CITATION:	*Tasneem v NT of A [2022] NTWHC001*
PARTIES:	MOHAMMAD TASNEEM V NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	WORK HEALTH
FILE NO:	2020-02841-LC
DELIVERED ON:	22 MARCH 2022
DELIVERED AT:	DARWIN
HEARING DATES:	22 TO 26 NOVEMBER AND 3 DECEMBER 2021
DECISION OF:	ACTING JUDGE JOHN NEILL

CATCHWORDS:

Identifying legal and evidentiary onera; what is included in an accepted claim; consideration of need for objective proof of injury; validity of section 69 Notice; expert evidence.

Return To Work Act section 69

Ju Ju Nominees Pty Ltd v Carmichael [1999] NTSC 20

Australian Fuel Distributors Pty Ltd v Andros [2015] NTSC 79

AAT Kings Tours Pty Ltd v Hughes (1994) 4 NTLR 185

Northern Cement v Ioasa [1994] NTSC 58

Joanne Claire Catford v Laminex [2021] 004

Laminex Group Pty Ltd v Catford [2021] NTSC 92

Cooper v NT Link [2012] NTMC 012

Robert Hicks v Bridgestone Australia Limited [1997] NTSC 65

Dura (Australia) Constructions P/L v Hue Boutique Living P/L [2012] VSC 99

REPRESENTATION:

Counsel:

Worker:	Mr P.M. Nolan
Employer:	Ms M. Chalmers SC

Solicitors:

Worker:	Hall Payne Lawyers
Employer:	Minter Ellison

Decision category classification:	A
Decision ID number:	NTWHC001
Number of paragraphs:	195

IN THE WORK HEALTH COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 2020-02841-LC

BETWEEN:

MOHAMMAD TASNEEM

Worker

AND

NORTHERN TERRITORY OF
AUSTRALIA

Employer

REASONS FOR DECISION
(Delivered 22 March 2022)

ACTING JUDGE NEILL:

BACKGROUND

1. Mohammad Tasneem ("the Worker") was born on 2 September 1963 and he is currently 58 years of age.

2. On 29 November 2014 when he was 51 years of age the Worker suffered an accident ("the accident") which caused him injuries ("the injury") when he fell from a tree in the course of his employment as a teacher with the Northern Territory of Australia ("the Employer") at the Borroloola School.

3. The Worker made a claim in respect of the injury pursuant to the *Return To Work Act* ("the Act"). In his Work Health claim form the Worker identified that the parts of his body affected in the injury were "*neck, left collarbone, ribs, left C2 and C3, right C2 and C3, left pinky".* He claimed that he suffered fractures of all these areas. In the appropriate field in the claim form he stated that the most serious of these fractures was *"stable C2 on neck".*

4. The Employer accepted the claim through its then insurer TIO by letter dated 18 March 2015. Specifically, the Employer advised:

"*We are writing in response to your claim for benefits for the following injury sustained on 29/11/14*:

"Fracture to C2 vertebrae, fracture to left clavicle, multiple fractures to ribs and fracture to left 5th finger

"We have accepted your claim for reasonable medical, hospital and rehabilitation benefits along with weekly compensation for loss of earning capacity…".

5. The Worker recovered from the acute effects of the injury and subsequently returned to work as a teacher. He taught at the Islamic College of Brisbane on a full time basis from 6 October 2015 to 12 March 2017, a period of one year and five months. He subsequently engaged in employment as a teacher with different employers in Victoria at different times but for limited periods and on a casual basis. The Employer paid him compensation in accordance with the Act, including weekly benefits as required from time to time, from the time of the injury and continuing.

THE CANCELLATION OF WEEKLY BENEFITS

6. On or about 13 June 2020 the Employer served the Worker with a Notice of Decision and Rights of Appeal dated 12 June 2020 ("the Notice") pursuant to subsections 69(1) and (3) of the Act.

7. The Notice was accompanied by a medical certificate dated 29 May 2020 of consultant Orthopaedic Surgeon Dr Phil Allen which expressed the opinion that "*the worker has ceased to be incapacitated for work*". The Notice advised: "*Given the foregoing, your entitlement to compensation of weekly benefits are* (sic) *cancelled effective 14 days from your receipt of this notice. This will be accompanied by a cessation in financial support for medical and like expenses".*

8. The Worker has appealed from the decision of the Employer to cancel payments of weekly benefits. The Employer has counterclaimed, maintaining that the Worker has ceased to be incapacitated for work as a consequence of the injury.

9. I heard the matter for five days from 22 November 2021 to 26 November 2021 and for a further half day on Friday, 3 December 2021. Two volumes of a Court Book containing 916 pages were tendered by consent as Exhibit E 1. A one page typed note of a telephone discussion on 22 November 2021 between consultant Orthopaedic Surgeon Dr Phil Allen and Ms Mary Chalmers SC, counsel for the Employer, was received as Exhibit E 2. An abridged *curriculum vitae* of Dr Phil Allen was received as Exhibit E 3. Chapter 18 entitled "Pain" from the 5th Edition of the AMA Guides to the Evaluation of Permanent Impairment was Marked for Identification E 4. It did not formally become an exhibit but the Worker's counsel Mr Nolan did cross examine Dr Allen on some parts of that document. A disc of

surveillance footage of the Worker taken on 12 April 2001, 3 May 2021 and 3 November 2021 was received as Exhibits E 5 and 6. A one page typed note of a telephone discussion on 18 November 2021 between specialist Occupational Physician Dr Jude Ugwu and Mr Lachlan Baird, solicitor of Minter Ellison for the Employer, was received as Exhibit E 7. A brief report dated 22 November 2021 of Dr Clayton Thomas, consultant in Rehabilitation and Pain Medicine, was received as Exhibit W 8. A further brief report of Dr Clayton Thomas, this one dated 23 November 2021, was received as Exhibit W 9. The *curriculum vitae* of Dr Thomas was received as Exhibit W 10. Finally, a bundle of teaching positions available in Victoria in 2021 and 2022 compiled by an organisation known as Seek was received as Exhibit E 11.

10. I allowed the parties' joint request to prepare and file written submissions at the conclusion of the hearing. These were all filed by 7 March 2022, as follows:

    i) Employer's Written Submissions received 9 February 2022;

    ii) Worker's Written Submissions received 24 February 2022;

    iii) Employer's Reply received 3 March 2022; and

    iv) Worker's Written Submissions In Reply received 7 March 2022.

PLEADINGS

11. The Worker's Further Amended Statement of Claim is dated 1 November 2021. This is a "mere appeal" from the Employer's decision to cancel payments of weekly benefits. The Worker pleaded the injury, the accepted claim and the Notice and he formally appealed the decision.

12. Additionally, the Worker pleaded that the Notice was invalid in that it did not comply with subsections 69(1)(b)(iii),(iv) and (v), 69(3), and 69(4) of the Act.

13. The Employer has filed a Notice of Amended Defence and Counterclaim dated 4 November 2021. In its Defence the Employer admitted the accepted claim and the subsequent cancellation of payment of weekly benefits. It denied the pleading that the Notice was invalid and it traversed the remedies sought by the Worker.

14. In its Counterclaim the Employer pleaded that the Worker had ceased to be incapacitated for work by the injury by no later than 18 March 2020, the date on which he was examined for the second time by consultant Orthopaedic Surgeon Dr Phil Allen. The Employer pleaded in the alternative that if the Worker did continue to suffer any incapacity as a result of the injury (which was denied), that incapacity was partial and it resulted either in no loss of earning capacity, or alternatively in a loss of earning capacity to be determined by the Court.

15. The Worker has filed a Notice of Defence to Counterclaim dated 17 November 2021. In that document the Worker simply denied the Employer's pleading in the Counterclaim that he had ceased to be incapacitated for work by the injury by 18 March 2020, or at all. The Worker simply denied the Employer's pleading in the alternative that he was only partially incapacitated.

ONUS

16. Because the Worker's Statement of Claim was a "mere appeal" the Employer was *dux litis* at the hearing. The Employer had to call its witnesses and adduce its evidence first, before the Worker might call any evidence.

17. The Employer bears both the legal and evidentiary onus of establishing the change of circumstances warranting the cancellation of payments of weekly benefits by the Notice – see *Ju Ju Nominees Pty Ltd v Carmichael* [1999] NTSC 20 per Martin CJ (BF) at paragraph 15. In this matter, that will involve proving that the Worker has ceased to be incapacitated for work.

18. If the Employer finds it necessary to rely on the Counterclaim then it will bear both the legal and evidentiary onus of proving the matters pleaded in that document – "*he who avers must prove*", and see also *Australian Fuel Distributors Pty Ltd v Andros* [2015] NTSC 79 per Blokland J at paragraph [41].

19. If the Employer discharges its onus of proving the Worker has ceased to be incapacitated for work then the Worker will bear the onus of proving any partial incapacity – see *AAT Kings Tours Pty Ltd v Hughes* (1994) 4 NTLR 185.

20. If the Worker is found to be partially rather than totally incapacitated as a consequence of the injury then the Employer will bear both the legal and the evidentiary onus of quantifying the value of the Worker's remaining capacity to earn – see *Northern Cement v Ioasa* [1994] NTSC 58 per Martin CJ (BF) in paragraph 15 at page 6.2.

THE LIMITED MEDICAL ISSUE

21. The Worker has not pleaded any different or additional injury, physical condition or pain condition arising at the time of or as a sequela to the injury in either his Further Amended Statement of Claim or his Notice of Defence to Counterclaim. He has not pleaded any psychiatric or psychological condition arising at the time of or as a sequela to the injury.

22. In his opening on 23 November 2021 at transcript page 106.1 to 106.3 Mr Nolan of counsel for the Worker confirmed that the Worker's pleadings reflected the Worker's case, as follows:

> "*Mr Nolan: The worker's case is absolutely* ***not*** (my emphasis) *that there*

is a distinct or separate chronic pain condition. *Your Honour, the worker's case is simply that the worker has suffered chronic pain as a symptom – diffuse pain symptoms – as a result of the work injury*.

"*His Honour: I understand what you are telling me is that the worker's case is that the pain condition is a direct result of the injury. It is not a sequela?*

"*Mr Nolan: Precisely, your Honour".*

23. The evidence before the Court in volume 1 of the Court Book included notes and records and medical certificates from Dr Altaf Kazi, the Worker's treating GP in Melbourne. Dr Kazi in multiple medical certificates referred to or noted that the Worker was suffering from "*chronic pain*" and also "*major depression with suicidal ideation*". Dr Kazi referred the Worker to consultant Psychiatrist Dr Akinsola Akinbiyi who stated in a report to Dr Kazi dated 11 December 2018 at Court Book volume 1 page 113 that the Worker was being managed for "*major depressive disorder, generalised anxiety disorder and chronic pain".*

24. The only live witness called in the Worker's case other than the Worker himself was Dr Clayton Thomas, a consultant in Rehabilitation and Pain Medicine. Dr Thomas was initially a treating doctor of the Worker and he subsequently became involved to provide a medico-legal opinion.

25. At the commencement of his cross examination Dr Thomas was asked the following questions by counsel for the Worker, Ms Mary Chalmers SC:

"*Ms Chalmers*: *And you certainly have not diagnosed any particular condition such as Chronic Pain Syndrome which is a condition that has psychological overlays to it?*

"*Dr Thomas: No, that's not correct. There is Chronic Pain Syndromes which can be psychologically driven, Somatic Symptom Disorder, psychosomatic problems. Then there's Chronic Pain Syndromes which are very organically based.*

"*Ms Chalmers: So you haven't diagnosed – you haven't diagnosed either of those?*

"Dr Thomas: I have not diagnosed either of those, no".

26. Accordingly, both the Worker's pleadings and the way his case was run at hearing are limited to the injury. The Court is not required to consider any symptoms of any physical condition now complained of by the Worker if that condition and those symptoms were not identified or are not identifiable as part of the accepted claim.

27. The Court is not required to consider the possibility of any diagnosable particular pain condition which might have arisen at a later time after the accident as a sequela to the injury.

28. No psychiatric or psychological condition has been pleaded and the Court is not required to consider the possibility of any diagnosable psychiatric or psychological condition which might have arisen either directly at the time of the accident or at a later time as a sequela to the injury. For this reason I must and I do disregard the documentary evidence of the treating GP Dr Kazi to the extent that it surmises or records or purports to diagnose the existence of any specific pain condition which might have arisen at a later time as a sequela to the injury, and/or any psychiatric or psychological condition affecting the Worker's perception of pain specifically or his capacity to work generally. Similarly, I must and I do disregard the evidence that the Worker was referred to a consultant psychiatrist and the observations in Dr Akinbiyi's report dated 11 December 2018.

29. The Court is required to weigh the evidence and rule solely on the questions: i) whether the Worker's symptoms of pain arising from the injury occurring on 29 November 2014 as identified in the Worker's claim dated 8 December 2014 and as accepted by the Employer, are still being suffered by him as a direct result of that original injury; and if so ii) whether these symptoms of pain have incapacitated the Worker for work either totally or partially at any time on and after 29 May 2020, the date of the subsection 69(3) certificate.

BACK PAIN

30. The Worker in the histories he provided to medico-legal medical experts and in his evidence before the Court placed emphasis on his limited capacity to remain standing and to walk about. He explained how this adversely impacted on his ability to work as a teacher, and how it limited his ability to carry out many of the normal activities of daily living. He gave evidence that this was mainly because of back pain. At page 134.3 of the transcript on 23 November 2021 there was the following question by Mr Nolan for the Worker, and the Worker's answer:

> "*Mr Nolan: Now can I ask you just about your current symptoms. Where is the main source of the pain?*
>
> "*The Worker: Two major pains. One of* – ***the main one is in the back, upper back*** (emphasis added)…*"*

The Recorded History of Back Pain

31. The Worker did not report suffering any injury to his back as a result of the accident which led to the accepted injury. The notes and records of the Royal Darwin Hospital where the Worker was admitted the day after the accident, on 30 November 2014, recorded fracture injuries to the C2 vertebra, multiple rib fractures

without collapse of the lungs, a fractured left clavicle and a fractured phalange on the left little finger. A CT scan of the chest and spine carried out at the Royal Darwin Hospital recorded "*multiple bilateral rib fractures are seen, **which are minimally displaced*** (my emphasis)*".*

32. The Worker made an undated statement in support of his Work Health claim shortly after he was discharged from the Royal Darwin Hospital in early December 2014. He stated that investigations at the Hospital "*concluded that I suffered stable C2 injury, left collarbone fracture, multiple ribs fractures, and left small (pinkie) broken".* He did not at that time mention any injury to his back, or any symptoms of back pain.

33. The Worker's claim form forwarded to the Employer on 8 December 2014 recorded that he suffered fractures to "*neck, left collar bone, ribs, left C2, C3, right C2, C3, left pinky"* - page 11 of volume 1 of the Court Book. The letter of acceptance of the Worker's claim dated 18 March 2015 by the TIO on behalf of the Employer was in the following relevant terms:

> "*We are writing in response to your claim for benefits for the following injuries sustained on 29/11/2014:*
>
> *"Fracture to C2 vertebrae, fracture to left clavicle, multiple fractures to ribs and fracture to left 5th finger*
>
> *"We have accepted your claim for reasonable medical, hospital and rehabilitation benefits along with weekly compensation for loss of earning capacity. If you are unsure as to what may be reasonable please contact us to discuss further and to ensure financial support".*

34. The Worker first consulted his treating GP Dr Kazi in Melbourne on 8 December 2014. Dr Kazi's notes and records span the period 8 December 2014 to 11 August 2018 and are before the Court at pages 130 to 151 in volume 1 of the Court Book. Dr Kazi referred the Worker to consultant Orthopaedic Surgeon Dr Raghavan Unni on 17 December 2014. Dr Unni provided a report dated 17 December 2014 to Dr Kazi in which no history of any back injury or back pain is recorded. Dr Kazi further referred the Worker to radiologist Dr Kenny Wong who conducted a Whole Body Bone Scan with SPECT CT on 22 January 2015. Dr Wong recorded "***no fractures of the thoracic or lumbosacral spine*** (my emphasis)*".*

35. The Worker consulted Dr Kazi on 16 separate occasions from 8 December 2014 to 24 January 2015, before he first complained of "*upper thoracic pain*" at a consultation on 27 January 2015. The note of that consultation goes on to record that the Worker wanted a CT chest scan to see how his ribs were healing and he was advised to wait because repeated radiation was not desirable.

36. The Worker then consulted Dr Kazi on 21 further separate occasions between 2 February 2015 and 19 September 2015 before a consultation on 22 September 2015 when the Worker complained of "*Pain in scapular region some times radiates to **lower back*** (emphasis added)*".* This is the first unequivocal record of back pain complained of by the Worker, some 10 months after the date of the injury on 29 November 2014 and on his 39th consultation with his GP Dr Kazi.

37. The Worker was assessed on 6 November 2015 by consultant Orthopaedic Surgeon Dr Phil Allen for a medico-legal report organised by the TIO on behalf of the Employer. In his report dated 12 November 2015 Dr Allen did not record any complaints by the Worker concerning his back in the course of that assessment.

38. Dr Kazi referred the Worker to radiologist Dr Dan Arhanghelschi who carried out x-rays and CT scans of the Worker on 14 January 2016. His report noted the clinical history of lower back pain. He relevantly reported:

> "*In the lumbar spine, there is no spondylolisthesis or pars defect demonstrated. Intervertebral disc height is well preserved at all levels. No focal bony lesion. No evidence of spondylosis".*

39. The Worker then consulted Dr Kazi on 14 separate occasions between 2 October 2015 and 5 May 2016 before a consultation on 21 May 2016 when the Worker for the second time reported back pain. He complained of "*Neck pain and **lower back pain*** (emphasis added)". This was some eight months after the first recorded complaint of back pain.

40. The Worker next consulted Dr Kazi on 2 June 2016 when he complained of "***Back pain*** (emphasis added)*, neck pain and left shoulder pain".*

41. The Worker then consulted Dr Kazi on three occasions between 6 July 2016 and 18 August 2016 before a consultation on 15 September 2016 when he complained of: "*Increasing aches and pain neck, **back*** (emphasis added)*, shoulders due to cold weather".*

42. The Worker then consulted Dr Kazi on six occasions between 13 October 2016 and 9 February 2017 before a consultation on 10 March 2017 when he complained of: "*Unable to stand for even five minutes due to neck and **thoracic pain*** (emphasis added)*, and dropping things from left-hand pain".* There was no clarification of this in the note.

43. The next consultation was on 30 March 2017 when the Worker once again complained of: "*Increasing neck pain, **back pain*** (emphasis added) *and chest pain, left hand pain".*

44. The next consultation was on 5 May 2017 when the Worker complained of: "***Left sided rib cage pain*** (emphasis added)*, like knife chopping on bending in rib cage*

region. He has seen an occupational physician who said there is cyst and go to your GP. There is swelling in left posterior thoracic region likely lipoma? Cyst. Also he feels like his jaw is coming off and it hurts. He gets stiffness when he sits and very difficult to move."

45. The next consultation was on 3 July 2017 when the Worker complained of: "*Increasing neck, shoulder and **back pain*** (emphasis added) *due to cold".*

46. The Worker then consulted Dr Kazi on four occasions between 25 July 2017 and 18 September 2017 before a consultation on 23 October 2017 when he complained of: "*Aches and pains, neck, **back*** (emphasis added)*, spine, chest left-hand. Counselling ++".*

47. The Worker then consulted Dr Kazi again on 22 November and 21 December 2017, before the next consultation on 23 January 2018 when he complained of: "*Neck pain, **back pain*** (emphasis added)*, thoracic, left-hand arm pain and chest pain sometimes unable to stand more than five minutes".*

48. The Worker then consulted Dr Kazi again on 6 March 2018 and 8 March 2018 before the next consultation on 18 April 2018 when he complained of: "*The pain in **back*** (emphasis added) *and neck worsening as it is getting cold weather now".*

49. The Worker then consulted Dr Kazi on two more occasions, up until the last entry on 11 August 2018, without further complaint of back pain.

50. Dr Kazi referred the Worker to Dr Clayton Thomas, consultant in Rehabilitation and Pain Medicine, and Dr Thomas saw the Worker in his capacity as a treating physician on two occasions, namely 14 February 2018 and 22 November 2019, and as a medico-legal consultant on 19 August 2020. Dr Thomas's notes on 14 February 2018 record the worker's history as: "***Whole upper back*** (emphasis added) *and ribs feels like squeezing him stabbing in the mid thoracic area and feels like cutting him*". The history recorded on 22 November 2019 was: *"pain is up and down and very hard to stand at times so sits. Ribs, **in the back and spine*** (emphasis added) *as well. Can sit on the chair".* The history recorded on 19 August 2020 was: "*Now starts **the middle lower back*** (emphasis added) *and like a spear that goes upwards and few inches up and then across and rib cage and when not at rest feels like being squeezed and can't stand any more and needs to lie down*".

51. Dr Thomas referred the Worker to radiologist Dr Samuel Wright who performed a Bone Scan SPECT CT of the thoracolumbar spine on 23 February 2018. Dr Wright reported:

> *"Dedicated SPECT CT of the thoracolumbar spine does not demonstrate a major osteoblastic focus with particular reference to the end plates, disc spaces, vertebral bodies, facet joints and sacroiliac joints".*

"*Overall Impression:*

*"**Relatively normal bone scan with no definitive cause of neck, thoracic or lumbar pain identified*** (emphasis added)***".***

Is Back Pain Part of the Accepted Injury?

52. In *Cooper v NT Link* ("*Cooper*") [2012] NTMC 012 I considered whether that worker's complaints of lower back pain were part of the claim accepted by the employer. That worker's claim form identified injuries to his head, neck and upper back suffered in a fall at work, but it made no mention of any lower back injury. Within 10 days of the injury Mr Cooper was complaining to his GP of tingling in his legs, which might have signalled a lumbar spine involvement. He made no unequivocal complaint of lower back pain however until about two months after the injury. He continued to complain of back pain thereafter. Radiology at that time confirmed lumbar vertebrae pathology.

53. Mr Cooper's position at the hearing of his matter was that he had suffered a lower back injury at the same time as the identified injuries but that it had taken some time to become fully apparent as it had been largely masked for the first few weeks by the symptoms of the other injuries. Mr Cooper pleaded the lower back injury in his Statement of Claim as arising at the time of the work injury. He was not relying on a sequela.

54. I found that the employer's acceptance of Mr Cooper's claim was an acceptance of liability pursuant to the Act for all Mr Cooper's injuries and their consequences arising from his work injury – paragraph 33 in *Cooper.* However, I went on to rule that in circumstances like those where all or most of the relevant information as to the disputed lower back injury was in the hands of the worker, the worker bore an evidentiary onus to establish that the disputed injury was directly caused by the work accident – paragraphs 34 to 38 in *Cooper.*

55. Mr Tasneem's case raises a similar issue in that he did not make any claim of any injury to his back arising in the original work accident and he made no complaint of back pain for some time after that accident yet in his evidence before me he has claimed he continues to be incapacitated for work because of back pain, as well as pain in his neck and left shoulder, arm and hand. I am satisfied and I rule that in these circumstances the Worker bears an evidentiary onus to establish that he suffers back pain and if so, that this arose as a direct consequence of the accident at work on 29 November 2014.

56. The Worker has not pleaded any back injury. This will not be fatal to his position provided that he can discharge his evidentiary onus, because if he can do so then the back injury will be part of the already accepted injury arising out of the accident on 29 November 2014, which injury has been pleaded.

Conclusion as to Back Pain

57. There is evidence before me that the Worker first complained to his GP Dr Kazi of pain which "*sometimes radiates to lower back*" on 22 September 2015, some 10 months after the accident on 29 November 2014. This was the first unequivocal complaint of back pain, not to be confused with one earlier complaint of thoracic pain which might have related to his broken ribs. The Worker is recorded to have made eight additional complaints to his GP unequivocally of back pain after 22 September 2015, the second complaint being recorded eight months later on 21 May 2016.

58. The Worker was not tested in cross examination on this history of back pain. I am satisfied and I find that the Worker on the balance of probabilities has discharged the onus of proving that he has suffered back pain, from 22 September 2015 and continuing after that date.

59. However, I am not satisfied on the evidence before me on the balance of probabilities that the accident on 29 November 2014 and the injury recorded as occurring on that date was the direct cause of the Worker's back pain.

60. The absence of any mention of back injury in the records of the Royal Darwin Hospital immediately after the accident, the radiology report in the Royal Darwin Hospital notes which established that the rib fractures were "*minimally displaced"*, the absence of any mention of back injury or pain in the history the Worker provided to Dr Kazi and then to orthopaedic surgeon Dr Unni in the weeks immediately following the accident, the radiology Bone Scan report of Dr Wong to Dr Kazi of 22 January 2015 which recorded that there were no fractures of the thoracic or lumbosacral spine, the lack of any history of back pain provided to Dr Allen on 6 November 2015, the x-ray and CT scan report of Dr Arhangelschi of 14 January 2016 showing no lumbar spine pathology, and the radiology Bone Scan report of Dr Wright of 23 February 2018 which concluded that there was no "*definitive cause of neck, thoracic or lumbar pain identified"* in that scan, are all contemporaneous and objective sources of evidence none of which provides any support for the Worker's having suffered a back injury directly as a consequence of the accident on 29 November 2014.

61. The absence of evidence of any precise physiological change is not in itself fatal to a claim for a back injury directly arising from the accident and injury of 29 November 2014, provided there is other sufficient evidence supportive of that back injury – see *Robert Hicks v Bridgestone Australia Limited* [1997] NTSC 65 per Martin (BF) CJ and Gallop J at pages 7.9 and 8.1, and per Mildren J at page 18.3.

62. The absence of any history of back pain over the 10 months between the injury on 29 November 2014 and the first recorded complaint of back pain by the Worker to his treating GP Dr Kazi on 22 September 2015 is significant. So is the further gap

of eight months before the next recorded complaint of back pain on 21 May 2016. This sparsity in the record of complaints of back pain has not been addressed or explained by the Worker or by any of the expert medical witnesses who have given evidence in this matter. The absence of any complaint or history of back pain being provided to Dr Allen at the medico-legal examination and assessment on 6 November 2015, six weeks after the first complaint of back pain being recorded by the treating GP, has not been addressed or explained before the Court.

63. In my assessment, this limited evidence of the history of the Worker's back pain without any corroborative evidence is not sufficient. The Worker has failed to discharge the onus of proving on the balance of probabilities that his symptoms of back pain arose directly out of the accident and the injury on 29 November 2014.

64. Accordingly, I disregard all evidence of the Worker's symptoms of back pain when considering whether the Employer has discharged its onus of proving that the Worker has ceased to be incapacitated for work as a result of the injury.

VALIDITY OF THE NOTICE

Subsections 69(1)(iii),(iv) and (v)

65. The Worker's counsel advised at the hearing that the Worker would rely on my analysis of these subsections in my Decision in *Joanne Claire Catford v Laminex* ("*Catford*") [2021] NTLC 004 in paragraphs 34. to 38. However, that Decision including that analysis was the subject of an appeal to the Supreme Court of the Northern Territory and the outcome of that appeal was delivered almost at the end of this hearing, on 30 November 2021, in *Laminex Group Pty Ltd v Catford* [2021] NTSC 92 ("*Laminex*"). The Supreme Court ruled that my analysis of the operation of these subsections was incorrect. It ruled that there was no invalidity of the Notice in that matter arising out of those subsections.

66. The Notice in this proceeding involves precisely the same wording relevant to these subsections as did the Notice in *Catford.* The Decision in *Laminex* is binding on this Court. I rule that the Notice was not invalid for any failure to comply with subsections 69(1)(iii),(iv) and (v) of the Act.

Subsection 69(3)

67. The Worker's counsel in his submissions purports to rely on my ruling in *Catford* that the Notice in that matter was invalid because whilst the medical practitioner completed a standard form of medical certificate entitled "Statement of fitness for work – Final certificate" which included the word "certificate" in its heading, he did not specifically state within that document that he "certified" that the worker had ceased to be incapacitated. Rather, he identified this conclusion specifically as being his "opinion". The Statement of fitness for work – Final certificate ("the certificate") in the present matter is in the same form and contains the same

omission, in that it also identifies Dr Allen's conclusion as being his "opinion" rather than any form of certification.

68. In *Laminex* the Supreme Court disagreed with this analysis in *Catford*. In paragraph [13] it concluded that because the title of the document included the word "certificate" and because of the nature of the document itself, *"Its whole character and content is a certification of medical opinion*".

69. The Decision in *Laminex* is binding on this Court. I rule that the Notice in this proceeding was not invalid because of the absence of the word "certify" or any version of that word employed by the medical practitioner Dr Allen in expressing his opinion in the certificate.

70. Additionally, the Worker's counsel has sought to rely on the discrepancy between the date of the injury on 29 November 2014 which is correctly identified on page 1 of the Notice, and the different and incorrect date "02/11/14" which is stated to be the date of the injury in the certificate.

71. I am satisfied and I rule that the certificate attached to the Notice is to be read together with the Notice for the purposes of subsection 69(3) – the language of subsection 69(3) requires that the Notice be "*accompanied by*" this certificate.

72. Perhaps neither party had noticed the discrepancy in dates until after Dr Allen had concluded his evidence at the hearing? Certainly, neither party asked him any questions about that discrepancy. This has resulted in there being no evidence before the Court from Dr Allen to explain the discrepancy. There is no evidence about this discrepancy from any other source. Counsel for the Worker has submitted that this absence of evidence prevents the Court from concluding that the incorrect date on the certificate was a typographical or clerical error.

73. In *Collins Radio Constructors Inc v Day* [1997] NTSC 104 Chief Justice Martin (BF) considered the purpose of section 69 of the Act and made the following observations:

> "*Section 69 is clear in that it prohibits the cancellation of payment of compensation where the worker to whom it is paid has ceased to be incapacitated for work, unless there has first been given to the worker a notice (subs(1)(a)), a statement(subs(1)(b)) and the medical certificate (subs(3)). In my opinion, the statutory requirements whereby an employer is enabled to unilaterally cancel a worker's continuing right to receive compensation constitute such an interference with personal rights* ***as to require strict compliance with the conditions attaching to it*** (emphasis added)*. Further, there are good reasons why, within the scheme of the Act designed to protect workers' rights, that* ***the worker should obtain the information required and in the form required*** (emphasis added)*".*

74. There is no stated or attached condition or required information or required form in subsections 69(1)(a) or (b) or 69(3) of the Act referring specifically to an injury. The operation of those subsections is limited by subsection 69(1) of the Act to the cancellation or reduction of "*an amount of compensation under this Subdivision".* This Subdivision is Subdivision B of Division 3 of Part 5 of the Act. Subdivision B is entitled - "***Total incapacity and loss of earning capacity***" within Division 3 entitled – "***Amount of compensation***", both within the context of Part 5 entitled – "***Workers compensation and rehabilitation***".

75. I am satisfied that the words "*an amount of compensation under this Subdivision*" in subsection 69(1) of the Act necessarily contemplate an injury as defined in the Act which has been the subject of an accepted claim under the Act. I am not satisfied that precise identification of the date of that injury is required to appear in the notice under subsection 69(1)(a) or in the statement under subsection 69(1)(b) or in the certificate to be used for subsection 69(3) of the Act. Even though the Form "Statement of fitness for work – Final certificate" includes a field for the date of the injury, that Form has not been prescribed for use in subsection 69(3) of the Act, it has merely been adopted for that purpose. In fact, no Form has ever been prescribed by Act, regulation or rule for use in subsection 69(3) of the Act.

76. This of course does not mean that an incorrectly identified date of injury appearing in a statement in a Notice or an accompanying certificate can never present a problem for an employer pursuant to subsection 69(3) of the Act. These documents must identify the incapacity for work which an employer's medical expert says a worker no longer suffers, and to do that they must adequately identify the injury which was the subject of the accepted claim.

77. The Worker was given the Notice incorporating the statement and the certificate together with the medical report of Dr Phil Allen dated 18 March 2020 - this inclusion is referred to at .5 on page 2 of the Notice. This report of Dr Allen is in evidence before the Court at page 114 in Volume 1 of the Court Book which is Exhibit E1. It is a report of Dr Allen's examination of the Worker on 5 March 2020 on which he based his opinion in the certificate. In that report, Dr Allen correctly and consistently identified the date of the injury as 29 November 2014.

78. The Worker was present in Court throughout the hearing. He gave his evidence in his case after the conclusion of the Employer's case and after hearing the evidence of Dr Allen. The Worker gave no evidence and made no suggestion that he had ever suffered an injury on 2 November 2014, 27 days before the date of the accepted injury on 29 November 2014 and in which he might have sustained the same or similar fractures. He gave no evidence and made no suggestion that he had ever suffered any other injury, either on 2 November 2014 or on any other date before or after 29 November 2014.

79. The certificate otherwise identifies the Worker correctly by name and by date of

birth. It correctly identifies the workplace where the injuries were sustained as "Northern Territory School". It correctly describes the fractures of the Worker's cervical spine, his left little finger, his left clavicle and of his ribs, essentially as set out in the original claim form and as accepted by the Employer. I am satisfied that the certificate correctly identifies these injuries and therefore the injury. I am satisfied that the certificate therefore adequately identifies the incapacity for work which in Dr Allen's opinion the Worker no longer suffered.

80. The certificate states the opinion of Dr Phil Allen that "*as from 5 March 2020 the Worker has ceased to be incapacitated for work".* This form of words accords with what is required by subsection 69(3) of the Act to be certified by the medical practitioner who is completing the document.

81. I am satisfied and I rule that notwithstanding the date of injury stated in the certificate being different from the correct date of injury in the accompanying Notice, this inconsistency does not in the circumstances of this matter invalidate the certificate. Accordingly, this inconsistency does not invalidate the Notice.

Subsection 69(4)

82. Subsection 69(4) of the Act provides as follows:

> *"(4) For the purposes of subsection (1)(b), the reasons set out in the statement referred to in that subsection shall provide sufficient detail to enable the worker to whom the statement is given to understand fully why the amount of compensation is being cancelled or reduced".*

83. In *Laminex* in paragraph [20] the Supreme Court noted my finding in *Catford* that the Notice in that matter consisted of four documents, being the covering letter to the worker dated 21 September 2018, the Notice of Decision and Rights of Appeal in the approved form, a medical report dated 28 August 2018 and the medical certificate dated 13 September 2018. The Supreme Court noted that the said medical report had been prepared by the same medical practitioner who had provided the certificate, and that medical report described the relevant examination of the worker and the conclusions drawn from that examination.

84. The Supreme Court ruled in *Laminex* in paragraph [21] as follows:

> "[21] *To approach the matter on the basis that the Notice was constituted by all of those materials was also in error. That is because s 69(4) of the* Return to Work Act *is concerned with the reasons set out in the statement in the approved form.* ***It is not concerned with the Notice generally, or with documents which might be related to or served with the Notice*** (my emphasis)*. Accordingly, it was not open to the Work Health Court, on a consideration of the* 'four documents as a whole'*, to determine that* 'the Notice is overlong, verbose, circular, ambiguous, garbled and confusing'.

It was also not open to the Work Health Court to adopt the test that the Notice had to be 'in clear terms which an average lay person can fully and readily understand'*. For the reasons already given, that is an erroneous synthesis derived from the misguided attempt to reconcile the statements in* Dickin *and* Newton*.* ***In assessing compliance with s 69(4) of the*** **Return to Work Act** ***the operative question is whether the reasons set out in the statement provide sufficient detail to enable the worker to understand why compensation has been cancelled or reduced, including with the assistance of a solicitor where necessary*** (my emphasis)***".***

85. These rulings in *Laminex* are binding on this Court.

86. The Notice in the present matter enclosed the certificate of Dr Allen and it was given to the Worker also enclosing a copy of the report of Dr Allen dated 18 March 2020, as identified above. On the basis of the first of the above two rulings in paragraph [21] in *Laminex*, the contents of the Notice, other than the statement of reasons it contains, are not to be considered for the purpose of considering compliance with subsection 69(4) of the Act. The position is the same for Dr Allen's report dated 18 March 2020 and for the certificate - neither of these is to be taken into account in considering compliance with subsection 69(4). This means that the incorrect date of injury in the certificate does not arise for consideration in considering compliance with subsection 69(4) in this case.

87. The statement of reasons in the Notice was in the following terms:

> "***The reasons for this decision are****:*
>
> "1. *You no longer incapacitated for work as a result of your work injury.*
>
> *"Particulars*
>
> *"(a) On 29 November 2014, you sustained an injury in the course of your employment with your Employer ('the injury').*
>
> *"(b) On or about 09 December 2014, you submitted a claim to your Employer in respect of the work injury, liability for which was initially disputed and subsequently accepted on 18 March 2015.*
>
> *"(c) On 05 March 2020, you were examined by Dr Phil Allen, Consultant Orthopaedic Surgeon. It is noted that Dr Allen has previously assessed you, on 06 November 2015.*
>
> *"(d) Dr Phil Allen in his report dated 18 March 2020, stated:*
>
> "I. I have previously reviewed Mr Tasneem in November 2015 and my

assessment at that time was that he had recovered from his injuries and indeed had little residual symptoms at that time."

"II. Other than the voluntary restriction of motion which made the range of motion examination impossible there were no other abnormal physical signs with no wasting, abnormal neurological findings or other objective stigmata of organic disease."

"III. His presentation is not consistent with the diagnosed conditions which have healed five years ago."

"IV. In the absence of any objective evidence of residual pathology in his musculoskeletal system I cannot recommend any further treatment at this point other than his own self-management."

"V. His reported level of symptoms cannot be ascribed to any previous injuries. His level of symptoms reported are out of step with the objective clinical findings and with the previous assessment in 2015."

"*Enclosed (*) is a copy of Dr Allen's report dated 18 March 2020.*

"(e) Dr Phil Allen issued a medical certificate dated 29 May 2020 certifying that 'The worker has ceased to be incapacitated for work.'

"*Enclosed (*) is a copy of Dr Phil Allen's NT WorkSafe Statement of Fitness – Final Clearance dated 29 May 2020.*

"2. Given the foregoing, your entitlement to compensation of weekly benefits are cancelled effective 14 days from your receipt of this notice. This will be accompanied by a cessation in financial support for medical and like expenses".

88. The question I am now required to answer is that posed at the end of paragraph [21] in *Laminex*, namely whether "…*the reasons set out in the foregoing statement provide sufficient detail to enable the worker to understand why compensation has been cancelled or reduced, including with the assistance of a solicitor where necessary".*

89. The Notice relied on subsection 69(3) of the Act. On the basis of the wording in that subsection, the minimum requirement in the statement of reasons to be set out in the Notice was a statement that a medical practitioner had certified that the Worker had ceased to be incapacitated for work, and of course a medical certificate of capacity of the medical practitioner to that effect had to accompany the Notice.

90. The history of the claim set out in the statement in the Notice under the heading

"*Particulars*" identifies the work injury and the claim the subject of the statement. The statements selected and reproduced from Dr Allen's report of 18 March 2020 explain how he arrived at his conclusion that the Worker was no longer incapacitated for work as a result of the work injury. All of this is in reasonably clear, plain language.

91. I am satisfied and I find that the reasons set out in the statement under the heading "***The reasons for this decision are***:" in the Notice did provide sufficient detail to enable the Worker to understand why compensation was being cancelled.

Conclusion as to Validity of Notice

92. I rule that the Notice dated 12 June 2020 is valid.

THE EMPLOYER'S CASE

The Expert Medical Evidence

Mr Raghavan Unni - Report

93. As noted earlier in these Reasons, the Employer bears the onus of establishing the change of circumstance warranting the cancellation of the payment of weekly benefits. Given the date of the cancellation of payment of weekly benefits – around 27 June 2020, 14 days after the Notice was given to the Worker - and given the limited nature of the medical issue, the relevant evidence in the Employer's case boils down to the reports and testimony of consultant Orthopaedic Surgeon Dr Phil Allen and of consultant Occupational Physician Dr Jude Ugwu. There is also a report dated 17 December 2014 from consultant Orthopaedic Surgeon Mr Raghavan Unni who saw the Worker on that date, about three weeks after the accident, and who reported to the treating GP Dr Kazi - Court Book volume 1 page 40. Mr Unni's report therefore provides something of a baseline against which to measure subsequent reports.

94. Mr Unni said as follows:

> "*His left clavicle conformation out of the sling did not demonstrate any skin bruises or changes and there was no (illegible) of the skin. There was no neurological deficit in his upper limb. The elbow and shoulder joints were within normal limits. He did have a swollen middle finger and his grip strength was reduced with restricted range of movements in his fingers.*
>
> *"I did not attempt to remove his cervical collar as I was unable to access his images which were on a CD he brought along.*
>
> *"I therefore organised an x-ray of his left clavicle which demonstrates an* ***undisplaced fracture of the mid shaft clavicle without compromising***

the soft tissues around (emphasis added)***.***

"His clavicle fracture can definitely be managed conservatively and is likely to heal very well. I have advised him to gradually wean off the sling over the next three weeks. He is allowed to do gentle active assisted exercises up to the shoulder level during this period and following complete removal of the sling he may start active exercises above the shoulder level".

95. The treating GP Dr Kazi referred the Worker for a whole body bone scan with a contrast medium. This was carried out on 22 January 2015 by Dr Kenny Wong and Dr Wong's undated report to Dr Kazi appears at pages 44 and 45 of volume 1 of the Court Book. Dr Wong relevantly reported:

"Mild activity is noted in the upper cervical spine in the region of C2, corresponding to the C2 vertebrae undisplaced oblique axial fracture as documented on MRI cervical spine dated 22/12/2014. ***No other significant findings and particularly no evidence of fracture involving the thoracic or lumbosacral spine*** (emphasis added)…

"CONCLUSION:

The findings are in keeping with multiple rib fractures involving the right second, sixth, seventh, eighth, ninth and 10th ribs and left fourth, seventh and eighth ribs. Evidence of a left distal clavicle fracture. Activity is seen in the C2 vertebrae likely in keeping with known undisplaced fracture at C2 vertebral body".

Dr Phil Allen – First Report

96**.** Dr Phil Allen is a consultant Orthopaedic Surgeon who first examined the Worker **on 6 November 2015, nearly 12 months after the accident,** on behalf of the Employer for medico-legal purposes. Dr Allen's first report addressed to the TIO is dated 12 November 2015. Dr Alan relevantly reported from page 3.3 to 3.8:

"*Current Symptoms:*

"Mr Tasneem reported that he still has some stiffness in his cervical spine. He reported a restricted range of motion as well as discomfort in his neck which radiates down across both shoulders. There is a dull ache present at rest and his symptoms are aggravated by activity. He reports no neurological symptoms in his upper limbs.

*"**With regard to his left shoulder, he reports residual restriction in range of motion in the left shoulder. He reports that his range of***

motion is gradually increasing however (emphasis added)***.***

"With regard to his ribs, these have healed but he still complains of occasional residual pain. He is unable to account for when the pain actually occurs.

"With regard to his little finger fracture, he reports that he has a restricted range of motion in the hand and little finger ***but whilst describing the restriction in the range of motion he concurrently demonstrated a full range of motion of all joints of his fingers and hand*** (emphasis added)***.***

"Work and Recreational Activities:

"Mr Tasneem has recently flown to Brisbane seeking a teaching position at a Brisbane Muslim school. He is very keen to get back to his normal teaching and he believes he is quite capable of this. He informed me that he had intentionally failed to mention to his new employer that he has had an injury as he hopes that this will not impede his application for the position. He feels he is quite capable of performing all necessary duties required of him in this new teaching position.

"He is able to drive a car but reported that he has some difficulty reversing because he cannot turn his neck fully (emphasis added).

"He is able to attend all his normal activities of daily living and was observed to undress and redress quite normally without any restriction".

97. At pages 4.5 to 5.4 of this report, Dr Allen reported as follows:

"*PHYSICAL EXAMINATION*:

"*Mr Tasneem attended early for his appointment today. I found him to be most pleasant and congenial and he cooperated fully with the interview and examination.*

"There were some inconsistencies during examination as his range of motion varied with some mild sickness behaviour and mild intermittent voluntary restriction of motion.

"He was wearing traditional Pakistani dress and was able to pull his tunic up over his head without difficulty using both arms. Later on in the examination he was unable to fully abduct his arms but once again at the end of the examination was able to pull his tunic back over his head and adjust his skullcap with full abduction and extension of his left arm which was at odds with the clinical findings (emphasis added)***…***

"Head/Neck:

"Mr Tasneem demonstrated a symmetrical range of motion of the cervical spine. He reported some pseudo-signs with discomfort on vertical pressure on the cranium, as well as vertical pressure on the shoulders. There was also a complaint of discomfort on very light palpation of the cervical spine posteriorly…

"Upper Limbs/Shoulder Girdles:

"There was normal neurology in the upper limbs with normal power, sensation and reflexes noted.

*"**Examination of the left shoulder revealed a restricted range of motion which was inconsistent. During the formal part of the examination he demonstrated restriction in range of motion but during observation between formal measurements was noted to have a full and equal range of motion in all planes to the contralateral side. The range of motion of the left shoulder was therefore taken as normal and equal to the contralateral side*** (emphasis added)***.***

"In the left hand he had an incidental trigger finger affecting the middle finger which is unrelated to his injury and is constitutional in nature. This occurred after his injury and he would like to ascribe it to the accident. It should be noted however that this is not related to this accident.

*"**With regard to the little finger, he had a full range of motion of the finger with no residual functional abnormality and he was able to flex all joints of the little finger and make a fist with his left hand*** (emphasis added)***".***

98. From the top of page 6 to the end of this report, Dr Allen relevantly expressed the following opinions:

"SUMMARY AND ASSESSMENT:

"Diagnoses:

1. Cervical spine fracture C2, now healed.

2. Fractured little finger left side, now healed and function restored.

3. Clavicle fracture left side, now united and continuing to improve, with increasing, possibly full, range of motion.

4. Multiple rib fractures, healed and minimally symptomatic at present.

"In answer to your specific questions:

1. …

2. …

3. **Mr Tasneem suffered multiple fractures a result of the fall from the mango tree which occurred some 11 months ago. Based on your assessment of Mr Tasneem, are you of the opinion that these injuries have now resolved? Please detail your answer.**

On the basis of my clinical assessment today I believe the fractures have all healed but there is still some residual recovery to occur which may take a further three months (emphasis added).

I believe his left hand has now returned to full function, as have his thorax injuries (emphasis added).

With regard to his left shoulder, he appears to have a full range of motion of the left shoulder but during the formal part of the examination he demonstrated some restriction in motion. This may be related to his strength and confidence and I anticipate this will continue to improve over the next three months.

With regard to his cervical spine, he appears to have a symmetrical range of motion in all planes with no residual neurological consequences (emphasis added).

4. Other disabilities and complaints regarding the injury in line with the diagnosis? Do you believe there is an element of exaggeration to reported symptoms in comparison to the diagnosis?

In general the complaints are in line with the diagnoses but there was some voluntary restriction in range of motion noted in all areas of the musculoskeletal examination. Details of the examination are as noted above.

5. …

6. Based on the information currently on hand to TIO, why has Mr Tasneem's injury not significantly improved (please provide answer in detail) – is it due to:

a) Insufficient treatment?

b) A psychiatric disorder?
c) Personality factors?
d) Coping style?
e) Sick role behaviour?
f) Psychosocial factors?
g) A lack of motivations?

Mr Tasneem's condition has improved significantly. There may be some restriction in his recovery based on possible personality factors, psychosocial factors, sickness behaviour and lack of motivation. I think however that these are in fact relatively minor ***and objective examination revealed a relatively good recovery all round*** (emphasis added).

7. In your opinion, do you consider that there is any permanent effect or permanent damage caused by Mr Tasneem's condition? If not, when you consider it would be reasonable to assume that the effects of the condition will cease.

I believe there will be minimal permanent impairment. I believe in three months' time the conditions will have reached maximum medical improvement and will have become stable and stationary after which a permanent assessment may be required".

99. From the foregoing it is plain that when Dr Allen examined the Worker on 6 November 2015, close to one year after the accident, he was of the opinion that the Worker had made a good recovery from all the fractures which had constituted the injury, notwithstanding some inconsistencies on formal clinical assessment as noted, and that the Worker would continue to recover over the following three months, essentially reaching full recovery by then.

Dr Jude Ugwu - Report

100. The TIO on behalf of the Employer arranged for the Worker to be assessed by consultant Occupational Physician Dr Jude Ugwu on 21 April 2017, about 18 months after his assessment by Dr Allen. This too was a medico-legal assessment. Dr Ugwu provided a report to the TIO dated 5 May 2017 which appears at page 79 of volume 1 of the Court Book. In that report Dr Ugwu provided the following opinions from page 3.4 to page 5.4:

*"**Functional Status***

"Mr Tasneem worked on a casual basis following return to work after his initial injury, up until December 2016. He states he was off work for about 10 months after the initial injury and then worked for 22 weeks after return to work. He states that he was, however, having trouble after the injury, with no energy, and pain in the neck, shoulder and upper back. According

to him, he was concerned with regards to duty of his care to his students. In his assessment, NT students can be very difficult to manage, and it requires a fit and agile teacher. He states that he feels better working with students in Brisbane, where he has had a secondment following his injury, managing children with high needs, where he only needed to put on the computer program for them and observe them work through the computer activities while he is seated.

"Mr Tasneem said he is not very active currently. He does not vacuum and does not sweep. He can perform light cooking. He states his standing tolerance is only to 10 minutes, then he needs to lie down. Walking tolerance is also said to be about 10 minutes. He admitted he goes shopping with his wife, but that he struggles with more than 2 kg items if he needs to pick items during shopping.

*"**Past Medical History***

"Nil noted, apart from allergy to pollens.

*"**Current Management***

"Mr Tasneem states he takes Brufen prn, last used it a couple of days ago. He also uses Panadol Osteo prn, alternating it with the Brufen. He is currently not on physiotherapy since September 2016, as he states that physiotherapy was not helping him. He avoids hydrotherapy because according to him he is a devout Muslim and does not wish to be in the same pool with women who are not well clothed.

"Mr Tasneem says he has recently been stressed and becoming angry easily due to his pain condition and off work status. He states his wife has noticed his changed mood. He feels frustrated because he is not able to do things he used to do in the past.

"Mr Tasneem further states that he has felt dizzy when he moves his neck commencing October 2015. He has spoken to his doctor. However, he states he has not had the symptoms for about five months now. He confirms that he experiences symptoms mainly with moving his head…

*"**PHYSICAL EXAMINATION***

"Neck

***"**Mr Tasneem presented with neck flexion of only 10°. Extension was only minimal with a catch type pain reported. Lateral flexion right and left were about 15°. Rotation was about 60% of normal. There was no tenderness noted over the cervical spine, over the spinous processes, intervertebral*

segments, or over the paravertebral muscles.

*"**Shoulders***

"No shoulder wasting was noted. Shoulder movement in the right shoulder was active abduction to 60° and passive to 110°. Shoulder flexion was to 120°. No tenderness was noted on palpation of the shoulders. Impingement tests were negative, with Hawkins' and Jobe's tests both negative.

"Left shoulder is clutched close to the body. Abduction was only to 45° active. Passive abduction was to 90°. Shoulder movement was limited by pain. No localised shoulder tenderness was noted. Negative impingement signs were noted. There was no clicking. There was no wasting.

"While shoulder power resistance tests were performed, he reported pain to his upper back. Mr Tasneem was noted, after formal examination of the shoulder, while removing and putting on his clothes, to freely abduct smoothly to about 120° on the right side.

*"**Back***

***"**Lumbar back examination showed thoracolumbar flexion performed slowly to 90°, with pain reported through the whole range. Extension movement was only 10° with a catch type pain reported. Lateral flexion movement was to only 50° of normal. Lumbar palpation did not show any localised tenderness. Straight leg raising was limited, with pain reported to the thoracic spine…*

*"**Left Little Finger***

"The left little finger fracture has also healed. He has normal range of movement of the finger. I did not note any trigger finger in the affected finger.

101. Dr Ugwu went on from page 6 to page 10.5 of his report to make the following relevant observations:

"***SUMMARY AND ASSESSMENT***

"Mr Tasneem is a teacher who sustained a fall with neck, rib fracture, left clavicular fracture and left little finger fracture in November 2014. He is currently off work reporting ongoing pain.

"In response to your specific queries:

*"**Examination***

"1. **In your opinion, what is the specific diagnosis of the conditions from which Mr Tasneem suffers?**

"Mr Tasneem had a fall on 29. 11. 2014 with a cervical spine fracture, left clavicular flexion fracture and left little finger fracture. ***Mr Tasneem has healed from his fracture conditions. There is some pain behaviour with a significant residual restriction of movement with no demonstrable tenderness. There is some disparity between formal range of movement testing and range of movement testing when not observed*** (my emphasis)*. The left little finger fracture has also healed. I did not note any trigger finger in the affected finger.*

*"***2. Based on the identified pathology, what is the typical duration of incapacity arising out of the diagnosis/es you have noted above? If this has been exceeded please provide your opinion regarding this**.

"*I note that Mr Tasneem is still off work following the fracture injuries of 2014.* ***This has exceeded the usual recovery period for undisplaced fractures managed conservatively*** (my emphasis). *He has restricted movement of neck and shoulders and lumbar back. No wasting was noted. Mr Tasneem should be encouraged to return to activities including a teaching program to assist him to get back to his normal life.*

*"**3.*** **Please detail any other potential clinical problems, even those outside your area of specialisation that you feel may also be impacting on Mr Tasneem's functional capacity.**

"*Pain behaviour has been noted* (my emphasis). *There may be behavioural or cultural aspects to his ongoing disability reporting. Mr Tasneem reports feeling presently angry and frustrated. His mood appeared euthymic. He responded directly to questions with good eye contact. He has good insight. Depressive mood was not noted.*

*"**4….***

"**5. Do you attribute Mr Tasneem's current symptoms to the work injury of 29.11.2011** (sic) **or to pre-existing conditions/degeneration?**
a. If you attributed part of Mr Tasneem symptoms to the work-related injury please detail and give a percentage.
b. If you attributed the current symptoms, in whole or part, to an aggravation of the pre-existing conditions/degeneration, please detail a percentage and when this aggravation is likely to cease?

I have noted that degenerative changes of the cervical spine were noted in

Mr Tasneem's cervical or MRI imaging study. He, however, reported not having any previous cervical spine or thoracolumbar spine conditions or symptoms prior to his fall. He also did not report any pre-existing shoulder pathologies or symptoms. ***I consider his current symptoms are related to the fall*** (my emphasis)***.***

*"****I have stated there appears to be pain behaviour. While his fracture conditions have healed, he continues to have a perception of disability, pain avoidance, and incapacity*** (my emphasis)***.***

"6. In your opinion is there any inconsistency between the reported symptoms, the level of incapacity and the objectively identified pathology?

"*I note that cervical spine range of movement is significantly restricted. There is, however, no tenderness noted over the cervical spine, and the cervical spine C2 fracture is considered to have healed. He also has significant shoulder pain reporting, with restriction of shoulder movement. There is no wasting noted. Resisted shoulder power testing does not result in any shoulder pain, but rather reporting thoracic spinal pain. Mr Tasneem was noted to move his right shoulder better and more smoothly while putting on his shirt then during formal testing. He continued to carry his left shoulder in a protective manner with minimal elevation during examination and while putting on his clothes.*

*"***7. Given the length of time since the date of injury and the amount of treatment received to date why has Mr Tasneem's injury not significantly improved (please provide answer in detail) – is it due to:**
a. Insufficient treatment?
b. Personality/psychological factors?
c. Coping style?
d. Sick role behaviour?
e. Psychosocial factors?
f. A lack of motivations

"I do not consider the lack of progress in this case is due to insufficient treatment. I have noted some pain behaviour. Improved coping mechanisms can improve his functional status to return to work…

"*Treatment*

"8. It is noted that Mr Tasneem is not currently receiving any active treatment relating to the compensable condition. Based on Mr Tasneem's presentation, are you of the opinion that this is reasonable to address Mr Tasneem symptoms? Please explain your answer.

"I do not consider any further active treatment is required ***for mending any physical pathology*** (emphasis added)***.*** *Pain management, however, with emphasis on coping skills, can be provided, with the aim of training to understanding better his medical symptoms and working out how to cope and function with his current symptoms.*

"9…
"10…

"*Incapacity*

"11. In your medical opinion when do you anticipate that Mr Tasneem would be able to undertake a return to work program for some form of suitable duties with the assistance of an accredited rehabilitation provider?
a. Would you expect that Mr Tasneem will be capable of returning to their preinjury hours? Please indicate your anticipated timeframe
b. Would you expect that Mr Tasneem will be capable of returning to their preinjury role? Please indicate your anticipated timeframe
c. Would you recommend will apply to Mr Tasneem's injury? Please indicate if any recommended restrictions will be permanent.

"*I note that Mr Tasneem's pre-injury duties are in a teaching role. I consider that with return to work rehabilitation program he can successfully return to pre-injury hours. I have noted the yellow flag issues associated with this case, which can make it problematic for return to work success. If a positive outcome from return to work rehabilitation effort is achieved, return to pre-injury duties in 3 to 6 months can be attained.*

"It is difficult to outline any restrictions in relation to his teaching role. Mr Tasneem's incapacity is difficult to determine due to pain behaviour. Restrictions relating to heavy lifting, climbing, and pushing or pulling is appropriate until he gains adequate confidence and re-acclimatisation to the work environment. Lifting restriction of 10 – 15 kg is appropriate.

"*Prognosis*

"12…
"13…

"14. Are there any other factors or comments that you feel are relevant to assisting us in the ongoing management of Mr Tasneem's claim which have not been addressed in the list of questions? Please outline your suggestions or recommendations in detail that you feel may be of assistance.

"Vocational rehabilitation and return to work program is appropriate in this case. ***Psychological counselling aimed at return to work, motivation and preparation is appropriate over a 1 – 2 month period*** (my emphasis)".

Dr Phil Allen – Second Report

102. The Worker was examined by consultant Orthopaedic Surgeon Dr Phil Allen for the second time, on 5 March 2020, nearly three years after the examination and report of Dr Ugwu. This was once again a medico-legal examination organised on behalf of the Employer. Dr Allen provided a report dated 18 March 2020 on the basis of this examination and this report appears at page 114 of volume 1 of the Court Book. At page 2.7 of this report Dr Allen said:

> "*I have previously reviewed Mr Tasneem in November 2015 and my assessment at that time was that* ***he had recovered from his injuries*** (my emphasis) *and indeed had little residual symptoms at that time.*
>
> *"At his assessment at that time, he demonstrated some mild illness behaviour with a voluntary restriction in motion and there were inconsistencies noted during the assessment.*
>
> *"He told me that he was not using any medications at that time other than occasional Panadol Osteo. He was self managing his condition and he was not seeing a therapist. No further treatment was planned for him. My assessment at that time was* ***that he had recovered from his injuries*** (my emphasis) *and there was little in the way of objective physical* ***evidence*** *of residual impairment or pathology.*
>
> *"I assessed him at that time as having a few more weeks of recovery necessary for his minimal residual symptoms to settle".*

103. From page 3.4 Dr Allen went on to make the following observations relevant to the Worker's presentation on 5 March 2020:

> ***"PHYSICAL EXAMINATION***:
>
> *"****Mr Tasneem's behaviour today was markedly abnormal with voluntary restriction in motion, where range of motion demonstrated was out of step with that observed*** (emphasis added).
>
> *"He also demonstrated a wide fluctuation in mood and at the beginning of the assessment started shouting at me. He was asked to modify his behaviour and a male chaperone attended for the remainder of the examination.*

"There was evidence of other abnormal illness behaviour with feigned fainting (where he appeared to collapse towards the ground but stopped himself halfway) and did not hit the ground. The examination was also accompanied by vocalisations, tight ocular occlusions and bizarre withdrawal behaviour.

"Other than the voluntary restriction of motion which made the range of motion examination impossible there were no other abnormal physical signs with no wasting, abnormal neurological findings or other objective stigmata of organic disease.

*"**Upper Limbs/Shoulder Girdles:***

"With respect to his left hand he demonstrated a full range of motion, motion of his left little finger and the clavicle fracture has long since healed. There is no paraspinal muscle tenderness or spasm in the neck and he had normal neurology in his upper extremities…

*"**SUMMARY AND ASSESSMENT**:*

"Mr Tasneem sustained a fracture of the cervical spine which has now healed and has been healed since 2015.

"Mr Tasneem had a fracture of the left little finger which is healed and has been healed since 2015.

"Mr Tasneem had a fracture of his left clavicle which is united and has been healed since 2015.

"Mr Tasneem has evidence of old rib fractures which have healed.

"Mr Tasneem presented with reports of pain and symptoms out of step with the objective clinical findings. The level of pain and disability reported is not substantiated by objective medical evidence.

"The abnormal illness behaviour was noted.

*"**The musculoskeletal injuries are considered to have long since healed and cannot account for the reported level of symptoms at today's assessment*** (my emphasis)".

104. Dr Allen went on in this second report to answer a number of specific questions and I set out the relevant parts of those questions and answers as follows:

"**1) What is Mr Tasneem's specific diagnosis for his injuries?**

Please comment on the results of any investigations and include copies of any results.

"Fractured C2, left little finger, left clavicle and rib fractures. All these injuries have healed and had healed by 2015.

"The investigation results are documented in the body of the report above under the heading "Investigations".

"2) What are Mr Tasneem's current symptoms and complaints? Is his presentation consistent with the diagnosed conditions?

"Mr Tasneem complained of severe pain which was out of step with the objective clinical findings and was not objectively verifiable. There was marked abnormal illness behaviour.

"His presentation is not consistent with the diagnosed conditions which have healed five years ago.

"3) In your opinion, are Mr Tasneem's reported conditions a direct result of the claim for compensation for injury sustained on 29/11/2019 (sic)**? Please provide detailed reasoning.**

"No.

"His reported level of symptoms cannot be ascribed to any previous injuries. His level of symptoms reported are out of step with the objective clinical findings with the previous assessment in 2015.

"4) Can you please detail the activities or events, employment-related or otherwise, that have contributed to the ongoing pain and stiffness related to this diagnosed injury.

"I cannot account for his level of symptoms which are reported today. Similarly, on the basis of my objective assessment I see no impediment to his normal activities of daily living, employment or domestic activities which can be objectively substantiated.

"The level of symptoms reported is not objectively verifiable.

"5) Has Mr Tasneem suffered from an aggravation, exacerbation or worsening of a pre-existing condition? If so, was this pre-existing condition symptomatic or asymptomatic prior to the work-related incident?

"No. This was a de novo *injury which occurred on 27 November 2014*

(sic).

"6) Are there any contributing factors, other than the injuries that may be limiting Mr Tasneem's ability to return to work? If present, what are the implications of management?

"There may well be a psychiatric or psychosocial issues (sic) *at play here but this is beyond my area of expertise.*

"7) - 13)…

"14) Do you have anything you wish to add?

"A psychiatric assessment may be warranted".

Dr Jude Ugwu – Live Evidence

105. Dr Ugwu gave evidence before the Court on 23 November 2021, the second day of the hearing. He confirmed that he had been sent some surveillance footage of the Worker which he had watched. He confirmed that he had then had a telephone discussion about that surveillance footage, with Mr Lachlan Baird, a solicitor employed by Minter Ellison, the solicitor for the Employer. A record of that telephone conversation was received as Exhibit E 7.

106. Dr Ugwu stated in that telephone conversation that his examination of the Worker had occurred in 2017 and that Dr Ugwu did not in 2021 have a specific memory of the Worker.

107. Dr Ugwu went on in that telephone conversation to offer his opinion on the basis of the surveillance footage set out in Exhibit E 7 as follows:

> "a. *the observed function of the gentleman in the surveillance footage has significantly more function in the shoulders than the subject of his 2017 report.*
>
> *"b. the observed function of the gentleman in the surveillance footage demonstrated significantly more neck rotation than the subject of his 2017 report, including in his ability to drive a motor vehicle.*
>
> *"c. the observed function of the gentleman in the surveillance footage demonstrated an increased lifting capacity to the subject of his 2017 report".*

108. In cross examination on 23 November 2021 at transcript pages 103.9 and 104.1 Mr Nolan for the Worker asked Dr Ugwu:

"*Do you accept that for chronic pain sufferers, being tense and anxious can have an impact on perception of pain levels?"*

Dr Ugwu answered:

"*That's correct".*

Dr Phil Allen – Live Evidence

109. Dr Allen gave evidence before the Court on 22 November 2021, the first day of the hearing. Dr Allen also had been asked to watch and consider the surveillance footage of the Worker. He did so and he had a telephone conversation with Mr Lachlan Baird of Minter Ellison for the Employer on 22 November 2021. That conversation was reduced to writing and was received by the Court as Exhibit E 2.

110. In Exhibit E 2 Dr Allen offered the following relevant opinions:

"5. Dr Allen has watched the surveillance footage and is able to say the following about matters referenced in his report

a. Worker is observed clearly lifting arms, neck and movement without restriction contrary to presentation upon examination (and per 2015 report – gave example of removing clothing over his head in November 2021 footage)

b. Picks up heavy shopping bags without issue in left hand – inconsistent with report of pain as

c. Moves mattress, shopping and other material without restriction – again inconsistent

d. inconsistent with painful arc syndrome test referred to in Clayton report – lifting arm overhead, carrying raising to side all seen in footage

"6. Dr Allen has been provided with Ch 18 AMA Guidelines because we were put on notice on 21/11/21 that his expertise in relation to pain was to be challenged. Dr said he was able to give evidence about pain within his specialisation

a. Pain is part of the human condition and integral part of medicine.

b. Pain cannot be objectively verified, and relies upon the reporting of the patient.

c. For a pain syndrome diagnosis there requires all of the following:

i. Skin change
ii. colour change
iii. hair loss
iv. (noted there are others all discussed in ch 18)

d. The worker does meet the Budapest criteria for a pain symptom

"7. The footage is consistent with the worker being able to work unrestricted as a teacher".

111. Dr Allen was cross-examined on behalf of the Worker. Mr Nolan initially asked Dr Allen questions arising from propositions about the nature of pain appearing in Chapter 18 of the 5th Edition of the AMA Guides – MFI E 4. Although the exchange was interesting, it was essentially philosophical in nature and ultimately I have found it of no assistance in the process of weighing the evidence in this matter.

112. The cross examination moved on to more concrete issues. At page 72.3 in the transcript of 22 November 2021 the following exchange occurred arising out of Dr Allen's first report dated 12 November 2015:

"*Mr Nolan: Under the answer to question 3, 'On the basis of my clinical assessment today, I believe the fractures have all healed but there is still some residual recovery to occur, which may take a further three months.' Do you see that?*

"Dr Allen: Yes.

"Mr Nolan: Can I ask you what you say he still needed to recover from? What is the residual recovery that you're referring to in your report?

"Dr Allen: When a fracture heals, the first step of fracture healing is inflammation, which is then followed by new tissue being laid down across the fracture site. Which then gets calcified, the fracture become stable and by six weeks we often refer to the fracture as united. It takes up to 18 months for a bone to remodel.

"Mr Nolan: Yes?

"Dr Allen: For the tissues to return back to normal. And for the strength and normality to return across the fracture into the bone. In an older person it may take a little longer. Residual recovery following a fracture may go through to 18 months, so often the symptoms are settled within the first 6 to 12 weeks.

"Mr Nolan: I see. And in Mr Tasneem's case, what was the particular

residual recovery that he needed to have occur at that point?

"Dr Allen: The remodelling of his tissues following his injuries. He had had a number of rib fractures, a clavicle fracture and the bones – his bones would heal at about the same rate as anybody else at his age and constitution".

113. The Worker's counsel then moved on to cross examine Dr Allen concerning his report dated 18 March 2020. At page 79.9 of the transcript of 22 November 2021 the following exchange took place:

"Mr Nolan: Okay. Then the final line, you said that, 'The musculoskeletal injuries are considered to have long since healed and cannot account for the reported level of symptoms of today's assessment.' So do I understand your evidence to be that if the fractures have healed, it cannot – there cannot be symptoms? Is that your evidence?

"Dr Allen: No, there may be symptoms from other components rather than just the fractures".

114. Further in cross examination, Mr Nolan put to Dr Allen, and Dr Allen accepted, that chronic pain might be the single resultant effect of a biological insult, or it might be a separate pain condition with a separate or even unidentified cause. Ms Chalmers SC, counsel for the Employer, asked a question concerning this in re-examination at page 86.2 in the transcript of 22 November 2021, as follows:

"*Ms Chalmers: Was there anything, Doctor, from your – any of your assessments of Mr Tasneem, including what you saw in the surveillance, that in your opinion is suggestive of chronic pain as a result of his physical injuries?*

"Dr Allen: No".

The Surveillance Footage

115. Following the conclusion of Dr Allen's evidence the Court and the parties and their counsel viewed the surveillance footage taken of the Worker relevant to this matter. The whole of that surveillance footage is on the disc which contains Exhibits E 5 and E 6 before the Court. The whole of that footage had been provided to each of the three medical experts who gave evidence in this matter, and each of them had the opportunity to and did express their opinions concerning that footage.

116. The surveillance footage was played to the Court on 22 November 2021. The first lot of surveillance footage – Exhibit E 5 – covered events recorded on 12 April and 3 May 2021, and ran for 22 minutes. The second lot of surveillance footage -

Exhibit E 6 – covered events on 3 November 2021, 19 days before the first day of the hearing, and ran for nine minutes. The Worker was present in the courtroom when the surveillance footage was played on this occasion.

117. In both lots of footage the Worker can be seen on a number of occasions walking along the street. None of these occasions was for as long as 5 to 10 minutes and therefore none contradicted the Worker's later evidence that he could only walk for five to 10 minutes before needing to lie down because of pain.

118. The Worker's face can be seen for varying periods of time from different angles on each of these occasions. On the majority of these occasions the Worker had both hands clasped behind his back as he walked. I observed that there was nothing in the Worker's gait, his posture, his demeanour or in his facial expressions when his face could be seen, that evinced any outward signs of hesitancy, poor balance, pain or discomfort.

119. I now proceed to note my observations of events I found significant in the surveillance footage in Exhibit E 5, in the order in which they unfolded.

i) The Worker is seen walking and carrying a full plastic shopping bag in his right hand. He is seen to bend at the lower back, apparently without restriction, and put the bag into a vehicle. He then walks on with both hands clasped behind his back.

ii) The Worker is seen watering a small garden with a hand-held hose, and then turning off the tap with his left hand.

iii) The Worker is seen approaching a van and opening the passenger side door with his left hand.

iv) The Worker is seen walking along holding two water bottles in his left hand. He is seen to transfer those to his right hand.

v) The Worker is seen walking along holding a plastic shopping bag in his right hand and a mobile phone held to his left ear with his left hand.

vi) The Worker is seen driving a van with his hands at the 10 minutes before 2 PM position on the steering wheel.

vii) The Worker is seen carrying a 10 litre container in his left hand – he subsequently gave evidence that it was full of water on this occasion. He is also seen at the same time carrying what he later described in his evidence as "*a six-pack 1 litre milk*" in his right hand - I take judicial notice of the fact that the weight of one litre of water is one kilogram, and of one litre of milk is also effectively one kilogram, so that the Worker was carrying 10 kilograms weight in his left hand and six kilograms weight in

his right hand.

viii) The Worker is seen behind his van closing the rear tailgate. Both of his arms are fully extended above his head, with no bending at the elbows, as he reaches up for the highest point of the open tailgate and then pulls it down to the closed position.

ix) The Worker is seen walking along carrying a load of what looks like blankets or bedding in his left arm. These did not look as if they would weigh very much.

x) The Worker is once again seen closing the rear tailgate of his van. Once again both his arms can be seen to be fully extended above his shoulders, with no bending of the elbows.

xi) The Worker can be seen seated in the driver's seat of his van, moving his head both to the left and to the right, although not to any great extent.

xii) The Worker can be seen holding a plastic bag filled with something unknown in his left hand and with what looks like old clothes draped over his left forearm and other cloths draped over his left shoulder, engaged in smiling conversation with a younger man. He then walks off carrying these materials.

xiii) The Worker can be seen taking a red dotted plastic bag with unknown contents from his van with his left hand. He can be seen, on the third occasion now, closing the rear tailgate of the van with both arms fully extended above his head, with his elbows not appearing to be bent.

xiv) The Worker can be seen holding two plastic shopping bags containing unknown items in his left hand while using his right hand to unlock the door of his van. He is seen to climb into the driver's seat of the van and then to reverse the van. The angle of the footage does not permit observation of the extent to which he might have turned his head.

xv) The Worker can be seen walking along carrying plastic bags in his left hand containing unknown items of unknown weight, however he can be seen bending to the right as he walks, apparently in compensation for the weight in his left hand.

120. I now proceed to note my observations of events I found significant in the second and shorter surveillance footage contained in Exhibit E 6, in the order in which they unfolded.

i) The Worker is observed driving his van. He is seen to turn his head to the right and then to lean his head towards the right.

ii) The Worker is seen sitting in the driver's seat of his van and removing his upper tunic by pulling it over his head. Both his arms are above his shoulder height during this exercise but the extent to which they are fully extended, or less than fully extended, cannot be determined. Once his tunic is removed he can be seen to turn his head fully to the left, return to looking straight ahead, and then to turn his head once again to the left.

iii) The Worker can be seen alighting from his van and turned his head to the right as he does so.

iv) The Worker can be seen walking along with both hands clasped behind his back, and then to turn his head to the right.

121. Dr Ugwu gave his evidence in the Employer's case after the surveillance footage had been viewed and received into evidence. The Employer closed its case at the conclusion of the evidence of Dr Ugwu, during the morning of 23 November 2021, the second day of the hearing.

THE WORKER'S CASE

Dr Clayton Thomas - Reports

122. Dr Clayton Thomas is a consultant in Rehabilitation and Pain Medicine. The Worker was referred by his GP Dr Kazi and was first seen by Dr Thomas on 14 February 2018 and then on two further occasions, 22 November 2019 and 19 August 2020. Dr Thomas referred the Worker to the Dorset Rehabilitation Centre following the first consultation. The third consultation, on 19 August 2020, was for a medico-legal assessment.

123. Dr Thomas prepared five reports which are before the Court. The first three are his reports of 16 February 2018 addressed to Dr Kazi, and 21 August 2020 and 4 November 2021 addressed to the Worker's lawyers, all of which appear respectively at pages 389, 121 and 126 of volume 1 of the Court Book. He prepared two further reports addressed to the Worker's lawyers, being dated 22 November 2021 which is Exhibit W 8, and dated 23 November 2021 which is Exhibit W 9 before the Court. Dr Thomas's *curriculum vitae* was received as Exhibit W 10.

124. Dr Thomas's first report is dated 16 February 2018. He recorded as follows:

> "*On 14 February 2018, he complained of significant pain. The pain was mainly in the trunk. Neck, shoulder girdle, scapular region and lower back region. He had pain in the left shoulder and left upper limb. Pain in the left hand. Numbness and tingling in the soles of his feet.*

"Pain levels he indicated fluctuated from 7 at worst to 2 at best…

"On examination, he was an easily engaged cooperative man. He was tender to palpation in his neck, thoracic spine and lumbar spine. Neck movements were moderately limited in all domains.

*"**Left shoulder movements were limited quite substantially*** (emphasis added).

"Reflexes seem to be somewhat brisker in his arms than in his legs. There was no clonus in his legs, no hypertonicity.

"He was reluctant to bend forward through his lumbar spine for fear that he gets stuck. He did show me how he is able to get to the ground and get back up again…

"On 14 February 2018, I formed the following impressions:

"1. Multitrauma. Ongoing residual problems. These seemed to be quite severely disabling for him.

"2. It was recommended that he do a pain management rehabilitation program. I felt that although that was quite reasonable and indeed quite appropriate, prior to doing that, we needed to get a nuclear bone study performed to make sure we are not missing any occult injuries or unhealed fractures and the like. I sent him off for nuclear bone study, whole body, for completeness here.

"3. He is not that keen to look at medications and I was not convinced that medications were likely to lead to any significant abatement of his symptoms. In a similar manner, in view of all the diffuseness of his pain complaints, interventional treatments were unlikely to be helpful here".

125. Dr Thomas's second report dated 21 August 2020 is addressed to the Worker's lawyers. It sets out a history of the injury and of the Worker's employment after the injury. Dr Thomas recorded the history of the Worker's complaints taken when he first saw him on 14 February 2018.

126. Dr Thomas further reported that when he saw the Worker in a clinical capacity on 22 November 2019 the complaints were the same. He said:

"*At that stage his pain had not changed. Ongoing spinal pain, left upper limb pain. He tended to sequestrate himself away from his community with very little interaction. He would, however, attend his mosque five times per day as this was a five-minute walk from his home. Outside of that he had a very basic life at home. He reports that although he was driving, he has*

had multiple scratches and bumps in his cars because of poor head turning.

*"**He presented as being markedly disabled*** (emphasis added) *and I was not convinced that revisiting a rehabilitation program was likely to lead to any functional improvement.*

*"When I saw him on 19 August 2020 his pain complaints remained fairly similar. Middle lower back pain, pain in the scapular region more on the left and the right. Into the neck. Neck stiffness. **Left shoulder girdle pain and stiffness. Left wrist pain**. **Difficulty using the left arm. Difficulty lifting with the left arm. Pain on doing so*** (emphasis added)***.***

"He was right upper limb dominant.

"He had occasional numbness in his left arm intermittently.

"Functionally his sleep was disturbed. He would get up at about 5 to 5:30 AM. He would read the Koran, sit before going back to bed for a couple of more hours. Intermittently overnight he would wake up, get up and go back to bed.

"Walking was at most 30 minutes. He would go for regular walks all he wanted to do was sit down. He would walk with his family but his family would leave him walking as he was too slow for them.

"He continued to complain of neck stiffness. He would ask his younger son to travel with him so that he can do the head checks. Although he would go to the shops with his wife, his wife would do the lifting. He has not been able to attend the mosques since the mosques shut down since the commencement of the pandemic.

"He is able to do dishes for about five minutes but then tends to sit down or lie down. He has difficulty with personal care, brushing his teeth because of the gentle flexion of his back that is required and so he does not do this on a daily basis.

On examination he is an appropriate cooperative soft-spoken man. He was 163 cm tall, his weight was 71 kg, his body mass index was 26.7.

"His back movements were similar to what they were when I previously examined him.

"Movements of his neck were moderately non-specifically limited. Rotation was approximately 50° to 60°. Lateral bending 10° to 20°, flexion 30°, extension 10°.

He was tender in the back at around L 4 in the mid-thoracic spine on the left-hand side. Thoracolumbar movements were moderately non-specifically limited.

"His left shoulder movements were limited but with gentle encouragement movements were possible but quite painful for him. He did have a painful arc syndrome but no Hawkins' or empty cans signs…

"As to your specific questions:

"The history has been outlined as per the body of this report

"The circumstances of the incident have been outlined as per the body of this report.

"Diagnostically he has fairly diffuse and widespread pain complaints and stiffness of his thoracolumbar spine and cervicothoracic spine and left shoulder. This has been the case when I first saw him and almost exactly the same range of movement when I assessed him on 19 August 2020.

"*The only investigation I organised was a bone scan which was performed on 23 February 2018 which was unremarkable.*

"He presents with a high degree of residual disability. This disability precludes his ability to return to full-time work as a teacher. He finds it standing in particular is very problematic for him and he has a tendency to always want to sit down and ideally recline. This is not compatible with working as a teacher. His attempt at returning to work as a teacher have not been successful".

127. Dr Thomas's third report is dated 4 November 2021 and is addressed to the Worker's lawyers. In that report Dr Thomas says as follows:

"*You have asked me two additional questions. You have asked me what the injuries were sustained by the event on 29 November 2014.*

"He sustained multiple fractures. A fracture to his upper cervical spine. Nine fractured ribs. A fracture to the left clavicle and a fracture to the left little finger.

"As a consequence of the physical injuries, he developed fairly diffuse pain symptoms, the sequelae of the stated fractures.

"The incident on 29 November 2014 led to the development of diffuse and widespread pain symptoms and a high degree of residual disability.

"In absence of the events of 29 November 2014 his current condition would otherwise not have arisen".

128. Dr Thomas's fourth and fifth reports are dated 22 and 23 November 2021 and are addressed to the Worker's lawyers. They are to the effect that Dr Thomas had seen the surveillance footage of 12 April and 3 May 2021, and subsequently of 3 November 2021, and that all of this video evidence "*does not alter my opinion as expressed in my previous report to you".*

Dr Clayton Thomas – Live Evidence

129. In the "Worker's Written Submissions" dated 23 February 2022 Mr Nolan of counsel for the Worker submits as follows:

> **"***67. The Employer's first criticism of Dr Thomas' opinion is that he has not sought to '*explain why or how a person with no objective evidence of residual physical injury could still be suffering pain effects'*.*
>
> *"68. With respect, Dr Clayton (sic) does not have to. He is a pain specialist and provided an opinion that they are causally linked. The Employer could have explored the concept of continuing pain complaints following the resolution of the original insult in cross examination but did not".*

130. This submission requires significant qualification. In his report dated 20 August 2020, Dr Thomas does indeed say in respect of the Worker and his pain: "*In absence of the events of 29 November 2014 his current condition would otherwise not have arisen*". Dr Thomas also says earlier in that report as follows: "*As a consequence of the physical injuries, he developed fairly diffuse pain symptoms, the sequelae of the stated fracture*…*The incident on 29 November 2014 led to the development of diffuse and widespread pain symptoms and a high degree of residual incapacity*".

131. I appreciate that Dr Thomas's use of the word "*sequelae*" does not necessarily mean that he intended the legal meaning attributed to this word in workers' compensation matters. Even so, in plain English Dr Thomas's foregoing statements of causality are equally consistent with the Worker's pain being a subsequently arising sequela to the injury as understood in workers' compensation law, as with its being a direct result of the injury.

132. In his first report dated 16 February 2018, Dr Thomas said that he "…*formed the following impressions: 1. Multitrauma. Ongoing residual problems. These seem to be quite severely disabling for him*". This suggests that Dr Thomas might have understood that the Worker had been experiencing severely disabling "*residual problems*" ever since the accident and the injury of 29 November 2014. He was not asked in evidence in chief or in cross examination whether this was his

understanding. If it was, that is not the history before the Court in the contemporaneously recorded notes of the treating GP Dr Kazi or in the first report of Dr Allen dated 12 November 2015.

133. Other than in the statements I have reproduced in the three preceding paragraphs, Dr Thomas did not anywhere else in his five reports discuss the nature of the causal relationship between the injury and the Worker's complaints of pain.

134. Dr Thomas gave live evidence before the Court commencing on 24 November 2021 starting at transcript page 171. We were not able to complete all of Dr Thomas's evidence in the time he had available that day and we adjourned part way through his cross examination until 26 November 2021 when he resumed giving evidence in cross examination, starting at transcript page 276. On that day we were once again unable to complete Dr Thomas's evidence and we adjourned again still in his cross examination to 3 December 2021, starting at transcript page 299.

135. In examination in chief starting at the foot of page 173 of the transcript of 24 November 2021, counsel for the Worker sought leave to ask Dr Thomas to clarify what he meant by the word "condition" in the final sentence of his report of 4 November 2021, which reads: "*In the absence of the events of 29 November 2014, his current condition would otherwise not have arisen".* I gave leave for Dr Thomas to respond to that.

136. At page 174.5 the following exchange took place:

> "*Ms Chalmers: I suppose if 'condition' is a medical term, the Doctor can be asked to explain what he meant by that medical term.*
>
> *"His Honour: Well, we'll see. Doctor, Mr Nolan has taken you to your report of 4 November 2021?*
>
> *"Dr Thomas: I can see the sentence that he wants me to clarify, but basically, in the absence of the original fall, his subsequent condition would not have arisen. So the condition that he is in now would not have otherwise arisen".*

137. This did not assist matters. The original expression of Dr Thomas's opinion as now clarified was in my view still equally consistent with the Worker's pain being a subsequently arising sequela to the injury as understood in workers' compensation law, as with its being a direct result of the injury.

138. Dr Thomas underwent lengthy cross examination by Ms Mary Chalmers SC, counsel for the Employer. I have reviewed my notes and also the transcript of the evidence of Dr Thomas, both in chief and in cross examination. I am satisfied that Dr Thomas did not at any stage in his evidence provide any further explanation of

the connection he had made between the injury on 29 November 2014 and the Worker's presentation to him of pain, referred to by Dr Thomas as "*his current condition*" in the final sentence of his report of 4 November 2021.

139. In relation to the Worker's complaints of left shoulder pain, the following exchange took place from transcript 24 November 2021 starting at page 189.5:

> *"Ms Chalmers: All I'm suggesting to you, doctor, and is relatively straightforward, is that because you haven't noted any of that in your notes or in your letter and you don't have an independent recollection of conducting the test we simply don't know?*
>
> *"Dr Thomas: I think we do know.* ***He's got a problem with his shoulder which is organic*** (emphasis added)***.***
>
> *"Ms Chalmers: Now, no Hawkins or empty cans signs, they're are more of these impingement tests aren't they?*
>
> *"Dr Thomas: Yes.*
>
> *"Ms Chalmers: Is the Hawkins one, what's that designed to test?*
>
> *"Dr Thomas: They're all impingement signs of the rotator cuff.*
>
> *"Ms Chalmers: And so you did, did you do the full range of those impingement tests?*
>
> *"Dr Thomas: Yes.*
>
> *"Ms Chalmers: Is the Hawkins, I confess I had to look on Dr Google so you're the expert. You tell us if it's wrong. Is that the one where you put your elbow up and like that?*
>
> *"Dr Thomas: Yes.*
>
> *"Ms Chalmers: Showing Hawkins syndrome?*
>
> *"Dr Thomas: It's actually moving from like that sort of thing.*
>
> *"Ms Chalmers: So, the doctor's showing an elbow up and waving motion using the forearm.*
>
> *"His Honour: And that's a test which tells us what, doctor?*
>
> *"Dr Thomas: Well, it's one of the things we look at for impingement or irritation of the rotator cuff.*

"His Honour: Doctor, I haven't noted anywhere in your reports that you found anything of that nature with Mr Tasneem?

"Dr Thomas: Well, I put it there that he had that, well I guess you could say an irritable left shoulder.

"His Honour: What I see is he did have a Painful Arc Syndrome but no Hawkins or empty can signs?

"Dr Thomas: Yes.

"His Honour: I'm not aware that in any of your reports you discuss the nature of any organic cause for the shoulder. Have I missed something?

"Dr Thomas: No I don't think I have. That's absolutely right".

140. This evidence relevantly continued on pages 190 and 191 of the transcript where surveillance footage was discussed of the Worker using his left arm to lift an object and extending both his arms in various ways in front of him and above him. Dr Thomas did not recall from his viewing of the surveillance footage that the Worker had raised both his arms to full extension above his head, which led to the following exchange at page 192.9:

"Ms Chalmers: Now, if his Honour finds as a fact that Mr Tasneem does not have particular difficulty raising his left arm above shoulder height and that's a matter for his Honour and you can answer this in the hypothetical if you want. But that would mean that the disability or restriction described in your report either has resolved but due to lack of all available information you didn't make that assessment correctly at the time. Do you agree with that?

"Dr Thomas: No I wouldn't agree with that. The condition won't have resolved. The condition related to the left shoulder may not be a major problem, he is right upper limb dominant. But I doubt it would have resolved.

"Ms Chalmers: Now, what you're talking about is fully resolved I assume, resolving can happen by degree?

"Dr Thomas: That's what we're talking about.

"Ms Chalmers: So, if Mr Tasneem was able to now without apparent difficulty raise his left arm up above his head in that manner then it's resolved at least to the extent that he could return to work duties. Would you agree to that?

"Dr Thomas: The left shoulder was never a major problem as far as work was considered as far as I can see.

"Ms Chalmers: Particularly when he is right hand dominant one would think?

"Dr Thomas: That's right.

"Ms Chalmers: Now, his legs were fine when you examined him. Legs are not in particular contention. Can I just ask one more – you agree with that don't you?

"Dr Thomas: Yes I would".

141. Finally on the question of the Worker's left shoulder, I note the following exchange at page 193.8 of the transcript on 24 November 2021, after a discussion of the Worker's being seen in the surveillance footage to lift and carry a 10 kg container of water in his left hand:

> "*Ms Chalmers: Well, yes but if he had a significant injury you wouldn't expect him to be just casually removing the 10 kg water container out of the back of the car in the way we can see in the video?*
>
> *"Dr Thomas: He doesn't have a significant problem with his left shoulder, no*".

142. The Worker can be seen on a few occasions in the surveillance footage walking along the street with his hands clasped behind his back and evincing no signs of discomfort, either from the activity of walking or from the way he is holding his hands behind his back. Dr Allen in his evidence concerning the surveillance footage said that clasping the Worker's hands behind his back would be difficult if the Worker had a painful left shoulder. The Worker gave evidence that his left shoulder was very painful and during almost the whole course of his evidence before the Court he held his left arm rigidly close to his side with his hand on his lap. The Worker said further that it did cause him pain to walk with his hands clasped behind his back but this was a lifelong habit and he continued to do this even though it caused pain. Nevertheless, Dr Thomas gave his opinion that it would not present the Worker with any problem to walk with his left arm behind his back in this fashion.

143. Dr Thomas in his fourth and fifth reports stated that his opinions were not changed by anything he saw in the surveillance footage. He did not deviate from this position during cross examination on 24 November 2021, other than as I have set out above in respect of the Worker's left shoulder. He said he did not recall seeing the Worker's full overhead extension of both arms on any occasion in that

footage, yet the transcripts show that Dr Thomas did not take the suggested opportunity to review the surveillance footage either before his adjourned cross examination on 26 November 2021 or his further adjourned cross examination on 3 December 2021.

144. I observed on the surveillance footage that the Worker was recorded on three separate occasions raising both his arms to full extension above his head as he lifted and pulled down the tailgate of his van, without any sign of hesitation or restriction, and without his evincing any outward sign of pain. I observed the Worker in the surveillance footage pulling his tunic over his head which involved raising both arms, although not necessarily to their full extension. I observed the Worker using his left arm and hand to open the door to his van, to turn off a water tap, and to carry various items of different weights including a 10 litre full container of water. On each of these observed occasions the Worker did not outwardly evince hesitation, pain or discomfort.

145. Dr Thomas's reports and his live evidence before the Court did not include or refer to any radiology or other test results or evidence generally which provided objective support for his opinion given in paragraph 139 above that the Worker had an organic problem with his left shoulder.

146. On the basis of my observations of the Worker in the surveillance footage and on the basis of Dr Thomas's foregoing concessions in cross examination, notwithstanding the hypothetical limitations of those concessions, I am satisfied and I find that the condition of the Worker's left shoulder including any pain he might experience arising from the condition does not cause a significant problem to the Worker generally. I further find that it does not cause a significant problem to him as far as carrying out work is concerned.

Dr Clayton Thomas - Expert Evidence

147. On the basis of Exhibit W 10 and in the absence of any contrary submission from counsel for the Employer, I am satisfied and I find that Dr Thomas is an expert in the field of rehabilitation and pain medicine. This does not mean that his opinion is to be received uncritically. An expert is still required to explain how an opinion is arrived at. Additionally, that expert opinion is only as good as the facts and matters relied on by the expert on which to base the opinion. If those facts are wrong, too vague, or simply not established then a court will give that expert opinion little weight or even no weight at all. In *Dura (Australia) Constructions P/L v Hue Boutique Living P/L* ("*Dura*") [2012] VSC 99 the Supreme Court of Victoria outlined the considerations when dealing with expert evidence, as follows:

> *"The expert has specialised knowledge based upon his or her training, study or experience that permits the expert to give their opinion.*
>
> *"The opinion evidence is wholly or substantially based on its specialised*

knowledge.

"The reasoning process is sufficiently clear to demonstrate that the witness has used his or her specialised knowledge (emphasis added)*.*

"Facts and assumptions used by the expert witness are set out in the report.

*"**The party tendering the expert evidence is able to establish the facts necessary to support the opinion*** (emphasis added)***".***

148. I am satisfied and I find on the contents of Dr Thomas's five reports in evidence before the Court, and on his live evidence before the Court, that Dr Thomas had no objective evidence at any time before him in support of his opinion concerning the Worker's pain, other than the results of a bone scan which were "*unremarkable*", and the surveillance footage. He relied on the history provided to him by the Worker directly or indirectly, and on the Worker's responses to Dr Thomas's physical examination of him. He did not find the surveillance footage contained anything to cause him to change his opinion.

149. There is nothing unusual about this. Most medical practitioners will rely to a very large extent on the history provided by their patients and on their patients' responses to any physical examination. The medical practitioners will have tests carried out and seek objective corroboration where possible, but such objective corroboration will not always be available or conclusive.

150. In this matter there is a very real question to be answered concerning the reliability of the Worker. This question arises from the reports and the live evidence of the medico-legal experts Dr Allen and Dr Ugwu, from the surveillance footage and from the Worker's evidence and demeanour before the Court. If I conclude that the Worker was not a reliable witness and that that lack of reliability extends to the history he provided and his presentation to Dr Thomas, then I will not be able to place any reliance on the opinion of Dr Thomas, based as it would be on an unreliable source.

The Worker's Evidence

151. The Worker's case commenced with the evidence of the Worker himself starting on Tuesday 23 November 2021. However, my observations of the Worker commenced before then, from the first day of the hearing on Monday 22 November 2021 at all times while he was present in the courtroom which was up to and including Wednesday 24 November 2021, except when Dr Thomas was giving evidence on that day. The Worker was excused from attendance after 24 November 2021.

152. When he was not in the witness box the Worker did not remain seated for very

long at any one time. He would stand, pace slowly along the back of the court room, and then lean against the wall for extended periods. This was a consistent behaviour over the first three days of the hearing except when he was seated at the witness stand giving his evidence.

153. When giving evidence, I observed the Worker to hold his left arm and hand very still and close against his body. From time to time he would arch his back and grimace. I noted that for long periods of time he would keep his head fixed and immobile, only occasionally moving it slightly to face counsel at the bar table, or to face the bench. From time to time he would groan softly.

154. As his time in the witness box grew longer, the Worker was observed to lean backwards in the witness chair in a somewhat arched and fixed position, holding his left arm closely in front of him bent at the elbow and kept immobile the whole time. At one point when answering a question about having seen a psychologist, the Worker showed signs of distress and covered his face with his right hand while speaking.

155. Later in the examination in chief, the Worker had moved the position of his left arm so that he now had his left hand in his lap, palm upward, held rigid and unmoving.

156. However, during a point in cross examination, the Worker used his left hand to remove his reading glasses from a pocket and place them on his face. This was brought to his attention by counsel for the Employer, Ms Chalmers SC, and the Worker agreed he had used his left hand for that purpose. When Ms Chalmers put to him that he was able to use his left arm when he needed to, the Worker replied: "*Depends*" - transcript 23 November 2021 at page 147.4.

157. When answering questions about the locations and the severity of his pain, the Worker broke into very loud sobbing which continued for so long that the Court took an early lunch break.

158. The Worker gave evidence in re-examination that he could sit for only 10 to 15 minutes at a time, because of the pain he suffered when sitting. This was plainly inconsistent with my observations of his sitting times during the course of his examination in chief and cross examination, when he remained seated for much longer periods than 10 to 15 minutes.

159. Starting at transcript 23 November 2021 at page 130.8 the Worker gave evidence that when he was working at a school in Brisbane he found it necessary to lie down for 15 minutes between each class "*to just ease my pain*". This appears to have been in 2016.

160. At the foot of transcript page 133 the Worker gave evidence that because of the pain in his back he cannot stand for long. He said he would go for a walk sometimes for 10 minutes and then when he came home he would have to lie

down. He continued:

> "*Sometimes I stand for two minutes, sometimes 10 minutes, I have to lay down. Sometime, I can sit for two minutes, sometimes I have to sit – I can sit for 10 minutes, I don't know what's the one. And much shoulder, it's not just clavicle, it's the joint. It is this joint that sometimes hurt so much that I can hardly breathe*".

161. At transcript 23 November 2021 at page 134.3 the following exchange took place:

> "*Mr Nolan: Now can I ask you just about your current symptoms. Where is the main source of the pain?*
>
> *"The Worker: Two major pains. One of – the main one is in the back, upper back, all my skeleton and (inaudible) no joking. It's like four nails, four big spears going in my middle. One, two, three, four… And that's – as soon as you release it within the second you get relief but this doesn't go away. He is just pushing in one, two, three, four. That like this it cuts and feels inside different places. And then it's – someone is just squeezing me. Squeezing me, I cannot stand. I have to take it out. Right now I want to lay down on the floor to ease my back pain. And then this is not serious but this is not, you know, but then I am get very anxious. This also get freeze. This arm, this – I cannot lift up* ***when I am very anxious and depressed and very angry*** (emphasis added) *because whatever happened to me".*

162. At this point the Worker was observed to touch the point of his left shoulder with his right hand, indicating the area of the problem with his left shoulder. He went on to explain:

> *"The Worker: Like this is not the clavicle. This is a joint and this part and this wrist… And neck, sorry. The neck as well. When it gets stiff. It depends on the way, yeah. Sometimes I can turn a little bit more, sometimes more. It goes up too far and I have to force. It's painful. Like I am driving car, I don't – my doctor's allowed me to drive car. But I don't drive it on all sides basically because when I have to change lines I got – I want to get a camera for reversing because I (inaudible) before accident reversing. I got blind mirrors so I can see in the blind mirrors without – I cannot check the blind points. Then I can turn my – depending on the day, my neck a little bit. But to move it more I have to make force and it hurts.*
>
> *"Mr Nolan: Mr Tasneem, are those symptoms consistent or are they sometimes problematic and sometimes not or?*
>
> *"The Worker: It's from mild to severe… Depending on the day. Depending on the day it is mild to severe. Depending. Now I got so many injuries I don't know, I just – sometimes I don't know which part is working.*

When I tell the doctor I don't know which part to tell him. There's so many fractures and this is the fractures that you can see through the scanning. They could not see what hurt, what got wrong in my – in the deep tissues, in the tissues, in the ligaments, in this area. So I don't know. For me it is a problem standing as well. I explained – go to doctor, I think I am – I said, 'I forgot this'. Even though I go to specialist. I start to explain something now I got so many injuries, how can I know which one to talk about?".

163. At this point in the examination in chief the Worker was shown the surveillance footage, which I note he had also seen when it was played to the Court the day before. At transcript 23 November 2021 at page 137.3 the following exchange occurred:

"Mr Nolan: And you can see that you had your hands behind your back?

"The Worker: Yes, I do.

"Mr Nolan: Are you always able to do that?

"The Worker: Putting my hand on back is not a – I feel pain but I can do it… But I feel pain, yes. But that's why from childhood it's my habit to put my hands on the back.

164. At page 138.6 the following exchange occurred:

"Mr Nolan: Now, just pausing it there, you can see there that you are gripping two water bottles with your left hand?

"The Worker: Yes.

"Mr Nolan: Are you always able to do that?

"The Worker: I don't always do it but probably I was just doing my (inaudible) in front of my eyes so I was pushing them up. So I swap my hand. That's what I think. But I don't really you know. It's a long time. But I don't always do it. It's occasionally I had to do it. When I have no other option.

165. At page 139.9 and over to the top of page 140, Mr Nolan took the Worker to a scene where the Worker was carrying a bag in his left hand. The following exchange took place:

"Mr Nolan: Do you remember what was in that bag?

"The Worker: What time is it? It might be a bottle of water, half a litre.

"Mr Nolan: It's on 28 April 2020.

"The Worker: Yeah, this is month of Ramadan. And we fast so when we go to mass, we break fast after sunset so that is probably half a litre. About 400, 500 bottle of litre. Just like I had one before for (inaudible) should be".

166. At transcript page 140.9 the surveillance footage showed the worker carrying a large container in his left hand. The following exchange took place:

"*Mr Nolan: Mr Tasneem, could you explain what the bottle is in the left hand?*

"The Worker: That's water.

"Mr Nolan: Was it full or empty?

The Worker: It's full.

"Mr Nolan: How many litres?

"The Worker: (inaudible) could be five, it could be 10, I don't know. I don't recall exact.

"Mr Nolan: Okay. What about in your right hand?

"The Worker: Right hand is 1 litre milk of six-packs. Six- packs of 1 litre".

167. At this point I interrupted the questioning and observed that I could recognise the container in the Worker's left hand as a 10 litre container, and that 10 litres of water weighed 10 kilograms.

168. The Worker went on to explain that he was outside the mosque waiting for his son but his son was delayed so the Worker had to carry the water and the milk inside the mosque without assistance on this occasion.

169. At the transcript on 23 November 2021 at page 142.2 the following exchange took place:

"*Mr Nolan: Just pause there for one moment. You can see there that you're closing the boot of your car. Are you always able to do that?*

"The Worker: I try to do this one hand, but sometimes, you know, when I'm feeling pain, then I don't use it; when I'm not feeling much pain, then I – you know, unintentionally just sort of… It depends on the condition, when my – whole scenario. As I said before, days to days is different, and

*it's (inaudible) month-to-month, it depends on the weather**. It depends how my anxiety level is, my depression is*** (emphasis added)***".***

170. The Worker went on at pages 142 and 143 to explain that he had to use his left shoulder and arm sometimes because it otherwise would freeze and he had to keep moving it to maintain any function.

171. The Worker was asked about carrying blankets and clothing in the surveillance footage. He explained this this by saying that normally his son would assist him but on the occasion shown in the footage his son was running late and the Worker had no option but to carry these items himself.

172. The Worker was asked about the scene in the surveillance footage where he was carrying a shopping bag of unknown items. He explained that the bag contained half a kilo of yoghurt, half a kilo of mince and a loaf of Lebanese bread that weighed about 450 grams. The Worker went on to explain that ordinarily his son and his wife would carry the shopping but there are times when no one is available to help him and he performs these tasks himself.

173. In cross examination the Worker was asked whether he had always told to truth to doctors and rehabilitation service personnel concerning his symptoms and functional capacities and limitations. He replied as follows:

> *"The Worker: Whatever I was feeling at that time, I told them the truth... Whatever I was feeling at that time, because as I said before, my condition may be different in summer, different in winter, depending on the rainy days, it all varies.*

174. At transcript 23 November 2021 at page 155.2 the Worker responded to questions about a trip he had taken to Pakistan in May 2015. This was only six months after the date of the accident and the injury. The Worker confirmed that he had flown from Melbourne to Bangkok which was a flight of about seven hours' duration, then from Bangkok to Islamabad, a flight of about four hours' to 4 and a half hours' duration. He explained that this lengthy flight had occasioned some difficulty for him as follows:

> *"The Worker: The difficulty was there. It's not that there was no difficulty… There was a difficulty, yes.*
>
> *"Ms Chalmers: You didn't report that to - any difficulties to your doctor?*
>
> *"The Worker: If I did not report that, doesn't mean that I didn't have difficulties".*

175. At this stage, the Court had been taken to the notes of the treating GP Dr Kazi where there is a reference to the Worker's having travelled to Pakistan, and there

was no complaint recorded of any problems he had experienced because of the long flights and being seated for lengthy periods involved.

176. Counsel for the Employer then took the Worker to various records of his interactions with rehabilitation personnel and doctors where she suggested he had recorded inconsistent symptoms of his ability to sit or stand or walk for different periods. The Worker's response was that his condition is not stable, and that his symptoms vary from time to time depending on factors such as the weather, the time of year and his state of mind.

CONCLUSION

177. The Worker repeatedly provided this explanation of his variable experience of pain in answer to questions about inconsistencies in his observed or reported symptoms at different times over the years. However, there was no evidence before the Court at any point in this proceeding to explain any possible mechanism behind such variation in symptoms if they were indeed organic in nature and arose directly from the accident and injury on 29 November 2014.

178. This is not a case involving the subsequent development of a chronic pain condition, whether organic or psychological in nature, arising some time after 29 November 2014 as a sequela to the injury. On the Worker's pleadings and his counsel's clarification in his opening, this case is limited to the Worker's claim he is still suffering incapacitating pain, organic in nature, arising directly as a result of the injury.

179. In his report dated 5 May 2017 consultant Occupational Physician Dr Jude Ugwu stated:

> "***Mr Tasneem has healed from his fracture conditions*** (emphasis added)*. There is some pain behaviour with a significant residual restriction of movement with no demonstrable tenderness. There is some disparity between formal range of movement testing and range of movement testing when not observed…*
>
> *"I note that Mr Tasneem is still off work following the fracture injuries of 2014.* ***This has exceeded the usual recovery period for un-displaced fractures managed conservatively*** (emphasis added)***.***

180. In his report dated 18 March 2020 consultant Orthopaedic Surgeon Dr Phil Allen stated:

> "*I have previously reviewed Mr Tasneem in November 2015 and* ***my assessment at that time was that he had recovered from his injuries and indeed had little residual symptoms at that time*** (emphasis added)…

> *"Mr Tasneem's behaviour today* (5 March 2020) *was markedly abnormal with a voluntary restriction in motion, where range of motion demonstrated was out of step with that observed…*
>
> *"**The musculoskeletal injuries are considered to have long since healed and cannot account for the reported level of symptoms at today's assessment (***emphasis added)*".*

181. In view of the opinion and evidence of Dr Allen in his live evidence on fractures, how they heal and how long they take to heal, and his opinion corroborated by the opinion of Dr Ugwu that the Worker's fractures had in fact healed by the date he was assessed by Dr Ugwu in May 2017, I have searched through the evidence and expert opinions before me for any explanation of an organic basis to the Worker's present complaints of pain, variable or otherwise. How might his present complaints of variable pain have arisen directly from the injury of 29 November 2014? I have not found any answer to this question in the evidence or opinions before me.

182. Dr Thomas's opinion in his reports as to causality was not explored and clarified in his live evidence so as to enable me to determine whether in his opinion the Worker's pain condition was one which had arisen directly at the time of the injury on 29 November 2014 and persisted to some degree at all times from that date, or whether it was a later-arising sequela to that injury. If the latter, it would fall outside the ambit of this proceeding. If the former, I would have expected some exploration of the history recorded of the Worker's complaints over the years since the injury and some explanation of the physiological basis for such persisting pain. No such exploration and no such explanation was provided by Dr Thomas.

183. I have explained earlier in these Reasons and ruled that I must disregard all the Worker's and other evidence before me concerning the back pain he suffers. I have further found on my consideration of the surveillance footage and the live evidence of Dr Thomas as set out in paragraph 146 above that any pain the Worker might experience in his left shoulder is not a significant problem for him. This leaves only his complaints of pain in his neck, ribs and left hand for my further consideration.

184. On the basis of the clinical inconsistencies at medico-legal assessments observed and reported on by each of Dr Allen and Dr Ugwu, on the basis of the Worker's manifestations in the witness box of pain and restricted movements of his neck and left hand which were in marked contrast to his activities and presentation in the surveillance footage, on the basis of the Worker's oral evidence of his limited capacity because of pain to turn his neck or to use his left shoulder, arm and hand, also in marked contrast with what could be observed of his use of these parts of his body in the surveillance footage, and on the basis of the opinions of each of Dr Allen and Dr Ugwu on the significance of the Worker's capacities to use these

parts of his body as displayed in the surveillance footage, I conclude that the Worker was not a reliable witness.

185. I do not accept the Worker's evidence of either the variable nature of any of his symptoms of pain or their severity at any material time, including whenever he attended on Dr Thomas and on his treating GP Dr Kazi. I do not accept the Worker's evidence of the impact of any symptoms of pain on his functional capacity at any material time.

186. It is not necessary for me to arrive at any conclusion that the Worker was consciously lying and/or feigning his symptoms. This is because there was evidence in the medical records before me of the treating GP Dr Kazi of the Worker's history of psychiatric symptoms and the diagnosis of Major Depression with suicidal ideation over a number of years. The Worker's own testimony of the variability of his symptoms depending on his anxiety and depression as I have set out in paragraphs 161 and 169 above, is also indicative of this background. This might conceivably provide some explanation for the Worker's inconsistencies in his presentations to his treating doctors, rehabilitation providers, the medico-legal assessors and the Court.

187. As noted earlier in these Reasons, this proceeding does not involve any claim of or for any psychiatric condition, whether work-related or otherwise, and there was no expert psychiatric evidence before the Court relevant to the Worker's perceptions and presentations.

188. I have earlier concluded that any reliance on the opinion of Dr Clayton Thomas will be dependent on the Court's acceptance of the Worker's evidence as to his relevant symptoms of pain and functioning as communicated to Dr Thomas. Additionally, Dr Thomas in my assessment has failed in his reports and in his live evidence to reveal his reasoning process to demonstrate he had used his specialised knowledge in arriving at his opinion. I conclude I am unable to rely on Dr Thomas's opinion.

189. I had in evidence before me the notes and records of the treating GP Dr Kazi. Dr Kazi has carefully recorded the complaints of pain made to him by the Worker over the years. For the reasons I have identified in paragraphs 184 and 185 above I do not accept that the history of complaints the Worker made to Dr Kazi can be accepted as reliable.

190. I am left with only the evidence in the Employer's case on which to determine this proceeding. That evidence is as set out earlier in these Reasons and it is to the effect that the Worker's fractures had all healed and that he had recovered from any significant physical effects of the injury of 29 November 2014, well before the Employer's cancellation of the Worker's weekly benefits. I am satisfied that the Employer has discharged both the legal and evidentiary onus on the balance of probabilities of establishing the change in circumstances warranting its

cancellation of payments of weekly benefits to the Worker pursuant to the Notice dated 12 June 2020.

191. I am satisfied on the evidence before me on the balance of probabilities and I find that the Worker had ceased to be incapacitated for work as a result of the injury by 29 May 2020, the date of the certificate of Dr Allen.

192. In view of my findings that I have not accepted the Worker's history and evidence of his symptoms of pain or functional incapacity, and I have not accepted Dr Thomas's opinions formed on the basis of the Worker's history, there is no acceptable evidence before me that the Worker had any partial incapacity for work as a result of the injury, on or after 29 May 2020.

COSTS

193. The Worker has been totally unsuccessful in this proceeding. The successful Employer is entitled to its costs**.**

ORDERS

194. The Worker's Further Amended Statement of Claim dated 1 November 2021 is dismissed.

195. The Worker pay the Employer's costs of and incidental to this proceeding to be taxed in default of agreement at 100% of the Northern Territory Supreme Court scale.

Dated the 22nd day of March 2022

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John Neill
ACTING LOCAL COURT JUDGE