

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 6081/19
Applicant: Nicholas Heiniger
Respondent: Icare Workers Insurance
(Workers Compensation Nominal Insurer)
Date of Determination: 7 January 2020
Citation: [2020] NSWCC 13

The Commission determines:

1. The Miscellaneous Application is dismissed.

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

Josephine Bamber
Senior 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 JOSEPHINE BAMBER, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Mr Nicholas Heiniger has filed a Miscellaneous Application (the Application) seeking for the Commission to determine whether he has exempt employer status from holding a worker's compensation policy.
2. At all material times Mr Heiniger operated the business known as Forster Dive Center and Aussie Boatshed and he did not have a policy of workers compensation insurance.
3. On 7 March 2019, iCare workers insurance issued a Notice to Reimburse under section 145(1) of the *Workers Compensation Act 1987* (the 1987 Act) to Nicholas Heiniger t/as Forster Dive Center and Aussie Boatshed of 11-13 Little Street Forster. The notice specified that Mr Heiniger had 28 days from the date of service of the notice to file an application for review with the Workers Compensation Commission. This was written in bold and was underlined in the covering letter and again in the actual Notice to Reimburse. The amount of the reimbursement sought was \$377,915.15. In the notice attention was drawn to the provisions in section 145 of the 1987 Act, including sub-section 3 which states:

“A person on whom a notice has been served under subsection (1) in respect of an injured worker may, within the period specified in the notice, apply to the Commission for a determination as to the person's liability in respect of the payment concerned.”

4. The Commission has stamped the Miscellaneous Application as having been registered on 20 November 2019.
5. It was raised in Part 3 of the Reply, filed by icare, that

“...the proceedings have been commenced by the Applicant contrary to an outside of the period required in section 145(3) of the Workers Compensation Act 1987 (as amended). Accordingly, the Respondent asserts the Applicant cannot therefore bring these proceedings and that there must be an award for the Respondent.”
6. Mr Heiniger filed this Miscellaneous Application more than 28 days after the section 145(1) notice was served.

PROCEDURE BEFORE THE COMMISSION

7. A telephone conference was held by me on 19 December 2019 with Mr Heiniger and Mr David Cooper, solicitor, representing icare. Mr Heiniger was not legally represented.
8. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.
9. The parties were informed of my intention to determine the dispute without holding a conciliation conference or arbitration hearing and that I intended to dismiss the application due to the operation of section 145(3) of the 1987 Act.

EVIDENCE

Documentary evidence

10. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application and attached documents, and
 - (b) Reply and attached documents.

Oral evidence

11. There was no oral evidence. Because Mr Heiniger was not legally represented, the telephone conference was sound recorded. A copy of the recording is available to the parties.

FINDINGS AND REASONS

12. In the case of *Workers Compensation Nominal Insurer v Earl*¹ an issue arose as to whether the Nominal Insurer was entitled to recover from an employer compensation paid by the Nominal Insurer to a worker. Deputy President Roche found that the answer turned on whether, at the date of injury, the worker's employer carried a mandatory worker's compensation insurance policy (the statutory policy).
13. The facts in *Earl* differ to Mr Heiniger's case because in *Earl* they involve a consideration of the purported cancellation of the employer's policy or whether the employer had been an exempt employer under section 155AA of the 1987 Act, and then subsequently when his wages increased beyond \$7,500, failed to take out a statutory policy.
14. However, while the facts differ, Roche DP stated:

"[42] The Commission's jurisdiction to hear disputes of this kind is found in s 145(3) of the 1987 Act, which provides that a person on whom a notice is served under s 145(1) may, within a set time, apply to it 'for a determination as to the person's liability in respect of the payment concerned'. The reference to "the payment concerned" is a reference to compensation payments made by the Nominal Insurer to the worker.

[43] The Commission may hear such applications and make such determination and such awards or orders as to the payment of compensation under the 1987 Act to, or in respect of, the injured worker concerned as it thinks fit (s 145(4)). The power extends to the making of orders against either an employer or insurer (*GRE Workers Compensation Insurance (NSW) Ltd v Nohil Pty Ltd* (1996) 13 NSWCCR 74)."
15. *Kula Systems Pty Ltd v Workers Compensation Nominal Insurer*² the President, His Honour Judge Keating found:

"[193] A certificate issued under s 145(5) of the 1987 Act is evidence of the matters stated in it. However, it is not conclusive evidence and is open to an employer to prove that at the relevant time it was not liable to pay compensation to the injured worker. It follows that the certificate is prima facie evidence that the appellant was liable for payments made by the Nominal Insurer to the worker in the sum of \$225,000, unless proven otherwise.

¹ [2012] NSWCCPD 61, *Earl*

² [2018] NSWCCPD 10, *Kula*

[194] Having correctly dealt with the question of onus, the Arbitrator drew an inference on the available evidence that the appellant, at the relevant time, did not have reasonable grounds for believing that the total amount of wages that would have been payable to the worker during the financial year would not exceed the exemption limit...”

16. In *Kula* the facts differ to Mr Heiniger’s case, but the decision demonstrates how the issue of whether an employer is an “exempt employer” under section 155AA of the 1987 Act is determined. In *Kula*, as in Mr Heiniger’s case, the Workers Compensation Nominal Insurer made payments to the worker and then issued a Notice under section 145(1) of the 1987 Act seeking reimbursement of the payments from the uninsured employer. In *Kula* the Arbitrator, as part of the process in determining the employer’s liability under section 145 to make reimbursement to the Workers Compensation Nominal Insurer, heard arguments and determined the issue of whether the employer was an exempt employer.³
17. Mr Heiniger in his Application seeks for the Commission to determine the issue of “exempt employer”. However, unlike Mr Kula and Mr Earl, Mr Heiniger is out of time to invoke the jurisdiction of the Commission under section 145(3) of the 1987 Act because he has filed his Application many months after the Notice dated 7 March 2019 was served.
18. Section 145(3) of the 1987 Act does not contain any discretion to permit the Commission to extend time beyond the 28 days specified in the Notice. Therefore, I find that Mr Heiniger’s Application cannot proceed and should be dismissed.

³ It is noted that subsequently the matter was referred to a different Arbitrator to determine the remaining issues in *Kula Systems Pty Ltd v Workers Compensation Nominal Insurer* [2019] NSWCC129, and on appeal in *Workers Compensation Nominal Insurer v Kula Systems Pty Ltd* [2019] NSWCCPD 67.