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COVERED CASES

Consent Orders – “Is a deal a deal?”

WORKCOVER V MATHIE

[2005] SA WCT 2 (FULL BENCH)

Issue

Whether the worker’s subsequent Claim for Compensation was competent in light of the terms of earlier consent orders.

Facts

The worker consented to orders in the Tribunal, which were signed and sealed by a Conciliation Officer on 7 February 2003. These orders resolved a number of disputes pending in the WCT relating to the rate of average weekly earnings and whether the worker had ceased to be incapacitated for work in consequence of his compensable disability pursuant to section 36. At conciliation the parties agreed to resolve the disputes by agreeing the worker’s rate of average weekly earnings, confirming the worker had suffered a compensable disability on or about 14 September 2001 and that the worker had suffered incapacity for work as a consequence thereof and was entitled to weekly payments from 24 October 2001 to 13 January 2003. The relevant date for the purpose of quantifying weekly payments was 24 October 2001 and importantly in the context of this case, the consent orders recorded “The worker ceased to be incapacitated as at 13/1/03 and has no

entitlement to income maintenance after that date.”

On 10 July 2003 the worker lodged a further Claim for Compensation seeking weekly payments of income maintenance, which claim was rejected by the Corporation on the basis of the terms of the consent orders. The dispute could not be resolved at conciliation and ultimately was heard by a Deputy President. The worker submitted that when he consented to the orders he was not incapacitated for work and that his condition had subsequently worsened resulting in a prescribed medical certificate being issued by Dr Tottman on 8 July 2003 certifying that he was incapacitated for work.

The Deputy President made a contrary finding upon hearing the evidence and concluded that at the relevant time the worker remained unwell and partially incapacitated for work contrary to the acknowledgment in the consent orders of 7 February 2003.

The Corporation submitted that the worker was bound by the terms of the consent orders and cannot pursue a further claim unless he could show an aggravation of his condition based upon the reasoning of the Tribunal in *Skinner v WorkCover JD 169/1998*.

The Deputy President concluded that the terms of the consent orders did not raise *res judicata* or issue estoppel and, that in the circumstances of this case; it was unconscionable for the Corporation to seek to deny the worker the opportunity of proving an entitlement under the Act. He further concluded that to the extent that the consent orders purported to deny the worker that right, the terms of the agreement reached between the worker and the Corporation infringed section 119 of the Act and to that extent, the agreement was of no effect. The

Corporation appealed the decision of the Deputy President to the Full Bench.

Decision

The following observations by the Full Bench are important to its conclusion:

- "... Parliament expected that a conciliation conducted under the Act might involve a consideration of and the resolution of issues that may extend beyond those raised by the disputed determination." The Full Bench considered that this was reflected by Parliament in section 92C(6), which provides that "The conciliator presiding at a conference may make a determination or order to give effect to a settlement reached at the conference."
- Referring to the Industrial Relations Court decision of *Lawrence v Brighton Day Surgery [2003] SAIRC 72* it approved the statement at par 26 that "...a consent order carries with it the same weight as an order made by an adjudicating authority after hearing the parties and their witnesses and publishing a written decision."
- "...The objects and scheme of the Act undoubtedly share the same legislative goal of comparable legislation in Western Australia of having disputes heard and determined as expeditiously as possible. In *Kuligowski v Metrobus [2004] HCA 34* at par 32, the High Court of Australia in commenting upon that legislation said that that goal 'Would not be assisted by a construction of the legislation, which prevented the doctrine of issue of estoppel from ever applying. That would increase the chance of double litigation and vexation of parties.' With respect, these observations are entirely apposite to orders or determinations made by the Tribunal under the Act."
- ". The objects and scheme of the Act reflect Parliament's contemplation that conciliation will be a robust process of give and take, that subject to them being

lawful and enforceable may include creative solutions, and that agreements reached through the process will be binding and enduring."

The Full Bench demonstrated the objects and scheme of the Act by reference to various provisions in section 92C and concluded that those provisions were entirely in keeping with the stated objects of the Act contained in section 2(1)(f) which were "to reduce litigation and adversarial contests to the greatest possible extent."

The Full Bench observed that had the case proceeded to a hearing there may have been evidence capable of supporting the worker's claim of continuing disability and incapacity, there may have been evidence capable of supporting a claim for weekly payments beyond 13 January 2003 and there may have been evidence supporting the Corporation's assessment of notional weekly earnings and its view that the worker's incapacity for work had long ceased. Accordingly it concluded that contrary to what was found by the Deputy President, the consent orders did not involve the waiver of rights that contravened section 119. The Tribunal observed "What they reflected was the give and take that conciliation necessarily envisages, namely the worker's preparedness to concede on some issues in order to secure the Corporation's concession on others."

It was concluded that the learned Deputy President erred in his approach and failed to accord the consent orders the legal weight that they merited and accordingly the decision of Deputy President could not stand.

For reasons peculiar to this case the Full Bench elected to remit the matter for rehearing before another Deputy President.

Note

This decision gives compensating authorities the reassurance that final or global settlements which include resolution of disputes pending in the WCT and which are expanded to include additional terms of settlement are binding, provided they

are “lawful and enforceable.” In that regard it is important to ensure that consent orders relate to issues which are properly before the Tribunal and, if there is any doubt, the issues should be expanded by consent pursuant to section 88DA of the Act – Rules 16(10) and 18(10) of the Workers Compensation Tribunal Rules where a Conciliation Officer or Arbitration Officer is involved.

Furthermore, consent orders should be limited to only those issues, including expanded issues, which are matters properly to be determined pursuant to the provisions of the Act by the compensating authority and/or the Tribunal.

WHAT ISSUES CAN BE ADDRESSED BY A COMPENSATING AUTHORITY DURING A HEARING?

[McKENNA V WORKCOVER](#)

[\[2004\] SAWCT 23 \(FULL BENCH\)](#)

Issue

Whether, having rejected the worker's claim on the basis that there was no relevant incapacity for work, it was open for the Corporation to later dispute the worker's claim on the ground that there was no relevant compensable disability.

Facts

By determination dated 15 March 2000 the Corporation rejected a Claim for Compensation made by the worker on the basis that the worker had not been incapacitated for work.

That determination was disputed not resolved at conciliation and listed for hearing before an Arbitration Officer. During the course of the hearing the Corporation put in issue between the parties whether the worker had sustained a compensable disability.

The Arbitration Officer appears to have accepted the worker sustained a

compensable disability but confirmed the Corporation's determination to reject the claim on the basis that the worker was at all relevant times not incapacitated for work.

The worker applied for a Judicial Determination from Arbitration. As part of the Agreed Statement of Issues signed by both parties it was stated that the Tribunal would be required to determine, inter alia, whether the worker suffered a compensable disability on or about 26 February 1999.

In a certificate of readiness for trial completed on 29 May 2003 the Corporation advised that it accepted the worker was incapacitated for work and accordingly the only issue to be determined was whether the worker suffered a compensable disability. The Tribunal was at that point in time advised that there was no preliminary point being taken by either party.

When the matter came on for hearing before a Deputy President the worker's counsel indicated that he wished to raise a preliminary issue namely that in light of the terms of the Corporation's determination rejecting the worker's claim, the only issue before the Tribunal which it had jurisdiction to adjudicate was the issue of the worker's incapacity for work and the Corporation having conceded that issue, the worker was entitled to summary relief.

The Deputy President rejected this submission, observing that when the matter proceeded to Arbitration the question of whether the worker suffered a compensable disability was an issue and by the time the matter was certified ready for trial for Judicial Determination, after a number of pre-hearing procedures, the parties were in agreement, as evidenced by the Statement of Issues, that one of the issues was whether the worker suffered a compensable disability.

The President concluded that the parties had effectively agreed to enlarge the issues in dispute pursuant to section 88DA of the Act to include the issue of whether the worker suffered a compensable disability.

The worker lodged an appeal to the Full Bench against the finding of the Deputy President on the preliminary point.

Decision

The Full Bench observed that whilst they were bound to follow the majority decision of the Full Bench in *Wear v WorkCover* [2001] SA WCT 77, it did “not understand the majority to require the Corporation in resolving to reject a claim to conduct enquiries as to every possible means of rejection prior to the issuing of its determination in order to be able to later put a matter in issue.” (Note, this approach has been confirmed and indeed expanded on by the Full Supreme Court in *Kairns v WorkCover* [2004] SASC 352 which we will discuss in a later issue.)

The Full Bench observed that the worker’s argument failed to recognise the true character of the Corporation’s determination, which was a determination to reject the worker’s claim. It qualified this observation by stating:

“That is not to say that the compensating authority can change tack with complete impunity.

The Tribunal’s capacity to prevent abuses of its process affords adequate protection against the unreasonable insistence that a fact not previously put in issue be proved and if there was any hint of unfairness in the compensating authority’s doing so the Tribunal would need to carefully consider whether this should be permitted.”

However in this instance given the parties conduct that was not a matter which the Tribunal needed to consider as the worker’s counsel made no objection during the hearing before the Arbitration Officer when this issue was raised and in the context of the Judicial Determination the worker through his solicitor expressly agreed that this was an issue, indeed the only issue, to be determined by the Tribunal. In the circumstances the appeal was dismissed and the matter remitted back to the Deputy President to determine the issue.

Note

If after a determination is disputed it becomes evident to the compensating authority that there are other grounds which support the determination, these must be communicated to the worker as soon as possible either before or at least if possible by the first hearing i.e. Conciliation Conference.

This will not be possible in the case of all determinations. Certainly it is possible in the case of what is referred to as “primary” determinations made pursuant to section 53 of the Act whether such determinations related to acceptance or rejection of a claim, setting a rate of average of weekly earnings, section 43 lump sum entitlement etc, but in our view is not possible in the case of any determination which requires notice to be given to a worker before an entitlement to income maintenance is affected such as section 36 determinations and reviews pursuant to section 38 which also contain notice requirements.

SETTLING NEW – TO INCLUDED OR NOT INCLUDE THE VALUE OF A MOTOR VEHICLE WHEN ON STRANDBY?

HOCKLEY V BORAL RESOURCES (SA) LIMITED

[2004] SA WCT 45 (Deputy President Judge Gilchrist)

Issue

Whether the worker was entitled to have included in the calculation of his notional weekly earnings the value of the provision of a motor vehicle, when that vehicle was provided to the worker when he was on standby.

Facts

The worker sustained a compensable disability on 4 December 1997. The worker’s entitlement to income maintenance was determined by setting

his rate of notional weekly earnings on the basis of his wages.

This determination was disputed and the worker contended that he should have had included in the notional weekly earnings an amount to reflect the benefit he obtained through the use of a company motor vehicle.

The worker's duties with the employer included monitoring various odours in sites and being on standby to respond to odourant spills or leakages. The worker was on standby every other week. When on standby the worker was supplied with a company motor vehicle, a utility, which bore the employer's logo and contained a tool kit and equipment sufficient to deal with spills, leaks and normal maintenance. The worker when on standby expected to have immediate access to the vehicle at all times so as to enable him to immediately respond to a reported spillage or leak. The worker was able to drive the company vehicle to and from work when on standby.

The worker found the use of the company vehicle beneficial and therefore volunteered to undertake more than his allocated share of standby work. As a result, for most of the time, he had the use of the company vehicle.

After quoting at length from the decision of *Cleggett v Coca Cola Amatil* [1995] SAWCAT 156, the Deputy President stated that what needed to be determined was whether the provision of the motor vehicle can properly be regarded as forming part of the consideration for the worker performed.

His Honour observed that if every technical officer, such as the worker, whose duties included the possibility of being on standby was provided with a company vehicle, irrespective of whether they were actually on standby, it would be easy to draw the inference that the provision of the vehicle was part of the remuneration package. However His Honour noted that the circumstances in this case were quite different and the worker was only provided with a vehicle when he was actually on standby. Although the arrangement suited the

worker and he regarded the use of the vehicle beneficial, when viewed objectively, His Honour concluded that it cannot be regarded as part of his remuneration package and accordingly it did not form part of the consideration for the duties he was required to perform. Accordingly His Honour concluded that the worker was not entitled to have included in the calculation of his notional weekly earnings a value reflecting the use of the company vehicle by the worker.

Note

Case managers should take special care in calculating notional weekly earnings where in similar circumstances a worker is provided a company vehicle but only for the purpose of limited aspects of his duties of employment such as in this case stand by work or call out work.

BREACH OF MUTUALITY – SUITABLE DUTIES, REHABILITATION & RETURN TO WORK PLAN

PHELAN V HOLDEN LIMITED

[2004] SA WCT 41 (Deputy President
Judge Gilchrist)

Issue

Whether the worker breached mutuality by declining to undertake duties offered to him by the employer which were more onerous than the duties which he was required to undertake in accordance with a Rehabilitation and Return to Work Plan which was in place at the time of such offer.

Facts

The worker received a determination pursuant to section 36 of the Act giving notice that the employer intended to discontinue his entitlement to income maintenance on the basis that he had on 4 June 2003 attended at work, as required by letter dated 2 June 2003, and reported to his supervisor but refused to undertake work offered to him by the employer and

which Dr Kelly had indicated in his view the worker was capable of performing.

The parties agreed that the work the worker had allegedly failed to undertake comprised of normal duties working 8 hours per day.

As at 28 May 2003 the worker and the employer had agreed to be bound by the terms of a Rehabilitation Return to Work Plan which was scheduled to commence on that day and continue to 8 July 2003. The plan provided for, inter alia, the worker to work 4 hours per day on off line duties with no repetitive straining on his left hand.

In an application for summary relief, counsel for the worker contended that because the duties the employer relied upon in support of its determination were different to and more onerous than the duties provided for by the Rehabilitation and Return to Work Plan, as a matter of law, the employer could not rely upon an alleged failure by the worker to submit to those duties in support of its section 36 determination.

The Deputy President agreed with the worker's counsel. His Honour agreed with the view of Deputy President Judge Parsons in *Sutton v SA Water [2002] SA WCT 6* wherein Her Honour concluded:

“An offer of work and reliance upon s 36(1A)(f) cannot be used as a means of overriding a current plan. When such a plan is binding upon the parties the employer cannot use a new offer of work as a device by which to create a breach of mutuality sufficient to discontinue weekly payments.”

Note

The relevance of this decision is self evident, namely that if there is a Rehabilitation Return to Work Plan on foot an offer of duties inconsistent with such Plan, in the event that the worker declines to accept same, does not allow a compensating authority to successfully determine to discontinue the worker's entitlement to weekly payments on the basis of breach of mutuality.

SURVEILLANCE FILM -TO PRODUCE OR NOT PRODUCE?

**CHERINI V SOUTH AUSTRALIAN
WATER CORPORATION**

**[2004] SA WCT 34 (Deputy President
Judge Parsons)**

Issue

Whether surveillance film should be produced to the worker prior to the hearing, whether production to the worker of a subsequent report of an expert witness prior to the hearing was required by the Act and Rules, whether disclosure to the worker of the film prior to hearing may deprive the compensating authority of procedural fairness and whether provision of the film to an expert witness constitutes an implied waiver of legal professional privilege.

Facts

The compensating authority intended to rely on Dr Beaumont, a medical witness, in support of its case at the hearing. Dr Beaumont was not one of the worker's treating doctors and he had not examined the worker at the request of the compensating authority. The compensating authority had shown Dr Beaumont a surveillance film of the worker and he reported thereon to the compensating authority. Her Honour noted that it could be inferred that the report contains Dr Beaumont's opinion about activities of the worker depicted on the video.

The existence of the film was to disclose to the Tribunal and the worker's solicitors at a pre-trial conference i.e. discovered but not produced. Her Honour observed that although not expressly stated in the pre-trial orders, it can be inferred that the compensating authority was excused from producing the surveillance film to the worker until cross-examination.

Counsel for the worker submitted that the compensating authority should be required to produce the surveillance film to the

worker prior to the hearing for various reasons that Her Honour did not accept.

We set out in sequence the submissions made by worker's counsel and Her Honour's decision in respect of each such application.

- ◆ Counsel for the worker submitted that as the Tribunal has a practice of requiring the worker to serve a statement of his or her evidence prior to the hearing, this required a modification of the principle that disclosure of film to the worker before his cross examination may deprive a compensating authority of procedural fairness. Her Honour decided that she was not persuaded that the Tribunal's practices should alter the usual situation. Her Honour referred to a passage from *Australian Postal Commission v Hayes [1989] 23 FCR 320* (approved and adopted by the Supreme Court in *BHP v Mason [1996] 67 SASR 456*) wherein Wilcox J said:

"It is important, in that process, that a mendacious witness not be aware of the material available to the cross-examiner to contradict the evidence under manufacture."

Her Honour concluded that the principles of procedural fairness will determine an application for production of surveillance material, unless there is some express statutory basis upon which the subject report of Dr Beaumont and the surveillance film is required to be produced to the worker.

- ◆ Counsel for the worker submitted that such statutory obligation was contained in section 109 of the Act. Section 109 deals with the requirement to send a copy of the medical report to a worker within seven days after receipt of a report from a medical expert following his examination of the worker. Her Honour noted that applying its plain and ordinary meaning "examination" in the context of the section refers to a situation where a worker has a personally submitted to a medical

examination by the medical expert, which did not occur in this case. Accordingly Her Honour found that the requirements of section 109 were not relevant.

- ◆ Worker's counsel then argued that Dr Beaumont's report should have been produced to the worker, as it is not afforded the protection contained in section 92(2) (which gives a Conciliation Officer the discretion to not require production of surveillance material to a worker). Worker's counsel argued that Dr Beaumont's report did not fit within that group of materials i.e. videotape, photographic material or a report of surveillance, referred to in that section. Whilst Her Honour considered that argument attractive, she did not consider section 92 was relevant, as the conciliation process had concluded prior to Dr Beaumont preparing his report.
- ◆ Counsel for the worker then relied on various provisions of the Supreme Court Rules imposing, amongst other things, a general duty on the parties to exchange expert reports and further relevant information referred to in the course of preparing the report. Her Honour concluded that although disclosure of experts reports may be the norm in the Supreme Court, the residual discretion to decline or modify disclosure, is to be determined upon competing interests guided by fairness in the circumstances of that particular case and in this case Her Honour concluded that the employer's entitlement to hold back the production of the surveillance film until the cross examination of the worker would be negated if Dr Beaumont's report, disclosing information about the video, is required to be produced to the worker prior to the hearing by an application of the Supreme Court Rules. To that extent Her Honour declined to apply the relevant Supreme Court Rules to these proceedings.
- ◆ Finally counsel for the worker submitted that release of the surveillance film to Dr Beaumont constituted an implied waiver of the

legal professional privilege, which attaches to the film, thereby entitling the worker to its production. Her Honour observed that whether limited disclosure of privileged material gives rise to an implied waiver of legal professional privilege or otherwise is to be resolved by reference to the requirements of fairness, relying on the decision of the Supreme Court in *Coles v Dyer* [1999] SASC 272 and concluded that showing the surveillance film to an expert witness and requesting an opinion does not constitute waiver of privilege.

Her Honour therefore dismissed the application for production of the surveillance film or Dr Beaumont's report to the worker prior to cross-examination.

Note

This is yet another decision which indicates that, provided a compensating authority strictly complies with the requirements for discovery of all surveillance material, the Tribunal will not require production of that material to a worker until after cross examination. Although Dr Beaumont did not examine the worker and to that extent it was easier for Her Honour to deal with the issue of producing a copy of Dr Beaumont's report to the worker before the hearing, even if Dr Beaumont had examined the worker, provided a report thereafter, was subsequently shown the surveillance film and prepared a further report or provided a statement thereafter, that does not necessarily mean that a compensating authority is required to discover and produce that subsequent report or statement. That issue has already been dealt with by the WCT in *Cochrane v WorkCover* [1999] SA WCT 15. In that case His Honour Deputy President Acting Judge Gilchrist (as he then was) directed the production of edited copies of medical reports and transcripts of interviews of doctors who had seen the surveillance film, the contents of which would not deprive the compensating authority of procedural fairness.

CASE SNIPPETS

WHAT IS THE FOLE OF MEDICAL EXPERTS AND THE TRIBUNAL IN EVALUATING EXPERT EDVIDENCE?

**North Western Adelaide Health Service
– QEH Campus v Sanguinetti**

[2004] SA WCT 28 (Full Bench)

The importance of this decision by the Full Bench is that it reiterates and defines the role of medical experts and the Tribunal in evaluating expert evidence.

Issue

Whether a disability which the worker clearly suffered arose out of employment. A Deputy President, at first instance, concluded that on all of the evidence presented before her the worker had established that his disability was compensable in that it arose out of employment within the meaning of section 30(1) of the Act.

The employer appealed to the Full Bench.

Decision

The employer contended that the medical evidence merely supported the possibility that events at work had contributed to the progression of an underlying medical condition which the worker suffered and was not strong enough to support a causal relationship between the worker's employment and his disability.

The following passages from this decision are a useful and concise statement as to the relative role of medical experts and a member of the Tribunal. It is useful therefore for the relevant paragraphs to be quoted in full as follows:

18. It was not the medical experts' role to determine the fate of the hearing. That was the learned Deputy President's role. It is sufficient to refer to the joint judgment of Dixon CJ, McTiernan, Kitto, Taylor and Windeyer JJ in *Ramsay v Watson*

(1961) 108 CLR 642 at 645 where they said: -

“That some medical witness should go into the box and say only that in his opinion something is more probable than not does not conclude the case. A qualified medical practitioner may, as an expert, express his opinion as to the nature and cause, or probable cause, of an ailment. But it is for the jury to weigh and determine the probabilities. In doing so they may be assisted by the medical evidence. But they are not simply to transfer their task to the witnesses. They must ask themselves are we on the whole of the evidence satisfied on a balance of probabilities of the fact?”

19. And, in discharging that role, the learned Deputy President had to apply a test of causation that accords with the law, not science: *March v E & MH Stramare Pty Ltd (1991) 171 CLR 506 at 509*. As was said in that case and in *WorkCover v Sherriff (1996)* Supreme Court of South Australia unreported judgment S5831, being an authority to which the learned Deputy President referred, what that entails is a commonsense evaluation of the evidence.
 20. That is not to say that the medical evidence is unimportant. To the contrary, without some expert evidence to support the proposition contended a claim such as this must fail. The fact that a particular cause could not be excluded cannot establish the cause of an injury on the balance of probabilities: *Sydney County Council v Furner (1991) 7 NSWCCR 210 per Hope A-JA at 214*.
 21. But where there is medical evidence that supports a possible connection between work and the claimed disability it is open for the
- trier of fact to conclude, having had regard to all of the evidence, that the connection has been made out on the balance of probabilities: *EMI (Australia) Ltd v Bes (1970) 2 NSW 238 at 242* per Herron CJ.
22. In this case the learned Deputy President was entitled to be impressed by the strong temporal connection between the workers's extensive bending and lifting at work and the spontaneous emergence of severe pain as graphically described in the worker's evidence as set out above. She was entitled to take particular note of Mr Hunter's evidence that this sudden onset of pain was unusual. In our view no error of law has been established in connection with the learned Deputy President's approach or in her ultimate conclusion. That an alternative finding was also open is not to the point. It merely demonstrates the difficulty that confronts a trier of fact in resolving issues pertaining to causation in personal injury cases and that reasonable minds may differ.

Note

It is important in deciding whether to proceed with a hearing to assess, realistically, the likely outcome based on all of the evidence which is to be presented and not make decisions based on one or more medical opinions which may support the compensating authority's determination which is the subject of the dispute.

That is not to say that there will not be instances where proceeding with a hearing is justified although there is a contrary view expressed by medical experts to those views expressed by the medical experts upon which a compensating authority relies e.g. cases involving issues of causation where the medical experts supporting the worker's claim rely on schools of thought which have not been proven or are not accepted by the relevant body of medical experts or more importantly have been proven by research to not be reliable etc.

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