WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number:	**5183/19**
Applicant:	**RONG JIE WANG**
First Respondent:	**YUNLONG BUILDING SERVICES PTY LTD**
Second Respondent:	**GUANGYI WANG**
Third Respondent:	**WORKERS COMPENSATION NOMINAL INSURER (ICARE)**
Date of Determination:	**19 DECEMBER 2019**
Citation:	**[2019] NSWWCC 415**

The Commission determines:

FINDING

1. The applicant was employed by the first respondent on 9 December 2015 when the applicant fell approximately three meters from a roof of work site at 2 Woodbury Road, St Ives.

ORDERS

2. Award for the second respondent.

3. Award for the third respondent.

4. The matter is remitted to the Registrar to refer to an Approved Medical Specialist for assessment of whole person impairment of the left upper extremity, facial disfigurement and nervous system (trigeminal nerve) as a result of the injury on 9 December 2015.

5. All documents attached to the Application to Resolve a Dispute, the Reply of the first respondent, the Reply of the second respondent and the Reply of the third respondent and the Statement of the applicant dated 3 December 2019 are admitted and to be sent to the Approved Medical Specialist.

6. The claims in respect of weekly benefits and medical expenses is to be listed for hearing following the assessment of whole person impairment by the Approved Medical Specialist.

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

Carolyn Rimmer
Arbitrator

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

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. On 30 September 2019, Rong Jie Wang (the applicant) lodged an Application to Resolve a Dispute (the Application) in the Workers Compensation Commission (the Commission). It is alleged that the applicant's employer at the relevant time was either Yunlong Building Services Pty Ltd (the first respondent) or Guangyi Wang (Gary Wang). The first respondent's workers compensation insurer at the relevant time was AAI trading as GIO.

2. The applicant alleged that on 9 December 2015 he fell approximately three meters from a roof on which he was working and suffered injuries to his face, left wrist, left arm and nerve damage. The accident occurred at 2 Woodbury Road, St Ives. The applicant alleges that he was either employed by the first respondent as a worker or deemed worker, or, in the alternative, he was employed by Gary Wang as a worker or deemed worker.

3. The second respondent was uninsured and the Workers Compensation Nominal Insurer (iCare) is the third respondent in these proceedings. I will endeavour to avoid confusion by calling the applicant the applicant and the second respondent Mr Gary Wang. As both the applicant and the second respondent have the same family name

4. The applicant notified the first respondent of the injury and made a claim for compensation on the insurer as required.

5. The insurer made provisional payments for weekly benefits and medical expenses in early 2016.

6. On 29 February 2016, the insurer issued a section 74 notice declining liability for the applicant's claim. The insurer declined liability on the basis that the applicant was an independent contractor and neither a worker nor a deemed worker pursuant to the Workers Compensation legislation.

7. On 19 June 2019, the insurer issued a section 78 notice disputing the applicant's claim for compensation for permanent impairment. The claim was declined on the basis that the applicant was not a worker as defined in section 4 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) and was not a deemed worker as defined in clause 2 of schedule 1 of the 1998 Act. The insurer also disputed that the applicant was a deemed worker pursuant to the provisions contained in section 20 of the *Workers Compensation Act 1987* (the 1987 Act).

8. On 4 July 2019, the third respondent issued a section 78 notice disputing the applicant's claim for compensation for the injury on 9 December 2015. The third respondent disputed that the applicant was a worker as defined in section 4 of the 1998 Act or a deemed worker as defined in clause 2 of Schedule 1 of the 1998 Act. Further, the third respondent did not agree that the applicant was entitled to compensation because he had failed to give notice of the claimed injury and make a claim for compensation within the time prescribed and as required by sections 254 and 261 of the 1998 Act.

PROCEDURE BEFORE THE COMMISSION

9. The parties attended a conciliation conference and arbitration 3 December 2019. The proceedings were sound recorded and a copy of the recording is available to the parties. The applicant was represented by Mr Callaway, who was instructed by Ms Sinclair of Owen Hodge Lawyers. The first respondent was represented by Mr Saul, who was instructed by Mr Bell of Turks Legal. The second respondent was represented by Mr Lathan, who was instructed by Ms Shao of Juris Cor Legal. The third respondent was represented by Ms Hogan, who was instructed by Mr Ainsworth and Ms Murray of HWL Ebsworth.

10. I am satisfied that the parties to the dispute understood the nature of the application and the legal implications of any assertions 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.

ISSUES FOR DETERMINATION

Matters previously notified as disputed

11. The parties agreed that the following issues remained in dispute:

    (a) Was the applicant a worker as defined in section 4 employed by the first respondent?

    (b) Was the applicant a deemed worker as defined in clause 2 of Schedule 1 of the 1998 Act employed by the first respondent?

    (c) Was the applicant a worker as defined in section 4 employed by Gary Wang, the second respondent?

    (d) Was the applicant a deemed worker as defined in clause 2 of Schedule 1 of the 1998 Act employed by Gary Wang, the second respondent?

    (e) Was the applicant a deemed worker under section 20 of the 1987 Act with Gary Wang, the second respondent being the contractor and the first respondent being the principal?

    (f) Capacity for work and entitlement to weekly benefits.

    (g) Section 60 expenses.

12. At the conciliation, the third respondent advised that issue of failure to give notice of the claimed injury and make a claim for compensation within the time prescribed and as required by sections 254 and 261 of the 1998 Act was not pressed.

EVIDENCE

Documentary Evidence

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

    (a) Application to Resolve a Dispute and attached documents;

    (b) Amended Application to Resolve a Dispute dated 1 November 2019;

    (c) Reply of the first respondent and attached documents;

    (d) Reply of the second respondent and attached documents;

    (e) Reply of the third respondent and attached documents;

    (f) Statement of the applicant dated 3 December 2019.

Oral Evidence

14. No application was made to adduce oral evidence in this matter.

FINDINGS AND REASONS

Evidence of the applicant

15. In a statement dated 27 January 2016, the applicant described coming to Australia in 2013 from China. He said he had work experience in roof repairs and was a general handyman. He described his work history as working for friends "for small jobs" and said he got other work through friends.

16. The applicant wrote:

> "28. I am not a sole worker or self-employed, I just do work for friends.
>
> 29. I know Mr Shui Yu. He is the boss of Yunlong Building Service. I was introduced to him by a friend. This was about the 24/11/15. I met with Shui. He asked me to do work – washing a roof. This job was for 6 days. I was to be paid $1,500. This was verbal agreement. I completed the job. I have one other job for Shui after the roof. This job was to extend a roof. This job took place on the 5/12/15 and I had the accident on the 9/12/15. I was to be paid $1,000 in cash for my labour. This was a verbal agreement. I don't get holidays, sick leave, and they did not pay my superannuation.
>
> 30. On Wednesday 9/12/15 I was at a house at St Ives – 2 Woodbury Road. I started work at 9am at the site. At about 1pm I was using a power drill to screw in a section of the metal roof. I was standing on the roof about 3m high. I was doing this and bending over. I moved my leg and to get into a different position and I slipped on the beam. At this time the beam was damp. I fell off the roof onto the ground …"

17. Mr Shui Yu is referred to by the applicant as both Mr Yu and Mr Shui in his various statements.

18. The applicant stated that he was not wearing a safety harness as the roof was too small to secure the harness. He said that the drill he was using was his property. He said that there were no other workers at the site at this time and Mr Yu had finished his checking work and already left.

19. The applicant stated that the owner of the house found him on the ground and called Mr Yu, who called for an ambulance. He stated that he was taken to Royal North Shore Hospital and admitted. He said that he was operated on his face and left arm.

20. The applicant said that hospital staff told his daughter to contact WorkCover, Safe Work NSW, who sent an inspector, Mr Thomas Yeung, out to the hospital. He stated that Mr Yeung came and saw him and spoke to him and his daughter and he told him what had happened. The applicant said that he had not been back to work and had trouble with pain and could not do much.

21. The applicant wrote:

> "Mr Shui knows I am not a sole trader or self employed as a company or anything like that. I have told him this. He gave me this work. Mr Shui thinks the job I did was my responsibility. He has paid me for the work at St Ives. I and my daughter have tried to call him and he does not answer."

22. The applicant was also asked if had any personal insurance or accident insurance or any other type of insurance for which this matter could be claimed and answered "No".

23. In a statement dated 5 April 2018, the applicant said that he had not received workers compensation payments since early 2016 and had been unable to work because of his injuries. The applicant said that his lack of English would make it impossible to perform anything other than physical work and his injuries prevented him from performing physical work.

24. In a statement dated 15 April 2019, the applicant said that he had been made aware of the accounts provided by Mr Yu, the owner of Yunlong Building Services Pty Ltd and by Mr Gary Wang. The applicant wrote:

> "3. Firstly, in relation to Mr Gary Wang. Mr Wang did not place the advertisement in Chinese newspapers referred to in his statement on my behalf or at my request. I do not advertise and my work comes through friends and by way of word of mouth in the Chinese community.
>
> 4. I am aware that Mr Gary Wang actively looks for work in the Chinese community through advertisements id [sic] he obtains work he then offers to Chinese workers and pays them direct. I do know how much Mr Gary Wang deducts from the price he agrees but he tells you as a worker when he offers you work how much he is prepared to pay.
>
> 5. It was through Mr Gary Wang that I was introduced to Mr Yu and attended at on the house at St Ives. Mr Wang had prior to my introduction asked me whether I was interested in washing a roof of the house at St Ives and told me how much he would pay.
>
> 6. Mr Gary Wang drove me to the job at St Ives on the first day where he spoke with Yu and left. Mr Gary Wang did not return the next day although Mr Yu was seen by me on site in the morning."

25. The applicant said that he did not have a car and could not drive and normally used public transport to get to work. He said he did this on the following day and caught a train to Pymble and a bus to the house. He said he did not have any tools other than a drill which he preferred to use. The applicant said he carried out the washing of the roof by himself without speaking to Mr Yu, who was not always on site, although there were other Chinese building workers on site who, from his observations, reported to Mr Yu.

26. The applicant wrote:

> "9. On the afternoon I completed the cleaning of the roof, Mr Yu approached me and asked me whether I knew how to make a metal roof, and I replied yes, I did. Mr Yu offered to pay me $700 to make the metal roof on the house I had worked on. I agreed and he told me he would buy the materials and have them ready for me to commence work the next day. At the time Mr Yu did not ask for my advice on what materials were needed or how I wanted to make the roof or to accompany him to buy the materials. Mr Yu just wanted me to make the roof as he had planned it to be made.
>
> 10. Mr Yu instructed me to meet him the next day, that is 9 December 2015 at Pymble station at 9.30am when he would pick me up with the materials and we would go together to the St Ives house."

27. The applicant said that he waited for Mr Yu at Pymble as directed and he arrived in his vehicle which was a "ute" in which he was carrying the material to be used for making the roof. He said that after Mr Yu picked him up, they went directly to the house. The applicant said that when they arrived he was instructed by Mr Yu to unload the vehicle while Mr Yu went to the area in the house where the roof was going to be placed and marked out where he was to place the columns for the roof and how he wanted the roof to be constructed. The applicant said Mr Yu did not require him to accompany him to the place where he marked out where the columns would be placed or ask for his view on how the roof should be constructed. The applicant said it was all Mr Yu's idea and he was just to follow what Mr Yu had decided as to how the roof was to be constructed.

28. The applicant stated that when he arrived at the area which Mr Yu had marked out, Mr Yu told him where he wanted the columns to go. The applicant said Mr Yu then left to go elsewhere in the house where other Chinese workers were carrying out work.

29. The applicant referred to the statement of Mr Yu and said that he did not know what arrangement was between Mr Gary Wang and Mr Yu, however, the cleaning of the roof was organised through Mr Gary Wang and after it was finished Mr Yu arranged for the applicant to work for him to construct the roof. He stated that Mr Yu attended the worksite on each day when he was there while Gary Wang was only at the worksite on the first day when he drove him there. The applicant said that on 9 December 2015 Mr Yu picked him up from Pymble station and drove him to the house where he told him what he wanted to be done, marked out how he was to do it, and provided him with the materials and ladder to do it.

30. The applicant wrote:

> "18. As to arrangement between Mr Yu and myself, I say:
>
> 18.1 Mr Yu offered to pay me $700 cash to erect the roof;
>
> 18.2 Mr Yu provided the materials to perform the work and the tools including a ladder to carry out the work;
>
> 18.3 Mr Yu required me to start work the next day and required me to be at Pymble station at 9.30am to be picked up and transported to where I was to work;
>
> 18.4 The hours of work were to be whatever was required to complete the roof;
>
> 18.5 Mr Yu decided what materials were to be used and purchased them himself. Mr Yu decided how the metal roof was to be constructed and marked out where he wanted the columns for making the roof to be placed. Mr Yu did this by marking the floors and walls. I was to just follow his direction and was not asked how to make the roof or invited to do it different from how Mr Yu had planned that it should be done;
>
> 18.5 Mr Yu provided me with a ladder which was to be used to do the job and access the roof. Mr Yu did not ask me what else I needed or suggest to me I could use another method of doing the job as he planned that it should be done;
>
> 18.6 Mr Yu asked me to do the job and required me to do the job and arranged for me to be picked up to do the job. The agreement with Mr Yu required me to do the job;

18.7 My attendance at the site was up to Mr Yu who could tell me when to come, go or stay as he pleased;

18.8 On the day I was working making the roof I was working only for Mr Yu's company and not engaged to work for anyone else. I did not tell Mr Gary Wang prior to accepting the job and didn't consider it was any of his business. I did not pay Mr Gary Wang out of the money and he had no interest in the job;

18.9 Mr Yu told me he would get the material the next day and I was to make the roof the next day. He decided when I was to do the job and the hours I would work, which was to commence at 9.30 at what time he told me he would pick me up;

18.10 I understood that I was to attend the job, make the roof and follow the directions of Mr Yu while I was working for Mr Yu on the job.

18.11 The agreement with Mr Yu did make the roof [sic] did not involve Mr Gary Wang but was between Mr Yu and myself; and

18.12 I do not have an ABN, or an invoice book, or give receipts or have a business name or conduct myself as a business, or advertise or have any tools or equipment, or operate a bank account for conducting a business."

31. In a statement dated 31 October 2019, the applicant stated that on the first day he worked at 2 Woodbury Road in St Ives, Mr Gary Wang picked him up from Pymble station and drove him to the job in a white transit van. He said that they arrived at about 10am and Mr Gary Wang drove onto the driveway of the premises and parked near the house. He said that Mr Gary Wang provided him with equipment, which he already had in the van when Mr Gary Wang picked him up. The applicant said that the equipment included a petrol driven pressure cleaner, which he believed belonged to Mr Gary Wang, and a container of fuel, a harness and a rope. The applicant said that he had no equipment.

32. The applicant stated that they both got the equipment out of the van and Mr Gary Wang pointed to the roof and told the applicant where to do the work. The applicant said that the roof was made from grey cement tiles and there was already a ladder on the property. He said he attached the rope provided by Mr Gary Wang to tree branches on either side of the roof and attached the harness to the rope. He said he then started to clean the roof with the pressure cleaner. The applicant said that Mr Gary Wang stayed for a while, however, he did not recall how long that was for. He said that, to the best of his recollection, Mr Gary Wang visited the site again on about two more occasions.

33. The applicant said that when he provided his statement dated 15 April 2019, he had said that the amount that Mr Yu had agreed to pay him for the roof construction job was $700. He stated that was an error on his part and the amount was $1,000 and that was the amount that Mr Yu transferred to his bank account after he was injured.

34. The applicant wrote:

> "I refer to my statement dated 27 January 2016. At the time I made that statement I did not believe that Gary Wang had any involvement in the matter because I had completed the roof cleaning job and I was constructing the roof for Shui Yu when I fell off the roof. So far as I am aware, Gary Wang had no involvement in that arrangement."

Evidence of Guangyi (Gary) Wang (second respondent)

35. In a statement dated 6 December 2018, Mr Gary Wang said that he had moved to Australia from China in 2008. He said that he had been retired for about five years and had worked as a mechanical engineer in China. Mr Gary Wang stated that since he had arrived in Australia, he had only done short casual jobs, including car repair jobs and engineering planning jobs, mainly for friends to help them out. He stated that he also did volunteer work for his church in Hurstville.

36. Mr Gary Wang wrote:

> "I have never done any building work myself nor have I done any construction or repair work on roofs. I don't like heights and I have bad knees."

37. Mr Gary Wang said he had never owned a company in Australia and never had workers compensation insurance. He said that he was involved in a large social group of elderly Asian people and they organised activities and trips and helped each other out, including organising things to get done and jobs for each other. He said that he knew the applicant through the social group and he had known him for many years.

38. Mr Gary Wang said that he had arranged for Mr Yu to contact the applicant to do some roof cleaning work.

39. Mr Gary Wang wrote:

> "18. I can't recall now exactly how I know Mr Yu as it has been so long, but it may have been through the social group or it may have been through friends of friends.
>
> 19. I can't remember the address of where the roof cleaning was to be done, as it a few years ago now.
>
> 20. I also can't remember now who contacted who, whether it was me who contacted Mr Yu to recommend Mr Wang for the roof cleaning work, or whether it was Mr Yu who contacted me seeking a recommendation for someone to do the work. …
>
> 22. I did place an advertisement in the Chinese newspaper as a "Roofer". I did that for Mr Wang, so that he could get some work. I personally can't do this type of work, as explained. I was aware that Mr Wang had worked in management when he was in China, so I did that to help Mr Wang.
>
> 23. I also did a lot of other advertisements in the Chinese newspaper for other people in the social group. Those adverts included people looking for jobs, rental accommodation, and also looking for a partner. It is all volunteer work."

40. Mr Gary Wang said he had only met Mr Yu once so he did not know him well. He said that he was not personally involved in any of the roof work at 2 Woodbury Road in St Ives, and all that he was involved in was recommending the applicant to Mr Yu for the roof cleaning work. He said he had been to 2 Woodbury Road, St Ives, once, and that was to take the applicant to check the address because the applicant did not have a car.

41. Mr Gary Wang wrote:

> "29. I never employed Mr Wang to work on the roof at 2 Woodbury Road St Ives NSW. That was something arranged between Mr Yu and Mr Wang.

30. I recall when Mr Wang was injured. I could not contact him for about 10 days. …

31. I went and saw Mr Wang in hospital. I asked him how come I couldn't get through to him and what had happened and he told me that he fell off the roof. He told me that he was installing an awning for Mr Yu.

32. I knew nothing about the installing of the awning work. I only knew about the roof cleaning work which Mr Wang was to be doing.

33. I asked Mr Wang how much did he do the awning work for and he told me a little amount. I told him that he shouldn't be doing that as it was not much money and he is too old to be working on rooves. He did not say how much money he was doing it for."

42. Mr Gary Wang stated that he could not remember if the applicant had said whether he had been paid any money or not by Mr Yu. Mr Gary Wang said that he never paid any money to the applicant at all as he did not need to. He said that he had only gone to check up on him as a friend. Mr Gary Wang denied ever working for Mr Yu or for Mr Yu's company.

43. Mr Gary Wang said that he was aware that Mr Yu said he had called him a couple of times during the work and on the last time was told the job would be finished. Mr Gary Wang said he did recall this but it was about the roof cleaning work only, which was finished.

44. Mr Gary Wang wrote:

"41. I had uplifted some money from Mr Yu for the roof cleaning job before the job, which was for materials. The money was supposed to have been given directly to Mr Wang, however Mr Wang could not pick it up as he did not have a vehicle and he lived in Hurstville which was a long way from where Mr Yu lived, so I picked it up from Mr Yu and gave it to Mr Wang as a favour."

45. Mr Gary Wang said he did not know what the materials were. He said he did not know where Mr Yu lived, but picked up the money from him at an address in St Ives. Mr Gary Wang said he gave all of the materials money to the applicant. He said it was cash but he could not now recall how much it was, but it was only a little amount. He said the money was for the materials only for the roof cleaning job. He said he did not know what the arrangement was or how much was to be paid to the applicant for the labour part of the roof cleaning work as he was not involved in that at all.

46. Mr Gary Wang wrote:

"46. I also don't know what arrangements were made between Mr Yu and Mr Wang over the awning work or if that was done for Mr Yu or directly for the owner of the house.

47. I do not know if Mr Wang was to supply his own tools or equipment or not, as I had nothing to do with the work.

48. I do not know why Mr Yu would say that Mr Wang was working for me as he was not."

47. In a statement dated 23 October 2019, Gary Wang said that since about 2009 he had been involved in a large social group of elderly Asian people, who organised activities and trips together. He said he had known the applicant from that social group since about 2010 and they became friends. Mr Gary Wang wrote:

"7. As a friend of Mr Wang I helped him to advertise in the Chinese newspaper once or twice because he wanted to get some work and earn more money. I offered to help for free since I regard myself as his friend.

8. I put my contact number on the advertisement because Mr Wang required me to do put my contact number. Mr Wang cannot read or write or communicate very well so I think it would be more convenient for me to contact others on his behalf.

9. I never owned and still do not own any company in Australia. I never conducted any business as a sole trader.

10. I never had any employment agreement with Mr Wang.

11. Mr Wang helped me to fix the roof of my house twice. One of which happened in 2017, and the other happened in 2018. I paid him some money in cash (which amount I do not specifically recall) for each of the fixing work he did for me."

48. Mr Gary Wang stated that late October or early December 2015, Mr Yu, the director of Yunlong Building Services Pty Ltd, called him. He did not recall how Mr Yu got his number, but he said Mr Yu might have read the newspaper advertisement or obtained his phone number from some friends. He said that Mr Yu and he had a conversation to the following effect:

"Mr Yu: I have some roof cleaning work for you to do.

Mr Wang: I do not know how to clean the roof. My friend Mr Wang might be able to do the roof cleaning work for you. I can ask him and confirm whether he is willing to take the work and the price of the work."

49. Mr Gary Wang stated that after the phone conversation with Mr Yu he called the applicant and the applicant agreed to work for Mr Yu doing some roof cleaning work.

50. Mr Gary Wang stated that in early December 2015, the applicant said he was to start the roof cleaning work but the site at St Ives was a little far from his place. The applicant told Mr Gary Wang that he did not have a car and did not drive and asked if Mr Gary Wang could drive him to the site. Mr Gary Wang said that he agreed to drive the applicant to the site.

51. Mr Gary Wang wrote:

"15. On the first day of the roof cleaning work, which date I do not specifically recall, I drover Mr Wang to the site located at 2 Woodbury Road, St Ives NSW ("the site").

16. I do not specifically recall how long I stayed at the site. To my best memory, I greeted Mr Yu, introduced Mr Yu to Mr Wang and left.

17. After the first day of the roof cleaning work, I never went to the site again.

18. I did not discuss with Mr Yu or Mr Wang further about how the roof cleaning work would be conducted and how long it was going to take."

52. Mr Gary Wang stated that he did not contact Mr Yu or the applicant after the first day of the roof cleaning work for about two weeks. He said that in about late December 2015, the applicant phoned him and told him he was in hospital and had been seriously injured while working for Mr Yu. Mr Gary Wang said the applicant told him he fell off the roof while he

was installing an awning for Mr Yu. Mr Gary Wang said to the applicant that he remembered he had only agreed to clean the roof tiles. Mr Gary Wang stated that the applicant told him that after he finished the roof cleaning work Mr Yu asked him to do more work. The applicant said that he discussed it with Mr Yu and the applicant took the awning installation work.

Evidence of Shui Yu

53. In a statement dated 4 February 2016, Mr Shui Yu stated that he was employed as a director of the first respondent which was involved in the building industry. He said he had been in the business for four to five years and was a licensed builder in NSW, doing residential work. Mr Yu said that he had a job at 2 Woodbury Road in St Ives to construct a metal roof at the house in November and December 2015. Mr Yu wrote:

> "18. I was also doing other work at this house. I decided to subcontract the roof job out. I checked through the Chinese newspaper and found an ad for a roofer.
>
> 19. I called the number – 0425 226 565 – I know the boss name is Wang. I called Mr Wang and arranged for the job to be done. I was to pay the boss, Mr Wang, $5,300 for about 5 days work. Mr Wang agreed to take the job on. He did not say who was going to do the job. This contract was only verbal.
>
> 20. I did not attend the worksite. I only called the above number a couple of times during the work period. I don't remember the exact date of the job, when it started and finished. I spoke to the boss – Mr Wang – about the progress of the job. I was told it would be finished on the last time I phoned.
>
> 21. About noon on the day, I don't remember, the owner of the house, Mr Yang, called me. He said that the worker had fallen off the roof. He asked me to call an ambulance. …"

54. Mr Yu said that he did not attend the house and went to Royal North Shore Hospital where he saw the applicant. He said he did not know the applicant's name but his family was present. Mr Yu said that he was told the applicant's last name was Wang. He said that the applicant's daughter asked him to make the remaining work payment to them as her father was injured. He said that was about $1,000 and the daughter gave him her father's bank details. He said he transferred the $1,000 the next day. Mr Yu said he did this as Mr Wang was injured, but he was supposed to pay "the boss Wang".

55. Mr Yu said that in the advertisement there was no company name for the roofer, but only a number. He said he met the "boss Wang" when he made progressive payments to him, which were in cash. He said the total cost for the job was about $5,300 and he paid him direct. He said he told "boss Wang" about him paying worker Wang the $1,000 and "boss Wang" said that was fine. Mr Yu said that when he asked "boss Wang" to do the job he did not ask any questions about insurance, whether he was licensed or qualified, or if his workers were covered.

56. Mr Yu stated that the applicant had nothing to do with his company which used subcontractors. He said that "boss Wang" was to provide all equipment for the job, including roofing materials, as per the verbal contract. He said he did not know how much the applicant was to be paid by his boss. Mr Yu said that he was to pay a total of $5,300 and he paid $4,000 to the "boss" in cash and $1,000 to the applicant and the job had not been finished.

Other documents

57. A translation of the advertisement in the Australian Chinese Daily placed in the edition dated 7-8 November 2015, and on a number of subsequent occasions, was interpreted as follows:

> "Roof repair and maintenance.
>
> Tiles cleaning and painting, roof leaking; change of trough; repair and maintenance of iron roof; mat-awning build; outer wall renovation, the best offer for Chinese.
>
> 0425 226 565"

58. The advertisement was placed in the Australian Chinese Daily in the editions dated 14/15 November 2015, 5-6 December and 12/13 December 2015.

59. Documents obtained from Safe Work NSW on 26 September 2017 included the following:

    (a) WSMS RFS report – 1/352242. This report followed the accident at 2 Woodbury Road, St Ives and was reported on 16 December 2015. Under "description of issue", it was noted that the employer was refusing to provide workers compensation policy details to the worker (Rongjie Wang) or to the customer care to assist the customer to notify the incident and make a workers' compensation claim.

    (b) In a note of a call which appeared to be received on 12 December 2015, the following was recorded:

> "Notifier reports her 62yo father was working for Mr Shui Yu … when he fell from the roof and suffered multiple injuries including fractured arm, facial bones and multiple soft tissue injuries. The IP only speaks Mandarin and are not familiar with their rights and obligations in relation to workers compensation insurer. Notifier was unclear on the company details or insurance."

    It was noted that the incident occurred on 12 December 2015 at about 10.43am.

    (c) In the entry dated 23 December 2015 after Description, Mr Yeung wrote:

> "Site visited.
>
> I met Shui Yu, the principal contractor.
>
> Yu advised that he is a builder, he was contracted by the owner of the house to do renovation work for the house, subsequently he engaged Guangyi Wang from a Chinese newspaper advertisement to clean the roof tiles of the house, Wang had brought Rongjie Wang, the IW, to work together. Yu also advised that the owner of the house wanted something to be done on the metal awning at the rear of the house. Subsequently Rongjie Wang agreed to do the work.
>
> It appeared that Wang, the IW, fell from the top of the metal awning, approximately 2.5 metres high, to the ground, while he was working on the metal awning by himself".

    (d) In the handwritten notes attached to the Work Safety Report dated 23 December 2015, it was noted that the builder at 2 Woodbury Road was Shui Yu. The notes read as follows:

"Shown a receipt signed by both parties"

Owner, client engaged him to do renovation work including cleaning roof. The client also asked him to repair the metal awning at the rear.

He saw an advertisement in Chinese newspaper and engaged Guangyi Wang to clean the roof tiles who bought Rongjie Wang to work together.

Rongjie Wang agreed to do the repair work himself.

He was working by himself when the accident happened.

Meet at Hurstville Library.

Wang advised that he was working by himself at the time of accident, when he was up on top of the metal awning. He went to buy some material earlier that day and then went to the house and worked by himself."

(e) In an entry dated 31 December 2015, Mr Yeung noted that he had talked to Guangyi Wang, a friend of Rongjie Wang, the injured person. He wrote:

"Guangyi Wang advised that he is a friend of Rongjie Wang and helping him getting some work."

Was the applicant a worker or a deemed worker?

60. The next issue to be determined in this matter is whether the applicant was, at the time of his injury, a worker within the meaning of the 1998 Act or a deemed worker employed by either the first respondent or the second respondent pursuant to the provisions of clause 2 of Schedule 1 of the 1998 Act.

61. All parties made oral submissions in the arbitration. Counsel for the applicant handed up a "Preliminary Outline of Facts Supporting a Finding of Worker". Counsel for the second respondent handed up written submissions dated 2 December 2019.

62. The applicant submitted that there was evidence that the applicant was a party to a contract of employment with the first respondent at the time of his injury and the evidence supported a finding was a worker under section 4 of the 1998 Act and deemed worker pursuant to the provisions of clause 2 of Schedule 1 of the 1998 Act.

63. The first respondent submitted that the applicant, at the time of his injury, was neither a worker nor a deemed worker. Counsel submitted that there must be a consideration of the indicia relevant to whether or not there was a contract of service between the applicant and respondent, as stated by the High Court in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; 63 ALR 513 (*Stevens*). The first respondent argued that there was only one contract for work at 2 Woodbury Road and there was not a second contract between the applicant and the first respondent.

64. Counsel for the second respondent referred to a number of authorities including *Stevens*, *On Call Interpreters and Translaters Agency Pty Ltd v Commissioner of Taxation (Number 3*) [2011] FCA 366: 279 ALR 341 ('*On Call Interpreters'),Ace Insurance Ltd v Trifunovski* [2013] FCAFC(2013) 209 FCR 146*, C&T Grinter Transport Services Pty Ltd (in liquidation) & Grinter Transport Pty (In Liquidation) (Controller appointed)*[2004] FCA 1148*,* and *Gothard v Davey* [2010] FCA 1163 . In conclusion, the second respondent submitted that the evidence was against a finding of employment by the second respondent and that the

applicant was an employee of the first respondent or an independent contractor. In terms of deemed worker, the second respondent submitted that there was no contract between the applicant and the second respondent.

65. Counsel for the third respondent adopted the submissions made by the second respondent. She submitted that there were two separate contracts in relation to work performed by the applicant at 2 Woodbury Road, and the second respondent was not involved in the second contract, and it was during that work that the applicant fell off the roof. She submitted that section 20 of the1987 Act did not apply.

66. Section 4(1) of the 1998 Act defines "worker" as follows:

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

67. Schedule 1, Clause 2 of the 1998 Act provides:

> "**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."

68. A crucial matter to be resolved in determining the question is whether the applicant was a worker or deemed worker employed by the first respondent or the second respondent, is what, if any, contract arrangements existed between the applicant and the respondents.

69. Roche DP in *Riverwood Legion and Community Club Ltd v Morse* [2007] NSWWCCPD 88 (*Riverwood*) said:

> "Before any applicant for compensation can succeed it is necessary that he or she establish that a contract for service existed with the putative employer. The fundamental principles of contract law apply to the formation of the contract of employment just as they do to any other contract."

70. Roche DP accepted that it was necessary to look at the totality of the arrangements in determining whether there was a contract.

71. The applicant must establish the existence of the essential ingredients of a contract, namely agreement between the parties to perform and consideration (*Unicomb v Jimmy Cole Caravans Pty Ltd* [1979] WCR (NSW) 65).

72. Whether a contract has been entered into is determined on "an objective assessment of the state of affairs between the parties"; *Ermogenous v Greek Orthodox Community of SA Inc* [2002] HCA 8; (2001) 209 CLR 95 at 25. It is not necessary in determining whether a contract has been formed, to identify either a precise offer, or a precise acceptance, nor a precise time at which an offer or acceptance could be identified (*Ormwave Pty Ltd v Smith* [2007] NSWCA 210).

73. The task of the Commission in deciding whether a given relationship constitutes a contract of service, that is to say an employment contract, was considered by DP O'Grady in *Mohamed v Barnados Australia Limited* [2014] NSWWCCPD 81 (*Mohamed*). The DP said at [57]:

> " ... It is instructive to consider ... the observations of Bromberg J in *On Call Interpreters and Translaters Agency Pty Ltd v Commissioner of Taxation (Number 3*) [2011] FCA 366: 279 ALR 341 ('*On Call Interpreters')* concerning the 'modern approach' to this question, as follows (at [204]):
>
> 'Despite the earlier preoccupation of the law with the degree of control exercised by the putative employer as defining an employment relationship, the modern approach is multi-factorial. As the majority said in *Hollis v Vabu Pty Ltd* [2001] HCA 44: (2001) 207 CLR 21 ('*Hollis')* at [24] it is 'the totality of the relationship' which is to be considered. A range of indicia may be examined. Some will be more useful than others in some work arrangements but less useful in other work arrangements. Because of the multiplicity and diversity of work arrangements and the ingenuity of those fostering disguised relationships, there is value in a multi-factorial test which recognises that one spotlight will not necessarily adequately illuminate the totality of the relationship. Such an approach also involves what may be described as a 'smell test', or a level of intuition. The majority in *Hollis* (at [48]) described the notion that bicycle couriers were each running their own business as 'intuitively unsound'."

74. The members of the Court in *Hollis* identified a non-exhaustive range of indicia which might be considered when determining the nature of an agreement concerning the provision of services. Those matters included the mode of remuneration; the provision and maintenance of equipment; the obligation to work; hours of work and provision of holidays; deduction of income tax; delegation of work; the right to dismiss; the right to have a particular person do the work; the right to dictate the place and hours of work and payment by the putative worker of expenses from his remuneration.

75. As Deputy President Roche in *Malivanek* [2014] NSW WCC PD 4(*Malivanek)* at [208] said:

> "Simply expressed, the question of whether a person is an independent contractor in relation to the performance of particular work, may be posed and answered as follows: Viewed as a 'practical matter':
>
> (i) is the person performing the work an entrepreneur who owns and operates a business; and,
>
> (ii) in performing the work, is that person working in and for that person's business as a representative of that business and not of the business receiving the work?
>
> If the answer to that question is yes, in the performance of that particular work, the person is likely to be an independent contractor. If no, then the person is likely to be an employee."

76. Whether in a given set of circumstances a person can be described as a worker has been the subject of considerable judicial opinion. The current approach to the problem was considered by DP Roche in *Malivanek* from [181] and adopted by DP Wood in *Baines v* Hany [2018] NSW WCC PD 14. DP Woods said at [266]:

> "Those authorities have been discussed in a number of Presidential decisions. The indicia is helpfully set out in the decision of Deputy President Roche in *Malivanek v Ring Group Pty Ltd*. The factors considered included:
>
> (a) the control test, and whether there were set times to work;
>
> (b) whether he was paid an hourly rate as opposed to a set fee, the hourly rate being indicative of an employment relationship;
>
> (c) the provision of tools;
>
> (d) deduction of income tax;
>
> (e) exclusivity of the relationship;
>
> (f) whether there was an obligation to perform the work, and
>
> (g) the entitlement to bring others on to the site."

77. The first matter that requires consideration is whether there was one contract or two contracts of involving work performed by the applicant at 2 Woodbury Road. I am satisfied that there were two contracts entered into in respect of work carried out by the applicant at 2 Woodbury Road. The first contract was for the cleaning of the roof and the second contract was for the extension/awning installation on the roof.

78. I accept the evidence of the applicant that he was introduced to Mr Yu by the second respondent, Gary Wang. In his first statement dated 26 January 2016, the applicant said that Mr Yu asked him to wash a roof which was a six day job. The applicant stated that he was to be paid $1500. The applicant said that this was a verbal agreement and he completed the job.

79. The applicant stated that he had one more job for Mr Yu which was to extend a roof and this job started on 5 December 2015. The applicant fell off the roof on 9 December 2015. The applicant said that this was a verbal agreement and he was to be paid $1,000 in cash for his labour. He said that he did "not get holidays, sick leave", or superannuation.

80. However, the applicant made several later statements. In his statement dated 14 April 2019, the applicant said that the second respondent, Gary Wang, actively looked for work in the Chinese community through advertisements and when he obtained work, he then offered the jobs to Chinese workers and paid them direct.

81. The applicant said he was introduced to Mr Yu through Gary Wang. He said that Gary Wang had asked him whether he was interested in washing a roof of the house at St Ives and told him how much he would be paid. The applicant said that Gary Wang drove him to the job at St Ives on the first day where he spoke with Mr Yu and left.

82. The applicant said he carried out the washing of the roof by himself without speaking to Mr Yu. The applicant stated that on the afternoon when he completed the cleaning of the roof, Mr Yu approached him and asked him whether he knew how to make a metal roof, and he replied yes, he did. The applicant said that Mr Yu offered to pay him $700 to make the metal roof on the house he had worked on and he agreed. Mr Yu told the applicant that he would buy the materials and have them ready for the applicant to commence work the next day.

83. The applicant said that he on the next day he waited for Mr Yu at Pymble Station as directed and Mr Yu arrived in his vehicle which was a “ute” in which he was carrying the material to be used for making the roof. The applicant said that when they arrived at the house he was instructed by Mr Yu to unload the vehicle while Mr Yu went to the area in the house where the roof was going to be placed and marked out where the applicant was to place the columns for the roof. The applicant said Mr Yu did not ask for his view on how the roof should be constructed.

84. It was in the later and more detailed statements that the applicant’s evidence made it clear that the cleaning of the roof was organised through Mr Wang but after that job finished, Mr Yu arranged for the applicant to work for him to erect the roof.

85. The evidence of Gary Wang supports in part the evidence given by the applicant. Mr Gary Wang could not remember whether he contacted Mr Yu to recommend Mr Wang for the roof cleaning work, or whether Mr Yu contacted him seeking a recommendation for someone to do the work. Mr Wang said that he was not personally involved in any of the roof work at 2 Woodbury Road in St Ives, and he had only recommended Mr Wang to Mr Yu for the roof cleaning work.

86. Mr Gary Wang said the applicant told him that he fell off the roof while he was installing an awning for Mr Yu. Mr Gary Wang said to the applicant that he remembered he had only agreed to clean the roof tiles and the applicant told him that after he finished the roof cleaning work Mr Yu asked him to do more work installing an awning.

87. Mr Yu, in a statement dated 4 February 2016, said that he had a job at 2 Woodbury Road in St Ives to construct a metal roof at the house in November and December 2015. Mr Yu said that he decided to subcontract the roof job out. He said that he called Mr Wang and arranged for the job to be done. The contract was verbal and Mr Yu was to pay the boss, Mr Wang, $5,300 for about five days of work. Mr Wang did not say who was going to do the job. Mr Yu said that he did not attend the worksite and only called a couple of times about the progress of the job.

88. It was odd that Mr Yu only referred to the construction of a roof in this statement, particularly, in the light of the records of Safe Work NSW. In the Safe Work NSW records, My Yueng, on 23 December 2015, noted that he had visited the site and met Shui Yu, who was contracted by the owner of the house to do renovation work. Mr Yu said he engaged Guangyi Wang from a Chinese newspaper advertisement to clean the roof tiles of the house. Guangyi Wang had brought Rongjie Wang “to work together”. Mr Yueng also noted that Mr Yu advised that the owner of the house wanted something to be done on the metal awning at the rear of the house and “subsequently Rongjie Wang agreed to do the work”.

89. I am satisfied that there were two contracts of employment entered into in respect of work carried out by the applicant at 2 Woodbury Road. The first contract was for the cleaning of the roof and the second contract was for the extension of the roof.

90. The evidence supports a finding, in my view, that the second contract was made between the applicant and the first respondent. I accept the evidence of the applicant and Mr Gary Wang in relation to there being a second later contract made between the applicant and the first respondent. This was also consistent with what Mr Yu told Mr Yeung. I do not accept Mr Yu’s evidence that there was only one contract, that being with the second respondent, Mr Gary Wang. The evidence in relation to the parties to the first contract is less clear and there is evidence that Mr Gary Wang either arranged for the first respondent to employ the applicant to clean the roof or that the first respondent and Mr Gary Wang entered into a contract and Mr Gary Wang then engaged the applicant to carry out the roof cleaning work. However, in my view, it is not necessary for me to decide who the parties were to the first contract for the roof cleaning work.

91. The next matter that needs to be considered is whether the contract between the applicant and the first respondent for the construction of the metal roof was a “contract of service” between the “employer” and the “worker”. This relationship must be distinguished from that of the “contract for services”, which is generally referred to as the rendering of services by an independent contractor. The current test is to balance the indicia in favour of an employment contract with those not in favour of that relationship.

92. In *Stevens*, Mason J with whom Brennan and Deane JJ agreed, said:

> “... the existence of control, whilst significant, is not the sole criterion by which to gauge whether a relationship is one of employment. The approach of this court has been to regard it merely as one of a number of indicia which must be considered in the determination of that question ...”

93. Mason J at p 24 listed the following indicia, additional to control, as relevant, although not exhaustive, to determining the existence of a contract for service:

- mode of remuneration;
- the provision and maintenance of equipment;
- the obligation to work;
- the hours of work and provision for holidays;
- the deduction of income tax, and
- delegation of work by the putative employee.

94. Wilson and Dawson JJ, concurring with Mason J on the balance of indicia approach, listed at p 36 the following as indicating an employment relationship:

- the right of the employer to have a particular person do the work;
- the right to suspend or dismiss the person engaged;
- the right to the exclusive services of the person engaged, and
- the right to dictate the place of work, hours of work and the like.

95. The control test is not determinative of an employer/employee relationship. The other indicia that must be considered include the provision of tools and equipment, the method of remuneration, the arrangements about the hours of work and the provisions of holiday, the obligation to work, the arrangements about taxation and the capacity to delegate work (*Malivanek* at [165]; *Stephens* at p24).

96. Kirby P in *Articulate Restorations and Developments Pty Ltd v Crawford* (1994) 10 NSWCCR 751 said:

> “In a sense the existence of indicia of the ultimate right of control and its exercise is more telling than the existence of indicia of independence. This is because a high measure of independence of skilled workers is now commonplace in the workforce. Thus, the existence of flexible hours, a large discretion in the performance of work, a lack of effective real control and supervision may not, in a particular case, be determinative. In today’s employment market, these features of the relationship between the putative employer and worker may be neutral as to the nature of the relationship which was established between them. But where there are clear indications of the right of control, and especially where there are indications that that right of ultimate control has been actually asserted, a court may more readily draw the inference that a contract of service (employment) has been established. Where it is, a contract for services (independent contractor) will have been excluded”.

97. Ipp JA *in Boylan Nominees Pty Limited t/a Quirks Refrigeration v Sweeney* [2005] NSWCA 8: -

> "The control test remains important and it is appropriate, in the first instance, to have regard to it (albeit that it is by no means exclusive) because, as Wilson and Dawson JJ said in *Stevens v Brodribb Sawmilling Company Pty Ltd* [1986] HCA 1; (1986) 160 CLR 16 (at 36):
> '[I]t remains the surest guide to whether a person is contracting independently or serving as an employee'" (at [54])

98. I have considered the various indicia of employments and note the following factors:

(a) In respect of the control test, the evidence of the applicant was that Mr Yu picked him up from Pymble station on 9 December 2015 and drove him to the house in Woodbury Road where he had agreed to construct the metal roof or awning. Mr Yu then told the applicant what had to be done. According to the applicant, Mr Yu decided what materials were to be used and Mr Yu had purchased them himself. The applicant said that Mr Yu decided how the metal roof was to be constructed and marked out where he wanted the columns for making the roof to be placed, by marking the floors and walls. The applicant said that he was just to follow Mr Yu's direction and was not asked how the roof should be made. Mr Yu's evidence was that he did not attend the worksite. I do not accept Mr Yu's evidence in relation to this issue. Mr Yu's evidence is not plausible. Mr Yueng of Safe Work NSW reported that Mr Yu had agreed to engage the second respondent, Gary Wang, to carry out cleaning of the roof. Mr Yu told Mr Yeung that the applicant in fact did the roof cleaning and he then employed the applicant to repair the roof awning. Mr Yu changed his evidence after making the initial statement to Mr Yeung and in his next statement omitted any reference to a roof cleaning job and only referred to a roof repair job. Further, it is difficult to accept that Mr Yu did not attend the worksite as he had engaged various workers on the site and would surely have attended the site regularly to check progress and supervise the work. I am satisfied that in the arrangement between the first respondent and the applicant as to the work to be carried out between 5 December 2015 and 12 December 2015, the first respondent exercised a degree of control over the applicant in terms of when and where the work was to be done, and exactly what was required. It seems to me that the first respondent would have had the right to suspend or dismiss the applicant if the first respondent was unsatisfied as to how the work was carried out. I am satisfied that the first respondent had control of the work site.

(b) In terms of set times of work, the applicant said that Mr Yu required him to start work the day after he agreed to do the roof construction job and also required the applicant to be at Pymble station at 9.30am to be picked up and transported to the worksite. The applicant said that the hours of work were to be whatever was required to complete the roof. The applicant said that his attendance at the site was up to Mr Yu who could tell him when to come, go or stay as he pleased. Mr Yu's evidence was that he did not attend the worksite. For the reasons given above, I do not accept Mr's Yu's evidence that he did not attend the worksite. I accept the applicant's evidence that he met Mr Yu at the train station at Pymble as instructed by Mr Yu and Mr Yu then took the applicant to the worksite.

(c) In terms of the mode of renumeration, the rate of pay was clearly determined by the first respondent. The applicant was paid a set fee as opposed to an hourly rate. The applicant gave evidence that Mr Yu offered him $1,000 to construct the roof, although the applicant later changed this amount to $700 and then changed the amount back to $1,000 in his last statement. In my view, nothing

turns of the change in the amount to be paid. However, I accept that an hourly rate is usually regarded as indicative of an employment relationship. The applicant was to be paid cash. No tax was deducted. The applicant was not paid holidays, sick leave, or superannuation. The absence of any provision for holiday pay, sick pay or superannuation is also a factor which weighs against a finding that the applicant was a worker. Mr Yu paid the applicant $1,000 after the applicant was injured although Mr Yu said that such payment was just part of the $5,300 that Mr Yu had agreed to pay Gary Wang. In considering the mode of remuneration, the evidence is against a finding that the applicant was a worker.

(d) In terms of the provision of tools and materials, the applicant said that Mr Yu provided the materials to perform the work and the tools including a ladder to carry out the work. The applicant did use his own drill. Mr Yu said that "boss Wang" was to provide all equipment for the job, including roofing materials, as per the verbal contract. The second respondent, Gary Wang, stated that he had no knowledge of the second roof repair job. While there is evidence that Gary Wang provided some tools in respect of the first roof cleaning job, I accept that he had no involvement in the roof repair job and did not provide any material or tools for that work. I accept the applicant's evidence that Mr Yu provided tools and materials for the roof repair job and the applicant merely used his own drill. It is significant that the applicant does not own a car or drive and relies on public transport apart from when he was given a lift. The reliance on public transport is consistent with the applicant's evidence that he did not provide tools or materials apart from the drill. However, I note that Mr Yeung in the Work Safety Report recorded that the applicant advised that he went to buy some material earlier the day of the accident and then went to the house and worked by himself. No details of the materials bought were provided and the applicant did not address this in his evidence. However, as the applicant was reliant on public transport, I would infer that any material he bought on the day of the injury, was limited to a size that he could take on public transport. I am satisfied that the large materials, the ladder and all tools except for the drill were supplied by Mr Yu.

(e) In terms of conducting a business, the applicant stated that he did not have an ABN, or an invoice book, or give receipts, or have a business name, or conduct himself as a business, or advertise or have any tools or equipment, or operate a bank account for conducting a business. I accept that the applicant did not have an ABN, use an invoice book, give receipts, have a business name, operate a bank account for conducting a business or conduct himself as a business. There was evidence that Mr Gary Wang, placed an advertisement in a Chinese newspaper for a roofer. It appears that Mr Yu rang Mr Gary Wang about a roof cleaning job and Mr Gary Wang then asked the applicant to do that work. The applicant stated that Mr Gary Wang did not place the advertisement in Chinese newspapers on his behalf or at his request. Mr Gary Wang stated that he placed an advertisement in the Chinese newspaper as a "roofer" and that he did that for the applicant, so that he could get some work. Gary Wang later stated that he helped the applicant to advertise in the Chinese newspaper once or twice because the applicant wanted to get some work and earn more money. Gary Wang said that he put his own contact number on the advertisement because the applicant required him to do so. Gary Wang said that the applicant could not read or write or communicate very well so the applicant thought it would be more convenient for Gary Wang to contact others on his behalf. The evidence of Gary Wang on this issue needs to be considered very carefully. The applicant gave evidence that Mr Gary Wang actively looked for work in the Chinese community through advertisements and when he obtained work, he then offered it to Chinese workers and paid them directly. The applicant said that he did not

know how much Mr Gary Wang deducted from the price he agreed but he would tell the worker when he offered the work how much he was prepared to pay. On balance, I prefer the evidence of the applicant to that of Gary Wang in respect this issue. I was not persuaded that Mr Gary Wang was a disinterested party, who merely performed volunteer work in the local Chinese community. It was more plausible that Mr Gary Wang advertised various jobs and then when he obtained work offered it to Chinese workers for a set amount. Mr Gary Wang was apparently working as a recruiter of labour, and may have been paid for doing so or as a facilitator of the provision of labour. Other factors that should be considered when looking at whether the applicant conducted a business include whether he had tools and equipment. There was no evidence that the applicant had tools, apart from his drill, which he took to the work site. I am satisfied that the applicant used a ladder and other tools provided by the first respondent. I should also add that it would be difficult for the applicant to take tools to a site when he did not own a car or drive and was reliant on public transport or lifts from other people such as Mr Yu or Gary Wang. I accept the applicant's evidence that he carried out handyman jobs. There are no financial records going to what income was generated. The applicant said that he obtained work through word of mouth in the Chinese community. On balance, the evidence as a whole is, in my view, inconsistent with the proposition that the applicant regularly carried out a trade or business.

(f) In terms of exclusivity of the relationship the applicant stated that he understood he was to attend the job, make the roof and follow the directions of Mr Yu while he was working for Mr Yu on the job. The applicant worked alone so presumably the first respondent expected the applicant to personally do the work.

(g) In terms of whether there was an obligation to perform the work, and the entitlement to bring others on to the site, the applicant stated that Mr Yu asked him to do the job and required him to do the job and arranged for him to be picked up to do the job. The applicant said that the agreement with Mr Yu required him to do the job. Mr Yu's evidence was that he called the second respondent, Gary Wang, and he agreed to take the job on and was to be paid $5,300. Mr Yu said that Gary Wang did not tell him who was to do the job. Mr Yeung noted that Mr Yu said he engaged Gary Wang from a Chinese newspaper advertisement to clean the roof tiles of the house, and Gary Wang had brought the applicant to work together. Mr Yeung recorded that Mr Yu advised that work needed to be done on the metal awning at the rear of the house and the applicant subsequently agreed to do the work. I have not accepted Mr Yu's evidence when it conflicted with the evidence given by the applicant, Mr Gary Wang or the records of Work Safe NSW. I am satisfied that there was an obligation on the applicant personally to perform the roof construction/awning work.

99. On balance, I am satisfied that the applicant was employed by the first respondent to perform roof and awning construction work at the site in Woodbury Rd, St Ives and that he was so employed when he fell from the roof on 9 December 2015. In reaching this finding I was persuaded that the first respondent had control and direction of manner in which the applicant was to perform his work, the place of work, the tools to be used and the work to be performed. Mr Yu, director of the first respondent, had planned how the metal roof was to be constructed and marked out where the columns were to be placed. According to the applicant, Mr Yu attended the site every day. Mr Yu also provided transport to the applicant from the station on one occasion and provided the tools and materials required, apart from a drill, which the applicant owned and preferred to use. A payment was made to the applicant by the first respondent following his injury for the sum the applicant said the first respondent had agreed to pay for the work. I accept that payment of a set fee rather than

an hourly rate is not usually indicative of an employment relationship. However, such an arrangement would not be a typical for a handyman in the construction industry and particularly where the job was fairly small and did not involve a large payment, such as in this case. My finding is that the indicia as to control and also as to the provision and maintenance of equipment would favour a finding of an employer/employee relationship between the first respondent and applicant.

100. I accept that the mode of remuneration indicia would in my view not favour a finding of employer/employee between the first respondent and the applicant, but this was outweighed by the factors in respect of control and the provision and maintenance of equipment. It seems to me also that the first respondent would have had the right to suspend or dismiss the applicant had Mr Yu been unsatisfied as to the way in which the work was being carried out. There is no evidence of any arrangement between the first respondent and the applicant as to the deduction of income tax. In my view, this is a neutral indicia, favouring neither the applicant nor the respondent in terms of the determination of employee/employer relationship. There was no evidence that the applicant was engaged in a distinct profession, trade or calling. There is no evidence that the applicant had his own place of work or equipment apart from a drill; there was no evidence that the applicant was engaged in creating goodwill or a saleable asset in the form of any regular work carried out by him as a handyman or roofer, and obviously, in the absence of tax returns, there is no evidence that the applicant deducted from any remuneration obtained by him business expenses of any significant proportion.

101. Consideration should be given to the fact that the applicant apparently paid no income tax on his earnings (in the absence of any tax returns). It may be that the applicant's earnings from year to year were not such as to require a tax return to be lodged. Alternatively, if that was not the case, quite obviously the applicant should have been paying tax on his earnings. However, having regard to his background, and the casual nature of his employment, I do not draw any adverse inference from any apparent absence of the payment of income tax.

102. Having regard to the whole of the evidence which I have summarised and dealt with above, I am satisfied that the applicant has discharged the onus on him to show that, on 9 December 2015 when he was injured, he was an employee of the first respondent, and therefore suffered injury arising out of or in the course of that employment.

103. Although a further finding in respect of the "deemed worker" issue is not necessary in view of my finding on the applicant's primary submission, if I am wrong in respect of that matter, I also find on the evidence that the applicant was a deemed worker.

104. If I am wrong about this conclusion, it is necessary to have regard to Schedule 1 clause 2 of the 1998 Act.

Deemed worker

Was the applicant a "deemed worker" within the meaning of Schedule 1, clause 2(1)(a) to the 1998 Act?

105. The workers compensation legislation deems certain people to be workers for the purposes of claiming workers compensation. Section 5 and Sch 1 of the 1998 Act deals with the concept of deemed employment of workers. Section 5 states that Sch 1 has effect. Schedule 1, cl 2 is set out as follows:

"**Outworkers and other contractors**

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

(b) [Repealed]

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."

106. The applicant bears the onus in reliance on Sch1, cl 2(1)(a) to the1998 Act. Bainton AJA in *Scerri v Cahill*[22] (*Scerri*) said the applicant must establish:

(a) he was a party to a contract with the respondent to perform work;

(b) the work exceeds $10 in value;

(c) that the work was incidental to a trade or business regularly carried on by the applicant in his own name or under a business or firm name, and

(d) that the applicant had neither sublet the contract nor employed workers in the performance of it."

107. For there to be a "*contract*", the first ingredient listed by Bainton AJA in *Scerri*, there must be an intention to create legal relations and mutuality or contractual consensus. The presence of both of these factors is to be determined objectively: *Lindeboom v Goodwin* (2000) 21 NSWCCR 297 at 302 and 305 (*Lindeboom*) and *Cudgegon Soaring Pty Ltd v Harris*. 1996) 13 NSWCCR 92 at 101.

108. I am satisfied in view of the findings made above that in respect of the work performed on 9 December 2015:

(a) The applicant was a party to a contract with the first respondent to perform work;

(b) The work exceeded $10 in value, and

(c) the applicant did not sublet the contract nor employ workers in the performance of it.

109. In *Davis v Pioneer Concrete (NSW) Pty Ltd* [1976] 1NSWLR 562, Mahoney JA said at 575 that the applicant in that case: " did, in a sense, carry on a trade or business; what he did involved expenditure, eg, in the requisition of a vehicle and on maintenance, equipment and the like, and may have had a sufficient complexity and regularity of operation to fall within the ambit of the phrase…"

110. Truss J held in *Dowling v Ulmarra Investments Pty Ltd* (CC(NSW), Truss J, No 57484/99, 9 December 2001, unreported) that the work performed by the applicant for the respondent was not incidental to a trade or business carried on by the applicant, as the applicant only ever worked for the respondent, was paid directly by the respondent, never employed workers and never advertised nor made himself available to the public to accept employment. The fact that the applicant claimed deductions on his income tax returns for the cost of telephone, replacement of tools and rent did not alter her Honour's view. These expenses she regarded as typical for a contract tradesman and were not necessarily indicative of carrying on a business.

111. The questions posed by Deputy President Roche in *Malivanek* at [208] are determinative of whether the applicant was an independent contractor when he was injured at the Woodbury Road property on 9 December 2015:

    (a) is the person performing the work as an entrepreneur who owns and operates a business, and

    (b) in performing the work, is that person working in and for that person's business as a representative of that business and not of the business receiving the work?

    If the answer to the questions is "yes", then the person is an independent contractor.

112. The real issue in dispute, in my view, is whether the work being performed on 9 December 2015 was work incidental to a trade or business regularly carried on by the applicant in his own name or as a "small business entity of a roofer and handyman".

113. The applicant gave evidence that he was a general handyman and had work experience in roof repairs. He described his work history as working for friends "for small jobs" and said he got other work through friends. He stated that he was not a sole trader or self employed as a company or "anything like that".

114. I accept that the second respondent, Gary Wang placed an advertisement in a Chinese language newspaper seeking work for a roofer. The advertisement provided no name and gave Gary Wang's telephone number. The applicant denied instructing Gary Wang to place the advertisement in the newspaper. Gary Wang stated that he helped the applicant to advertise in the Chinese newspaper once or twice because the applicant wanted to get some work and earn more money. Gary Wang said that he put his own contact number on the advertisement because the applicant required him to do so because it would be more convenient for Gary Wang to contact others on his behalf. I have already expressed some reservations above about Gary Wang's evidence in regard to this issue and preferred the evidence of the applicant to that of Gary Wang where their evidence differed.

115. The evidence of the applicant is scant in relation to his work history. There are no financial records. This has made it difficult to decide whether that he was operating a business and if so, whether he was doing so "regularly". I have on balance accepted that the applicant did not advertise and had obtained all of his work through word of mouth in the Chinese community.

116. There are factors that support a finding that the applicant did not carry on a trade or business. There is no evidence that what he did in his work involved expenditure, eg, in the acquisition of a vehicle and on maintenance, equipment and the like. Indeed, the evidence of the applicant in his statement dated 31 October 2019 was that when he did the roof cleaning work, Mr Gary Wang supplied all the equipment including a petrol driven pressure cleaner, container of fuel, harness and rope. The applicant provided a power drill in relation to the roof and awing repair work but no materials or other tolls such as a ladder. On balance I was not of the view that the applicant carried on a trade or business.

117. In those circumstances, I am satisfied that if the applicant was not to be regarded as a section 4 “worker”, he falls within the definition of “deemed worker” in Schedule 1 clause 2 of the 1998 Act.

Section 20 principal issue

118. As noted, it was argued by the applicant that, if the applicant was found to be a worker or deemed worker of the second respondent, then the first respondent was liable as a section 20 principal, having regard to section 20(6).

119. In view of the finding that the applicant was neither a worker nor a deemed worker employed by the second respondent, it is not necessary to further consider this issue.

Further Matters

120. This matter is to be remitted to the Registrar to refer to an Approved Medical Specialist for assessment of whole person impairment of the left upper extremity, facial disfigurement and nervous system (trigeminal nerve) as a result of the injury on 9 December 2015.

121. The claims for weekly benefits and medical expenses will be determined after the Medical Assessment Certificate is issued.