

SUPREME COURT OF QUEENSLAND

CITATION: *Watson v WorkCover Queensland & Anor* [2005] QSC 225

PARTIES: **ROBERT KEITH WATSON**
(applicant)
v
WORKCOVER QUEENSLAND
(first respondent)
AMCOR FLEXIBLES AUSTRALASIA PTY LTD
(ACN 004 275 165)
(second respondent)

FILE NO: BS2958 of 2005

DIVISION: Trial Division

PROCEEDING: Originating application

DELIVERED ON: 24 August 2005

DELIVERED AT: Brisbane

HEARING DATE: 20 June 2005

JUDGE: Mullins J

ORDER:

1. **Within 7 days of the date of this order the first respondent must make unconditional the conditional damages certificate issued on 4 September 2002 by the first respondent to the applicant.**
2. **Pursuant to s 306(3)(b) of the *WorkCover Queensland Act 1996*, the time for service of the claim filed in the Supreme Court in proceeding 8240 of 2002 (“the existing proceeding”) on 6 September 2002 and the amended statement of claim filed in the existing proceeding on 20 December 2004 be extended until 28 days after the making of this order.**
3. **It is declared that the claim filed in the existing proceeding on 6 September 2002 and the amended statement of claim filed in the existing proceeding on 20 December 2004 is a proceeding commenced within the limitation period prescribed by s 11 of the *Limitation of Actions Act 1974* and compliant with Chapter 5 of the *WorkCover Queensland Act 1996*.**
4. **The first and second respondents pay the applicant’s costs of the originating application to be assessed.**

CATCHWORDS: EMPLOYMENT LAW – LIABILITY OF EMPLOYER FOR INJURY TO EMPLOYEE AT COMMON LAW – GENERALLY - where applicant granted a conditional damages certificate under s 262(3) *WorkCover Queensland*

Act 1996 for psychiatric injuries – where proceeding against employer for damages for psychiatric injuries commenced before expiry of limitation period pursuant to s 11 *Limitation of Actions Act 1974* – where both psychiatric and physical injuries assessed in accordance with *WorkCover Queensland Act 1996*– where WorkCover Queensland admitted liability for incident which resulted in the injuries – where compulsory settlement conference held pursuant to s 293 of *WorkCover Queensland Act 1996* – where respondents claimed that any claim by the applicant was statute barred because no proceeding was filed within 60 days of compulsory conference – whether proceeding commenced in respect of psychiatric injuries complied with s 308(2) *WorkCover Queensland Act 1996*

PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – AMENDMENT - where conditional damages certificate under s 262(3) *WorkCover Queensland Act 1996* particularised psychiatric injury – where applicant also claimed entitlement to sue in respect of physical injuries – whether applicant can amend statement of claim after limitation period expired to include physical injuries – whether amending particulars of the injuries adds a cause of action

UCPR r 375, r 376, r 378, r 387
WorkCover Queensland Act 1996

Do Carmo v Ford Excavations Pty Ltd (1984) 154 CLR 234
Green v Suncorp Metway Ltd [2001] 1 Qd R 485
Narayan v S-Pak Pty Ltd [2003] 2 Qd R 387
Read v Brown (1888) 22 QBD 128
Ward v Walton (1989) 66 NTR 20

COUNSEL: R J Douglas SC and D J Schneidewin for the applicant
S C Williams QC for the respondents

SOLICITORS: Sciacca’s Lawyers & Consultants for the applicant
McCullough Robertson for the respondent

- [1] **MULLINS J:** On 6 September 2002 the plaintiff commenced proceeding 8240 of 2002 (“the existing proceeding”) in this Court seeking damages for personal injuries which were specified as an adjustment disorder and psychological/psychiatric injuries, against the second respondent which the applicant alleges he sustained during the course of his employment by the second respondent as an extruder operator on 6 September 1999 when a guide bar fell on him (“the incident”). The applicant also sustained physical injuries in the incident. The applicant’s cause of action for damages arising from the incident is governed by the procedural requirements of the *WorkCover Queensland Act 1996* (“WQA”). The issue raised by this application is whether the applicant is able to amend the existing proceeding to claim damages for the physical injuries sustained in the incident.

Background facts

- [2] Under the *WQA* the first respondent is the insurer of the second respondent. On 15 September 1999 the applicant lodged with the first respondent an application for statutory compensation which described his injuries as bruising and soft tissue injury to the right elbow. That application was accepted by the first respondent.
- [3] The applicant claimed to have subsequently developed a pain disorder and an adjustment disorder with mixed anxiety and depressed mood. It appears that the applicant made an application for workers' compensation for a stress injury arising from the incident consisting of an adjustment disorder and a pain disorder. That was accepted by the first respondent. The second respondent applied to the review unit of Q-Comp for review of the acceptance of that claim. The decision was made by Q-Comp on 25 October 2001 to set aside the decision by the first respondent to accept the claim for adjustment disorder, but to confirm the decision to accept the claim for pain disorder.
- [4] On 19 November 2001 the first respondent issued the applicant with a notice of assessment for a soft tissue injury to the right elbow with ulnar nerve compression and pain syndrome, assessing the degree of permanent impairment attributable to the injury as 11%. The notice of assessment made an offer of lump sum compensation which the applicant did not accept.
- [5] The applicant appealed to the Industrial Magistrates Court against Q-Comp's decision and settled the appeal with Q-Comp on 25 June 2002 on the basis that the first respondent would accept the applicant's claim for an adjustment disorder consequent upon the injuries sustained by him in the incident which the first respondent did do.
- [6] On 2 September 2002 the applicant applied to the first respondent for a conditional damages certificate for an adjustment disorder arising out of the incident. That conditional damages certificate which described the injury as adjustment disorder was issued by the first respondent on 4 September 2002 pursuant to s 262(3) of the *WQA*. On 6 September 2002 the applicant obtained an order from this Court pursuant to s 305 of the *WQA* permitting him to commence a proceeding against the second respondent for damages for all injuries sustained in the course of his employment on 6 September 1999, despite non-compliance with the requirements of s 280 of the *WQA*. The existing proceeding was commenced the same day.
- [7] The claim and statement of claim in the existing proceeding was not served on the first respondent, as that proceeding was stayed pursuant to s 262(4) of the *WQA*.
- [8] On 5 November 2002 the first respondent referred the applicant to the General Medical Assessment Tribunal – Psychiatric for assessment of any permanent impairment with respect to the adjustment disorder. The Tribunal determined that the applicant had sustained a degree of permanent impairment, the nature of the impairment was an adjustment disorder with anxious and depressed mood and the degree of the impairment was 5%.
- [9] On 17 January 2003 the first respondent issued a notice of assessment to the applicant in respect of the adjustment disorder with anxious and depressed mood, assessing the degree of permanent impairment attributable to the injury as 5%. The notice of assessment made the applicant an offer of lump sum compensation. On 10

March 2003 the applicant applied to the first respondent for a damages certificate in respect of right shoulder and back injuries which the applicant claimed also were sustained in the incident. On 12 August 2003 the first respondent issued a notice of assessment to the applicant which assessed at 0% the degree of permanent impairment attributable to each of the soft tissue injuries to the lower back and right shoulder.

- [10] The solicitors then acting for the applicant delivered to the first respondent a notice of claim pursuant to s 280 of the *WQA* on 10 October 2003. The solicitors for the first respondent sent the first respondent's response pursuant to s 280 of the *WQA* to the applicant's solicitors under cover of letter dated 22 October 2003. The response pointed out the respects in which the first respondent claimed the notice of claim was non-compliant. Some steps were then taken by the applicant to make the notice of claim compliant.
- [11] The first respondent responded further pursuant to s 282 of the *WQA* on 27 November 2003 noting that the applicant had not provided copies of certain taxation records. The first respondent indicated it was prepared to waive non-compliance upon the applicant's undertaking to request copies of the relevant documents from the Australian Taxation Office and provide them to the first respondent. That undertaking was given on behalf of the applicant. Those documents were provided to the first respondent in April and May 2004.
- [12] On 26 May 2004 the first respondent's solicitors gave notice pursuant to s 285 of the *WQA* in which the first respondent admitted liability for the incident and made a settlement offer. That offer was rejected by the applicant on 9 June 2004.
- [13] A compulsory conference pursuant to s 293 of the *WQA* was organised for and held on 6 July 2004. Mandatory offers were exchanged between the parties which remained open for a period of 14 days pursuant to s 294 of the *WQA*.
- [14] Neither the claim and statement of claim in the existing proceeding or any amended pleading in the existing proceeding were served on the second respondent within 60 days after the compulsory conference was held.
- [15] By letter dated 9 September 2004 the respondents' solicitors advised the applicant's solicitors that as the applicant had failed to comply with either ss 306(3) or 308(2) of the *WQA*, they considered that the applicant no longer had the protection of s 308 of the *WQA* and the limitation period for bringing proceedings had expired.
- [16] The applicant's then solicitors advised him to consult other solicitors. The applicant consulted the solicitors who now act for him on 13 October 2004
- [17] The applicant's current solicitors suggested to the respondents' solicitors by letter dated 20 December 2004 that consent orders be made in the existing proceeding giving leave *nunc pro tunc* pursuant to s 291 of the *WQA* for the plaintiff to file the amended statement of claim in the existing proceeding which had been filed on 20 December 2004, and extending the time for service of the claim and amended statement of claim pursuant to s 306 of the *WQA* to the date which would be 28 days after the making of the consent order. The amendment that was incorporated in the amended statement of claim was the addition of further particulars of the plaintiff's personal injuries from the incident as follows:

- “(c) right elbow with ulnar nerve compression and pain syndrome;
- (d) injury to right shoulder;
- (e) pain disorder;
- (f) adjustment disorder with anxious and depressed mood; and
- (g) lower back injury.”

[18] The respondents declined to consent to the orders proposed by the applicant’s solicitors. The applicant filed the originating application seeking orders to allow him to pursue the existing proceeding on 12 April 2005.

Relevant legislation

[19] The version of the *WQA* that is relevant for the purpose of the applicant’s claim is reprint 2C.

[20] Section 306(3) of the *WQA* provides:

- “(3) If a claim has not been settled at a compulsory conference, then despite any rule of court, the legal process that starts the proceeding must be served on the employer-
- (a) within 60 days after the day the conference was held; or
 - (b) within the further period that the court orders on the claimant’s application.”

[21] Section 308 of the *WQA* provides:

- “**308(1)** A claimant may bring a proceeding for damages for personal injury after the end of the period of limitation allowed for bringing a proceeding for damages for personal injury under the *Limitation of Actions Act 1974* only if—
- (a) before the end of the period of limitation—
 - (i) the claimant gives a notice of claim that is a complying notice of claim; or
 - (ii) the claimant gives notice of claim for which WorkCover waives compliance with the requirements of section 280; or
 - (iii) a court makes a declaration under section 304; and
 - (iv) a court gives leave under section 305;
 - (b) the claimant complies with section 302.
- (2)** However, the proceeding must be brought within 60 days after a compulsory conference for the claim is held.”

Common ground

[22] As the first respondent had issued a notice of assessment with respect to the adjustment disorder with anxious and depressed mood, it was common ground that the first respondent was required to make the conditional damages certificate in respect of that injury unconditional, pursuant to s 262(5) of the *WQA*.

[23] It was also common ground that the applicant could rely on the existing proceeding commenced as a result of the issue of the conditional damages certificate, notwithstanding that the applicant had not complied with s 303 of the *WQA* at the

time the existing proceeding was commenced: *Green v Suncorp Metway Ltd* [2001] 1 Qd R 485, 494 [58].

- [24] Mr Williams of Queen’s Counsel made an appropriate concession on behalf of the respondents that the applicant should be given the extension under s 306(3)(b) of the *WQA* to enable the service of the claim and statement of claim filed in the existing proceeding filed on 6 September 2002 to be served on the respondents.

Applicant’s submissions

- [25] In response to the contention of the respondents that the applicant’s existing proceeding is limited to the psychiatric injury identified in the conditional damages certificate and in the statement of claim filed on 6 September 2002, the applicant contends that it is irrelevant that the conditional damages certificate referred only to the psychiatric injuries. The applicant submits that as a matter of statutory construction, it was beyond power for WorkCover to specify the injury arising out of the incident in the conditional damages certificate. It is submitted that the description of the injury was “surplusage” and that the certificate was all encompassing in that it allowed the applicant to commence a proceeding for damages for personal injury arising out of the incident. The applicant relied on *Craig v BHP Coal Pty Ltd* (unreported, Sup Ct (Q), Dutney J, No S760 of 1999, 19 October 2000) and *Dixon v Australian Meat Holdings Pty Ltd* [2003] QSC 267 at paragraph [15].
- [26] The applicant submits that in any event, or as an alternative argument, the applicant is able to amend the existing proceeding, after he had complied with chapter 5 of the *WQA* in respect of all the injuries. It is submitted that although the *WQA* provides for distinct pre-proceeding steps to be taken in respect of different categories of injuries, the applicant had only one cause of action for damages for personal injuries arising from the incident to prosecute against the second respondent. It follows that when the issue of the expiration of the limitation period is considered, the applicant needed to commence a proceeding seeking damages for personal injuries arising out of the incident, in order to satisfy any limitation period, as the applicant was entitled to amend that proceeding to extend the injuries for which damages are to be claimed against the respondents. The applicant relies on the generous provisions permitting amendment to the statement of claim found in rr 375 and 376 of the *UCPR*.
- [27] The applicant therefore claims to be entitled to proceed with the existing proceeding, as pleaded in the amended statement of claim, upon obtaining the order pursuant to s 306(3)(b) of the *WQA*.

Respondents’ submissions

- [28] The respondents argue that for the purposes of the *WQA*, each of the adjustment disorder, the soft tissue injury to the right elbow with right ulnar nerve compression and the pain syndrome is a separate injury, requiring the applicant to have each injury assessed, with each such assessment essential to the commencement of a valid proceeding for damages for personal injury. The respondent relies on the restriction that applies to the commencement of a proceeding for damages found in s 302 of the *WQA*. Because the applicant had not served a notice of claim pursuant to s 280 in respect of the soft tissue injury to the right elbow with ulnar nerve compression and pain syndrome on or prior to 6 September 2002, the respondent submits that the applicant’s entitlement to issue proceedings as at 6 September

2002, when the existing proceeding was filed, was limited to the injury described in the conditional damages certificate. The respondents submit that the effect of obtaining the order under s 305 of the *WQA* was to extend the limitation period for commencing the proceeding, but only for a maximum period of 60 days after the compulsory conference was held: s 308 *WQA*.

- [29] The respondents rely on *Narayan v S-Pak Pty Ltd* [2003] 2 Qd R 387 as authority for the effect of the limitation contained in s 308(2) of the *WQA* and that there is no power under the *WQA* or otherwise to extend that limitation. It is therefore submitted that the applicant was obliged to commence his proceeding for damages for personal injuries arising from the incident within 60 days of the compulsory conference held on 6 July 2004 and as he failed to do so, he is limited to the claim for damages for the psychiatric injuries pleaded in the statement of claim that was filed on 6 September 2002. It is submitted that the court has no power to permit amendment of that statement of claim to add the additional injuries that the applicant sought to include in the amended statement of claim as to do so would be to relieve the applicant from his non-compliance with mandatory statutory provisions that were fundamental to the existence of his cause of action for damages for those particular injuries. It is also argued on behalf of the respondent that the applicant was using this application in an attempt to circumvent the mandatory requirements of s 308 of the *WQA*.

Nature of cause of action

- [30] Fundamental to the respective submissions is the nature of a cause of action for limitation purposes and for determining the application of the rules for amending pleadings.
- [31] The classic definition of a cause of action is that given by Lord Esher MR in *Read v Brown* (1888) 22 QBD 128, 131:
 "... every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court".

The meaning of the term "cause of action" may vary with the context, but the above definition would seem to be appropriate for limitation purposes and amendments of pleadings. In the context of the application of an extension of the limitation period provision in *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234, Wilson J stated at 245:

"The concept of a "cause of action" would seem to be clear. It is simply the fact or combination of facts which gives rise to a right to sue. In an action for negligence, it consists of the wrongful act or omission and the consequent damage ..."

- [32] The applicant's cause of action for damages for negligence for the personal injuries sustained in the incident arose at the time the applicant was injured in the incident. Although the applicant appears to have developed consequential injuries, as a result of the incident, that affects the extent of the injuries and the extent of the damages, but does not give rise to a separate cause of action for each injury. The emphasis in the *WQA* on discrete injuries for the purpose of the pre-proceeding procedures does not affect the nature of a cause of action for the purpose of the commencement of a proceeding.

Whether the existing proceeding can be amended

- [33] Adding to the list of injuries for which damages is sought in the existing proceeding does not amount to adding a cause of action to the proceeding. In respect of the amendments made by the applicant to the statement of claim on 20 December 2004, the only provision of the *WQA* which the respondent claims was not complied with by the applicant is s 308. The respondents acknowledge that the applicant was otherwise entitled to file a proceeding for damages for personal injury arising out of the incident in respect of which the applicant had complied with parts 5 and 6 of chapter 5 of the *WQA*. This was because the applicant had the benefit of the order made by the court on 6 September 2002 pursuant to s 305 of the *WQA*. The limitation period for bringing the proceeding was, in effect, extended by virtue of s 308 of the *WQA* to the date which was 60 days after the compulsory conference. This limitation period has the effect of accommodating the pre-proceeding requirements under *WQA*, but at the same time ensuring the timeliness of the commencement of the proceeding after those pre-proceeding requirements have been satisfied.
- [34] In this matter the applicant did not have to issue a fresh proceeding, because he had the benefit of the existing proceeding, as a result of relying on the alternative regime for commencing a proceeding before the expiry of the limitation period related to the grant of the conditional damages certificate.
- [35] There are two ways of construing s 308(2) of the *WQA*. One is that it requires the proceeding to be brought after the compulsory conference and before the expiry of 60 days after the compulsory conference. The other is that it requires the proceeding to be brought before the expiry of 60 days after the compulsory conference.
- [36] In *Ward v Walton* (1989) 66 NTR 20 (“*Ward*”) the relevant limitation period expired on 4 March 1985. The plaintiff’s solicitors issued the writ on 15 March 1985. The plaintiff sought an extension of the limitation period on the basis that the relevant material fact was not within her knowledge until 15 August 1986. Under the relevant limitation provision, the action had to be commenced “within 12 months after” the ascertainment of the material facts by the plaintiff which literally would have allowed the plaintiff to commence the action between 15 August 1986 and 15 August 1987. It was held by the majority of the Court of Appeal of the Northern Territory that the mischief the limitation provision sought to prevent was undue delay in bringing an action after ascertainment of the material facts by the plaintiff and that if the action had been instituted before the specified period of 12 months, the mischief was already prevented. In the context of the relevant provision, Asche CJ held (at 23) that it was “to regard the time limits fixed as the outer limits within the action can be brought”. Gallop J who agreed with Asche CJ stated (at 26) that the word “within” as used in the relevant provision should be read as meaning “before the end of” to give effect to the subject matters, scope and purpose of the provision. The action was held to be properly instituted as it was commenced before 15 August 1987, even though it was also commenced before the ascertainment of the material facts.
- [37] Section 308(2) of the *WQA* is an analogous provision to that considered in *Ward*. It gives effect to the purposes of s 308(2) of the *WQA* to construe it as requiring the proceeding to be brought before the expiry of 60 days after the compulsory

conference, whether or not the proceeding is brought before or after the compulsory conference. This construction also has the advantage of accommodating the situation, as in this case, where the applicant properly relied on the issue of the conditional damages certificate to commence the existing proceeding before the expiry of the limitation period.

[38] The amendments made to the existing proceeding in the amended statement of claim filed on 20 December 2004 did not add a cause of action and therefore could be made without leave in accordance with r 378 of the *UCPR*. Upon being made those amendments took effect on and from the date of the statement of claim, as originally filed, which was 6 September 2002: r 387(1) *UCPR*.

[39] I therefore conclude that the existing proceeding was amended on 20 December 2004 in accordance with the *UCPR* and without circumventing the requirements of s 308(2) of the *WQA*. It is therefore not necessary to deal with the submission of the applicant as to the form of the conditional damages certificate.

Orders

[40] It follows that the orders which should be made are:

1. Within 7 days of the date of this order the first respondent must make unconditional the conditional damages certificate issued on 4 September 2002 by the first respondent to the applicant.
2. Pursuant to s 306(3)(b) of the *WorkCover Queensland Act 1996*, the time for service of the claim filed in the Supreme Court in proceeding 8240 of 2002 (“the existing proceeding”) on 6 September 2002 and the amended statement of claim filed in the existing proceeding on 20 December 2004 be extended until 28 days after the making of this order.
3. It is declared that the claim filed in the existing proceeding on 6 September 2002 and the amended statement of claim filed in the existing proceeding on 20 December 2004 is a proceeding commenced within the limitation period prescribed by s 11 of the *Limitation of Actions Act 1974* and compliant with Chapter 5 of the *WorkCover Queensland Act 1996*.
4. The first and second respondents pay the applicant’s costs of the originating application to be assessed.