

(tho94001)

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 44/90

BETWEEN:

ALBERT JAGAMARA WILSON
Plaintiff

AND:

UNION INSURANCE COMPANY
Defendant

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 2 February 1994)

The plaintiff, Albert Jagamara Wilson, claims that he sustained serious injury in a motor-car accident in the course of his employment on 29 October 1988.

The application before the court is by the plaintiff seeking a declaration that the defendant is liable to provide to and for the plaintiff compensation and rehabilitation in accordance with Division 3 and 4 of Part V of the *Work Health Act*.

The essential argument relates to the interpretation of section 87 (s87) of the *Work Health Act* which at the relevant date stated:

"87. FAILURE TO DECIDE WITHIN SPECIFIED PERIOD

Where within the time specified in section 85(1) an employer does not dispute liability for compensation claimed, he shall, subject to section 85, be deemed to have accepted it."

Mr Wilson's case is that he completed a claim form in August 1989. The claim form was posted to the Yuendumu Community Council Incorporated. Mr Wilson heard nothing about it, there

was no dispute of liability subsequent to the claim form and he received no compensation. The plaintiff's case is that the employer's liability was deemed to have existed by virtue of the application of s87. Consequently, a claim was then made to the employer's insurer, being the present defendant, the Union Insurance Company pursuant to s132 of the *Work Health Act* which states:

"132. RECOVERY OF COMPENSATION FROM INSURER

- (1) Where -
 - (a) a claim has been made against an employer that the employer is liable to pay compensation;
 - (b) in relation to the claim, the employer has agreed to pay compensation or the liability of the employer to pay compensation has been established in accordance with this Act;
 - (c) the employer is entitled to be indemnified against his liability to pay the compensation under a policy of insurance or indemnity obtained in accordance with this Act; and
 - (d) the employer defaults in payment of an amount of the compensation for a period exceeding one month,

the person entitled to the compensation may make a claim against the approved insurer of the employer for payment of the amounts of compensation payable and to become payable.

(2) A claim under subsection (1) shall be made within one month after the right to make the claim arose or within such further time as the Court, on an application made before or after the expiration of that period of one month, allows.

(3) The Court may allow such further time for the making of a claim under subsection (1) as it thinks fit and the claim may be made accordingly.

(4) An approved insurer shall, in writing to an employer who has defaulted in payment of the compensation, give notice of the making of a claim under subsection (1).

It is relevant to set out the following provisions of the *Work Health Act* and *Interpretation Act*:

A claim form and medical certificate must be "given to or served on the employer":

"82. FORM OF CLAIM

- (1) A claim for compensation shall -
 - (a) be in the prescribed form;
 - (b) unless it is a claim for compensation under section 62, 63 or 73, be accompanied by a prescribed certificate from a medical practitioner or other prescribed person; and
 - (c) subject to section 84(3), be given to or served on the employer."

The claim may be given or served personally or posted to the employer at the usual or last known place of residence or business:

"83. SERVICE OF CLAIM

- (1) A claim for compensation may be given or served on an employer by -
 - (a) giving it to or serving it personally on the employer; or
 - (b) placing it in a properly addressed envelope and leaving it with a person who has apparently attained the age of 16 years at, or sending it by pre-paid post to the employer at, the employer's usual or last known place of residence or business."

and s25 *Interpretation Act*:

"25. SERVICE BY POST

Where an Act authorizes or requires a document, parcel or other thing to be served by post, whether the expression "serve" or "give" or "send" or any other expression is used, service shall be deemed to be effected by properly addressing and posting it by prepaid post, and service is deemed to have been effected at the time at which the package would be delivered in the ordinary course of post."

The employer must forward the claim and a copy to the insurer:

"84. EMPLOYER TO FORWARD INCIDENT REPORT AND CLAIM

(1) An employer shall, immediately on receiving a claim for compensation, complete the employer's report section of the prescribed form of claim and, within 3 working days after receiving the claim -

- (a) where the employer is a self-insurer or is uninsured - forward a copy of the claim to the Authority;
- (b) in all other cases - forward the claim, and a copy, to his insurer; and
- (c) in all cases - retain a copy of the claim for his own records."

The employer must within 7 days of receipt of claim accept or dispute liability:

"85. DECISION AS TO ELIGIBILITY FOR COMPENSATION

(1) An employer shall, within 7 working days after receiving a claim for compensation -

- (a) accept liability for the compensation;
- (b) accept liability for the compensation subject to the condition that the claimant will, within a specified time, provide such further information relating to the claim as the employer requires;
- (c) require further medical information to be provided; or
- (d) dispute liability for the compensation."

Where the employer disputes liability he must advise the worker immediately:

"85. DECISION AS TO ELIGIBILITY FOR COMPENSATION

(9) Where an employer disputes liability for compensation claimed, he shall immediately advise the

claimant, in writing, of that fact and the reasons for his decision.

(10) At the same time as he advises a claimant of a fact referred to in this section the employer shall give to the claimant a statement, in the prescribed form, indicating that the claimant has a right to commence proceedings before the Court for the recovery of compensation to which he is entitled."

If the employer does not dispute liability within 7 days of receipt of claim he is deemed to have accepted liability (s87).

Section 85(2)(a) states:

"85. DECISION AS TO ELIGIBILITY FOR COMPENSATION

(2) Where an employer accepts liability for compensation claimed, he shall immediately advise the claimant in writing of that fact and -

- (a) in the case of a claim for weekly payments - commence those payments within 10 working days after the receipt of the claim;"

Section 88(1) states:

"88. WEEKLY PAYMENTS

(1) Unless otherwise agreed in writing by the worker, a weekly payment shall be made to the worker before the expiration of 7 days after the end of the week in respect of which it is payable or, where the worker is normally paid at intervals greater than one week, before the expiration of 7 days after the end of the period in respect of which he is normally paid.

Penalty: In the case of a body corporate - \$10,000.

In the case of a natural person - \$2,000.

Default penalty: In the case of a body corporate - \$500.

In the case of a natural person - \$100."

The employer has defaulted in payment of compensation for a period exceeding one month.

By order made on 12 January 1990, the Work Health Court allowed, until 26 January 1990, for a claim to be made against the approved insurer of the employer pursuant to s132 of the Act.

By letter dated 22 January 1990 the plaintiff made a claim against the defendant for payment of the amounts of compensation payable and to become payable.

The defendant has failed to pay the compensation payable at the date of the claim and to become payable.

The plaintiff claims against the defendant the amounts of compensation payable and to become payable in accordance with the *Work Health Act*, costs, interest and stamp duty.

The effect of s87 is that if the employer does not do anything, or in particular, if the employer does not dispute liability, then the employer is deemed to have accepted it. This puts a very heavy onus on the employer to make sure the claim gets processed very quickly after it is received. The period allowed is 7 days.

The first issue in this case is, did the employer/defendant receive the plaintiff's claim for compensation dated 3 August 1989? It is the submission of the defendant that the plaintiff has not established that Yuendumu Community Council Incorporated received the August 1989 claim for compensation. Copy of the claim for compensation is dated 3 August 1989 (exhibit P1 page 5). The defendant argues that not only has the plaintiff failed to prove, on the balance of probabilities, that the Yuendumu Community Council Incorporated received the claim, they have not proved, on the balance of probabilities, that the claim form was correctly served on the Yuendumu Community Council Incorporated.

The Yuendumu Community Council Incorporated is an incorporated body (exhibit P1 page 12) governed by the *Associations Incorporation Act*. S24(1) of the *Associations Incorporation Act* states:

"24. SERVICE ON ASSOCIATIONS AND NOTICES AND DEMANDS
BY ASSOCIATIONS

(1) A notice, demand, summons, writ or other document or process may be served on an incorporated association by serving it personally on the public officer of the association or by sending it by post to him at his last-known address."

Under the provision of the *Associations Incorporation Act* the public officer has a number of important duties including being one person in the Association who is constantly available and identifiable. Exhibit D6, being the certificate from the Registrar of Companies, indicates that at the relevant time in August 1989 Mr John Stewart was the public officer of the Yuendumu Community Council Incorporated.

I agree with the submission of counsel for the defendant that s87 of the *Work Health Act* provides for very severe consequences and that, accordingly, service of the claim should in these circumstances have been on the public officer. In this particular instance the letter and envelope containing the claim were addressed to Mr Christopher Raynal, Administrator CMB Yuendumu Community Council Incorporated. Mr Raynal had in fact left the employ of the Yuendumu Community Council Incorporated in August 1989 and he had never been the public officer. Inadequate service could be cured by evidence of the receipt of the document and I now proceed to make findings in respect of the evidence given on that aspect.

I accept the evidence of Mr James Stuart Brown that he took instructions from Mr Albert Wilson at the Hetty Perkins Nursing Home in Alice Springs. I accept his evidence that on 3 August 1989 he completed a worker's compensation claim form which was signed by Mr Wilson. On 11 August 1989 he wrote a letter to Mr Christopher Raynal, Administrator, CMB Yuendumu Community Council Inc, Via Alice Springs NT 0872. This letter (exhibit P1 page 8) enclosed the worker's compensation claim form dated 3 August 1989 together with a medical certificate dated 8 August 1989. Copies of the claim form and medical certificate are exhibit P1 pages

5 and 7. I find that the letter with the enclosures was entered in the CAALAS mail-out book on 16 August 1989 and taken to the Alice Springs Post Office. Neither Mr Brown or Mr Wilson received any reply to that letter and claim form and no compensation was received by Mr Wilson. I accept the evidence that Yuendumu is a small community and that Mr Brown had previously corresponded frequently with Mr Raynal and received replies from Mr Raynal to letters addressed to him in the same manner as this particular letter. I accept the evidence of Mr Wilson that after signing a claim form in August 1989, he never received a letter from the Union Insurance Company advising that liability was disputed and he has not received any worker's compensation. Mr Christopher Raynal gave evidence that he was appointed the Administrator of the Yuendumu Community Council Incorporated in May 1988. I accept the evidence of Mr Raynal in preference to the evidence of Mr Wilson relating to the completion by Mr Raynal on behalf of Mr Wilson of a worker's compensation claim form to the Union Insurance Company. Copy of this claim is exhibit D2 signed by Christopher Raynal on behalf of Albert Wilson and dated 28 November 1988. I accept the evidence given by Mr Raynal that in due course he received notification from the Union Insurance Company dated 9 December 1988. A copy of this notification (exhibit D7) states that liability has been denied by the Union Insurance Company Limited. It is stamped as being received by the Yuendumu Community Council Incorporated on 13 December 1988. At the end of July 1989 Mr Raynal left the Yuendumu Community Council Incorporated and returned to his home in Tasmania. I accept his evidence that he arranged with the Alice Springs Post Office that any mail addressed to him be redirected to his new address. I find Mr Raynal advised people who normally wrote to him direct to Yuendumu to write to him at his new address. I accept that Mr Raynal never received the letter from Mr Brown dated 11 August 1989 (Exhibit P1 page 8). I found Mr Raynal to be a credible witness and accept the evidence he gave.

Mr Dennis Williams gave evidence that he is the assistant administration officer at the Yuendumu Community Council Incorporated. Following the departure of Mr Raynal and at the

relevant time in August 1989, Mr Williams was in charge of the office and remained in charge until the appointment of another Administrator. I accept Mr Williams' evidence as to the system at that time in respect of mail addressed to Yuendumu Community Council Incorporated. I find that in August 1989 Mr Williams travelled each Tuesday and Thursday to the airstrip at Yuendumu to collect the mail bags. The mail bags were then taken to the post office and employees sorted the mail. Any mail addressed to individual people was placed in private boxes. Mr Williams then collected mail addressed to Yuendumu Community Council Incorporated and took this mail back to the office of the Council. He opened the mail and placed some mail onto the appropriate files. Letters that needed to go to the next Council meeting would be placed on a separate file for the next scheduled meeting of the Council. With regard to any important letters that needed immediate attention, Mr Williams would seek assistance from a person in Essential Services or with Local Government. Mr Williams was aware of a claim form for worker's compensation signed by Mr Raynal on behalf of Mr Wilson on 28 November 1988 with regard to the motor-vehicle accident suffered by Mr Wilson on 29 October 1988. Mr Williams confirmed that also on the same file was a claim form dated 17 May 1993 and a medical certificate dated 11 May 1993 in respect of the accident that occurred on 29 October 1988. He stated there was a letter on file dated 19 January 1989 from the Aboriginal Legal Rights Movement received by the Yuendumu Community Council Incorporated on 24 January 1989. Mr Williams gave evidence that he did not receive any claim form dated 3 August 1989 or medical certificate dated 8 August 1989 or letter dated 11 August 1989 from CAALAS. Mr Williams stated he has looked for those forms and letters but has not been able to find them. Mr Williams agreed that after Mr Raynal left, files at the office were a bit mixed up and there were some letters that had not been put on the right file. I accept as true and correct the evidence given by Mr Williams. Evidence was given by Mr John Ross Haywood, who is a loss adjuster, that on 25 January 1990 he was instructed by Mr Dennis James, of the Union Insurance Company, to take some steps to attempt to locate a claim form in relation to Mr Albert Wilson at Yuendumu community. This was a worker's compensation claim

form forwarded to the Yuendumu Community Council Incorporated in August 1989. Mr Haywood went to Yuendumu Community Council Incorporated. Mr Haywood, in company with Mr Barry Graham, searched the office of the Yuendumu Community Council Incorporated. The office was fairly untidy with papers and files everywhere. Mr Haywood said he searched every file, every piece of paper, every drawer, every cubby hole in the office looking for the claim form. He did locate one file relating to Mr Wilson. The claim form was not on this file and there were no other files relating to Mr Wilson. There did not appear to be any entries on the file after the middle of July 1989. Mr Haywood found records that indicated the Administrator had left the Council in July 1989. Having searched the Council office Mr Haywood went to the Yuendumu post office with Mr Edmonds, the book-keeper of the Yuendumu Community Council Incorporated. As a result of enquiries at the post office they found one letter in Mr Wilson's post office box addressed to Mr Wilson. Mr Haywood telephoned a Mr Zweck who was one of the accountants for the Yuendumu Community Council Incorporated. He also spoke to a Sharon Taylor of the Office of Community Affairs. None of the persons with whom he made inquiries had any knowledge of the claim form. Mr Haywood was not able to locate the worker's compensation claim form concerning Mr Wilson dated 3 August 1989. Neither was he able to find any correspondence relating to the worker's compensation claim form dated 3 August 1989.

I accept the evidence given by Mr Haywood. I find that Mr Haywood knew exactly what the worker's compensation claim form looked like and did make extensive enquiries and a thorough search of the office of the Yuendumu Community Council Incorporated but was unable to find the worker's compensation claim form dated 3 August 1989 in respect of Mr Albert Wilson or any associated correspondence.

Counsel for the plaintiff argues that there is a strong probability that the letter from CAALAS dated 11 August 1989 with the enclosures was received at the Yuendumu Community Council Incorporated and is on file 8-1-3. This file did exist but was never produced and was not located by Mr Haywood.

It is the submission of Mr Hiley QC, counsel for the plaintiff, that the letter from CAALAS dated 11 August 1989 with enclosures relating to Mr Wilson was forwarded to Yuendumu Community Council Incorporated by post to an address at which mail normally sent to that address is received. It is the plaintiff's argument that the envelope containing the claim form was properly addressed and correctly served. In accordance with the affidavit of Mr Gary Hill sworn 9 November 1993 (exhibit P2), the letter with claim form enclosed would, in the ordinary course of post, have been delivered to Yuendumu on 22 August 1989. (Pearce on Statutory Interpretation in Australia (3rd Edition) paragraph 6.31, *Australian Trade Commission v Solarex Pty Ltd* (1987) 78 ALR 439.

I accept the submission of counsel for the plaintiff that the effect of deeming provisions in legislation and contracts has been subject to some debate over the years. In some cases it has been held to create a conclusive presumption; in others it has been held to create (only) a rebuttable presumption. In order to determine the quality of the presumption which it does create, it is necessary to look at the purpose behind the deeming. Muller v Dalgety & Co Ltd (1909) 9 CLR 693 at 696 and 705; Ex parte Walton, in Re Levy (1881) 17 Ch D 746 at 756; Consolidated School District of St. Leon Village (No.1425) v Ronceray (1960) 23 DLR (2d) 32 at 35, 36 and 37; Hill v East and West India Dock Company (1884) 9 AC 448 at 455, 456 and 458; Hunter Douglas Australia Pty Ltd v Perma Blinds (1970) 122 CLR 49 at 67." Some of the cases have recently been reviewed by Von Doussa J in *Re Rustic Homes Pty Ltd* (1988) 13 ACLR 105.

In my opinion the deeming provision of s25 of the *Interpretation Act* is a rebuttable presumption (*Wilson v Union Insurance Ltd*, Martin J reasons for decision dated 21 December 1990 pages 26-28). The onus of rebutting the presumption lies on the person alleging non-delivery (*Re Ocean Distributors Pty Ltd* (1990) 2 ACSR 486. Pearce on Statutory Interpretation in Australia (3rd Ed) paragraph 4.28 and 4.29).

In this matter I have found the following facts:

The letter was incorrectly addressed in that a letter which had such important consequences should have been addressed to "the Public Officer" Yuendumu Community Council Incorporated as required by the *Associations Incorporation Act* (s24). Accordingly I am not prepared to make a finding that service of the claim is deemed to have been effected. Even if service had been properly effected I am not satisfied it was in fact delivered.

The letter was addressed to Mr Christopher Raynal, Administrator Yuendumu Community Council Inc, via Alice Springs. I accept that mail sent to that address is normally received by the Yuendumu Community Council Incorporated and that this letter would in the normal course of events have been received at the Yuendumu Community Council Incorporated by about 22 August 1989.

However, there were other events which could have affected the receipt of the letter. The Administrator, Mr Christopher Raynal, had left the Yuendumu Community Council Incorporated on 28 July 1989 a little over three weeks before the day the letter would normally be expected to be received. Mr Raynal had made arrangements with the Alice Springs Post Office for mail addressed to him to be forwarded to his new address. The arrangements for collection of mail at Yuendumu was that Mr Williams collected the mail bag from the plane each Tuesday and Thursday. Employees of Yuendumu Community Council Incorporated then placed some mail in private boxes and mail for the Yuendumu Community Council Incorporated was collected by Mr Williams and taken to the Council office to be sorted and filed. Both Mr Williams and Mr Raynal have given evidence, which I accept, that neither of them ever received the letter from CAALAS dated 11 August 1989 with a worker's compensation claim form and medical certificate relating to Mr Albert Wilson enclosed. Both Mr Williams and Mr Raynal were well aware of the appearance of a worker's compensation claim form. Mr Haywood has given credible evidence that enquiries conducted by him and a search of the office at the Yuendumu Community Council Incorporated in January 1990 failed to locate such a letter.

I have concluded that the defendant has satisfied the onus, on the balance of probabilities, and rebutted the presumption that the letter from CAALAS, dated 11 August 1989 with claim form enclosed, was ever delivered to or received by the Yuendumu Community Council Incorporated.

For these reasons the application sought by the plaintiff for a Declaration is refused.

The parties have leave to apply on the question of costs.