WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter No:	**5949/18**
Applicant:	**Youssef John Georges t/as The Hills Cement Rendering**
First respondent:	**Icare Workers Compensation Insurance & others**
Second respondent:	**Farik Shina-Suleyman**
Date of Determination:	**1 October 2019**
Citation:	**[2019] NSWWCC 319**

The Commission determines:

1. The application by Mr Georges is dismissed.

2. A claim pursuant to s 145 of the *Workers Compensation Act 1987* is confined to the terms of the notice issued pursuant to s 145(1), and the Commission has no jurisdiction to enquire beyond it pursuant to s 145 (4).

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

John Wynyard
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 WYNYARD, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. The applicant, Mr Georges, brings an action pursuant to s 145(3) of the *Workers Compensation Act 1987* (the 1987 Act) to review a decision made by the first respondent, icare Workers Insurance, which I shall call by its statutory name, the Nominal Insurer, to pay the sum of $37,686.48 to the second respondent, Mr Shina- Suleyman. The orders sought were:

    - That the applicant is not liable under s 145(1) of the 1987 Act for the amount the subject of the notice given to him;
    - That the amount claimed in the s 145(1) notice was not a payment of compensation in accordance with the Act, and
    - In the alternative, should the applicant be so liable, pursuant to s 145(4) that the applicant's liability be reduced because Mr Shina-Suleyman had a residual capacity to earn.

2. The Nominal Insurer particularised the said amount paid out in the s 145(1) Certificate as consisting of payment for both medical treatment and for weekly payments of compensation.

3. Mr Shina-Suleyman had been employed by Mr Georges to work as a cement mixer on a building site at which Mr Georges was a contractor. He, commenced on 5 February 2018 and suffered an injury to his back and left shoulder on 2 March 2018, having been working continuously for Mr Georges over that time. It was in respect of those injuries that payments for compensation were made by the Nominal Insurer. Mr Georges, it was common ground, was uninsured.

4. As is not unusual in these cases, the matter was case managed until it was ready for hearing on 21 June 2019.

ISSUES FOR DETERMINATION

5. These were set out at Part 3 of the Amended Miscellaneous Application which was attached to the Application by Mr Georges to join Mr Shina-Suleyman to the action. At Part 6 the following issues were raised:

    (a) That Mr Shina-Suleyman did not suffer injury as alleged on 2 March 2018;

    (b) In the alternative, if he did suffer injury employment was not a substantial contributing factor, pursuant to s 9A;

    (c) That if the worker did suffer an injury, the effect of the injury or aggravation had ceased at the time the amounts in the notice were paid;

    (d) Payments made by the Nominal Insurer had not been paid in accordance with the Act;

    (e) Any incapacity occasioned to the worker did not arise from any compensable injury;

    (f) The worker failed to give notice of claim or injury pursuant to ss 254 and 261 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act);

(g) Mr Shina-Suleyman was not a "worker" within the meaning of the 1987 Act or at all. This claim was expressly disavowed at teleconference on 20 February 2019.

PROCEDURE BEFORE THE COMMISSION

6. As noted, actions of this nature usually require some case management. The matter first came before the Commission by way of telephone conference on 12 December 2018 in which Senior Arbitrator Bamber directed Mr Georges to join Mr Shina-Suleyman.

7. On 20 February 2019 at a further telephone, Senior Arbitrator Bamber listed the matter for 24 April 2019, noting that Mr Georges indicated that "worker" was not in issue.

8. The matter was transferred to me and on 24 April 2019, was stood over for a further teleconference to 24 May 2019. I issued a direction to that effect on 26 April 2019 noting that settlement negotiations were then underway.

9. The appearances on 24 April 2019 were Mr Luke Morgan of Counsel for the applicant, Mr Stephen Flett of Counsel for the Nominal Insurer, and Mr Bruce McManamey of Counsel for Mr Shina-Suleyman.

10. On 24 May 2019 at teleconference, Mr Georges and the Nominal Insurer had still not reached any decision as to resolution, and the matter was set down for hearing on 21 June 2019.

11. The matter was heard on 21 June 2019 at Sydney. On that occasion Mr Georges was represented by his solicitor, Mr David Dickinson. Mr Flett again appeared for the Nominal Insurer and Mr McManamey for Mr Shina-Suleyman.

12. On 24 June 2019, I granted leave to the parties to lodge and serve further submissions.

EVIDENCE

Documentary evidence

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

    (a) Miscellaneous Application dated 9 November 2018;

    (b) Application to Join a Party to Proceedings containing an Amended MIscellanous Application both documents dated 14 December 2018;

    (c) Application to Admit Late Documents (ALD) dated 6 December 2018 containing the Reply of icare also dated 6 December 2018;

    (d) ALD from the Nominal Insurer dated 20 December 2018;

    (e) ALD dated 6 February 2019 from Mr Suliman containing the reply of Mr Shina-Suleyman of the same date;

    (f) ALD dated 11 April 2019 from Mr Suliman;

    (g) ALD dated 25 June 2019 containing submissions from Mr Shina-Suleyman dated 25 June 2019;

(h) ALD dated 1 August 2019 containing written submissions from Mr Georges;

(i) Written submissions dated 17 July 2019 from the Nominal Insurer;

(j) Further submissions dated 7 August 2019 from the Nominal Insurer, and

(k) ALD from the applicant dated 18 April 2019.

Oral evidence

14. Leave was granted to Mr Dickinson to cross-examine Mr Shina-Suleyman.

FINDINGS AND REASONS

Statement of Mr Georges

15. Mr Georges made a statement on 15 June 2018[1]. It is common ground that Mr Shina-Suleyman was employed by Mr Georges as a result of the latter putting an advertisement on Gumtree. Mr Georges said that he met Mr Shina-Suleyman on 5 February 2018 at the job site in Bourke Street, Zetland following a telephone conversation as a result of the advertisement.

16. Mr Georges alleges that he was told that Mr Shina-Suleyman had his own ABN. He said:

> "….when I asked him if he had any Income Protection insurance he replied that he was in the process of obtaining a policy"[2]

17. Mr Georges noticed that Mr Shina-Suleyman was an "older man" and he explained in detail the nature of the work required. Mr Georges said that Mr Shina-Suleyman had to pour 20 kg bags of render into the mixer and then to add water. When it was ready, he was to pour the mixture into a barrow and to wheel it to where Mr Georges was working. Mr Georges said that for "a week or two" he was the only person doing the rendering but he then hired another renderer called "Mahrous". When that occurred, Mr Shina-Suleyman had to provide both Mr George and Mahrous with render. Mr Georges said[3]:

> "I told Frank on that first morning, 5th February that I would assess his work performance over his first week and then decide how much I would pay him. He was agreeable to that and as it eventuated on that Friday, 9th February, after he had worked the entire week I told him I would pay him $200 per day and that he needed to issue me an invoice."

18. Mr Georges said that Mr Shina-Suleyman preferred cash as he was already receiving Centrelink. Mr Georges said that was not possible "as I would only accept his invoice" and would then debit the wages directly into Mr Shina-Suleyman's bank account.

19. Mr Shina-Suleyman reluctantly agreed, Mr Georges said and supplied an invoice and bank details. Mr Georges said that he regarded Mr Shina-Suleyman as a "contractor".

20. Mr Georges said that he was contracted to render the inside walls of the common areas from ground floor level to level 5 of the jobsite. He said that he and Mr Shina-Suleyman were required to undergo an induction during which time they were told to report any injury to the Site Safety Officer named "Steve". Mr Georges said:

[1] Miscellaneous Application 8
[2] Miscellaneous application 8[5]
[3] Miscellaneous application 9[7]

> "On that first morning when I met Frank I asked him if he has arranged his Income Protection insurance and he said again he was in the process of getting this done."

21. Mr Georges then discussed matters which may have been relevant to the question of whether Mr Shina-Suleyman had been a worker, but in view of the concession by Mr Georges that 'worker' was no longer in issue, that evidence is irrelevant, apart from the underlying question of the credit of the protagonists.

22. Mr Georges said that Mr Shina-Suleyman's work was satisfactory. He thought the barrows of mixture Mr Shina-Suleyman was required to push weighed between 50-60 kgs. Mr Georges said that Mr Shina-Suleyman never complained to him that it was causing any physical problems. The barrow had to be pushed from the mixing area along the corridor and Mr Shina-Suleyman was occasionally required to go through doorways, although no doors were installed at that time.

23. Mr Georges said[4] that Mr Shina-Suleyman "worked each day from 5 February 2018 until he took a sick day on Monday 26 February but I can't recall why he took that day off". Mr Shina-Suleyman then worked from 27 February to 2 March without complaint.

24. Mr Georges said that on 2 March 2018 Mr Shina-Suleyman arrived at 7.30 am and worked as normal until work finished at about 3.00 pm. At that stage Mr Georges said that there was no mention of any injury, moreover Mr Shina-Suleyman did not display any sign of any physical problem. Mr Georges recounted that in the normal manner Mr Shina-Suleyman wrote out his invoice for the previous four days at the usual rate of $200 per day. He said:

> "Everything was normal when he gave it to me and he then left the site to walk to the railway station. It was the weekend on 3 and 4 March."

25. Mr Georges said that he rang Mr Shina-Suleyman on one of those days to ask him about his Income Protection insurance. Mr Georges maintained that he had spoken to Mr Shina-Suleyman a few times about it over the last month and was always told that it was in process.

26. The reason the phone call was made, Mr Georges said, was because his wife (who worked for Centrelink) said he should insist on the Income Protection being organised by Mr Shina-Suleyman. Mr Georges said:

> "When I spoke to him that weekend about the matter he again said that he hadn't yet obtained the policy. I was angry with him and said to him that without any insurance he could not return to the site. I finished the conversation by saying to him 'when you get it (the policy) call me' and I then terminated the conversation".

27. Mr Shina-Suleyman did not thereafter work for Mr Georges and in fact Mr Georges did the mixing job himself and relied on Mahrous to do the rendering. The job finished about a week and a half later.

28. When Mr Georges got a call from "Kristin at icare" in mid to late March 2018 he said he knew nothing about any work injury sustained at the site. He said by that stage Mahrous had stopped working for Mr Georges as well, but he said:

> "I'm sure that if Frank had reported any injury to Mahrous then Mahrous would have mentioned it to me."

[4] Miscellaneous application 15

Mr Farik Shina-Suleyman

29. Mr Shina-Suleyman made two statements dated 20 March 2018, and 6 February 2019.

30. On 20 March 2018 he was interviewed by an investigator[5]. He said that he was working on 2 March 2018, preparing cement with a cement mixer on level 5 of the site. He said there were two renderers applying render to the wall of the balcony. He described his job as follows[6]:

> "In order to mix the cement in the cement mixer, I also had to pick up bags of cement and break the contents into the mixer. Each bag of cement weighs 20kgs. On the day I got injured I might have lifted about 60 -70 bags of cement from the ground in addition to moving about 12-15 wheelbarrows full of cement out to the renderers. I would generally leave the wheelbarrows full of cement with the renderers and then go back to the mixer and then prepare another wheelbarrow of cement.

31. Mr Shina-Suleyman said that a few days prior to his injury "I had told my boss Yousef Georges that I was developing a problem with my lower back which was giving me pain"[7].

32. Mr Shina-Suleyman said that he was "merely" told not to manoeuvre the barrow with one arm favouring the other.

33. Mr Shina-Suleyman said that he was working with two renderers before another joined called Jarwid. But in the second week Mr Shina-Suleyman thought Jarwid left because of shoulder pain and pressure from the speed of work.

34. Mr Shina-Suleyman gave a lot of detail about the type of work he was doing for Mr Shina-Suleyman.

35. Mr Shina-Suleyman worked for an interpreting company between 2008 and 2013 and had an ABN as a result. When Mr Georges asked if he had an ABN Mr Shina-Suleyman gave him that number. Mr Shina-Suleyman then gave some further particulars as to the issue of 'worker', again in some detail.

36. Mr Shina-Suleyman asserted that he had also told Mahrous Mahmoud that he had hurt his back. They conversed in Arabic. He also complained to Jarwid in Farsi as Jarwid was an Afghani who apparently now lives in Iran.

37. Mr Shina-Suleyman said that at about 1.30 pm on Friday 2 March 2018 whilst he was manoeuvring his barrow of cement he felt a sharp pain in his lower back and left shoulder. Mr Shina-Suleyman said[8]:

> "I told [Mr Georges] about my injury and he told me 'well we only have cleaning up to do before we finish for the day'."

38. Mr Shina-Suleyman related that he thought over the weekend his back would improve but instead it got worse. Late on Sunday morning he advised Mr Georges by telephone that because of his back he would not be able to attend work the following day. Mr Georges observed that work seemed to be too hard for Mr Shina-Suleyman and that he better not go to work anymore.

[5] Reply the Nominal Insurer 74
[6] Reply the Nominal Insurer 74[5]
[7] Joinder applicant (JA) 74
[8] JA 76

39. Mr Shina-Suleyman said that he had not been able to undertake any kind of work. He thought that he would not be able to work until he had had some rehabilitation on his back and leg.

Supplementary statement of Mr Shina-Suleyman

40. On 6 February 2019 Mr Shina-Suleyman made a further statement[9]. Mr Shina-Suleyman said he was born in Iraq and migrated to Australia in 1993. Since then he has obtained a Masters Degree in Politics and International Relationships. This degree was not recognised in Australia, unfortunately, and Mr Shina-Suleyman has been performing labouring jobs since 1993.

41. The purpose of the statement of 6 February 2019 was to respond to Mr Georges' statement in which he denied every allegation made by Mr Georges that was inconsistent with his own account. This included an allegation that at the induction on 3 February 2018 Mr Shina-Suleyman was told that he would be paid $200 per day, and that payment would be made by bank transfer. Mr Shina-Suleyman said that he gave his bank account details to Mr Georges at that time, for that purpose.

42. Mr Shina-Suleyman gave a lot of detail, including his opinion as to whether there had been a specific incident or that the nature and conditions of his employment caused him to sustain injury.

43. He gave further particulars as to the nature of his work, (again in considerable detail) and repeated his allegations as to the events surrounding the onset of his back and shoulder injury. Mr Shina-Suleyman said that on Tuesday 6 March 2018 he underwent a CT scan of his lumbar spine and the following day he saw his treating general practitioner, Dr Chingching Zhao.

44. On 12 March 2018 Dr Zhao suggested that he apply for workers compensation as his pain had not abated. He was advised to wait another two weeks before doing so however as his symptoms could have subsided by then.

45. By 28 March 2018 his pain had worsened and he again saw Dr Zhao, who referred him for physiotherapy and issued WorkCover Certificates.

46. Mr Shina-Suleyman related that he had undertaken restricted duties between 28 March 2018 and 4 June 2018. It was during that period of restricted duties that he felt an increase in the pain in his shoulder, he said. He consulted Dr Zhao on 9 April 2018 and on 15 April 2018 underwent imagining of the left shoulder and cervical spine. Mr Shina-Suleyman then related the history of the certification issued by Dr Zhao. On 20 June 2018. Dr Zhao "upgraded" Mr Shina-Suleyman's capacity to work eight hours per day, three days per week. However, on 27 June he obtained a downgraded certificate.

47. Mr Shina-Suleyman said on 9 July 2018 he was upgraded to eight hours per day, five days per week which certification remained the same on 23 July 2018 and 6 August 2018.

48. On 12 August 2018, Dr Zhao certified Mr Shina-Suleyman fit for four hours per day, three days per week "as my pain had increased".

49. Since 22 August 2018, Mr Shina-Suleyman has been certified fit for work eight hours per day, five days per week.

[9] Reply Second Respondent (2R) 6

Statement of Mr Georges in response

50. In a further statement dated 21 February 2019 Mr Georges said that in his earlier statement he had not mentioned that Mr Shina-Suleyman had worked for him earlier on a small rendering job on 23 January 2018. Mr Georges annexed to his statement copy of text messages later exchanged between himself and Mr Shina-Suleyman in which Mr Georges indicated that he had work available at the subject job site.

51. Mr Georges then responded to Mr Shina-Suleyman's statement of 20 March 2018[10]. He submitted that Mr Shina-Suleyman exaggerated the difficulty of negotiating corridors. He said that Mr Shina-Suleyman exaggerated the quantity of bags that he had to lift and the number of wheelbarrows of cement that he had to take out to the renderers. Mr Georges said that the mixer would only take five bags at a time and would only take about eight wheelbarrows full of cement during the course of the day. He would only have used 40-50 bags of cement. Mr Georges denied that he had been told by Mr Shina-Suleyman of a developing a problem with Mr Shina-Suleyman's lower back a few days prior to his injury.

52. Mr Georges alleged that Mr Shina-Suleyman was incorrect in various parts of his statement. He said:

- Contrary to his statement the subject job site was not the first time he had worked for Mr Georges;
- Mr Georges advised Mr Shina-Suleyman that he would need to attend before commencing work for induction purposes;
- Mr Georges said that on Saturday 3 February 2018 he picked up Mr Shina-Suleyman and then Jarwid from Northmead and Auburn respectively and took them to Green Square and handed them over to the person performing the induction process;
- Mr Georges said he waited for them whilst the process was undertaken. He said he later picked both men up and dropped them off at Lidcombe station where he bought them pizza and soft drink for lunch;
- Mr Georges denied that he told Mr Shina-Suleyman that he did not want them to do the induction;
- Mr Georges said that he knew Mr Shina-Suleyman was capable of doing the job as he had worked for him before as he indicated in his statement. Mr Georges related a statement in which Mr Shina-Suleyman expressed some interest in learning to become a cement renderer himself;
- Mr Georges denied that he had any shortcoming in his safety protocols;
- Mr Georges said that he was "very conscious" of maintaining a safe working environment;
- With regard to the ABN conversation Mr Georges repeated that he thought engaging Mr Shina-Suleyman as a contractor and Mr Georges repeated that he continued to ask for details as to personal disability and accident insurer from Mr Shina-Suleyman for that reason;

[10] ALD Applicant 1

- The hours of work that Mr Shina-Suleyman performed were not 7.30 am to 4.30 pm as alleged by Mr Shina-Suleyman but from 7.30 am to 2.30 pm;

- Mr Georges repeated the denial of Mr Shina-Suleyman's injury at 1.30 pm on Friday 2 March 2018. He said he had no knowledge of such an injury and repeated that the first he found out about it was when icare contacted him;

- Mr Georges said that Jarwid was not on site after 15 February 2018;

- Mr Georges said that the contents of the phone call on the Sunday was untrue and repeated his evidence that the subject matter of the call was about whether Mr Shina-Suleyman had income protection insurance and that Mr Georges said he would not allow him back on the site until he had it, and

- Mr Georges repeated that Mr Shina-Suleyman did not mention that he had suffered any injury on the site.

53. With regard to the content of Mr Shina-Suleyman's second statement of 6 February 2019 Mr Georges made the following comments:

- He annexed copies of text messages between himself and Mr Shina-Suleyman regarding the earlier work undertaken by Mr Shina-Suleyman in January 2018;

- Mr Georges repeated that the whole purpose of asking for Mr Shina-Suleyman's ABN was in relation to payment for his services "on a contract labouring basis and not as an employee". Mr Georges repeated that he told Mr Shina-Suleyman that he could not continue to work because in the telephone call of 4 March 2018 he learnt that Mr Shina-Suleyman had not by then obtained his income protection insurance;

- Mr Georges repeated his evidence regarding Saturday, 3 February 2018. He denied that he picked up Mr Shina-Suleyman from his home and said that he had never been here. Mr Georges denied that he pressured Mr Shina-Suleyman into signing any form and he confirmed his earlier statement that he was not there during the induction process;

- Mr Georges also denied that he offered Mr Shina-Suleyman the job during the induction as he had already offered and indeed that was why Mr Shina-Suleyman was at the induction;

- Mr Georges denied that he had to show Mr Shina-Suleyman how to mix cement as he had already demonstrated that ability in the earlier job in January;

- Mr Georges observed that part of the induction process was that injuries had to be reported to the First Aid Officer on site and an incident report filed in. Mr Georges said that no incident report was filled in by Mr Shina- Suleyman;

- Mr Georges repeated his denial that he knew anything about Mr Shina- Suleyman's injury in late March and that he found out about it for the first time from icare, and

- Mr Georges then referred to the statement of Mahrous of 11 December 2018. He denied that he ever heard Mr Shina-Suleyman say that his back was sore and stated that Mahrous was mistaken in his recollection of overhearing that conversation.

Further statement by Mr Georges

54. Mr Georges made a further supplementary statement on 17 April 2011[11]. This statement related to a number of text messages between Mr Georges and Amena Khadbaz, Mahrous's wife. The text messages were annexed.

55. The first text was dated 23 March 2019 advising Mr Georges that Mahrous was looking for work. Mr Georges response was short and to the point. He said:

> "How is your husband gonna work for me after he lied to the investigators about Faruk's injury in saying i new about it. He did not injure himself on my job site and your husband lied about it".

56. The response from Ms Khadbaz was:

> "He didn't lie all he said that for Farouk told u his going home and when he asked Farouk the next day he said his back was hurting…my husband told the investigators that he didn't do it on the job site."

57. Mr Georges responded:

> "Then where did Farouk get injured then. My wife left me because I was so stressed and got depression."

58. Ms Khadbaz replied that she was sorry to hear that and wondered why Mr Georges would be stressed out. Mr Georges responded:

> "Because it stuffed up my business so your telling me Farouk didn't hurt himself on my job site. It's not fair. I really liked your husband. Was a bloody hard worker".

59. Ms Khadbaz responded that she did not know where Mr Shina-Suleyman hurt himself:

> "all I know is that Farouk was complaining of bad back and asked you if he can go home early. And next hubby asked u u went home. He said if his back that's what I told the investigators did they make u pay or something".

60. Mr Georges responded:

> "No much but it's not fair so he only told your husband that he hurt his back. Not fair. I've got work for him but not next week cause rain. Ill text you next week."

[11] ALD Applicant 11

61. Ms Khadbaz then asked for some advice from Mr Georges where apparently a labourer working for Mahrous fell and broke his ankle and Mahrous himself had no insurance. Further conversation continued in the text exchange about the circumstances of that injury and that Mr Georges was clearly distressed that his wife had left him.

62. Further text conversation ensued about Mahrous's worker who broke his ankle, and Mr Georges's unfortunate domestic situation.

Mahrous Mahmoud Abdelfattah

63. In these reasons I shall continue to refer to Mr Abdelfattah as "Mahrous", as that is how he was known to the protagonists. Mahrous made a statement[12] in which he confirmed that he was working at the job site with Mr Georges, a labourer named Farik S and another renderer by the name of Jarwid. He said he ceased work for Mr Georges on 7 March 2018. He said[13]:

> "6. I recall that one day Farik came to me and told me [he] had an injury because of the difficulty of his work mixing the cement and taking it to where it was needed.
>
> 7. I recall that on that day Farik left early from the job side about 2pm. After that day I did not see Farik on the job again."

64. Mahrous's statement was brief. He did not identify the nature of the injury that Mr Farik Shina-Suleyman complained of.

65. However, on 11 December Mahrous gave a comprehensive statement to an investigator. He related that he witnessed Mr Shina-Suleyman tell Mr Georges that his back was very sore and that he needed to leave the site to see his doctor.

66. Mahrous said it was about 2.00 pm when this happened. He said that was the first and only time he heard Mr Shina-Suleyman tell Mr Georges about his sore back.

67. Mahrous also said:

> "I got to know Fariq fairly well from speaking to him each day as we worked and also at our breaks. He said he is from Iraq and we communicated in Egyptian and Arabic."

68. Mahrous then recounted a conversation with Mr Georges which he said occurred the next day, but which according to Mr Shina-Suleyman said occurred after the weekend. Nothing much turns on this inconsistency. In this conversation he asked Mr Georges what had happened to Mr Shina-Suleyman and was told that Mr Shina-Suleyman was a bit too old for the labouring and he would not be coming back

Medical

Dr Sham Rao Deshpande

69. Dr Sham Rao Deshpande, Orthopaedic Surgeon, reported to the first respondent on 24 May 2018.[14] Dr Deshpande took a consistent history of the injury. Dr Deshpande found that the employment was a substantial contributing factor to Mr Shina-Suleyman's symptoms in the left shoulder and lower back.

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[12] JA 78
[13] JA 78
[14] Reply 1R 1

70. As to the injury to the left shoulder, Dr Deshpande recorded:[15]

> "[Mr Shina-Suleyman] was asked to push a wheelbarrow full of cement in a confined space on 2/3/2018 when he developed low back pain.... He stated that he also strained his left shoulder and this has become stiff and painful since the accident."

71. Dr Deshpande took no history of the period suitable duties described by Mr Shina-Suleyman in his second statement of 6 February 2019.

72. Dr Deshpande diagnosed multilevel lumbar disc degeneration and back sprain. With regard to the left shoulder, he diagnosed an adhesive capsulitis with minor tear of the supraspinatus, a type II acromion.

73. Dr Deshpande was satisfied that there was evidence of pre-existing lumbar disc degenerative and facet joint arthritis. Dr Deshpande's view was that there was a back strain which had aggravated that degenerative background, but which aggravation had since resolved. He said[16]:

> "However, concern remains about his left shoulder motion. If this is related to adhesive capsulitis, this may take longer, sometimes months to resolve".

Dr J Brian Stephenson

74. Dr J Brian Stephenson, Orthopaedic Surgeon, reported to the solicitors for Mr Shina-Suleyman on 18 February 2019. He recorded the following history of injury:[17]:

> "…In the course of his duties on 2 March 2018, [Mr Shina- Suleyman] was emptying a concrete mixer when he felt a tearing sensation in the left shoulder and a sharp pain in lower back.
>
> Mr Shina-Suleyman was concerned that was what had happened and after lunchtime about 1 PM on that day, there was left shoulder pain and lumbar pain. He reported this to his employer."

75. Dr Stephenson took additional background history from Mr Shina-Suleyman, noting that Mr Shina-Suleyman was a university graduate in his home country, graduating in Baghdad as an interpreter and in English Literature. He referred to Mr Shina-Suleyman's degree in International Relations and noted at the time of his injury Mr Shina-Suleyman was undertaking a training course at TAFE College to become an employment trainer in a company, or a teacher in a TAFE College. Unfortunately, he could not continue due to his back injury.

76. Dr Stephenson took no history of any return to work, as described by Mr Shina-Suleyman in his statement of 6 February 2019.

77. Dr Stephenson noted the imaging in respect of both the left shoulder and lumbar spine and, following examination, diagnosed a DRE category II for the lumbar spine, referring to the American Medical Association 5th Edition publication. Dr Stephenson confirmed that the aggravation of degenerative changes in the lumbar spine persisted.[18]

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[15] Reply 1R 2
[16] Reply 1R 5
[17] ALD 2R 11.4.19 p.3
[18] ALD 2R 11.4.19 p.7

78. In the left shoulder, he found strain and contusion. There were features of calcific tendinopathy affecting the subscapularis and supraspinatus tendons with partial thickness tears of the supraspinatus tendon associated with sub acromial bursitis as found by the radiologist.

79. So far as Mr Shina-Suleyman's work capacity was concerned, Dr Stephenson found that there was capacity for light to moderate work but not heavy manual labouring work.

80. There was a residual capacity in the realm of customer service, light-semi sedentary office based duties. Dr Stephenson noted specifically that there was a capacity to do some work as an interpreter, should such work be available. He noted that there was apparently a downturn of work for interpreter of Kurdish or Iraqi language. Dr Stephenson recorded that Mr Shina-Suleyman's employment as an interpreter "fell off after the government stopped the boats."

Oral evidence

81. I granted leave to Mr Dickinson on 21 June 2019 to cross-examine Mr Shina-Suleyman.

82. The cross-examination was concerned with Mr Shina-Suleyman's prior complaints of back symptoms made to various health professionals. A number of records were put to him regarding prior injuries to his back, and as to a motor vehicle accident in June 2008, in respect of which he initiated legal proceedings.

83. Mr Shina-Suleyman was taken to the evidence regarding that motor vehicle claim, which included injuries to the lower back, left knee and neck. He agreed that he had settled with the relevant insurer, and when asked if back pain had persisted thereafter answered that it did persist for a while, but that it gradually was getting better.

84. Mr Shina-Suleyman was asked about complaints he had made, according to notes as long ago as 2003. With regard to those earlier complaints Mr Shina-Suleyman said that he could not recall "to be honest" because it was too long a period since such entries had been made.

85. He agreed he had seen a general practitioner on 7 July 2011, but could not recall why he had seen him on that particular day. It was put to him that at that stage he had chronic back pain and Mr Shina-Suleyman answered frankly "Yes, I don't know about the severity but I had a back issue". He agreed that he had not consulted any doctor about his left shoulder. He said he had never had an issue with his left shoulder prior to the injury he suffered with Mr Georges.

86. I found Mr Shina-Suleyman's answers to be considered and courteous. He was ready to assist by answering questions directly and without hesitation. I accept that he was unable to recall the details of complaints he had made to medical professionals many years ago, but he readily conceded that he had a history of back problems.

Submissions

Mr McManamey

87. Mr McManamey submitted that pursuant to s 145 of the 1987 Act, once the certificate had issued under subsection (1), it was evidence of the matters stated within it. Mr Georges had the onus of rebutting that presumption. The onus of proof was not on Mr Shina-Suleyman, Mr McManamey submitted but Mr Georges had to prove that the matters raised in the certificate were displaced by the evidence upon which Mr Georges relied.

Mr Flett

88. Mr Flett submitted that the issue was simply about recovery of payments by the Nominal Insurer. He submitted that at the time when the claim was made Mr Shina-Suleyman was complaining of low back, left shoulder and right foot problems. Dr Deshpande supplied certificates that Mr Shina-Suleyman was incapacitated and the claim by Mr Georges was an attempt to avoid having to repay monies paid. In that respect he adopted Mr McManamey's submission.

Mr Dickinson

89. Mr Dickinson in making his original submissions misunderstood that the evidence had closed and sought leave to cross-examine, which leave was granted, and at that point the cross-examination proceeded. Leave was granted to Mr McManamey and Mr Flett to make further submissions following the closure of cross-examination.

90. Mr Dickinson then submitted that the question of injury was a matter for me to determine.

91. He said firstly that Mr Georges' evidence was that he had no knowledge of injury until he was told by "the lady from icare". He said that the other evidence to which he referred showed that there had been a long history of back problems prior to this injury.

92. Mr Dickinson referred to Dr Deshpande's report of 24 May 2013, which supported, he submitted, that the aggravation to the back had ceased. Dr Deshpande's opinion, Mr Dickinson said, was that the aggravation to the back condition resolved, but that the shoulder injury continued.

93. Mr Dickinson then referred to the evidence of Mahrous. He asserted that if I accepted that evidence then there was no support for Mr Shina-Suleyman's allegation that he injured his left shoulder at the same time as he injured his back. It was open for me to find on that evidence that no shoulder injury had then occurred, Mr Dickinson submitted.

94. Mr Dickson submitted that it could not be said that Mr Shina-Suleyman had been found to have no current work capacity during the period he received compensation. Mr Dickinson submitted that there was a significant residual capacity in that Mr Shina-Suleyman's prior occupation had been an interpreter, as he admitted in his first statement.

95. Mr Dickinson relied upon the assertion by Mr Shina-Suleyman in his first statement that he had worked as an interpreter for several years and indeed had obtained an ABN for that service. Work as an interpreter is exactly what was identified by Dr Stephenson as being suitable duties for Mr Shina-Suleyman. Mr Dickinson submitted that it was irrelevant pursuant to the provisions of s 32A that no work was available, as Dr Stephenson had been told.

96. Mr Dickinson submitted that I would also entertain some doubts as to whether Mr Shina-Suleyman had been injured at all. He referred to comments made by Ms Khadbaz, Mr Shina-Suleyman's wife.

97. Mr Dickinson referred to the text exchange which I have reproduced above. He submitted that the comments made by Ms Khadbaz raised a real issue as to whether Mr Shina-Suleyman injured his back at work or elsewhere.

Mr McManamey (after cross-examination)

98. Mr McManamey repeated his submission that the onus of proof lay on Mr Georges to show that Mr Shina-Suleyman was capable of working suitable duties. The only evidence upon which Mr Dickinson's submission was based was Mr Shina-Suleyman's statement that he only once had a business as an interpreter. If I was to find that there was a residual earning capacity, Mr McManamey submitted that it would be minimal.

Mr Flett (after cross-examination)

99. Mr Flett said that weekly payments continued to be made, and that under s 145 I could make a determination as to the future payment of weekly compensation.

100. This proposition was challenged by Mr McManamey who submitted that the proper interpretation of s 145 of the 1987 Act was that it gave the Nominal Insurer jurisdiction to pay compensation to an injured person in the case of an uninsured employer. It was provided by a s 145(1)(a) Notice that the amount recoverable was restricted to the amount that had actually be paid by the Nominal Insurer. He submitted that s 145 (3) spoke of "the payment concerned". This restricted the Commission's jurisdiction to a consideration of the payment that had been made as disclosed in the certificate. That interpretation would therefore flow into the provisions of subs (4) and, as I understood Mr McManamey, was concerned with the power of the Commission, should it uphold an application under s 145(3) for a redetermination of the Nominal Insurer's decision.

101. This was further demonstrated by subsection (5) which provided that the certificate by the Nominal Insurer was evidence of the matters stated in his certificate.

102. The parties were granted leave to rely on written submissions regarding this issue of statutory interpretation. Submissions were duly received and it is preferable to delay consideration of them pending a determination of the factual issues in dispute.

DISCUSSION

The factual issues

103. The recollection of the different witnesses has raised inconsistencies that cannot be resolved. I have no doubt that all the witnesses were doing their best to assist the Commission, but it is inevitable that one account be preferred over another. In resolving this impasse, it is as well to consider the observations of Gleeson CJ, Gummow and Kirby JJ in *Fox v Percy.*[19] In reasoning conclusions judges (and arbitrators) should as far as possible have recourse to contemporary materials, objectively established facts and the apparent logic of events.

104. It is common ground that Mr Shina-Suleyman was employed by Mr Georges when Mr Shina-Suleyman answered an advertisement on Gumtree. Mr Georges did not mention in his first statement of 15 June 2018 that he had in fact employed Mr Shina-Suleyman in similar circumstances in January 2018. The contemporaneous materials of the text messages demonstrated that to be so.

105. It did not therefore seem logical that Mr Georges needed to assess Mr Silverman's work performance, as he said in that statement. Neither does it seem likely that anybody would work for a week for an employer without knowing how much he was to be paid. In that regard it is more probable that Mr Georges and Mr Shina-Suleyman discussed payment arrangements at the time of the induction on Saturday, 3 February 2018.

[19] [2003] HCA 22; 214 CLR 118 at [31]

106. In his first statement, Mr Georges did not mention the induction on 3 February 2018, but he gave considerable detail about it in his further statement of 21 February 2019. It is probable that details such as payment were discussed in the time Mr Georges spent with both Mr Shina-Suleyman and the other worker who now lives in Iran, Jarwid, on the induction day.

107. Other inconsistencies were not so controversial. Mr Georges originally maintained that only he and Mr Shina-Suleyman were on site doing the rendering until Mahrous was hired a week or so later. Mr Shina-Suleyman remembered that Jarwid was also on site when he began to work for Mr Georges, and this was later confirmed by Mr Georges in his statement of 21 February 2019.

108. What was common ground between all the witnesses was that the work Mr Shina-Suleyman was required to do was heavy. Mr Georges said that Mr Shina-Suleyman had the pour 20 kg bags of render into the mixer and to wheel the render out to where Mr Georges was applying it to the public area of four stories of the jobsite. Mr Shina-Suleyman described the job as lifting 20 kg bags of cement into the mixer possibly 60 to 70 times on the day he was injured, as well as wheeling 12 to 15 wheelbarrows full of cement out to the renderers.

109. There was some inconsistency as to the hours worked by Mr Shina-Suleyman - whether he ceased work at 2.30 pm or 4.30 pm, but nothing much turns on that issue, as regardless of the hours worked, on any version of Mr Shina-Suleyman's work duties, they were arduous and quite capable of causing injury to a degenerative back.

110. The most significant dispute in the case of course was as to whether Mr Shina-Suleyman injured himself whilst working for Mr Georges. Mr Georges maintained consistently that he had no knowledge of any injury sustained by Mr Shina-Suleyman on the jobsite. He said on a number of occasions that the first he heard that Mr Shina-Suleyman had been injured was when he was telephoned by a representative of icare.

111. Mr Shina-Suleyman's account was that he told Mr Georges earlier in the job that he was developing a problem in his lower back. Mr Shina-Suleyman also said that on Friday, 2 March 2018 towards the end of his shift he felt a sharp pain in his lower back and left shoulder. He alleged Mr Georges indicated that there was only the cleaning up to do before the job was finished for the day.

112. I do not draw any adverse conclusion about Mr Georges' credit in his denial. The task he was doing was also arduous and the description by all the witnesses was that wheelbarrows of cement were constantly being delivered and taken away and that the jobsite was very busy. It may be that Mr Georges genuinely does not recall the conversation referred to by Mr Shina-Suleyman. However, unbeknownst to Mr Georges, Mahrous overheard that conversation on 2 March 2018.

113. Mahrous unequivocally stated that he had overheard Mr Shina-Suleyman telling Mr Georges on site that he had injured himself. In his first statement of 28 March 2018 he gave a general statement as to that event, but in his second statement of 11 December 2018 he gave more detailed particulars. He stated that he heard Mr Shina-Suleyman tell Mr Georges that he, Mr Shina- Suleyman, had a sore back and needed to go and see a doctor. Mahrous did not say when that occurred, apart from saying that when he returned to work Mr Shina-Suleyman was not there and that Mr Georges had told them that Mr Shina-Suleyman was a bit too old and would not be coming back. I can therefore infer that the conversation that Mahrous overheard occurred on Friday, 2 March 2018.

114. Mr Dickinson tried to nullify the effect of this evidence by referring to a later statement of Mr Georges which I have referred to above. That was the statement of 17 April 2019 which had annexed to it screenshots of text messages between Ms Khadbaz, Mahrous's wife and Mr Georges. I am unable to accept Mr Dickinson's submission that the texts raised a real issue as to whether Mr Shina-Suleyman's back injury occurred on the jobsite, or elsewhere. It is apparent from Ms Khadbaz's responses that she had been told by Mahrous of the conversation he witnessed regarding Mr Shina-Suleyman's bad back.

115. I am accordingly satisfied that Mr Shina-Suleyman complained about his painful back to Mr Georges on 2 March 2018, and that his complaint was overheard by Mahrous.

116. Mr Dickinson however submitted that in the final analysis such a finding would not be determinative as to injury. Firstly, he submitted that the evidence did not relate to any injury to the left shoulder. Mahrous only spoke of injury to the back. Secondly, Dr Deshpande on 24 May 2013, had found that the injury to the back was an aggravation of degenerative changes, which by then had ceased - a situation which cross examination demonstrated had been a recurring problem for many years. That left the injury to the left shoulder, which was not established by contemporaneous evidence. There had been no suggestion from Mahrous that the left shoulder was mentioned in the conversation he overheard.

117. I understood Mr Dickinson to be referring to the evidence in Mr Shina-Suleyman's second statement of 6 February 2019, in which Mr Shina-Suleyman stated that he undertook suitable duties between 28 March 2018 and 4 June 2018. No express reference was made to this evidence by counsel and I am accordingly limited in the use I can make of it. No particulars of where that period of light work took place were given, neither was any submission made regarding Mr Shina-Suleyman's assertion that the restricted duties resulted in his feeling an increase in the pain in his left shoulder. The clinical notes of Mr Shina-Suleyman's general practitioner showed that on 7 March 2018 he presented complaining of symptoms in his lower back and left shoulder. The notes did not extend as far as 28 March 2018, but it is clear that Mr Shina-Suleyman's first complaint to his general practitioner included the left shoulder. Moreover, the Reply from the Nominal Insurer contained a report from rehabilitation specialists dated 5 June 2018, which did not make any mention of Mr Shina-Suleyman doing light duties.

118. In view of the fact that a complaint was made to Dr Chong contemporaneously to the occurrence of the injury, I am satisfied that Mr Shina-Suleyman injured both his back and his left shoulder whilst doing the cement mixing at the subject jobsite.

119. Although Dr Deshpande was of the opinion that the aggravation to the degenerative changes in Mr Shina-Suleyman's lumbar spine had ceased, Dr Stephenson held the opposite view. Dr Deshpande did not expand on his opinion, although his reference to the pre-existing lumbar disc degeneration and facet joint arthritis may be assumed as being the basis of his opinion. I infer that his conclusion was based upon Mr Shina-Suleyman's long history of back complaints. Dr Deshpande however did not refer to the relevant facts and circumstances upon which he came to that conclusion on this occasion. There has been no cessation of symptomatology, nor any other evidence that would indicate that the aggravation has ceased. It is probable that work as arduous as that which Mr Shina-Suleyman was engaged at the time of his injury would have caused significant aggravation.

120. Accordingly, I am satisfied that Mr Shina-Suleyman suffered injury to his lower back and to his left shoulder whilst working for Mr Georges. I accept Mr Shina-Suleyman's statement that he has continued to suffer from low back and left shoulder pain since the occurrence of the injuries. I note in passing that Mr Shina-Suleyman's second statement appeared to be far too detailed and legalistic to have been entirely his own work, but nonetheless I accept that part of it that described his continuing symptoms.

121. Mr Dickinson submitted that if his client were found to have been the cause of Mr Shina-Suleyman's injuries, nonetheless on the evidence before the Nominal Insurer, it could not have been said that Mr Shina-Suleyman had no current work capacity. Mr Dickinson submitted that the amount contained in the s 145 (1) certificate should be reduced as a result.

122. Section 145 of the 1987 Act provides:

> "**Employer or insurer to reimburse Insurance Fund**
>
> **145 EMPLOYER OR INSURER TO REIMBURSE INSURANCE FUND**
> (cf former s 18C (21)-(26))
>
> (1) The Nominal Insurer may serve on a person who, in the opinion of the Nominal Insurer, was:
>
> (a) in respect of an injured worker to or in respect of whom a payment has been made by the Nominal Insurer in respect of a claim under this Division, an employer at the relevant time, or
> (b) an insurer under this Act of such an employer, a notice requiring that person, within a period specified in the notice, to reimburse the Insurance Fund an amount (not being an amount exceeding the amount of the payment made) specified in the notice.
>
> (2) The Nominal Insurer may, by instrument in writing, waive the liability of an employer under subsection (1) to reimburse the Insurance Fund an amount, if the Nominal Insurer, in respect of the amount, is satisfied that:
>
> (a) the amount is beyond the capacity of the employer to pay,
> (b) the employer could not reasonably have been expected to regard himself or herself as an employer at the relevant time,
> (c) the employer, not being a corporation, is bankrupt and the liability under this section is not provable in the bankruptcy,
> (d) the employer, being a corporation, is being wound up and the liability under this section is not provable in the winding up,
> (e) the employer, being a corporation, has been dissolved, or
> (f) it would not be commercially feasible for the Nominal Insurer to attempt to recover the amount.
>
> (3) A person on whom a notice has been served under subsection (1) in respect of an injured worker may, within the period specified in the notice, apply to the Commission for a determination as to the person's liability in respect of the payment concerned.
>
> (4) The Commission may hear any such application and may:
>
> (a) make such determination in relation to the application, and
> (b) make such awards or orders as to the payment of compensation under this Act to or in respect of the injured worker concerned, as the Commission thinks fit.
>
> (4A) The Commission is not authorised to make a determination that waives the liability of an employer under subsection (1) to reimburse the Insurance Fund or that limits or otherwise affects any function of the Nominal Insurer to decide whether or not any such liability should be waived.

(5) In any proceedings under subsection (4), a certificate executed by the Nominal Insurer and certifying that:

(a) the payments specified in the certificate were paid to or in respect of an injured worker named in the certificate, and

(b) a person named in the certificate was, in the opinion of the Nominal Insurer, liable at the relevant time to pay to or in respect of the injured worker compensation under this Act or work injury damages, is (without proof of its execution by the Nominal Insurer) admissible in evidence in any proceedings and is evidence of the matters stated in the certificate.

(6) The Nominal Insurer may recover an amount specified in a notice served under subsection (1) (being a notice in respect of which an application has not been made under subsection (3)) from the person to whom the notice was given as a debt in a court of competent jurisdiction.

(7) An order by the Commission that the Nominal Insurer is to be reimbursed by a person named in the determination concerned may be enforced under section 362 of the 1998 Act."

123. It can be seen that by subsection (5) that the contents of the certificate issued pursuant to subsection (1) is evidence of the matters stated in the certificate.

124. The Nominal Insurer assessed Mr Shina-Suleyman's pre-injury average weekly earnings, about which there was no dispute, and pursuant to s 37 of the 1987 Act, found that he had a capacity to earn limited to 15 hours per week.

125. I note that submissions were made on the basis that the Nominal Insurer had found that Mr Shina-Suleyman had no current work capacity. This is incorrect, as can be seen. The Nominal Insurer paid weekly compensation on the basis that Mr Shina-Suleyman was able to earn $25 per hour 15 hours per week.

126. Submissions were made that Mr Shina-Suleyman had a residual earning capacity, particularly in view of the fact that he had obtained and ABN number for his business as an interpreter. Mr Shina-Suleyman referred to that work in his first statement, although he neglected to mention it in his more comprehensive statement of 6 February 2019. He said that he worked between 2008 in 2013 for an interpreting company, translating from the Kurdish language. Dr Stephenson noted that the work had fallen off with the implementation of the Australian Government's policy towards refugees arriving by boat, as I understood the evidence.

127. Section 32A of the 1987 Act provides relevantly:

"'suitable employment', in relation to a worker, means employment in work for which the worker is currently suited:

(a) having regard to:

(i) the nature of the worker's incapacity and the details provided in medical information including, but not limited to, any certificate of capacity supplied by the worker (under section 44B), and

(ii) the worker's age, education, skills and work experience, and
(iii) any plan or document prepared as part of the return to work planning process, including an injury management plan under Chapter 3 of the 1998 Act, and
(iv) any occupational rehabilitation services that are being, or have been, provided to or for the worker, and
(v) such other matters as the Workers Compensation Guidelines may specify, and

(b) regardless of:

(i) whether the work or the employment is available, and
(ii) whether the work or the employment is of a type or nature that is generally available in the employment market, and
(iii) the nature of the worker's pre-injury employment, and
(iv) the worker's place of residence."

128. Mr Shina-Suleyman in his statement of 6 February 2019 noted that his capacity to work as certified by his general practitioner varied between four to eight hours per day three days per week up until 22 August 2018, after which time he was certified fit for work eight hours per day five days per week. The question then arises as to whether the assessment since that time should be revisited. Annexure A showed that the payment for which the Nominal Insurer is seeking reimbursement regarding weekly compensation ceased on 12 October 2018.

129. It is clear that, having regard to Mr Shina-Suleyman's education (he is a university graduate, having qualifications in interpreting, English literature, politics and International relations) and work experience (apart from his experience as an interpreter he has been unable to utilise his other qualifications and has worked as a labourer since arriving from Iraq in 1993), he is currently suited for employment as an interpreter.

130. Mr McManamey submitted however that the onus lay on Mr Shina-Suleyman to rebut the presumption created by s 145(5) that the certificate issued pursuant to s 145(1) was proof of its contents. He submitted that I would not be satisfied, as the only evidence of Mr Shina-Suleyman's ability to work as an interpreter came from Mr Shina-Suleyman's statement itself, and that the extent of his ability was limited to the Kurdish language.

131. Firstly, evidence from a worker as to his capabilities I find to be primary evidence which can be accepted. I note secondly that Mr Shina-Suleyman was able to converse with Jarwid in Farsi, and with Mahrous in Egyptian and Arabic. Thirdly, it appears that Mr Shina-Suleyman could also interpret from the Kurdish language, as also reported by Dr Stephenson. However, the generality of the evidence regarding Mr Shina-Suleyman's abilities to interpret does not enable me to assume that his credentials extended to an ability to interpret at a professional level into Farsi, Egyptian or Arabic

132. Mr Shina-Suleyman's case falls squarely within the current definition of suitable duties. I am unable to have regard pursuant to s 32A as to whether work as an interpreter is available, nor whether it is of a type or nature that is generally available in the employment market, nor as to the nature of Mr Shina-Suleyman's pre-injury employment, which was as a labourer (presumably because work as an interpreter was not actually available), or his place of residence. Moreover, the nature of the work would not require any overt physical activity that might affect the injuries he suffered whilst working for Mr Georges.

133. Balanced against those considerations however is the requirement pursuant to s 32A, which also provides for me to have regard to Mr Shina-Suleyman's age. He was born in 1956 and accordingly is 63 years old. It also needs to be borne in mind that he is still carrying the injuries and disabilities he mentioned in his statement of 6 February 2019 involving constant pain and restriction of movement in his back and left shoulder. These two factors, his age and his injuries, would have the effect of limiting Mr Shina-Suleyman's ability to do full-time work as an interpreter. I agree with the assessment made by the Nominal Insurer that in all circumstances Mr Shina-Suleyman would be capable of working for 15 hours per week. I accordingly find that Mr Georges has not been able to rebut the presumptions created by s 145 (5) of the 1987 Act.

134. I therefore dismiss the application.

The limits of s 145

135. As indicated, a question arose during the hearing the case as to the limitations of the application of s 145. This followed Mr Flett's submission that the section enabled me to make a determination regarding future payments of weekly compensation. A lively debate ensued, but as the parties were not then prepared to argue this issue, I made orders regarding written submissions.

136. Mr McManamey submitted that s 145 (3) was clear in its terms, and was concerned with the ability of an uninsured employer (relevantly) to challenge the contents of the notice issued pursuant to s 145 (1). The Commission is given power by virtue of s 145 (4) to determine that issue alone.

137. Mr McManamey argued that Mr Shina-Suleyman continued to receive weekly payments of compensation, and there were no proceedings before the Commission that raised any dispute as to that entitlement.

138. Mr McManamey referred to *Ballantyne & Anor v WorkCover Authority of NSW*[20] and *Raniere Nominees Pty Ltd v Daley*[21] in furtherance of those submissions.

139. For the Nominal Insurer, Mr Flett argued that Mr Shina-Suleyman gained no assistance from *Ballantyne,* which was concerned with whether the Commission had power to waive liability as part of its jurisdiction pursuant to s 145 (4), as subsection (2) gave the power of waiver to the Nominal Insurer alone. Mr Flett submitted that the judgement in *Raniere* expressly authorised the Commission to make orders regarding payments of compensation at large.

140. With regard to *Raniere No 2*, Mr Flett submitted that the judgement had to be seen in the context of an earlier decision between those parties, *Raniere Holdings P/L v Daley & Anor*[22]*,* which was concerned with the interpretation of s 144 of the 1987 Act, which has since been repealed and subsumed into the operation of s 145.

141. Mr Flett argued that there was a distinction between matters that were "part of the application" and those that were necessary for the Commission to consider in order to determine the application. Reference was made to *Galstyan and Markaryan t/as Rite Price Hair Care v WorkCover Authority of NSW*[23] and *Nohill Pty Ltd v GRE Workers' Compensation Insurance (NSW) Ltd*[24] in support of his submission that s 145 (1), (3) and (4) conferred a plenary power for the Court to determine the rights of all persons or bodies who

[20] [2007] NSW CA 239 (*Ballantyne)*
[21] [2006] NSW CA 235 (*Raniere No 2)*
[22] [2005] NSWCA 121 *(Raniere No 1)*
[23] [2006] NSW WCC PD 130 (*Galstyan)*
[24] (1995) 11 NSW CR 69 (*Nohill*)

may have an existing or potential interest because of insurance in respect of a claim for compensation.

142. The effect of these decisions, it was argued, was that the Commission's power was to consider the uninsured employer's liability at large, and took its jurisdiction beyond the scope of the s 145 (1) notice and certificate.

Mr Dickinson

143. For Mr Georges, Mr Dickinson submitted that the submissions of Mr Shina-Suleyman were misconceived. He adopted the submissions of the Nominal Insurer, and, referring to *Ballantyne,* relied on a passage from Basten JA that the function of the Commission pursuant to s 145(4)(a) was to determine whether payment by the Nominal Insurer was made in accordance with the 1987 Act.

144. Mr Dickinson also referred to s 145(4)(b), arguing that a broad discretion was thereby conferred on the Commission, and if jurisdiction were limited in the manner suggested by Mr Shina-Suleyman, the words "as the Commission thinks fit" would be otiose.

Nominal insurer in reply

145. Mr Flett in his further submissions maintained that there was a distinction that had to be drawn between the jurisdiction given to the Commission in s 145 (4) and the terms of s 145 (1). In practical terms, if the Commission found that the liability of the uninsured employer should be higher than the sum contained in the certificate issued under s 145 (1), any order would, because of the application of the extended jurisdiction, be able to extend to the period between the issue of the certificate and the date of hearing. The Nominal Insurer could then issue a further certificate in respect of that period so as to avoid a further hearing.

DISCUSSION

146. It must be borne in mind when examining this legislation, that amendments to it were commenced in 2007, having been made in 2003. This was adverted to by DP Roche in *Workers Compensation Nominal Insurer v Massoud*[25]. At [50] he said:

> "…While it is true that Div 6 of Pt 4 of the 1998 Act was amended in July 2007, and the Uninsured Liability and Indemnity Scheme (the Scheme) was repealed and replaced by the Nominal Insurer and the Insurance Fund, the substantive provisions from the repealed sections that are relevant to the issue before me have been retained, but with some modifications.
>
> 51. The power that previously existed in s 144 for the Compensation Court to hear and determine any application by a claimant under the Scheme is now found in ss 142A and 142B. However, rather than saying that the Commission may hear and determine any application by a worker and make 'such orders in relation to the application as the Commission thinks fit', as the repealed s 144(3) said, s 142A(1) provides that the 1987 Act and the 1998 Act apply to, and in respect of, a claim under Div 6 of Pt 4 'as if the Nominal Insurer were the insurer under this Act of the relevant employer at the relevant time'. The effect of the new provision is that the Nominal Insurer is directly liable to a worker, as if it were an insurer (s 159 of the 1987 Act)."

[25] [2012] NSWWCCPD 62

147. The learned DP continued:

> "53. The power that previously existed in s 144(5) for the Compensation Court to make an order providing for the reimbursement of the WorkCover Authority Fund is now found, with a subtle variation, in s 142B(2). Section 144(5) provided that '[a]n order under subsection (3) [of s 144] may provide for the reimbursement of the WorkCover Authority Fund under section 145'. Section 142B(2) provides that the 'Commission may make orders providing for the reimbursement of the Insurance Fund under section 145'.
>
> 54. The subtle change in s 142B(2), compared to s 144(5), namely, the omission of the words 'an order under subsection (3)', suggests that reimbursements are now exclusively dealt with by notice under s 145 and that the general power for the Commission to order reimbursement in the absence of a s 145 notice has been removed.
>
> 55. This change makes good sense because it allows the Nominal Insurer the freedom to settle claims expeditiously, without the need to have a contested hearing, and without the need to obtain consent from the uninsured employer. The Nominal Insurer's right to recover the compensation it has agreed to pay (or has paid) is not prejudiced by its actions because it has the right to issue a notice under s 145 seeking reimbursement.
>
> 56. The uninsured employer's rights are protected because it has the right, within the period specified in the notice, to apply to the Commission for a determination as to its liability in respect of the payment. If the employer does not dispute that notice within the time specified, the Nominal Insurer may recover the amount specified in it as a debt in a court of competent jurisdiction (s 145(6)).
>
> 57. Sub-sections (3) and (4) of s 145 are in the same terms now as they were in *Raniere Holdings*, save that 'the Commission' has been substituted for 'the Compensation Court'. Sub-section (5) of s 145 is also in the same terms except that 'the Nominal Insurer' has been substituted for 'the Authority'.
>
> 58. Once the nature of the amendments to Div 6 of Pt 4 are understood, it is clear beyond doubt that…. the principles discussed in *Raniere Holdings* apply to proceedings in the Commission….. It was open to the Commission to make the orders in the Consent Orders (s 142A). However, applying *Raniere Holdings*, there is no power in the Commission to order reimbursement unless the employer's liability to pay compensation to the injured worker has been determined or agreed *(Raniere Holdings* at [56]). …"

148. The principle under consideration in *Massoud* concerned an agreement reached between the injured worker and the Nominal Insurer for the payment of compensation in the absence of the uninsured employer. Applying *Raniere Holdings*, DP Roche upheld the Senior Arbitrator's determination that there was no jurisdiction to order the uninsured employer to repay the compensation thereby agreed unless and until, absent agreement, the Commission had determined that the employer was in fact liable to pay that compensation.

149. The principle at issue before me is as to whether any order made by me applies to payment of compensation beyond the amount and the date specified in the notice issued pursuant to s 145(1).

150. There is merit in the submissions advanced by Mr Shina-Suleyman that on a literal interpretation of the section, no power is thereby conferred.

151. In *Ranier (No 2)* Giles JA said at [19]:

> "19. Section 145(3) is clear in its terms, entitling the person on whom the notice had been served to apply within the period specified in the notice and as a corollary denying any such entitlement outside the period specified in the notice. Section 145(4) then confines the application which the Commission may hear and determine to an application so made, by the clear words 'any such application': the employer's submission takes no account of the word 'such'. The Commission's power to determine the person's liability in respect of the payments is enlivened only by the making of an application within the period specified in the notice."

152. The Nominal Insurer submitted that his Honour's dicta needed to be seen in context as he referred to the submissions made by the uninsured employer in that extract. I do not agree. *Ranier (no 2)* was concerned with the question of whether the time limit mandated by s 145(3) was mandatory or discretionary. Nonetheless, I do not accept that it is possible to read into the finding by Giles JA a gloss on the word "such" that extends its meaning to liability beyond the terms of the notice. The title of s 145 after all is: "Employer or Insurer to Reimburse Insurance Fund". I am accordingly satisfied that the purpose of the legislation is confined the reimbursement of payments made as defined by s 145(1) and (5).

153. In *Ballantyne* Basten JA considered the purpose of the various provisions in s 145. He said at [106]:

> "Consistently with *Raniere Nominees (No. 2)* the powers of the Commission are conferred for the sole purpose of determining an application made under sub-s (3), as it is 'any such application' which the Commission is empowered to hear and determine, and no other. That application must be one as to the 'liability in respect of the payment concerned', being a liability of the person served with a notice under sub-s (1) in respect of a payment identified as having been made by the Authority to or in respect of an injured worker. As already discussed, the person's 'liability' will depend, in broad terms, on the following factors:
>
> (a) was the person properly served with a notice under sub-s (1);
> (b) did the notice require payment of an amount not exceeding the payment made by the Authority;
> (c) was the person served the employer or an insurer of the employer of the injured worker;
> (d) was the payment made by the Authority a payment of "compensation in accordance with this Act".

154. The Nominal Insurer sought to distinguish his Honour's remarks on the basis that the issue in *Ballantyne* concerned the subject of waiver, and whether the Commission had power to waive an uninsured employer's liability when that power was expressly granted to the Nominal Insurer by virtue of s 145 (2). Accordingly, his Honour's comments could be interpreted as leaving the uninsured employers liability "at large". I reject that argument also. There is no reservation made in his Honours comments that suggests that the words "any such application" should extend beyond the parameters of the notice under s 145 (1).

155. I was not assisted by the decisions in *Galstyan* and *Nohill.* The generality of the overview of the purpose of s 145 as permitting appropriate orders adjusting the rights of the parties including existing or potential liability did not come to grips with the issue before me. The "potential liability" I do not read as indicating potential liability beyond the terms of the notice.

156. Mr Georges adopted the submissions of the Nominal Insurer, and I reject his submissions accordingly. Mr Georges also submitted that I could read the power given to the Commission in s 145 (4) (a) as referring to a determination pursuant to subparagraph (b) regarding the payment of compensation under the 1987 Act which would otherwise be payable. As I understood Mr Dickinson's submission, the words "as the commission thinks fit" bestows on the Commission a discretion to go beyond the terms of the s 145 (1) notice and consider the quantum of compensation payable thereafter.

157. A similar argument was raised by the Nominal Insurer in its further submissions. It addressed the hypothetical situation where the Commission found that the uninsured employer was liable for higher payments than had in fact been made.

158. There is a short answer to these submissions, and that was adverted to by Mr Shina-Suleyman. The Commission is a creature of statute. It has no inherent jurisdiction and cannot make orders beyond the terms of the Compensation Acts. The interpretation advanced by the Nominal Insurer and Mr Georges essentially embraces the use of a fiction – that within the language of s 145 can be found an intention that the legislature authorised a power to go beyond the terms of the application pursuant to subsection (3) and accordingly go beyond the terms of the notice issued pursuant to subsection (1). I decline to so find.

159. I was advised by counsel that Mr Shina-Suleyman's weekly payments are currently calculated on the basis that he has no current work capacity. This is in contradiction to the contents of the notice, and of my determination. In order to reduce that amount to the appropriate rate, will be necessary for a dispute to be created. The Commission has no jurisdiction to entertain any application before a specific dispute is created by virtue of ss 287, 288, 289 and 289A of the 1998 Act. A dispute about reimbursement pursuant to s 145 would not raise an issue regarding future payments of compensation.

DECISION

160. For the above reasons:

    (a) The application by Mr Georges is dismissed, and

    (b) A claim pursuant to s 145 of the 1987 Act is confined to the terms of the notice issued pursuant to s 145(1), and the Commission has no jurisdiction to enquire beyond it pursuant to s 145 (4).