to 31 December 2019 for a payment of \$4,760.
151. There remains other evidence of concern. There is the difference in the evidence of Ms Sulaiman, who states that she saw Mr Thomas put cash into the applicant's pocket at the hospital, and the evidence of Mr Mohammadi, who states that he saw Mr Thomas hand cash to the applicant and the applicant counted it out. The applicant also states that he counted out the cash that was given to him by Mr Thomas at the hospital. If Mr Mohammadi's evidence and that of the applicant were accepted, that leads me to query how the applicant was able to count cash with both hands just hours after he had surgery to the lower right arm.
152. I am also left to query why the applicant would be paid the equivalent of at least \$30 per hour from the time he started his alleged employment, whereas Mr Hobaiter was paid somewhere between \$18 and \$21 per hour.
153. However, upon a review of all the evidence and consideration of the evidence given orally by the parties and witnesses, the most compelling and convincing evidence supports a finding that the applicant was employed with the respondent and, in particular, on the day of 30 November 2018. That evidence is the photo of the applicant in the respondent's premises, which was not adequately explained by Mr Thomas; the photos of work undertaken by the applicant at the direction of the respondent, with explanations of the work performed at some of those sites, which again was not adequately addressed by Mr Thomas; and the phone records of the applicant, which do not support the assertion made by Mr Thomas that the applicant made these calls in order to follow Mr Thomas to work sites just to take photos.
154. There is also convincing evidence from the day of the applicant's injury of the unchallenged evidence of Mr Donev of seeing the applicant working on the roof, and the confident assertion made by Mr Thomas that the applicant rang him exactly at 8.30 am on that day, when no such record is found on the applicant's phone records.
155. While the onus rests on the applicant and respondent is not required to prove his defence, the respondent has done little to refute this evidence which I rely upon the find in favour of the applicant. There is no evidence from the wife of Mr Thomas, who works at the Wetherill Park premises, and may have provided evidence of her own observations of the applicant, and also some further explanation of the financial dealings of the respondent's business.
156. There is no evidence from the owner of the premises at the Casula property, who both Mr Hobaiter and Mr Donev state was present after the applicant fell, as to that person's observations of what occurred at the property on that day.
157. I was impressed by the evidence given by Mr Hobaiter, but he only works for the respondent for no more than 10 hours per week, so he was not there for much of the time that the applicant worked for the respondent. His evidence that the applicant followed Mr Thomas and himself to work sites and took photos comes in his second statement after further evidence is provided by the applicant. The evidence of Mr Hobaiter does not change the weight of evidence which I have found to favour the applicant's claim that he was employed by the respondent at the time he sustained injury.

158. Ms Balendra emphasised the inconsistency of the applicant's evidence as to what he did with his wages and what the money was spent on. Although I have already noted this and the somewhat evasive responses provided by the applicant in cross examination, I have concluded that when all of the written and oral evidence of the witnesses is considered, the applicant was just handing over his wages to his wife for her to spend in accordance with their needs and what she might like.
159. Ms Balendra also highlighted the inconsistent evidence in regard to the purpose of a loan of \$8,000 made by Mr Mohammadi to the applicant and his wife. Mr Mohammadi said in cross examination that the applicant told him that the loan was so that the applicant could "do some business." The applicant and his wife state that it was used to buy another car following a motor accident, but there was then a difference in the evidence of each spouse as to when the motor accident occurred.
160. Yet despite this confusion, the evidence from the applicant, Ms Sulaiman and Mr Mohammadi supports a finding that this loan was being repaid in differing amounts in the latter part of 2018. The evidence was consistent with a couple repaying a loan to a friend when they had some additional monies available to reduce that debt. I do not consider any further conclusion can be drawn from this particular issue.
161. I have not had any regard to the other witnesses relied upon by the respective parties to this dispute. All of that evidence simply sought to entrench each party's position in this dispute.
162. The applicant has clearly sustained a serious injury to his right forearm above the wrist. Although the operating surgeon, Dr Dave, was optimistic about the outcome of his surgery, there is a recommendation from another orthopaedic surgeon for removal of screws and some fusion surgery to be performed.
163. I also accept that the applicant sustained soft tissue injuries to his lower back and neck in the fall on 30 November 2018. The fall would certainly have been capable of causing such injuries. The first report of symptoms in the lower back and neck is made by Dr Mostaphazadeh on 31 January 2019, some two months after the injury, but I consider it reasonable to conclude that the delay in reporting those symptoms was due to the applicant's immediate concern with the condition of his right arm.
164. In September 2019, Ms Radhakrishnan, Staff Specialist Rehabilitation Medicine at Westmead Hospital, reported the applicant displaying numerous pain behaviours and being very concerned about his use of opioid medication. While the applicant may be manifesting excessive symptoms, I accept from the medical evidence that he has continued to have significant aching and pain in his right arm.
165. The applicant is a welder by trade and has only limited English, having come to Australia as a Kurdish refugee in 2016. There are Certificates of Capacity which certify that the applicant had no current work capacity up until 24 August 2019. Although Ms Radhakrishnan was critical of the applicant's approach to pain management, there is nothing in her report which indicates that the applicant had some capacity for work.
166. Ms Balendra did cross examine the applicant on certain physical actions which he undertook on 15 November 2019 of opening a garage door with his foot and pulling down some plastic shelving. This was in the context of some criminal offences which the applicant has been charged with but to which he has pleaded not guilty, and which are still before the court.
167. I do not accept that a few physical movements within a matter of minutes can lead to a conclusion that the applicant has some work capacity.

168. Ms Balendra did submit that there was no current evidence as to the applicant's capacity for work. I also note the concession made by Mr Petrie that weekly payments of compensation should not be awarded for the applicant's period of incarceration from 15 November 2019 to 30 January 2020.
169. On the available medical evidence, I am not satisfied that the applicant would have been fit for any suitable employment as defined in section 32A of the 1987 Act up until 15 November 2019. I find that the applicant had no current work capacity from 3 December 2018 to 14 November 2019.
170. There is really no evidence available from February 2020 onwards as regards the applicant's capacity for work. I do not consider it appropriate to make an award of weekly payments after 30 January 2020 without some evidence of whether or not the applicant has some capacity for work. It might well be that if the applicant requires further surgery on his right arm then he has continued to have no current work capacity. However, there is no evidence to guide me on this. It will be incumbent upon the applicant to provide evidence to support a claim for weekly payments from February 2020 onwards.
171. In regard to pre-injury average weekly earnings (PIAWE), the applicant's evidence was that he was received \$1,500 in cash each week from Mr Thomas for working from Monday to Saturday. Ms Sulaiman states that the applicant sometimes worked on a Saturday. She also states that the applicant would give her cash on a Friday or a Saturday, which suggests that the applicant did not always work on a Saturday.
172. I propose to find PIAWE to be \$1,375, which represents five and a half days of work per week on average. 95% of PIAWE is \$1,306.25. 80% of PIAWE is \$1,100. The award in favour of the applicant will commence on 3 December 2018 as the payment made by Mr Thomas to the applicant on the Friday was \$1,400, which seems to include the following day which the applicant would otherwise have worked.
173. The respondent is to pay the applicant the following:
- (a) \$1,306.25 per week from 3 December 2018 to 2 March 2019 pursuant to section 36 of the 1987 Act, and
 - (b) \$1,100 per week from 3 March 2019 to 14 November 2019 pursuant to section 37 of the 1987 Act.
174. I note that there was no claim made for medical expenses in the ARD and leave was not sought during the proceedings to amend the ARD for such a claim to be made.