

Burns v Territory Insurance Office Board [2007] NTSC 24

PARTIES: BURNS, TRACY ANNE

v

TERRITORY INSURANCE OFFICE
BOARD

TITLE OF TRIBUNAL: NORTHERN TERRITORY MOTOR
ACCIDENTS (COMPENSATION)
APPEAL TRIBUNAL

JURISDICTION: APPEAL PURSUANT TO S 29 MOTOR
ACCIDENTS (COMPENSATION) ACT
NT

FILE NO: M2 of 2005 (20513540)

DELIVERED: 16 APRIL 2007

HEARING DATES: 12 APRIL 2007

JUDGMENT OF: ANGEL J

REPRESENTATION:

Counsel:

Applicant: B O'Loughlin
Respondent: I Nosworthy

Solicitors:

Applicant: —
Respondent: Cridlands

Judgment category classification: C
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IN THE MOTOR ACCIDENTS
(COMPENSATION) APPEAL TRIBUNAL
DARWIN REGISTRY

Burns v Territory Insurance Office Board [2007] NTSC 24
No. M2 of 2005 (20513540)

BETWEEN:

TRACY ANNE BURNS

Applicant

AND:

**TERRITORY INSURANCE OFFICE
BOARD**

Respondent

CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 16 April 2007)

[1] The respondent by summons filed 4 April 2007 seeks the following orders:

1. That the applicant do submit to a medical examination arranged by the respondent with Dr Geoffrey Graham on 10 April 2007 at Adelaide in South Australia.
2. Alternatively that the proceedings be stayed until such time that the applicant submits to a medical examination with a medical practitioner appointed by the respondent.
3. Such further or other orders as the Tribunal sees fit.

[2] In proceedings commenced on 6 June 2005 pursuant to s 29 Motor Accidents (Compensation) Act NT the applicant challenges a determination of the respondent Board of 3 May 2005 affirming a decision that the applicant is not entitled to benefits pursuant to s 13 of the Act. The applicant's appeal before the Tribunal is currently part-heard. The hearing commenced on 12 March 2007 and continued to 15 March 2007 when it was adjourned to be resumed for final hearing on 29, 30 and 31 May 2007. The applicant's case is part-heard. I have heard evidence from her medical and other expert witnesses. The applicant completed her evidence on 15 March 2007. She has one further non-medical witness.

[3] At 9.52 am on 29 March 2007, apparently without warning, a person describing herself as a "para-legal" emailed to the applicant a letter dated 29 March 2007 in the following terms:

"Dear Mrs Burns

Yourself -v- TIO Board
MACA Tribunal M2 of 2005

I refer to previous correspondence and I confirm we have arranged an appointment for you to be medically examined by Dr Geoffrey Graham in Adelaide as follows: -

Doctor: Geoffrey Graham
Occupational Physician
Date: Tuesday 10 April 2007
Time: 12.00 pm
Where: 5th Floor, 22 King William Street
Adelaide SA

I will forward you confirmation of travel and accommodation

arrangements in due course.

Please advise as soon as possible by close of business Friday 30 March 2007, if you are available to attend the scheduled appointment.

Should you have any queries, please do not hesitate to contact me.

Yours faithfully
CRIDLANDS

VICKY KOSSARIS
Associate”.

- [4] At about 2.36 pm on 30 March 2007 a copy of that letter was emailed by the respondent’s solicitors to Mr O’Loughlin, counsel for the applicant. Less than two minutes later he replied: “I’ll get back to you on Monday. I suspect we will object.”
- [5] At 3.18 pm on 3 April 2007 the solicitors for the respondent emailed Mr O’Loughlin with a letter from Cridlands dated 3 April 2007 in the following terms:

“Dear Mr O’Loughlin

Tracy Burns –v– TIO Board – MACA Tribunal M2 of 2005

I refer to the above matter and in particular, our telephone discussion on 3 April 2007, with respect to the Applicant’s attendance at the medical examination arranged with Dr Graham by the Respondent for 10 April 2007.

In that regard, I note that you informed me that the Applicant was not proposing to submit to the medical examination for a number of reasons. You also informed me that Mr Doug Burns, on behalf of the

Applicant, would be sending a letter to Cridlands outlining the grounds for the Applicant's refusal to attend.

Given that the medical examination is scheduled on 10 April 2007, we request that you or Mr Burns provide us with written confirmation of the Applicant's refusal and/or inability to attend to the medical examination as a matter of priority by close of business, 3 April 2007.

The Respondent intends to rely on this letter in any future application made to the Tribunal, which may arise from the Applicant's refusal or failure to submit to the medical examination.

I look forward to hearing you. (sic)

Yours faithfully
CRIDLANDS

VICKY KOSSARIS
Associate".

- [6] Subsequently on 4 April 2007 the applicant's husband Mr Douglas Burns hand delivered a letter to the respondent's solicitors in the following terms:

"Dear Madam

RE: BURNS v TIO BOARD MS OF 2005 MAC TRIBUNAL

I refer to your letter of 29 March 2007 requesting the Applicant to submit to a medical examination by Dr Graham. I assume from the heading of the letter that you intend to seek to tender this proposed report of Dr Graham in the current hearing before the Tribunal.

If this assumption is correct, then it is improper to require the Applicant to submit to this examination and is unfair to allow the tender of the report.

The Applicant has called 4 doctors, a rehabilitation specialist and a physiotherapist. Dr Graham's earlier reports of 2002 and January 2003 were not put to these witnesses and it is very likely that all the six witnesses will need to be recalled if Dr Graham now purports to give this and other evidence.

Furthermore, it is also highly likely that the applicant will also be required to be recalled to give further evidence on Dr Graham's earlier reports and the proposed 2007 report. The Applicant will be approximately 8 months pregnant by the time you require her to be recalled and the three days for the resumed trial will clearly not be sufficient.

The claim has been before the Respondent since November 2004 and yet the Respondent has apparently elected not to have the Applicant examined over the past 2 and a half years.

This matter had been set down for a hearing some months ago and the Respondent's apparent election not to examine the Applicant continued during that time.

Orders were made on 20 February 2007 for the parties to serve reports upon which they intend to rely and on 2 March 2007, the Respondent indicated that it proposed to tender the old reports without calling Dr Graham. When it was explained by the Tribunal that this would not be permitted the Respondent apparently took no further steps in obtaining a report from Dr Graham.

During the Applicant's opening, the Tribunal asked counsel for the Respondent to describe the Respondent's case. At no stage during the exchange did counsel for the Respondent advise that the Respondent intended to have the Applicant examined again by Dr Graham.

Indeed at an earlier interlocutory mention the Respondent sought orders permitting examination prior to the hearing, but then abandoned this order.

The Respondent had 2 and half years to exercise the right of medical examination pursuant to s 12(3) of the Act. It has clearly waived that right and now that the matter is before the Tribunal it will be

submitted that the Respondent can no longer compel examination pursuant to s 12(3).

The Applicant will of course comply with her requirements under the Act but declines to be examined given the above circumstances.”

- [7] The 10th April 2007 having now passed the order in terms sought is spent. Counsel for the respondent submitted that pursuant to s12(2) Motor Accidents (Compensation) Act NT, the Board had power to require the applicant to undergo an examination by a medical practitioner of its choice and that the applicant having refused or declined to do so the Tribunal should pursuant to Rule 7(2)(f) of the Motor Accidents (Compensation) Appeal Tribunal Rules require the applicant to submit herself for a medical examination.
- [8] I decline to make any such order for the following reasons:
- [9] It is apparent that s 12 of the Act addresses a situation pending a determination by the Board. In order for the Board to make a determination it may, inter alia, require a person to undergo an examination by a medical practitioner nominated by the Board. However once the matter has been determined by the Board it is functus officio and there is no further power in the Board to require a person to undergo an examination by a medical practitioner.
- [10] Once an appeal against a Board determination is lodged to the Tribunal pursuant to s 29 of the Act the matter is thereafter in the hands of the Tribunal and any medical examination that might be required of a party in

proceedings before the Tribunal is a matter for the Tribunal's discretion under Rule 7. Rule 7 confines the making of any such order at a mention prior to the hearing before the Tribunal. Once the hearing of a reference before the Tribunal has commenced Rule 7 of the Appeal Tribunal Rules has no further operation.

- [11] The respondent Board has no power in the circumstances of this case to require the applicant to undergo a medical examination pursuant to s 12(2) of the Act.
- [12] The hearing of the reference having commenced, I have no power under Rule 7 to order any such examination.
- [13] In any event even if I had power I would unhesitatingly decline to exercise it in the present case. No reason is given in the affidavit material before me as to why there is a need for the applicant to be medically examined at the present time. There is no explanation why no application was made prior to the commencement of the hearing. In December 2006 the respondent's solicitors proposed pre-hearing directions including that the applicant submit herself to "a medical or related examination" but that was abandoned. There is no explanation as to why the particular medical practitioner in Adelaide nominated by the Board should be the examining medical practitioner. As is evident from the correspondence cited above, to require the applicant – who is pregnant with two small children – at short notice to present herself in Adelaide for medical examination after she had

completed her evidence at the hearing before the Tribunal in circumstances where a further medical examination may require her and her medical witnesses to be recalled at the Tribunal hearing was manifestly unreasonable.

[14] The respondent's summons is dismissed with costs. Certified fit for counsel.
