Henry Walker Contracting Pty Ltd v Edwards [2001] NTSC 16

PARTIES:	HENRY WALKER CONTRACTING PTY LTD
	v
	ANTHONY EDWARDS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	WORK HEALTH APPEAL
FILE NO:	No. LA24/00 (9822374)
DELIVERED:	16 March 2001
HEARING DATES:	2 March 2001
JUDGMENT OF:	ANGEL J

REPRESENTATION:

Counsel:

Appellant:	Mr O Downs
Respondent:	Mr S Southwood QC

Solicitors:

Appellant:	Ward Keller
Respondent:	Priestleys

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

Henry Walker Contracting Pty Ltd v Edwards [2001] NTSC 16
No. LA24/00 (9822374)

BETWEEN:

HENRY WALKER CONTRACTING PTY LTD
Appellant

AND:

ANTHONY EDWARDS
Respondent

REASONS FOR JUDGMENT

(Delivered 16 March 2001)

ANGEL J:

[1] This is an employer's appeal and worker's cross–appeal against a judgment of the Work Health Court delivered 30 October 2000.

[2] The worker was physically injured when he fell into a trench in the course of his employment on 15 November 1996. The worker claimed compensation in a form (Exhibit E19) which described the "part of body affected" as "back, neck, elbow, knee" and the type of injury as "strained vertebrae". The employer accepted the claim and paid compensation from the date of the injury until 24 September 1998. That cessation of payment was in purported pursuance of s 69 of the Work Health Act. On 10 September 1998 the employer had served a Form 5 Notice relying on the single ground that the worker had "ceased to be incapacitated for work, as a result of any injury arising out of or in the course of (his) employment with

the employer". Pursuant to s 69(3) Work Health Act where compensation is to be cancelled for the reason that the worker has ceased to be incapacitated for work, the Form 5 Notice is required to be accompanied by a medical certificate of a medical practitioner "certifying that the person has ceased to be incapacitated for work". The present appellant's Form 5 Notice was accompanied by a medical certificate of Dr Mark Awerbuch dated 1 September 1998 certifying that the worker "had ceased to be incapacitated for his employment as a labourer with Henry Walker as a result of the said injury". That medical certificate, confined in its terms as it was to the physical injury referred to in the worker's claim, did not comply with s 69(3) of the Act.

[3] Prior to issuing the Form 5 Notice dated 16 September 1998 the employer had sought and received a medical report from the psychiatrist Dr McLaren dated 10 August 1998. The obtaining of this report was obviously prompted by recommendations of Dr Awerbuch in his report to the employer of 22 July 1998. Dr McLaren reported that the worker was suffering from a significant depressive state with paranoid features resulting from his physical injuries. He said, inter alia:

> "I see an interaction between his original injury, his subsequent perceptions of his management and the development of his paranoid and depressive state, and believe the original injury is to be held responsible for his present mental disorder. Left untreated I think he will not make a proper recovery and may well remain a chronic invalid for many years to come, if not for life."

[4] Counsel for the appellant relied on the following passage in the judgment of Mildren J in *Disability Services v Regan* (1988) 8 NTLR, 73 at 77:

> "In dealing with an appeal under s 69, the Court is not called upon to decide whether or not the employer was justified in the action it took because there was evidence to support the action. The question which has to be decided is whether, upon a consideration of all the evidence in the case, the employer has proved the facts set out in the certificate, and if so, whether as a matter of law those facts support the conclusion that the worker's weekly compensation payments should be cancelled or reduced, as the case may be, as from the relevant date, which is 14 days after service of the Form 5 notice."

Counsel submitted that the question before the Work Health Court was not whether the employer had proved the grounds stated in the Form 5 Notice but whether the employer had proved the facts set out in the accompanying medical certificate. It was submitted that in this case the whole matter before the Work Health Court had miscarried and there had been a breach of natural justice because the employer was required to bear an onus that, as a matter of law, it did not bear. I am quite unable to accept that argument. I have already adverted to the fact that s 69 (3) requires a medical certificate certifying that the worker has ceased to be incapacitated for work. The certificate in the present case was qualified by reference to particular injuries. Thus it did not support the Form 5 Notice. It is the Notice not the medical certificate that needs to be justified factually. As Martin CJ (Bailey J concurring) said in *Ju Ju Nominees Pty Ltd v Carmichael* (1999) 9 NTLR 1 at 8:

> "If the employer fails to establish the grounds stated in the notice, the effect of allowing the worker's appeal would be that the employer would be required by force of s 69 to continue to make weekly payments of compensation until lawfully permitted to cease or reduce those payments, either by the giving of a fresh notice or by making a substantive application under s 104, *Disability Services v Regan* (supra) at 4.".

[5] Mildren J in *Disability Services v Regan* (supra), when referring to the certificate, was dealing with a case where the certificate – in compliance with s 69(3) – coincided in its terms with the Form 5 Notice. The present employer's difficulties were self–created and the Work Health Court correctly required the employer factually to justify the cessation of payments on the sole ground given in the Notice. This, the Work Health Court found, the employer manifestly failed to do.

[6] While there was some complaint about the state of the pleadings before the Work Health Court, I agree with the presiding Magistrate when he said:

> "Whatever debate might be had about the form of pleading, I believe the issues are clear, namely whether the Form 5 is made out and if not whether any and if so what compensation is payable to Mr Edwards. I have taken this broad view of the issues because they appear to arise not only on the pleadings but were the subject of contested evidence and submissions by the parties. It is clear that a broad interpretation of the issues was and is necessary to resolve the dispute between the parties.".

[7] The employer also complained that because the worker's psychiatric injury was not part of the worker's original claim that by operation of s 182 of the Act, the worker was precluded from entitlement to compensation in respect

thereto. I am unable to accept this submission. Once a claim is accepted a worker is entitled to compensation until proper cessation or reduction of payments is effected pursuant to the s 69 procedure. I do not think that in the circumstances of this case, and particularly given the way it was conducted in the Work Health Court, that s 182 Work Health Act has anything to do with the proper disposal of the issues between the present parties.

[8] There remains for decision the grounds of appeal and the cross–appeal which relate to the Work Health Court's conclusion that from 1 June 1999 to the date of the determination of 30 October 2000 that the worker was reasonably capable of earning the sum of $200.00 per week. Appeals from the Work Health Court are confined to questions of law. On these issues the Court said:

> " I have found that the worker has little or no physical injuries limiting his capacity to work but that in consequence of his psychological state he was unemployable in the sense that he was not capable of attending at a regimented daily work schedule. There remains the question of any residual earning capacity based on his ability to participate in the music industry.
>
> Unfortunately, the evidence at the hearing did not focus on his limited ability to perform work in the music industry. Notwithstanding the state of the evidence I remain obliged to make an assessment of his earning capacity so that s 65 can be applied to calculate his remaining loss of earning capacity.
>
> The worker is clearly on his own and on the video evidence able to work in a band from time to time. He appears to be able to be a full participant that he showed no limitations in the physical set up work that needs to be done to enable the band to play. In evidence in chief he indicated that he worked in a band 'out of hand' for about eight months prior to February 2000 and at an average of

almost one 'gig' (performance) per week. Later in cross examination he said he had received an invitation to play base guitar with another band known as 'Grasscutters' but there is some doubt as to whether he intended to work with one or both bands. His evidence is that he earns between $60 and $500 per performance with the average being about $100.

In addition, Mr Edwards accept that he has from time to time given lessons in playing guitar. He indicated that the maximum number of students he saw in one week was five and that he charged $12–$15 for a 45 minute lesson. I must admit that the fee charged by him appears to me to be extraordinarily low.

Doing the best that I can with the evidence before me I assess the worker as being capable of performing in a band on a number of nights each week and in addition able to give guitar lessons to several students each week. There is evidence of the fluctuating availability of band work and of course student numbers and would in the ordinary course vary. Overall, therefore, I assess the worker as being able to earn an average of $200 per week; an amount which represents one to two band appearances and a number of students that is less than five.

It seems from the evidence of Mr Edwards that the work in the bands only reasonably came available to him about eight months prior to his giving evidence in February 2000 and so I hold that his earning capacity began 1/6/99 and continues to the present.".

[9] As is evident from those remarks the conclusion of an earning capacity of $200.00 per week is an inference drawn from a paucity of primary facts. It is a conclusion that is open upon the evidence and thus a finding of fact which can not be disturbed on appeal. It can not be said, as was submitted, that there was no evidence which as a matter of law could support the finding. See on this question generally *Wilson v Lowery* (1993) 110 FLR 142 at 146.

[10] Both appeal and cross–appeal fail and are dismissed.