WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 4894/19
Applicant: Mark Burridge
Respondent: PW Russell & M A McNeil
Date of Determination: 12 December 2019
Citation: [2019] NSWWCC 398

The Commission determines:

1. Leave is granted, pursuant to section 4 of *Civil Liability (Third Party Claims Against Insurers) Act 2017*, to substitute the insurer as the respondent in these proceedings.

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

Carolyn Rimmer
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 CAROLYN RIMMER, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. On 20 September 2019, an Application to Resolve a Dispute (the Application) by the applicant, Mark Burridge (the applicant), was registered in the Workers Compensation Commission (the Commission). Mr Burridge's employer at the relevant time was PW Russell & MA McNeil (the respondent). The respondent's workers compensation insurer at the relevant time was AAI Limited trading as GIO.

2. The applicant claimed lump sum compensation in respect of 24% whole person impairment (WPI) of the lumbar spine pursuant to s66 of the *Workers Compensation Act 1987* (the 1987 Act). The applicant claimed that on 31 August 2013 while in the course of his employment with the respondent at "Parkview", in Bega, he sustained an injury to his lumbar spine, namely, an acute L5/S1 disc injury/rupture and S1 nerve root compromise with left radiculopathy requiring anterior interbody fusion and compression.

3. At the time of injury, the respondent held a policy of insurance with AAI Limited trading as GIO.

4. On 15 August 2019, the respondent made the applicant an offer to settle the applicant's claim for lump sum compensation on the basis of a payment in respect of 19% WPI. The applicant did not accept this offer. The only matter is dispute was the degree of permanent impairment.

5. A telephone conference was held in this matter on 18 October 2019, and the matter was remitted by consent to the Registrar to refer to an Approved Medical Specialist (AMS) for assessment of WPI as a result of the injury to the lumbar spine on 31 August 2013.

6. The applicant and respondent are "natural persons" presently residing in different states of the Commonwealth of Australia. However, at the time of injury, all parties resided in NSW.

7. The question of whether the insurer should be substituted as the respondent in proceedings where the applicant and respondent are persons living in different states was raised by Arbitrator Harris in *Bilal v Haider* WCC 4091-19 (25 September 2019) (*Bilal*). I considered it necessary to decide whether in this matter the insurer should be substituted as the respondent in the proceedings.

8. A direction was issued on 23 October 2019 as follows.

   1. This matter was remitted to the Registrar to refer to an Approved Medical Specialist (AMS) for assessment of whole person impairment of the lumbar spine as a result of the injuries on 31 August 2013.

   2. The Application to Resolve a Dispute filed in the Commission in this matter indicates that the applicant and respondents may be residents of different states of the Commonwealth. The parties are requested to address the following matters in written submissions:

      (i) 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).

(ii) 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)*."

3. Applicant is to file and serve written submissions by 8 November 2019.

4. Respondent to file and serve written submissions by 22 November 2018.

5. Parties may wish to refer to the decision of Arbitrator Harris in *Bilal v Haider* WCC 4091-19 (25 September 2019).

9. The applicant filed submissions dated 28 October 2019. The applicant sought leave to have the insurer substituted as the respondent in these proceedings.

10. The respondent's solicitor in an email dated 29 November 2019 advised that the respondent did not intend to make submissions and agreed with the applicant's submissions.

REASONS

11. Section 105 of the *Workplace Injury Management and Workers Compensation Act 1998 Act* (the 1998 Act) provides:

"(1) Subject to this Act, the Commission has exclusive jurisdiction to examine, hear and determine all matters arising under this Act and the 1987 Act.

(2) The Commission does not have that jurisdiction in respect of matters arising under Part 5 (Common law remedies) of the 1987 Act except for the purposes of and in connection with the operation of Part 6 of Chapter 7 of this Act.

(3) The Commission does not have jurisdiction in respect of matters that the Compensation Court or (after the repeal of the *Compensation Court Act 1984*) the District Court has jurisdiction to examine, hear and determine.

(4) Subject to this Act and the *Compensation Court Act 1984*, the *Compensation Court Act 1984,* the Compensation Court has exclusive jurisdiction to examine, hear and determine all existing claim matters except matters arising under Part 5 of the 1987 Act.

(4A) After the repeal of the *Compensation Court Act 1984*, the District Court has exclusive jurisdiction to examine, hear and determine all coal miner matters (except matters arising under Part 5 of the 1987 Act).

(5) Despite section 17 (4) of the *Compensation Court Act 1984*, the Compensation Court not have jurisdiction to reconsider a matter, or to rescind, alter or amend any decision previously made or given by the Court in relation to a matter, once the matter has become a new claim matter.

(6) For the purposes of giving effect to subsections (4) and (4A), references in this Act to the Commission are to be read as references:

(a) to the Compensation Court, to the extent that the reference relates to a matter that the Compensation Court t has jurisdiction to examine, hear and determine, or

(b) to the District Court, to the extent that the reference relates to a matter that the District Court has jurisdiction to examine, hear and determine."

12. The scope of the commission's jurisdiction pursuant to s 105 was considered by the Court of Appeal in *Raniere Nominees Pty Ltd (t/as Horizon Motor Lodge) v Daley* [2006] NSWCA 235 in which Santow JA (with whom Spigelman CJ agreed) noted at [66]:

> "Section 105 of the WIM Act sets out the jurisdiction of the commission. Thus, in acting judicially in its decision-making, the Commission is governed by statute. It does not possess an inherent jurisdiction but only such powers which are incidental and necessary to the exercise of its statutory jurisdiction; see *DLJ v Central Authority* (2000) 201 CLR 226 at [24ff]."

13. The commission has jurisdiction to determine issues of injury and causation: *Total Steel of Australia Pty Ltd v Waretini* [2007] NSWWCCPD 33; *WorkCover NSW v Evans* [2009] NSWWCCPD 95; *Superior Formwork Pty Ltd v Livaja* [2009] NSWWCCPD 158.

14. 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.

15. 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."

16. 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."

17. 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. A listing of 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.

18. The Commission is not a court: *Orellana-Fuentes v Standard Knitting Mills Pty Ltd* [2003] NSWCA 146; *Mahal v State of New South Wales (No 5)* [2019] NSWWCCPD 42.

19. In *Burns v Corbett* [2018] HCA 15 (*Burns*) the appellant applied to a predecessor of part of NSW Civil and Administrative Tribunal (NCAT), the Administrative Decisions Tribunal, for certain redress under the *Anti-Discrimination Act 1977 (NSW)*. This related to the making of comments found to have constituted homosexual vilification in breach of that Act. The appellant resided in NSW and the respondent in Victoria. Under s 75(iv) of the *Constitution*, only a body invested with federal jurisdiction can deal adjudicatively, as opposed to administratively, with the matter in these circumstances. It was assumed in this case that NCAT was not a court but it was found to be acting judicially, so jurisdiction was wanting.

20. In *Attorney-General of New South Wales v Gatsby* [2018] NSWCA 254 *(Gatsby)*, a mother residing in Queensland had applied to NCAT for an order under the Residential Tenancies Act 2010 (NSW) to terminate a lease to her daughter of her house located just south of the border, as rent was in arrears. The issue argued was whether NCAT is a 'court' for the purposes of Chapter III of the *Constitution*. The Court of Appeal determined two questions:

    1. Whether the Tribunal was exercising "judicial power" in making an order to terminate a residential tenancy agreement; and if so, 2. Whether the Tribunal was a "court of a State" for the purposes of the *Constitution* and s 39 of the *Judiciary Act* which was vested with federal jurisdiction to determine matters between residents of different States.

21. In relation to the first question, the Court of Appeal held that the Tribunal was exercising judicial power. It found that the making of an order under s 87 of the *Residential Tenancies Act 2010 (NSW)* terminating a residential tenancy agreement was analogous to that exercised by courts under the general law, because it required the Tribunal to identify the existence of a contract constituting the agreement, whether that contract was breached, and whether that breach was sufficient to justify termination. The Court also noted that such termination orders were enforceable by the Tribunal.

22. In the present matter, there is a real question as to whether the Commission is exercising judicial power. This matter required a referral to an AMS to assess the degree of WPI as a result of an injury to the lumbar spine on 31 August 2015. This, in my view, involved the exercise of administrative, not judicial power.

23. In *Bilal*, the issues requiring determination included that the claim for compensation was not made within the time limits proscribed by ss 254 and 261 of the 1998 Act and that Mr Bilal was not a worker as defined by the 1987 Act.

24. The applicant claims in respect of an injury which he alleges occurred in Bega, NSW, whilst employed by the respondent in NSW. Such injury occurred while both the applicant and the respondent were residents of NSW. Although no specific evidence has been directed to where the contract of employment was entered into, it may be assumed provisionally that the contract of employment was probably made in NSW and involved work being done in NSW. However, the jurisdictional issue in the present case does not turn on the place of entry into the employment contract or the place where work was done under such employment contract.

25. The applicant at some time after the injury occurred moved to an address near Hobart, Tasmania where he now resides. The respondent apparently has continued to reside at a property in or near Bega, NSW.

26. When the applicant commenced these proceedings, his residential address was specified as being his Tasmanian home.

27. In recent years, the Court of Appeal in *Burns v Corbett* [2017] NSWCA 3, the High Court in *Burns* and the Court of Appeal in *Gatsby* have considered whether other NSW tribunals have jurisdiction to determine proceedings between residents of different states, if such State tribunals are not "courts of a state" invested with federal jurisdiction to determine matters between residents of different States pursuant to Chapter III of the *Constitution* and s 39 of the *Judiciary Act (Cth).*

28. It is undoubted that at both the date when the matter commenced in the Commission and at all stages since that date, the applicant and the respondent resided, and have continued to reside, in different states. If the respondent was not a natural person, but instead was a corporation, no jurisdictional problem would exist, as the expression "residents of different states" under s 75 (IV) of the *Constitution* only applies to natural persons and does not apply

where one of the two opposing parties is a corporation: (*Australian Temperance and General Mutual Life Assurance Society Ltd v Howe* (1922) 31 CLR 290; *Cox v Journeaux* (1934) 52 CLR 282; *Crouch v Commissioner for Railways (Qld)* (1985) 159CLR22. But where the only opposing parties are respectively a natural person and a company, the proceeding does not come within s 75(iv): *Rochford v Days* (1989) 84 ALR 405.

29. Under s 77(iii) of the *Constitution*, the Federal Parliament may make laws investing any court of a State with federal jurisdiction. Section 39(2) of the *Judiciary Act*, enacted pursuant to s 77(ii) and (iii) of the *Constitution*, provided that "the several courts of the States shall …be invested with federal jurisdiction" in all matters in which the High Court has original jurisdiction.

30. The Court of Appeal in *Gatsby* concluded that the Civil and Administrative Tribunal of NSW (the Tribunal) was not a "court of a State" within the meaning of s39 (2) of the *Judiciary Act* and s 77(iii) of the Constitution: *Gatsby* at [184]-[192], [197], [198], [201]-[205], [223]-[228], [279]. For the same reasons as were given by members of the Court of Appeal in *Gatsby*, I conclude that the Commission is not a "court of a State" within those provisions of the *Judiciary Act* and the *Constitution*.

31. In *Gatsby,* the Court of Appeal held that the Tribunal lacked jurisdiction to determine matters between residents of different states under s 75(iv) of the *Constitution*: *Gatsby* at [197], [205], [292]-[304].

32. The Court of Appeal also concluded that the Tribunal was exercising judicial power in making an order under s 87 of the *Rental Tenancies Act (NSW)* because the discretion exercised by the Tribunal to make such an order was analogous to that exercised by courts under the general law, since s 87 required the Tribunal to identify whether the contract constituting such residential tenancy agreement existed, whether the contract was breached, whether the breach was sufficient to justify termination, and whether any such termination was enforceable by the Tribunal.

33. However, the present issue in respect of which the exercise of the Commission's jurisdiction is being sought is a quite limited one, and not, in my view, sufficiently analogous to the types of issues which in *Burns* and *Gatsby* led to determinations by the High Court and the Court of Appeal that by reason of ss 75(iv), 77(ii) and 73(iii) of the *Constitution* and s 39(2) of the *Judiciary Act*, the particular Tribunals lacked jurisdiction to hear and resolve the particular dispute.

34. The remittal to the Registrar for referral to an AMS has already taken place by consent of both parties. The referral by the Registrar to an AMS has either already occurred or else is on the brink of occurring. The Commission would ordinarily issue a Certificate of Determination making orders giving effect to the assessment by the AMS. But the Commission's task in making such orders can best be described as purely administrative, rather than judicial or quasi-judicial.

35. Therefore, my provisional view is that the outstanding issues in the present case would not appear to raise for decision by the Commission any jurisdictional issue of constitutional dimension. Further, even if, as is doubtful, judicial power, as distinct from administrative power, has been exercised or is expected to be exercised by the Commission taking further steps to resolve this matter, there does not appear to be involved any past or proposed exercise of Commonwealth judicial power in order to complete the resolution of this case.

36. However, the question of whether jurisdiction exists must be determined by reference to the claim as made from the outset and whether jurisdiction was validly invoked or accepted at the threshold stage, and not solely by reference to the position subsequently appearing at the time when the potential jurisdictional issue was first raised either by any of the parties or by the Commission itself.

37. Jurisdiction of a tribunal cannot legally be established by consent or acquiescence of the parties, and must be determined by the tribunal itself, without regard to the concessions made by the parties, the giving of consent by the parties, or the lack of specific objection by the parties. Further, if there is a lack of jurisdiction from the outset, the later narrowing of the issues by the parties so that all that remains to be done involves no significant decision making by the Commission's arbitrator, does not solve any jurisdictional problem.

38. When the Commission's jurisdiction was first invoked through the filing of the Application, the applicant was claiming that he sustained a compensable injury while employed by the respondent, that the nature of this injury was as claimed in the Application, and that as the result of such injury he had a permanent impairment of 24% WPI for which he ought be fully compensation under s 66 of the 1987 Act. It matters not for jurisdictional purpose that the respondent has not put in issue anything other than the proper assessment of extent of the WPI resulting from injury and is content to have that issue resolved by an AMS on referral by the Registrar pursuant to the remittal by the Commission for that limited purpose. The existence of jurisdiction in this matter does not depend upon which section of the 1987 Act is being invoked in the Application: see *Gatsby* at [133]-[134]. Similarly, the existence of jurisdiction cannot properly depend upon which sections of the 1987 Act the respondent relies upon when a Reply is filed on the respondent's behalf or which sections of the 1987 Act and 1998 Act, it will contend the applicant has not satisfied.

39. As an Arbitrator of the Commission, I cannot make a determination of issues of interpretation of the *Constitution*, as only a superior court can pronounce authoritatively on the limits of jurisdiction.; *Gatsby* at [281]. But in *Gatsby* at [281], Leeming JA recognised that it is permissible to express an opinion as to the limits of the particular tribunal's own authority even though such opinion has no legal effect, in order that the tribunal may appropriately mould its conduct.

40. However, expressing such an opinion at this stage in the present case would, in my view, be unnecessary and inappropriate for the following reasons.

41. Firstly, doing so may create undue delay and significant additional costs, including the costs of any further appeal or judicial review proceedings.

42. Secondly, there is no utility in my expressing an opinion as there still is an unresolved question, which only the Court of Appeal or the High Court can resolve, as to what constitutes a "matter" for the purposes of s 75 and s 76 of the *Constitution*. In *Gatsby*, Basten JA concluded that there was not a "matter" before the particular Tribunal for the purposes of s 75 and s 76 of the *Constitution*. The other Court of Appeal judges in *Gatsby* declined to consider this question because such question was not raised by the parties to those proceedings, and because to allow belated argument would require further notices to be given to the Attorneys General for the States and the Commonwealth under s 78B of the *Judiciary Act*, and thus would add to further delay in the proceedings. Therefore, *Gatsby* may not be the final word on the jurisdictional issues of this type limiting the powers of any State tribunal which is not a "court of a State".

43. Thirdly, because the decisions in both *Burns* and *Gatsby* raise wide ranging potential problems for the jurisdiction of numerous tribunals of the Commonwealth and of all of the States and Territories, this most likely will lead to legislative correction and clarification. For example, as is exemplified in the present case, if the Commission lacks jurisdiction in cases between residents of different States, where else can the case be resolved if there is no other tribunal or Court in NSW which can validly exercise jurisdiction? It is predictable that either amendment of the Judiciary Act or the introduction of special legislation in NSW may become the preferred option for attempting to overcome any unnecessary disturbance of the work and availability of numerous tribunals. Therefore, it seems to be a preferable course to await any legislative action by either the Commonwealth or the States which may provide a comprehensive response to the jurisdictional uncertainty which presently prevails with many tribunals.

44. Fourthly, as Basten JA stated in *Gatsby* at [251]-[253], any construction which denies jurisdiction to the particular tribunal because the parties are residents of different States will subject those parties to a disability or discrimination based on residence. In the workers compensation jurisdiction, any of the parties who are natural persons may be residents in different States, particularly if they live near State borders such as in the Albury/Wodonga and Tweed Heads/Coolangatta twin towns regions. Also, such parties who are natural persons can change their place of residence at any stage of the proceedings in order to move across State borders to an adjoining State or any other State where they wish or need to live. It would be odd if jurisdiction which validly existed at the time when proceedings were commenced in the Commission could be removed simply because one party later crossed the border from NSW in order to reside elsewhere in Australia. Although a limited number of cases commenced in the Commission involve proceedings between residents of different states, the potential loss of access to justice for this limited number of litigants in the Commission is of sufficient concern for it to be anticipated that the problem will be resolved by appropriate legislation at Commonwealth and/or State levels. A particular source of injustice would arise in death claims where the Commission would need to resolve conflicts between dependants of a deceased worker where natural persons who were residents of different states would be on opposing sides of the record as the applicant and the named respondent or respondents, with such dependants including children of the deceased who live in States outside NSW. It is preferable to await the emergence of such legislative solutions rather than me attempting to shed further light on the problems which presently may arise in the Commission in this limited class of case based upon legislation as it presently exists, and prior to any comprehensive legislative measures emerging.

45. Fifthly, it is fortunate that in all proceedings in the Commission, all employers if insured are covered by insurance policies issued by insurers and if uninsured are covered by the Workers Compensation Nominal Insurer. These insurers and the Workers Compensation Nominal Insurer are all corporations and not natural persons and are made directly liable under relevant NSW legislation along with the employer. Therefore, in cases of this interstate type, simply substituting the insurer (or the Workers Compensation Nominal Insurer) as the sole respondent in place of the named respondent is the best way to deal with this matter so that the proceedings become proceedings between an applicant who is a natural person and the named respondent who is a corporation, which means that the proceedings are no longer between residents of different states.

46. The applicant submitted that I should adopt the approach taken by Arbitrator Harris in *Bilal* of substituting the insurer in place of the named respondent. The respondent's solicitors advised they would make no submissions regarding any jurisdictional issue and agreed with the applicant's submission that the Commission make an order substituting the insurer in place of the named respondent.

47. Accordingly, I adopt the approach taken by Arbitrator Harris in *Bilal* that leave should be granted under the *Civil Liability (Third Party Claims Against Insurers) Act 2017 (NSW)* for the applicant to bring proceedings to recover compensation directly against the insurer, and I order that the insurer be substituted as the respondent in place of the existing respondent.