KANTROS v TERRITORY INSURANCE OFFICE BOARD

Motor Accidents (Compensation) Appeal Tribunal

Martin J.

19, 20, 21, 22, 23 August, 20 September & 5 December 1991

APPEAL - motor vehicles - injury arising from accident - compensation - Board's determination to discontinue entitlement - appeal before Tribunal - evidence of reduced capacity to earn - no evidence of degree - onus on respondent

APPEAL - motor vehicles - injury arising from accident - Board's determination to decline funding for operation - whether a reasonable medical expense - evidence of incorrect diagnosis & that operation inappropriate

APPEAL - motor vehicles - appeal before Tribunal - hearing de novo - not confined to evidence before Board - reject submission that quantum of compensation not a matter referred to Tribunal

Case referred to:

McMillan v TIO (1988) 57 NTR 24

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IN THE MOTOR ACCIDENTS (COMPENSATION) APPEAL TRIBUNAL

No. M10 of 1990

BETWEEN:

NICHOLAS KANTROS
Applicant

AND:

THE TERRITORY INSURANCE OFFICE BOARD
Respondent

CORAM: MARTIN J.

REASONS FOR JUDGMENT

(Delivered 5 December 1991)

The applicant, who was at the time of the accident a resident of the Territory, suffered an injury in or as a result of a motor vehicle accident that occurred in Darwin on 30 October 1987. His capacity to earn income from personal exertion was reduced as a result of the injury. He applied for benefits under the *Motor Accidents (Compensation) Act* and for a period was paid compensation for total loss of earning capacity in accordance with s. 13(2) of the *Act* and received other benefits.

From time to time the Office received medical reports from doctors consulted by the applicant, and it also arranged for him to undergo examination by medical practitioners nominated by it. On 31 July 1990 the Board of the Office upheld a determination made by a person appointed

by the Office for the purpose that:

1. the applicant was a person who qualified as a resident of the Northern Territory as defined within s. 4 of the *Act*;

2. on the basis of medical evidence to hand it was of the opinion that the applicant's capacity to earn income was no longer reduced;

3. the applicant's entitlement to receive s. 13 benefits should cease on 18 May 1990.

Further, on the same date, the Board having considered a further medical opinion, upheld an administrative decision to decline the funding of an occipital operation, proposed to be performed on the applicant by his treating specialist in Queensland, as not constituting a reasonable medical expense pursuant to s. 18 of the *Act*. (As to the internal decision making and review process see s. 27 of the *Act*).

The applicant exercised his rights under s. 29 of the *Act* to refer the matter to this Tribunal. The form of the reference to the Tribunal simply asserted that the applicant was a person aggrieved by each of the determinations.

Grounds were set out for the reference, they being that the applicant was not capable of earning a sum per week greater than the amount that is equal to 85% of the average earnings per week in the Northern Territory, and that since 18 May 1990 he had not been capable of being gainfully employed in his former or any other occupation due to the injuries he received as a result of the motor vehicle accident. He asserted that he was entitled to receive s. 13 benefits since 18 May, and that the cost of the occipital operation was a reasonable medical expense in terms of s. 18. By its answer the respondent took issue on those claims and asserted that the determinations made were correct.

The matter was mentioned before the Tribunal in accordance with r. 7 of the *Motor Accidents (Compensation) Appeal Tribunal Rules* on three occasions. On 15 November it was ordered that the rules be complied in regard to each party providing to the other copies of the relevant documents within seven days from that date. No other issues were raised and no other orders sought.

When the matter came on for hearing the plaintiff gave evidence, and there was evidence from medical experts on both sides. In brief, the plaintiff had suffered a significant injury in the form of a fracture of the C1 vertebra (the atlas). The area of dispute was as to whether he had continued to suffer from the consequences of that injury in particular by way of stiffness in his neck and back, headaches and poor concentration leading to disability affecting his earning capacity. The medical experts called in the applicant's case were of the opinion that he was quite unfit for work at all, whereas those called in the respondent's case, though acknowledging him to be unfit for heavy physical work, considered that he was fit for work in other categories. None of the respondent's witnesses, whose opinions I prefer over those of the experts called by the appellant, were prepared to estimate the continuing disabilities of the applicant in percentage terms whether relating to physical capacity or earning capacity.

Having prescribed the circumstances in which a person is entitled to compensation for loss of earning capacity in ss. (1), s. 13 then goes on in ss. (2) to prescribe the compensation payable. Relevantly, it provides that in respect of the period during which an applicant suffers a loss of earning capacity as determined by the Board, he is to be paid the amount by which the amount that the Board determines he is reasonably capable of earning in employment in each period of six months during that period if he were to engage in the most profitable employment (if any) available to him is less than 85% of the average earnings for that six months of wage earners in the Territory calculated on the basis of what, in the opinion of the Board, is the best statistics available to it, both amounts calculated net of income tax as if paid to the person.

A hearing conducted by the Tribunal is a hearing de novo and thus it is not a case of the Tribunal adjudicating upon the correctness or otherwise of the exercise of the powers of the Board. Rather, the Tribunal stands in the same position as the Board deciding whether the applicant is entitled to compensation and if so, the amount of it. The question for the determination of the Tribunal is whether the decision of the Board was the correct or preferable one on the material before the Tribunal (see generally the discussion by Gallop J. in *McMillan v TIO* (1988) 57 NTR 24 at p. 26). The Tribunal is called upon to exercise an original jurisdiction and it is not confined to the materials which were before the Board. Even on the respondent's evidence it is clear that the applicant's capacity to earn income from personal exertion is reduced as a result of the injury and continues to be reduced. However, there is no evidence of the amount which he is reasonably capable of earning if he were to engage in the most profitable employment available to him. There is evidence on the basis of which the Tribunal might determine the amount of 85% of the average earnings of wage earners in the Territory at the relevant time or during a relevant period.

The applicant says that the question of the quantum of his compensation is not a matter referred to the Tribunal. I reject that proposition. The determinations made by the Board, all of which were referred to the Tribunal, were that his capacity to earn income was no longer reduced (which proposition I have rejected) and that his entitlements to receive benefits under s. 13 were to cease, that is, he did not qualify for payment of any amount of compensation in accordance with s. 13(2). Furthermore, there is no provision in the *Act* whereby this Tribunal might remit the whole or any part of a matter referred to it back to the Board. It stands in the place of the Board and is to make its determination on the basis of the material before it. The capacity of the applicant to earn income from personal exertion has been reduced as a result of the compensable injury. He has established the circumstances giving rise to the need to consider the next question, that is, the amount of compensation to which he is entitled. In that regard he has failed in his attempt to show that he has suffered a total loss of earning capacity. If he had been successful he would have been entitled to the maximum benefit prescribed by s. 13(2). However, there is evidence that he has

suffered an unquantified loss of earning capacity, unquantified in the sense that there is no evidence of the amount which he is reasonably capable of earning as described and qualified in that subsection. That is a matter which the Board is required to determine, or upon reference to the Tribunal, the Tribunal.

Absent evidence before the Tribunal as to the relevant amount which the applicant is capable of earning the question arises as to whether the applicant is entitled to the maximum rate of compensation payable under s. 13(2), or nothing. The answer must be the former. A person claiming total loss of earning capacity can hardly be expected to produce evidence that he has not lost his total earning capacity, ("total" meaning, within the limitations of s. 13(2)), nor theoretical evidence as to what his earning capacity would be if the Tribunal were to consider he did not suffer from such a loss. Taking the analogous position in an action for damages for personal injury at common law, the burden of proof is on the plaintiff to establish liability and damage, as the applicant has done here, but it is for the defendant to establish the failure of the plaintiff to mitigate, or, for the respondent to prove here the amount which the applicant is reasonably capable of earning for the purposes of the subsection. The evidence falls short of showing that the applicant is incapable of earning anything, but there is nothing to show what he is capable of earning. The amount which is less than 85% of the relevant earnings is not known. Accordingly there can be no reduction of that prescribed rate of compensation.

As to the proposed surgery, I am not satisfied that the expenses which might be associated with it would be reasonably incurred by the applicant whether it was proposed that the operation be carried out in Queensland or Darwin. The procedure is called an occipital neurectomy in which the occipital nerve is cut with a view to reducing neuralgia type of pain. It was a procedure recommended by the applicant's treating neurosurgeon who had seen him on some 17 occasions. However, the neurosurgeons called in the respondent's case were of the view that the diagnosis of occipital neuralgia was not correct and furthermore that the proposed surgery was outdated, inappropriate and unwarranted. I am satisfied that it is more likely than not that the opinions of

those specialists are correct, and I am not prepared to hold that the expense of such an operation and any attendant expenses would be reasonably incurred. I am not satisfied there is good reason for the operation to be carried out.

I will hear counsel as to the orders to be made and as to costs.