WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

MATTER NO:	**001525/13**
APPLICANT:	**Carolyn Maree Bee**
RESPONDENT:	**NSW Department of Community Services**
DATE OF DETERMINATION:	**16 June 2014**
CITATION:	**[2014] NSWWCC 191**

The Commission determines:

1. The respondent is to pay the applicant weekly payments of compensation from 25 August 2010 to 28 February 2011 the rate of $650 per week and from 1 March 2011 to 7 May 2012 at the rate of $418 per week.

2. The respondent is to pay the applicant's section 60 expenses upon production of accounts and/or receipts and/or Medicare Notice of Charge.

3. The respondent is to pay the applicant's costs as agreed or assessed and I specify an uplift of 30 per cent from complexity, which uplift is to be available to both parties.

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

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

Abu Sufian
Senior Dispute Services Officer
By Delegation of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. The applicant contracted H1N1 swine flu influenza in August 2010 and became so seriously ill that she was fortunate not to succumb to the virus. She alleges that she contracted the virus from one or both of two foster children who were in her care as a registered foster carer, having been so appointed by the respondent pursuant to the *Employment and Workplace Relations Legislation Amendment (Welfare to Work and Other Measures) Act* 2005.

ISSUES FOR DETERMINATION

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

    (a) Was the applicant worker or deemed worker employed by the respondent?
    (b) Did the applicant suffer an injury arising out of or in the course of her alleged employment?
    (c) Was the applicant's alleged employment by the respondent a substantial contributing factor to her injury?

PROCEDURE BEFORE THE COMMISSION

3. The parties attended a hearing on 26 May 2014. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

EVIDENCE

Documentary Evidence

4. The following documents were in evidence before the Workers Compensation Commission (the Commission) and taken into account in making this determination:

    (a) Application to Resolve a Dispute (the Application) and attached documents;
    (b) the Reply, and
    (c) Applications to admit late documents dated 5 February 2014, 14 April 2014 and 14 May 2014 and attached documents.

Oral Evidence

5. No oral evidence was received at the arbitration hearing

FINDINGS AND REASONS

Worker/deemed worker

6. Counsel for the respondent referred to the letter to the applicant from the respondent of 14 August 2009 (Application page 2) pointing out that the applicant was receiving a care allowance, and not a wage. She submitted that this allowance was to cover the children's

expenses and she was in addition entitled to be reimbursed for pre-approved case-plan expenses.

7. She referred to the Advice of Deposit (Application page 4) which appeared to characterise the payment in respect of one of the children (alleged to have contracted swine flu and to have passed it on to the applicant) as an allowance, as did the next document in the Application at page 5.

8. Counsel for the respondent also drew attention to the average earnings of $650 per week which were clearly those the applicant was receiving in her employment with Gunnedah Automotive (see the applicant's statement of 6 May 2014 at paragraph 15).

9. My attention was drawn by counsel for the respondent to the statement of Simone Czech of 31 January 2014 at paragraph 17 where Ms Czech, a Director of Out-Of-Home Care Reform, explained that "Foster carers are not paid for the service they provide, rather there is a care allowance intended to cover the cost of caring for the child including food, clothing, educational and other needs. This is classified as an "allowance to meet the needs of the child in the care of the Minister". It is not income and is not classified as income by the Australian Taxation Office."

10. Accordingly counsel for the respondent submitted that the applicant was not being paid for a service and that the nature of the payment was critical and that it was an allowance. She relied on paragraph 18 of the statement of Ms Czech to the effect that the age of the child determined the amount of the allowance.

11. Thus far these submissions are clearly correct.

12. Counsel for the respondent then addressed Clause 2 of Schedule 1 of the *Workplace Injury Management and Workers Compensation Act* 1998.

13. This reads as follows:

> **2 Other contractors**
>
> (cf former Sch 1 cl 2)
>
> (1) Where a contract:
> (a) to perform any work exceeding $10 in value (not being work incidental to a trade or business regularly carried on by the contractor in the contractor's own name, or under a business or firm name), or
> is made with the contractor, who neither sublets the contract nor employs any worker, the contractor is, for the purposes of this Act, taken to be a worker employed by the person who made the contract with the contractor.
> (3) A person excluded from the definition of **"worker"** in section 4 (1) because of paragraph (d) of that definition is not to be regarded as a worker under this clause.

14. She contended that even if the contract existed between the applicant and the respondent there still had to be an intention to create legal relations as was found in the decision of *Scerri v Cahill* 14NSWCCR 389. She also relied on the decision of *Sekuloska v Sekuloski* [2012] NSWWCCPD 10 where Deputy President Roach determined that the parties had not demonstrated that they had entered into a legally binding relationship. She submitted that the respondent had authorised the applicant to undertake foster care and provided her with a licence but that no contract was created thereby. Otherwise there would be, it was submitted,

a contract in writing, as is the case with all employment by any instrumentality of the NSW State Government. In the present case it was submitted, the applicant was not paid for any service which she provided but was only allocated an allowance to cover expenses.

15. Accordingly counsel for the respondent submitted that contrary to Clause 2 of Schedule 1 the applicant had not performed work as required by the provisions of subsection 1 of Clause 2, as there was no contract only an arrangement between the parties. Counsel for the respondent also submitted that the applicant had in addition failed to establish that the work exceeded $10 in value, as there was no contract and no evidence that the applicant was paid, and that she was only provided with an allowance to cover expenses.

16. Counsel conceded the other two elements of the Clause 2 were not relevant as the applicant was not involved in work which was incidental to a trade or business regularly carried out by her in her own name, nor had the applicant sublet the contract or employed other workers. Counsel for the respondent reiterated that there was no intention to create legal relations between the parties, that there was no contract for the applicant to perform work on behalf of the respondent and that even if such contract existed no work to the value of in excess of $10 was performed. It was accordingly contended that the applicant had not satisfied the necessary requirements to prove that she was a deemed worker.

Injury

17. Although no medical evidence had been provided at all by the respondent, counsel for the respondent contended that it did not follow that one had to accept the applicant's case. She pointed out that the evidence on causation is from Dr Torzillo alone and that his reports did not meet the relevant criteria of admissibility of expert opinion laid down *in Makita v Sprowles* [2001] NSWCA 305 (*Makita*) and *Hancock v East Coast Timber Products Pty Ltd* [2011] NSWCA 11 (*Hancock*). She noted that Dr Torzillo in his report of 6 September 2012 admitted that it was difficult to attribute the source of a viral respiratory infection and submitted that the evidence upon which Dr Torzillo had relied was taken after it had been established that the applicant was suffering from the H1N1 virus.

18. She pointed out that no diagnosis of flu was made in respect of one of the children and that it was not sufficient for Dr Torzillo merely to suggest that the applicant had acquired her infection from one or either of the children. Counsel submitted that the applicant had to prove that the children infected the applicant and that there was no epidemiological evidence to this effect and that the applicant could have picked up the virus anywhere. Counsel also was critical of the further report of Dr Torzillo of 20 January 2014 on the basis that the two to three line report was not sufficient and does not comply with the law in relation to expert evidence as laid down by *Makita* as modified by *Hancock* and that as Dr Torzillo had not provided the basis for his conclusion that I was unable to evaluate his opinion.

Discussion

19. The respondent's counsel in her submissions drew attention to the Screening Request (Application page 139) which the applicant had signed, indicating that the purpose for which the screening was required was that of "Authorize Carer" and not the first option, being "Employment/Promotion ...etc.". However this submission loses much of its force because both sections of this document are headed "EMPLOYER REQUEST FOR EMPLOYMENT/OTHER CHILD-RELATED PURPOSE SCREENING".

20. However little can be inferred by the description by one party of the nature of the relationship between the applicant and the respondent – as Deputy President Hack observed

in *Floorplay Pty Ltd and Commissioner of Taxation* [2013] AATA 637, at [12] that the manner in which the parties choose to describe the relationship "cannot be determinative because the parties cannot deem their relationship to be something that it is not".

21. Counsel for the applicant relied on section 16 of the *Children and Young Persons (Care and Protection) Act* 1998 noting that subsection 1 describes the "Principal role the Director-General is to provide services and to promote the development adoption and evaluation of policies accord with the objects and principles of this act." He also relied on the definition of "out-of-home care" in section 135 of the same act:

> **135 Definition and types of "out-of-home care"**
> (1) For the purposes of this Act,
> **"out-of-home care"** means residential care and control of a child or young person that is provided:
> (a) by a person other than a parent of the child or young person, and
> (b) at a place other than the usual home of the child or young person,
> whether or not for fee, gain or reward.

22. He also pointed out that "voluntary out-of-home care" is essentially that care provided by parents or grandchildren, and accordingly he submitted that one of the services which the Director-General can provide is to use out-of-home care pursuant to section 135 (1) (a) or (b).

23. Section 136 provides that statutory out-of-home care can only be provided by an authorised carer. Counsel for the applicant conceded that being appointed an authorised carer does not give rise to a contract of employment. He also pointed out pursuant to section 139 that the applicant only did work for the respondent and that the designated agency under section 139 was accordingly the respondent. He went on to examine the provisions of section 140 which allowed the designated agency the power to control the exercise of the care responsibility by giving directions to the authorise carers (subsection c) and the provisions of section 161 which allowed the Director-General to provide financial assistance.

24. The applicant's statement at paragraph 37 establishes that the applicant, a duly authorised carer, agreed to take two girls into her care on 22 August 2010 as an emergency because another foster carer had become sick.

25. I agree with the submission from counsel for the applicant that this constituted contract between the applicant and the respondent.

26. The statutory provisions to which counsel for the applicant had referred and which I have set out in the preceding paragraphs, provide the framework for an agreement between the applicant and the respondent, which was perfected once the applicant agreed to the respondent's request that the applicant care for the two children.

27. The fact that no written contract was concluded is unsurprising.

28. The particular instance of the applicant's agreement to undertake the care of the two children on 22 August 2010 is a case in point. This was an emergency. The requirement for written agreements between the respondent and authorised carers would be unduly onerous, as some placements could be with little or no notice (as in the present case), for very short times, could be varied by addition of more children, by the temporary placement of the children with a parent or grandparent, and a myriad of other situations which could not possibly be covered in any standard agreement. Even if a written agreement endeavoured to cover these

eventualities, it would require running amendments or new agreements each time an unforeseen event altered the scope of the initial agreement.

29. Accordingly I have no hesitation in finding that the applicant, when she agreed to undertake the care of the two children on 22 August 2010 at the request of the respondent, entered into a contract with the respondent.

30. The fact that the allowance for the care of children is not characterised by the respondent or the Australian Tax Office as a wage is immaterial for the purposes of Schedule 1 Clause 2(1). All that is required is that the employment exceeds $10 in value. *Spackman v Morrison* 21 NSW CCR 67 established that the payment of money is not required for the purpose of deemed employment, merely that the value of the service provided exceeds $10 a day. There can be no doubt, as counsel to the applicant submitted, the minding of two children for an indefinite time exceed $10 in value – indeed one can infer from the allowance provided by the respondent that its value was somewhere in the region of $33 per child per day.

31. I am not persuaded that the respondent's reliance on *FM v CareSouth & Anor* [2011] NSWSC 1366 is is of any relevance to the present proceedings. Bryson J at [24] found no contractual agreement in circumstances where one contract had expired and the other contract was terminated in accordance with the agreement. What his honour actually found at [21] was:

> My conclusion on the claims against DFCS is that there was no contractual agreement with the plaintiff which DFCS breached, and that nothing happened which could be a breach of contract.
>
> That is, a contract did exist between the parties.

32. Accordingly I am comfortably persuaded that the applicant was a deemed employee pursuant to the provisions of Schedule 1.

33. I am not persuaded that the brevity of both of the reports of Dr Torzillo offends the principles in *Makita* and *Hancock*. Contrary to the submissions from the respondent's counsel, the professor had been provided with all of the records in relation to the children's attendance at the local hospital. These were provided with the material attached to the letter which sought his further opinion. These documents are to be found at commencing page 82 of the Application to Admit Late Documents dated 14 April 2014, and are clearly referred to in the additional request from Mr Long to Dr Torzillo (Mr Long's letter commences at page 75 of the Application to Admit Late Documents).

34. Dr Torzillo accordingly he had all of the records relevant to making an assessment as to whether the children with a source of the H1N1 infection. The respondent put no contrary records or any evidence at all before the Commission. Dr Torzillo, whose expert qualifications in the field of respiratory medicine was unchallenged, and he relied on the unchallenged medical records of the applicant and the two children.

35. It is of significance that these records were not available to the applicant at the time of the making of her first statement. The details which the applicant has provided at paragraph 35 conform exactly with the hospital records, the applicant's statement having been made some 2 ½ years prior to the hospital records being available.

36. In his first report, Dr Torzillo explains that influenza can be a mild illness in children and he considered that it was a reasonable likelihood that the applicant would have acquired the

H1N1 infection from the children. He estimated the likelihood of this occurring as being greater than 50 per cent. When one takes into account second report where Dr Torzillo had then been provided with all of the available material, he merely reiterated his earlier opinion of 6 December 2012. It seems to me that Dr Torzillo has taken into account the difficulty attributing source of the viral respiratory infection, considered all of the history available as to the applicant's contraction of the virus, including the exposure to the children, and has concluded that it was more probable than not that the children were the source of this infection. This clear and succinct reasoning appears to me to be perfectly congruent with the principles in *Makita* and *Hancock*. Dr Torzillo clearly possesses the requisite expertise to provide such an opinion, he being a respiratory physician and a clinical professor at the University of Sydney and there is no expert opinion from a similarly and relevantly qualified expert to the contrary.

37. The respondent's counsel submitted that the applicant has to prove that the children were infected. All that the applicant has to prove on the balance of probabilities is that the children (or one of them) were infected and that such infection was passed on to the applicant. The absence of any evidence of any other potential source of infection is telling. The only expert opinion is that the children were the source of the infection. As Hayden JA observed at [23] in *Moukhayber v Camden Timber & Hardware Co Pty Ltd* [2002] NSWCA 58, the balance of probabilities is an undemanding test.

38. Accordingly I am comfortably persuaded that the opinion of Dr Torzillo should be accepted that the children were the source of the N1H1 infection which was then contracted by the applicant. It follows that the applicant's injuries arose out of the course of her employment with the respondent, and that the applicant's employment with the respondent was the substantial contributing factor to her injury.

SUMMARY

39. In the course of the hearing the parties agreed on a Wages Schedule which would apply in the event that there was an award for the applicant, and I adopt that document.

40. The respondent is to pay the applicant weekly payments of compensation from 25 August 2010 to 28 February 2011 the rate of $650 per week and from 1 March 2011 to 7 May 2012 at the rate of $418 per week.

41. The respondent is to pay the applicant's section 60 expenses upon production of accounts and/or receipts and/or Medicare Notice of Charge.

42. The respondent is to pay the applicant's costs as agreed or assessed and I specify an uplift of 30 per cent from complexity, which uplift is to be available to both parties.

43. This was self-evidently a very complex matter. The Application to Resolve a Dispute alone comprised of some two and a half thousand pages. The issues of worker and causation were almost unique and the quality of the work by all the legal representatives involved in these proceedings was of the highest order.