CITATION: TAAL JOHANNSEN V BUSLINK VIVO PTY LTD [2018] NTLC023

PARTIES:	TAAL JOHANNSEN
	V
	BUSLINK VIVO PTY LTD
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	WORK HEALTH
FILE NO(S):	21817717
DELIVERED ON:	20 SEPTEMBER 2018
DELIVERED AT:	DARWIN
HEARING DATE(S):	24 MAY, 13 JUNE AND 23 JULY 2018
JUDGMENT OF:	JUDGE NEILL

CATCHWORDS:

Joinder of the Work Health Authority before the Work Health Court in proceedings involving Subdivision C of Part 5 of the Return To Work Act; procedure for making an application pursuant to section 72A of that Act.

Return To Work Act

Work Health Administration Act

Work Health Court Rules

Taylor Enterprises v Pointon & Work Health Authority [2009] NTMC 029

Consolidated Press Holdings Limited v Wheeler (1992) 84 NTR 42

Mays v Rose et al Superior Court of Chancery (1884) 703

REPRESENTATION:

Counsel:

Worker:	Matthew Littlejohn
Employer:	Tom Anderson
Work Health Authority:	Duncan McConnel

Solicitors:

Worker:	Maurice Blackburn
Employer:	Minter Ellison
Work Health Authority:	Solicitor for the Northern Territory

Judgment category classification:	A
Judgment ID number:	023
Number of paragraphs:	54

IN THE WORK HEALTH COURT

AT DARWIN IN THE NORTHERN

TERRITORY OF AUSTRALIA

No. 21817717

BETWEEN

TAAL JOHNANNSEN
Worker

AND

BUSLINK VIVO PTY LTD
Employer

REASONS FOR DECISION

(Delivered 20th September 2018)

JUDGE NEILL

BACKGROUND

1. Mr Taal Johanssen ("the Worker") at all material times was employed by Buslink VIVO Pty Ltd ("the Employer") as a bus driver.

2. On a date unspecified in documentation filed with the Work Health Court the Worker was involved in a motor vehicle accident while he was driving a bus in the course of his employment with the Employer ("the accident").

3. As a result of the accident the Worker sustained relatively minor physical injuries. However, three people in the other vehicle involved in the accident died. The Worker suffered a psychological injury as a consequence of these events ("the injury").

4. The Worker made a claim in respect of the injury under the *Return to Work Act* ("the Act") and his claim was accepted by the Employer's Work Health insurer ("the insurer").

PERCENTAGE PERMANENT IMPAIRMENT

A – Overview

5. Where a claim is accepted an injured worker may be entitled to a number of different types of compensation under the Act. The most common types of compensation are payment or reimbursement of various medical expenses, and also payment of weekly benefits while the worker continues to be wholly or partially incapacitated for work.

6. A less common entitlement to compensation arises where the injured worker does not fully recover from the effects of the injury. In such a case the worker may be entitled to be paid a lump sum of money calculated on the basis of the relevant percentage permanent impairment of the whole person arising from the injury.

7. Sections 70 to 72A inclusive of the Act are set out in Subdivision C of Part 5 of the Act. These sections deal with how a percentage permanent impairment is to be assessed. They deal with any challenge to the validity of such an assessment by empowering the Work Health Authority to rule on this question. They allow for a review of an unchallenged assessment by a panel of three medical specialists to be appointed and organised by the Work Health Authority. They prescribe time limits for paying an assessed lump sum.

8. Where an employer does not pay the assessed lump sum within the prescribed time then section 72A of the Act provides a system of enforcement of payment. That involves approaching the registry of the Work Health Court for a certificate of the amount payable and then registering that certificate with the Local Court. The Local Court's usual enforcement processes are then available.

B – The History in this Matter

9. On or about 16 August 2017 the Worker was assessed by psychiatrist Dr Eric De Leacy at the request of the Worker's lawyers. Dr De Leacy provided a report dated 16 August 2017 ("the first report") in which he assessed that the Worker as a consequence of the injury had sustained a 25% permanent impairment of the whole person ("the assessment") calculated in accordance with the 4th Edition of the American Medical Association Guides ("the prescribed Guides").

10. The Worker's lawyers served a copy of the first report on the insurer by email dated 28 August 2017.

11. The insurer sent a copy of the first report to NT WorkSafe by email dated 4 September 2017, one week after receiving it from the Worker's lawyers. In that email the insurer advised NT WorkSafe that it disagreed with the assessment. The reason provided for the disagreement was that the Worker's injury had not yet stabilised as at the date of the assessment.

12. Mr Geoff Anstess of NT WorkSafe wrote to the insurer by letter dated 5 September 2017 and advised that NT WorkSafe was not satisfied the assessment had been conducted in accordance with the prescribed Guides. He stated this was because Dr De Leacy did not state or otherwise indicate that the Worker's condition had stabilised as at the date of the assessment. The insurer forwarded a copy of this letter to the Worker's lawyers on 24 November 2017, three months after the Worker's lawyers had served the first report.

13. The Worker by his lawyers then sought a further report from Dr De Leacy to consider the question whether the Worker's condition had stabilised as at 17 August 2017, the date of the assessment. Dr De Leacy provided a report dated 6 December 2017 in which he stated unequivocally that as at 16 August 2017 the Worker had *"reached maximum medical improvement"* and *"at 16 August I did not consider that his symptoms would substantially change in the next year"* ("the second report").

14. The Worker's lawyers served a copy of the second report on the insurer's lawyers by a hand-delivered letter dated 22 December 2017.

15. The insurer did not provide a copy of the second report to NT WorkSafe until the 22nd of March 2018, three months after the second report had been served on the insurer's lawyers. The insurer asked NT WorkSafe in its accompanying email of that date whether the second report *"satisfies the legislative requirements"*.

16. By email dated 26 March 2018 an officer of NT WorkSafe advised the insurer that if a permanent impairment *"reassessment request was rejected a supplementary report would not be sufficient. We would need a full new report to be submitted"*. However, by email dated 8 May 2018 Mr Geoff Anstess of NT WorkSafe told the insurer's lawyers that a full, new report might not always be required – that could depend on when the supplementary report was supplied, whether it was consistent with the first report, and any relevant history between the first report and the supplementary report. Mr Anstess went on to express his opinion that in the case of this Worker, too much time had elapsed between the two reports and Dr De Leacy would need to reassess the Worker.

17. By letter dated 12 April 2018, the insurer's lawyers informed the Worker's lawyers that NT WorkSafe had advised the second report was not sufficient and the Worker would have to be reassessed by Dr De Leacy and a third report assessing the Worker's percentage permanent impairment of the whole person would need to be provided. The insurer's lawyers did not communicate further after receipt of Mr Anstess's email of 8 May 2018.

18. The Worker's lawyers did not seek any third report from Dr De Leacy. Rather, they commenced enforcement proceedings against the Employer by initiating Application filed on 17 April 2018. They did not first seek a mediation of the dispute with the Employer or its insurer.

19. The initiating Application stated on its face that the Worker sought *"Enforcement of entitlement to compensation pursuant to section 72A of the Return to Work Act"*. This initiating Application was made inter partes rather than ex parte, and was

accompanied by the affidavit of lawyer Elizabeth Utting made 18 April 2018. Ms Utting is employed by the Worker's lawyers.

20. The Worker's lawyers then filed an interlocutory application on 30 April 2018 seeking section 109 interest on the lump sum sought by the Worker for his percentage permanent impairment of the whole person. This interlocutory application was not accompanied by any affidavit.

21. The Worker next by letter dated 10 May 2018 wrote to the Work Health Court enclosing copies of the first and second reports and filing written submissions dated 9 May 2018 by Mr Matthew Littlejohn of counsel.

22. The Employer filed an affidavit of lawyer Ms Jordan Wunsch made 9 May 2018 under cover of a letter dated 11 May 2018 from Minter Ellison, the lawyers for the Employer and insurer. That letter stated that the Employer opposed the Worker's request for a certificate to be issued pursuant to section 72A of the Act. The Employer filed its Appearance in the proceeding only on 22 May 2018.

23. The matter became further procedurally complicated when the Worker filed a second initiating Application against the Employer, this time dated 11 May 2018. This Application set out detailed orders sought by the Worker in relation to the history of the Worker's assessment for a percentage permanent impairment of the whole person. The proceeding commenced by this second initiating Application was given the claim number 21821873 ("the second proceeding").

24. In the second proceeding the Worker filed an Index of Documents and also an interlocutory application which was set out almost in the form of pleadings, or perhaps written submissions, but which in essence was seeking to join the Work Health Authority as a Second Respondent to the second proceeding.

25. The Worker then filed an affidavit of lawyer Elizabeth Utting made 15 May 2018, in the second proceeding.

26. The Employer on 23 May 2018 in the second proceeding filed its Appearance and its Index of Documents.

27. The Worker's interlocutory application in the second proceeding seeking to join the Work Health Authority as a Second Respondent was listed before me on 24 May 2018. On that date I made the following Orders:

    a. the Worker within seven (7) days file and serve on the Employer and on the Work Health Authority written submissions as to:

        i. the power of the Work Health Court to join the Work Health Authority as a party to this proceeding; and

        ii. whether the Work Health Authority should be joined.

    b. The Employer within fourteen (14) days file and serve any written submissions it wants to make on the same issues.

    c. The Work Health Authority within fourteen (14) days file and serve its written submissions on the same issues.

    d. Adjourned before Judge Neill for any further submissions and Decision and Directions, on Wednesday 13 June 2018 at 9:00am.

28. On 13 June 2018 the parties appeared before me and made further oral submissions in addition to their written submissions. I reserved my Decision as to the jurisdiction of the Work Health Court to join the Work Health Authority, and if any such power existed, whether I should exercise my discretion to do so, until 23 July 2018 at 9:00am. I consolidated both proceedings which were now to proceed as Claim Number 21817717. I adjourned further Directions in the consolidated proceeding also to 23 July 2018 at 9:00am.

29. I set out below my Decision and Orders in relation to the joinder of the Work Health Authority. I also set out below my observations as to the procedure required in commencing proceedings and raising the sorts of questions raised in this consolidated proceeding.

C – Joinder of the Work Health Authority

30. In *Taylor Enterprises v Pointon & Work Health Authority* [2009] NTMC 029 (“*Pointon*”) Magistrate Dr John Lowndes (as he then was) considered whether the Work Health Court has jurisdiction to rule on the validity of the administrative process commenced by a worker provided for in Subdivision C of Part 5 pursuant to Sections 71 and 72 of the Act. He concluded that the Work Health Court does have such jurisdiction – see paragraphs 42 and 43 of that Decision.

31. Dr Lowndes did not however consider whether the Work Health Authority was properly a party to the proceeding before him, or could be made a party to that proceeding. The proceeding was commenced with the Work Health Authority already included as a party and it does not appear from the Reasons for Decision in *Pointon* that the question was argued or even raised.

32. It is trite law that the Act and the *Work Health Administration Act* together establish a complete code in respect of the jurisdiction of the Work Health Court. The Court has no inherent jurisdiction, although it does of course have an implied jurisdiction – see *Consolidated Press Holdings Limited v Wheeler* (1992) 84 NTR 42 per Mildren J at paragraph 13.

33. The Act in three places specifically provides for the involvement of a party other than the worker and the employer. These are first, subsection 55(3) which allows a current employer to apply to join a previous employer where the injury is a disease and the disease may have been contracted in a previous employment.

34. Second, pursuant to subsection 126A(2)(b)(ii) a current insurer may commence proceedings against a previous insurer of the same employer, or apply to join it in an existing proceeding between the Worker and Employer, where the current insurer believes the injury may have arisen during the period when the previous insurer covered the employer.

35. Third, pursuant to section 167 a Worker may make a claim against the Nominal Insurer in the circumstances prescribed in that section. That can involve

commencing proceedings against the Nominal Insurer only; or in proceedings already commenced against an Employer that can involve proceeding as if the Nominal Insurer were the named employer; or by substituting the Nominal Insurer for the named Employer; or by joining the Nominal Insurer as a party in addition to the Employer. The precise procedure is not prescribed but whichever method is adopted, the Nominal Insurer can become a party to the proceeding.

36. There are no other specific provisions in the Act or in the *Work Health Administration Act* for the addition or involvement of any other category of party in a proceeding.

37. The *Work Health Administration Act* establishes the Work Health Authority and sets out its functions, specifically including in subsection 5(1)(h) "*the functions conferred on it under the Return to Work Act*".

38. Section 6 of the *Return to Work Act* identifies the Work Health Authority's functions and powers under the Act. I am satisfied that these are limited to an overview of the operation of the Act and to administrative functions involving the Act. Specifically, I am satisfied and I rule that the Work Health Authority has no function and no role to play under Part 5 of the Act, which relates to payment of compensation, other than as specified in section 72 of the Act.

39. The *Work Health Court Rules* ("the Rules") in Rule 4.04(e) prescribe the manner of service of a document on the Work Health Authority. This is relevant for the purposes of the functions of the Work Health Authority set out in section 72 of the Act, and also in the case of any application by or involving the Work Health Authority under section 111 in Division 3 of Part 6A of the Act.

40. The Rules otherwise go on in Rule 11 to provide for the joinder of a party. The Rules specifically identify joinders of a prior employer, and of a previous insurer, and then go on in subrule 11.01(1)(c) to provide for a third category, namely "*a party proposing to join another person as a party*". Counsel for the Worker submitted that this subrule provides sufficient general jurisdiction for the joinder of the Work Health Authority as a party. I do not accept this submission in respect of

Part 5 of the Act, although it might be correct in respect of an application pursuant to section 111 in Division 3 of Part 6A of the Act.

41. Rules of Court cannot and do not create powers and jurisdiction beyond that established by the Act or Acts under which the Rules are made. If there is no jurisdiction in the Act or in the *Work Health Administration Act* sufficient to permit joining the Work Health Authority as a party in respect of Part 5 of the Act, then such jurisdiction cannot be created by the Rules – "t*he stream cannot rise higher than the source whence it flows*" – *Mays v Rose et al*. Superior Court of Chancery (1844) 703 at 716.6.

42. The Work Health Authority has no exposure in any process under Subdivision C of Part 5 of the Act. It does not pay for any initial assessment. It does not pay for the costs involved in a review by three medical specialists – those expenses are spread among all the insurers operating in the Northern Territory Work Health system.

43. I am satisfied and I rule that the Work Health Court does not have jurisdiction either to entertain an initiating Application against the Work Health Authority or to join the Work Health Authority as a party to existing proceedings where the issue comes under Part 5 of the Act, including in sections 70 to 72A inclusive in Subdivision C of Part 5 of the Act.

44. The Work Health Court might have such jurisdiction in respect of an application under section 111 in Division 3 of Part 6A of the Act, however I am not required to rule on that.

D – Procedural Issues Generally

45. The Worker in this matter wished to take advantage of subsection 72A(2) of the Act which requires the registrar of the Work Health Court to issue a certificate certifying the amount of the compensation payable by way of a percentage permanent impairment of the whole person. The registrar is required to do this "*on application by or on behalf of the worker or his or her employer*". The form of any such application is not specified in the subsection or elsewhere in the Act.

46. The Act refers to "*apply*" or "*application*" in a number of places – these include the three places already identified in relation to joinder, and also in subsection 104(2) and in section 111 of the Act. Once again, the Act is silent on the precise form of any such application.

47. The Rules fill this gap. Part 5 of the Rules provides for the manner of any initiating Application to the Work Health Court. That initiating Application is not intended to be used as a pleading. It is not intended to set out the orders the filing party is seeking. It is intended solely to institute a proceeding before the Court within which orders might be sought and/or pleadings might be filed. The prescribed initiating Application form requires the filing party merely to specify the section or sections of the Act to which the initiating Application relates – see subrule 5.02(1)(a).

48. Any more detailed application if required should be made by way of interlocutory application filed concurrently with, or shortly after, the initiating Application. Interlocutory applications are provided for specifically in Part 6 of the Rules.

49. In the present case, the Worker was required to file an initiating Application specifying subsection 72A(2) of the Act as the section to which the initiating Application related. He should concurrently have filed an interlocutory application seeking the order that the registrar issue the required certificate. There should have been an accompanying affidavit establishing:

    a. that there was an accepted Work Health Claim;

    b. that a permanent impairment assessment has been carried out by a medical practitioner in respect of the accepted injury, and not in respect of any additional or different injury, and annexing copies of the original claim and acceptance documents as evidence of the ambit of the accepted injury;

    c. the calculation of the amount of compensation payable in accordance with that assessment; and

    d. annexing a copy of the assessment.

50. This initiating Application and interlocutory application in ordinary circumstances would be made *ex parte*, because other than the bare fact of non-payment there would be no dispute between the Worker and the Employer concerning the assessment. For the same reason, there would be no need first to seek a mediation under Part 6A of the Act.

51. In the present matter it would not have been appropriate, or useful, to proceed *ex parte*. This is because the Worker was on notice of a dispute between him and the Employer concerning the assessment. If the Worker had proceeded *ex parte* in the suggested manner and if a certificate had been issued and subsequently been registered with the Local Court in accordance with subsection 72A(3) of the Act then the Employer upon becoming aware of this could have sought a stay – see paragraph 31 in *Pointon*.

52. In this matter, because of the existence of this dispute there should have been a mediation between the parties before any proceedings were commenced – see subsections 103B(c) and 103J(1) of the Act.

THE OUTCOME

53. On 23 July 2018 I made the following Orders:

    a. A ruling that the Work Health Court does not have jurisdiction to join the Work Health Authority as a party to a proceeding which relates to Part 5 of the *Return to Work Act*.

    b. The Worker's interlocutory application dated 11 May 2018 is dismissed.

    c. The question of the jurisdiction of the Work Health Court in respect of Part 5 of the Act is adjourned before Judge Neill for oral submissions on 20 August 2018 at 2:00pm.

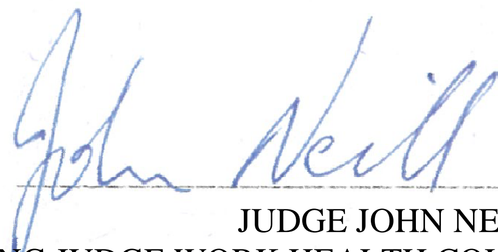
    d. The Employer is to file and serve any application for any extension of time and written submissions in support of that by close of business 13 August 2018.

e. The Worker pay the costs of NT WorkSafe occasioned by the application to join it in the proceedings, fixed at the lump sum in the Supreme Court scale for a contested interlocutory application and certified fit for senior/junior counsel fixed at the approved rate for such counsel for one day's work.

f. The costs of the Worker and the Employer to date are to be costs in the cause, certified fit for counsel.

54. The parties resolved the remaining issues between them shortly before 20 August 2018 and a Notice of Discontinuance was filed on 17 August 2018. Accordingly I am no longer required further to consider or rule upon the questions of: i) whether the second report cured the defect in the first report and the two reports together constituted a valid assessment; ii) whether the requests by the insurer/Employer to NT WorkSafe complied with the time requirements of Subdivision C of Part 5 of the Act; and iii) if not, whether an extension of time can be granted in respect of the times prescribed in Subdivision C of Part 5 of the Act, and if so, whether it should be granted in this matter.

Dated this 20th day of September 2018



JUDGE JOHN NEILL
MANAGING JUDGE WORK HEALTH COURT