

SUPREME COURT OF QUEENSLAND

CITATION: *ByrneCut Mining Pty Ltd v Croxford* [2004] QSC 437

PARTIES: **BYRNECUT MINING PTY LTD**
(ACN 009 257 952)
(Applicant/Defendant)
v
STEVEN JAMES CROXFORD
(Respondent/Plaintiff)

FILE NO/S: S. 350/04

DIVISION: Trial

PROCEEDING: Application for Medical Examination

ORIGINATING COURT: SUPREME COURT

DELIVERED ON: 11 June 2004

DELIVERED AT: TOWNSVILLE

HEARING DATE: 7 June 2004

JUDGE: Cullinane J

ORDER:

- 1. Order that the respondent submit to a medical examination by either Dr Paul Licina, Professor Bruce McKee or Dr John Tuffley.**
- 2. Order the respondent to pay the applicant's costs of and incidental to the application to be assessed.**

CATCHWORDS: WORKERS' COMPENSATION — ASSESSMENT AND AMOUNT OF COMPENSATION — where respondent claims damages under *WorkCover Queensland Act 1996* — where respondent underwent medical examinations during time of compensation claim — where applicant requests independent examination from panel of 3 specialists — whether further examination by specialist will be unreasonable, unnecessary or repetitious.

WorkCover Queensland Act 1996 (Qld) s. 286

Re Woolworths (Qld) Pty Ltd v Berry Porter (2002) QSC 360

COUNSEL: Mr G D Houston for the Applicant/Defendant

Mr M A Drew for the Respondent/Plaintiff

SOLICITORS: MacDonnells Solicitors for the Applicant/Defendant
Connolly Suthers, Lawyers for the Respondent/Plaintiff

- [1] The applicant seeks an order that the respondent pursuant to s.286 of the WorkCover Queensland Act 1996 as amended submit to a medical examination from one of three orthopaedic surgeons named by the applicant.
- [2] The respondent opposes the application.
- [3] The respondent has submitted to the applicant two claims for damages both said to arise out of his employment with Byrncut Mining Pty Ltd who was named the applicant in these proceedings. I will refer to WorkCover as the applicant however in the course of these reasons as it has the conduct of the proceedings.
- [4] The first relates to an incident which occurred on 1st May 2001 which was the date upon which the applicant ceased work whilst the second relates to an incident on 8th January 2001.
- [5] Each incident is described in broadly the same way and involved the respondent driving an underground loader and striking in once instance a large rock on the surface and in the other a pothole on a mine road. In each case it was said that the seat on the machine was inadequate and as a result the respondent injured his back.
- [6] The first incident is referred to in the application relating to 1st May 2001 in a manner which suggests that it was from that time that the applicant suffered the onset of symptoms in his lower back and his left leg and continued to do so until the time of the second incident where there was an increase in the pain which he suffered. He was not able to return to the work he had previously been doing and was placed on light duties.
- [7] In February 2002, the respondent underwent a fusion at L45 carried out by Dr Low, an orthopaedic surgeon.
- [8] He has not worked since September/October 2001. He claims a figure in excess of \$1,000.00 in respect of each claim.
- [9] The applicant sought workers' compensation from the respondent and following this claim, was examined on the respondent's behalf by a number of medical practitioners including two orthopaedic surgeons and a rehabilitation specialist. The full list of those who saw him and provided reports to the applicant appear in paragraph 2 of the affidavit of Yvette Joy McLauchlan filed on 26th May 2004.
- [10] Reports were obtained from Dr Gibberd, an orthopaedic surgeon on 20th June 2001 (only a bit more than a month after the second incident) and the 30th August 2001. These reports related to the incident of 1st May 2001 although some reference is made in the first of these to an incident some "eight or nine months ago". In each report he was asked a number of questions including questions about the respondent's capacity to resume full time work in his pre-injury position of some alternative employment.

- [11] A report was obtained from Dr Low prior to the fusion dated 19th October 2001.
- [12] A further report was obtained from Dr Gibberd dated 11th November 2002.
- [13] This was of course following the fusion. It was Dr Gibberd's opinion at that time, as it had been at the time of the earlier reports that any difficulties which the applicant had related to a pre-existing condition and it is apparent from the terms in the first two reports that the applicant's capacity to work had not been effected by the May accident. He said in the report of 20th June 2001 he thought that:
- "I believe the incident on 1 May aggravated a pre-existing condition, I state this on the grounds that he has really had some intermittent for the past nine months."*
- [14] It would seem that the word "symptoms" or "pain" was omitted.
- [15] It is however correct to say that in relation to the first reports and in relation to the later report of 11th November 2002 Dr Gibberd was concerned with the consequences of the 1st May accident and does not appear to have been asked or at any rate did not report on the January incident and any consequences it might have. There is however, in the above passage, a suggestion that his symptoms following the earlier incident played some role in the opinion Dr Gibberd expressed.
- [16] His opinion following the fusion was that since the respondent was able to work prior to the May incident and was placed on light duties thereafter he must be regarded as having some "small permanent impairment" as a result of that accident. It is fair to say that the conclusions in each of Dr Gibberd's reports are quite unsympathetic to the respondent and there are some remarks which suggest that Dr Gibberd is of the view that the symptoms of which the respondent complains are not genuine or entirely genuine.
- [17] It is difficult to conceive that in the light of these matters Dr Gibberd will not be called by the applicant at the trial. When the applicant asked the respondent to submit to an examination of one of the three orthopaedic surgeons to whom I have referred the respondent refused upon the basis that he had already undergone a number of medical examinations including examinations by Dr Gibberd and Dr Low who had provided reports to the applicant. The respondent indicated a readiness to submit to further examinations by Dr Gibberd and Dr Low.
- [18] The applicant in correspondence has placed the claim to have the respondent further examined upon a number of different grounds. Firstly it is said that what the reports of Dr Gibberd and others addressed was the claim for compensation made by the respondent and a different issues arise upon the claim for damages. It is said also that the applicant desires to have examined the relationship between what is said to be three incidents (one in September 2000 in addition to the ones I have mentioned) and the respondent's present condition so that the applicant can properly consider the claim for past and future economic loss. It was also pointed out that a considerable time had elapsed since the last of the reports which was obtained from Dr Gibberd in 2002.

- [19] Subsequently it was said that the three orthopaedic surgeons who have been nominated are specialists in back or spinal injuries and for this reason a report was sought from one of them following examination.
- [20] The relevant provision of the WorkCover Queensland Act 1996 as amended is s.286 which provides as follows:

“Worker to undergo medical examination

- (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*
- (b) an assessment of cognitive, functional or vocational capacity by a registered person to be selected by the worker from a panel of at least 3 person with appropriate qualifications and experience nominated in the request.*
- (2) The worker must comply with the request unless it would be unreasonable or unnecessarily repetitious.*
- (3) If 3 doctors or persons with appropriate qualifications and experience are not available for inclusion on a panel, the number on the panel may be reduced to 2.”*

- [21] As has been said in other cases this provision provides what has been described as adjusting two conflicting rights, namely the right of a person not to have his personal liberty infringed by an unwanted medical examination and the right of a defendant to obtain an expert witness of his choice where the justice of the situation requires it.
- [22] It has been said in other cases that the legislation shouldn’t be construed as intending to confer a right to a multiplicity of specialist witnesses or the right to choose the most favourable witness from a number of specialists who have independently examined the claimant. *Re Woolworths (Qld) Pty Ltd v Berry Porter* (2002) QSC 360. If that is the only advantage which can be seen to an insured from an examination then it would be unreasonable or unnecessarily repetitious to order such an examination.
- [23] I do not think this can be said of the present case.
- [24] Dr Gibberd’s reports are clearly directed towards the May incident and it is apparent from what I have said above that he did not express any opinion about the January incident except to the extent that it provided evidence that the May incident did not cause, in his view, the respondent any significant disability.

- [25] The two claims will of course fall for consideration separately and the question of negligence in each case will have to be resolved by reference to the evidence relating to that particular incident. It is perfectly conceivable that the respondent could succeed in relation to one but not in relation to the other. This being so the respondent is entitled to obtain opinions as to what consequences flowed, if any, from each of the two incidents separately and what the position would have been had the respondent sustained one but not the other of those incidents.
- [26] In these circumstances, without any other consideration, I do not think it can be said that the request of the respondent to be examined by one of the three specialists nominated can be said to be unreasonable, unnecessarily repetitious.
- [27] I order that the respondent submit to a medical examination by either Dr Paul Locina, Professor Bruce McKee or Dr John Tuffley.
- [28] I order the respondent to pay the applicant's costs of and incidental to the application to be assessed.