SUPREME COURT OF QUEENSLAND

CITATION:	*Haylett v Hail Creek Coal Pty Ltd* [2014] QSC 176
PARTIES:	**MICHAEL KEITH HAYLETT** (Applicant) **v** **HAIL CREEK COAL PTY LTD** ACN 080 002 008 (Respondent)
FILE NO/S:	BS 970 of 2014
DIVISION:	Trial Division
PROCEEDING:	Hearing
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	7 August 2014
DELIVERED AT:	Brisbane
HEARING DATE:	24 April 2014
JUDGE:	Philip McMurdo J
ORDER:	**It is declared that the report completed by Dr Parker on 19 November 2013, in respect of the applicant, is of no effect under the *Coal Mining Health and Safety Regulation* 2001 (Qld).**
CATCHWORDS:	EMPLOYMENT LAW – EFFECT OF INDUSTRIAL AWARDS, AGREEMENT, LEGISLATION ON EMPLOYMENT CONTRACT – where the applicant suffered a neck injury in his role as a bulldozer operator - where the applicant returned to work in a different role as a drill rig operator – where the applicant underwent a medical assessment under the coal mine workers' health scheme prescribed by the *Coal Mining Safety and Health Regulation* 2001 (Qld) – where the medical adviser determined the applicant was unfit to undertake his current role because of a foreseeable risk of future injury – whether the medical advisor erred by considering fitness for employment based on a future risk – whether the medical adviser was restricted to considering fitness for employment based on ability to undertake current role. *Coal Mining Safety and Health Act* 1999 (Qld), s 6, s 7, s 18, s 19. *Coal Mining Safety and Health Regulation* 2001 (Qld), s 45, s 46, s 47, s 48, s 48A.

MBR v Parker [2012] QCA 271, followed.
Haylett v Hail Creek Coal Pty Ltd [2013] QDC 340, cited.

COUNSEL: D Kent QC for the applicant
A McLean Williams for the respondent

SOLICITORS: Hall Payne Lawyers for the applicant
Sparke Helmore Lawyers for the respondent

[1] The applicant is employed by the respondent at its Hail Creek Coal Mine. He has worked there since January 2009. At first he drove a bulldozer until he injured his neck. He underwent surgery and has since worked as a drill rig operator.

[2] Last November, the applicant underwent a medical assessment under the coal mine workers' health scheme prescribed by the *Coal Mining Safety and Health Regulation* 2001 (Qld) ("the Regulation"). Under that scheme, there are consequences for the employment of a worker who is assessed as unable to carry out the worker's tasks at a coal mine "without creating an unacceptable level of risk".[1] The applicant was examined by a Dr Green. On the basis of what he reported about the applicant, a Dr Parker, who was the nominated medical adviser appointed by the respondent under the Regulation,[2] determined that the applicant:

> "Is not fit to undertake the proposed/current position because of the following restriction(s):
>
> > Unfit due to a significant and foreseeable risk of further injury or aggravation of medical condition which prevents him from performing the occupational demands of the role."

[3] In this proceeding, the applicant challenges the decision of Dr Parker and seeks a declaration that it has or should be given no legal effect. His principal argument is that the opinion expressed by Dr Parker was not an answer to the relevant question, which was whether the applicant was then able to do the work of a drill rig operator. Instead, it is said that Dr Parker has opined about the risk to the applicant from doing that work.

[4] Before going to that question, I should say something about a previous case between these parties. The applicant successfully sued the respondent for damages from the injury to his neck to which I have referred. His case was tried in the District Court at Townsville on 11 November 2013 and Judge Baulch SC delivered judgment four days later.[3] His award was more than $600,000. In the reasons for judgment, it was noted that in August 2010, the applicant underwent a C6/7 discectomy and fusion of his neck before returning to work in October 2010 "on light duties". His Honour also said:[4]

> "[The applicant] was asked to operate a service vehicle, but lasted less than one shift before ceasing that work.

---

1 See in particular s 48 of the Regulation.
2 s 45 of the Regulation.
3 *Haylett v Hail Creek Coal Pty Ltd* [2013] QDC 340.
4 Ibid at [30] – [40].

> His employer has since retained him, and he now works as a member of a drill crew at the mine. He is able to carry out his duties with some difficulty. The difficulties that he encounters now include a muscular type pain [at] the back of his neck, the top of his shoulders and a pain going down to the right elbow. He has tingling, or pins and needles feelings, in his right little finger, and aches and pains that come and go. He finds that physical activity causes his muscles to tighten up. He develops pain in the neck that sometimes takes a couple of days to settle down. He tells me that being seated more than an hour causes pain in his right elbow, and tingling in his finger while operating the drill at work. …"

His Honour assessed the applicant's diminished earning capacity upon the premise that he was able to work as a drill rig operator. Clearly, the plaintiff's award would have been higher had his Honour concluded that the applicant was unable to work at all at a coal mine.

[5] From that outcome in the District Court, the applicant now argues that the respondent is estopped from disputing that he is able to work as a drill rig operator. On this alternative argument, the applicant again seeks a declaration about the ineffectiveness of the assessment of Dr Parker. Because I accept the applicant's principal argument, it is unnecessary to consider this alternative argument of estoppel.

[6] Division 2 of Part 6 of Chapter 2 of the Regulation provides for the scheme, which applies to each coal mine worker, other than a person employed, or to be employed, to carry out a "low risk task" at a mine.[5] It is common ground that the applicant was and is a coal mine worker and not employed to carry out a low risk task.

[7] By s 45 of the Regulation, an employer must appoint a nominated medical adviser to carry out, supervise and report on health assessments conducted under the scheme. Section 46 of the Regulation requires an employer to ensure that a health assessment is carried out for each of its employees at a coal mine, either before the person is employed or periodically during their employment. The scope of the required assessment is according to these parts of s 46:

> "46 Health assessment
>
> …
>
> (3) An assessment must be carried out—
>
> (a) in accordance with the instructions, and covering the matters, in the approved form; and
>
> (b) by, or under the supervision of, the nominated medical adviser.
>
> (4) An assessment may include matters not covered in the approved form if, having regard to a risk assessment carried out for a task for which the

[5] s 44 of the Regulation.

> person is to be employed, or is employed, the nominated medical adviser considers the person needs to be assessed in relation to the additional matters to achieve an acceptable level of risk.
>
> (5) Despite subsection (3)(a), a person may undergo an assessment (a subsequent assessment) in accordance with some of the instructions only, and covering some of the matters only, in the approved form if—
>
> (a) the person has previously undergone a health assessment (a previous assessment); and
>
> (b) the subsequent assessment relates to a matter identified at a previous assessment; and
>
> (c) the assessment is carried out to ensure the person is able to carry out the person's tasks at the mine without creating an unacceptable level of risk having regard to the matter mentioned in paragraph (b). …"

[8] Section 46(6) of the Regulation provides that an assessment may be made on the basis of a medical examination although it is by a doctor who is not the nominated medical adviser. As I have noted, this is what occurred in the present case: Dr Parker's assessment was followed by Dr Green's examination.

[9] The nominated medical adviser reports to the employer.[6] If the employer is given a report showing that "the worker is unable to carry out the worker's tasks at the mine without creating an unacceptable level of risk", s 48 applies.[7] In that event, s 48(2) provides that "before taking action to terminate the worker's employment or demote the worker", the employer must give the worker an opportunity to undergo a further health assessment from another doctor. If the worker then undergoes that further health assessment, the report of that assessment is given to the original assessor so that he or she can review the original assessment. If the assessments are inconsistent, the question needs to be resolved by a third doctor.[8] If that third assessment "shows the worker is unable to carry out the worker's tasks at the mine without creating an unacceptable level of risk", then the employer may take action to terminate the worker's employment or demote the worker.[9]

[10] It can be seen that in several of these provisions, the Regulation refers to the existence or otherwise of what it describes as "an acceptable level of risk". In particular, there is s 48 which effectively provides that the (original) health assessment report cannot be the basis for terminating the worker's employment or demoting him unless it is to the effect that the worker is unable to carry out the worker's tasks at the mine without creating an unacceptable level of risk.

---

6 s 47 of the Regulation.
7 s 48(1) of the Regulation.
8 s 48A of the Regulation.
9 s 48A(6) of the Regulation.

[11] Those references to an unacceptable level of risk have a basis in the statute under which the Regulation is made, namely the *Coal Mining Safety and Health Act* 1999 (Qld) ("the Act"). Some of the objects of the Act are:

> "(a) to protect the safety and health of persons at coal mines and persons who may be affected by coal mining operations; and
>
> (b) to require that the risk of injury or illness to any person resulting from coal mining operations be at an acceptable level …"[10]

Section 7 of the Act provides that those objects are to be achieved by (amongst other things) "providing for the health assessment of coal mine workers ...".[11]

Regulation 5 also refers to "an acceptable level of risk at a coal mine". It provides that Chapter 2 (other than ss 47(3) and 52(1)) "prescribes ways of achieving an acceptable level of risk at a coal mine in the circumstances mentioned in the chapter".[12]

[12] The Act defines the term "risk" to mean "the risk of injury or illness to a person arising out of a hazard",[13] which in turn is defined as "a thing or situation with potential to cause injury or illness to a person".[14]

[13] Neither the Act nor the Regulation further identifies or describes the risk or risks which are relevant for these provisions. But the provisions to which I have referred would appear to encompass a risk to others from a worker not being physically able to carry out his tasks. They would also seem to encompass the risk to the worker himself in the circumstance. It was a risk of that kind which Dr Parker identified. He concluded that there was a significant and foreseeable risk that the applicant's present condition would be aggravated by performing his work. But the applicant contends that a risk of that kind is not one which is to be addressed by a doctor who reports under this scheme.

[14] The applicant's argument is based upon a decision of the Court of Appeal in *MBR v Parker*.[15] The appellant there was the operator of heavy machinery at a coal mine who, coincidentally, was the subject of an unfavourable assessment by Dr Parker. In his view, that worker was unfit to undertake his duties because of "a significant and foreseeable risk of sudden incapacity, from a sudden cardiac event". As the court accepted, an operator of large machinery at a coal mine suffering a sudden cardiac event could pose serious risk to himself and for the workers.[16] However, the Court of Appeal concluded that Dr Parker's assessment was not according to the Regulation and therefore had no legal effect. In the judgment of the President, with whom Fraser and White JJA agreed, it was held that the question for Dr Parker was whether there was some present "restriction" which made the appellant unfit to undertake his current position. Because the appellant *was* performing his required duties, that question could not have been answered adversely to him. It was held

---

10 s 6 of the Act.
11 s 7(k) of the Act.
12 s 5(1) of the Regulation.
13 s 18 of the Act.
14 s 19 of the Act.
15 [2012] QCA 271.
16 Ibid at [36].

that instead, Dr Parker had assessed the likelihood that the appellant would *become* unfit to perform his duties.[17] The court's conclusion was largely based upon the wording of the approved form to be used for a health assessment under this scheme. Section 46(3) requires an assessment to be carried out "in accordance with the instructions, and covering the matters, in the approved form".

[15] The approved form in the present case is that which was relevant in *MBR*. It is unnecessary to repeat here the description of the form which appears in the President's judgment in *MBR*.[18] It is necessary only to refer to what appears within that part of the approved form which is to be completed by the nominated medical adviser.

[16] The form is there in terms which allows for one of four conclusions. The first is that the worker is "fit to undertake any position". The second is that the worker "is fit to undertake the proposed/current position" (which seems to require the deletion of one of the words "proposed" and "current"). The third is that the worker "is fit to undertake the proposed/current position subject to the following restriction(s) …". And the fourth alternative (which was selected by Dr Parker in this case) is in these terms:

> "Is not fit to undertake the proposed/current position because of the following restriction(s): …"

Dr Parker selected that alternative and inserted immediately underneath it the words:

> "Unfit due to a significant and foreseeable risk of further injury or aggravation of medical condition which prevents him from performing the occupational demands of the role."

[17] In *MBR*, the wording of those alternatives, and in particular those which refer to a "restriction" or "restrictions", was seen as critical. Because the nominated medical adviser was required to carry out the assessment in the terms of the form, an assessment of unfitness could not be made absent a finding of some "restriction" which then affected the worker's undertaking his (current) position. In *MBR*, there was a risk of a sudden cardiac event with a consequent risk to the safety of that worker and his co-workers. But that was not a relevant risk, according to the Court of Appeal. The appellant in *MBR* was relevantly "unrestricted" in performing his duties because unless and until such an event occurred, he was able to undertake his current position.

[18] That reasoning governs the present case. Dr Parker has not found that the applicant is presently restricted in performing the task or tasks for which he is employed. Rather, he has identified a risk that the applicant's performance of that work will result in a future event. Dr Parker's opinion is that having regard to that risk, the applicant ought not to be doing the work which he is doing. That may be a responsible and weighty opinion. But it is not an opinion that, according to the reasoning in *MBR*, is relevant according to what is required by s 46(3) of the Regulation.

---

[17] Ibid at [55]-[56].
[18] Ibid at [26]-[28].

[19] The respondent seeks to distinguish *MBR*, upon the basis of what are said to be factual differences between the two cases which are revealed by the differences in the completed details in other parts of the approved forms. In *MBR*, another part of the approved form had been completed by a doctor (other than Dr Parker) by noting that there were no physical restrictions of any kind. The President's judgment records that that doctor had written that there was no reason why [the worker] was not fit for duty in relation to work as an operator of, or working around, heavy vehicles and in certain contexts and conditions.[19] In the present case, Dr Green completed that part of the form differently. Against the question "is there any reason why the coal mine worker may not be fit for duty in relation to work … as an operator of or working around heavy vehicles", Dr Green wrote "see below" where he wrote:

> "Limited neck movement: plant operator currently limited to drill rig only."

[20] Dr Green there indicated that the applicant was not fit for work as an operator of all heavy vehicles. But it could not be thought that Dr Green was there indicating that the applicant may not be fit for work as an operator of a drill rig. More relevantly, Dr Parker's opinion was unambiguous in referring to a risk of injury, rather than a present inability to perform the work for which the applicant was employed. It cannot be thought that Dr Parker was addressing the applicant's ability for duties that involved the operation of other heavy vehicles. After all, the applicant had recovered a substantial award of damages upon the basis that he was unable to perform such a wide range of duties.

[21] The respondent's argument also sought to make something of the description of the applicant's position in two parts of the form, completed respectively by the applicant and the respondent, where his position was given as "operator". In some way, this description is said to have made Dr Parker's assessment one where he has assessed the applicant's fitness to perform duties as the operator of any machinery. That submission cannot be accepted. It is clear that Dr Parker has addressed the performance of the applicant's "current position". Had Dr Parker been addressing the applicant's "current position" as if that included duties such as the operation of a bulldozer, his conclusion would have been quite differently expressed. Dr Parker would have concluded that there was a present disability, rather than that there was a present risk.

[22] In my conclusion, there is no basis for distinguishing *MBR*. It follows that Dr Parker did not address the requisite question under s 46 of the Regulation and that his assessment has no legal effect.

[23] It will be declared that the report completed by Dr Parker on 19 November 2013, in respect of the applicant, is of no effect under the *Coal Mining Health and Safety Regulation* 2001 (Qld). I will hear the parties as to any further relief (if any) and as to costs.

---

[19] Ibid at [34].