Normandy Mining Pty Ltd v Horner [2000] NTSC 79

PARTIES:	NORMANDY MINING PTY LTD
	v
	PETER HORNER
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM WORK HEALTH COURT
FILE NO:	12 of 2000
DELIVERED:	19 September 2000
HEARING DATES:	30 August 2000
JUDGMENT OF:	BAILEY J

CATCHWORDS:

WORK HEALTH – COMPENSATION – APPEAL

Whether the magistrates findings as to the nature of the injury were sufficiently detailed – findings of fact where difference in expert opinion.

Hicks v Bridgestone Australia Ltd (CA(NT) 29 May 1997, unreported), applied

Obligation of employer to notify worker of employment opportunity – evidence that employment is reasonably available to the worker.

Work Health Act, s 65, s 68, s 75B(3)

Failure of employer to establish a balance of probabilities that the worker had failed to mitigate his loss – magistrate's implied finding of fact.

Work Health Act, s 65(2)(b)
Ansett Australia v Van Nieuwmans (CA (NT) 9 December 1999, unreported), referred to
Northern Cement Pty Ltd v Ioasa (SC (NT) 17 June 1994, unreported), applied

REPRESENTATION:

Counsel:

Appellant:	Mr Bryant
Respondent:	Mr Grant

Solicitors:

Appellant:	Cridlands
Respondent:	Halfpennys

Judgment category classification:	C
Judgment ID Number:	bai005
Number of pages:	17

bai005

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

Normandy Mining Pty Ltd v Horner [2000] NTSC 79
No. 12 of 2000

BETWEEN:

NORMANDY MINING PTY LTD
Appellant

AND:

PETER HORNER
Respondent

CORAM: BAILEY J

REASONS FOR JUDGMENT

(Delivered 19 September 2000)

[1]

[2] This is an appeal pursuant to s 116 of the Work Health Act ("the Act").

[3] On 14 April 2000, the Work Health Court found that the respondent worker suffered a shoulder injury on 25 March 1998 in the course of his employment with the appellant employer. The Court further found that the shoulder injury resulted in an incapacity within the meaning of s 3 of the Act, namely a limited ability to engage in paid employment. The relevant limitation was found to be an inability on the part of the worker to engage in repetitive or heavy manual work. The Court awarded compensation in

accordance with the Act for the worker's partial incapacity from 25 March 1998 to 14 April 2000 and continuing.

[4] The grounds of appeal allege that the learned magistrate, sitting as the Work Health Court:

(a) failed to make sufficiently detailed findings of fact as to the nature of the injury;

(b) erred in finding that certain employment was not reasonably available to the worker because the availability of such employment was not brought to the attention of the worker; and

(c) erred in not considering whether there was a failure on the part of the worker to mitigate his loss.

Nature of the Injury

[5] The learned magistrate dealt at some length with the expert medical evidence called on behalf of the worker and the employer. His Worship rejected the conclusions of Dr Awerbuch, called on behalf of the employer, that the worker suffered "no incapacity" and that there was "no cause or nexus between Mr Horner's employment duties and the injury" and that the worker "currently has no injury". The learned magistrate preferred the evidence of four doctors called on behalf of the worker. After his review of the evidence of Drs Flavell, Anthony Brown-John, Wallace Tracey and David Millons, His Worship concluded at para [52] of his reasons:

> "Medical evidence which has been traversed whilst at variance in relation to specific diagnoses, is an idem, to the extent that, resumption of the work the worker was employed upon at the time of his injury is ruled out. Labouring work is in practical terms ruled out. There is in my findings an unequivocal limited ability to undertake paid work because of the injury."

[6] Earlier in his reasons (at para [31]) the learned magistrate had held:

> "Whatever the pedantic clinical label may be, I find that the worker in this case suffered an injury of a physical nature to the musculature or ligaments related his right shoulder."

[7] In summarising his findings, the learned magistrate (at para [65.2]) held:

> "The worker suffered a strain to the right shoulder girdle region (the shoulder injury) on 25 March 1998 in the course of his employment with the employer."

[8] On behalf of the employer, Mr Bryant submitted that the learned magistrate's findings as to the nature of the injury were insufficiently detailed. Mr Bryant conceded that it is not necessary for a court to find a fact of injury for it to be satisfied that a precise physiological change had occurred: *Hicks v Bridgestone Australia Ltd*, (CA (NT) 29 May 1997, unreported). However, in Mr Bryant's submission, it is necessary to make specific findings of fact as to what injury has occurred where, in a case such as the present, there are differences of opinion between the four doctors called on behalf of the worker as to the nature of the injury suffered by the worker.

[9] Mr Bryant drew attention to the various opinions expressed by doctors called on the worker's behalf. He submitted that the employer in the present

case does not know from the learned magistrate's reasons whether the worker's injury is one or more of the following:-

(a) a rotator cuff strain of the tendons or muscles of the rotator cuff;

(b) a thoracic interspinous ligimentous strain;

(c) muscular strain to the muscles or tendons of the muscles of the shoulder girdle in the vicinity of the thoracic spine where the muscles of the shoulder girdle attach to the spine – the mid paravertebral region;

(d) a muscle strain of the musculature proximal to the shoulder joint in the muscles running or placed between the shoulder and the neck.

[10] In support of his submissions, Mr Bryant referred to authorities dealing with a judge's failure to give any reasons (*Mobasa v Nikic* (1987) 47 NTR 48 and *Pettit v Dunkley* [1971] 1 NSWLR 376) or to address evidence critical to an issue in the case (*Mifsud v Campbell* (1991) 21 NSWLR 725); or a failure to make findings on material questions of fact which would have enabled a tribunal's reasoning process to be understood (*Australian Postal Corporation v Lucas* (1991) 33 FCR 101).

[11] I do not consider that it is necessary for present purposes to canvass the authorities referred to by Mr Bryant in any detail. The present case is far removed from the circumstances considered in such authorities.

[12] In *Hicks v Bridgestone Australia Ltd*, supra, the Court of Appeal rejected the contention that it was necessary for a worker to establish a physiological change in order to establish that he had suffered a compensable injury. Martin CJ and Gallop J in their joint judgment held at p 8:

> "Compensation is not payable for the injury but for the loss of power to earn caused by the injury, that is, for incapacity for work which results from the injury. The question is whether the injury has left the worker in such a position that in open labour market his earning capacity in the future is less than it was before the injury."

[13] In a separate judgment, Mildren J, after expressing his agreement that it was not necessary for a worker to establish what precise physiological change occurred in the worker's back to establish that he had suffered an "injury" as defined by the Act, observed at p 10:

> "Further, the definition of 'injury' includes a 'disease' which is defined to include 'a physical or mental ailment, disorder or morbid condition, whether of sudden or gradual development'. The point was not raised in argument, but it seems to me that the words 'physical ailment', are wide enough to include a 'facet joint injury', or for that matter, a painful back condition, ***whatever may be the cause***." (emphasis added).

[14] In the present case, the learned magistrate "unhesitatingly" accepted the worker as a witness of truth and, in particular, accepted the worker's description of his injuries and symptoms. In relation to the expert evidence, the learned magistrate made a number of specific findings concerning the evidence of the doctors called on behalf of the worker before making his "final finding" that the worker suffered "a strain to the shoulder girdle region" (para [65.2] of his reasons).

[15] In relation to the evidence of Dr Flavell, the learned magistrate accepted the "label" that the doctor gave to the worker's symptomology as "chronic pain syndrome" (para [45]). He also found, in accordance with Dr Flavell's opinion that " 'it was more likely than not' that there was an existing pathophysiology which had not been identified" (para [45]). The learned magistrate noted (para [47]) that Dr Anthony Brown-John agreed with Dr Flavell "that there was a pathophysiological cause which was non specific. In other words it cannot be discreetly identified". His Worship similarly noted (para [49]) that Dr William Tracey "agreed expressly with the view that the 'non-identification of a discreet pathophysiological injury simply did not exclude the existence of such (ie the worker's) an injury'". The evidence of Dr David Millons evidence was that "although he could find no discreet pathology in the right shoulder, he nevertheless classified the injury to the worker as a pathophysiological injury".

[16] In the absence of an identified pathophysiological cause for the worker's injury, it does not seem to me that it is a matter of surprise or concern that medical experts might proffer varying opinions as to the precise nature of the worker's shoulder injury. In the circumstances of the present case, I do not think the learned magistrate was compelled to choose one or more precise diagnoses of the worker's condition and furnish detailed reasons for his preference for one or more medical opinions over another or others. Once the evidence of Dr Awerbuch was rejected, the expert medical was all one way, namely that the worker had suffered a shoulder injury, however

described, that had partially incapacitated him for work. No complaint is made that the evidence of Dr Awerbuch was wrongly rejected or that the learned magistrate erred in accepting the worker's evidence as to his injuries and symptoms. In the circumstances, I do not consider that it was necessary for the learned magistrate to make any more specific findings than he did as to the nature of the worker's injury.

Availability of Work and Failure to Mitigate

[17] It is convenient to address these two grounds of appeal together. Mr Bryant submitted that the learned magistrate had misdirected himself in law in that, in determining whether or not there was work reasonably available to the worker for the purposes of s 65(2)(b) of the Act, he had regard to the irrelevant fact that the availability of any such employment was not communicated to the worker. Further, Mr Bryant submitted the learned magistrate erred in failing to consider and address submissions made on behalf of the employer that the worker had failed to mitigate his loss.

[18] Section 65 of the Act deals with payment of weekly compensation for long-term incapacity. In the present case, in consequence of the learned magistrate's finding that the worker was, and continued to be, partially incapacitated for work, the worker was entitled to receive compensation equal to 75% of his loss of earning capacity (after an initial period of 26 weeks incapacity).

[19] Section 65(2) of the Act provides:

"(2) For the purposes of this section, loss of earning capacity in relation to a worker is the difference between -

(a) his or her normal weekly earnings indexed in accordance with subsection (3); and

(b) the amount, if any, he or she is from time to time reasonably capable of earning in a week in work he or she is capable of undertaking if he or she were to engage in the most profitable employment, if any, reasonably available to him or her, and having regard to the matters referred to in section 68."

[20] Section 68 of the Act provides:

"In assessing what is the most profitable employment available to a worker for the purposes of section 65 or reasonably possible for a worker for the purposes of section 75B(3), regard shall be had to -

(a) his or her age;

(b) his or her experience, training and other existing skills;

(c) his or her potential for rehabilitation training;

(d) his or her language skills;

(e) the potential availability of such employment;

(f) the impairments suffered by the worker; and

(g) any other relevant factor."

[21] There was, to some extent, an overlap in the evidence before the learned magistrate as to "the amount, if any, (the worker) is from time to time reasonably capable of earning in a week" (s 65(2)) and the worker's alleged failure to mitigate his loss.

[22] The evidence, in very broad terms, may be summarised as follows:

(a) A tavern proprietor, the general manager of a car accessory retail business and the retail operation manager of a fuel distributor each gave evidence of recent employment opportunities in their business. Each of these witnesses gave evidence that they received multiple applications for any advertised vacancies. Each gave evidence that applicants with relevant experience would be preferred to applicants without such experience. The worker had no relevant experience for employment in any of the three specific businesses nor any experience in retailing or customer relations generally. None of the three witnesses had made any assessment of the worker's particular condition (or been asked to do so by the employer) and none of the three witnesses had offered employment to the worker.

(b) The operator of a recruitment agency in the hospitality and tourism field gave evidence of securing short-term work for the worker during the re-building of a bridge over the Adelaide River. At the employer's request, the worker was subsequently assessed for employment skills, aptitude and ability. The worker was assessed as suitable for security work, subject to training and qualification for a licence at a cost of $500. No such training was provided by the employer. The worker's evidence was that he had been in receipt of social security benefits for some 13 months and did not have any savings. The recruitment agency had not introduced the worker to

any employment opportunities aside from the temporary position during the rebuilding of the Adelaide River Bridge.

(c) There was evidence that the worker had applied unsuccessfully for employment as a driving instructor, a spare parts salesman and with a shipping company.

(d) There was evidence that the worker had registered with Centrelink, Job Network and various community job placement schemes, but had not been referred to any potential employer.

(e) There was evidence that the worker made application to the New Enterprise Incentive Scheme for assistance in starting a business. He was advised that he lacked the necessary capital to pursue the business and that no incentive or assistance would be forthcoming.

(f) There was evidence that the worker accepted a temporary position which exacerbated his injury. He did not voluntarily leave that position. The work simply came to an end.

[23] Under the heading of "Availability of Other Employment" the learned magistrate dealt in brief terms with the issue arising under s 65 (2)(b) of the Act and employment opportunities generally. In relation to the evidence of the general labour market called by the employer to show that there was work reasonably available to the worker, the learned magistrate held (para [57]):

> "…the existence of such positions and the availability of such positions as may have been available in the businesses carried on by or under the control of the various witnesses was never at any relevant time brought to the attention of the worker. On that basis alone I find that it is not proven that such work was 'reasonably available' to him. He just didn't know about it and how was he supposed to find out? I ask rhetorically. Specifically in regard to submissions in relation to the issue of the position of a security officer I find the employer has not discharged the onus incumbent upon it. It follows also in relation to all other work the finding is to the same effect."
>
> The learned magistrate then continued (para [58]):
>
> "It is not in my finding relevant whether the worker did or didn't frenetically or otherwise attempt to find other work. If it was established that from any available employment he was "reasonably capable of earning", his entitlement would fall to be reduced. Finally in relation to this aspect of the evidence I reject the contention that there has been a discharge of the onus in regard to the availability of work at Perkins."

[24] Mr Bryant submitted that the learned magistrate erred by imposing an obligation upon the employer to notify the worker of reasonably available employment opportunities. Mr Bryant submitted that there is no authority for such a proposition. In the submission of the employer, the question whether or not there is suitable work available is a question of fact: Fletcher Moulton LJ in *Eyre v Houghton Main Colliery Co Ltd* [1910] 1KB 695 at 700; and a finding of fact reached by an error of law is an error of law: *Australian Steel and Mining Corp Pty Ltd v Corben* [1974] 2 NSWLR 202 at 209.

[25] In my view, the learned magistrate's remarks about the failure of the employer to draw the worker's attention to possible employment

opportunities need to be read in the context of the evidence. In summarising the evidence at para [21] above, I have noted that the worker had no relevant experience, training or qualifications for the various employment "opportunities" canvassed in the employer's general labour market evidence; nor did the worker have the financial resources to obtain training and qualifications, for example, to undertake security work; and nor had the business operators called by the employer assessed the worker's condition or offered him any employment. Against the background, I consider the learned magistrate intended to convey that, as a matter of fact, the various possibilities for work canvassed by witnesses called on behalf of the employer were not "reasonably available" to the worker. I do not interpret the learned magistrate's words as imposing a general requirement on an employer to notify a worker of what work, if any, is reasonably available to the worker. I consider that the learned magistrate was simply holding, on the facts, that job opportunities for which the worker lacked experience, training and/or qualifications were not "reasonably available" to him unless, at the very least, the employer specifically brought these to his attention. Of course, mere notification of possible employment opportunities for which a worker lacks experience, training or qualifications is unlikely to meet the criterium of being "reasonably available" within the terms of s 65 (2) – but in the present case, I think the learned magistrate was saying, in a somewhat abbreviated fashion, that the employer's evidence did not begin to amount to

evidence of work being reasonably available to the particular worker in the case before him.

[26] At para [58] of his reasons, the learned magistrate held: "If it was established that from any available employment he was 'reasonably capable of earning', his entitlement would fall to be reduced." The only reasonable inference from this observation is that there was no evidence before him to find that there was any work reasonably available to the worker from which it would be possible to calculate the amount he was "reasonably capable of earning" pursuant to s 65 (2)(b) of the Act. While it would undoubtedly have been preferable for the learned magistrate to make an express finding in this regard, I am in no doubt that such a finding of fact is implicit in his reasons when such reasons are considered in the context of the evidence to which I have referred at para [21] above.

[27] The final ground of appeal advanced by the employer is that the learned magistrate erred in failing to consider and address the submission of the employer that the worker had failed to mitigate his loss.

[28] Mr Grant for the worker accepts that the worker is under a duty to mitigate his loss: *Ansett Australia v Van Nieuwmans* (CA (NT) 9 December 1999, unreported) at p 13 (and see *Fazlic v Milingimbi Community Inc* (1982) 150 CLR 345 at 353-4). However, in Mr Grant's submission, the finding of fact implicit in the learned magistrate's reasons (namely, that there was no work reasonably available to the worker) demonstrates both that His Worship

considered and rejected the employer's submissions that the worker had failed to mitigate his loss.

[29] In *Northern Cement Pty Ltd v Ioasa* (SC (NT) 17 June 1994, unreported) Martin CJ held (at p 12) in a case where a worker established partial incapacity for work because of an injury:

> "In respect of the quantification of loss of earning capacity, it is up to the employer to point to evidence in the case minimising his liability in monetary terms. It would be unreasonable to require the worker 'to prove an open ended negative', such as that he was not capable of earning more than an amount which he chooses to rely upon. Once there is evidence to demonstrate incapacity and loss of earning capacity on the part of the worker, then minimising the financial consequences of such findings rests with the employer. The powers available to the employer under the Act, such as in s 75B, in relation to treatment, training, rehabilitation and assessment of a worker, and the penalty upon a worker who unreasonably fails to undertake the same as provided in subs(2) of s 75B, work together to ensure that an employer is not disadvantaged when it comes to showing the earning capacity of the injured worker."

[30] With respect, I agree with approach adopted by Martin CJ. In order for an employer "to point to evidence …… minimising his liability in monetary terms", generally speaking, the evidence would be expected to be directed to at least three matters:

(a) the most profitable work which, after the accident, the worker would be capable of undertaking;

(b) whether such work is reasonably available; and

(c) the amount which the worker is reasonably capable of earning from such work.

[31] The finding of fact implicit in the learned magistrate's reasons to the effect that, on the evidence before him, no work was reasonably available to the worker, in my view, represents a failure by the employer to point to evidence relevant to (b) and (c) above and consequently a failure to establish on a balance of probabilities that the worker had failed to mitigate his loss. It would have been appropriate for the learned magistrate to make express findings about the extent to which the worker had sought to secure employment. However, in the absence of any evidence that work was reasonably available to the worker (and not taken up) the magistrate's reasons are sufficient to demonstrate that he had considered and rejected the employer's submissions that the worker had failed to mitigate his loss.

[32] The appeal is dismissed. The appellant employer is ordered to pay the respondent worker's costs of the appeal.