Rupe v Beta Frozen Products [2000] NTSC 71

PARTIES:	CLINTON DOUGLAS RUPE
	v
	BETA FROZEN PRODUCTS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	LA7 of 2000 (9828002)
DELIVERED:	6 September 2000
HEARING DATES:	23 & 25 August 2000
JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Appellant:	Mr M. Grant
Respondent:	Mr O. Downs

Solicitors:

Appellant:	Hunt & Hunt
Respondent:	Cridlands

Judgment category classification:	
Judgment ID Number:	ril0018
Number of pages:	13

ril0018

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

Rupe v Beta Frozen Products [2000] NTSC 71
No. LA7 of 2000 (9828002)

BETWEEN:

CLINTON DOUGLAS RUPE
Appellant

AND:

BETA FROZEN PRODUCTS
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 6 September 2000)

[1] The appellant/worker was injured in the course of his employment with the respondent. At the time he was employed as a grade 1 butcher under the Federal Meatworkers Award.

[2] On 27 February 1998 the worker sustained an injury to his Achilles tendon. As a consequence he was hospitalised and then placed in a plaster cast which remained in place for a period of weeks. Upon discharge he underwent physiotherapy and eventually, in August 1998, he embarked upon a return to work program. During this program he was paid compensation on the basis of a partial incapacity and those payments continued until December 1998 when he was served with a Form 5 notice issued pursuant to

s 69 of the *Work Health Act*. That notice advised him that the payment of weekly benefits was to be cancelled and set out the reasons for the decision. The grounds for cancellation raised in the Form 5 notice were summarised by the appellant as being:

> "(1) that the worker had ceased to be incapacitated for work;
>
> (2) that the worker had unreasonably failed to undertake rehabilitation treatment; and
>
> (3) that the worker had unreasonably failed to present for assessment of employment prospects."

[3] In response to the Form 5 notice the worker commenced proceedings in the Work Health Court appealing against the decision of the respondent to cancel payments. That application was met by an answer and counterclaim in which the respondent made an alternative claim that, on and from 2 December 1998, the worker had ceased to be incapacitated for work.

[4] The matter came before the learned Chief Magistrate who held that the employer had failed to establish that the worker had unreasonably failed to undertake rehabilitation treatment or that he had unreasonably failed to present for assessment of employment prospects. There is no challenge to those findings. As to the remaining ground of the Form 5, being that the worker had ceased to be incapacitated for work, his Worship held that "as at 4 December 1998 Mr Rupe was capable of undertaking his employment with

Beta on a full time basis". He went on to hold that one basis of the Form 5 notice had been made out and that the worker's claim therefore failed.

[5] The worker has appealed to this Court on three grounds which, as they were developed by the appellant on the appeal, may be summarised as follows:

(1) that the Form 5 was ineffective in that it was not accompanied by a valid certificate of cessation of incapacity as required by s 69(3) of the Act;

(2) the learned Chief Magistrate erred in law in finding that as at 4 December 1998 the worker was capable of undertaking employment with the employer on a full time basis and dismissing the worker's application in consequence of that finding;

(3) alternatively that the learned Chief Magistrate erred in law in finding that the worker was not entitled to weekly benefits pursuant to the *Work Health Act* beyond 18 December 1998 and in not finding that any relief from the requirement to pay weekly benefits should not have taken effect until the date of the Court's finding on the counterclaim.

Ground One

[6] The worker submitted that his appeal was limited to an appeal against the cancellation of benefits. In that regard, if the Form 5 document by which the cancellation was effected was vitiated by a formal defect then, it was

said, the cancellation effected by that notice was of no effect. Reference was made to *Collins Radio Constructors Inc. v Day* (1998) 143 FLR 425.

[7] It was submitted that in this case the employer had failed to comply with s 69 of the Act. By virtue of s 69(3) of the Act a medical certificate was required to accompany the Form 5 notice because the employer alleged a cessation of incapacity for work. It was said that the certificate that did accompany the notice was not "a certificate for the purposes of s 69, and that ground of Form 5 was vitiated by formal defect". As the remaining grounds identified by the Form 5 had been rejected by his Worship, therefore the whole of the Form 5 was ineffective.

[8] The attack upon the medical certificate, which had been issued by Mr Sen, an orthopaedic surgeon, arose from the unusual circumstances surrounding the issuing of that certificate. Mr Sen had been engaged to review the worker prior to the worker entering upon a return to work program in August 1998. Mr Sen then reviewed the worker in October 1998 after the program had been in place for some two months. He saw the worker on 9 October 1998. When he gave evidence before the learned Chief Magistrate, Mr Sen expressed the view that the worker was not ready to return to his pre-injury duties on a full time basis as at 9 October 1998 and he had recommended a gradual increase of work over time. In a medical report dated 26 October 1998 that followed and was based on the attendance on 9 October 1998, Mr Sen noted that "the injury is not stable yet". He observed that "Mr Rupe needs ongoing physiotherapy" and, further, "he needs to do his own

exercises and have physiotherapy at least twice a week for the next 3-4 weeks".

[9] On 25 November 1998, at the request of the employer, Mr Sen issued the certificate which accompanied the Form 5 notice. In that document he certified that:

> "(1) On 09/10/98 I examined Mr Clinton Rupe in respect of work related injury that he says arose on 27 February 1998, namely left Achilles tendon;
>
> (2) In respect of that injury, Clinton Rupe has ceased to be incapacitated for work and is fit to resume pre-injury duties."

[10] Mr Sen provided that certificate from his address in South Australia without the benefit of again examining the worker. The certificate issued even though Mr Sen gave evidence that he did not obtain a history from the worker as to what his "work duties" involved. He only knew that the worker was a butcher. There was no evidence of Mr Sen having been provided with any additional information between 9 October 1998 and 25 November 1998 relevant to the condition of the worker. He did not speak with the physiotherapist. The learned Chief Magistrate described the matter in this way:

> "Mr Sen saw Mr Rupe shortly after the injury and once more only on 9 October 1998 when he formed the view that Mr Rupe was not then ready to resume full time duties, opined that further physiotherapy was required ("twice a week for the next three to four weeks") and gave an expectation of being able to resume full time work in four weeks from the date of the report, namely 26 October 1998. He then issued the medical certificate dated 25 November 1998 (Exhibit E16)

> which was appended to the Form 5. This certificate was given without further examination or apparent enquiry as to whether his recommendations had been followed or there had been any substantive improvement in the condition of Mr Rupe. In his oral evidence he indicated that he still backs his judgment which was based on years of experience. He says his views are supported by the video evidence showing Mr Rupe participating in bow hunting and fishing."

[11] There was no satisfactory explanation as to how Mr Sen could express the view contained in the medical certificate dated 25 November 1998 when he had not seen the worker since 9 October 1998 at which time he had been of the view that further treatment was required in order to enable the worker to resume full time work. He said he made the date 25 November 1998 because that was when he "expected him to go back to work". The opinion expressed in the medical certificate can only have been speculation on the part of Mr Sen based upon an assumption that there had been intervening medical treatment in the form of physiotherapy and exercise which had been successful. He assumed, without any identified basis for so doing, that the condition of the worker had responded to treatment and that nothing had occurred which aggravated the condition. His Worship was critical of the certificate issued by Mr Sen. He made the following observations:

> "The Form 5 with the certificate of Mr Sen, complies with the legal requirements of s 69, however I would have had little regard to the certificate of Mr Sen dated 25 November 1998 unless supported by other evidence. The practice of giving medical certificates should be treated seriously by the medical profession, especially since the rights of employers and workers are thereby affected. In this case, and in almost all cases, I cannot imagine that it would be appropriate for a medical certificate to be given without having some current process of assessment."

[12] In his evidence to the Work Health Court the following exchange occurred between Mr Sen and cross-examining counsel:

> Doctor Sen, for all you know Mr Rupe may not have been able to cope working full-time five days a week at the time you signed the certificate?---Well, it is my expectation. That – that's what it is. The certificate said that I expect him to go back to work on such and such a day."

In fact, as can be seen from the document, it said that at that date he "has ceased to be incapacitated for work and is fit to resume pre-injury duties". Mr Sen may have been confused as to the purpose of his certificate or the use to which it was to be put. It seems he regarded the certificate as a statement of expectation rather than a certification of fact.

[13] His Worship later observed that he did "not accept the evidence of Dr Sen's certificate of 25 November 1998". Given the history set out above that was a perfectly understandable conclusion.

[14] It seems that his Worship, whilst not accepting that certificate, came to a conclusion that what was said in the certificate reflected the truth of the situation. He based this view upon evidence other than the certificate. The final conclusion of his Worship was that he was satisfied on the balance of probabilities that as at 4 December 1998 the worker was capable of undertaking his employment on a full time basis. He therefore held that "on the above basis, a basis of the Form 5 is made out, and the worker's claim must fail".

Section 69 of the *Work Health Act*

[15] Section 69 of the *Work Health Act* provides the method by which an amount of compensation payable under the Act may be cancelled or reduced. For present purposes the section requires that an amount of compensation shall not be cancelled or reduced unless the worker to whom it is payable has been given 14 days notice of the intention to cancel or reduce together with a statement complying with s 69(1)(b). Section 69(3) then provides:

> "Where compensation is to be cancelled for the reason that the worker to whom it is paid has ceased to be incapacitated for work, the statement under subsection (1) shall be accompanied by the medical certificate of the medical practitioner certifying that the person has ceased to be incapacitated for work."

[16] The application of s 69 of the *Work Health Act* was considered in *Collins Radio Constructors Inc. v Day* (supra) where the Court of Appeal (at 429 and 430) accepted the reasoning of Martin CJ in the Court below when he said:

> "In my opinion, the statutory requirements whereby an employer is enabled to unilaterally cancel a worker's continuing right to receive compensation constitutes such an interference with personal rights as to require strict compliance with the conditions attaching to it. Further, there are good reasons why, within the scheme of the Act designed to protect workers' rights, that the worker should obtain the information required and in the form required."

The Court went on to observe that whilst the requirements of s 69(3) must be complied with it was not the intention of the legislature that only the precise words chosen by the legislature and no others conveying the same meaning would suffice.

[17] The question that then arises is whether there has been compliance with s 69(3) of the *Work Health Act* in this matter given the evidence and the findings of his Worship in relation to the certificate of Mr Sen. In my opinion there has not. The document relied on to support the Form 5 was not what it purported to be. It complied with the requirement of form in s 69 of the Act but in truth what Mr Sen did not do was certify that the worker had ceased to be incapacitated for work as at 25 November 1998. At its highest Mr Sen speculated that such would be the case. That is not what s 69(3) required. The section requires certification that the worker "*has* ceased to be incapacitated for work" ie the certificate must speak effectively of the worker's recovery at the time the s 69 notice to discontinue weekly payments is issued. It cannot be known what opinion Mr Sen may have formed had he examined the worker on or near to the date of his certificate.

[18] If the evidence of Mr Sen is accepted he was not intending to certify that the worker had ceased to be incapacitated for work. Notwithstanding the wording of the document he signed, he was only setting out his future expectations. The fact that it was issued in the circumstances described means it was a speculative expression of opinion as to the future by the doctor rather than an expression of concluded fact. In all of the circumstances his Worship was correct in not accepting the certificate.

[19] The question that it is then necessary to address in this matter is whether the employer has fulfilled the requirements of s 69 of the *Work Health Act* and is thereby permitted to cancel or reduce payments of compensation

otherwise due and payable. Are the conditions present that give rise to the right created by the section to discontinue or limit payments? What is not of concern is any question of whether or not the opinion of the doctor should be accepted. That would necessarily open up questions of weight and merit relating to the opinion of the doctor. Such issues are to be addressed at a different stage in the proceedings if this be necessary. In an appeal of the kind being considered in this matter the issue is whether, in all of the circumstances, the certificate itself is of the kind contemplated by s 69(3) of the *Work Health Act*. In my opinion it was not.

[20] It follows from what has been said above that, in this matter, there was a failure by the employer to comply with the requirements of s 69 of the *Work Health Act* and the employer could not rely upon the provisions contained in that section in order to cease payments. Having failed to comply with the requirements of s 69, the employer is obliged to continue to make weekly payments of compensation until lawfully permitted to cease or reduce those payments either by giving a fresh notice or by making a substantive application: *Ju Ju Nominees Pty Ltd v Carmichael* (1999) NTSC 20 at 9; *Disability Services of Central Australia v Regan* (1998) 8 NTLR 73 at 76, 78-79. In this matter a substantive application was made in the counterclaim filed and delivered on behalf of the employer.

[21] The counterclaim (which is now permitted under the amended *Work Health Rules*) included the "further and alternative" claims made by the employer that on and from 2 December 1998 the worker had ceased to be incapacitated

for work or had only been partially incapacitated for work. In his defence to counterclaim the worker admitted that he was only partially incapacitated for work. He also said that his employment with the respondent had been terminated and that the employer had failed to take any or any reasonable steps to find or provide him with suitable employment or retraining.

[22] A review of the reasons for judgment of his Worship indicates that he did not turn his mind to the counterclaim or the defence to it. As is noted above his Worship declined to accept the evidence of Mr Sen's certificate of 25 November 1998. He went on to consider other evidence that he had before him including evidence that the worker was able to undertake regular hunting, bowhunting and fishing exercises throughout the relevant period. He had before him video evidence of a bowhunting and fishing expedition undertaken by the worker. Notwithstanding his earlier indication that he did not accept the certificate of Mr Sen, his Worship proceeded to rely upon that certificate given that other evidence suggested the certificate reflected the truth of the situation. Having considered all of the evidence before him his Worship determined that "as at 4 December1998, Mr Rupe was capable of undertaking his employment with Beta on a full time basis." He then concluded:

> "On the above basis a basis of the Form 5 is made out and the worker's claim must fail."

[23] In reaching this conclusion it is clear that his Worship relied upon the Form 5 and the provisions of s 69 to dismiss the appeal of the worker. For the

reasons I have expressed above, and consistent with the findings of fact made by his Worship, the provisions of s 69 had not been complied with by the employer and that section could not be relied upon as a basis for the cessation of payments to the worker. The learned Chief Magistrate erred in dismissing the appeal of the worker on this basis.

[24] The issue of the extent of the capacity for work of the worker remained a live issue in the proceedings because of the pleading in the counterclaim and the defence thereto. However his Worship considered the findings he made only in the context of the Form 5 application. He did not proceed to deal with the matters raised by the counterclaim at all. A consideration of the matters raised in the counterclaim would, of necessity, have involved a consideration of the matters raised in the defence to the counterclaim. That has not occurred.

[25] In the circumstances I find that his Worship erred in failing to find that the Form 5 notice was ineffective in that it was not accompanied by a valid certificate of incapacity as required by s 69(3) of the Act. The appeal must therefore be allowed.

[26] It was the submission of both parties that, in the event that I reached the conclusion set out above, I should not proceed to determine the matters outstanding from the counterclaim and defence thereto as they had not been addressed by the Work Health Court. I agree.

[27] In light of the appeal being allowed on ground 1 it is not necessary to consider the remaining grounds of appeal or the cross-appeal. I will hear the parties as to the appropriate formal orders and as to costs.

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