WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number:	**4245/20**
Applicant:	**Volker Thoms**
First Respondent:	**Peter Ross Green t/as Lurch Spares**
Second Respondent:	**Workers Compensation Nominal Insurer**
Date of Determination:	**18 December 2020**
Citation No:	**[2020] NSWWCC 419**

The Commission determines:

1. The applicant has not discharged the onus of establishing that he was a "worker" or deemed worker.

2. Award in favour of the second respondent.

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

Rachel Homan
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 RACHEL HOMAN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A MacLeod

Ann MacLeod
Acting Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. On 4 September 2015, Mr Volker Thoms (the applicant) injured his right eye when he struck a centre punch onto a stainless steel barrel and the centre punch recoiled, came out of his hand and into his eye. The applicant claims that he was in the course of employment with Peter Ross Green t/as Lurch Spares (the first respondent) at the time the injury occurred. The first respondent did not hold a valid workers compensation insurance policy.

2. A claim for compensation was made on the Workers Compensation Nominal Insurer (the second respondent). Liability to pay compensation was declined in a notice issued pursuant to s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) on 11 September 2018. That decision was maintained in further notices issued following review on 27 November 2018 and 15 July 2019.

3. The present proceedings were commenced by an Application to Resolve a Dispute (ARD) lodged with the Commission on 31 July 2020. The applicant sought weekly compensation from 4 September 2015 onwards and lump sum compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act).

PROCEDURE BEFORE THE COMMISSION

4. The matter initially proceeded to teleconference on 31 August 2020. There was no appearance for the first respondent on that occasion and no Reply had been lodged. Directions were made extending the time for the first respondent to lodge a Reply and fixing the matter for further teleconference at which the first respondent was directed to appear. The first respondent was warned that the matter may proceed and orders adverse to his interests may be made if he failed to appear at the next event.

5. The Commission notified the first respondent of the directions and the further teleconference by Express Post sent to his last known address. Australia Post confirmed the letter was delivered. An officer of the Commission also attempted to telephone the first respondent on numerous occasions using the number identified in the ARD and two other numbers found through internet searches, without success.

6. A further teleconference was held on 1 October 2020. Again, there was a failure by the first respondent to appear or lodge a Reply. Directions were made fixing the matter for conciliation conference and arbitration hearing. The first respondent was notified of the next date in the same manner as before.

7. The matter proceeded to conciliation conference and arbitration hearing on 17 November 2020. The applicant was represented by Mr Ross Hanrahan of counsel, instructed by
Ms Alix Ryan. The second respondent was represented by Mr Larry Brazel of counsel, instructed by Mr Tim Ainsworth. A representative from iCare was also present.

8. There was no appearance for the first respondent and the parties informed me that they had not had any contact with him. Having regard to the procedural history, I was satisfied that it was appropriate for the matter to proceed in the absence of the first respondent, given the considerable efforts made to bring the proceedings to his attention.

9. During the conciliation conference, the applicant discontinued the claim for weekly compensation, leaving only the claim for lump sum compensation. Documents attached to an Application to Admit Late Documents filed by the applicant on 3 November 2020 were admitted in the proceedings without objection.

10. 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.

ISSUES FOR DETERMINATION

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

    (a) whether the applicant was, at the time of the injurious event, a worker or deemed worker;

    (b) whether the applicant was in the course of employment when the injury was sustained, and

    (c) the entitlement to lump sum compensation, including whether the applicant has achieved Maximum Medical Improvement.

EVIDENCE

Documentary Evidence

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

    (a) ARD and attached documents;

    (b) Reply lodged by the second respondent;

    (c) documents attached to an Application to Admit Late Documents lodged by the applicant on 24 August 2020;

    (d) documents attached to an Application to Admit Late Documents lodged by the applicant on 3 November 2020, and

    (e) written submissions lodged by the second respondent on 17 November 2020.

13. Neither party applied to adduce oral evidence or cross-examine any witness although the applicant did indicate that he would have applied to cross-examine the first respondent had he appeared.

Applicant's evidence

14. The applicant's evidence is set out in written statements made by him on 3 May 2018, 25 July 2018 and 28 October 2019.

15. The applicant was educated to Year 10 and was a trade qualified welder and boilermaker and qualified spray painter and panel beater.

16. The applicant said he had known the first respondent since the 1980s but only met him briefly. In 1993, the applicant started working for the first respondent at Tilberry Spares. Since about 1994, the first respondent had operated under the name of "Lurch Spares". The applicant had no ownership interest in Lurch Spares but did help set it up and worked for the first respondent over the years. The first respondent also employed a good friend of the applicant, Bill Parkes and another person, Ray, who did a bit of work from time to time.

17. Lurch Spares was a motor wrecking business specialising in Ford F series vehicles. They bought old F series Fords, dismantled them and sold the parts. The shells would be sold as scrap metal to SIMS.

18. The applicant said he worked for the first respondent in his business from 1993 up until the date of injury. Over the years, the applicant worked for the first respondent on and off and had also worked elsewhere. There were times when the applicant did not work as much because he was involved in bringing up his son.

19. In about 2006, the applicant went to work for mining contractors, Seico Australia, as a boilermaker and industrial spray painter. The applicant was employed by Seico for a couple of years from 2006, then a further period of about one year after that as well as another shorter period after that. The applicant also had short periods of employment with two other employers. When working for the other employers, the applicant would drop working for the first respondent or just do a bit for him on the weekends.

20. The applicant said he also did a bit of work for himself starting in 1998. The applicant had his own small workshop and set up an ABN but did not advertise. The applicant registered a business name in about 2010 or 2011. The applicant specialised in power steering conversions on F series Fords and restoration works on vehicles.

21. The applicant stated

> "There was no direct ongoing contract or other business relationship between my business and Lurch Spares, but I did used to buy parts from him when he had useful parts available. I also used to work for Lurch during this period, for a bit of cash in hand. Given my skills I also used to do the same for other businesses along the street, there is a panel beater along there, also a sheet metal place, I did cash work for each of them from time to time.
>
> I did not have an official title or capacity (as in full-time, part-time or casual).
>
> I did not have set hours or days of work, he always managed to find us work. I also had my own work and work for others on the street. Also, as I say there were times when I went off and did work for other companies outside of that area.
>
> Generally, the business operated seven days a week, I would say that over the years I worked a similar amount for Lurch, it didn't get more or less. I couldn't really provide an accurate estimate of hours, I would say I generally worked for Lurch three to four days a week over that period from 1993, except for the times I was working for other companies like Seico or Goninans. As far as hours, it's too hard to say, generally what we did was we just worked, it would be all day, from early until late. Lurch was a friend of mine at that time, so we would work for the day then have a couple of beers at the end. It was the same for Bill."

22. The applicant said he worked in the role of a vehicle dismantler but basically did anything the first respondent wanted done.

23. All of the work was conducted at the first respondent's business premises. The applicant was "directly responsible to" the first respondent as the business owner.

24. There was no paperwork generated in relation to the applicant's employment.

25. The applicant received all payments from the first respondent in cash did not recall any time when wages were paid into an account or in the form of a cheque. The applicant would be paid in cash at the end of the day or every couple of days. The applicant did not retain any official record of the payments although the applicant recalled that the first respondent had a book in which he recorded payments. The applicant did not know whether those records were maintained over the entire period of his employment or where those records may be.

26. The applicant said he was paid between $50 and $100 per day although when he first started it was only $20 per day. Over time the pay increased. It was up to the first respondent how much he paid based roughly on how much work was done on the day. Eventually, the applicant and Mr Parkes got together and said they needed to be paid an hourly rate. The first respondent agreed to pay $15 per hour but there was still no record of the payments or hours worked.

27. The injury occurred on a Friday between 11.00 am and 12 noon. The applicant had only been at work for about 10 minutes at the time. The first respondent had called the applicant and asked him if he wanted to take over Ray's half day as he needed a vehicle dismantled. Ray had wanted to have the afternoon off. The applicant had arranged to have a barbecue with friends and had planned a day off.

28. The applicant had worked the previous day and left his safety glasses at the other workshop.

29. When the applicant arrived, Ray had already left and Mr Parkes was not in that day. Mr Parkes only worked on weekends. Only the applicant and the first respondent were present.

30. The applicant was working outdoors on a level concrete driveway in front of the shed. The vehicle had already been dismantled when the applicant arrived and he was working with some other scrap metal to go in the same load. The vehicle chassis had already been loaded onto the trailer. The applicant was working with an empty stainless steel 9 gallon beer keg.

31. The applicant explained that if metal could be recycled it could not be accepted by SIMS as scrap. With an item like a keg, holes were drilled in it so it was not able to be reused. The applicant was in the process of drilling some holes in the side of a keg when the injury occurred.

32. The applicant said that the first respondent did not have to direct him on each specific task as he had done the work for long enough. The first respondent did not instruct the applicant directly to drill a hole in the keg or to use the centre punch prior to drilling. The applicant just knew this was the process.

33. The first respondent was standing directly beside the applicant at the time of the injury possibly loading other items onto the trailer which was parked on the driveway.

34. The applicant denied that he was working for himself on the day of the injury. The applicant did not own any of the equipment or materials he was working with. The applicant expressed the belief that the first respondent rented the premises on which he was working. The applicant was not getting a cut out of the load of scrap metal and expected to be paid cash in hand for the half day of work.

35. As result of the injury, the applicant lost all sight in the right eye. Consideration had been given to removing the eye and replacing it with an artificial eye. The applicant said he had not been able to return to work since the incident.

36. The applicant said he had very minimal contact with the first respondent since the incident. The applicant did contact the first respondent about picking up his tools but he was told they had been sold.

37. In his statement dated 25 July 2018, the applicant provided further detail with regard to the circumstances surrounding the injury:

> "As far as I know the beer keg I was drilling belonged to Lurch Spares, we had picked up the beer keg from a house in Oyster Cove some months earlier, as I recall they were moving house and they had a number of kegs and other steel items. I believe they had just given Lurch a call and I had gone with Lurch to pick the items up. He did not have to pay for them.
>
> I did NOT own the beer keg and I did NOT have any part ownership of the beer keg.
>
> As I explained, I was drilling the hole so the keg could not be re-used and so Lurch could sell it to SIMS Metal at Kooragang Island.
>
> As I previously stated, I consider I was an employee of Lurch Spares / Peter Green at the time of the injury.
>
> I did NOT have an account with SIMS Metal, it was only Lurch Spares which had the account with SIMS Metal, as far as I know he used to receive his payments in cash when he delivered the scrap metal, as he was leaving the site. There was paperwork, so SIMS should have record of those payments."

38. In the statement of 28 October 2019, additional information was provided with regard to the relationship between the applicant and the first respondent:

> "I believe it was agreed between Peter Green and myself that I would receive $50.00 per day for work that I performed for him. I do not have any cash receipts for the monies I received from him and this money was paid to me in my hand by Mr Green after each day's work.
>
> I was in prison from 1992 to 1993 initially at Cessnock Jail and I was later transferred to Muswellbrook Jail. After being released from prison, I recall on one occasion I was at Peter Green's residence. I did not have work at that time and he asked if I would like to do a bit of work for him restoring motor vehicles. I agreed but do not recall any further specifics of our conversation including when I would start and specific details of pay.
>
> At the beginning of each working day I would report to Mr Green and he would advise me what tasks to do for that day. Sometimes tasks such as restoring cars would take more days than one, so I would continue working on the task I had been given until Peter would pull me off to do other tasks for him such as putting scrap on the tow truck and dismantling sections of other motor vehicles.
>
> My usual hours of work were from 8am to 7pm five to seven days per week. Mr Green did not pay my super or tax and I did not pay these either. All of the tools and equipment I used were provided by Mr Green with the exception of a couple of my own spray guns which I brought to use at my place of employment on occasion. I did not have any leave because I was hired as a casual employer.
>
> On the day of the accident, Mr Green had instructed me to drill a hole in a keg this was so nobody else could use it and it would not explode if the pressure built back up in it. Mr Green had previously instructed me to do this for gas bottles and oxy bottles."

Workers Injury Claim Form

39. The applicant completed a Workers Injury Claim Form on 15 August 2017. The applicant identified the first respondent as his employer and said that the incident occurred whilst working at his usual workplace.

40. The applicant identified his employment status as “temporary” said he commenced working for the employer in 1994. The applicant said he did not have any other employment at the time he was injured. The applicant said he worked 38 to 50 standard hours each week prior to injury and was paid $50-$100 per day.

NSW Ambulance Report

41. An ambulance electronic medical record for 4 September 2015 refers to a severe eye injury occurring at “Lurch Spears”.

42. The billing details shown on the document indicate a billing type of “Pensioner” and “Health Care Card”.

43. The case description states:

> “SUSTAINED DIRECT INJURY/LACERATION TO THE EYE FROM A STEEL CENTRE PUNCH TOOL NOT WEARING SAFETY GOGGLES, PT HIT STEEL CENTRE PUNCH WITH HAMMER, RICOCHET OF METAL AND SUSTAINED A LACERATION TO RIGHT CORNEA OA WALKING AROUND METAL SHOP, NOTICEABLE BLOOD IN EYE PER BYSTANDER VOLKER DAZED FROM INCIDENT NIL LOSS OF CONSCIOUSNESS…”

John Hunter Hospital

44. Clinical records including a discharge referral from John Hunter Hospital refer to an admission on 4 September 2015. The notes refer to a penetrating injury to the right eye from a metal punch:

> “Patient was hammering a large metallic tube. Material flung up and struck right eye. Visual acuity immediately diminished.”

Optus telephone records

45. The applicant has lodged in the Commission records from Optus Mobile Pty Ltd. The records show voice and SMS communications between the applicant’s mobile phone number and other numbers including a number which was identified as the first respondent’s number in the written statements prepared by him.

Dr Delaney

46. The applicant relies on a medicolegal report prepared by ophthalmic surgeon, Dr Michael R Delaney, dated 30 May 2019.

47. The applicant gave a history of being injured during the course of his work whilst using a centre punch which caused a penetrating injury to his right eye. The applicant was a qualified welder/boilermaker but had not worked since the time of the accident.

48. Dr Delaney gave the opinion that the applicant had suffered a severe penetrating injury caused by phthisis resulting in scarring and atrophy of the remnants of the eye which was now totally blind. The injury in the accident at work was the main contributing cause of the blindness and phthisis.

49. Dr Delaney assessed the applicant as having 35% whole person impairment to the visual system as a result of the injury.

First respondent's evidence

50. Attached to the Reply filed by the second respondent is an unsigned statement of the first respondent prepared on 1 May 2018 by an investigator.
51. According to the statement, the first respondent had known the applicant for around 20 years. The first respondent denied that the applicant was or ever had been a direct employee of himself or Lurch Spares or any other business connected with the first respondent or Lurch Spares.

52. The first respondent said he did not directly witness the injury but was present and assisted the applicant after the injury.

53. The first respondent was a scrap metal merchant and vehicle dismantler specialising in Ford F series trucks operating from a site in Lemon Tree Passage. The site was leased from the complex owner. The applicant had no ownership or leasehold rights over the site.

54. The first respondent said he did not specifically know what the applicant was trying to do at the time of his injury but believed he was trying to tap something, meaning he was trying to drill a hole into something using a hammer and metal centre punch.

55. The first respondent said he did not have any other employees with him on the day and had no other direct employees in the business at the time. The applicant was not working for the first respondent on the day of the injury and the first respondent did not know why he was tapping a hole into the stainless steel.

56. The first respondent said there would have been safety glasses in the industrial unit for the applicant's use had he wanted them. The equipment the applicant was using belonged to Lurch Spares.

57. The first respondent said the applicant was a friend of his, came and went to as he wished and did not have to contribute to rent or pay for the usage of the tools. The applicant did not report to the first respondent and did not take instructions from him. The first respondent could not now recall how long the applicant had been at the industrial unit before the injury.

58. The first respondent said he and the applicant were both outside the unit on the concrete driveway when the injury occurred. There was no CCTV surveillance in the area.

59. The first respondent said he did not officially report the incident as the applicant was not a direct employee and he did not consider there was any requirement for him to make any official report. As far as he was aware, the incident and injury were not reported to New South Wales police, New South Wales WorkCover or any other authority of the New South Wales Ambulance.

60. The first respondent said he had minimal contact with the applicant since the incident but had been advised that he was now pursuing a workers compensation claim on the basis that he alleged he was a direct employee of Lurch Spares and was working in this capacity on the day of the incident.

61. The first respondent stated:

> "I note that the investigator has advised that Volker Thoms has provided a signed statement to state that he was a direct employee of Lurch Spares on the day of the injury (4 September 2015) and that he had been a direct employee for a number

> of years prior to that time, working for me on a casual basis doing general labouring work associated with the business of vehicle dismantling, vehicle restoration, scrap metal collecting and other duties as directed and that he received cash payments from me of varying amounts (usually between $50 and $100 per day, paid in cash on the day of work).
>
> I hereby deny this allegation by Volker, knowing full well that I am making a signed statement to that effect and knowing that statement includes the jurat relating to me declaring the information in this statement is true and correct.
>
> I deny that I ever considered Volker Thoms an employee and I also deny that I have any other direct employees.
>
> As a consequence, I do not hold a workers' compensation policy and I have never held a workers' compensation policy."

62. A signed statement dated 28 July 2018 by the first respondent is also in evidence. The second statement indicates that it was made further to the previous statement:

> "I don't remember who the beer keg belonged to and it is too long ago now to remember where it came from.
>
> As far as I know Volker was drilling the keg to turn it into a fireplace which was something he had done before.
>
> I did not consider Volker was an employee of Lurch Spares/Peter Green at the time of the injury, he wasn't drilling the keg as part of any duties for me.
>
> I did have an account with SIMS Metal.
>
> I do not believe Volker Thoms also had an account with SIMS metal."

Factual Investigation Report

63. The second respondent relies on a factual investigation report prepared by Maurice J Kerrigan and Associates, dated 5 June 2018.

64. The report noted that no witnesses were identified and the applicant had been unable to produce any documentation to verify his employment status with the first respondent. The applicant maintained that all payments to him were made in cash. The report stated:

> "We contacted the Claimant's two nominated colleagues, Ray HIGGINS and Bill PARKS, who he named as 'cash-in-hand' employees of the Employer like himself but both deny any such a relationship and deny any knowledge of any employment relationship between the Employer and the Claimant."

65. According to the report, the first respondent was interviewed at his current address on 1 May 2018. A draft statement was prepared and forwarded via email and a copy left at his address on 21 May 2018 with a request that he sign and return it to the investigators. The first respondent was yet to do so and had not returned any calls.

Applicant's submissions

66. Mr Hanrahan referred to the evidence set out in the applicant's statement that he first met the first respondent in 1993 and had been working for him in another location. The applicant was employed on an on and off basis and he said he was injured whilst working for the first respondent in 2015.

67. Mr Hanrahan noted that there was no dispute that the applicant was present at the first respondent's business premises on the day of the injury and that the first respondent was present. Mr Hanrahan submitted that this raised questions as to how the applicant came to be on the premises and the purpose of him being there.

68. The applicant's evidence was that there was a power relationship between the applicant and the first respondent. The first respondent could require the applicant's services on a casual basis when required for his business.

69. Mr Hanrahan noted that the first respondent had given evidence that he had a motor wrecking business and an account for SIMS Metal. The telephone records confirmed a considerable number of telephone calls and messages between the applicant and the first respondent. Mr Hanrahan submitted that the telephone records were consistent with the nature of the applicant's alleged relationship with the first respondent.

70. Mr Hanrahan noted that the applicant had given evidence that the reason why he was at the first respondent's premises on the date of injury was that he had been called up and asked if he wished to take over Ray's half day shift.

71. Mr Hanrahan noted that the first respondent had neither filed a Reply nor presented himself such that no cross-examination could be undertaken. Mr Hanrahan submitted that this was consistent with there being no real challenge to the applicant's evidence.

72. With regard to the activity engaged in at the time of injury, the applicant's evidence was that he was instructed to take the keg to SIMS Metal as scrap. The first respondent admitted that he had an account with SIMS but the applicant did not. The first respondent had suggested that the applicant was turning the keg into a fireplace but Mr Hanrahan submitted that this would require different work to punching a hole with a centre punch. The applicant would have had to use an angle grinder or other tool. The first respondent's evidence was said to be inconsistent with the activity the applicant was performing at the time of injury.

73. Mr Hanrahan conceded that there was very little evidence of a formal contractual relationship but there was evidence of an oral contract. The first respondent told the applicant what he needed done and when he wanted it done. Although there were no payslips, the first respondent had control over the relationship and paid the applicant around $50 per day. The applicant was compliant and had an expectation that there would be ongoing work available to him. The oral contract developed over a number of years in accordance with the pattern shown in the telephone records.

74. Mr Hanrahan submitted in the alternative that the applicant was a deemed worker. There was an oral contract to engage in work greater than $10 in value. The applicant was not conducting a business of his own. The work was being carried out for the first respondent's benefit.

75. Although the applicant was receiving Centrelink payments, Mr Hanrahan submitted that this was not inconsistent with the applicant's evidence that he was receiving cash in hand. Mr Hanrahan submitted that the Commission would be satisfied that the applicant was a worker or deemed worker engaged by the first respondent.

Second respondent's submissions

76. The second respondent relies on written submissions served and lodged in the Commission on 17 November 2020. The written submissions were supplemented by oral submissions at the arbitration hearing.

77. Mr Brazel referred to the statutory definitions of worker and deemed worker. In addressing first whether the applicant was a worker, Mr Brazel referred to the indicia of employment set out in *Stevens v Brodribb Sawmilling Co Pty Ltd*[1].

78. Mr Brazel submitted that there did not appear to be any complaint of the injury being a work injury in the records of John Hunter Hospital. There was no record of the applicant mentioning employment in the notes or the discharge summary. Employment was not mentioned in the ambulance records and the applicant was recorded to have said he was a pensioner with a health care card.

79. Mr Brazel noted that the applicant had not given evidence as to when, where and how any contract of employment was formed. Centrelink records showed the applicant was receiving a benefit in the 2015 and 2016 tax years. No information had been submitted by the applicant as to what income had been reported prior to the incident.

80. Mr Brazel noted that the applicant's evidence was that he had been asked to work on the day of the injury as there was a vehicle that had to be dismantled. Mr Brazel noted that the work the applicant claimed he was asked to complete was in fact completed when he got to the premises.

81. Mr Brazel said there were inconsistencies in the applicant's evidence with regard to whether he was told to work on the keg. The first respondent had denied knowledge of what the applicant was doing suggesting no control over the applicant. The first respondent had suggested that the applicant may have been making a fireplace with the keg as he had previously. This type of activity was not consistent with being a vehicle dismantler as the applicant alleged.

82. Mr Brazel noted the applicant's evidence that he was not exclusively employed by the first respondent. The applicant described doing a bit of work for the first respondent whilst operating his own business and working for other companies along the street. The applicant had an ABN and had registered a business name in 2010-11.

83. Mr Brazel noted an inconsistency in the applicant's evidence as to whether he worked set hours. If the applicant did work set hours as suggested by his second statement it was unclear why the applicant was called to come in and work in the manner alleged.

84. Mr Brazel noted that the first respondent denied paying the applicant in cash. There were no bank records, payslips or wages books in evidence. There was an inconsistency in the applicant's evidence as to whether there was no paperwork or a book in which pay was recorded. No group certificates or tax records had been provided.

85. Mr Brazel said the applicant's evidence was unclear or inconsistent on the question of whether all of the tools and equipment he used were provided by the first respondent, noting the applicant had given evidence that he contacted the first respondent about picking up his tools but had been told they were sold.

86. Mr Brazel observed that the claim was not lodged until most two years after the incident and said this was consistent with the applicant not being an employee.

87. Mr Brazel submitted that the applicant's credit was adversely affected and no documentary evidence had been produced to verify employment. No witness evidence had been produced from Bill Parkes or Ray Higgins. Bill Parkes and Ray Higgins were spoken to by the investigator and did not support the applicant's evidence although declined to make statements.

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[1] (1986) 160 CLR 16.

88. It was submitted that the phone records were not convincing as it was not clear whether incoming and/or outgoing calls were shown. The records were equivocal at best and consistent with the applicant and first respondent being friends. The phone records appeared to show calls from the applicant's phone to that of the first respondent. The last call before the injury was on 19 August 2015. Mr Brazel submitted that the phone records did not suggest a business or employment relationship.

89. Mr Brazel submitted that the Commission would not be satisfied that there was an employment relationship between the applicant and the first respondent.

Applicant's submissions in reply

90. Mr Hanrahan submitted that it was not unreasonable that the applicant did not reveal his contractual arrangements with the first respondent to the ambulance officers or the hospital. It was submitted that no adverse inference would be drawn from these omissions.

91. With regard to the late filing of the claim, Mr Hanrahan submitted that this could be explained by the unusual circumstances including the absence of a regular employment relationship. The applicant understandably took some time to consider and gather his evidence.

92. Mr Hanrahan submitted that the phone records were consistent with a regular a pattern of work.

93. With regard to the absence of witness statements, Mr Hanrahan submitted that Mr Parkes and Mr Higgins had only indicated to the investigator that they did not want to say anything. Mr Hanrahan submitted that that was consistent with the arrangement the first respondent had in place and consistent with the applicant's own evidence as to the nature of the relationship.

FINDINGS AND REASONS

Worker / Deemed worker

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

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

95. The legislation also deems certain persons to be workers. Relevantly, clause 2 of Schedule 1 to the 1998 Act provides:

> **"Other contractors**
> (cf former Sch 1 cl 2)
>
> 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."

96. The purpose of provisions such as cl 2(1) of Sch 1 to the 1998 Act was described by Dixon J in *Humberstone v Northern Timber Mills Pty Ltd*[2] in the following terms:

> "… a person conducting a business in the course of which he contracted to perform work should himself carry the risk of personal injury as one of the hazards of his business, while the man who worked under contract but only for the employer or without any general trade or business or outside his trade or business, should, like an ordinary employee, be insured by the Act against the risk of injury in his work."

97. In order for the applicant to be considered a "worker" or a deemed worker, there needs to be in existence a contract of service or a contract for services between the applicant and the first respondent.

98. It is the applicant who bears the onus of establishing that he was a "worker" or a deemed worker. In *Nguyen v Cosmopolitan Homes*[3] the Court of Appeal found that a tribunal of fact must be actually persuaded of the occurrence or existence of the fact before it can be found, summarising the position as follows:

> "(1) A finding that a fact exists (or existed) requires that the evidence induce, in the mind of the fact-finder, an actual persuasion that the fact does (or at the relevant time did) exist;
>
> (2) Where on the whole of the evidence such a feeling of actual persuasion is induced, so that the fact-finder finds that the probabilities of the fact's existence are greater than the possibilities of its non-existence, the burden of proof on the balance of probabilities may be satisfied;
>
> (3) Where circumstantial evidence is relied upon, it is not in general necessary that all reasonable hypotheses consistent with the non-existence of a fact, or inconsistent with its existence, be excluded before the fact can be found, and
>
> (4) A rational choice between competing hypotheses, informed by a sense of actual persuasion in favour of the choice made, will support a finding, on the balance of probabilities, as to the existence of the fact in issue."

99. There is no dispute in this case that the applicant sustained an injury to his right eye in the manner alleged on 4 September 2015. There is no dispute that the injury occurred on the concrete driveway of the premises of the first respondent's business. The first respondent was present at the time the injury occurred. What is in dispute is whether the applicant was a worker or deemed worker and in the course of employment at the time of the injury such that the injury is compensable under the 1987 Act.

100. The primary difficulty for the applicant in discharging the onus of establishing that he was a worker or deemed worker is the lack of corroborative evidence. Whilst corroborative evidence is not required in order for the applicant to discharge the relevant onus, it is a relevant consideration in weighing all the evidence.

101. In this case there is no written contract of employment. There is no documentary evidence of remuneration in the form of payslips or payment summaries, bank deposits, superannuation statements, tax returns or Centrelink declarations. There are no business records or written correspondence between the parties evidencing any employment agreement.

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[2] [1949] HCA 49; (1949) 79 CLR 389.
[3] [2008] NSWCA 246.

102. There is also no witness evidence from any person attesting to employment relationship between the applicant and the first respondent. Although the applicant has identified two persons, one of whom he described as a good friend, as having knowledge of his employment relationship with the first respondent, there is no evidence before the Commission from either person. There is also no evidence from any family member or other person who may have had knowledge of the alleged employment relationship.

103. The only documentary evidence relied on by the applicant in support of the alleged employment relationship are the Optus telephone records. I accept that the records show regular communications between the applicant's number and a number that has been identified in other documents as the mobile phone number of the first respondent, both before and after the alleged period of employment. It is unclear on the records, however, whether the records show contact made by the applicant to the first respondent or the reverse or both. The format of the records including the identification of the applicant's number as "A_ Number" and a variety of other telephone numbers including that of the first respondent as "B_Number", suggests that the document shows calls and SMS messages originating from the applicant's number only.

104. Whilst I accept that there appears to be a pattern of contact between the applicant and the first respondent shown on the records, in the context of the other evidence that the applicant and the first respondent were friends, I do not find the telephone records to be of assistance in determining whether there was an employment relationship between the applicant and the first respondent.

105. The is no evidence of the content of any SMS messages sent to the first respondent. Whilst there is correspondence from Optus explaining that such content is not held by Optus for longer than 10 days, there is no evidence from the applicant as to whether such content might be available on his mobile device.

106. The contemporaneous medical evidence available to the Commission including, the ambulance records and John Hunter Hospital records, do not appear to identify any employment relationship. The respondent has noted in its written submissions a handwritten entry in the hospital records in which the word "employer" or "employment" appears to have been written. The record itself, however, is not sufficiently clear that it can be discerned what the word was used in reference to and I am not satisfied that it constitutes reliable evidence of an employment relationship between the applicant and first respondent.

107. The applicant did subsequently disclose an employment relationship in the history provided to Dr Delaney on 30 May 2019. I have not, however, been taken to any contemporaneous medical evidence in which the applicant reported that the injury occurred in the course of employment. Correspondence in evidence from the applicant's optometrist, Mr Mark Schmidt refers to the applicant experiencing difficulty finding employment following the injury but makes no reference to the injury having occurred in the context of work.

108. The absence of corroborative evidence has been explained in the applicant's own evidence to some degree, for example, by reference to the claim that there was an oral contract of employment, payment by cash in hand and a failure to pay taxes by both the applicant and the first respondent.

109. The applicant has not, however, explained why he was not able to procure any witness evidence or produce any SMS messages. The applicant has not explained whether he declared any income to Centrelink. The absence of reference to work or employment in the contemporaneous medical evidence is unexplained except for Mr Hanrahan's submission that it is not unreasonable or unusual that in the context of receiving treatment for his serious and traumatic injury the applicant may not have disclosed the nature of his contractual relationship with the first respondent.

110. The second respondent's submissions also identify evidence which appears to be inconsistent with the applicant's evidence that the injury occurred in the context of work. The ambulance record refers to a billing type of "Pensioner" and identifies the applicant's health care card details. The first respondent is identified in the ambulance record as a "bystander" rather than as an employer work colleague.

111. The factual investigation report attached to the Reply records that the two witnesses identified by the applicant had declined to provide statements and had advised that they were unaware of any employment relationship between the first respondent and the applicant.

112. The second respondent has also submitted that the delay of almost two years in making a claim for compensation was also inconsistent with there having been a work injury. The applicant has submitted that given the informal nature of the employment relationship it took the applicant time to gather evidence and prepare his claim. Given the scant evidence relied on by the applicant I am not persuaded that this provides an entirely satisfactory explanation for the delay. Viewed in the context of the evidence as a whole, I find the delay in making a claim weighs generally against the applicant's case.

113. The applicant's written evidence is detailed and I have given it considerable weight. As indicated above, the absence of corroborative evidence is some degree explained by the applicant's claims with regard to the nature of the employment relationship.

114. There are, however, some inconsistencies within the applicant's evidence. As noted by the second respondent there is some inconsistency within the applicant's evidence as to his timetable of work. In the applicant's first statement, the applicant said he did not have set hours or days of work but the first respondent always managed to find work. The applicant had his own work and worked for others on the street. There were also times when the applicant performed work for other companies outside of the area. The applicant could not provide an accurate estimate of hours but said he generally worked 3 to 4 days a week except for the times he was working for Seico or Goninans. In contrast, in the statement of 28 October 2019, the applicant said his usual hours of work were from 8am to 7pm five to seven days per week. In the worker's injury claim form, the applicant said he worked 38 to 50 standard hours each week prior to injury.

115. The second respondent has submitted that there was an inconsistency between the applicant's identification of his role as a vehicle dismantler and the task he was performing when injured. I note, however, that the applicant's own evidence was that he did anything the first respondent wanted to be done. I accept that selling scrap metal is consistent with the business apparently operated by the first respondent.

116. The second respondent has identified a lack of clarity or inconsistency with regard to whether the applicant used his own tools. In his first statement, the applicant denied owning any of the equipment or materials he was working with. Later in the same statement the applicant said he had made contact with the first respondent after the injury to enquire about picking up his tools but was told they had been sold. This apparent inconsistency does appear to have been addressed in the applicant's final statement in which he explained that all of the tools and equipment used were provided by the first respondent with the exception of some spray guns. I am not satisfied that any inconsistency in this regard is material.

117. The second respondent has identified an inconsistency in the applicant's evidence that there was no paperwork created in relation to the applicant's employment, noting that the applicant also indicated that a book in which pay was recorded had been maintained. Whilst this apparent inconsistency is not fully explained, I consider it to be relatively minor and again place little weight upon it.

118. The applicant's evidence as to the existence of an employment relationship is contradicted by the evidence from the first respondent. The evidence of the first respondent is set out in two statements, one of which is not signed and does not appear to have been adopted by the first respondent. The lack of adoption seriously undermines the weight that is able to be given to that statement. The first respondent has, however, signed and adopted a second statement on 28 July 2018, which was described as being "further to" the previous statement. The first respondent denied any employment relationship with the applicant.

119. The applicant has submitted that failure of the first respondent to participate in the proceedings before the Commission was consistent with there being no real challenge to the applicant's evidence. In view of the statement of 28 July 2018, I would be unwilling to draw that inference. The first respondent's failure to participate is simply unexplained. The failure to participate in the proceedings is, however, a relevant consideration in determining what weight should be given to the first respondent's evidence.

120. I do accept that there is a lack of detail in the first respondent's evidence and compared with the applicant's evidence. Some aspects of the applicant's evidence are also corroborated by the first respondent's evidence including the evidence that the first respondent had an account with SIMS Metal but he did not believe the applicant did. I have given weight to this circumstance but find that it is not of itself indicative of an employment relationship.

121. Mr Hanrahan submitted that the presence of the applicant on the first respondent's business premises and the nature of the activity being performed at the time of injury were consistent with an employment relationship. Whilst I accept these circumstances are broadly consistent with the applicant's claim that there was an employment relationship and that he was engaged in work, I am not satisfied that this is the only possible explanation for the applicant being in that place and undertaking that activity at the time. The applicant's own evidence is that he did similar work for himself and others. There was also a friendship between the applicant and the first respondent and the first respondent has said the applicant came and went as he pleased.

122. I have carefully considered and weighed the evidence as a whole but find that the evidence has not induced in my mind an actual persuasion that there was any employment relationship between the applicant and the first respondent at the time of the injury.

123. I am not satisfied on the balance of probabilities that the applicant had entered into or was working under a contract of service with the first respondent. I am also not satisfied on the balance of probabilities, for the purposes of cl 2(1) of Schedule 1 that the applicant was party to a contract with the first respondent to perform work.

124. In view of these findings, the injury sustained by the applicant on 4 September 2015 is not compensable.

SUMMARY

125. The applicant has not discharged the onus of establishing that he was a "worker" or deemed worker.

126. Award for the second respondent.