SUPREME COURT OF QUEENSLAND

CITATION:	*Guest v Boyne Smelters Ltd & Anor* [2017] QSC 250
PARTIES:	**TANIA LEA GUEST** (Applicant) **v** **BOYNE SMELTERS LIMITED** **(ACN 010 061 935)** (First Respondent) And **WORKCOVER QUEENSLAND** (Second Respondent)
FILE NO:	S697 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Rockhampton
DELIVERED ON:	2 November 2017
DELIVERED AT:	Rockhampton
HEARING DATE:	30 October 2017
JUDGE:	McMeekin J

ORDERS:

1. It is declared that:-

(a) the Applicant sustained an injury to her elbows while employed by the First Respondent over a period of time;

(b) the Applicant first consulted a relevant health practitioner within the meaning of s 235A of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) on 19 September 2013;

(c) due to the deeming effect of s 235A of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld), the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) as it stood on 19 September 2013 applies to the Applicant's claim as set out in the

Applicant's Notice of Claim dated 17 June 2015;

2. **The Second Respondent pay the Applicant's costs of and incidental to the Application to be assessed.**
3. **The parties have liberty to apply on the giving of 3 days' notice.**
4. **If I do not hear from the parties within 7 days the orders set out above are confirmed.**

CATCHWORDS: STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – INTERPRETATION OF ACTS AND PROVISIONS – PRESERVATION OF RIGHTS, LIABILITIES AND LEGAL PROCEEDINGS ON AMENDMENT – GENERALLY – where the applicant seeks damages from her employer for an injury sustained in the course of her employment – where on 15 October 2013 the legislature introduced a new condition that the worker's impairment assessment had to exceed 5% – where the applicant does not satisfy the 6% threshold test – where the applicant is precluded from pursuing her damages claim if the threshold applies – where applicant claims she first consulted a relevant health practitioner on 19 September 2013 – whether or not the *Workers' Compensation and Rehabilitation Act* 2003 (Qld), as it stood as at 19 September 2013 applies

Workers' Compensation and Rehabilitation Act 2003 s 132, s 235A, s 237

Bull v Attorney-General (NSW) (1913) 17 CLR 370, cited
CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384, considered
Parker v The President of the Industrial Court of Queensland (2010) 1 Qd R 255; [2009] QCA 120, considered
WorkCover Queensland & Ors v Padua [2016] QDC 115, cited

COUNSEL: G F Crow QC for the applicant

S J Deaves for the first and second respondents

SOLICITORS: Chris Trevor & Associates for the applicant

DibbsBarker for the first and second respondents

McMeekin J:

Introduction

[2] When a "worker" as defined in the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) ("the Act") seeks damages from their employer for an injury sustained in the course of their employment he or she must satisfy certain pre-conditions laid down in the Act. Those pre-conditions have varied from time to time. On 15 October 2013 the legislature introduced a new condition – the worker's impairment assessment had to exceed 5%. This change was effected by amending s 237 of the Act so that it read (with my underlining of the relevant amendment):

> **237 General limitation on persons entitled to seek damages**
>
> (1) The following are the only persons entitled to seek damages for an injury sustained by a worker –
>
> (a) the worker, if the worker –
>
> (i) has received a notice of assessment from the insurer for the injury and the DPI for the assessed injury is more than 5%; or
>
> (ii) has a terminal condition;
>
> …

[3] That amendment has since been repealed but not retrospectively, and so the repeal is irrelevant in the present case. For present purposes the relevant point is that if an injury was sustained before 15 October 2013 there was no need to satisfy the 6% threshold. If after that time the threshold must be met.

[4] The applicant here, Tania Lea Guest, has lodged a Notice of Claim for damages for an injury sustained to her elbows over a period of time from March 2013 to the start of October 2013 when working at Boyne Smelters Limited, the first respondent. She has been assessed with a 2% impairment, the maximum for her condition of bilateral epicondylitis. Thus she does not satisfy the 6% threshold test[1] and so is precluded from pursuing her damages claim, if the threshold applies. The respondents assert that the threshold does apply.

[5] Ms Guest says that her injury is not caught by the provisions introduced on 15 October 2013 and applies for the following declarations:

(a) that she sustained an injury to her elbows over a period of time and while employed by the first respondent, Boyne Smelters Limited;
(b) that she first consulted a relevant health practitioner on 19 September 2013;
(c) that the *Workers' Compensation and Rehabilitation Act* 2003 (Qld), as it stood as at 19 September 2013 applies to her claim.

Ms Guest attends on a doctor

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[1] In case it is thought that the reference to 6% is a slip. In order to satisfy the legislative test – that the DPI for the assessed injury is more than 5% - it is necessary that the impairment be at least 6%. There is no such thing as a fractional impairment. This is evident from paragraph 1.42 of the *Guidelines for Evaluation of Permanent Impairment* published pursuant to s 183 of the Act.

[6] It is common ground between the parties that on 19 September 2013 Ms Guest attended on Dr Pfidze, a medical practitioner at the employer's medical centre and complained of pains in her elbows. There is a dispute about the extent of the discussion that day. There are only two witnesses to the conversation – Ms Guest and the doctor. I am sure that both witnesses were doing their best to recall events of four years ago. Ms Guest was more likely to have the better recall. The doctor has seen many patients over the intervening years and there was no reason for this attendance to stand out. I accept that the conversation was more or less along the lines that Ms Guest recalls, but I do not think it matters greatly.

[7] The doctor's notes read:

> "Presents reporting increasing symptoms in hands and forearms. Elbow pains. Asking for employer support to access necessary care, specialist/surgery. Has not appealed WorkCover decision. Discussed my role in process (as treating doctor or assessing fitness for work). Discussed need to direct dissatisfaction [with] WorkCover outcome through Q-Comp."

[8] Both therefore agree that there was a reference by Ms Guest to pain in her elbows. Her condition has now been diagnosed as bilateral epicondylitis. The symptom of that condition, it is agreed, is pain in the elbows.

[9] Further, it is common ground that Ms Guest again attended on Dr Pfidze on 16 October 2013 again complaining of elbow pains. She was then examined and advice offered for treatment. The doctor recorded, and there is no present dispute, that Ms Guest complained of experiencing painful symptoms in her elbows for the previous month.

[10] In addition Ms Guest gave evidence (which was not disputed) that she had attended on the medical centre nurse in the weeks before 19 September complaining of elbow pains and had been given braces to wear.

The legislation imposes an artificial date of injury

[11] In the normal course one would think that there would be no doubt about the matter – the injury to Ms Guest's elbows was plainly sustained before 15 October 2013. All the evidence points that way. However the Act provides in s 235A for an artificial date of injury:

> **235A Date of relevant health practitioner consultation taken to be date of injury**
>
> (1) For the application of this chapter in relation to an injury sustained by a worker that happens over a period, the date on which the worker first consulted a relevant health practitioner about the injury is taken to be the date of the worker's injury.
>
> (2) …
>
> (3) …
>
> (4) In this section—

> ***relevant health practitioner*** means a doctor, nurse practitioner or dentist authorised under section 132 to issue a certificate under the section.

[12] Both s 237 and s 235A appear in Chapter 5 of the Act entitled "Access to damages". So s 235A governs s 237.

[13] The argument between the parties is whether the attendance on the medical practitioner on 19 September 2013 falls within the meaning of "consulted… about the injury" in s 235A.

[14] It is common ground that the medical practitioner was a "relevant health practitioner" as defined and that the nurse at the medical centre was not.

[15] It is relevant to note that s 132 of the Act provides in part as follows:

> **132 Applying for compensation**
>
> (1) An application for compensation must be made in the approved form by the claimant.
> (2) The application must be lodged with the insurer.
> (3) The application must be accompanied by—
> (a) a certificate in the approved form given by—
> (i) a doctor who attended the claimant; or
> (ii) if the application relates to a minor injury—a nurse practitioner who attended the claimant and who is acting in accordance with the workers' compensation certificate protocol; and
> (b) any other evidence or particulars prescribed under a regulation.
> (4) A registered dentist may issue the certificate mentioned in subsection (3)(a) for an oral injury.
> …

The respondents' submissions

[16] The respondents make two submissions.

[17] The first is that for the medical practitioner to be "authorised" under s 132, as s 235A(4) requires, it is necessary that the practitioner be in a position to complete the medical certificate referred to in that section. That is, that as a result of the consultation the medical practitioner must be armed with the information necessary to complete the certificate. If the consultation involves the giving of information to some lesser extent then there has been no "consultation" for the purposes of the Act.

[18] The second submission is that the attendance on the medical practitioner on 19 September did not involve Ms Guest consulting the doctor, giving the word "consulted" in s 235A its ordinary meaning.

The first submission – the interrelationship of s 132 and s235A

[19] I observe at the outset that the submission was not advanced that the date of injury was determined by the date of the first WorkCover medical certificate issued as WorkCover had said in their letter of 30 April 2014[2]. There is no such requirement in the legislation. What is notable is that the s 235A(4) does not require that the "relevant health practitioner" who is first consulted about the injury issue a certificate under s 132.

[20] But the submission that is advanced comes very close to this. What the respondent urges is that, in this case, the doctor has no "authority" to issue a certificate because his meeting with the patient did not result in him obtaining sufficient information to complete the certificate.

[21] The submission depends on a meaning to be attributed to the word "authorised" in s 235A(4) that I cannot accept the legislature intended that it bear. What the submission does, in my view, is to confuse the power given by the legislation to certain persons and the occasion for the use of that power.

[22] I have consulted a number of dictionaries and they proffer various definitions for "authorise" but that which comes closest to the meaning intended here is "to endow with authority", as it is put in each of them. The question is: who has the legislation endowed with authority to issue these certificates?

[23] I think that the question is simply answered. If one asked the doctor here – "Are you authorised to give a certificate under the WCRA?" he would have replied "Of course!" I am sure that since 2009 when he commenced at Boyne Smelters he has given many such certificates. His authority to do so does not wax and wane with the state of his knowledge of any particular patient. No doubt his preparedness to issue such a certificate would depend on that knowledge, but not his authority to do so.

[24] Textual and practical considerations both support that approach.

[25] Section 132 in fact says nothing explicitly about authorising any person to do anything. What s 132 requires is that an application for compensation be accompanied by a certificate in the approved form. The certificate must be "given by" a particular person. So far as the legislation shows that person must have two qualities. First they must be one of the designated health providers – doctor, nurse or dentist. Implicitly each must hold the necessary qualifications to be described as a doctor, nurse or dentist as the case might be. For a doctor there is only one additional requirement and it is set out in s 132(3)(a)(i) – that they attend on the worker. Dr Pfiske satisfied those two requirements.

[26] The ordinary meaning of the word – that one is empowered to do something – does not necessarily carry the connotation that one is armed with all necessary information to exercise that power. There is nothing in the legislation which suggests that the implication be made here. Quite to the contrary. If the respondents' submission was right it would prove highly impracticable.

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2 See Ex MAE4 to the affidavit of Ms Esdale.

[27] I note that the information needed to complete the certificate is extensive. An approved form of the Certificate is in evidence. It requires various matters to be completed. Counsel for the respondents has identified 12 separate matters. They include that the practitioner attended on the worker on a particular date and that the practitioner diagnosed a particular condition. They cover causation, onset, work capacity, treatment, and further investigations. Notably the certificate provides for the practitioner to assert when he or she first saw the worker "for the condition".

[28] The practical effect of the respondent's approach is that in order to determine when an injury had been sustained for the purposes of Chapter 5 of the Act it would be necessary to enquire into every consultation that may have taken place at which the relevant symptoms were mentioned to determine the extent of the information given to that practitioner to see if they had sufficient information such that they could have issued a certificate, whether they did or not. The problems involved are manifest.

[29] There is a second problem. While the argument happens to suit the respondents' purposes here, it would be a very strange result if the legislation had the effect that for the purposes of Chapter 5, there was no accepted injury despite a plain reference in a medical consultation to the injury in question, its treatment and so on, but a failure, say, to ask for information about the worker's view of when the injury was sustained or the cause of injury; matters that the certificate requires be certified by the doctor. While the legislation obviously delays the true date of injury (at least as the common law would have it), to delay it beyond the time that the symptoms are acknowledged to a medical practitioner would seem perverse. Such an approach would not promote fairness to either worker or employer which, either expressly or implicitly, is one of the objects of the Act: see s 5(4).

[30] I reject the first submission.

The second submission – the ordinary meaning of the words

[31] The argument here is that what occurred on 19 September 2013 was not a consultation but something less. It is said that the interaction on that date involved no examination, no diagnosis, no advice, no treatment plan, no diagnostic investigations, and no consideration of Ms Guest's ability to continue working. Reference is made to the definitions from the Macquarie Concise Dictionary:

> "**consult**…ask advice of…"
>
> **"consultation**…an application for advice to one engaged in a profession, esp. to a medical practitioner…"

[32] The respondents' argument is that Dr Pfidze sees workers for reasons other than the provision of medical advice and treatment. While Dr Pfizde conducts a medical practise at Boyne Smelters Limited (where Ms Guest attended on him), he is employed by Boyne Smelters Limited as an occupational physician and has other duties. The medical practise involves only part of his time. It is said that he saw Ms Guest on 19 September 2013 in a capacity other than as a treating doctor. It was said that her attendance that day where there was no examination and only limited

notes were made can be compared to her attendance on the 15 October where a thorough examination took place and extensive notes were made (in the same record as previously) of findings, possible causes and suggested treatment modalities.

[33] The applicant submits that the legislation has been held to be "beneficial" citing *Parker v The President of the Industrial Court of Queensland*[3], that to consult involves something less than treatment, and that the attendance comfortably fell within other definitions of the word which are more helpful. Reference was made to the Oxford English Dictionary definition:

> 1. Seek information or advice from (someone, especially an expert or professional) 'if you consult a solicitor, making a will is a simple a procedure'
> 2. Have discussions with (someone), typically before undertaking a course of action 'patients are entitled to be consulted about their treatment' 'the government must consult with interested bodies'

Discussion

[34] I observe at the outset that the definitions proffered make clear that the giving of advice is not essential to the meaning of the word "consult".

[35] I further note that the passages referred to in *Parker v The President of the Industrial Court of Queensland* do not provide authority for the proposition advanced. Keane JA (as his Honour then was) there was simply setting out the views of the President of the Industrial Court without endorsement, necessarily, of those views. His Honour's analysis of the problem later in his reasons contains no reference to the supposed beneficial nature of the legislation. While legislation providing for compensation has often been held to be beneficial in nature[4] and so the language in it deserving of an interpretation "so as to give the fullest relief which the fair meaning of the language will allow"[5] I am not at all sure that it can be said of the provisions of Chapter 5 of the Act that they were intended by parliament to be beneficial to workers.

[36] The respondents refer me to the decision of the High Court in *CIC Insurance Ltd v Bankstown Football Club Ltd* as setting out the relevant principles that apply to statutory interpretation:

> "Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh

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3 [2010] 1 Qd R 255 at [14]-[15] per Keane JA.

4 See the authorities collected in Pearce, D C and Geddes R S Statutory Interpretation in Australia 6th ed LexisNexis Butterworths, Chatswood, 2006 at 281 para 9.3.

5 *Bull v Attorney-General (NSW)* (1913) 17 CLR 370 at 384 per Isaacs J.

> JA pointed out in *Isherwood v Butler Pollnow Pty Ltd*, if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent."[6]

[37] That exposition does not help me greatly in construing the word "consult" as used here.

[38] The purpose of the section is plain – it is to fix a single date of injury where there is in truth no single date. Presumably that was done to avoid any complications that might arise in applying the provisions of Chapter 5. One would expect that the legislature fixed on a date that was assumed to be relatively easily ascertainable and one where the worker could be expected to at least be aware that they had an injury, given the need to tell a doctor about it. I observe that so far as the involvement of the injured worker in the process is concerned, practically speaking, he or she can do little more than report the symptoms and ask what he or she should do.

[39] Turning to the facts here - the statement to a medical practitioner, when being seen at a medical practice, in his capacity as a medical practitioner, of symptoms then being suffered with the evident purpose of determining what next should be done would seem to me to involve all that is necessary to satisfy the concept of "consult" as used in the legislation.

[40] The respondents pointed out that not every meeting with a medical practitioner where symptoms of some condition are mentioned involves a person "consulting" with that practitioner as that concept is normally understood. So much may be accepted. A chance meeting with a medical practitioner at a social function with passing reference to a symptom would probably not be suffice. But this case is far removed from that situation.

[41] There is no dispute that on 19 September 2013 Ms Guest attended on the practitioner at the medical centre, that she did so in the normal course of his practise, and that she sought advice. Notes were recorded by the practitioner in the normal way on the record headed "Medical Progress Notes". There is no evidence, and it was certainly not put to Ms Guest, that she saw him in any capacity other than his capacity as a medical practitioner, or indeed that she appreciated that he could be seen by her in some other capacity.

[42] What seems to have complicated the picture is that Ms Guest had had a long standing problem with a carpal tunnel. She had complained for some time of symptoms of pain in her wrist and forearms. When she saw the doctor on 19 September these symptoms were mentioned. It seems likely that both she and the practitioner were under the impression that her complaints about her elbows were

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6 (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ (citations omitted).

related to her earlier complaints. Because of that the discussion turned to a re-opening of her earlier workers' compensation claim so that she could obtain assistance with the cost of remedial surgery. As a result the doctor made no examination of her and offered her no treatment.

[43] It is evident from his oral evidence that Dr Pfidze was conscious that he wears several different hats at the employer's workplace and was attempting to be careful in the discharge of his duties not to confuse his various roles. At some point the doctor decided that he had taken his medical practitioner's hat off and put on some other hat. All this seems to have happened without Ms Guest having any appreciation of what was going through the doctor's mind. And it occurred because of a view taken as to the nature of the condition being reported – that it was a flare up of the previous carpal tunnel problem, a problem the subject of an earlier workers' compensation claim.

[44] It is entirely irrelevant what view the practitioner might have as to what the proper characterisation of the meeting might be. It is the objective assessment of what occurred that is relevant. And a misunderstanding about the nature of the condition is of no consequence. The respondents expressly disclaim any submission to the effect that there is some requirement that the practitioner accurately diagnose the injury for there to be a consultation about "the injury". They were right to do so. The legislation does not require that the medical practitioner consulted accurately diagnoses the problem, or that the patient understands the nature of the injury sustained.[7] Nor is it relevant that because of the possible misdiagnosis the practitioner thought that it was a matter for Ms Guest to re-open her earlier claim and so not a matter for him to treat the condition.

[45] In my view, in every practical sense Ms Guest consulted a medical practitioner about her injury on 19 September 2013. I reject the second submission.

Conclusion

[46] The parties are agreed that if I reached this view I should make the following declarations:

1. It is declared that:-
   (a) the Applicant sustained an injury to her elbows while employed by the First Respondent over a period of time;
   (b) the Applicant first consulted a relevant health practitioner within the meaning of s 235A of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) on 19 September 2013;
   (c) due to the deeming effect of s 235A of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld), the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) as it stood on 19 September 2013 applies to the Applicant's claim as set out in the Applicant's Notice of Claim dated 17 June 2015;
2. The Second Respondent pay the Applicant's costs of and incidental to the Application to be assessed.

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[7] I note that this approach is consistent with the view taken by Reid DCJ in *WorkCover Queensland & Ors v Padua* [2016] QDC 115.