WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **3696/20**
Applicant: **Mostafa Naderihonar**
First Respondent: **398 Investment Pty Ltd**
Second Respondent: **Workers Compensation Nominal Insurer (iCare)**
Date of Determination: **17 February 2021**
Citation No: **[2021] NSWWCC 48**

The Commission determines:

1. The second respondent is to pay weekly compensation:

    (a) pursuant to s 36 of the *Workers Compensation Act 1987* (the 1987 Act) at the rate of $1,368 to 12 March 2019, and

    (b) pursuant to s 37 from 13 March 2019 to date and continuing at the rate of $1,152.

2. The second respondent is to pay Mr Naderihonar's medical and related treatment expenses pursuant to s 60.

3. Pursuant to s 145B(2) and s 145 of the 1987 Act, the first respondent is to reimburse the second respondent in respect of all payments made pursuant to orders 1 and 2.

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

Catherine McDonald
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 CATHERINE McDONALD, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Disputes Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Mostafa Naderihonar claims that he was a worker employed by 398 Investment Pty Ltd (398) as a painter. He alleged that he suffered an injury to his cervical spine, lumbar spine and right knee as a result of the nature and conditions of his employment between 2014 and 2 October 2018.

2. Though there is no evidence about the insurance status of 398, the matter proceeded on the basis that it was not insured. The claim was defended by both 398 and the Nominal Insurer. Both denied that Mr Naderihonar was a worker employed by 398 and that he suffered an injury.

PROCEDURE BEFORE THE COMMISSION

3. The matter had a complex procedural history. It is relevant to note that Mr Naderihonar had commenced proceedings which were discontinued at conciliation in 2019.

4. It was listed for telephone conference on 31 July 2020 when 398 did not appear. I granted leave to issue a direction for production for its records.

5. The matter was listed for conciliation conference and arbitration hearing by telephone on 30 September 2020. Mr Tanner of counsel appeared for Mr Naderihonar, Mr Beran of counsel appeared for the Nominal Insurer and Mr Claridge of counsel appeared for 398.

6. All of the time allocated for conciliation and arbitration was taken up with interlocutory issues.

7. For reasons given on 30 September and recorded, I declined 398's application for an adjournment and I granted leave to the Nominal Insurer to rely on a statement obtained from Mr Zhang Hui, the director of 398. Mr Zhang said in that statement that he paid Mr Naderihonar on behalf of another company, Crown Home (NSW) Pty Ltd (Crown Home).

8. Again for reasons which were recorded, I declined to grant leave to the Nominal Insurer to rely on two reports by Dr S Rimmer dated 7 September 2020 in respect of an examination on 28 August 2020. No steps had been taken to arrange that examination until after the telephone conference on 31 July 2020 and no orders were sought at the telephone conference in respect of it.

9. I granted leave to issue a direction on Crown Home and extended the time for 398 to comply with the direction for production. I ordered that the parties prepare submissions in writing.

10. Mr Naderihonar's solicitors requested a further telephone conference when no documents were produced by either 398 or Crown Home. It took place on 18 November 2020. The order for written submissions was rescinded and further directions with respect to production of documents were made. The matter was listed for hearing and I granted leave to Mr Naderihonar's representatives to cross examine Mr Zhang and Ying Xu, the director of Crown Home, and leave to issue a summons for the attendance of Ms Ying.

11. The matter was listed for conciliation conference and arbitration hearing on 13 January 2021 by video conference when the same counsel as before appeared. After 9.00 am on that day, Mr Zhang provided a small number of bank statements showing that 398 made at least one payment to Mr Naderihonar. As a result of the production of those documents, Mr Tanner did not press the application to cross examine Mr Zhang. There was no appearance by Ms Ying.

12. The parties agreed that the issues to be determined were whether Mr Naderihonar was a worker, whether he suffered injury in the course of his employment, the extent of his capacity for work and his credit.

13. The parties agreed that, if I found that Mr Naderihonar was a worker employed by 398, his pre-injury average weekly earnings were $1,440.

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 supporting documents;

    (b) Reply of each respondent;

    (c) Mr Naderihonar's Application to Admit Late Documents dated 13 August 2020 and 25 September 2020;

    (d) 398's Application to Admit Late Documents dated 29 September 2020;

    (e) the Nominal Insurer's Application to Admit Late Documents dated 23 September 2020, and

    (f) the bank statements provided by Mr Zhang on the morning of the hearing.

15. There was no oral evidence.

16. The parties agree that the man referred to as John in Mr Naderihonar's evidence is Mr Zhang.

Lay evidence

17. Mr Naderihonar said in his statement that he migrated to Australia in 2012 and first obtained work in 2014, when he started working for 398 as a labourer. He knew the "owner" of the company as John and John directed him and other workers to sites at which 398 was working. He was paid cash for the labouring work he did.

18. In 2016, he obtained an ABN. He said that other Iranian immigrants had told him that he would need it to obtain work in the construction industry.

19. In 2017, Mr Naderihonar told John that he had worked as a painter in Iran. John offered him work as a painter for $50 per hour and that he would work Monday to Friday and sometimes Saturday. He would need to present John with tax invoices showing an ABN. Mr Naderihonar started painting for 398 in December 2017. He performed interior and exterior painting at an apartment block in Bonnyrigg.

20. Mr Naderihonar said that John directed him as to the painting he was to perform. Showing him the parts of the property to be painted and advising him as to the colour and type of paint. All of the paint, tools and equipment were provided by John. John sent him to Bunnings to buy material on the company account.

21. Mr Naderihonar worked for John from December 2017 to October 2018. He presented John with invoices which are attached to his statement and John provided him with cheques in payment. He also attached bank statements to his statement. Mr Naderihonar said that he did not work for anyone else during that time.

22. Mr Naderihonar said that the work was arduous and required him to lift, flex and twist his neck and hold it in awkward positions for long periods. He noticed increasing pain in his neck and right arm which became acute on 2 October 2018 but did not see a doctor because he thought it would go away and he did not want to make a big deal out of it.

23. In early October 2018, John told him that his job was over. Mr Naderihonar then obtained work as a painter with Mushtaq Hussa for whom he worked for two periods of four and five days. The work was lighter but he stopped work in November 2018 because work was an ordeal. He said that the payments from Mr Hussa into his bank account were made on 8 and 13 November. He explained that a deposit in December 2018 was the late payment of invoice 328418 by 398.

24. Mr Naderihonar saw his general practitioner, Dr Noorzad but Mr Naderihonar felt that Dr Noorzad did not take his complaints seriously. He had injections into his shoulder at Auburn Hospital and was referred for an MRI scan. He decided that he needed to find a new general practitioner and received a recommendation to go to Workers Doctors in Parramatta where he saw Dr Calvache-Rubio on 8 February 2019. He was given a certificate of capacity in the SIRA form and told that he could make a workers compensation claim. As at May 2020, he had not worked for over a year and said that he continued to struggle with severe neck pain radiating to his right arm.

25. Photographs of carbon copies of requests for payment are attached to his statement. They record Mr Naderihonar's name and a number which I presume to be his ABN. They appear to be addressed to "Jan" and refer to either painting services in Bonnyrigg, Goldfinger painting or Blue Rose painting. Each records an amount and a number of days.

26. Mr Naderihonar also attached bank statements for the period from 13 December 2017 to 22 August 2019 which record receipt of most of the amounts set out in the invoices.

27. Another copy of the invoices was attached to the Application to Admit Late Documents dated 25 September 2020, including invoice 406 which was not attached to the ARD.

28. Without providing an exhaustive summary of those invoices and statements, I note that invoices ending with the numbers 404, 405, 406, 407, 408, 410, 411, 414 and 418 match entries for cheques deposited in the bank statements. The amount paid in respect of 413 is different, being $6,000 rather than $6,400 as is 417. There are records in respect of three payments from Mr Hussa in November 2018. There are no other deposits to the account from the time it was opened in December 2017 and the date Mr Naderihonar ceased working at the Bonnyrigg site other than transfers from another Commonwealth Bank Account. Invoice 420 matches a cheque deposit in November.

29. Mr Naderihonar prepared a supplementary statement dated 12 August 2020. He said that when he was working for Mr Hussa he was only painting doors and door frames which meant that he did not have to look up a lot and the work was carried out indoors. While working for 398 he painted around 140 units, including ceilings and balconies, which required him to look up a lot. He was pushed to hurry that work. The building had not been completed which required him to carry paint and tools up scaffolding. He said that he was unaware of workers compensation until he saw Dr Calvache-Rubio in February 2019.

30. Mr Naderihonar also relied on a very short statement from Hosein Mohsenzadeh who said that he, his "staff" and Mr Naderihonar worked for John for 398 for a set rate and under his direction.

Documents

31. Mr Naderihonar completed a claim form on 8 February 2019. The Nominal Insurer wrote to him on 12 March 2019 stating that it had a reasonable excuse not to pay compensation. On 28 March 2019 it issued a notice under s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) stating that Mr Naderihonar had provided insufficient evidence to support the contentions that he was a worker or that he had notified 398 of the injury. The Nominal Insurer sought an authority to obtain documents from Dr Noorzad.

32. The Nominal Insurer issued another s 78 notice on 14 June 2019 denying that Mr Naderihonar was a worker employed by 398 and stating that insufficient evidence had been provided to substantiate employment and earnings or that the earnings were from 398. It denied that Mr Naderihonar was a deemed worker and said that the evidence demonstrated that he operated his own business because he had an ABN, issued invoices and reported the main business activity of his business as painting. It concluded that even if he did undertake work for 398 it was incidental to a trade or business carried out in his own name. It said that the bank statements showed that he worked after ceasing work with 398.

33. Mr Naderihonar's 2018 tax return shows that he declared income of $26,381 and that no tax was deducted. It said that his business activity was painting and that he had commenced business in that year. The total income of the business was $40,700 and he claimed deductions for rent, depreciation, motor vehicle expenses and other expenses. Those other expenses included mobile phone costs, protective clothing and materials among other things.

34. The Nominal Insurer relied on an ABN search which showed that Mr Naderihonar's ABN had been active from April 2016 to March 2020.

35. As noted above, there is no evidence as to whether or not 398 had insurance but the matter proceeded on the basis that it did not.

Zhang Hui

36. Mr Zhang prepared a statement dated 11 September 2020. The statement was prepared with the assistance of an interpreter but is repetitive and rambling.

37. He said that he was a director of 398 and he employs five people. He acts as a developer, buying land, obtaining plans and a development application and then giving the job to a builder.

38. Mr Zhang said that he met Mr Naderihonar about four or five years ago, that he had never employed him and that he worked for others as a contractor. Mr Zhang said he mostly employs Chinese people. He started a job in Bonnyrigg in 2016 and painting began in 2017. He said that the builder was Crown Home and that Mr Naderihonar was subcontracted to Crown Home. Mr Zhang said he paid him $400 per day which is "subcontractor rates." His "friend" – whom I presume to be Mr Mohsenzadeh – was paid as a separate contractor and sacked at the same time. The invoices showed the ABN and Mr Zhang paid them on behalf of Crown Home.

39. Mr Zhang said that the builder sacked Mr Naderihonar "because he wasn't very good" and the manager Jin Zhang told him and his friend not to return on Monday. The friend was also paid as a subcontractor and had a long name. Mr Naderihonar worked on 2 October 2018 but "we" didn't use him after 2018 and another subcontractor finished the work which was completed two months before the statement was prepared. He said that Mr Naderihonar did not work as a labourer in 2016 before working as a painter.

40. The bank statement for 389 provided by Mr Zhang on 13 January 2021 is statement number 44 from 22 June 2018 to 24 July 2018. It shows a mix of business expenses and apparently personal hotel expenses for the period. The business expenses are both Visa debit card expenses paid to Bunnings and other suppliers and cheques. Cheque number 2031 for $9,600 matches Mr Naderihonar's invoice 411 and the payment which appears in his account on 9 July 2018 as a result of the deposit of a cheque at the Bonnyrigg branch of the bank. There are no other payments from 398 to Mr Naderihonar in the period covered by the bank statement.

Medical evidence

Auburn Hospital

41. Notes from Auburn Hospital show that Mr Naderihonar attended on 25 September 2018 by ambulance complaining of abdominal pain, dizziness and vomiting. He had previously attended the hospital in 2017 for flu-like symptoms.

42. Mr Naderihonar went to the Emergency Department again on 23 October 2018 and was diagnosed with an upper respiratory tract infection. The notes recorded that he "works as a painter."

43. On 11 December 2018 Mr Naderihonar went to Lidcombe Hospital complaining of left arm pain. The triage notes record that he presented with right shoulder, arm and neck, muscle pain for two months, worse in the last three days. The physical examination notes record that there was "no c-spine tenderness". A lignocaine injection was administered "to the sore muscle" and his general practitioner was requested to organise physiotherapy and an MRI scan.

44. Mr Naderihonar went to Auburn Hospital again on 1 February 2019 complaining of chronic neck pain with radiculopathy and bilateral shooting arm pain which subsided about three months ago with treatment with Lyrica. He had had a steroid injection the previous day. It was noted that he had difficulty with neck extension secondary to neck pain.

45. He attended the hospital again on 20 February 2019 for the removal of multiple lipomas on both arms and his left leg. He went back to the hospital that evening complaining of a foreign body in his right eye since the surgery. Mr Naderihonar returned to Auburn Hospital on 11 March with dehiscence of one of the wounds. It was noted that he had failed to attend the clinic for follow up.

General practitioners

46. Mr Naderihonar saw Dr Noorzad in 2016 and 2017 for general medical conditions. On 19 April 2018, he saw Dr Noorzad asking for analgesia for back pain, saying that his general practitioner was in Blacktown and that he was not sure of his medication. The doctor noted that Mr Naderihonar did not look to be in pain and declined further examination but nonetheless prescribed medication. He saw Dr Noorzad for general medical conditions in June, July and September 2018 and on the July visit complained of back pain.

47. Mr Naderihonar saw Dr Noorzad on 12, 23 and 30 October and on 1 November when he did not mention neck or right arm pain. On 10 November he complained of "right knee pain for years" and an MRI scan was ordered.

48. On 12 December 2018, Dr Noorzad recorded:

> "woke up with right side neck and shoulder pain, radiating to his right arm he has been to hospital see the discharge letter."

49. Mr Naderihonar was referred to physiotherapy. On 17 December 2018, Dr Noorzad noted that he was seeing the physiotherapist and complaining of upper back and shoulder pain and neck pain radiating to his right arm. Dr Noorzad noted that the range of shoulder and cervical spine movement was normal, there was no midline tenderness and no focal neurological signs. Dr Noorzad ordered an MRI scan on 17 December 2018 which was carried out on the same day. The conclusion was:

> "1. Single level disc disease at C6/7 with a large right central/foraminal and mid-central disc osteophytic extrusion and a superimposed annular tear. This leads to compression and displacement of the right descending C8 nerve root and mild impingement on the right exiting C7 nerve root. This likely explains the patient's symptoms. Please correlate with appropriate levels. At this level, there Is also some contact on the left descending C8 and left exiting C7 nerve roots due to background disc disease. Mild canal stenosis.
>
> 2. Moderate, diffuse facet joint arthritic change."

50. Mr Naderihonar saw Dr Noorzad on the following day when he prescribed Lyrica and prepared a referral to Dr J van Gelder. On 20 December Dr Noorzad wrote to the physiotherapist again.

51. An invoice from Castlereagh Imaging suggests that Mr Naderihonar underwent a paravertebral nerve block at the request of Dr Rao on 31 January 2019.

52. Dr Calvache-Rubio prepared a report dated 8 February 2019 after his first consultation. He said that Mr Naderihonar suffered an injury to his neck, back and right knee due to repetitive heavy lifting, bending and twisting. He ceased work on 2 October 2018 and tried to do a lighter job but could not cope with it. He considered that Mr Naderihonar would benefit from a multi-disciplinary pain management program and referred him for physiotherapy and examination by an orthopaedic surgeon.

53. Mr Naderihonar saw Dr Noorzad for the last time on 4 March 2019 when he asked that his file be sent "to the workcover." Dr Noorzad noted that Mr Naderihonar had seen Dr Rao who referred him for a C5-C6 injection. Again Dr Noorzad noted that Mr Naderihonar's spinal movements were normal, there was no midline tenderness and no focal neurological signs.

54. Dr Calvache-Rubio provided Mr Naderihonar with a series of certificates of capacity. From 14 May 2019 he began to certify him fit for some work on one seven hour day per week with a lifting capacity of less than 5 kg, no ability to push or pull or to bend, lift or squat. He should rotate posture and required and was fit for "TAFE only."

55. Mr Naderihonar saw Dr B Singh, orthopaedic surgeon, on 31 August 2019. He had a history that Mr Naderihonar had right neck and shoulder symptoms since an injury in October 2018 suffered while spray painting at a height. Dr Singh considered that a disc extrusion on the right at C 6-7 giving rise to foraminal stenosis and some deformation of the spinal cord was likely to be responsible for his symptoms.

Dr Endrey-Walder

56. Mr Naderihonar's solicitors qualified Dr P Endrey-Walder, who reported on 9 July 2019 and 22 June 2020. Some important aspects of Mr Naderihonar's history appear in what he told Dr Endrey-Walder rather than his statement.

57. In his first report, Dr Endrey-Walder said that Mr Naderihonar was required to do rendering and grinding as well as painting. Mr Naderihonar said that all of his daily work was performed with his arms elevated and his neck extended, looking up. Dr Endrey-Walder recorded that Mr Naderihonar saw Dr Noorzad after suffering symptoms for about a month but Dr Noorzad told him it was a muscular strain. He went to Auburn Hospital with severe neck pain going down his right arm and was given an injection. He then ceased work. He went back to Dr Noorzad and asked for an MRI scan and was referred to Dr Rao, neurosurgeon. He then saw Workers Doctors. Dr Endrey-Walder said that Mr Naderihonar originally suffered pain at the back of his neck but soon began experiencing pain towards the right shoulder which extended down his arm.

58. Dr Endrey-Walder described his examination and commented on the MRI scan. He said that Mr Naderihonar suffered a right-sided C6-7 intervertebral disc protrusion as a result of the nature and conditions of his work with 398. Dr Endrey-Walder said that acute disc protrusions sometimes recede with the passage of time and considered that had happened here because Mr Naderihonar had no radiculopathy. He considered that nerve conduction studies were warranted. He considered that Mr Naderihonar was unfit for work and that his limited skills and difficulty with English made his long term prospects meagre.

59. In his second report, Dr Endrey-Walder said that Mr Naderihonar's English was reasonable, though he did have the assistance of a Farsi interpreter on the telephone. Dr Endrey-Walder noted that the assessment was for the assessment of impairment. Again, his report contains important elements of Mr Naderihonar's case. Mr Naderihonar told him that he obtained lighter work in late 2018 but he worked only for two periods – one of four and one of five days. Mr Hussa declined to provide further work because he saw that Mr Naderihonar was in pain. Dr Endrey-Walder asked Mr Naderihonar specific questions about the work. Mr Naderihonar said that he suffered the same pain as before while working for Mr Hussa. The work for Mr Hussa was casual ad hoc work. Dr Endrey-Walder wrote:

> "On repeated questioning he was adamant that his symptoms were neither worse nor better during those few days when he worked for Mr Hussa when compared to the neck and right shoulder condition from 2 October 2018 onwards."

60. Dr Endrey-Walder said that Mr Naderihonar had significant neck pain and intermittent right arm pain. Mr Naderihonar told him that his range of movement at the right shoulder was better . Dr Endrey-Walder said that the limited range of cervical movement was a concern at Mr Naderihonar's age but there was no evidence of radiculopathy. He considered that Mr Naderihonar should be referred to an orthopaedic surgeon or neurosurgeon and that he may need consideration for surgery if his symptoms became intractable. Dr Endrey-Walder said that he asked Mr Naderihonar in detail about the condition during his subsequent employment and Mr Naderihonar claimed that the work rekindled the same symptoms and that Mr Naderihonar did not think there had been an exacerbation or aggravation of his condition. On the basis of that history, Dr Endrey-Walder accepted that the condition was related to the work with 398.

61. The Nominal Insurer did not rely on any medical evidence which was not attached to the ARD and did not arrange an independent medical examination until after the telephone conference on 31 July 2020. Dr Rimmer's reports were not admitted.

SUBMISSIONS

62. The submissions of counsel were recorded and I have summarised them below.

63. Mr Tanner took me at length to the decision of *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3*[1]*)* (*On Call*). He said that the evidence in Mr Naderihonar's statement showed that he was initially working as a subordinate labourer at the direction of "John". Once he began to work as a painter, he was directed as to how he was to perform the work, which would not be so if he was a contractor. He obtained an ABN which was consistent with the practice in the building industry which purports to deprive workers of the protection of industrial legislation.

64. The bank statement relied on by 398 showed that there were purchases at Bunnings which was consistent with Mr Naderihonar's statement. Mr Naderihonar's own bank statements did not show purchases of that kind but they would be expected to if he was a contractor.

65. Mr Tanner said there was no evidence that Mr Naderihonar had other customers as a contractor. He issued invoices because he was asked to do so by the more powerful party to the contract. The payment of those invoices by cheque is acknowledged by 398 and the suggestion that another company was the employer is not established by evidence. He said that Mr Zhang had the opportunity to provide evidence to show that Crown Home was the employer but had failed to do so and failed to produce documents. If Mr Zhang was paying Mr Naderihonar on behalf of Crown Home one would expect there to be invoices. Despite the directions for production, the only document produced was the bank statement which confirmed payment to Mr Naderihonar.

66. Referring to *On Call*, Mr Tanner said that it was necessary to look at the substance of the relationship, not the label that 398 sought to place on it. Beneath the superficial form of the invoices, Mr Naderihonar was a worker under the direction and control of Mr Zhang. Mr Tanner noted the statements in *On Call* about the focal point around which the indicia of employment can be examined and that Bromberg J referred to the decision of the High Court in *Hollis v Vabu Pty Ltd* [2] (*Hollis*) and the statement that:

> "the distinction between an employee and an independent contractor is 'rooted fundamentally' in the fact that when personal services are provided to another business, an independent contractor provides those services whilst working in and for his or her own business, whereas an employee provides personal services whilst working in the employer's business."

67. Mr Tanner said that an independent observer would see Mr Naderihonar as a manifestation of Mr Zhang's business and that it cannot be said that Mr Naderihonar was operating his own business. There was no evidence that Mr Naderihonar had a business and if he did, he was not operating it during the relevant period between December 2017 and 2 October 2018. A business aspires to have a value and goodwill. There was no evidence of system, repetition and continuity in the pursuit of profit[3]. Mr Naderihonar did not generate profit – he was paid a flat rate for his time and did not take risks as an entrepreneur would.[4] Mr Naderihonar was integrated into Mr Zhang's business, he had no independence and any goodwill generated by his work was goodwill for Mr Zhang. There was no evidence of his own expenditure and no evidence that he used his own equipment but even if I was to accept Mr Zhang's evidence on that issue, he was still working under the direction of Mr Zhang. Mr Naderihonar was therefore a worker.

68. With respect to injury, Mr Tanner said that common sense suggests that Mr Naderihonar had suffered an injury working above shoulder height for eight hours a day and that his description of the tasks he performed – particularly spending long periods looking up was not contested. The findings on the MRI scan explained his symptoms.

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[1] [2011] FCA 366; 279 ALR 341.
[2] [2001] HCA 44; (2001) 207 CLR 21.
[3] On Call at [212].
[4] On Call at [213].

69. Mr Tanner said that I would accept Dr Endrey-Walder's opinion with respect to Mr Naderihonar's capacity and that it was unlikely that assessment would result in the ability to do any real job.

70. Mr Claridge began his submissions by considering the medical evidence. He said that Mr Naderihonar's evidence that he was in acute pain when he ceased employment on 2 October 2018 was contradicted by the medical evidence. He stopped work because his job was terminated and it would be expected that if he had suffered an injury he would have been to a doctor. Mr Claridge noted that there was no mention of neck and arm pain when he went to Auburn Hospital only one week before Mr Naderihonar ceased work. Similarly, if he was in acute pain, it might be expected that Mr Naderihonar would take time off work but he found other work straight away.

71. Mr Naderihonar saw Dr Noorzad on half a dozen occasions before he complained of neck pain on 12 December 2018, after he had worked nine days for Mr Hussa. The complaint to Auburn Hospital of two months' pain on the previous day suggested the pain commenced nine days after ceasing work. Mr Claridge said it was relevant that Mr Naderihonar denied suffering an injury but said that he woke up with pain and that the genesis of the claim was the information provided by Dr Calvache-Rubio on 8 February 2019. Notably, Dr Calvache-Rubio did not have a history of a gradual development of the condition as a result of painting.

72. Mr Claridge said that Mr Naderihonar had deceived Dr Endrey-Walder about the work he had done for Mr Hussa and that I would not find he was a witness of truth. If he did suffer a gradual process injury, the last relevant employer was Mr Hussa because there was no complaint before 12 December 2018. Mr Claridge adopted the submissions to be made by Mr Beran with respect to the issue of worker.

73. Mr Beran said that the real issue was whether Mr Naderihonar was a worker or deemed worker and that a forensic examination of the documents showed that the matter was not as clear cut as Mr Tanner said. Mr Beran said that I would find that Mr Naderihonar was not a witness of truth with respect to his work activities. His tax return showed that he did pay for painting supplies and that he claimed considerable deductions.

74. Mr Beran said that the omission of invoices ending in 406, 409, 412 and 416 – every second to fourth invoice – suggested that Mr Naderihonar was working for others. Invoices 419 and 420 were issued to Mr Hussa. The lack of those invoices suggests that Mr Naderihonar was holding himself out as a painter and that he cannot prove he was working exclusively for 398. The bank statements also showed a payment of $2,000 from Merzad Shah.

75. He said that the 2018 tax return did not show any earnings as an employee including during the period when he was paid cash in hand. The claim for 5,000 business kilometres did not reflect a short daily commute between Merrylands and Bonnyrigg. Deductions were also claimed for tools and equipment. Those indicia were against a finding of employment or deemed employment because Mr Naderihonar was doing work for others.

76. Mr Beran said that the failure to cross examine Mr Zhang meant that his evidence was not impugned and that I should accept that 398 was an agent for Crown Home. He said that I need not be concerned about the references to Goldfinger and Blue Rose on the invoices because Mr Zhang conceded he had paid them.

77. With respect to the question of injury, Mr Beran said that it beggars belief that Mr Naderihonar would not see a doctor for the particularly acute pain that he described but did go to the Emergency Department of Auburn Hospital for a sore throat. He also said that the history with respect to subsequent employment was difficult to accept. Mr Beran said that medical records showed that Mr Naderihonar was 175 cm tall and unless the doorframes he was painting were very low, he would have been looking up to paint them. He did not say he was using a stool or scaffolding so it was ludicrous to suggest that was lighter work.

78. Mr Beran also submitted that the references in the medical notes from December 2018 to pain for two months dated the onset to the period when Mr Naderihonar was working for Mr Hussa. Mr Naderihonar saw Dr Noorzad on four or five occasions after he ceased work with 398 before he complained about his neck. He said, considering the statement in *Mason v Demasi*[5] that is was difficult to accept that he complained of pain on those occasions and the doctor did not record the complaints.

79. He said that the report from Dr Calvache-Rubio on 8 February 2019 records a wealth of complaints. Those with respect to Mr Naderihonar's back and right knee arose at an earlier point in time but Dr Calvache-Rubio attributed them to the injury, indicating that Mr Naderihonar had given an incorrect history. Similarly, Dr Endrey-Walder's report was based on an incorrect history which did not provide a fair climate for him to express an opinion. Mr Beran accepted that there was no competing medical evidence but said that I should apply a common sense test of causation, determine that the injury was a disease and attribute it to the subsequent employment.

80. With respect to incapacity, Mr Beran said that the evidence was sparse but that it was likely Mr Naderihonar was fit for a sedentary occupation, work as a "lollypop person" or a ticket collector.

81. If I found that Mr Naderihonar was a worker and ordered payment of compensation, Mr Beran said that the Nominal Insurer sought an order for recovery from 398 under s 145 of the *Workers Compensation Act 1987* (the 1987 Act).

82. In reply, Mr Tanner said that there was no evidence that Mr Naderihonar suffered a disease injury and that the only evidence with respect to the work he did for Mr Hussa was in Mr Naderihonar's supplementary statement. There was no basis to conclude that Mr Naderihonar was standing on the floor rather than a box when painting the door frames and no attempt was made to explore that evidence. In any event, there is a difference between painting a door frame and painting a whole room.

83. Mr Tanner said that Dr Endrey-Walder dealt with the correct history. The gaps in the contemporaneous evidence should be considered in light of Mr Naderihonar's evidence that he lost confidence in his general practitioner.

84. With respect to the invoices, Mr Tanner noted that the Nominal Insurer's submissions relied on impermissible assumptions. There are a number of possible explanations for missing invoices besides the conclusion that they were issued to someone else. The conclusions which Mr Beran sought to draw were impermissible in the absence of cross examination. Similarly, he argued that the failure to cross-examine Mr Zhang cannot be criticised when he failed to comply with the direction for production other than to produce one bank statement on the morning of the hearing.

FINDINGS AND REASONS

85. The case presented by the Nominal Insurer is scant. There is no evidence of significant investigation of the claim and no independent medical examiner was qualified until it was too late for Mr Naderihonar to meet his report. The only evidence the Nominal Insurer obtained was a short statement from Mr Zhang, prepared by an investigator in a fairly rudimentary way and without exploring the contentions he made. Neither the Nominal Insurer nor 398 sought to obtain documents from Crown Home to make good the case on which it relied.

86. There is no evidence about why 398 did not have insurance.

[5] [2009] NSWCA 227.

87. 398 failed to comply with a detailed direction for production, suggesting a lack of understanding of its obligations as a litigant in the Commission. I was told that it failed to participate in the previous proceedings.

88. The outcome of the case is substantially influenced by the lack of preparation of the claim by both respondents.

Evidentiary issues

89. Mr Beran sought to draw conclusions from some of the evidence - for example, he said that the omission of certain invoices from those attached to Mr Naderihonar's statement supported the contention that he was running a business and working for others during the period relied on. One of those invoices (406) is in fact attached to an Application to Admit Late Documents.

90. One possible explanation is that on which Mr Beran relied - that they were issued to persons other than 398. Equally, there are other explanations, such as the invoices were not issued or the page of the invoice book was spoilt. A careful review of Mr Naderihonar's bank statements shows that he banked cheques corresponding to the amounts of invoices issued and that there were no other substantial deposits into the account during the period Mr Naderihonar was working at the Bonnyrigg site. A "reasonable excuse" letter sought some information on 12 March 2019 and a s 78 notice issued two weeks later. It does not appear that the Nominal Insurer pressed Mr Naderihonar for any other financial information.

91. As Mr Tanner submitted, the conclusion which Mr Beran urged on me had not been put to Mr Naderihonar in cross examination. In Commission proceedings, cross examination may not be necessary to afford procedural fairness because documents are exchanged before the hearing. The rule in *Browne v Dunn*[6] is a rule of procedural fairness, as Roche DP said in *Prestige Property Pty Ltd v Rafiq*[7] *(Rafiq).*

92. In *New South Wales Police Force v Winter*[8] (*Winter*), Campbell JA quoted from *Aluminium Louvres & Ceilings Pty Limited v Zheng*[9] (*Aluminium Louvres*):

> "In *Aluminium Louvres* Bryson JA noted, at [22], that s 354 *WIM Act* , and other provisions of the *WIM Act* , give the present Commission a wider range of discretionary choices about the procedure appropriate for a particular case than existed under the *Workers Compensation Act* 1926 . He said, at [25]:
>
> > 'The requirements of the rules for information to be lodged in advance and for statements revealing the cases of parties to be made in advance, taken with the width of the sources of information on which the Commission is authorised to act and the ways in which it is authorised to proceed, mean that assumptions upon which common law trials are conducted should not be readily carried over when testing contentions that a hearing before an Arbitrator was not conducted in a fair way.' "

93. His Honour said in *Winter*:

> "In the present case the exchange of documents between the parties prior to the oral hearing would be sufficient to have notified the Respondent that there was a live dispute about whether he suffered from a mental condition of sufficient seriousness to warrant classification as a *'psychological injury'* . It would have been

[6] (1894) 6 R 67.
[7] [2006] NSWWCCPD 355.
[8] [2011] NSWCA 330.
[9] [2006] NSWCA 34.

> sufficient to notify him that there was a live issue about whether the reason for his absence from work since 8 September 2008 was a psychological injury, rather than that he had undergone difficulties at work that he found disagreeable, even intolerable, but that had not precipitated a psychological injury. It would also have been sufficient to notify him that there was a live dispute about whether he was suffering any ongoing incapacity.
>
> However, the exchange of documentation before the hearing would not have been sufficient to inform the Respondent that a submission was to be made that as at 8 September 2008 no diagnosis of PTSD had been made, that the theory that he was suffering from PTSD had its origins in his union, or that his statement incorrectly created the impression that Dr Gordon had diagnosed him with PTSD on 8 September 2008."

94. Those principles are relevant in this case. The s 78 notice dated 14 June 2019 made clear that it was alleged that Mr Naderihonar operated a business based on the fact that he issued invoices and filed a tax return which suggested that he operated a business. However, there was nothing in the documents filed, including the s 78 notices, which would have put Mr Naderihonar and his lawyers on notice that it would be submitted that an inference should be drawn from fact that some invoices were missing that he had issued them to other clients. He was denied the opportunity to lead evidence about why the invoices were not consecutive.

95. In the absence of anything other than conjecture on the part of the Nominal Insurer, there is no reason not to accept what Mr Naderihonar said about the invoices issued during the relevant period.

96. 398 and the Nominal Insurer said that Mr Naderihonar's credit was in issue. The attacks on his credit relied on the issue about the invoices and the alleged inconsistencies between his 2018 tax return and the contention that he was a worker and the lack of complaint about the injury. For the reasons set out above with respect to the invoices and below with respect to the tax return, where the evidence of Mr Zhang conflicts with that of Mr Naderihonar, I prefer Mr Naderihonar's evidence.

97. Mr Beran also submitted that Mr Zhang should have been cross examined before adverse findings can be made about his credit. A party requires leave to cross-examine in the Commission and the failure to do so does not prevent submissions being made on credit provided that the issues have been raised and an opportunity given to respond.[10] It was abundantly clear from the argument about directions for production that Mr Zhang's credit was in issue. Mr Zhang failed to comply with that direction, despite having legal representation.

98. Mr Zhang's statement is rambling and inconsistent. It is remarkably brief but he said that there is nothing he wished to add. An example of the inconsistency is that he said that Mr Naderihonar did not work for 398 as a labourer before commencing as a painter but said that Crown Home – on whose behalf Mr Zhang pays workers – paid him in 2016.

99. Mr Zhang failed to produce documents to support his statement. He has not provided the assistance that the Commission is entitled to expect from witnesses.

[10] Rafiq at [30].

Worker - authorities

100. Mr Tanner relied on the decision of Bromberg J in *On Call*. Before considering that decision, it is relevant to note the definition of worker in s 4 of the 1998 Act:

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

101. In *Boylan Nominees Pty Ltd t/as Quirks Refrigeration v Sweeney*[11] Ipp JA said:
"The control test remains important and it is appropriate, in the first instance, to have regard to it (albeit that it is by no means conclusive) because, as Wilson and Dawson JJ said in *Stevens v Brodribb Sawmilling Company Pty Ltd* [1986] HCA 1; (1986) 160 CLR 16 (at 36)

> '[I]t remains the surest guide to whether a person is contracting independently or serving as an employee.' "

102. In *On Call*, Bromberg said that the question of:

> "Whether a person is an employee or alternatively an independent contractor is to be answered by reference to an objective assessment of the nature of the relationship that person has with the entity that takes the benefit of that person's work."[12]

103. His Honour said that it is necessary to look at the substance of the relationship, rather than the label that the parties apply to it [13] and beyond contractual descriptions to the substance or truth of the relationship.[14] He said:

> "A wide range of entitlements and protections are conferred upon workers by legislation and industrial awards or agreements made pursuant to industrial legislation like the *Fair Work Act 2009* (Cth) ('Fair Work Act'). It is commonplace for such legislation to identify the recipient of such entitlements or protections by reference to the common law definition of 'employee'. In that context, it is particularly important that the common law look to the reality of the relationship in determining whether an employment relationship exists. A contrary approach would place many workers who are in truth employees, beyond the protective reach of labour law."

104. His Honour quoted from *Hollis*, saying:

> "Despite the earlier preoccupation of the law with the degree of control exercised by the putative employer as defining an employment relationship, the modern approach is multi-factorial. As the majority said in Hollis at [24] it is 'the totality of the relationship' which is to be considered. A range of indicia may be examined. Some will be more useful than others in some work arrangements but less useful in other work arrangements. Because of the multiplicity and diversity of work arrangements and the ingenuity of those fostering disguised relationships, there is value in a multi-factorial test which recognises that one spotlight will not necessarily adequately illuminate the totality of the relationship. Such an approach also involves what may be described as a 'smell test', or a level of intuition. The majority in Hollis (at [48]) described the notion that bicycle couriers were each running their own business as 'intuitively unsound'."

[11] [2005] NSWCA 8 at [54].
[12] At [188].
[13] At [189].
[14] At [193].

105. His Honour went on:

> "The majority in *Hollis* (citing Windeyer J) said, the distinction between an employee and an independent contractor is 'rooted fundamentally' in the fact that when personal services are provided to another business, an independent contractor provides those services whilst working in and for his or her own business, whereas an employee provides personal services whilst working in the employer's business: at [40]. Unless the work is being provided by an independent contractor as a representative of that entrepreneur's own business and not as a manifestation of the business receiving the work, the person providing the work is an employee.[15]
> …
> Simply expressed, the question of whether a person is an independent contractor in relation to the performance of particular work, may be posed and answered as follows:
>
> > Viewed as a 'practical matter':
> >
> > (i) is the person performing the work an entrepreneur who owns and operates a business; and,
> >
> > (ii) in performing the work, is that person working in and for that person's business as a representative of that business and not of the business receiving the work?
>
> If the answer to that question is yes, in the performance of that particular work, the person is likely to be an independent contractor. If no, then the person is likely to be an employee."

106. Bromberg J said that carrying on a business is conducting a commercial enterprise as a going concern which usually involves the acquisition of assets in the pursuit of profit. A business will enter into transactions on a repetitive basis in the pursuit of profit and typically has value or goodwill beyond its saleable assets. "Business" connotes "the notion of system, repetition and continuity."[16] A business has a different risk profile to that of an employee.[17] He said:

> "A genuine independent contractor providing personal services will typically be: autonomous rather than subservient in its decision-making; financially self-reliant rather than economically dependent upon the business of another; and, (as I have said), chasing profit (that is a return on risk) rather than simply a payment for the time, skill and effort provided.
>
> In an employment relationship, there will typically be an entrepreneur, but that will be the employer, it will never be the employee. The employer will take the risk of profit or loss. The employee seeks the security of fixed and certain remuneration. Unlike the independent contractor, the employee has no business, and typically will have no interest or desire, in exposure to the risk of loss in return for the chance of profit."[18]

107. His Honour considered the indicia relevant to determining whose business the economic activity was being performed in.[19] They include considering who controls or directs the manner in which the economic activity is carried out, whether the activity is portrayed as that of the putative business of the putative employer's business, the extent to which the person

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[15] At [207].
[16] [210].
[17] At [213].
[18] At [214]-[215].
[19] At [218].

performing the work is integrated into the business; whether the person doing the work is free to employ others to perform the work, to whom any goodwill enures, whether the person performing the work has agreed to provide an outcome or result and whether they use their own tools.

108. With respect to the withholding of tax and provision of leave, His Honour said:

> "I have already stated my reluctance to utilise the absence of deductions of income tax and the failure to provide leave as indicators of any utility because of the circularity of reasoning involved. Even if these indicators were to be put in the mix, the absence of these factors is a common feature of most casual contracts of service and thus no assistance in this case: *Sgobino* at 308."

109. Mr Tanner said that an examination of the indicia set out led to the conclusion that Mr Naderihonar was a worker in the business of 398.

110. In *Gerob Investments Ballina Pty Limited t/as Beach Life Homes v Compton*[20] the worker was in partnership with his wife and split his income with her. Roche DP agreed with the arbitrator's finding that the fact that he did so did not necessarily mean that the worker was a contractor – his relationship with the Australian Taxation Office was not determinative of the employment relationship.

Application of the principles

111. There is no evidence beside Mr Zhang's statements to support the contention that Mr Naderihonar was contracted to Crown Home. The invoices were issued to "Jan" or John, who, it is conceded, is Mr Zhang and he was paid by Mr Zhang from 398's account. If Mr Naderihonar was a worker, the only conclusion available on the evidence is that he was a worker in the business of 398.

112. Mr Zhang's evidence about the relationship with Mr Naderihonar is generally unhelpful. He did not dispute that he retained Mr Naderihonar and that he paid his invoices. He did not say anything about the work that Mr Naderihonar did other than that it was painting. He said that Mr Naderihonar provided his own tools. He accepted that Mr Naderihonar was paid $400 per day which is essentially the same as $50 per hour which Mr Naderihonar said he was paid.

113. In those circumstances, there is nothing significant to contradict Mr Naderihonar's evidence about the relationship.

114. In the period between December 2017 and 2 October 2018, Mr Naderihonar worked at a site under the control of 398. There is no probative evidence that he worked anywhere else during the period. There is no evidence about the nature of his relationship with Mr Hussa but that work was done after he ceased with 398 and is not relevant for determining his relationship with 398.

115. Mr Naderihonar did painting work at Mr Zhang's direction. Mr Zhang told him what to paint and what materials to use. His evidence that he bought equipment at Bunnings on the company account is consistent with payment to Bunnings in the one bank statement which Mr Zhang provided. The use of some of his own equipment is not inconsistent with being a worker.

116. Mr Naderihonar did the work himself and there is no suggestion that he could have delegated the work to anyone else. Mr Mohenszadeh was paid as a separate contractor.

[20] [2007] NSWWCCPD 180.

117. Mr Naderihonar had an ABN and submitted invoices because he was asked to do so by Mr Zhang. His tax return – prepared for him by a tax agent – suggested he ran a business and claimed deductions. As the authorities cited above show, Mr Naderihonar's relationship with the Australian Taxation Office is not determinative of whether or not he was a worker.

118. The business in which Mr Naderihonar was working was 398's business. Mr Zhang controlled the way in which the work was being carried out. He said that he "sacked" Mr Naderihonar and Mr Mohsenzadeh which is an admission that he controlled the work.

119. When the evidence is taken as a whole, the conclusion is that Mr Naderihonar was a worker within the meaning of s 4 in 398's business during the time that he worked at the site at Bonnyrigg. I find that Mr Naderihonar was a worker employed by 398.

Injury

120. While there are gaps in the medical evidence, they are explained in Dr Endrey-Walder's report. In the absence of any competing medical evidence offering an explanation, there is no reason not to accept what Dr Endrey-Walder said.

121. It could be said that Dr Noorzad's notes do not assist Mr Naderihonar in that he did not record any complaint of pain until December 2018 however that can be seen as consistent with Mr Naderihonar's evidence that he did not make a big deal of it. He went to Auburn Hospital on 11 December and told Dr Noorzad on 12 December. Dr Noorzad did not record a history of the cause for the pain but he noted the discharge summary from the hospital, which referred to Mr Naderihonar's work as a painter.

122. Mr Claridge and Mr Beran argued that the date of onset indicated that something must have happened while Mr Naderihonar was working with Mr Hussa to cause injury because the complaints of pain for two months in the notes of Auburn Hospital coincide with that work. I do not agree that the time frame in the hospital notes can be read so precisely.

123. There is also no evidence of any attempt by the Nominal Insurer to locate or obtain a statement from Mr Hussa to explore the nature of the work or what happened during it. Mr Naderihonar said the work he did for Mr Hussa was lighter and he said he felt unable to continue. Dr Endrey-Walder obtained a detailed history about that.

124. Both the hospital notes and the notes from Dr Noorzad should be read in light of the comments by Basten JA in *Mason v Demasi*. His Honour said:[21]

> "First, the trial judge was invited to discount the appellant's oral testimony on the basis of accounts given to various health professionals, which appeared inconsistent either with each other, or with her oral testimony, or both. The difficulties attending this kind of exercise should be well-understood; as explained in *Container Terminals Australia Ltd v Huseyin* [2008] NSWCA 320 at [8], such apparent inconsistencies may, and often should, be approached with caution for the following reasons, amongst others:
>
> > (a) the health professional who took the history has not been cross-examined about:
> >
> > > (i) the circumstances of the consultation;
> > > (ii) the manner in which the history was obtained;
> > > (iii) the period of time devoted to that exercise, and
> > > (iv) the accuracy of the recording;

[21] At [2].

(b) the fact that the history was probably taken in furtherance of a purpose which differed from the forensic exercise in the course of which it was being deployed in the proceedings;

(c) the record did not identify any questions which may have elucidated replies

(d) the record is likely to be a summary prepared by the health professional, rather than a verbatim recording, and

(e) a range of factors, including fluency in English, the professional's knowledge of the background circumstances of the incident and the patient's understanding of the purpose of the questioning, which will each affect the content of the history."

125. Mr Beran and Mr Claridge made much of Mr Naderihonar's attendances on the Emergency Department of Auburn Hospital, for apparently minor ailments while failing to mention neck and shoulder pain. The statement in *Mason v Dimasi* is appropriate when considering the notes taken in an Emergency Department which was even more likely that a general practitioner to focus on the problem with which Mr Naderihonar presented.

126. The fact that Mr Naderihonar was unaware that he could make a claim for compensation may also be relevant to his lack of complaint.

127. Following Mr Naderihonar's attendance on 12 December, Dr Noorzad ordered an MRI scan. Mr Naderihonar saw Dr Rao but told Dr Endrey-Walder he didn't go back because he could not afford to. Dr Noorzad referred Mr Naderihonar to Dr van Gelder but Mr Naderihonar changed doctors and embarked on a different course of treatment.

128. Dr Endrey-Walder asked Mr Naderihonar about symptoms suffered while working for Mr Hussa. He said "with the help of the interpreter I was able to question him" and "on repeated questioning." Those statements suggest that Dr Endrey-Walder may have doubted the history until it was explored. Once he was satisfied that Mr Naderihonar undertook lighter work for Mr Hussa, Dr Endrey-Walder accepted that Mr Naderihonar suffered injury working for 398 and that the disc protrusion observed on the MRI scan was a result. He accepted that Mr Naderihonar ceased work because "he simply could not cope" rather than because he suffered an injury.

129. Mr Beran's speculative submissions about Mr Naderihonar's height and the need to look up while painting door frames are not persuasive. Mr Naderihonar's evidence in his second statement is that he spent long periods looking up while working with 398. That is consistent with interior painting of walls and ceilings and exterior painting. Compared to that work, it is easy to accept that painting doors and door frames would be lighter.

130. I accept Dr Endrey-Walder's evidence and find that Mr Naderihonar suffered an injury to his cervical spine which resulted in some radiculopathy in his right arm. The injury is deemed to have been suffered on 2 October 2020.

Incapacity

131. Dr Endrey-Walder noted that Mr Naderihonar had experienced some improvement in his symptoms. He considered that treatment was necessary. He considered that Mr Naderihonar's prospects of finding work were meagre.

132. The medical certificates from Dr Calvache-Rubio and other doctors in his practice have certified Mr Naderihonar fit for one day per week from about May 2019 with significant restrictions, such that he could only attend TAFE.

133. While it is possible to conceive of tasks that Mr Naderihonar might be able to do, those roles are purely speculative.

134. In *Wollongong Nursing Home Pty Ltd v Dewar*[22] Roche DP considered the meaning of suitable employment in s 32A of the 1987 and said:

> "…In context, the phrase 'employment in work', in the definition of suitable employment, 'in relation to a worker', must refer to real work in the labour market. That is, it must refer to a real job in employment for which the worker is suited.
>
> Therefore, the determination of whether a worker is 'able to return to work in suitable employment' is not a totally theoretical or academic exercise and Mason P's reference to the 'eye of the needle' test may still be relevant in many cases. To use his Honour's example, a labourer who is rendered a quadriplegic may well be able to perform tasks using only his voice. However, whether, under the new provisions, he or she would be found to have no current work capacity will depend on a realistic assessment of the matters listed at (a) and (b) of the definition of suitable employment. Depending on the evidence, it is difficult to see that work tasks that are totally artificial, because they have been made up in order to comply with an employer's obligations to provide suitable work under s 49 of the 1998 Act, and do not exist in any labour market in Australia, will be suitable employment."

135. In the absence of any evidence from 398 and the Nominal Insurer as to a greater capacity for work and as to real jobs which he is fit to do, I find that Mr Naderihonar has no current work capacity.

136. The claim for compensation in the ARD commences on 2 October 2018. That is clearly inappropriate because Mr Naderihonar worked for Mr Hussa after that date. Doing the best I can with the evidence, I consider that the period of weekly compensation should commence from 12 December 2018 when Mr Naderihonar saw Dr Noorzad and complained of neck pain.

137. Counsel for the respondents did not make any submissions about s 60 expenses so that it is appropriate that they follow the award of weekly compensation.

138. I therefore make the following orders:

    (a) The Nominal Insurer is to pay weekly compensation:

        (i) pursuant to s 36 of the 1987 Act at the rate of $1,368 to 12 March 2019, and

        (ii) pursuant to s 37 from 13 March 2019 to date and continuing at the rate of $1,152.

    (b) The Nominal Insurer is to pay Mr Naderihonar's medical and related treatment expenses pursuant to s 60.

    (c) Pursuant to s 145B(2) and s 145 of the 1987 Act, 398 is to reimburse the Nominal Insurer in respect of all payments made pursuant to orders 1 and 2.

[22] [2014] NSWWCCPD 55.