



## Transcript of Proceedings

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REVISED AND CORRECTED  
State Reporting Bureau  
Date 02.04.02

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

JONES J

Application No 30 of 2002

PAUL ANTHONY MITCHELL

Applicant

and

TULLY GLASS & ALUMINIUM

Respondent

CAIRNS

..DATE 26/03/2002

JUDGMENT

*As corrected*  
*[Signature]*

HIS HONOUR: Before me are two applications by Paul Anthony Mitchell. The first application, filed on 20 March 2002 sought the issue of a conditional damages certificate or, in the alternative, the granting of leave pursuant to section 305 of the WorkCover Queensland Act 1996 (the Act) to start proceedings for a psychological/psychiatric injury.

The second application, filed today, seeks a declaration, or other relief, requiring the WorkCover to issue forthwith a notice of assessment in respect of the psychological/psychiatric injury sustained by the plaintiff.

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These two applications are opposed by WorkCover Queensland.

The applicant was injured at work on the 27th of March 1999. If he was to commence proceedings within the period prescribed by the Limitations Act he must do so today, or perhaps tomorrow, hence there is an urgency in determining these applications. In respect of the latter, issued by leave this morning, the time for the hearing was abridged.

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Some two or three days after the accident the applicant lodged an application for compensation. This application was made in respect of the physical injury which he sustained at that time, which, in the main, was a severe laceration of his left wrist. Some time after the original application the applicant claims he developed a psychiatric condition which was caused by the accident. This alleged psychiatric injury was noted to WorkCover, in an informal way, on the 17th of May 2001. At

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about this date he went before the assessment tribunal in respect of the physical disabilities.

On 21 June 2001 WorkCover notified the applicant that it had made an appointment with Dr Athey, a psychiatrist of its choosing, to assess the psychiatric injury. On 4th September 2001 WorkCover referred the consideration of this injury to the Medical Assessment Tribunal pursuant to section 442 of the Act for the assessment of permanent impairment. Prior to the Tribunal considering this reference, a copy of a report from Professor Basil James dated 28 April 2001 concerning his examination of the applicant on 18 April 2001 was forwarded to the tribunal.

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The tribunal convened on the 16th of November 2001. On the 27th of November 2001 the applicant was advised of the tribunal's finding by a notice of assessment which referred only to the physical injuries. The tribunal, in its conclusions (Exhibit 7 to the affidavit of Paul Anthony Mitchell), concluded that there was no permanent impairment arising from the psychiatric injury.

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It is common ground that no notice of assessment has issued in respect of that referral of the psychiatric injury to the tribunal. WorkCover contends that it has rejected the applicant's application for compensation in respect of this injury.

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Under the strict constraints imposed by the Act for access to

a claim for damages, the only way in which the applicant can qualify as a person entitled to seek damage is if he falls within the classification set out in section 253(1)(a), being: "A worker, if the worker has received a notice of assessment from WorkCover stating that:

- i) the worker has sustained a certificate injury; or
- ii) the worker has sustained a non-certificate injury."

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The applicant has sustained a certificate injury in respect of the physical injuries which he sustained, but that does not help in respect of the psychiatric injury in respect of which he wishes to pursue damages. It is for this reason that the applicant seeks to compel WorkCover to issue a notice of assessment in respect of the psychiatric injury. WorkCover resists doing this, and opposes the application for leave under section 305, contending that it has in fact rejected the application in respect of this injury, and further that this was a reviewable decision and the applicant has failed to do so in the time prescribed. Consequently, WorkCover contends the applicant has no further rights in respect of the injury.

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WorkCover further contends that the application is made in breach of an agreement between the applicant's solicitors and the WorkCover solicitor that a consent order would be made for section 305 leave in respect of the physical injuries and further that, as the consent order has been perfected, these proceedings constitute an abuse of process.

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I shall deal with this argument first.

The affidavits of Ms Dwyer, the solicitor for WorkCover, and Mr Roati, solicitor for the applicant, have been relied upon to support and oppose this argument. It is agreed between them that there were discussions about the terms of the consent order, and the circumstances leading to that agreement being made, but the precise terms of those discussions cannot be determined on the material before me, nor in the short time available. However, I am satisfied that in agreeing to the terms of the consent order Mr Roati was not abandoning his client's right to seek to pursue the claim for damages for the psychiatric injury.

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I accept what he swears to in paragraph 7 of his affidavit filed by leave on today's date, which is in these terms -

"(7) I made it very clear to Christine Dwyer that the claimant intended to pursue his claim for psychological/psychiatric injury. I asked her to amend the proposed consent order so that it was acceptable to WorkCover and advised her that we would consider seeking an order of the Court in respect of the psychological/psychiatric injury."

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Now, in those circumstances, although the matter could have been dealt with in a more convenient and orderly way by making a single application pursuant to section 305 for all disabilities, I see the course that was followed was to isolate what was agreed from that which was still to be contested. In these circumstances, there is no abuse of process or breach of agreement.

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Turning then to the other arguments raised by the applicant, there is no doubt that the application for compensation in respect of the psychiatric injury was not made on the approved form, but it must be taken that that requirement has been waived by WorkCover. Certainly, no complaint has been made about any lack of form in the way the application was made.

Since that time, WorkCover has arranged for the independent medical examination by Dr Anthey, Psychiatrist, and has referred the matter to the Medical Assessment Tribunal pursuant to section 442 of the Act for assessment of permanent incapacity.

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Those steps would not, in my view, have been made if there was not an acceptance of the injury or alternatively those

circumstances lead to an inference that there has been an acceptance of the injury.

The applicant relies on the scheme of the Act to show that the inference to which I have just referred must be drawn. The starting point is to refer to section 161(1) of the Act which requires that an application for compensation must be allowed or rejected in the first instance by WorkCover. I am not sure what is meant by "allowed or rejected in the first instance" and I am not aware of any authority which has considered the meaning of those words. 10

In any event, a decision on the application is required to be made within three months of the application being made. If that three month rule is not complied with, then pursuant to section 161(6), WorkCover must within seven days after the end of the three month period notify the claimant of the reasons for not making the decision. In the circumstances before me, no decision to reject the application was made within three months. No reasons were ever given in respect of any purported rejection and there was no compliance with subsection (6). 20

I will not detail all the argument that is relied upon, but it seems to me that what is crucial in determining whether the inference should be drawn is the fact that WorkCover has elected to make a reference to the Medical Assessment Tribunal, not pursuant to section 440 of the Act which would be appropriate if WorkCover had a concern about whether there 30

was a compensable injury or not, but under section 442 which has the purpose of requiring the Tribunal to determine the quantum of permanent impairment. That is all that the Tribunal set out to do and it is all, in fact, that they did do, arriving at the conclusion that there was no permanent impairment. That reference - to assess the level of permanent impairment - is quite different to the task of determining whether there was, in fact, an injury.

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It was only after the Medical Assessment Tribunal reached its conclusion that there was no permanent incapacity, that WorkCover purported to reject the plaintiff's application. Again, in purporting to reject at that stage, there was no complaint about the lack of form in which the application was made and again there was no compliance with the relevant provisions of section 161. In particular, no reasons were given for the rejection. Notwithstanding this, WorkCover now argues that that rejection still entitles the applicant to seek a review.

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I have come to the view that in all the circumstances the applicant is entitled to receive a notice of assessment of the findings of the Medical Assessment Tribunal, given that it was undertaken pursuant to section 442 of the Act. That assessment ought to be made forthwith. If it is made, then the plaintiff would satisfy the requirements of section 253(1) of the Act and be a person then entitled to seek leave to proceed pursuant to section 305.

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The concern I have is, what order will be effective in allowing that course to be undertaken within the time remaining for the plaintiff to bring the action.

My first order will therefore be to declare that the applicant is entitled to receive forthwith a notice of assessment based on the conclusions of the Medical Assessment Tribunal hearing on the 16th of November 2001. In the expectation that WorkCover will respond forthwith to that declaration I would further declare that the applicant should thereupon be a person entitled, by section 553, to make application, pursuant to section 305, for leave to proceed.

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MR PHILP: Would that be 253, your Honour?

HIS HONOUR: Did I not say that? 253 for leave to proceed. Mr Houston, I ask you if you have instructions to, or you can give an indication, that WorkCover will comply with the declaration, or along with the declaration that I have made, otherwise I would have to seek-----

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MR HOUSTON: Yes, they will, your Honour.

HIS HONOUR: They will? All right. Well then, it would be an order then to further consider the application for leave pursuant to section 305.

MR HOUSTON: Yes, your Honour.

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HIS HONOUR: Is there any basis of opposing that in the light of my findings?

MR HOUSTON: If your Honour would just give me a moment. Yes, your Honour, perhaps the best way to do it would be to vacate the previous order that was made by consent, and to make a - a new order by consent.

HIS HONOUR: Yes. So - well, would you consent to the vacating of the previous order on the basis that a - a more comprehensive order will be used in substitution?

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MR PHILP: Yes, your Honour.

HIS HONOUR: That will be - make it tidier, I suspect.

MR HOUSTON: Yes, your Honour.

HIS HONOUR: Okay. And there is no further submissions you wish to make?

MR HOUSTON: No, your Honour.

HIS HONOUR: Okay.

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Mr Houston, having indicated that he has instructions that WorkCover will honour the terms of the declaration that I have made by giving a notice of assessment in terms of the medical tribunal's assessment of the permanent impairment in respect of the plaintiff's psychiatric/psychological injury, I will by consent, vacate the order made by the Registrar on 19th March 2002 in proceedings number 29 of 2002, and in this proceeding make an order that applicant be granted leave, pursuant to section 305 of the WorkCover Queensland Act 1996, to start proceedings against the respondent for damages for injury sustained during the course of his employment on 27 March 1999, including a psychological/psychiatric injury, despite the non-compliance with the requirements of section 280 of the Act.

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HIS HONOUR: I further order that such leave is granted on the condition that subject to any relaxation from the same, which may subsequently be granted by a Court, the applicant will lodge a notice of claim within 30 days of the decision made by WorkCover with respect to the last unassessed injury to either:-

2.1 Reject the injury as not being an injury within the

Act;

- 2.2 Accept the injury and provide a damages certificate or notice of assessment with respect to the last unassessed injury.

I further order that such proceedings be stayed until the applicant has complied with the following:-

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- 3.1 The relevant division under part 2 of chapter 5 of the Act;
- 3.2 The requirement of part 5 of chapter 5 of the Act;
- 3.3 Compliance with the requirements of part 6 of chapter 5 of the Act; and
- 3.4 Section 303 of the Act.

No order as to costs?

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MR HOUSTON: Well, your Honour, in my submission that would be an appropriate order, there would be no order as to costs given the rather extraordinary course this matter has taken.

HIS HONOUR: Yes. Yes, I certainly wouldn't have ordered costs for the applicant.

MR HOUSTON: Well, your Honour, that - I was going to submit that-----

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HIS HONOUR: There will be no order for costs.

MR HOUSTON:-----no order for costs be made.

HIS HONOUR: Yes. Thank you. Yes, very well. Any other orders that are sought?

MR HOUSTON: That's it.

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MR PHILP: Thank you very much, your Honour.

HIS HONOUR: Yes. I wished I had more time to have done greater justice to the arguments that you gentlemen have put up.

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