QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*Motlap v Workers' Compensation Regulator* [2020] QIRC 196
PARTIES:	**Motlap, Phillip Justin** (Appellant) v **Workers' Compensation Regulator** (Respondent)
CASE NO:	WC/2018/222
PROCEEDING:	Appeal against decision of Workers' Compensation Regulator
DELIVERED ON:	17 November 2020
HEARING DATE:	23 and 24 June 2020
MEMBER:	O'Connor VP
HEARD AT:	Cairns
ORDERS:	**1. The appeal is upheld;** **2. The decision of the Respondent dated 22 November 2018 is set aside;** **3. The Commission substitutes a new decision that the Appellant is a worker for the purposes of s 11 of the *Workers' Compensation and Rehabilitation Act* 2003;** **4. The matter is remitted back to WorkCover Queensland for the determination of whether the Appellant has suffered an injury within the meaning given to that term under s 32 of the *Workers' Compensation and Rehabilitation Act* 2003; and,**

5. The Respondent is to pay the Appellant's costs of and incidental to this appeal to be agreed or, failing agreement, to be the subject of a further application to the Commission.

CATCHWORDS:	WORKERS' COMPENSATION - APPEAL AGAINST DECISION - where the appellant stepped onto a large batten screw causing injury to his left foot - where appellant alleges injury sustained whilst carrying out work duties at lodging houses - whether the duties were completed at the direction and under the control of the employer - where credibility of witnesses is in issue - whether the appellant is a worker pursuant to s 11 of the *Workers' Compensation and Rehabilitation Act* 2003.
LEGISLATION:	*Workers' Compensation and Rehabilitation Act* 2003, s 11, s 32
CASES:	*Carna Group Pty Ltd v The Griffin Coal Mining Company (No 2)* [2019] FCA 2209 *Jones v Dunkel* (1959) 101 CLR 298 *RHG Mortgage Limited v Rosario Ianni* [2015] NSWCA 56 *Shane Joseph Farrell AND Q-COMP* [2013] QIRC 19
APPEARANCES:	Mr D.G.H. Turnbull, Counsel instructed by Mr R. Anderson, Bounty Law for the Appellant. Ms L.A. Neil, Counsel directly instructed by Ms R. Jamieson, Workers' Compensation Regulator for the Respondent.

Reasons for Decision

[1] Mr Phillip Justin Motlap (the Appellant) has appealed a decision of the Respondent dated 22 November 2018 confirming the decision of WorkCover to reject his application for compensation for an injury to the 'left foot & lower left leg & nerve damage w/related back pain'. The Appellant alleges the injury was sustained as a result of stepping on a

large batten screw 'whilst carrying out work duties at lodging houses' in the backyard of premises at 26 and 28 Clare Street, Paramatta Park, Cairns. The application for compensation states that at the relevant time the Appellant was employed as a Labourer by Mr Carlo Van Smoorenburg.

[2] The issue for determination in this matter is whether the Appellant was employed as a worker pursuant to s 11 of the *Workers' Compensation and Rehabilitation Act* 2003 (WCR Act) or that he was performing work for an employer when he sustained the injury.

[3] During the course of the hearing the Commission heard from two witnesses. The Appellant gave evidence on his own behalf and the Respondent called Mr Van Smoorenburg. The credibility of their evidence is the determining factor as to whether the Appellant is a worker.

The Facts

[4] In or around February 2018, Mr Motlap was unemployed, and he became aware through Mr Alan Tregenza that Mr Van Smoorenburg had a room available for rent which was less than he was paying. He approached Mr Van Smoorenburg to become a boarder at one of his properties.

[5] The Appellant alleges that two separate oral agreements were entered into around the beginning of February 2018. The first is said to be a rental agreement between the Appellant and Mr Van Smoorenburg to pay $170.00 per week to reside in one of the two adjoining lodging houses owned by Mr Van Smoorenburg. The second agreement involved Mr Van Smoorenburg offering the Appellant, "$15.00 an hour to do labouring work all around the house, because he's actually renovating the whole two properties".[1] The Appellant said there was nothing mentioned about tax.

[6] In terms of the rental agreement, the Appellant stated that Mr Van Smoorenburg said, "everyone chips in to clean, part of the keeping it clean and just general weeding and general gardening. Just maintaining the place like it's my own home".[2]

[7] It was claimed by Mr Van Smoorenburg that three days after the Appellant moved in, he said, " … because I told him I was a plumber. I was in business and he proposed, so you want to do a WorkCover scam?". Mr Van Smoorenburg said he laughed this off as a joke at the time and told him to "fuck off".[3]

[8] The Appellant holds a white card issued by the Queensland Building Services Authority to undertake labouring and construction work on construction sites.[4] The Appellant told

[1] TR1-11, LL1-2.
[2] TR1-14, LL12-14.
[3] TR2-5, LL 24-28.
[4] TR1-4, LL3-6.

the Commission that Mr Van Smoorenburg identified daily tasks for him to undertake.[5] Some of the construction work performed by the Appellant included building the whole wooden fence on both properties, "… I had to dig the holes for the posts to be in … I used that with a shovel and a crowbar … I did the heights by string lines … I put the posts in. Then I cemented it …".[6] In addition, he put together an A-frame on top of the gate; installed paving inside the front yard and out the back of house No. 26[7]; and performed a lot of painting including concrete painting.[8]

[9] The Appellant said that Mr Van Smoorenburg worked onsite all the time with him.[9]

[10] The Appellant's evidence was that Mr Van Smoorenburg said, "I'll provide you all the tools and that, I need a lot of work done. I'll supply you with work boots". The Appellant said that when he told Mr Van Smoorenburg that he only had thongs, Mr Van Smoorenburg said, "That's fine. Just work with them". While Mr Van Smoorenburg said he had all those items including a hard hat and vest, they were not provided.[10]

[11] It was Mr Van Smoorenburg's evidence that the Appellant did not help with construction or painting of the fence or the gazebo nor did he assist with the paving work.[11] Further, he did not assist with any work under the house or on the granny flat at the back.[12] Other than general household chores, the Appellant did not undertake any sort of work at either of the properties and he was not paid to do any work, nor was there any agreement to pay him for any work.[13]

[12] A week after the Appellant moved into the rental property Mr Van Smoorenburg stated that he saw the Appellant drinking heavily and he told him to go to Alcoholics Anonymous and get himself sober.[14] Mr Van Smoorenburg said that the Appellant, "just sat and drank in the house and did absolutely nothing, in terms of improving the yard or doing any works to renovate the houses and … didn't do any gardening, painting, concreting, building or cleaning".[15]

[13] The Appellant denied that he had issues with alcohol when he commenced work for Mr Van Smoorenburg.[16] However, he accepted that prior to the injury, he did have a problem with alcohol because of "my amputation and … I've been through a pretty bad

---

[5] TR1-27, LL21-24.
[6] TR1-17, LL21-26.
[7] TR1-19, LL7-14.
[8] TR1-20, L2.
[9] TR1-22, L11.
[10] TR1-28, L43 - TR1-29, L14.
[11] TR1-88, L16 - TR1-89, L35.
[12] TR1-90, L15, L35.
[13] TR1-92, LL41-47.
[14] TR1-86, LL5-8.
[15] TR1-107, LL32-47 - TR1-108, LL1-8.
[16] TR1-26, L22.

divorce at that time I suffered depression".[17] He said that he went back to church however the mental battles were still there. He undertook rehabilitation through the Salvation Army and said it was very successful, he got on top of it all and went back to church again.[18]

[14] In cross-examination, Mr Van Smoorenburg said he could not recall suggesting to the Appellant that it would be in his best interest, even for his own welfare, to go and use these tools to do something useful under the house. He went on to say, "when people are drunk, you don't give them tools".[19]

[15] However, that evidence is inconsistent with what Mr Van Smoorenburg told the WorkCover Claims Representative. In the WorkCover Queensland Communications Report, Mr Van Smoorenburg was recorded to have said, "I have a workbench with tools in the house and had offered him some work to get him to do something to get off the couch as all he did was drink and not work".[20]

[16] The Appellant said that prior to the injury Mr Van Smoorenburg paid him $450.00 upfront for the three week period and he kept mentioning and promising other things, like materials but nothing happened about the money.[21] The Appellant said he worked out that $750.00 was still owing in addition to the $450.00 already paid. He told the Commission that he recorded his start and finish times in a book kept under the house of No. 26.[22] In cross-examination, Mr Van Smoorenburg denied there was such a book because there was no work undertaken, however the Appellant reiterated, "there was … because I had other guys there signing in too - signing off".[23]

[17] On the day of the injury the Appellant said he was working clearing pipes, timber and rubbish from around the pool. Whilst moving a long piece of timber, he stepped back off the deck and onto a long batten screw measuring 90 millimetres which went straight into his foot. The deck was approximately one metre high.[24]

[18] Following the injury, "Steve actually screwed it out … he took the screw out with a screwdriver". Mr Steve Gannon and Mr Zach Van Smoorenburg were present in the vicinity when the incident occurred.[25]

[19] Mr Carlo Van Smoorenburg was not present at the time of the accident and when he arrived back at the property, he asked what happened.[26] Mr Van Smoorenburg said, "I

---

[17] TR1-25, LL37-42.
[18] TR1-25, LL36-46.
[19] TR1-103, LL15-20.
[20] Exhibit 1, p 2.
[21] TR1-28, LL17-27.
[22] TR1-28, LL26-28.
[23] TR1-75, LL18-20.
[24] TR1-25, LL3-26.
[25] TR1-93, L18.
[26] TR1-93, LL17-22.

arrived back at the house and saw all three of them standing by the roadside. I got out of the car and realised Phillip was bleeding in his foot and decided to help drive him to hospital".[27] It is recorded that Mr Van Smoorenburg advised the Claims Representative the Appellant said that "he stood on a screw". Mr Van Smoorenburg went on to say, "he was not working for me at all and I do not know where he stood on the screw but it was definitely not from my yard or driveway as he had walked away from my property and was walking back towards it when he called out at Steve …".[28]

[20] Mr Van Smoorenburg drove the Appellant to the hospital emergency department.[29] The Appellant alleges Mr Van Smoorenburg told him, " … say you were just working in your own backyard and doing a bit of gardening".[30]

[21] In examination-in-chief the Appellant gave evidence about the journey from Clare Street to the hospital and was asked:

MR TURNBULL:	All right. Now, what happened during the journey to the hospital?
MR MOTLAP:	So during the journey, he said, "Whatever you do, please, don't say nothing about compensation to the doctors or anybody at Centrelink or nothing," because there's insurance and he'll lose his insurance, he'll lose his properties and he'll lose everything and he'll go straight – he'll lose the whole lot. And I said, "Look, mate, I don't really care. I'm in that much pain. Yeah." It started going blue.

[22] The Appellant told the Commission that on the night of the injury Mr Van Smoorenburg telephoned him to ask why he was not at home. The Appellant said he told him that he required surgery and said that Mr Van Smoorenburg did not appreciate the seriousness of the injury and said, "Well, look, don't worry. Don't worry. Don't say nothing. I will pay you 300 a week until you get back on track, and I'll put you back on as another job again."[31]

[23] The Appellant indicated it was not his intention at that stage to make a WorkCover claim because he wanted: to keep his job when he got back to the property, as he was unemployed;[32] to maintain an income; and trusted the word of Mr Van Smoorenburg, who had promised to look after him and continue to pay him $300.00 a week. The Respondent denied that there was any conversation with the Appellant. However, the Appellant said, "there was a conversation about that … that's why I stayed there … I wanted to do my job."[33]

---

[27] TR2-5, LL6-8.
[28] Exhibit 1, p 4.
[29] TR1-30, LL30-34.
[30] TR1-43, LL3-4.
[31] TR1-42, LL32-34.
[32] TR1-36, LL42-44.
[33] TR1-75, LL26-27.

[24] Relations soured between the Appellant and Mr Van Smoorenburg approximately one week after the Appellant returned from hospital when he realised, he was being lied to. He denied the allegations by Mr Van Smoorenburg that he was, "lying around drunk and not doing his share of the housework and not paying his rent".[34]

[25] Approximately two weeks after the injury, Mr Van Smoorenburg asked the Appellant for his ABN. The Appellant provided the number he had used as a "subcontractor tree lopper". Mr Van Smoorenburg located the registration on his computer and the Appellant said, "he put down the money he was owing, like, seven hundred and something. I couldn't remember, 720 plus the money that's owing to me previous before that, the 300. But he just put it all on a tax invoice, and he ripped the copy off it … I was supposed to get a copy, but he didn't give me a copy. …I thought he was going to pay me, but he never paid me anything".[35]

[26] The Appellant said he stayed at the lodging house for approximately one month after the injury paying $170.00 per week for rent.

[27] Mr Van Smoorenburg's evidence was that the Appellant did not continue to pay rent after the injury; was not complying with house rules and behaved aggressively.[36] He relied on those grounds to issue the Appellant with an R12 notice to evict him.[37] Further he said, " … he's a thief … I don't like people scamming the system in that way. … he stole food out of the fridge".[38]

[28] The Appellant told the Commission that it was his choice to leave, "I've got to go … you're not honest with me. I moved out".[39] The Appellant denied in cross-examination that he was given an R12 form for immediate eviction from the property because his rent was not up to date and he was drinking too much.[40]

[29] The Appellant lodged a workers' compensation application with WorkCover. In investigating the claim, WorkCover contacted Mr Van Smoorenburg on a number of occasions. He said that when he was first called by WorkCover, he was in shock[41] and had no understanding of the process. He said he was not performing any renovation works to the property however in cross-examination agreed, "that was a lie".[42]

[30] On 5 June 2018 at 10.28 am Mr Van Smoorenburg spoke to a WorkCover Claims Representative where it was recorded in a Communications Report[43] that the "claimant

---

[34] TR2-22, LL10-23.
[35] TR1-43, L21 - TR1-44, L2.
[36] TR1-96, LL3-13.
[37] TR1-106, L37-39.
[38] TR1-116. TR45 - TR1-118, L11.
[39] TR1-43, L3.
[40] TR1-68, LL12-15.
[41] TR1-122, LL25-35.
[42] TR1-123, L45.
[43] Exhibit 1, p 7.

advised he was working for you when he sustained an injury in Feb 2018". The recording further indicates Mr Van Smoorenburg saying, "he has never worked for me and he used to rent a room from me and I had to kick him out due to various reasons. … I have never paid him for any work done … this is a fraudulent claim".[44]

[31] On 15 June 2018 Mr Van Smoorenburg is recorded in the Communications Report as stating, "all I can say is that he has not hurt himself at my property in any way, shape or form". The Communications Report[45] recorded Mr Van Smoorenburg as saying, "I live in a Queenslander and I am always working in this house I own as a hobby, but have not offered work to anyone in the property or have paid anyone to do so".[46]

[32] Mr Van Smoorenburg agreed that his response to WorkCover was: "at that stage, I wanted to put the phone down because I was shitting myself because he had made a claim. I had no idea what kind of consequences that would have given to me or how far this was going … I don't want to know about this … I don't want to talk about this … leave it, go away".[47]

[33] In denying the Appellant injured himself on his property, Mr Van Smoorenburg continued to argue that the Appellant hurt himself, "somewhere off my property, not at my property".[48]

[34] During cross-examination, Mr Van Smoorenburg said the claim should have been against Middleman Australia Pty Ltd (Middleman) which is a company he maintains for some business purpose. Mr Van Smoorenburg acknowledged that the company does not have a WorkCover insurance policy and its services were unrelated to renovation work.[49] The existence of this company was not mentioned to WorkCover in the conversation on 15 June 2018.

Consideration

[35] This matter is a factual dispute and the burden of proof rests on the Appellant to establish that he was a worker for the purposes of s 11 of the WCR Act.

[36] In assessing the evidence, let me respectfully adopt the approach of MacKenna J who described his fact-finding process in a paper delivered at the University College, Dublin in 1973:

> This is how I go about the business of finding facts. I start from the undisputed facts which both sides accept. I add to them such other facts as seem very likely to be true, as, for example, those recorded in contemporary documents or spoken to by independent witnesses like the policeman

[44] TR1-120, LL6-21.
[45] Exhibit 1, p 3.
[46] TR1-147, LL19-21.
[47] TR1-130, LL22-29.
[48] TR1-132, L12-17.
[49] TR1-136, LL27-28.

> giving evidence in a running down case about the marks on the road. I judge a witness to be unreliable if his evidence is, in any serious respect, inconsistent with these undisputed or indisputable facts, or of course if he contradicts himself on important points. I rely as little as possible on such deceptive matters as his demeanour. When I have done my best to separate the true from the false by these more or less objective tests, I say which story seems to be the more probable, the plaintiff's or the defendant's? [50]

[37] The versions of events given by the Appellant and Mr Van Smoorenburg differ markedly. Indeed, they are diametrically opposed. The only common ground appears to be the acceptance that both men entered into a verbal rental agreement whereby the Appellant would pay $170.00 per week for a room at No. 28 Clare Street which included some utilities but with a condition that the Appellant undertake some household chores to "…keep the house nice and tidy".[51]

[38] In its simplest form, the Appellant's evidence is that he entered into an agreement with Mr Van Smoorenburg to undertake work at his direction at 26 and 28 Clare Street in return for a payment of $15.00 per hour. He undertook a range of tasks including fence building on both properties; cementing; construction of an A-frame on top of the gate; installed paving inside the front yard and out the back of house No. 26; and painting. Whilst moving a long piece of timber, he stepped back off the deck and onto a long batten screw measuring 90 millimetres which went straight into his foot. He was transferred to hospital after suffering 'left foot & lower left leg & nerve damage w/related back pain'. The Appellant alleges that Mr Van Smoorenburg told him to say that he was not injured at work and that he would look after him. In the weeks following the Appellant's discharge from hospital, relations between both men deteriorated. The Appellant was not looked after as had been promised and the Appellant left the rental property after not being paid approximately $750.00 which was owing to him.

[39] Mr Van Smoorenburg's evidence was that he owned the two properties at 26 and 28 Clare Street, Cairns. Mr Van Smoorenburg denied the Appellant was employed by him in any capacity. The Appellant did not undertake any work for him; he was not injured at his property and claimed that he did not know where he was injured; he had no conversation with the Appellant regarding being injured and certainly did not suggest to the Appellant that he should not tell anyone that he was injured at work. Mr Van Smoorenburg alleged that the claim was fraudulent. Mr Van Smoorenburg was not the holder of a policy of insurance with WorkCover. He said that the Appellant was asked to leave after being issued with an R12 Form.

[40] In order to assist in dealing with the opposing oral evidence, let me turn to the documentary evidence before the Commission and, in particular, the Communications Report and the Hospital Progress Notes.

---

[50] 5 Irish Jurist vol. IX, New Series, p. 1 quoted in JPO Barry, *The Methodology of Judging* (1994) 1 JCULR 135, 140-141.
[51] TR1-84, LL42 - TR1-85, L20-21.

[41] It was submitted by the Respondent that the evidence of the Appellant was inconsistent as to how the injury occurred with three out of the four references in the hospital Progress Notes referring to the injury having occurred in a domestic setting rather than at his workplace.[52] The first entry on 21 February 2018 at 16:35 (ED Triage) records, "Stood on a screw while gardening - pulled in (sic) out". The second entry was at 18:59 on 21 February (ED RMO Assessment) and records, "Stepped backwards at work today onto approximately - 6 cm metal screw - screw passed through dirty sandal and into foot, embedded at least 3cm - states it felt like it hit bone - unable to be pulled out by work mates > screwed out by hand." A further entry at 19:45 on 21 February records, "doing gardening this afternoon around pool - Stepped on nail, penetrating left heel." The entry for 22 February 2018 at 14:28 records, "injury at home, not work-cover".[53]

[42] The hospital Progress Notes are not, in my view, inconsistent with the evidence of the Appellant in two important respects. First, the evidence of the Appellant was that his injury was sustained in the course of working to clear away pipes, timber, junk from around the pool and "the weeding, the landscape on – around the pool".[54] Secondly, the Appellant contends that he was told by Mr Van Smoorenburg in the journey to the hospital not to say that the injury occurred at work and to, "Just say you were just working in your own backyard and doing a bit of gardening".[55] The Appellant was again reminded in a telephone conversation with Mr Van Smoorenburg on 21 February 2018 not to say the injury was work related. On the Appellant's evidence he was both a resident and worker at 28 Clare Street. He was undertaking gardening work when he was injured. The Respondent contends that reference to work was setting the claim up. I do not accept that submission.

[43] The second group of relevant documents is the Communications Report from WorkCover. It will be recalled that Mr Van Smoorenburg was contacted by WorkCover on a number of occasions in relation to the Appellant's claim. On 5 June 2018, Mr Van Smoorenburg spoke to a WorkCover Claims Representative and denied that the Appellant was working for him and that he, "…never paid him for any work done".[56]

[44] There was a further conversation recorded on 18 June 2018 where Mr Van Smoorenburg said, "there is no renovation or construction work being done at the property". In his evidence Mr Smoorenburg said he does not know why it said that, "it makes no sense to me."[57] He accepted in cross-examination that the statement was a lie. In re-examination, counsel for the Respondent took Mr Van Smoorenburg to the entry further down the page under the heading, "any other comments" where it records, "I live in a Queenslander and

[52] TR2-8, LL16-17; Exhibit 1, pp 8-14.
[53] Exhibit 1, p 11.
[54] TR1-25, L7.
[55] TR1-33, L5.
[56] Exhibit 1, p7.
[57] TR1-121, LL38-39.

I am always working in this house I own as a hobby but have not offered work to anyone in the property or have paid anyone to do so".[58]

[45] The Respondent submitted that Mr Van Smoorenburg was not trying to hide anything when he spoke to WorkCover. In his cross-examination he was not telling deliberate lies as was suggested. It was argued by the Respondent that there was clearly some confusion during that conversation but Mr Van Smoorenburg made it clear by the end of the conversation to WorkCover that he was doing work on the house but it was work he was doing on his own and not work that he was paying others to do. It was submitted that his evidence is consistent with the response that he gave to WorkCover some two years ago and should be accepted.[59]

[46] However, what Mr Van Smoorenburg told WorkCover was inconsistent with his oral evidence. He did not do work at the property on his own. Mr Van Smoorenburg agreed during cross-examination that his son worked at the Clare Street property[60] and he admitted Mr Gannon also did some significant work on the fence and painting at No. 28.[61] However, Mr Van Smoorenburg told the Commission that he did not pay Mr Gannon anything to do that work and said that, "occasional job satisfaction made him feel happy".[62]

[47] The Appellant submitted the response to WorkCover was deliberately misleading and false by trying to convince it, "he's lying, he wasn't injured, this never happened, and nothing ever happened to do with my property".[63]

[48] In the further Communications Report of 18 June 2018, Mr Van Smoorenburg is recorded as telling WorkCover that the Appellant, "…was always joking about how he can get easy money by lodging a WorkCover claim before the incident happened".[64] The Respondent submitted there was no recent fabrication given the entry on 18 June 2018 together with the earlier reference to the entry of 5 June 2018 wherein Mr Van Smoorenburg referred to the claim being fraudulent.

[49] The Respondent acknowledged that both these allegations of the WorkCover scam and the claim being fraudulent were never put to the Appellant in cross-examination.[65]

[50] Mr Van Smoorenburg addressed each of the allegations made by the Appellant as to the work allegedly undertaken by him and explained who had done the work on the fence at the front of the property, the paving, the painting work and the work under the house. He

---

[58] Exhibit 1, p 3.
[59] TR2-6, LL5-13.
[60] TR1-88, LL13-14.
[61] TR1-88, L14; TR1-112, LL7-17.
[62] TR1-113, LL11-13.
[63] TR2-25, LL22-24; Exhibit 1, p 5.
[64] Exhibit 1, p 3.
[65] TR2-11, LL20-22; TR2-12, LL3-22.

was a home renovator; he was not conducting a business; and he did not have any employees.

[51] When questioned during cross-examination whether he reported his income from renting to the Commissioner of Taxation, Mr Van Smoorenburg admitted to avoiding this out of "greed".[66] The Respondent submits this goes largely to his credit. Nevertheless, he argued that if he had workers to claim and expenses to deduct in relation to a renovation business, he would have sustained no advantage from evading this fact during tax reporting.[67]

[52] The Appellant submitted that Mr Van Smoorenburg is the sort of person who would employ people at a cheap rate and not account for PAYG tax or superannuation. Mr Van Smoorenburg understands the outcome of this appeal has the potential to detrimentally affect his financial affairs so that is a strong incentive to come here and give evidence which is not true.[68] I agree.

[53] Counsel for the Respondent submitted that there is no evidence that Mr Van Smoorenburg understands that he may be personally liable under any claim and there is no basis for a suggestion he was motivated to lie about the situation for fear of the potential personal consequences against him.[69] The fact that he holds no WorkCover policy was explained by him when he said, "why would I?" when he didn't employ any workers.[70]

[54] The Respondent's submission is not supported by the evidence. Mr Van Smoorenburg gave evidence that he did not want to deal with WorkCover, and he wanted to put the phone down because he was, "… shitting myself because he had made a claim. I had no idea what kind of consequences that would have given to me or how far this was going … I don't want to know about this … I don't want to talk about this … leave it, go away".[71]

[55] Mr Van Smoorenburg was aware of the consequences which would flow from any workers' compensation claim made against him. In cross-examination Mr Van Smoorenburg was asked by counsel for the Appellant, "… if Phil was successful in his claim that he was a worker, that you wouldn't be covered by an insurance policy to meet his claim. You knew that, didn't you? Yeah. Yeah."[72]

[56] The Respondent submitted that Mr Van Smoorenburg's evidence was that he thought if he did not have insurance personally when talking to WorkCover, speaking as a director of Middleman, his company would be liable. Again, this is contrary to the evidence.

---

[66] TR1-102, LL37-45.
[67] TR2-7, LL10-12.
[68] TR2-16, LL7-16.
[69] TR2-7, LL26-32.
[70] TR2-7, LL31-32.
[71] TR1-130, LL22-29.
[72] TR1-121, LL6-9.

Mr Van Smoorenburg was asked in cross-examination, "So you would've clearly understood that Middleman had nothing to do with the renovation of this property, wouldn't you? Correct".[73]

[57] It was submitted by the Respondent that the volume of work said to have been undertaken by the Appellant was simply not plausible. It was argued that even with the assistance of others, the Appellant could not have achieved that amount of work in the timeframe suggested. This was particularly so because the Appellant was still recovering from a significant injury to his dominant hand with nerve damage which he described in his evidence as affecting his shoulder and his dominant arm. Even after suffering a significant injury he kept working eight or nine hours a day. The Respondent submits that evidence of the Appellant simply cannot be accepted.[74] Whilst I accept that the Appellant may have exaggerated the amount of work undertaken by him at the Clare Street properties, it does not diminish the fact that he did undertake work under the direction of Mr Van Smoorenburg.

[58] Mr Alan Tregenza was listed on the Appellant's list of witnesses however he was not called. The Respondent submits that the Commission should draw a *Jones v Dunkel*[75] inference for the failure to call a material witness.[76] However, the Appellant submitted that Mr Tregenza was not called because any evidence that he could give was not material to the appeal.[77]

[59] Equally, both Mr Steve Gannon and Mr Zach Van Smoorenburg were on the Respondent's list of witnesses however neither of them were called. Ms Jamieson of the Workers' Compensation Regulator provided an affidavit explaining her attempts to contact those witnesses and why they were unable to be called.[78] However, in cross-examination, Mr Van Smoorenburg said that he had been in contact with both and in respect of his son, only a couple of days before the hearing. Mr Van Smoorenburg was asked by Counsel for the Appellant:

MR TURNBULL:	No. Well, can you - about a month ago, did you have a conversation with Ms Jamieson about procuring the attendance here today of your son Zach?
MR VAN SMOORENBURG:	Yes.
MR TURNBULL:	As a witness?
MR TURNBULL:	And what discussions did you have with Zach after that?

[73] TR1-136, LL30-31.
[74] TR2-8, L44; TR2-9, L16.
[75] *Jones v Dunkel* (1959) 101 CLR 298.
[76] TR2-9, L36; TR2-10, L8.
[77] TR2-17, LL27-29.
[78] TR2-10, LL10-15.

MR VAN SMOORENBURG:	Ms Jamieson said that he would be by video conference, so there could have been a possibility if they would have asked him to do that.
MR TURNBULL:	Did you discuss that with Zach?
MR VAN SMOORENBURG:	Yes.
MR TURNBULL:	All right. Does it surprise you that he's not a witness here today?
MR VAN SMOORENBURG:	No.
MR TURNBULL:	Why not?
MR VAN SMOORENBURG:	Because he told me that he is not in the state of mind because he broke off - a girlfriend of three years broke off with him and that he did not feel that he could contribute anything.

[60] In *Shane Joseph Farrell AND Q-COMP,*[79] I addressed a situation in which a *Jones v Dunkel*[80] inference might arise:

> The principle in *Jones v Dunkel* at its most fundamental is usually understood as an inference that can arise against a party who elects not to adduce evidence on a matter in issue.
>
> Windeyer J, at 320 to 321, embraced the notion of "fear of exposure" on the part of the party who fails to call the witness, quoting Wigmore on Evidence:
>
> > "The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstances or document or witness, if brought, would have exposed facts unfavourable to the party."
>
> In *Manly Council v Byrne & Anor*, Campbell J cited the joint judgment of Gibbs A-CJ, Stephen, Mason and Aickin JJ in the High Court's decision in *Brandi v Mingot* to support the proposition that:
>
> > "Insofar as the passage from Wigmore approved the drawing of an inference that a witness if called would have exposed facts unfavourable to the party who failed to call that witness, it is not the law in Australia . . . [L]ater cases confirm that the fullest extent of the inference which can be drawn is that the evidence which was not called would not have helped the party who failed to call the witness" and at paragraph 51:
> >
> > > "Thus, if a witness is not called two different types of result might follow. The first is that the tribunal of fact might infer that the evidence of the absent witness, if called, would not have assisted the party who failed to call that witness. The second is that the tribunal of fact might draw with greater confidence any inference unfavourable to the party who failed to call the witness, if that witness seems to be in a position to cast light on whether that inference should properly be drawn."

[79] [2013] QIRC 19 [51], [52], [53].
[80] (1959) 101 CLR 298.

[61] In *RHG Mortgage Ltd v Ianni*[81] the New South Wales Court of Appeal reiterated that the circumstances for drawing a *Jones v Dunkel*[82] inference are found where an uncalled witness is a person presumably able to put the true complexion on the facts relied on by a party as the ground for any inference favourable to that party.[83] The three conditions to be applied are: first, whether the uncalled witness would be expected to be called by one party rather than the other; secondly, whether his or her existence would elucidate the matter; thirdly, whether his or her absence is unexplained.[84]

[62] Of course, any inference to be drawn pursuant to the principles under *Jones v Dunkel*[85] is discretionary.[86] I am not inclined to draw a *Jones v Dunkel*[87] inference in respect of Mr Tregenza. The only evidence adduced in respect of Mr Tregenza was that he was responsible for introducing the Appellant to Mr Van Smoorenburg[88] and for suggesting to him that he might contact Mr Van Smoorenburg because he had a spare room.[89] It is quite unclear how Mr Tregenza might throw light on the issue to be determined by the Commission, namely, whether the Appellant is a worker. To infer that he would, would be for the Commission to impermissibly speculate.

[63] However, both Mr Gannon and Mr Zach Van Smoorenburg were in my view material witnesses. Both lived at 28 Clare Street, both undertook work at the property, and both were on the scene on 21 February 2018 when the Appellant alleges, he was injured. Mr Van Smoorenburg gave evidence that Mr Gannon undertook work not for payment but for the rather improbable reason that "…job satisfaction made him feel happy." Applying the *Jones v Dunkel*[90] reasoning results in the drawing of an inference that any evidence given would not have assisted the Regulator's case.

[64] The Appellant referred to the attacks on the character of Mr Motlap in relation to alleged stealing, conspiracy and alcohol abuse. The allegations were raised at a late stage in the proceedings by Mr Van Smoorenburg and were, in my view, gratuitous.[91]

Conclusion

[65] As accepted by the parties, this is a factual dispute and the burden of proof rests on the Appellant to establish that he was a worker for the purposes of s 11 of the WCR Act. When the evidence is considered in its totality and for the reasons advanced above, I have formed the view that the evidence of the Appellant is more probable than that of the

---

[81] *RHG Mortgage Limited v Rosario Ianni* [2015] NSWCA 56 [76], [78].
[82] (1959) 101 CLR 298.
[83] *White v State of Queensland (Central Queensland Hospital and Health Service)* [2017] QIRC 041 [74].
[84] Ibid.
[85] (1959) 101 CLR 298.
[86] *Carna Group Pty Ltd v The Griffin Coal Mining Company (No 2)* [2019] FCA 2209 [19].
[87] (1959) 101 CLR 298.
[88] TR1-53, LL38-39.
[89] TR1-54, LL23-24.
[90] (1959) 101 CLR 298.
[91] TR2-21, LL21-35.

Respondent. It follows therefore that having accepted the Appellant's evidence, I should find that he is a worker for the purposes of s 11 of the WCR Act.

[66] Ms Neil on behalf of the Regulator advised the Commission that WorkCover have not yet made a decision as to whether or not the Appellant has suffered an injury within the meaning of s 32 of the WCR Act and as such, in the event that there is a finding in favour of the Appellant, the matter ought to be remitted back to WorkCover for further decision.[92] Any order of the Commission should reflect this.

Orders

[67] I make the following orders:

1. **The appeal is upheld;**
2. **The decision of the Respondent dated 22 November 2018 is set aside;**
3. **The Commission substitutes a new decision that the Appellant is a worker for the purposes of s 11 of the *Workers' Compensation and Rehabilitation Act* 2003;**
4. **The matter is remitted back to WorkCover Queensland for the determination of whether the Appellant has suffered an injury within the meaning given to that term under s 32 of the *Workers' Compensation and Rehabilitation Act* 2003; and,**
5. **The Respondent is to pay the Appellant's costs of and incidental to this appeal to be agreed or, failing agreement, to be the subject of a further application to the Commission.**

[92] TR2-2, LL18-21.