WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **6511/18**
Applicant: **TT Brookvale Pty Ltd t/as Total Tools Brookvale**
1st Respondent: **Workers Compensation Nominal Insurer**
2nd Respondent: **Gregory Sullivan**
Date of Determination: **26 August 2019**
Citation: **[2019] NSWWCC 281**

The Commission determines:

1. The second respondent sustained injury to his back arising out of or in the course of his employment with the applicant on 23 June 2017.

2. That employment was a substantial contributing factor to such injury.

3. The injury sustained by the second respondent was an aggravation of pre-existing disc degenerative changes in the lumbosacral spine secondary to spondylolisthesis at the L5-S1 level.

4. The second respondent was totally or partially incapacitated for work as a result of such injury.

5. For the period from 19 September 2018 to 20 November 2018 the second respondent had current work capacity and returned to work for less that 15 hours per week.

6. The applicant is liable to pay compensation to the second respondent at the rate of $1,104.44 per week pursuant to s 37(3) of the *Workers Compensation Act 1987* from 19 September 2018 to 20 November 2018.

7. The applicant is liable to pay the second respondent's expenses pursuant to s 60 of the *Workers Compensation Act 1987* incurred in the period from 4 September 2018 to 20 November 2018.

8. The applicant is to pay the first respondent $21,211.32 pursuant to s 145(1) of the *Workers Compensation Act 1987*.

9. Liberty is granted to the parties to apply to the Commission for a further telephone conference if the first respondent and/or the second respondent seek findings as to the liability of the applicant to pay compensation to the second respondent after 20 November 2018.

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

Brett Batchelor
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 BRETT BATCHELOR, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Pursuant to s 145(3) of the *Workers Compensation Act 1987* (the 1987 Act) the applicant, TT Brookvale Pty Ltd trading as Total Tools Brookvale (the employer), seeks a determination from the Commission as to its liability to the first respondent, the Workers Compensation Nominal Insurer (the Nominal Insurer), in respect of payments made by it to the second respondent, Gregory Sullivan (the worker/Mr Sullivan). The payments were made in respect of an injury to the back which the worker claims he suffered on 23 June 2017 whilst in the employ of the employer.

2. As at that date the employer was uninsured, that is, it was not maintaining in force, a policy of insurance for the full amount of its liability under the 1987 Act.

3. Payments of compensation by the Nominal Insurer to the worker in respect of the claimed injury on 23 June 2017 were the subject of two notices to reimburse issued by it to the employer pursuant to s 145(1) of the 1987 Act, dated 4 September 2017 and 20 November 2017. Attached to each notice was a certificate under s 145(5) of the 1987 Act specifying payments that "…were paid to or in respect of Gregory Sullivan an injured worker." The certificate dated 4 September 2017 specified an amount of $26,687.85 as being the sum which, in the opinion of the Nominal Insurer, the employer was liable at the relevant time to pay to or in respect of the injured worker. The certificate dated 20 November 2017 specified a sum of $21,211.32 as the liability to the Nominal Insurer.

4. Each of the s 145(1) notices to reimburse were forwarded under cover of a letter of the same date, from Icare Workers Insurance to the Company Secretary of the employer, specifying the date of injury of the worker as 23 June 2017.

5. The employer paid to the Nominal Insurer the sum of $26,687.85 referred to in the s 145(5) certificate dated 4 September 2017.

6. Pursuant to Miscellaneous Application dated 12 December 2018 naming the Nominal Insurer as the only respondent (the Application), the employer sought the determination referred to in [1] above. Attached to the Application were:

    (a) the covering letter dated 20 November 2018 from Icare Workers Insurance to the Company Secretary of the employer;

    (b) the s 145(1) notice to reimburse dated 20 November 2017, and

    (c) the s 145(5) certificate dated 20 November 2017.

7. By way of Application to Admit Late Documents dated 23 January 2019 the Nominal Insurer lodged a Reply to the Application (the Reply), in Part 3 of which (Matters in Dispute) there was an allegation that the employer did not commence the proceedings within the period specified in the reimbursement notice issued by the Nominal Insurer as required by s 145(3) of the 1987 Act. In an email dated 23 March 2019 to the Commission, the solicitor for the Nominal Insurer advised that the dispute raised in Part 3 of its Reply regarding the timing of the commencement of proceedings was withdrawn. It was also acknowledged by the solicitor for the Nominal Insurer in the initial telephone conference on 5 February 2019 that the reference to the worker suffering Q Fever whilst in the employ of the was clearly an error.

8. The Nominal Insurer also submitted in Part 3 of its Reply that the worker should be joined to the proceedings.

9. At the first telephone conference on 5 February 2019 a direction was made that the worker be joined as second respondent.

10. By way of Application to Admit Late Documents dated 21 May 2019 (AALD 21.05.19), the worker lodged documentation on which he proposed to rely, including statement dated 21 May 2019[1] (noting that page references to documents in this Statement of Reasons are to those in the Commission's electronic file).This statement was noted in the list of late documents attached to AALD 21.05.19 to be that date, although the full date did not appear on the statement itself at p 20 above the worker's signature.

ISSUES FOR DETERMINATION

11. The parties agree that the following issues remain in dispute:

    (a) Did the worker sustain injury to his back on 23 June 2017 whilst in the employ of the employer?

    (b) Was the employment of the worker by the employer a substantial contributing factor to such injury?

    (c) What was the nature of any such injury?

    (d) Was the worker incapacitated as a result of injury sustained on 23 June 2017?

    (e) What is the extent of the incapacity sustained by the worker as a result of injury on 23 June 2017?

    (f) What is the liability of the employer to the worker for weekly benefits as a result of such incapacity?

    (g) Is the worker entitled to a finding in his favour for the payment of expenses for medical and related treatment pursuant to s 60 of the 1987 Act?

    (h) What sum is payable to the Nominal Insurer in respect of the notice to reimburse issued by the employer dated 20 November 2018?

    (i) Is the worker entitled to a finding by the Commission in respect of compensation payable to him after 20 November 2018, being the date of the second s 145(5) certificate referred to in [3] above?

Matters previously notified as disputed

12. These are as set out in [11 (a)-(h)] above.

[1] AALD 21.05.19 p 21.

Matters not previously notified

13. The matter referred to in [11 (i)] above was not notified as a Matter in Dispute in Part 3 of the Reply but raised by counsel for the Nominal Insurer at the arbitration hearing on 6 August 2019. Submissions (including written submissions) were made in support thereof. The employer opposed any finding in respect of liability to the worker beyond the date of the s 145(5) certificate of 20 November 2018, arguing that if such a finding was to be sought, the employer should be given a chance to address that issue, and that liberty be reserved to the parties to make further submissions thereon. The worker supported the submissions of the Nominal Defendant.

PROCEDURE BEFORE THE COMMISSION

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

15. The matter was the subject of conciliation/arbitration on 17 April 2019, 3 June 2019 and 6 August 2019. It did not proceed on 17 April 2019 due the fact that the worker, who had been joined to the proceedings on 5 February 2019 and had been served with late documents by the employer on 12 April 2019, was not ready to proceed. It was accordingly stood over to 3 June 2019, with directions being made as to the lodgement and service of further evidence by the parties.

16. As a result of the admission of late documents lodged by the worker, including records produced by the treating physiotherapist John Appleby, the matter was on 3 June 2019 on the application of the employer stood over for conciliation/arbitration on 6 August 2019.

17. The matter proceeded to arbitration hearing on 6 August 2019. Mr P Macken, solicitor, appeared for the employer, Mr S Flett of counsel appeared for the Nominal Insurer and Mr C Tanner of counsel appeared for the worker. The worker was not present.

EVIDENCE

Documentary Evidence

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

    (a) the Application and attached documents;

    (b) the Reply and attached documents;

    (c) Application to Admit Late Documents lodged by the employer dated 10 April 2019 (AALD 10 April 2019) with the following attachments:

        (i) Clinical notes produced by Drs Thompson and Little, and
        (ii) Statement of Tom Iannazzo dated 10 April 2019;

    (d) Application to Admit Late Documents lodged by the employer dated 23 May 2019 (AALD 23 May 2019) with the following attachments:

        (i) report of John Appleby, physiotherapist, to Dr Jeremy Thompson dated 7 July 2017, and
        (ii) report of Dr Kim Edwards, surgeon, dated 15 May 2019;

(e) AALD 21.05.19 with the following attachments:

(i) Lumbar Spine Assessment – The McKenzie Institute dated 4 July 2017;
(ii) report of Dr P Endrey-Walder, general and trauma surgeon, dated 24 April 2019;
(iii) Cab Tax Invoice dated 24 April 2019;
(iv) Letter Walker Law Group to Leigh Virtue & Associates dated 24 April 2019;
(v) Physio referral – John Appleby dated 29 April 2018;
(vi) Letter Walker Law Group to Hall & Wilcox dated 1 May 2019, and
(vii) Statement of the worker dated 21 May 2019.

19. At the arbitration hearing on 6 August 2019, Mr Macken tendered a report of John Appleby dated 5 August 2019, which had been served on the solicitors for the Nominal Insurer and the worker the same day. This report was said to address the anomaly raised by the admissions of Mr Appleby's clinical note dated 4 July 2017[2]and the report of Mr Appleby to Dr Thompson dated 7 July 2017[3]. The report was pressed by the employer in view of the what the applicant said at [10] – [11] in his statement dated 21 May 2019 in respect of a visit to Mr Appleby on 29 April 2019, and the change that Mr Appleby then made to the clinical note dated 4 July 2017 when he crossed out the word "box" and inserted the word "compressor" in describing what the worker was lifting when he experienced the onset of back symptoms.

20. Mr Macken acknowledged that the report from Mr Appleby was requested on 19 July 2019 following the conciliation/arbitration on 3 June 2019.

21. The admission of the report dated 5 August 2019 was opposed by Mr Tanner on behalf of the worker as:

(a) this report raised anomalies which had to be addressed by the applicant, either by way of a further report from Mr Appleby or by requiring him to attend and give oral evidence;

(b) the report was dated and had been served the day before the date fixed for the (third) conciliation/arbitration;

(c) there was no explanation as to why the request for the report had not been made until 19 July 2019, when the reason for the adjournment of the proceedings on 3 June 2019 was to enable the solicitor for the employer to explore apparent anomalies between the clinical note dated 4 July 2017 of Mr Appleby and his report to Dr Thompson dated 7 July 2017, and

(d) the worker would suffer prejudice which he was not able to meet if the report was admitted into evidence.

22. Mr Macken asserted that there were no anomalies raised by the report of 5 August 2019 and that it should clearly be admitted for the reasons referred to in [19] above.

[2] AALD 21.05.19 p 4.
[3] AALD 23.05.19 p 2.

23. In the circumstances, I rejected the tender of the report for the reasons put forward by the worker in opposing the tender. There was also a suggestion by the employer that there should be a further adjournment of the proceedings, which having regard to the history of the matter, I rejected. In my view that employer had ample opportunity to explore any anomalies raised by the original documentation of Mr Appleby which was in evidence, and to which objection had not been raised, on 3 June 2019 and that the service of a further report from him on the day before the hearing unfairly prejudiced the worker in the presentation of his case.

Oral Evidence

24. There was no application to adduce oral evidence or to cross-examine the worker.

SUBMISSIONS

25. The submissions of the parties have been recorded and there is a transcript of the hearings of 3 June 2019 (T1) and 6 August 2019 (T2). I will not repeat the submissions in full but in summary they are as follows.

Employer (applicant)

26. In opening submissions, the solicitor for the employer noted that s 145 of the 1987 Act provided for a statutory right of recovery of the amount referred to in the notice to reimburse issued under s 145(1). Attached to that notice was a certificate under s 145(5) of the 1987 Act. The notice to reimburse and certificate were both forwarded with a letter dated 20 November 2018 in which the date of injury was specified as 23 June 2017[4]. If the worker was found not to have suffered an injury on 23 June 2017, there was no right of recovery by the Nominal Insurer.

27. The employer notes that the "*Incident/Hazard Report Form*" dated 26 July 2017[5] had recorded thereon the date of injury as 24 June 2017 and no entry as to the names of any witnesses. The "Uninsured liabilities Worker claim form" dated 11 December 2017[6] recorded at [2] that there were no witnesses. A letter from Icare Workers Insurance to the employer dated 21 December 2017[7] also recorded date of injury as 23 June 2017. The same date of injury was recorded in the report of Dr V Kirychenko dated 3 January 2019[8] whereas the report of Dr Gregory Carr dated 29 January 2018[9] recorded date of injury of 18 June 2017. Dr Kitychenko's report included a history that the worker was part of a team of three people who were trying to lift up a large compressor weighing nearly 200 kg. These histories had to be contrasted with what the worker said in his statement dated 21 May 2019 at [4] as to the number of people moving equipment and tools around the premises and the fact that the worker was assisting staff[10].

28. The employer also draws attention to the clinical notes of Dr Thompson in respect of entries on 3 and 6 July 2017[11] and the report of x-ray dated 3 July 2017[12]. The first reference in the doctor's clinical notes of an injury on 23 June 2017 was in the entry dated 6 July 2017. Between the two dates the worker had seen the physiotherapist John Appleby on 4 July 2017 in whose note of the consultation on that day there was no reference to date of injury. This then had to be compared to Mr Appleby's report to Dr Thompson dated

[4] Application p 9.
[5] Reply p 9.
[6] Reply p 11.
[7] Reply p 16.
[8] Reply p 30.
[9] Reply p 38.
[10] AALD 21.05.19 p 21.
[11] AALD 10.04.17 p 10.
[12] Reply p 47.

7 July 2017 which recorded a history of complaint of right sided low back and leg pain "several weeks" prior to the date of consultation on 4 July 2017.

29. The employer submits that the absence of reference to a specific incident or frank injury in Mr Appleby's report to Dr Thompson dated 7 July 2017, when considered with the rejection of the report of Mr Appleby dated 5 August 2019 (objected to by the worker), would enable an inference to be drawn that this latest report would not assist the Nominal Insurer or the worker. Such an inference is strengthened, it is submitted, by the fact that there was no reference to a lifting incident in Mr Appleby's clinical note of 4 July 2019. The alteration of this clinical record by Mr Appleby at the request of the worker is emphasised by the employer.

30. The employer then further refers to the clinical notes of Dr Thompson recorded during May 2017, notably on 1, 12 and 29 May[13], where there are complaints recorded of the applicant being stressed because of unfair treatment at work and having these claims being investigated by the HR department. From this material, the employer submits that it is evident that the worker was dissatisfied with his workplace (with the employer).

31. The employer also notes from [3] of the statement of Tom Iannazzo dated 10 April 2019[14] that the first report of injury by the worker to the employer was on 29 June 2019 when Mr Sullivan indicated that some problems he was having with his lower back were the result of a longstanding condition going back to when he was a teenager. The employer also relies on what Mr Iannazzo says at [4]-[6] of that statement that the worker was unable to give a clear answer as to how he sustained the injury or who, if anyone, witnessed the lifting of the compressor.

32. The employer notes the prior complaint of back pain recorded by Dr Thompson in his clinical note of 15 January 2013 "…when dumped at Manly Sun 29th…"[15].

33. In so far as the question of the occurrence of an alleged incident on 23 June 2017 is concerned, the employer submits that, having regard to all the material considered together, the Commission would be comfortably satisfied that there was not an injury, as such, on 23 June 2017. That does not mean that there may not have been some other basis by which the worker could have asserted an entitlement to compensation, but if it is found that there was no injury to the worker' back on that date, the statutory right to recover payments made by the Nominal Insurer is not present. The only concession made by the employer is that it was not insured on that date.

34. The employer also submits that if the worker was to assert that his injury wasn't a frank injury, but a disease process, there would be a different (deemed) date of injury, the earliest of which could be 23 July 2017 when a certificate of capacity in respect of weekly compensation was issued.

35. As a secondary issue, the employer submits that the rate of compensation at which the worker was paid must be considered, noting that payments were made to the worker on the basis that he had no current work capacity. In this regard, the employer submits that the certificates of capacity in evidence show that the worker was capable of working between initially, 15 hours a week, increasing to 18 hours a week. This latter figure represents one half of a working week and that therefore the recovery in those periods would be limited to about half of the payments claimed. It was acknowledged that, in the absence of a schedule of the payments making up the claimed figure of $21,211.32, calculation of the figure that the employer should be obliged to pay would be difficult.

[13] AALD 10.04.19 p 11.
[14] AALD 10.04.19 p 37.
[15] AALD 10.04.19 p 13.

36. The employer also conceded that it had paid $26,687.85 which was the subject of an earlier notice to reimburse dated 4 September 2018, noting that the current demand (for $21,211,32) was in the notice to reimburse dated 20 November 2018[16].

Nominal Insurer (first respondent)

37. The Nominal Insurer supports the worker's assertion that he suffered injury on 23 June 2017 notwithstanding the handwritten *Incident/Hazard Report Form* dated 26 July 2017 in which the date of incident is stated to be 24 June 2017. It refers to the clinical note of Dr Thompson dated 6 July 2017 which identifies date of injury as 23 June 2017, the date noted in the Uninsured Liabilities Worker claim form dated 11 December 2017 referred to above at [27]. The Insurer also notes that if one looks at the reports other than those of Dr Carr, 23 June 2017 is consistently referred to as the date of injury. The Nominal Insurer also submits that the statement of Mr Iannazzo is not productive on the issue of the date of injury, and that the date 24 June 2017 in Mr Appleby's records is nothing other than an error.

38. The Nominal Insurer notes that the evidence is quite clear that the worker started his employment with the employer in early June 2017, so that the employer's submissions as to psychological problems that the worker was consulting his doctor about in May 2017 have nothing to do with his employment with the employer.

39. The Nominal Insurer also points to the acknowledged payment by the employer of the sum of $26,687.85 in response to the notice to reimburse dated 4 September 2017 in respect of the same stated date of injury, 23 June 2017. This constitutes an admission of that by the employer.

40. The Nominal Insurer's principal submissions are directed towards the meaning of s 145(4) of the 1987 Act. It submits that this subsection permits the Commission to make a determination and award for compensation payable to or on behalf of the worker beyond the period in respect of which payments were made to or on behalf of him which make up the sum of $21,211.32 demanded by the Nominal Insurer from the employer. This date is 20 November 2018, the date of the s 145(1) notice to reimburse and the s 145(5) certificate to which the employer responded in the current proceedings.

41. Mr Flett handed up written submissions in support of this submission, dated 17 July 2017, which he had also tendered before another Commission arbitrator in a similar case. He submits that, applying the judgements in *Raniere Holdings Pty Ltd v Daley & Anor* (*Raniere No 1*)[17], *Ballantyne v WorkCover Authority of NSW*[18], *Nohil Pty Ltd v GRE Workers'Compensation Insurance (NSW) Ltd*[19], and *Galstyan and Markaryan t/as Price Hair Care v WorkCover Authority of NSW*[20], s 145(4) necessarily requires the Commission to consider the uninsured employer's liability at large, and for that reason permits the Commission to consider matters and make orders outside of a strict determination of whether the sum sought in a specific s 145(1) notice to reimburse ought to be paid.

42. Mr Flett acknowledged that this submission had not been previously conveyed to the other parties (in particular the employer) prior to the arbitration hearing on 6 August 2019, but nevertheless submits that an order for the employer to pay compensation at least to the date of the arbitration hearing could be made on the evidence in the proceedings. Alternatively, he submits that a determination on liability could be made, to be the subject of further evidence[21]. In this regard reference is made to the WorkCover certificates of capacity in evidence in the proceedings, including the last certificate dated 7 December 2018.

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[16] T2 p 21.05-21.30, T2 p 28.01 and T2 p 32.10.
[17] [2005] NSWCA 121.
[18] [2007] NSWCA 239.
[19] (1995) 11 NSWCCR 69.
[20] [2006] NSWWCCPD 130.
[21] T2 p 36.

Worker (second respondent)

43. The worker submits that the payment by the employer of the earlier notice to reimburse dated 4 September 2018, referred to above at [36] constitutes an admission by the employer as to the date of injury, 23 June 2017. He submits that if the employer wanted to resile from that admission, one would have expected evidence from the employer explaining the circumstances in which that payment was made.

44. Counsel for the worker also submits that, in the circumstance in which there is an attack on the worker's credit, there should have been cross-examination of him as to his account of the circumstances of the injury.

45. The worker also supports the submission of the Nominal Insurer that, having regard to the commencement of his employment with the employer in early June 2017, his attendance on his general practitioner in May 2017 when he complained that he was being treated unfairly at work can have no bearing on the physical injury he suffered on 23 June 2017. The employer's submission that such attendances demonstrated that the worker was dissatisfied with his workplace with the employer is without substance.

46. The worker notes that the clinical note recorded by Dr Thompson on 3 July 2017 refers only to the symptoms he complained of, not to the causation of the injury. The circumstances of the injury are as set out in his statement dated 21 May 2019 where he states that he injured his back on 23 June 2017 in the course of his employment. The worker submits that, having regard to the "madhouse" he describes as occurring on that day when the new store was being set up, it is not surprising that others around him would not take note of any difficulty experienced by him. The worker also submits that the requirement that he move an extremely heavy compressor has not been put in issue by the employer, and it is a typical mechanism of injury which would place a significant load on the lumbar spine.

47. The worker notes that there is no report from Paul Briggs, his manager, to dispute his assertion that the injury was reported to this person. The worker submits that if the employer wished to contradict what he was saying at [6] in his statement dated 21 May 2019 that he told Mr Briggs that he was in pain and that it had started the previous week when lifting a compressor, it would have been simple enough to engage him and get a statement from him.

48. The worker submits that the date, 24 June 2017, noted in the *Incident/Hazard Report Form*, is clearly an error, noting that the circumstances of the incident set out in that form are as described by him. The form also contains an entry that the incident was reported on the Friday following the date of injury, that is 30 June 2017. The worker notes that the erroneous date, 24 June 2017 is recorded at a time after he informed his doctor, Dr Thompson, on 6 July 2017 that the injury occurred on 23 June 2017. The mechanism of injury described in the clinical note of 6 July 2017[22] is as described in the *Incident /Hazard Report Form*.

49. The worker notes that the mechanism of injury described by the physiotherapist Mr Appleby, in his clinical note headed "The McKenzie Institute Lumbar Spine Assessment" dated 4 July 2017[23], is consistent with his evidence as to the commencement of his employment with the employer, and also with the lifting of a "compressor" (singular), noting also that the word "box", which was crossed out at his request and replaced with the word "compressor", is also in the singular. This confirms, according to the worker, a frank incident as opposed to a gradual process of work.

[22] AALD 10.04.19 p 10.
[23] AALD 21.05.19 p 4.

50. The worker submits that there is nothing unusual about seeing an entry in clinical notes that is not accurate and refers to the reservations expressed by the Court of Appeal in *Mason v Demasi* (*Mason*)[24] in respect of clinical notes of treating practitioners. The worker also submitted that the report of Mr Appleby to Dr Thompson dated 7 July 2017 does not contain evidence that contradicts the occurrence on which he relies on 23 June 2017.

51. The worker submits that the reports of doctors, apart from those of Dr Gregory Carr in his report to Dr Thompson dated 9 August 2017[25] and Dr Kim Edwards in his medico-legal report dated 15 May 2019[26], all contain the correct date of injury, 23 June 2017. It is submitted that the date of 18 June 2017 recorded by Dr Carr is obviously a mistake (that being a Sunday), and that in his subsequent report dated 29 January 2018[27] he adopted the correct date of injury (accepting that the heading in that report would be in keeping with the details that the Nominal Insurer had given to him, but also noting that such report is addressed to Dr Thompson).

52. In respect of the report of Dr Edwards, the worker notes the history recorded by that doctor (two years after the date of injury) that the worker was uncertain of the date of injury, and that it may have been 18 June 2017. It is also noted that there is another obvious error in the history in the report where it is recorded that the matter was reported to the worker's manager on 24 June 2017, when in fact this occurred on 30 June 2017.

53. The worker also criticises the conclusion reached by Dr Edwards as to the reason for his lower back complaints (that the incident of 18 June 2017 is not reasonably responsible for the lower back complaints), this being a bold assertion without foundation. This must be considered against the worker's evidence that he was attempting to lift a 200-kg compressor, which caused aggravation of his underlying condition. This constitutes a clear frank injury.

54. The worker notes the treating general practitioner, Dr Thompson, is more that satisfied as to the correct date of injury, this date having been adopted and repeated in the WorkCover certificates of capacity issued by him.

55. The worker supports that submissions of the Nominal Insurer that the Commission has jurisdiction to make findings in respect of the liability of the employer for compensation to the worker beyond the period for which compensation payments were made to him by the Insurer and which are the subject of the current proceedings. These submissions are referred to above at [40]-[41] above.

56. The worker submits that the rate of weekly payments for which the employer should be found liable to him is eighty percent of the pre-injury average weekly earnings (PIAWE).

Employer in response

57. The employer submits that no significance should be attached to the fact that 24 June 2017 fell on a weekend (a Saturday), rather than a Friday, to suggest that something may have happened on that day. The work setting up the store could logically have been done on the weekend in anticipation of a Monday opening.

[24] [2008] NSWCA 320.
[25] AALD 10.04.19 p 31.
[26] AALD 23.05.19 p
[27] Reply p 36.

58. The employer opposes the submission of the Nominal Insurer that s 145(4) of the 1987 Act allows the Commission to make findings as to its liability beyond the period to 20 November 2018 referred to in the s 145(1) notice, which seeks recovery of $21,211.32 compensation paid by the Nominal Insurer to the worker. The employer has had no possibility or opportunity of considering what payments have been made by the Nominal Insurer, and the jurisdiction of the Commission is found in the s 145(1) notice to reimburse and is constrained by that notice. A new notice can issue in respect of what happens after the date of that notice.

59. The solicitor for the employer was "surprised"[28] by the submission of counsel for the worker that the worker should have been subject to cross-examination in respect of his credit, in the circumstance where the worker was not present at the conciliation/arbitration on 6 August 2019 because of (according to his counsel) ill health. (The suggestion by the employer's solicitor that there be a further adjournment of the proceedings to allow such cross-examination was rejected by the Commission.) It was anticipated by the employer's solicitor that the late evidence of Mr Appleby, the physiotherapist would have been admitted, and the submission that such evidence would not have assisted the worker was emphasised.

60. The employer rejected the proposition that any inference against it should be drawn because of its failure to call Mr Briggs. It submitted that he should more naturally have been called by the worker, and that there was no evidence that he was still employed by the employer. It was submitted that any adverse inference because of the failure to call evidence from Mr Briggs should be against the worker.

61. On the question of injury, the employer submits that any injury alleged by the worker should be classed more in the nature of a disease injury, in which case the correct date of injury should not be 23 June 2017. It was however conceded that an aggravation of a disease condition could also be classed as a frank incident.

FINDINGS AND REASONS

Date of injury

62. The employer submits that the worker did not suffer injury to his back in the course of his employment on 23 June 2017 while setting up a new store at Brookvale. In his statement dated 21 May 2019 the worker says that he commenced employment with the employer on 1 June 2017. This is confirmed by what the physiotherapist, Mr Appleby recorded on 4 July 2017 that the worker's present symptoms commenced as a result of a "new job - @ Total tools"[29], and also by the surgery consultation the worker had with Dr Bruce Wakefield on 1 May 2017 when he complained of being immensely stressed as a result of being treated unfairly at work[30]. Dr Wakefield referred the Mr Sullivan to Lesley Russell, clinical psychologist, who saw him and reported to Dr Wakefield on 7 June 2017[31]. There is no other evidence to suggest that the unfair treatment at work of which Mr Sullivan complained to Dr Wakefield was work with the employer. Therefore, any suggestion that the worker was motivated to pursue his current claim because he was being treated unfairly by the employer has not been made out.

[28] T2-59.10.
[29] AALD 21.05.19 p 4.
[30] AALD 10.04.19 p 11.
[31] AALD 10.04.19 p 33.

63. In his statement dated 21 May 2019 the worker says at [4]-[6]:

> "4. On that day, we were setting up a new store at Brookvale. It was a mad house, with people moving equipment and tools around the premises. Most of the tools were in boxes, and I was assisting the staff. We needed to move a compressor which was extremely heavy and I went to assist. As I lifted the compressor I felt something go and felt a strain in my back. I mentioned to a couple of the staff that my back was sore, but did not make a big fuss. I thought it would go away.
>
> 5. I kept working until the end of the working day. My back was in pain that night and the pain was worse when I woke up the following morning.
>
> 6. I just thought it was a stain [sic] at the time, so over the following week, I kept working and bending. The pain was getting worse and was going down my right leg. I told Paul Briggs, my manager, that I was in pain, and that it had started the previous week when lifting a compressor."

64. The only evidence as such from Mr Briggs is in the *Incident/Hazard Report Form* which he signed as "Paul Briggs" on 26 July 2017. That form records the "Time and Date of Incident" as "24/6/17 am" and that it was reported on 30 June 2017 in the morning. The description of the incident is:

> "UNPACKING LARGE COMPUTER BENT DOWN TO HELP STAFF LIFT THE COMPRESSOR ON TO A TROLLEY FELT A SLIGHT TWINGE IN THE LOWER BACK AS DAYS WENT ON IT GOT WORSE TO THE POINT MY DOCTOR PUT ME ON LEAVE."

The form was signed by Mr Sullivan on 25 July 2017.

65. There is in evidence a statement from Tom Iannazzo dated 10 April 2019 who was employed by the employer in the position of Store Manager. He says in [3] that the first occasion on which the worker sought to allege that he was having some problem with his lower back was by telephone on 29 June 2017 when he indicated at that stage that it was as a result of a long-standing condition going back to when he was a teenager. At [4] of his statement Mr Iannazzo said that the "Claimant subsequently sought to allege that he had aggravated his back condition while helping to lift a compressor." When asked how he sustained the injury and who witnessed him lifting the compressor, he was unable to give a clear answer, could not confirm the time and could not identify any witnesses to the lifting of the compressor.

66. At [5]-[6] Mr Iannazzo states that all of the staff of the Company were questioned as to whether they had witnessed the Claimant lifting a compressor and none of the staff had witnessed any such incident. He also days that the Claimant had spoken to a staff member, Adam Candlish, on or about 5 July 2017 about having a sore hip and said that it was a condition he had had since he was a young man.

67. The Nominal Insurer submitted that the statement of Mr Iannazzo did not assist as to the date on which the worker says he suffered his injury[32] and I accept that submission. The worker did not make any submissions on this statement. I accept that what Mr Iannazzo says at [4]-[6] cannot be relied upon without corroboration of what is set out therein. It appears to be all hearsay evidence, with no indication of the source thereof apart from the reference to "All of the staff" and to "Adam Candlish." However, when one notes in [3] of the statement that the worker sought to allege by telephone that he was having some problems with his lower back on 29 June 2017 and having regard to:

[32] T2 – p 34.15.

(a) the worker's statement that he told Mr Briggs that he was in pain, and

(b) the note in the *Incident/Hazard report Form* that the incident was reported on 30 June 2017,

I accept that it was reported either on that day or the day before.

68. I do not draw any adverse inference either against the worker or the employer for their "failure" to call evidence from Mr Briggs. There is evidence that the employer's business changed hands in 2018, and no other evidence as to the continued employment of Mr Briggs by the employer, or when that may have ceased.

69. The worker first sought treatment from Dr Thompson on 3 July 2017 and made no reference to the incident on 23 June 2017. Dr Thompson issued a medical certificate certifying Mr Sullivan unable to work from 30 June 2017 until 4 July 2017 inclusive. When the worker saw Mr Appleby on 4 July 2017 he complained of "…several weeks history of R sided low back and leg pain after commencing a new job which entailed lifting heavy tool boxes and prolonged periods of standing."[33]

70. The worker next saw Dr Thompson on 6 July 2017 when the following consultation note was recorded:

> "Surgery Consultation wt 86 kg was 105 kg
> Increased low back pains since trying to lift a heavy compressor at work on 23/06/17. Felt a sl strain, but only got worse in next couple of days. Now hard to stand for more than 30 minutes, better sitting, pain goes down
> Right leg, eased since resting more. XR shows significant spondilosithesis. Needs MRI or CT to assess for lumbar disc protrusion with N root pressure radiculopathy"

71. Thereafter, as noted by the worker, Dr Thompson continued to certify the date of injury as 23 June 2017 in all the WorkCover certificates of capacity he issued.

72. It is significant in my view that, as submitted above at [48], the erroneous date 24 June 2017 was recorded in the *Incident/Hazard Report Form* at a time after Mr Sullivan informed Dr Thompson on 6 July 2017 that the injury occurred on 23 June 2017.

73. The clinical note recorded by Mr Appleby on 4 July 2917, referred to above at [62], as originally written referred to the worker lifting "box" (singular), which was later at the request of the worker altered to "compressor". This suggests a frank incident rather than a series of work related duties as giving rise to the worker's back problem on 23 June 2017. In his report to Dr Thompson on 7 July 2017, Mr Appleby referred to complaints from Mr Sullivan of "several weeks history" of right sided low back and leg pain after commencing a new job which entailed lifting heavy tool boxes and prolonged periods of standing. Counsel for the worker concedes that the reference to several weeks is inaccurate and submits that the description of the duties in that report does not mean that Mr Sullivan injured himself while performing those duties as opposed to the frank incident that occurred on 23 June 2017. The reference to lifting heavy tool boxes and prolonged standing is a recording the stressors which the worker experiences in the course of his employment. Having regard to the fact that the worker continued work for a further week after the incident, it is submitted that the worsening of the pain with prolonged periods of standing refers to what happened after the frank incident.

[33] AALD 23.05.19 p 2.

74. In short, the worker submits that the report is not evidence which contradicts the occurrence of injury on which he relies as occurring on 23 June 2017. I accept this submission, particularly when one has regard to what Basten JA said at [2] in *Mason* about treating with caution inconsistencies between a party's evidence and medical histories in clinical notes. The matters highlighted by his Honour were:

> "(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;
>
> (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."

75. Evidence sought to be relied upon by the employer from Mr Appleby in respect of his records was rejected for the reasons referred to in [19]-[23] above. However, what is important is that the primary records of Mr Appleby are in evidence. I accept that there may be an inference that the rejected report of Mr Appleby may not have assisted the worker in his case. Nevertheless, I think that the history recorded by Dr Thompson on 6 July 2017 as to how the worker injured his back on 23 June 2017, that record being the most contemporaneous with that date, should be accepted in preference to:

> (a) inferences to be drawn from the anomalies which the employer submits are raised by the records of Mr Appleby, and
>
> (b) the recording of the date of incident as 24 June 2017 in the *Incident/Hazard Report Form.*

76. Dr Carr in his report to Dr Thompson dated 9 August 2017 states the date of injury as 18 June 2017, which is difficult to understand having regard to the fact that the report is addressed to Dr Thompson. As noted above at [51], the doctor adopted the date 23 June 2017 in his subsequent report dated 10 December 2018.

77. Dr Edwards in his report dated 15 May 2019[34] notes that the worker was uncertain of the date of injury but thought it may have been 18 June 2017. This report is some two years after the event claimed by the worker and in my view, cannot be relied upon to fix the correct date of injury. Dr Edwards does record the correct mechanism of injury. A similar observation applies to the report of Dr Endrey-Walder dated 24 April 2019[35]. It is not clear from where this doctor obtained the date of injury as 24 June 2017, possibly from the *Incident/Hazard Report Form*.

[34] AALD 23.05.19 p 3.
[35] AALD 21.05.19 p 6.

78. An inference is available to be drawn from the payment by the employer of $26,687.85 in response to the earlier notice to reimburse dated 4 September 2018 (referred to above at [36] and [43]). This earlier notice specified date of injury as 23 June 2017, and the employer has not given an explanation as why issue was not taken top the date of injury at that time.

79. Having regard to the evidence that I have summarised above, I think that the worker has discharged the onus on him to show that he did injure his back on 23 June 2017 as he claims.

80. From this finding, it follows that the applicant's employment with the respondent was a substantial contributing factor to the worker's back injury. In making this finding I have regard to the matters in s 9A(2) of the 1987 Act, in particular:

    (a) the time and place of injury;
    (b) the nature of the work performed and the particular tasks of that work, and
    (c) …
    (d) the probability that the injury or a similar injury would have happened anyway, at about the same time or at the same stage of the worker's life, if he or she had not been at work or had not worked in that employment.

81. The worker's state of health before the injury (s 9A(2) (e))is relevant to the extent that it is quite clear that Mr Sullivan was suffering pre-existing degenerative change in his back as at 23 June 2017. Dr Farey noted in his report dated 9 March 2018[36] that he has symptomatic lumbar degenerative disc disease and possible symptoms of spondylolisthesis and foraminal stenosis and had an exacerbation of symptoms which the doctor related to his work when attempting to lift a compressor. This is confirmed by Dr Endrey-Walder in his report dated 24 April 2019. This is a frank injury as opposed to an aggravation or exacerbation of a pre-existing degenerative condition caused by the type of work in which the worker was obliged to engage by the employer, in accordance with what the Court of Appeal held in *Rail Services Australia v Dimovski* [37].

82. I do not accept the opinion of Dr Edwards that the genuine back symptoms from which he finds the worker to be suffering are not attributable to anything allegedly occurring on 23 or 24 June[38]. He has an incorrect history that the worker did not notice pain, did not report the matter and continued working. This also against the earlier history recorded that Mr Sullivan felt something move at the base of his spine when helping to lift a very large compressor. I do not think that Dr Edwards sets out reasons for his conclusion that the genuine back symptoms suffered by the worker are not attributable to anything occurring at work.

Incapacity

83. The employer submitted that the certificates of capacity should be utilised when determining the capacity of the worker as a result of injury, and the resultant payments that the employer should be ordered to reimburse the Nominal Insurer up to the amount of $21,211.32 referred to in the s 145(5) certificate attached to the s 145(1) notice to reimburse dated 20 November 2018. There is no schedule in evidence as to how this sum is made up. There is in evidence a schedule as to how the sum of $26,687.85 referred to in the s 145(5) certificate dated 4 September 2018 is made up[39]. In the absence of a schedule in respect of $21,211,32 it was acknowledged by the solicitor for the employer that there would be difficulty in calculating any amount payable to the Nominal Insurer[40].

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[36] Reply p 43 at 44.
[37] (2004) 1DDCR 648; [2004] NSWCA 267.
[38] AALD 23.05.19 p 9.
[39] Reply pp 22-24.
[40] T2 pp 21-22.

84. The worker submitted that the PIAWE was $1,380.87 referred to in the Uninsured Liabilities Worker claim form at [6] – "DETAILS OF YOUR EARNINGS"[41]. No submission to the contrary was received either from the employer or the Nominal Insurer. The worker submitted that an award there should be an in his favour at eighty percent of this figure[42].

85. Dr Thompson issued a medical certificate dated 3 July 2017 (the date of his first consultation with the worker) certifying Mr Sullivan's inability to work from 30 June 2017 until 4 July 2017 inclusive[43]. Thereafter there are WorkCover certificates of capacity issued by Dr Thompson in evidence covering the period 5 July 2017 to 7 February 2019[44]. These certificates contain differing periods when Dr Thompson certifies the worker as either having no current work capacity for any employment, to having capacity for some type of employment for differing hours per day and days per week, with restrictions on lifting/carrying capacity, standing tolerance, pushing/pulling ability, bending twisting squatting ability and driving ability. Some of the certificates overlap and some have obvious typographical errors as to dates.

86. It appears from the schedule in evidence in respect of the sum of $26,687.45 referred to in the s 145(5) certificate dated 4 September 2018 that on 22 August 2018 the worker was paid $2,208.44 for the period from 20 August 2018 to 2 September 2018 and the same amount for the period 6 September 2018 to 19 September 2018. These payments appear to have been made pursuant to s 37 of the 1987 Act (weekly payments in second entitlement period) and when Mr Sullivan was working less than 15 hours per week. The payments would therefore have been made pursuant to s 37(3) of the 1987 Act. It thus appears that the worker was receiving weekly payments of $1,104.44 until 19 September 2019. This is eighty percent of $1,380.87.

87. The rest of the amounts referred to in the schedule of payments totalling $26,687.45 are all listed to be for "Medical Treatment". The employer has paid this sum to the Nominal Insurer.

88. Dr Thompson's WorkCover certificate of capacity for the period 3 August 2018 to 14 September 2018 certifies capacity for work with restrictions of 15 hours per week (five hours a day for 3 days a week)[45]. The next certificate covering the period 14 September 2018 to 17 October 2018 certifies capacity of 18 hours per week (six hours a day for three days a week). This certification is continued in the certificates until 7 December 2018, after which, in the final certificate in evidence, Dr Thompson certifies no current work capacity for any employment until 7 February 2019[46].

89. Dr Ian D Farey, orthopaedic surgeon, saw the worker at the request of Dr Thompson on 9 March 2018 and 15 June 2018[47]. On 9 March 2018 Dr Farey recorded that the worker was working three days a week and he may increase his work hours to four hours a day with restrictions. On 15 June 2018 Dr Farey reported that the worker was working two hours per day three days a week with an increase in pain the previous week after ticketing objects.

90. Dr Carr reported on the worker to Dr Thompson on 10 December 2018[48] and said he did not think that Mr Sullivan would ever work again because of the degree of pain that he gets in his low back. This opinion is in accordance with the certification of Dr Thompson from 7 December 2018.

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[41] Reply p 12.
[42] T2 p 55.
[43] AALD 10.04.19 p 34.
[44] Reply from p 50.
[45] Reply p 86.
[46] Reply p 98.
[47] Reply pp 43-45.
[48] Reply p 40.

91. Having regard to this evidence, it appears that he period for which the worker must reimburse the Nominal Insurer for weekly benefits included in the demand for $21,211.32 until the date of that demand, 20 November 2018, is from 19 September 2018 to 20 November 2018. There is no evidence as to whether the worker increased the weekly hours that he worked from 15 to 18 after 17 October 2018. I propose to proceed on the basis that this did not occur.

92. My finding is therefore that, for the period from 19 September 2018 to 20 November 2018 the worker was entitled to weekly compensation at the rate of $1,104.44 per week.

93. In the absence of a schedule of payments making up the figure of $21,211,32 it is not possible to determine how the balance of this sum, after deducting liability for weekly payments, is made up. Having regard to the schedule in respect of the sum of the $26,687.85 paid by the employer to the Nominal Insurer, it is likely that an amount would represent liability for s 60 expenses.

94. Having regard to the finding in [92], the worker is entitled to an award in his favour for expenses pursuant to s 60 of the 1987 Act incurred in the period from 4 September 2018 (the date of the earlier s 145(5) certificate for $26,687.85) and 20 November 2018 (the date of the s 145(5) certificate for $21,211.32).

95. However, s 145(5) provides that in any proceedings under s 145(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 on respect of the injured worker compensation under this Act or work injury damages,
>
> is (without proof of its execution by the Nominal Insurer) admissible evidence in any proceedings and is evidence of the matters stated in the certificate.

96. I think that the Nominal Insurer is entitled to rely on this section in the current proceedings. There is no other evidence as to how the sum of $21,211.32 is calculated, but s 145(5) provides that the certificate executed by the Nominal Insurer is evidence that the person named in the certificate, the employer, is liable to pay in respect of the worker compensation under the 1987 Act to the amount specified in the certificate.

97. The employer is therefore liable to pay to the Nominal Insurer the sum of $21,211.32 referred to in the s 145(5) certificate dated 20 November 2018.

Compensation payable after 20 November 2018

98. This issue is referred to at [13] and [58] above.

99. Part 3 – Matters in Dispute of the Reply relevantly sets out the following matters that the Nominal Insurer put in dispute in the proceedings:

> "Accordingly, the Respondent submits that all payments made to the worker by iCare were appropriate and the Applicant is liable to reimburse the Respondent. The Respondent seeks an order in accordance with sections 142B and 145 of the *Workers Compensation Act* 1987 that the Applicant reimburse the Respondent for compensation paid to the worker.

> If the proceedings are permitted to continue, the Respondent submits that the worker should be joined to these proceedings as the matters raised in the Miscellaneous Application directly impact the worker."

100. The order sought by the Nominal Insurer was for payment of $21,211.32 referred to in the s 145(5) certificate dated 20 November 2018 attached to the s 145(1) notice to reimburse of the same date. The employer had previously paid to the Nominal Insurer $26,687.85 referred to in the s 145(5) certificate dated 4 September 2018 attached to the s 145(1) notice of the same date. The Nominal Insurer was therefore clearly seeking reimbursement of $21,211.32 as "compensation paid to the worker". Apart from the schedule as to how the sum of $26,687.85 is made up, there is no other evidence in the current proceedings of compensation paid to the worker.

101. The case that the employer therefore came to the Commission to argue was its liability to pay to the Nominal Insurer $21,211,32. The employer argues that if the Nominal Insurer seeks an order that the Commission determines its liability to pay compensation beyond the date of the s 145(5) certificate of 20 November 2018, liberty should be given to the parties to make further submissions thereon. In view of the circumstances in which the Nominal Insurer notified the Commission, the employer and the worker that it would be seeking such a finding, I think that this is reasonable.

102. Accordingly leave will be given to the parties to bring the mater back before the Commission if the Nominal Insurer wishes to pursue its submission that the Commission has jurisdiction to make findings as to the liability of the employer to pay compensation to the worker after 20 November 2018.

Summary

103. The worker sustained injury to his back arising out of or in the course of his employment with the employer on 23 June 2019.

104. That employment was a substantial contributing factor to such injury.

105. The injury sustained by the worker was an aggravation of pre-existing disc degenerative changes in the lumbosacral spine secondary to spondylolisthesis at the L5-S1 level.

106. The worker was totally or partially incapacitated for work as a result of such injury.

107. For the period from 19 September 2018 to 20 November 2018 the worker had current work capacity and returned to work for less than 15-hour per week.

108. The employer is liable to pay compensation to the worker at the rate of $1,104.44 per week pursuant to s 37(3) of the 1987 Act from 19 September 2018 to 20 November 2018.

109. The employer is liable to pay the worker's expenses pursuant to s 60 of the 1987 Act incurred in the period from 4 September 2019 to 20 November 2018.

110. The employer is to pay the Nominal Insurer $21,211.32 pursuant to s 145(1) of the 1987 Act

111. Liberty is granted to the parties to apply to the Commission for a further telephone conference if the Nominal Insurer and/or the worker seek findings as to the liability of the employer to pay compensation to the worker after 20 November 2018.