SUPREME COURT OF QUEENSLAND

CITATION:	*Otto v Mackay Sugar Ltd & Anor* [2011] QSC 305
PARTIES:	GARY ALAN OTTO (applicant) v MACKAY SUGAR LIMITED ACN 057463671 (first respondent) and WORKCOVER QUEENSLAND (second respondent)
FILE NO/S:	BS5636/11
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	13 October 2011
DELIVERED AT:	Brisbane
HEARING DATE:	Written submissions of 3 August 2011 and 10 August 2011
JUDGE:	Douglas J
ORDER:	**Order the applicant to pay the respondents' costs of and incidental to the application.**
CATCHWORDS:	WORKERS' COMPENSATION – PROCEEDINGS TO OBTAIN COMPENSATION – DETERMINATION OF CLAIMS – COSTS – GENERALLY – where application dismissed – where applicant sought reliance on s 316(4) of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) in relation to costs – whether the claimant is a worker who has a WRI of less than 20% or no WRI *Workers' Compensation and Rehabilitation Act* 2003 (Qld), ss 39, 233, 315, 316(4) *Edmunds v D. Dunn Industries Pty Ltd (No. 2)* [2007] 2 Qd R 128 referred *Handover v Consolidated Meat Group Pty Ltd* [2009] 2 Qd R 133 referred
COUNSEL:	R F King-Scott for the applicant J S Miles for the respondents
SOLICITORS:	Shine Lawyers for the applicant WorkCover Queensland for the respondents

[1] **Douglas J**: I dismissed the application in this matter but counsel for the applicant argued his client should not pay his costs of the application because s 316(4) of the *Workers' Compensation and Rehabilitation Act* 2003[1] (Qld) ("the Act") provides that an order about costs for an interlocutory application may be made (under Div 2 of Pt 12 of the Act) only if the court is satisfied that the application has been brought because of unreasonable delay by one of the parties.

[2] It is not asserted for the second respondent that there has been unreasonable delay by the applicant. Rather, it argued in written submissions, that reliance on s 316(4) is misconceived. Its submission was that s 316(4) relates to applications for costs made under Pt 12 Div 2 of the Act because of s 315 which provides that the division applies "if the claimant is a worker who has a WRI of less than 20% or no WRI." A WRI is a work related impairment.

[3] The second respondent's argument is that the applicant is neither a claimant as defined in s 233 nor a "worker … who has no WRI." It says he is not a claimant as he is not entitled to seek damages because of its earlier determination that there was no "injury" as defined in s 32 of the Act and my decision refusing him leave to claim common law damages.

[4] Further, it says that he is not a worker because that word is defined in s 233 as follows:

> "**Worker** for a claim, means the worker in relation to whose injury the claim is made."

[5] The submission is that "claim" in that section should be understood to mean a claim for damages as distinct from a statutory application for compensation and that the applicant, again as a result of my decision, does not have a claim for damages. That argument is based partly on the appearance of s 233 in ch 5 of the Act dealing with access to damages. The submission then proceeded to point out that the applicant has not suffered an "injury" as referred to in the s 233 definition of "worker" because of the decision to that effect by the second respondent which has not been disturbed.

[6] Finally, the submission is that the applicant is not someone who has a work related impairment (WRI) of "less than 20% or no WRI" but rather is someone who has never had an assessed WRI. That is said to follow from s 39 of the Act which provides:

> "**39 Meaning of *work related impairment***
>
> (1) A worker's ***work related impairment*** from injury is the worker's entitlement to lump sum compensation under section 180 expressed as a percentage of maximum statutory compensation calculated under section 183.
>
> (2) To remove any doubt, it is declared that a work related impairment only relates to an injury arising out of, or in the course of, the worker's employment within the meaning of this division."

[7] Again, as the determination that the applicant has not suffered an injury stands, the argument is that he does not have an assessed WRI. The expression "no WRI" in s 315 was said to refer to a worker who has sustained an "injury" but who has not

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[1] In reprint 3E in force at the relevant times and now reproduced in s 318C.

suffered a measurable degree of impairment as occurred in *Handover v Consolidated Meat Group Pty Ltd* [2009] 2 Qd R 133, 135 [4] or, as appears in an example in Div 2 of Pt 4 of Sch 2 of the *Workers' Compensation and Rehabilitation Regulation* 2003 under the heading "Lumbosacral spine" where a "mild aggravation of pre-existing degenerative disease in lumbosacral spine with subjective symptoms, but no significant clinical findings other than degenerative changes on x-ray" is said to have a 0% maximum WRI.

[8] Those submissions seem to me to be correct with the result that s 316(4) does not apply. Mr Otto is not a claimant for damages who has suffered an injury for which damages under ch 5 can be claimed. Nor is he a worker with an assessed WRI. The costs regime in Pt 12 Div 2 of the Act does not apply to him.

[9] Mr Miles for the second respondent also made submissions about the effect of s 316(1) in this context as confining s 316(4) to applications in a proceeding for damages of the kind referred to in ch 5 and sought to distinguish a decision of Cullinane J in *Edmunds v D. Dunn Industries Pty Ltd (No. 2)* [2007] 2 Qd R 128 dealing with whether the application before his Honour was an interlocutory application. As I have concluded that s 316(4) does not apply to this application, I do not need to consider those arguments.

[10] Accordingly, I order the applicant to pay the respondents' costs of and incidental to the application.