CITATION:	Tran v Northern Territory of Australia [2023] NTWHC 3
PARTIES:	Thuy Quyen Tran v Northern Territory of Australia
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	WORK HEALTH
FILE NO(s):	2021-03347-LC
DELIVERED ON:	6 February 2023
DELIVERED AT:	DARWIN
HEARING DATE(s):	11 January 2023
JUDGMENT OF:	JR GORDON

CATCHWORDS:

Discovery; 'possession, custody or power'; discoverability of material relied upon by expert witness

Work Heath Court Rules 1998

Goben Pty Ltd v The Chief Executive Officer of Customs (No 2) (1996) 68 FCR 301
FCT v Australia and New Zealand Banking Group Ptd (1979) 143 CLR 499
Comptroller General of Customs v Zappia (2018) 92 ALJR 1053
Psalidis v Norwich Union Life Australia Ltd [2009] VSC 417
Lonrho Ltd v Shell Petroleum Co Ltd [1980] 1 WLR 627

REPRESENTATION:

Counsel:

Worker:	T. Anderson
Employer:	K. Sibley

Solicitors:

Worker:	Halfpennys
Employer:	Roussos Legal Advisory

Judgment category classification:	B
Judgment ID number:	[2023] NTWHC 3
Number of paragraphs:	43

IN THE WORK HEALTH COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 2021-03347-LC

BETWEEN:

THUY QUYEN TRAN

Worker

AND:

NORTHERN TERRITORY OF AUSTRALIA

Employer

REASONS FOR DECISION

(Delivered 6 February 2023)

Judicial Registrar Gordon

1. This is an application by the Worker for discovery, seeking a range of documents, identified in the interlocutory application by reference to various exchanges of correspondence from the Worker's solicitors to the Employer's solicitors.

2. A preliminary issue with respect to the discovery of worksheets and a job description was disposed of quickly, with orders by consent.

3. The balance of the application, relating to documents relied upon by a medical expert engaged by the Employer, was argued on 11 January 2023 and a decision on same was reserved.

4. Noting that the matter has second listed hearing dates in April 2023, to avoid any detrimental delay associated with this interlocutory decision, on 16 January 2023 the parties were subsequently notified that the following orders would be issuing:

   "Within 21 days the Employer to discover to the Worker details and copies of any 'literature' relied upon by Dr du Plessis in his reports dated 13 August 2021 and 22 August 2022"

5. These are the reasons for that decision.

6. It is unnecessary for the purpose of this decision to detail either the procedural history, the medical evidence, or the issues in dispute save to say, broadly, that the Worker has made a claim for compensation for an injury, being "*bilateral wrist injury including but not limited to Neurogenic pec minor syndrome and symptomatic thoracic outlet syndrome and/or bilateral carpel tunnel syndrome*"[1], for which liability is denied by the Employer.

[1] Statement of Claim filed 12 January 2022 at paragraph 4

7. Doctor LJ du Plessis is a Consultant Neurologist and Rehabilitation Physician engaged by the Employer to undertake independent medical examinations of the Worker and provide expert reports.

8. He authored reports in relation to the Worker dated 13 August 2021 and 22 August 2022.

9. In correspondence to the Employer dated 27 October 2022 the Solicitor's for the Worker notes:

> *"In relation to the report of 31 August 2021 Dr du Plessis:*
>
> *(a) refers to "a significant number of studies" (p.9 at [4]) which apparently establish that carpal tunnel syndrome is not caused or contributed to by minor types of physical work without providing any details of the "studies" to which he refers or on which he relies contrary to the requirements of opinion evidence;*
>
> *(b) refers to "literature" which apparently indicates that heavy physical work results in carpal tunnel syndrome, presumably to the exclusion of any other type of physical work without providing any details of the "literature" to which he refers or on which he relies contrary to the requirements of opinion evidence;…*
>
> *In relation to the report of 22 August 2022 of Dr du Plessis:*
>
> *(a) the doctor again refers to "literature" (p.12 at (e)) without providing any details of the "literature" again contrary to the requirements of opinion evidence…"*[2]

10. Doctor du Plessis in a supplementary report dated 20 December 2022[3] responds:

> *"I am of the opinion that it is inappropriate for me to be asked to supply information that the neurologist of Ms Tran should be aware of. When I have a particular case relating to a particular condition/problem and it needs review, I do the review online and do not make copies of these journal articles. However, Dr Rosen could access the various documents relating to what I recorded from the medical literature, and if the matter proceeds to hearing, I will be happy to supply the Court with my references. I would encourage Ms Tran's legal team to research the connection between carpal tunnel syndrome and light physical work such as Ms Tran was performing as opposed to heavy physical work, which can cause carpal tunnel syndrome. It is my opinion that Ms Tran's neurologist should be up to date with the medical opinions/information regarding carpal tunnel syndrome and physical activities. This literature dates back to at least 2002."*

11. And further in relation to the literature referred to in the report prepared in 2022:

> *"I have indicated earlier in this response that I reviewed the necessary journal articles relating to pathologies at the time of this assessment and I do not keep copies of all the journal articles I read. There is however a significant amount of information regarding this topic of which I am sure Dr Rosen is aware."*[4]

[2] Affidavit of Catherine Louise Spurr filed 24 November 2022 at "CLS6"

[3] Affidavit of Catherine Louise Spurr filed 10 January 2023 at "CLS8", page 3.

[4] Ibid at page 4

12. Part 12 of the *Work Heath Court Rules 1998* compels mutual discovery by the parties of documents:

    i. *that are or have been in the party's possession; and*
    ii. *that relate to a matter in question between the parties;*[5]

13. Relevantly, possession is defined as meaning "*possession, custody or power*"[6].

14. Both parties agree that the sources of information relied upon by a medical expert to form their views and conclusions with respect to a Workers injury, relate to a matter in question between the parties and are therefore discoverable.

15. Indeed, it was conceded by the Employer that this extends to research, resources and literature accessed by a medical expert in undertaking their review of a Worker and reporting to the commissioning party.

16. Nonetheless, the Employer however, says that in this matter the Workers request cannot be seen as a proper request for discovery, as the documents are not in the possession custody or power of the Employer.

17. The Employer acknowledges the existence of the material and concedes that it should be produced in a timely manner should the Employer intend upon calling and relying on the evidence of Dr du Plessis. But the Employer notes that Dr du Plessis has clearly indicated "*I do the review online and **do not make copies** of these journal articles*"[7] (my emphasis).

18. The Employer submits therefore that what the Worker seeks is not documents in the possession of the Employer, but seeks an order for Dr du Plessis to re-research the medical issues and compile said literature for the purposes of discovery.

19. The Worker takes issue with the approach being undertaken by Dr du Plessis who states: "*if the matter proceeds to hearing, I will be happy to supply the Court with my references*"[8].

20. Counsel for the Worker notes that matter is indeed listed for hearing, and the earliest at which it may commence is just 3 months' time on 3 April 2023. The Worker argues that the material is pressing now, the Worker may wish to put same to her medical experts and needs adequate time to do so in the lead up to the hearing. I agree.

21. The vagueness with which Dr du Plessis reassures that '*if*' the matter goes to hearing, the Court will be supplied his references, is of no comfort to the Worker as to when they may have the benefit of reviewing such material.

22. It should also be noted that at the interlocutory hearing I did not accept Dr du Plessis' conclusion that Dr Rosen (a medical expert engaged by the Worker in relation to the Work Health Court proceedings), should simply undertake his own research and this would satisfy him as to the literature relied upon by Dr du Plessis.

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[5] *Work Heath Court Rules 1998* at Rule 12.01(a)
[6] *Work Heath Court Rules 1998* at Rule 1.08(1)
[7] Paragraph 10 above
[8] Ibid

23. While is quite likely the medical experts will peruse like material in undertaking research, as Dr du Plessis notes "[t]*here is however a significant amount of information regarding this topic"*, dating as he says, back to 2002.[9] Even for a medical lay person such as myself, it appears abundantly clear that there is no way Dr Rosen can adequately satisfy himself that he has accessed the very resources relied upon by Dr du Plessis in the commission of his own research into the Workers injuries and symptomology. Dr du Plessis' view in this regard was not pressed by counsel for the Employer.

24. Further, it is acknowledged that counsel for the Employer conceded that procedural fairness must be accorded to the Worker in allowing sufficient time for inspection of the material, once compiled and supplied by Dr du Plessis.

25. Indeed, to try and fast track the process, the Employer consented to an order at the conclusion of the interlocutory hearing "*That within 7 days the Employer to request in writing from Dr du Plessis details and copies of any 'literature' relied on in his reports dated 13 August 2021 and 22 August 2022*." Of course, this order does not impose any positive obligation upon Dr du Plessis to provide his response within any set timeframe, if at all.

26. Nonetheless, the Employer maintains their position that the request for this literature is a matter for the Employer and Dr du Plessis, and that it ought to be undertaken informally, not by way of an order for discovery.

27. The key question in this application for discovery is not whether the test of discoverability has been met but rather whether the documents are in the possession custody or power of the Employer and therefore capable of being subject to an order for discovery.

28. Justice Davies in *Goben Pty Ltd v The Chief Executive Officer of Customs (No 2)*[10] noted:

> *"The expression "possession, custody or control", which appears in s 33 of the Tobacco Act, is a common one. It is used by courts in relation to subpoenae duces tecum.... The term appears in s 35A of the Customs Act. A similar term "possession, custody or power" is used in the Federal Court Rules 1979 (Cth) with respect to discovery of documents."*

29. His Honour considered *Commissioner of Taxation (Cth) v Australian & New Zealand Banking Group Ltd*; *Smorgon v Cmr of Taxation*[11] where Mason J opined

> *"The content of 'control' is somewhat different from that of 'custody'; however, both are 'wide enough to include many types of possession which are not commensurate with full ownership… There is to my mind no reason to limit the scope of 'custody and control' to 'exclusive custody and control'."*

30. Thus authority, in my view, supports a plain and broad interpretation of 'power, custody and control' where such terminology is imported into Rules of Court.

[9] Paragraphs 10 & 11 above
[10] (1996) 68 FRC 301 at 306
[11] (1979) 143 CLR 499

31. The High Court gives further guidance as to the construction of the expression 'possession custody or control' in *Comptroller General of Customs v Zappia*[12] *('Zappia')* observing[13] *"none of the terms, "possession", "custody" or "control" has a fixed legal meaning"* rather, *"the power or authority of a person in relation to a thing connoted by any one or more of those terms in statutory collocation is a question of degree"*.

32. And at [32] finding "*The reference to "the possession, custody or control" of dutiable goods is appropriately construed as a compendious reference to that degree of power or authority which is sufficient to enable a person to meet the [statutory] obligations …"*

33. Applying such an approach to present circumstances highlights the Employers obligation for continuing discovery, as enshrined at Rule 12.04 of the *Work Health Court Rules*.

34. In my view, where the Employer has the power and control necessary to compel Dr du Plessis to compile and discover the literature relied upon for the purposes of a report, which has been served on the Worker, and is being relied upon by the Employer, then they should proactively attend to the process of discovery.

35. A party should not be bound by the timeframes a medical expert ascribes to the urgency of production, the Rules of Court impose on ongoing obligation directly on the parties. The mere fact a medical professional has not yet attended to the compilation of relevant material does not, in my view, go so far so as to place such material outside the 'possession, custody or control' of a party who has the power to call upon them.

36. Counsel for the Worker further relied upon *Psalidis & Anor v Norwich Union Life Australia Limited*[14] to support their submission that the Employer had the requisite control over the documents sufficient to warrant an order for discovery.

37. Therein Cavenough J adopted the frequently accepted definition of power established by Lord Diplock in his 1980 decision of *Lonrho v Shell Petroleum Co Ltd*[15]*:*

> *"…. the expression 'power' must, in my view, mean a presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else. Provided that the right is presently enforceable, the fact that for physical reasons it may not be possible for the person entitled to it to obtain immediate inspection would not prevent the document from being within his power …"*

38. The Worker submits that, in engaging an independent medical expert to procure medical evidence for the purpose of litigation, this creates a legal relationship whereby the Employer is entitled to compel their medical expert to attend to the compilation and discovery of materials pertinent to the findings in the report.

39. The Worker submits that there exists a presently enforceable right to obtain the documentation. This proposition was not resisted by the Employer.

40. There is no indication that the material requires further consent to obtain or is subject to subscription, or access to restricted medical journals, or otherwise, simply that the compilation and delivery of the documents had not yet been undertaken by Dr du Plessis.

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[12] (2018) 92 ALJR 1053
[13] Ibid at 30
[14] [2009] VSC 417
[15] [1980] 1 WLR 627 at 635

41. Authority further supports the proposition that a lack of immediacy or physical possession is not necessarily a bar to having control of documentation.

42. The Court has frequently taken a broad and facilitative view of discovery and the concept of ‘possession, custody or control’ and I intend to do so here.

43. In my view the request by the Worker does not fall outside the realm of discovery and the Employer ought be compelled to discover the broadly defined ‘literature’ relied upon by Dr du Plessis, and I have so ordered.

ORDERS:

1. Within 21 days the Employer to discover to the Worker details and copies of any 'literature' relied upon by Dr du Plessis in his reports dated 13 August 2021 and 22 August 2022.

2. Parties are at liberty to apply with respect to costs.