

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 4091/19
Applicant: Khalil Bilal
Respondent: Joseph Haidar
Date of Determination: 25 September 2019
Citation: [2019] NSWCC 312

1. Opinion

The Commission cannot determine the issues as between the applicant and the named respondent as they are residents of different States within the meaning of s 75 of the *Commonwealth of Australia Constitution Act*.

2. Order

Leave is granted, pursuant to s 4 of the *Civil Liability (Third Party Claims Against Insurers) Act, 2017*, to substitute the Workers Compensation Nominal Insurer as the respondent in these proceedings.

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

JOHN HARRIS
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 JOHN HARRIS, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

1. These are interlocutory reasons explaining why it is necessary in limited circumstances, due to s 75 of the *Commonwealth of Australia Constitution Act* (the Constitution), to substitute the insurer as the respondent in proceedings before the Workers Compensation Commission (the Commission).
2. Mr Khalil Bilal (the applicant) alleges that he suffered injury on 29 July 2006 whilst employed by Joseph Haidar (the respondent).
3. At the time of the injury, the respondent held a policy of insurance with the Workers Compensation Nominal Insurer (Nominal Insurer).
4. The applicant has brought proceedings in the Commission claiming weekly compensation, permanent impairment compensation and medical expenses compensation pursuant to the provisions of the *Workers Compensation Act 1987* (the 1987 Act).
5. The respondent has denied liability and quantum and has issued notices pursuant to s 74 and s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act). Defences raised under these notices include that the claim for compensation was not made within the time limits proscribed by ss 254 and 261 of the 1998 Act and that the applicant was not a worker as defined by the 1987 Act.

THE PROCEEDINGS BEFORE THE COMMISSION

6. The Application to Resolve a Dispute (Application) was registered with the Commission on 14 August 2019.
7. On 23 August 2019, the Commission issued the following Direction:

“The Commission refers to the Application to Resolve a Dispute filed in this matter which indicates that the applicant and respondent may be residents of different States of the Commonwealth and raise the following matters for the parties’ consideration. It is requested that these matters be addressed by the legal representatives at the telephone conference.

 1. Whether any determination by the Commission would be in breach of s 75(iv) of the *Commonwealth of Australia Constitution Act, 1900* (see *Attorney General for New South Wales v Gatsby* [2018] NSWCA 254) as the Commission is not a Court (see *Orellana-Fuentes v Standard Knitting Mills Pty Ltd* [2003] NSWCA 146).
 2. Whether it is appropriate in these circumstances to join the insurer as a respondent to the proceedings: see *Civil Liability (Third Party Claims Against Insurers) Act, 2017 (NSW)*.”
8. This matter was listed for a telephone conference on 11 September 2019. Mr Hansen appeared for the applicant and Mr Bennett appeared for the respondent. At that time the parties requested further time to consider the matters raised in paragraph 7 herein. The telephone conference was then stood over to 17 September 2019.
9. At the initial telephone conference, the parties confirmed that the applicant and respondent were “natural” persons presently residing in different states of the Commonwealth.

10. At the subsequent telephone conference, the parties agreed that it was appropriate to substitute the Nominal Insurer as the respondent in these proceedings and to list the matter for hearing. These are my reasons why it is necessary to substitute the Nominal Insurer as the respondent.

REASONS

11. Section 71 of the Constitution provides that the judicial power of the Commonwealth shall be vested in the High Court, such other federal courts created by Parliament and in such other courts invested with federal jurisdiction.
12. Section 75 of the Constitution is headed “Original Jurisdiction of the High Court” and provides:

“In all matters:

....

- (iv) between States, or between residents of different States, or between a State and a resident of another State;

....

the High Court shall have original jurisdiction.”

13. Section 77 of the Constitution provides:

“With respect to any of the matters mentioned in the last two sections the Parliament may make laws:

- (i) defining the jurisdiction of any federal court other than the High Court;
- (ii) defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States;
- (iii) investing any court of a State with federal jurisdiction.”

14. Section 39(2) of the *Judiciary Act, 1903* (Judiciary Act) provides that courts of a State are invested with federal jurisdiction in some matters in which the High Court has exclusive jurisdiction. The matters in which the High Court retains exclusive jurisdiction is not relevant to the facts of this case. By reason of s 39(2) of the *Judiciary Act*, courts of a State may determine matters between residents of different States.
15. The Commission is not a court: *Orellana-Fuentes v Standard Knitting Mills Pty Ltd*¹; *Mahal v State of New South Wales (No 5)*².
16. As a member of a tribunal I cannot make a determination of issues of interpretation of the Constitution: *Attorney-General of New South Wales v Gatsby* (Gatsby)³.

¹ [2003] NSWCA 146

² [2019] NSWCCPD 42

³ [2018] NSWCA 254

17. In *Gatsby*, the relevant issue concerned the capacity of the Appeals Panel of the Civil and Administrative Tribunal of New South Wales to determine questions of whether it was a court of a State for the purposes of the Constitution and s 39 of the *Judiciary Act*. The issue in that case involved litigation between residents of different States. Leeming JA stated⁴:

“At best, all that NCAT could do was to form and express an opinion, in accordance with what Brennan J had said, sitting as President of the Administrative Appeals Tribunal, in *Re Adams and the Tax Agents’ Board* (1976) 12 ALR 239 at 242.”

18. My reasons on this issue must be considered in this context, that is, limited to forming and expressing an opinion. However, I observe that I am providing reasons for the purpose of setting out why a jurisdictional issue in a small number of cases may impact on the Commission’s ability to determine issues arising under the 1987 Act and the 1998 Act.
19. “Residents” in s 75(iv) of the Constitution has been interpreted by the High Court to mean an individual and not a corporation: *Australasian Temperance and General Mutual Life Assurance Society Ltd v Howe*⁵.
20. “Matters” as defined in s 75(iv) of the Constitution means the determination of legal disputes between residents of different States: *Burns v Corbett*⁶ (*Burns*).
21. As the plurality stated in *Burns*⁷:

“The effect of these provisions of the Judiciary Act is that the exercise by a State court of adjudicative authority in respect of any of the matters listed in ss 75 and 76 of the Constitution, including matters between residents of different States, is an exercise of federal jurisdiction. As was explained in *Baxter v Commissioners of Taxation (NSW)*:

‘The result is that the jurisdiction of the State Courts is now derived from a new source, with all the incidents of jurisdiction derived from that new source, one of which is an appeal in all cases to the High Court.’”

22. Accordingly, a tribunal which is not a “court of a State” within the meaning of s 77(iii) of the Constitution cannot exercise the judicial power of the Commonwealth: *R v Kirby; Ex parte Boilermakers’ Society of Australia*⁸.
23. For these reasons, there is no doubt that the issue raised in *Gatsby* is similar if not identical to any matter before the Commission where the parties are both natural persons and residents of different States.
24. The question of absence of jurisdiction in this limited circumstance has not previously been argued in the Commission. However, there is no reason why the principles articulated in *Gatsby* do not apply to matters before the Commission where the dispute is between individuals, who are residents of different States. Whilst s 105 of the 1998 Act provides that the Commission otherwise has exclusive jurisdiction to determine all matters arising under the 1987 Act and the 1998 Act, the exclusive jurisdiction provided under an Act of the New South Wales Parliament cannot override the express limitation in s 75 of the Constitution.
25. In these circumstances, it is necessary to consider whether the Nominal Insurer can be substituted for the respondent.

⁴ *Gatsby* at [281], Beazley P agreeing at [197]

⁵ [1922] HCA 50. See also *Street v Queensland Bar Association* [1989] HCA 53 at [30] per McHugh J

⁶ [2018] HCA 15

⁷ Per Keifel CJ, Bell & Keane JJ at [26]

⁸ [1956] HCA 10

26. An employer is required to maintain a policy of insurance and is liable to penalties and potential imprisonment for any failure: s 155(1) of the 1987 Act.
27. Section 159(1) of the 1987 Act provides that a policy of insurance shall contain such provisions as are prescribed by the regulations.
28. Clause 51 of the Workers Compensation Regulations, 2016 (the 2016 Regulation) provides that a policy of insurance must contain the provisions specified in Schedule 3 of the 2016 Regulation.
29. Paragraph 5 of Schedule 3 of the 2016 Regulation provides that the insurer (as well as the employer) is directly liable to the worker to pay compensation for which the employer is liable, and that a claim can be made and action taken directly against the insurer.
30. Section 154A of the 1987 Act provides for the establishment of the Nominal Insurer. The Nominal Insurer is a legal entity, it may take proceedings and be proceeded against in the name of the Workers Compensation Nominal Insurer. The Nominal Insurer is taken to be a licensed insurer and has such functions as may be necessary or convenient to operate to the fullest extent as a licensed insurer (s 154B of the 1987 Act).
31. Relevantly, paragraph 11 of Schedule 3 of the 2016 Regulation provides that the insurer can use the name of the employer to bring, defend and settle any legal proceedings for the benefit of the insurer.
32. These provisions mean that it is a fundamental feature of the scheme that the liability of the insurer to the worker is the same as the liability of the employer to the worker: *Registrar of the Workers Compensation Commission of NSW v National Employers' Mutual General Insurance Association Ltd*⁹.
33. The mandatory provisions of the insurance policies required by employers under the workers compensation scheme is a relevant factor because of the rights and obligations of an insurer to be bound by any decision and pay any award or determination. It is clear that an insurer can settle an action without the consent of an employer.
34. The *Civil Liability (Third Party Claims Against Insurers) Act, 2017* (CL Act) provides that, with leave of a court, proceedings can be brought against an insurer. Section 3 of the CL Act defines "court" as "a court or tribunal" and "liability" as "a liability to pay damages, compensation or costs."
35. The principle section for granting leave to proceed directly against an insurer is contained in section 4 of the CL Act which relevantly provides:
 - (1) If an insured person has an insured liability to a person (the "**claimant**"), the claimant may, subject to this Act, recover the amount of the insured liability from the insurer in proceedings before a court.
 - (2) The amount of the insured liability is the amount of indemnity (if any) payable pursuant to the terms of the contract of insurance in respect of the insured person's liability to the claimant.
 - (3) In proceedings brought by a claimant against an insurer under this section, the insurer stands in the place of the insured person as if the proceedings were proceedings to recover damages, compensation or

⁹ (1978) HCA 57 at [22]; 141 CLR 462 at 484 (per Aickin J)

costs from the insured person. Accordingly (but subject to this Act), the parties have the same rights and liabilities, and the court has the same powers, as if the proceedings were proceedings brought against the insured person.”

36. Section 11 of the CL Act otherwise provides that the Act extends any rights conferred under the 1987 Act. Section 11 is in the following form:

“The rights conferred on claimants under this Act do not affect, and are in addition to, the rights conferred under the *Workers Compensation Act 1987* or any other law on a person who is not a party to a contract of insurance to make a claim against an insurer in respect of an insured liability.”
37. The parties referred to the power in s 162 of the 1987 Act to make a declaration that the employer has entered into a contract of insurance in certain circumstances, such as where the employer is a natural person and has died, or the employer, as a corporation, has “ceased to exist”. However, s 162 does not permit the Commission to substitute an insurer for the employer as a party in the proceedings.¹⁰
38. The injury is alleged to have occurred in 2006. The CL Act commenced in 2017. The context of the CL Act is that it operates to substitute an insurer following the commencement of that Act. This is because s 12 of the CL Act provides that s 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* continues to apply only in respect of actions brought against insurers before the commencement of the CL Act. Accordingly, from the date of commencement of the CL Act, granting leave to bring proceedings against an insurer is pursuant to the CL Act, regardless of when the original cause of action against the insured arose.
39. As the plurality stated in *Military Rehabilitation and Compensation Commission v May*¹¹, the “question of construction is determined by reference to the text, context and purpose of the Act”; citing *Project Blue Sky Inc v Australian Broadcasting Authority*¹² and *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*.¹³
40. The text in s 4 of the CL Act contains a general power for any court or tribunal to grant leave to a claimant to bring proceedings and recover directly against an insurer. Consistent with the definitions in the CL Act of “court” and “liability”, those actions extend to claims brought in the Commission where a party is seeking compensation.
41. The clear purpose from the broad power provided by s 4 of the CL Act is to provide a simple mechanism for recovery directly against insurers. The express terms in s 11 specify that the CL Act is in addition to powers exercisable under the 1987 Act.
42. As noted above, the CL Act repealed and replaced s 6 of the *Law Reform (Miscellaneous Provisions) Act 1946*.
43. The former s 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* was described by Kirby P (as his Honour then was) in *Oswald v Bailey*¹⁴ as an “unusual statutory provision” which its “very uniqueness ... speaks against a narrow construction.”¹⁵ In my view the provisions of the CL Act warrant a similar description.

¹⁰ *Lachley Meats (Forbes) Pty Ltd v Merritt* [2019] NSWCCPD 49 at [22]

¹¹ [2016] HCA 19 at [10]

¹² [1998] HCA 28 [69]-[71]

¹³ [2009] HCA 41 (*Alcan*) at [47]

¹⁴ (1987) 11 NSWLR 715

¹⁵ At 717

44. The provisions of the CL Act, based on the text, context and purpose, clearly establish that the Commission may grant leave to substitute an insurer and allow the worker, if otherwise entitled to compensation under the 1987 Act and/or the 1998 Act, to recover directly against the insurer.
45. It is appropriate and necessary to grant leave to the applicant to substitute the Nominal Insurer as the respondent. Absent such leave, the Commission does not have jurisdiction to determine the issue and the resolution of the applicant's entitlements cannot be determined in any other tribunal or court.
46. In addition, paragraphs 5 and 11 of Schedule 3 of the 2016 Regulation provide a further basis in which proceedings can be brought directly against the insurer.
47. In *Burns* the High Court held the provisions of an Act which purported to provide a tribunal with powers of a court are invalid to "the extent that they purport to confer State judicial power with respect to subject matters identified in ss 75 and 76 of the Constitution."¹⁶
48. The CL Act and the 2016 Regulation do not provide the Commission with judicial power on the subject matters identified in ss 75 and 76 of the Constitution. They allow an action to be brought for recovery directly against an insurer. Rather than providing judicial power to a tribunal contrary to the Constitution, these provisions provide a means of recovery directly against a corporate insurer.
49. For these reasons, I do not believe that the grant of leave substituting the Nominal Insurer, offends the provisions of the Constitution.

CONCLUSIONS

50. I summarise my conclusions as follows:
 - (a) The Commission does not have jurisdiction to hear an action between individuals who are residents of different States because s 75(iv) and s 77 of the Constitution provides that such proceedings must be heard by a court.
 - (b) In these circumstances, where the respondent has a policy of insurance in force at the relevant time, the insurer should be substituted as the respondent.

ORDER

51. My order is set out in the Certificate of Determination.



¹⁶ *Burns* [2018] HCA 15 per Gageler J at [119]