

ABC Marketing & Sales Pty Ltd v Millar [2012] NTCA 6

PARTIES: ABC MARKETING AND SALES PTY LTD
v
MILLAR, Betty

TITLE OF COURT: COURT OF APPEAL OF THE
NORTHERN TERRITORY

JURISDICTION: CIVIL APPEAL FROM THE SUPREME
COURT EXERCISING TERRITORY
JURISDICTION

FILE NO: AP3 of 2012

DELIVERED: 10 August 2012

HEARING DATES: 23 July 2012

JUDGMENT OF: RILEY CJ, BLOKLAND & BARR JJ

APPEALED FROM: MILDREN J (No LA7 of 2011)
(21004782)

CATCHWORDS:

PROCEDURE – Supreme Court Procedure - whether matter should be remitted to trial magistrate to determine case using correct onus of proof – appeal allowed.

Hopkins v Collins/Angus and Robertson Publishers Pty Ltd (unreported LA 4 of 1997), referred to.

REPRESENTATION:

Counsel:

Appellant: M Crawley
Respondent: M Johnson

Solicitors:

Appellant: CridlandsMB
Respondent: C Scicluna

Judgment category classification: B
Judgment ID Number: Ril1211
Number of pages: 8

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

ABC Marketing & Sales Pty Ltd v Millar [2012] NTCA 6
No. AP3 of 2012

BETWEEN:

**ABC MARKETING AND SALES PTY
LTD**
Appellant

AND:

BETTY MILLAR
Respondent

CORAM: RILEY CJ, BLOKLAND & BARR JJ

REASONS FOR JUDGMENT

(Delivered 10 August 2012)

The Court:

- [1] These are our reasons for Orders made on 23 July 2012 allowing the appeal in part and remitting the matter to the Work Health Court to be determined in accordance with law.
- [2] On 28 June 2005 the respondent to this appeal (the worker) sustained an injury to her right knee in the course of her employment with the appellant, ABC Marketing and Sales Pty Ltd (ABC). Her claim for compensation under the Workers Rehabilitation and Compensation Act (the Act) was accepted by her employer. She underwent conservative treatment and, on 30 November 2005, received a clearance from her treating medical practitioner.

Compensation payments ceased at that time. She returned to work with another employer.

- [3] In June 2008 the worker sustained a further right knee injury whilst in the employ of Mining and Civil Services Pty Ltd (Mining and Civil) following which she underwent surgical treatment. The worker also suffered injuries in the course of her employment in a separate incident in June 2008. Those injuries were to other parts of her body, notably her upper body. Claims for compensation under the Act against Mining and Civil in relation to both sets of injuries were accepted on behalf of the employer and payments of weekly compensation and medical expenses were made.
- [4] In October or November 2008 the worker was certified fit to return to work and Mining and Civil cancelled the payments of compensation. Thereafter, the worker lodged an application in the Work Health Court challenging the decision. On 24 September 2009 the worker entered into a Deed between herself and QBE Insurance (Australia) Limited (QBE), the insurer of Mining and Civil, whereby she agreed to discontinue her claims against the company in consideration of the payment of the sum of \$80,000. The Deed was in a form commonly referred to as a Hopkins Agreement¹ and related to the right of the worker to receive compensation under the Act for the injuries suffered in 2008 which included the injury to the right knee and the upperbody injuries. The effect of the Deed was to enable a set off against whatever amounts of compensation, whether past or future, the worker might

¹ *Hopkins v Collins/Angus and Robertson Publishers Pty Ltd* (unreported LA 4 of 1997).

be entitled to recover under the Act in respect of the injuries referred to in the Deed.²

[5] In 2010 the worker filed an application in the Work Health Court against the original employer, ABC, seeking further compensation as a result of the injury sustained on 28 June 2005. ABC denied liability on various grounds including that the worker had already been compensated for the losses claimed by way payments made pursuant to the 2009 Deed and that the worker was precluded from seeking payment "in accordance with the principle of double compensation".³

[6] In the Work Health Court it was determined that in 2005 the worker had suffered a compensable injury to her knee in the course of her employment with ABC and this resulted in an entitlement to compensation under the Act from January 2010. It was held that the worker was entitled to an award totalling \$13,924.58 for weekly payments, certain rehabilitation expenses, medical expenses and travelling expenses. However the magistrate concluded that the worker could not be compensated twice for the same loss and that the worker had not discharged the onus, which the court held rested upon her, to prove that the payment to her of \$80,000 pursuant to the 2009 Deed was "not compensation for the knee". Therefore the amount of \$80,000 was required to be set off against the award to avoid double compensation for the compensable knee injury. The Work Health Court made a declaration

² *Millar v ABC Pty Ltd* [2012] NTSC 21 at [15].

³ Second Further Amended Defence, par 10.2(c) and par 12.4(c).

of liability for compensation in favour of the worker totalling \$13,924.58 but set off against that amount the \$80,000 paid under the Deed. Each party was ordered to bear its own costs.

- [7] The worker appealed to the Supreme Court on various issues. In the Supreme Court it was held that the magistrate erred in determining where the onus lay in relation to the 2009 Deed. The judge held that it was no part of the worker's case to prove that the ongoing effects of the 2005 injury had been compensated for by the terms of the Deed between her and QBE. The onus, in this regard, fell upon ABC. However, his Honour went on to conclude that ABC had discharged the onus resting upon it by proving the terms of the Deed.⁴ There is no challenge to these rulings in this Court.
- [8] The judge also held that, for ABC to prove double recovery, it had the onus to show that the incapacity experienced by the worker in 2010 in relation to the knee injury was due to both the 2005 and 2008 injuries. In the event that the 2008 injuries were causative of, or contributed to, the incapacity experienced by the worker in 2010 any liability for compensation in relation to that period would be set off against the amount of \$80,000 paid under the Deed in respect of the 2008 injuries.
- [9] The judge allowed the appeal of the worker to the extent of setting aside the magistrate's order that the payment of \$80,000 made under the Deed be set off against the compensation payable to the worker to avoid her receiving

⁴ Par [27] Reasons for Decision.

double compensation. The effect of so doing was to require the respondent, ABC, to pay to the worker the sum of \$13,924.58. The reasons for so ordering were expressed as follows:⁵

The way the case was run below was that (the worker) claimed that her incapacity was due to the 2005 injury, and (ABC) had evidence to the effect that her incapacity after 2008 was due to a natural degeneration of the knee. There was some evidence that the 2008 knee injury was also a contributing factor to her incapacity in 2010 – 2011. Questions of causation are questions of fact, and therefore this is a matter which the employer had to prove. There is no factual presumption that merely because the 2008 knee injury was an aggravation of the 2005 injury, the effects of the 2008 knee injury were also a contributing cause to incapacity in 2010. It is quite possible that the effects of the 2008 injury were spent shortly after the appellant was certified fit for work. The learned Magistrate could have found on this issue in favour of (ABC) but did not. *I can only assume that the learned Magistrate was not satisfied that this had been proved.* In those circumstances I consider that the (worker) is entitled to the orders of the kind sought. No argument was presented to me by (counsel for ABC) to the contrary.(emphasis added)

[10] Before this Court, ABC took issue with the conclusion of his Honour that the magistrate was not satisfied that ABC had proved that the 2008 injury was still a contributing cause of incapacity in 2010. It was submitted that "by necessary implication the magistrate did make such a finding". Further, it was submitted that, as his Honour found that the magistrate erred in holding that the onus was upon the worker to prove the 2008 injury was no longer causative, his Honour should have reviewed the evidence to determine whether the onus placed on the employer, ABC, was discharged and, had his Honour done so, it would have been clear that it was discharged.

⁵ Par [53] Reasons for Decision.

- [11] There was no issue in this Court that in the circumstances of the case the employer bore the onus of proving that the effects of the 2008 injury were a contributing cause of the worker's incapacity in 2010. In deciding that the worker bore that onus, the magistrate erred in law, for reasons explained by his Honour.⁶
- [12] His Honour went on to consider the consequences of the magistrate's error and whether, given that the worker had succeeded in the appeal "on the issue of who bore the onus and whether it was discharged", he should make an order that the respondent pay arrears of weekly compensation and past s 73 expenses or remit the matter to the magistrate for determination.⁷ His Honour then made the observations set out at par [9] above.
- [13] In making the assumption there emphasised, his Honour appears to have overlooked the magistrate's error of law found by him, namely that the magistrate had applied the wrong onus. The magistrate had found (in error) that the worker had to prove that the effects of the 2008 injury were not a contributing cause of incapacity in 2010. It was for that reason the magistrate did not consider or decide whether ABC had proven its case, as pleaded and conducted at trial, that the effects of the 2008 knee injury were a contributing cause to incapacity in 2010.

⁶ Par [28] Reasons for Decision.

⁷ Par [52] Reasons for Decision.

[14] In our opinion his Honour was not justified in making the assumption that the magistrate was not satisfied that the employer had proven its case. His Honour erred in law in making the assumption.

[15] In this Court it was also argued on behalf of ABC that the assumption made by his Honour was contrary to what arises by necessary implication from the following passage from the magistrate's reasons for decision:

If I can be satisfied on the balance of probabilities that the 2005 injury continues to have a causal effect on Ms Millar's knee condition then she is entitled to compensation from ABC for any loss of earning capacity caused by that knee condition notwithstanding the exacerbation or aggravation caused by the 2008 incident may also continue to have an effect. On the other hand if I can be satisfied that the effect of injury in 2005 has stabilized leaving only a vulnerability to the injury in 2008 then the present incapacity must be regarded as a result of the 2008 [*injury*] only.

[16] It is not necessary for this Court to address the employer's contention in this respect, and we refrain from doing so, bearing in mind that we have ordered that this issue is to be remitted to the magistrate to be determined according to law.

[17] At the conclusion of the hearing we allowed the appeal on the basis of the error of law identified above. We ordered that the appeal be allowed to the extent of setting aside the order of his Honour which set aside paragraph 7 of the orders of the Work Health Court. Notwithstanding that both counsel argued that this Court should decide the outstanding issue on the evidence which was before the Work Health Court, we considered that it was not appropriate to do so, for a number of reasons. The medical witnesses were

not in clear agreement as to the effects of the 2008 injury (particularly after surgery undergone by the worker in 2009), and specifically as to whether the 2008 injury was a contributing cause of the worker's incapacity during the period 1 January 2010 to 14 January 2011 (that being the period in respect of which the magistrate ordered payment of compensation for loss of earning capacity). Having read and considered the documentary medical evidence, and heard the oral evidence of the doctors, the magistrate is in a better position than this Court (or the Supreme Court) to resolve and determine the conflicts and differences in the medical evidence. This Court should not make any assumptions. It may also be that the evidence given by the worker is relevant to the remitted issue, and might also be considered.

[18] In those circumstances we allowed the appeal in part and directed, pursuant to s 116 of the *Workers Rehabilitation and Compensation Act*, that the matter be remitted to the Work Health Court to be determined according to law. We set aside the order of Mildren J made 23 April 2012 in relation to the costs of the appeal to the Supreme Court and the hearing in the Work Health Court, and also set aside the costs orders made by the Work Health Court.

[19] We will hear the parties as to the costs of the appeal to this Court.
