

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

This certificate is issued pursuant to s.294 of the *Workplace Injury Management and Workers Compensation Act 1998*

**Matter No:** WCC302-2002  
**Applicant:** Yu Chang Zhao  
**Respondent:** Monlea Pty Ltd T/as Nordex Interiors  
**Date of Determination:** 30<sup>th</sup> October 2002

The determination of the Commission in this matter is as follows;

The Respondent is not liable for the Applicant's claim for weekly compensation.

A brief statement of reasons for determination is attached.

Issued on 30<sup>th</sup> October 2002 by JENNIFER ROBICHAUD

Manager Arbitral Services, as delegate of the Registrar.

Signed: .....

## **WORKERS COMPENSATION COMMISSION**

### **STATEMENT OF REASONS FOR DECISION**

Determination of Claim for Weekly Compensation by Way of Income Support (*Workers Compensation Act 1987*, Part 3 Division 2).

#### **BACKGROUND TO THE APPLICATION**

1. On 20/9/01 Yu Cang Zhao ('the Applicant') lodged an 'Application to Resolve a Dispute' ('the application') in the Workers Compensation Commission ('the Commission'). He nominated the employer at the relevant time as being Monlea Pty Ltd T/as Nordex Interiors ('the Respondent'). The Respondent's workers compensation insurer at the relevant time was Allianz Australia Worker's Compensation (NSW) Limited ('the Insurer').
2. The basis of the Applicant's claim is that he suffered a total incapacity for work as a result of an injury that arose out of and in the course of his employment with the Respondent as a plasterer. The applicant claims he was on his way to work when the injury occurred. The claim is therefore a "journey claim" pursuant to section 10 of the Workers Compensation Act 1987 (WCA).
3. The Applicant claims to have suffered injury to his neck, head, left leg, left hand, left arm and left forearm. The injury occurred on 20/9/02. The applicant was working as a plaster and gyprocker for the Respondent at a shop fit-out at level 2, University of Technology, Sydney (UTS) Broadway. He was on his way to work and was walking down a flight of stairs at UTS when he slipped, he fell hitting his head against the wall and then landing on his back.
4. The Applicant did not notify the Respondent of the injury at the time. The work at the site was completed the same day. The applicant left the site on the same day and did not continue to work for the

respondent. He had no contact with the respondent until February 2002, when he advised Mr Nilsson the Director of the Respondent company that he was making a Workers Compensation claim.

5. The applicant filed an application with the Insurer on 18/4/02. On 30/5/02 the Insurer advised the Applicant that it denied liability for the claim for weekly benefits.
6. Provisional weekly payments of compensation were ordered by the Commission by an Interim Payment Direction made on 6/6/02 for the period 29/4/02 to 29/5/02. The reasons given for the issue of the Interim Payment Direction were that the insurer did not commence provisional payments pursuant to section 267 (1) of the WIMWCA within 7 days of notification.

## **ISSUES IN DISPUTE**

7. The issues in dispute in this application may be summarised as follows:
  - Is the applicant a worker as defined ? (WIMWCA s 4)
  - Did the Applicant receive an injury arising out of or in the course of employment? ([WCA s 9](#)) (WCA s10)
  - Was the Applicant totally or partially incapacitated for work as a result of his or her injuries? ([WCA s 33](#))
  - Is the Applicant precluded from compensation because the applicant failed to provide notice of injury to the employer as soon as possible after the injury ? ( WIMWCA s254)
  - Is the applicant precluded from compensation because he failed to make the claim within the 6 month limitation period ? (WIMWCA s.261 )

## **JURISDICTION**

8. The Workers Compensation Commission is established by the *Workplace Injury Management and Workers Compensation Act*

1998 ([s366](#)) to exercise functions under the *Workers Compensation Act* 1987 or any other act. Subject to certain limited exceptions the Commission has exclusive jurisdiction to hear and determine all matters arising under that Act and the *Workers Compensation Act* 1987 ([s105 WIMWCA](#)). The Commission aims to provide an independent, fair, timely, accessible and cost effective system for the resolution of disputes under the *Workers Compensation Acts* ([s367 WIMWCA](#)).

9. Chapter 7 of the *Workplace Injury Management and Workers Compensation Act* 1998 creates a 'New claims procedures' for the resolution of workers compensation claims made after 1 January 2002. Any party to a dispute about a claim may refer the dispute to the Commission for determination except for a dispute about lump sum compensation where only the person making the claim may refer a dispute to the Commission ([s 288 WIMWCA](#)). A dispute about a claim for weekly benefits and/or medical expenses can only be referred to the Commission where the person on whom the claim was made either denies liability for the claim or has failed to make a decision on the claim in the required time ([s289 WIMWCA](#)).
10. The *Workplace Injury Management and Workers Compensation Act* 1998 and the *Interim Workers Compensation Commission Rules* 2001 set out the practice and procedure in relation to disputes in the Commission. The Registrar has directed that I, as Arbitrator, be constituted as the Commission to hear these proceedings ([s 375 \(2\) WIMWCA](#)), Rule 28). This decision is final and binding on the parties and is subject to appeal or review only in very limited circumstances ([ss 350 & 352](#)).

## **THE WORKERS COMPENSATION ACT 1987**

11. The *Workers Compensation Act* 1987 establishes a comprehensive scheme for the payment of compensation to workers who are

injured in the course of their employment. Part 3 of that Act provides for the payment of compensation benefits by way of weekly benefits, medical and related expenses, lump sum payment for permanent impairment and damage to property. The Act sets out the way in which compensation entitlements must be assessed and paid including the calculation of weekly entitlements, indexation of benefits, method of payment and the reduction of benefits where other entitlements or alternative compensation is payable.

12. Sections 4, 254 and 261 and schedule 1 clause 2 WIMWCA and section 10 WCA and are of particular relevance to this application and provide as follows:

**Section 4**

**worker** means a person who has entered into or works under a contract of service or apprenticeship 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). However, it does not include:

- (a) a member of the Police Service who is a contributor to the Police Superannuation Fund under the Police Regulation (Superannuation) Act 1906, or
- (b) a person whose employment is casual (that is for 1 period only of not more than 5 working days) and who is employed otherwise than for the purposes of the employer's trade or business, or
- (c) an officer of a religious or other voluntary association who is employed upon duties for the association outside the officer's ordinary working hours, so far as the employment on those duties is concerned, if the officer's remuneration from

- the association does not exceed \$700 per year,  
or
- (d) except as provided by Schedule 1, a registered player of a sporting organisation (within the meaning of the Sporting Injuries Insurance Act 1978) while:
- (i) participating in an authorised activity (within the meaning of that Act) of that organisation, or
  - (ii) engaged in training or preparing himself or herself with a view to so participating, or
  - (iii) engaged on any daily or periodic journey or other journey in connection with the registered player so participating or the registered player being so engaged,
- if, under the contract pursuant to which the registered player does any of the things referred to above in this paragraph, the registered player is not entitled to remuneration other than for the doing of those things.

#### Schedule 1 Deemed Employment of Workers

##### Clause 2 Outworkers and 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
  - (b) to perform any work as an outworker,
- 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.

(2) In this clause:

outworker means a person to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished or repaired, or adapted for sale:

- (a) in the person's own home, or
- (b) on other premises not under the control or management of the person who gave out the articles or materials.

(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.

#### 254 Notice of injury must be given to employer

- (1) Neither compensation nor work injury damages are recoverable by an injured worker unless notice of the injury is given to the employer as soon as possible after the injury happened and before the worker has voluntarily left the employment in which the worker was at the time of the injury.
- (2) The failure to give notice of injury as required by this section (or any defect or inaccuracy in a notice of injury) is not a bar to the recovery of compensation or work injury damages if in proceedings to recover the compensation or damages it is found that there are special circumstances as provided by this section.
- (3) Each of the following constitutes special circumstances:
  - (a) the person against whom the proceedings are taken has not been prejudiced in respect of the proceedings by the failure to give notice of injury or by the defect or inaccuracy in the notice,
  - (b) the failure to give notice of injury, or the defect or inaccuracy in the notice, was occasioned by

- ignorance, mistake, absence from the State or other reasonable cause,
  - (c) the person against whom the proceedings are taken had knowledge of the injury from any source at or about the time when the injury happened,
  - (d) the injury has been reported by the employer to the Authority in accordance with this Act.
- (4) In addition, if the employer is the owner of a mine or quarry, or the occupier of a factory, workshop, office or shop, each of the following constitutes special circumstances:
- (a) the summary referred to in section 231 has not been posted up in accordance with that section or the employer has otherwise contravened that section,
  - (b) the injury has been reported by or on behalf of the employer to an inspector of mines or an inspector under the Occupational Health and Safety Act 2000,
  - (c) the injury has been treated in a first aid room at the mine, quarry, factory, workshop, office or shop.

255 How notice of injury is given

- (1) A notice of injury must state:
  - (a) the name and address of the person injured, and
  - (b) the cause of the injury (in ordinary language), and
  - (c) the date on which the injury happened.
- (2) A notice of injury may be given orally or in writing.
- (3) If there is more than one employer, a notice of injury may be given to any one of those employers.
- (4) A notice of injury is taken to have been given to an employer:
  - (a) if it is given to any person designated for the purpose by the employer, or



- (b) if it is given to any person under whose supervision the worker is employed.
- (5) A written notice of injury may be served by delivering it to, or by sending it by post to, the residence or any place of business of the person on whom it is to be served.
- (6) If the regulations so require (and despite anything to the contrary in this section), a notice of injury must be given in the manner, and contain the particulars, prescribed by the regulations.

261 Time within which claim for compensation must be made

- (1) Compensation cannot be recovered unless a claim for the compensation has been made within 6 months after the injury or accident happened or, in the case of death, within 6 months after the date of death.
- (2) If a claim for compensation was made by an injured worker within the period required by this section, this section does not apply to a claim for compensation in respect of the death of the worker resulting from the injury to which the worker's claim related.
- (3) For the purposes of this section, a person is considered to have made a claim for compensation when the person makes any claim for compensation in respect of the injury or death concerned, even if the person's claim did not relate to the particular compensation in question.
- (4) The failure to make a claim within the period required by this section is not a bar to the recovery of compensation if it is found that the failure was occasioned by ignorance, mistake, absence from the State or other reasonable cause, and either:
  - (a) the claim is made within 3 years after the injury or accident happened or, in the case of death, within 3 years after the date of death, or

- (b) the claim is not made within that 3 years but the claim is in respect of an injury resulting in the death or serious and permanent disablement of a worker.
- (5) The failure to make a claim within the period required by this section is not a bar to the recovery of compensation if the insurer concerned determines to accept the claim outside that period. An insurer cannot determine to accept a claim made more than 3 years after the injury or accident happened or after the date of death (as appropriate) except with the approval of the Authority.
- (6) If an injured worker first becomes aware that he or she has received an injury after the injury was received, the injury is for the purposes of this section taken to have been received when the worker first became so aware.
- (7) If death results from an injury and a person who is entitled to claim compensation in respect of the death first becomes aware after the death that the death resulted or is likely to have resulted from the injury, the date of death is, for the purposes of the application of this section to a claim by that person, taken to be the date that the person became so aware.
- (8) In a case where 2 or more persons are liable or partly liable in respect of compensation (whether or not that liability arises from the same or from different injuries), a claim is for the purposes of this section taken to have been made when a claim is made on any one of those persons.
- (9) When particulars of any injury received by a worker are entered in a register of injuries kept by the employer under this Act, the making of that entry suffices for the purposes of this section as the making of a claim for compensation in respect of the injury.

## **CASE LAW**

13. In determining whether or not a person is a worker as defined by the WIMWCA regard must be had to the leading authorities *Stevens v Brodripp Sawmilling Co Pty Ltd* (1986) 160 CLR (Stevens v Brodripp ) and *Hollis v Vabu Pty Ltd* (2001) 50 AILR (Hollis v Vabu). In *Stevens v Brodripp* the High Court determined that the issue of whether a person was a worker should be determined by reference to a multi-factor test which includes, but is not limited to, the following:

- Degree and Nature of control exercised over the worker (“the Control Test”)
- Mode of Remuneration
- Provision and Maintenance of equipment
- Obligation to work
- Entitlement to holiday and sickness benefits
- Deduction of Income Tax
- Delegation of work

14. In the later decision of *Hollis v Vabu* the High Court again emphasised the multi-factor test, that is the balancing of indicia in support of a person being a worker as against those suggesting the person is not a worker. The “Control Test” was seen to be one factor to be considered, shifting away from the previous view of the control test as the predominant factor. Further, there was an emphasis on “the right to control” as opposed to “actual control”. Wilson and Deane JJ went on to comment that the reservation of the right to supervise or direct the work does not impair independence. An independent contractor will be subject to some direction as to how to work. In summary it was the “totality of the relationship” between the parties which was seen to be determinative.

## THE EVIDENCE

### Oral Evidence given at Formal Hearing

15. The Workplace Injury Management and Workers Compensation Act 1998 requires an Arbitrator to use his/her best endeavours to bring the parties to the dispute to a settlement acceptable to all of them. Where this does not occur the Arbitrator makes an award or otherwise determines the dispute. Parties are not permitted to object to the making of an award by an Arbitrator who has first tried to facilitate a settlement to the dispute ([s 355 WIMWCA](#)). In this matter the parties attended a conference/ hearing on 1/10/01. The Applicant was represented by his legal adviser. The Respondent was represented by a legal adviser. The Commission provided an interpreter in the Mandarin language to assist the Applicant. At this conference/hearing the parties, with the assistance of the Commission, engaged in an informal mediation process designed to facilitate an agreed settlement of their dispute. The parties were advised at the outset of the conference/hearing that the matter would proceed to determination if they could not reach agreement. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed settlement of the dispute.
16. The Commission is not bound by the rules of evidence and may inform itself on any matter and in such matter as it thinks fit ([s 354\(2\)](#)). To the extent that it was logically probative and relevant to the facts and issues in dispute the following oral evidence, given on 1/10/02 was taken into account in making this determination (WCC Rule 38):  
For the Applicant:  
Sworn evidence of Yu Cang Zhao.
17. The applicant gave evidence that from September 1999 he worked for the respondent. The applicant on his own evidence did not work

constantly for the respondent, only when work was available. On the applicant's evidence he worked for friends, without pay, when the respondent did not have any work available. He claimed he did not work for anyone else for payment, however when questioned conceded he could do so.

18. The applicant gave evidence he supplied his own tools, including power tools. Larger tools and equipment such as scaffolding, tall ladders and the electric saw were supplied by the respondent. Materials were supplied by the respondent. The applicant provided his own car and petrol.
19. The applicant gave evidence he took his lunch break at a set time each day, however conceded it was because that time was convenient to him. He worked set hours each day. His work was not supervised.
20. There was an inconsistency between the private records kept by the applicant of hours worked and his calculated earnings and the invoices given to the respondent. The applicant gave evidence that he kept a record of hours worked and he calculated his earnings by multiplying the number of hours worked at the rate of \$ 27.50 per hour, plus GST, to arrive at the figure presented in the invoice. The invoice however did not record this. The sum invoiced was the same, however it was recorded as being charged on a square metre basis. The applicant gave evidence that this was made up. He would calculate the square metre figure by dividing the sum owed into the hourly rate to arrive at a figure which had no relationship with the work he did. It was claimed Mr Nilsson requested the invoices be calculated this way. The invoices are from Yu Cang Zhao "Specialised in Gyprock", ABN 73 639 585 592.

21. The applicant gave evidence that he did not report the accident as he was embarrassed. Further he did not realise he had sustained any serious injuries until much later.
22. Evidence was given that the reason for the delay in filing the claim with the insurer was because the applicant did not realise he had sustained any serious injury at work for some time. He initially thought that he had suffered some form of stroke which accounted for the symptoms he was feeling. He also did not realise he was able to make a workers compensation claim.

### **Documentary Evidence**

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

#### For the Applicant:

Statement of Yu Cang Zhao dated 19/9/02.

Record of Hours 3/5/00 – 30/6/00

Invoices for work 15/8/01; 28/9/01

Notes of Payment 1/7/01 to 16/9/01

Medical Reports were in evidence however it was unnecessary to have regard to them in making the determination as the claim was determined on a jurisdictional point.

The applicant sought to rely upon documentary evidence not provided in the application and for which no statement had been made pursuant to section 290 of the WIMWCA 1998 and Rule 16 of the Interim Rules of the Commission. The documents are a private record of hours worked per day for the period 3/5/00 to 30/6/00, and invoices for the periods Invoices for work 15/8/01; 28/9/01 and also personal notes of payment for the period 1/7/01 to 16/9/01. The fundamental issue to be determined is whether the applicant is a worker. Evidence of payment is

therefore critical to the claim. The applicant did not provide those documents, nor make any statement of an intention to rely on such documents in the application. It is therefore necessary, in special circumstances where “employment” is disputed to allow the introduction of the evidence pursuant to Interim Rule 16, sub-rule 3 in order to avoid an injustice.

For the Respondent:

Statement of Roland Nilsson 12/6/02

Statement of Darren Carre 13/6/02

Individual Tax Returns for Yu Cang Zhao for the years ended  
30 June 1999/2000/2001

Business Activity Statement Yu Cang Zhao for the period 1/7/01  
- 30/9/01

GIO Insurance Claim

The respondent sought to rely on further evidence after the close of the hearing. This evidence was not considered as it was not properly before the Commission, the hearing had closed pending legal submissions.

Medical Reports were in evidence however it was unnecessary to have regard to them in making the determination as the claim was determined on a jurisdictional point.

24. The respondent relied upon the statement of Roland Nilsson, Director of the Respondent company. Mr Nilsson stated the Respondent specialises in interior fit-outs of shops and offices. It uses a number of contractors for various work including plastering.
25. Yu Cang Zhao was a sub-contractor used on a fairly regular basis. He had his own Australian Business Number (ABN) and provided invoices upon completion of work. He invoiced on a twice monthly basis. It was negotiated on either an hourly rate or by quantity. He

would provide labour and tools, material was provided by the respondent.

26. He was contacted and offered work, when work was available. He would be sent to a site where either the builders foreman would give instruction or direction as to what was going on. He would then just turn up and go to work. Supervision on site would be by the builders foreman or Mr Nilsson.
27. Mr Nilsson stated that the applicant had some income protection, or sickness and accident insurance with an insurer, probably GIO.
28. In September 2001 the Respondent was doing a fit out on level 2 of the UTS building Broadway. The head builder was AJ Bristow and Son of Dural. The builder had a foreman on site. The respondent was contracted to do the fit-out of the walls and ceilings of the shop. The respondent had two plasterers working on site, the applicant and Darren Carre.
29. The starting hours on the site were 7.00am until 3.30pm, Monday to Friday. The applicant did not have to sign on, just turn up and work.
30. Roland Nilsson stated he would visit most mornings to see if things were progressing and if anything was needed. The plasterers had a set of drawings on site which they were working from, if help was needed they could check with the builders foreman.
31. Mr Nilsson claims the applicant was noticeably limping at least two months prior to the alleged incident. He had asked what the problem was, the applicant responded he did not know.
32. Roland Nilsson claims he has no record of any accident on the site on 20/9/01. He is unsure if the applicant was working that day, although he was aware of him working on 19/9/01, the day before. If



the applicant did work on that day it was the last day he worked for the Respondent.

33. Mr Nilsson states the first he knew of the accident was in February 2002 when the applicant came to see him. The applicant said he had made a claim for a "sickness" insurance on his policy, but it had been incorrectly paid and they were seeking a refund. He asked Mr Nilsson if he would be able to change it to an accident.
34. Mr Nilsson states the applicant then said he did have an accident. He claimed he had fallen over and hit his head at the UTS site. Mr Nilsson further states that the injuries were similar to the ones he was displaying in the months prior to 20/9/01 and there was no record of any accident on the site on 20/9/01.
35. The respondent relies upon the statement of Darren Carre of 13/6/02. Mr Carre states he is self employed and works as a sub-contractor. He sometimes works for Nordex Interiors (the Respondent) and has done work for them for about two and a half years. During that time he has worked with the applicant from time to time. He had worked at other jobs on the same site also with Mr Zhao.
36. Mr Carre states he worked at UTS as a sub-contractor working on the interior of a small shop with the applicant. From time to time the applicant would have a sore leg, as he would limp around a bit. Mr Carre states he did not know what the problem was, as communication was difficult as Mr Zhao's English was fairly poor.
37. The applicant did not mention that he had hurt himself at work.
38. The respondent in turn also sought to rely upon documentary evidence not provided in the reply and for which no statement had been made declaring an intention to rely on such evidence pursuant

to section 290 of the WIMWCA 1998 and Rule 27 of the Interim Rules of the Commission. The respondent sought to rely upon the applicants Individual Tax Returns for the years ended June 30 1999/2000/2001, Business Activity Statement for the period 1/7/01 - 30/9/01 and a Personal Accident claim to GIO. As the applicant had introduced additional evidence in respect of his payment, I find that in these special circumstances, there would be an injustice if the documents were not allowed. The documents are of direct relevance to the issues in dispute.

39. Regard was had to the Business Activity Statement (BAS) for the period 1/7/01 to 30/9/01. The BAS covered the relevant period when the injury occurred. The BAS records sales, non-capital purchases, GST owed to the Australian Tax Office (ATO), GST owed by the ATO to the applicant. The Individual tax return for the year ended 30 June 2001 provides the applicant earned a total business income of \$ 53, 091.00 and a net income for the business of \$ 37, 747.00 after off-setting expenses of \$ 15, 344.00. The "Main Business Schedule" records the "Business Activity" as plastering. The Individual tax return for the year ended 30/6/00 records no Group Certificates no salary or wage. Business and professional income are recorded, as are expenses recorded on the "Main Business Schedule" to the return. The Individual tax return for the year ended 30/6/99 provides similarly with the exception of limited earnings recorded in a Group Certificate. The "payer" is not the respondent.

#### **The injury and nature of the claim**

40. The Applicant is a 45 year old man. He works as a plasterer and gyprocker. He claims that on 20/9/02 he was injured on his way to work, resulting in a total incapacity for work. He is seeking compensation in the form of income support by way of weekly benefits.

41. The applicant gave evidence he commenced employment with the Respondent in September 1999 until 20/9/01. He provided hand written records of hours worked and money paid on a daily basis for the period commencing 30/5/00 to 30/6/00. Invoices for work dated 15/8/01; 28/9/01 and a note of earnings for the period 1/7/01 to 16/9/01 are also provided.
42. The applicant claims that on 20/9/01 he slipped on the stair-well at UTS. He then tripped on a bucket he was carrying and fell hitting his head against the wall and landed on his back. The applicant claims he has an injury to his left leg, left hand, left wrist, left forearm, neck and head resulting from this accident. He did not notify the Respondent of the injury on the date of the injury. It was not until sometime in February 2002 that the respondent was notified of the injury. On 18/4/02 the applicant made a claim for compensation for weekly benefits to the Insurer.
43. Following the incident the applicant did not return to work. There was no contact with the employer until February 2002.
44. At the time of the injury the Applicant was earning \$ 27.50. per hour.
45. It was not disputed by the respondent that the applicant was injured resulting in a total incapacity for work at least for the period 26/9/01 – 10/4/02. It was however disputed that the injury occurred as claimed. The respondent claimed the applicant was already injured prior to the alleged incident on 20/9/01. It was unnecessary for me to determine this issue.

## **SUBMISSIONS**

46. Both parties made written submissions, the Applicant dated 11/10/02 and the Respondent dated 8/10/02.
47. In summary the respondent submitted the applicant is neither a worker as defined, nor is he deemed to be a worker by virtue of schedule 1 clause 2 WIMWCA .
48. In summary the applicant submitted the respondent exercised significant control over the applicant directing his place of work, hours of work and method of work. The applicant did not work for any-one else during the two years he worked for the respondent. He is therefore a worker.

## **FINDINGS AND REASONS**

49. The central issue to be determined is whether the applicant is a worker as defined by section 4 of the WIMAWCA. The applicant contends he is a worker, the respondent in turn submits he is an independent contractor. The applicants rely upon the fact that the respondent had a significant degree of control over the applicant in terms of when and where he would work, and submits also controlled when breaks could be taken. The respondent submit that some control is necessary as the applicant was contracted to do a job. They also submit that he was not supervised, could have employed other persons to assist and invoiced upon completion of the work. He was free to take alternate work. Furthermore he did not return to work after the alleged injury on 20/9/02 nor did he notify the respondent of the injury. In fact there was no contact for a number of months until February 2002 when he contacted Mr Nilsson. Mr Nilsson claimed that the applicant had erroneously been paid on an insurance claim and the sum was to be recovered.

The applicant had then decided to make a workers compensation claim.

50. The respondent submits that the fact the applicant invoiced the respondent upon completion of the work including a charge for GST, lodged quarterly BAS for the relevant period and completed his tax return as a business return are very strong indicators that he was an independent contractor and not a worker.
51. As stated above “control” is no longer seen as the determinative test, rather it is a balancing of indicia in respect of the totality of the relationship.
52. Having regard to the evidence of both parties I find that the applicant was regularly contracted for work by the respondent. This was not disputed. The respondent dictated the hours to be worked for the reason the work site was only accessible during certain hours. The applicant took his lunch break at the same time each day as he conceded when questioned this was convenient to him. He did not receive sick leave, annual leave or superannuation contributions from the respondent. The applicant supplied his own tools, larger equipment and materials were supplied by the respondent. The applicant provided his own car. The applicant did not decline work, however he was free to take on other work for other contractors. The day of the alleged injury was the last day of work at the UTS site, the work was completed that day. The applicant made no further contact with the respondent until February 2002.
53. Having regard to this evidence I find the applicant was an independent contractor running a business as a plasterer. In reaching this conclusion I have regard to the totality of the relationship. I find the control exercised over the applicant to be no

more than necessary for the direction of an independent contractor who is contracted to do a specific job. He was given general direction, his hours were dictated by site access and his work was not directly supervised. I have further regard to the fact the applicant used his own vehicle and paid for his own petrol. Tools were provided by the applicant, larger equipment by the respondent. The invoices are at best conflicting. Very few were produced by the applicant. However it would appear despite the inconsistencies, that the applicant was largely being paid on a per hour basis at \$ 27.50 per hour plus GST. There is no doubt the applicant was charging GST. His oral and documentary evidence support this. He filed quarterly BAS. His income tax returns were prepared by an accountant. They record the applicant is running a business.

54. I further find the applicant is not a “deemed worker”. In reaching this conclusion I have regard to schedule 1 clause 2 WIMWCA . The applicant has an ABN and invoices as Yu Cang Zhao, “Specialised in Gyprock”. His tax return records his main business activity is plastering. The work performed at the UTS site for the respondent was plastering and gyprocking. I therefore find the work to have been “incidental to the trade or business regularly carried on” by the applicant and therefore outside the scope of the provisions of the WIMWCA deeming certain contractors in certain circumstances to be workers for the purpose of the Act.
55. It is unnecessary for me to determine the other issues in dispute before the Commission as I have determined the applicant is not a “worker” within the meaning of the WIMWCA and I therefore do not have jurisdiction to make the orders sought.

## **SUMMARY**

56. In summary the resolution of the issues in dispute is as follows:

- Yu Cang Zhao did not receive an injury arising out of or in the course of his employment with Monlea Pty Ltd t/as Nordex Interiors as he was not a worker within the meaning of the WIMAWCA.

## **DECISION**

57. For the reasons set out in this statement the decision in this matter is:

The Respondent is not liable for the Applicant's claim for weekly compensation.

J.Conley  
Arbitrator

30/10/02

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE REASONS FOR DECISION OF (NAME OF ARBITRATOR), ARBITRATOR, WORKERS COMPENSATION COMMISSION.

REGISTRAR