SUPREME COURT OF QUEENSLAND

CITATION:	*Muller v Nebo Shire Council* [2002] QSC 084
PARTIES:	**SHANE HENRY MULLER** (plaintiff/respondent) **v** **NEBO SHIRE COUNCIL** (defendant/applicant)
FILE NO/S:	S127 of 2000
DIVISION:	Trial Division
DELIVERED ON:	11 March 2002
DELIVERED AT:	Brisbane
HEARING DATE:	25 February 2002
JUDGE:	Mackenzie J
ORDER:	**(1) That the plaintiff undergo, at WorkCover's expense, a medical examination by a doctor to be selected by the plaintiff from a panel comprising:** **(a) Dr Tony Blue** **(b) Dr Geoffrey Bendeich** **(c) Dr Peter Boys** **(2) That the costs of and incidental to the application be reserved.**
CATCHWORDS:	WORKERS' COMPENSATION – PROCEEDINGS TO OBTAIN COMPENSATION – PROCEDURE BEFORE HEARING - application under s 286 *WorkCover Queensland Act* 1996 requesting the plaintiff/respondent undergo further medical examination – whether the request is "unreasonable or unnecessarily repetitious" *WorkCover Queensland Act* 1996 (Qld), s 286, s 293 (8), s 293 A (6), s 294, s 442 *Timms v Yandilla Park* [2000] QSC 281, considered
COUNSEL:	D V McMeekin SC for the plaintiff J P Kimmins for the defendant
SOLICITORS:	Macrossan & Amiet for the plaintiff HBM Lawyers for the defendant

[1] **MACKENZIE J:** This is an application under s 286 of the *WorkCover Queensland Act* 1996 for an order that the plaintiff undergo a medical examination by one of

three orthopaedic surgeons listed in the application. Section 286 of the Act relevantly provides:

> "(1) WorkCover may, at any time, ask the worker to undergo, at WorkCover's expense –
>
> (a) a medical examination by a doctor to be selected by the worker from a panel of at least 3 doctors nominated in the request; or
>
> …..
>
> (2) The worker must comply with the request unless it would be unreasonable or unnecessarily repetitious."

[2] Where a request has been made the worker has an obligation to comply unless it is unreasonable or unnecessarily repetitious. The words of the statute must be the ultimate determining feature as to whether the obligation exists. However, in *Timms v Yandilla Park Ltd* [2000] QSC 281, there is an analysis of the kinds of factors taken into account in exercising the inherent jurisdiction of the Court to order a medical examination. Issues of personal liberty and the right of parties to call such witnesses as they think fit are important in deciding whether it would be unreasonable or unnecessarily repetitious to request a further examination. In other words, there may be cases where the two factors collide and a decision must be made whether any further examination should be forced upon the worker.

[3] To understand what is involved in the present case it is desirable to recount some of the detail of what has happened so far. The action is based on an injury or injuries which the plaintiff says he suffered in the course of his employment by the defendant. He made an application for compensation from WorkCover in respect of the first incident. That claim was accepted and he was paid weekly benefits for time off work and medical expenses. In February 1998 he made another application in connection with a separate incident. He was not paid for time off work because his employer placed him in suitable duties, but a claim for medical expenses was accepted.

[4] Later that year his apprenticeship as a diesel fitter was transferred to another employer and he subsequently made two more claims for workers' compensation, both of which were accepted. He was off work for about five months following the latter claim, which was based on the worsening of back symptoms.

[5] He was examined in connection with the WorkCover claims by Dr Laister on 9 March 1999 and Dr Gibberd on 10 February 2000. Shortly after the first examination a request for assessment of permanent impairment arising from the first two claims was made. A notice of assessment, which the plaintiff rejected, was subsequently given.

[6] The plaintiff's solicitor had him examined by Dr White whose report was sent to WorkCover. WorkCover then arranged for an examination by Dr Shaw which occurred on 9 May 2000. On 31 May 2000 WorkCover assessed permanent incapacity attributable to the first incident on 11 December 1997 at 5% and offered lump sum compensation of $5,891. The plaintiff agreed with the degree of

impairment but rejected the offer. The permanent impairment attributable to the later claims and the compensation offered were assessed as nil.

[7] There was a complication over the validity of some of the later steps taken by WorkCover because Local Government WorkCover, a licensed self insurer, had taken over liability from 1 February 2000. In any event, Local Government WorkCover proposed a reference to a Medical Assessment Tribunal under s 442 of the *WorkCover Act*. The plaintiff advised that he would reject a lump sum offer in any event because he wished to take common law proceedings. In an exchange of correspondence, an arrangement was made whereby it was agreed that the plaintiff would be examined by Dr Martin on behalf of the defendant on the same day as he appeared in the Medical Assessment Tribunal. This occurred on 21 September 2000.

[8] When the notice of assessment issued, the plaintiff rejected it. A conditional certificate had been granted and a claim and statement of claim was duly lodged. A notice of claim of damage was completed shortly after the rejection of the notice of assessment, in early November 2000. The notice was declared to be compliant on 11 December 2000 and the s 293 conference was held on 17 July 2001. Final offers to settle pursuant to s 294 were made that day and have been filed in court. The levels of the respective final offers to settle affects the costs order which may be made at trial (s 324 and following).

[9] On the same day the plaintiff's solicitor confirmed arrangements with Dr Cook to examine the plaintiff on 14 August 2001. That examination duly occurred and the report was provided to the defendant on 26 November 2001.

[10] The respective cases for the applicant plaintiff and the respondent defendant have aspects of unreality about them. The chronology of examinations by relevantly qualified specialist medical practitioners has been recited above. By the time the matter went before the Medical Assessment Tribunal and the final offers were exchanged, Drs Laister, Gibberd and Shaw had examined the plaintiff for WorkCover (but not at the instigation of Local Government WorkCover), Dr Martin had examined him at the request of Local Government WorkCover and Dr White had examined him at the request of his own solicitors.

[11] There is no suggestion in the material before me that any of those medical practitioners is unavailable to give evidence. One of the foci of the disagreement between the parties is whether Dr Martin had examined the plaintiff in connection with the WorkCover claim or the common law claim. It seems implicit in this exchange that the defendant claims a right to treat the start of a proceeding for damages as the justification for a new round of medical investigations.

[12] Given the obligation in s 293 (8) to attempt to settle the claim, and the obligation in s 293 A (6) to have obtained and exchanged reports of all expert witnesses to be relied upon, and the obligation to make a final offer at the conference, which offer governs the costs order which may be ultimately made, it is unlikely that it was intended that the defendant's distinction be sustainable under the present statutory regime, at least in a case where there has been no material change in the plaintiff's condition or there is an absence of other facts in the individual case which make further examinations appropriate.

[13] That conclusion then draws attention to two incongruent aspects of the plaintiff's submissions. One was that it was the plaintiff who embarked upon obtaining an opinion from a new specialist, Dr Cook, after final offers had been made. Yet the complaint is that the defendant should not be permitted to do so because it should be taken to be "shopping around" for another opinion to support its case. Allied to this is the submission that allowing the defendant to obtain a report from a doctor who has not yet examined the plaintiff may put the plaintiff in jeopardy with respect to costs if the opinion is less favourable than existing opinions to the plaintiff and the trial judge acts on it, or finds at least that it adds weight to the defence evidence already obtained.

[14] It may be accepted that this last submission is not without some force. However, if, as the plaintiff claims, the opinion in the new report from Dr Cook is consistent with that already obtained from Dr White, that fact is fortuitous. Had it been more favourable to the plaintiff the obtaining of the new report by the plaintiff would have had exactly the same potential to affect costs as any new report for the defendant.

[15] Further, since the numerical imbalance between doctors who had examined the plaintiff for the defendant and for the plaintiff respectively was alluded to in oral submissions, it is at least possible that consciousness of that was one reason for recently obtaining Dr Cook's opinion. That, of itself, is a side issue in this application.

[16] Although it was not conceded that the plaintiff should be further examined at all, there was an undertone in the plaintiff's submissions that if an order for further medical examination was to be made it should only be ordered that he be re-examined by one of the doctors who has already examined him for the defence. This submission, if it be put as a sort of compromise, does not sit easily with the notion that further examination would be such an intrusion upon the plaintiff or so repetitious that the defendant's request should be refused.

[17] Identification of the incongruities in the respondent's argument in the respects referred to above does not determine the matter. The question to be answered is whether the request for examination by one of the panel nominated by the defendant would be unreasonable or unnecessarily repetitive.

[18] It is true that the plaintiff has been examined by several orthopaedic surgeons already. In a case where all those examinations had been carried out at the request of the same insurer the case would be stronger for refusing to require a further examination. However, in this case, only one of those who has examined the defendant has been the choice of Local Government WorkCover. Given that an important element in cases of this kind is the right of the defendant to rely on experts of its choosing, the fact that there have been several prior examinations is of less weight than it might otherwise be.

[19] Further, the plaintiff has obtained a recent opinion, subsequent to the compulsory conference. By contrast, the first three opinions obtained by those who stand behind the defendant are now relatively old, although whether that would have any significantly detrimental effect on the defendant's case if those doctors were called to give evidence is questionable. On the other hand, requesting the plaintiff to undergo one more examination would afford the defendant the opportunity to obtain

an up to date assessment of the plaintiff's condition and put it on an equal footing with the plaintiff in that regard.

[20] In my view, it has not been demonstrated in the particular circumstances of the case that the defendant's request that the plaintiff undergo an examination by a doctor to be selected by the worker from the nominated panel is unreasonable or unnecessarily repetitious.

[21] I make the following orders:

(1) That the plaintiff undergo, at WorkCover's expense, a medical examination by a doctor to be selected by the plaintiff from a panel comprising:

(a) Dr Tony Blue

(b) Dr Geoffrey Bendeich

(c) Dr Peter Boys

(2) That the costs of and incidental to the application be reserved.