Ali Curung Council Association Inc v Doyle [2005] NTSC 39

PARTIES:	ALI CURUNG COUNCIL ASSOCIATION INC v DOYLE, Tina
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LA 2 of 2005 (20322037)
DELIVERED:	20 July 2005
HEARING DATES:	18 July 2005
JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

WORK HEALTH
Appeal – Work Health Court may only determine matters before it – burden of proof - estoppel

AAT King's Tours v Hughes (1994) 99 NTR 33 at 38.25, applied
Blair v Curran (1939) 62 CLR 464, cited
Horne v Sedco Forex Australia (1992) 106 FLR 373 at 380.9, followed

REPRESENTATION:

Counsel:

Appellant:	P M Barr QC
Respondent:	J B Waters QC

Solicitors:

Appellant:	Morgan Buckley
Respondent:	Caroline Scicluna

Judgment category classification:	B
Judgment ID Number:	Sou0506
Number of pages:	7

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

Ali Curung Council Association Inc v Doyle [2005] NTSC 39
No. LA 2 of 2005 (20322037)

IN THE MATTER OF an appeal under the *Work Health Act*

BETWEEN:

ALI CURUNG COUNCIL ASSOCIATION INC
Appellant

AND:

TINA DOYLE
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 20 July 2005)

[1] This is an appeal from a decision of the Work Health Court that was delivered on 14 February 2005. The appeal was commenced by a notice of appeal dated 10 March 2005. By consent on 18 July 2005 the grounds of appeal were amended in accordance with an amended notice of appeal dated 14 July 2005.

[2] The grounds of appeal are:

(1) In determining and quantifying the worker's entitlements to weekly compensation for the partial incapacity, the learned magistrate erred

in law in acting on the incorrect basis that the onus of proving any partial incapacity and the extent thereof rests with the employer;

(2) In determining and quantifying the worker's entitlement to weekly compensation for partial incapacity for the period 25 August 2003 to 26 November 2004, the learned magistrate erred in law in adopting the amounts and calculations set out in exhibit 15 without regard to the requirements for determining "loss of earning capacity" under s 65(1) and s (2)(b) Work Health Act;

(3) In determining and quantifying the worker's entitlements to weekly compensation for partial incapacity for the period 25 August 2003 to 26 November 2004, the learned magistrate erred in law in adopting an amount by way of normal weekly earnings ("NWE") which was not established on the evidence or on agreed fact before him.

[3] The order sought by the appellant if the appeal is successful is that the issue of the extent of the worker's partial incapacity be remitted to the Work Health Court for trial.

[4] The appeal is misconceived. For the following reasons it should be dismissed.

[5] The issues that are to be determined in a proceeding in the Work Health Court are firstly those contained in the pleadings and ultimately those issues determined by the conduct of counsel for the parties at the hearing in the

Work Health Court: *Horne v Sedco Forex Australia* (1992) 106 FLR 373 at 380.9.

[6] As a result of the conduct of both counsel for the employer and counsel for the worker during the hearing in the Work Health Court and despite the matters pleaded in par 3 of the counterclaim, the only issue between the parties in the Work Health Court, and the only issue decided by the learned magistrate, was whether the worker had ceased to be incapacitated per se for work as a result of the work injury. The employer contended that as a result of two medical reports that it had received, that the worker was fit to return to her pre-injury employment and that she was no longer incapacitated in any respect for work as a result of her work injury. This was disputed by the worker. However, it was conceded by the worker that she had ceased to be totally incapacitated for work. Consequently the latter issue was abandoned by the parties and formed no part of the hearing in the Work Health Court.

[7] Put simply, the worker's entitlement to weekly benefits for partial incapacity, the quantification of any such benefits and the amount of normal weekly earnings for the period 25 August 2003 to 26 November 2004 were not matters before the Work Health Court: *Horne v Sedco Forex Australia* (supra) at 380.9

[8] While it is true that the learned magistrate erred in finding that the worker had sustained a loss of weekly payments of compensation in the sum of

$25,265.37 for the period 25 August 2003 until 26 November 2004 because this was not a matter which fell to be decided by him in the proceeding, the finding was of no effect and strictly did not form any part of the learned magistrate's ultimate determination of the proceeding in the Work Health Court. It was an unnecessary finding. It involved factual issues which were not litigated by the parties at the hearing in the Work Health Court.

[9] The learned magistrate's ultimate conclusion was as follows:

> "The employer cannot establish that the pain and headaches from which the worker suffers which interfere with her ability to work do not arise out of the motor vehicle accident. The best that can be said is the pain and headaches might extend from the motor vehicle accident and then again they might not. The employer cannot tip the scales in its favour.
>
> However a consideration of the worker's employment record both pre and post 25 August 2003 reveals a limited capacity to undertake paid work. As this limited capacity exists either side of 23 August 2003 **the employer cannot point to or establish that a limited capacity to work ceased after 23 August 2003** (emphasis added).
>
> The employer cannot prove that the worker's inability to undertake more than 20 hours per week is not related to the pain arising from the motor vehicle accident. The employer cannot rule out that the worker lacks the capacity to undertake paid work for more than 20 hours per week in a clerical environment or to work in a non clerical environment."

[10] On 14 February 2005 as part of his reasons the learned magistrate made the following orders:

1. Judgment for the worker.

2. The worker's entitlements pursuant to the Work Health Act to weekly and other benefits of compensation are to be reinstated from 25 August 2003.

[11] On 21 February 2005 the learned magistrate made the following further orders:

1. The employer is to pay the worker's costs of the proceeding at 100% of the Supreme Court Scale.

2. Liberty is granted to relist the matter in relation to quantification of payments and interest

[12] All of the above is consistent with the learned magistrate simply determining that the employer had failed to prove that the worker had ceased to be incapacitated per se for work as a result of the work injury. This was the only issue to be determined at the hearing in the Work Health Court. The learned magistrate correctly directed himself as to which party bore the legal burden of proof in relation to this issue. His remarks that the employer cannot prove that the worker's inability to undertake more than 20 hours work per week and so on must be read in context. The context is the resolution of the issue of whether the evidence led by the employer demonstrated that all incapacity for work as a result of the work injury had ceased. At page 18 of his reasons the learned magistrate correctly stated that the employer had to prove a cessation of incapacity after 25 August

2003. This is consistent with his earlier statements at page 16 of his reasons as to who bore the onus of proof.

[13] The extent of the worker's entitlement to weekly benefits for partial incapacity, the quantification of the worker's weekly benefits and the amount of the worker's normal weekly earnings were not issues that were indispensable or fundamental to the ultimate decision in the proceeding in the Work Health Court. Nor were the factual findings complained of in this appeal ultimate facts which formed an essential element of the determination of the question of whether the worker had ceased to be incapacitated per se for work. In the circumstances no issue estoppel arises in relation to either the worker's entitlement to weekly benefits for partial incapacity or the quantification of arrears and ongoing weekly benefits or the amount of normal weekly earnings: *Blair v Curran* (1939) 62 CLR 464 per Dixon J at 532. Nothing but what is legally indispensable to the conclusion is finally closed or precluded.

[14] If the matters referred to in par [13] above cannot be agreed between the parties and if mediation of the issues is unsuccessful it will be necessary for the worker to make a fresh application to the Work Health Court for a ruling about the extent of her partial incapacity and the quantification of her arrears and ongoing loss of earning capacity. Should such an application be made, the worker would bear the legal onus of proof in relation to each of these issues: *AAT King's Tours v Hughes* (1994) 99 NTR 33 at 38.25.

[15] The appeal is dismissed. The stay imposed by the Work Health Court on the payment of arrears of weekly benefits is set aside. I will hear the parties as to the costs of the appeal.