

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *State of Queensland (Department of Health) v WorkCover Queensland* [2020] QIRC 113

PARTIES: **State of Queensland (Department of Health)**
(Applicant)

v

WorkCover Queensland
(Respondent)

CASE NO: WC/2020/62

PROCEEDING: Application in existing proceedings to lift a stay on a Form 29 Notice of Non-Party Disclosure

DELIVERED ON: 7 August 2020

HEARING DATES: 7 August 2020

MEMBER: McLennan IC

HEARD AT: Brisbane

ORDERS: **See paragraph [41] for full orders.**

CATCHWORDS: INDUSTRIAL LAW – APPLICATION TO LIFT A STAY ON A FORM 29 NOTICE OF NON-PARTY DISCLOSURE – objections to produce documents – where objection was made out of time – where direct relevance is considered – where application is varied.

LEGISLATION: *Industrial Relations (Tribunals) Rules 2011* (Qld) r 64B, r 64E, r 64F, r 64G, r 64H

Industrial Relations Act 2016 (Qld) s 536

Workers' Compensation and Rehabilitation

Regulation 2014 (Qld) reg 132

CASES: *Mullins v Workers' Compensation Regulator; Ex parte Drake International Pty Ltd (No. 2)* [2020] QIRC 003

APPEARANCES: Ms J Marr, counsel instructed by Crown Law for the State of Queensland.

No appearance on behalf of WorkCover Queensland.

Reasons for Decision

- [1] On 26 May 2020, the State of Queensland (Department of Health) ('the State') filed a Form 29 Notice of Non-Party Disclosure with the Industrial Registry ('the Notice').
- [2] The Notice sought to compel WorkCover Queensland ('WorkCover') to produce various documents that the State submitted they require for the future substantive hearing of the Workers' Compensation Appeal. In that Appeal, the State as the employer appeals against a decision of the Workers' Compensation Regulator to accept an injury for compensation pursuant to a claim lodged by Ms Amy Alker.
- [3] In an email dated 15 June 2020 from Ms Mair, WorkCover communicated to the State that they declined to provide all of those documents, though would provide some of the documents sought in a redacted form.
- [4] On 9 July 2020, the State filed an Application in Existing Proceedings seeking that WorkCover be ordered to comply with the Notice in accordance with the *Industrial Relations (Tribunals) Rules 2011 (Qld)*.¹
- [5] There are two primary questions to be addressed in this Application:
1. Has the Notice been stayed by an objection, and if not should the timeframe for objecting be extended so as to stay the Notice?
 2. Should any stay on the Notice be lifted, and on what terms?
- [6] For the reasons that follow, I have determined that:

¹ 'the Rules'.

1. The objection was beyond the statutory time limit and so the operation of the Notice was not stayed. Further, there are insufficient reasons to extend the objection period. On that basis, the Notice as varied must be complied with.
2. Even if the Notice was stayed, that stay should be lifted and the Notice as varied must be complied with.

The Notice

[7] The State sought production of:

All documents (including but not limited to, medical certificates and reports, correspondence, communication reports etc) in (WorkCover's) possession or control, and which do not contain any deleted or redacted information, relating to the application for workers' compensation lodged by AMY LEE ALKER (DOB 20/8/1988), statutory claim file numbers S18YA611420 and S18RT582048.

[8] Within the Notice, the State contended that the documents held by WorkCover are relevant to determining:

- Whether Ms Alker suffered from a personal injury which was an injury for the purposes of s 32 of the *Workers' Compensation and Rehabilitation Act 2003* (Qld);² and or in the alternative
- Whether Ms Alker sustained a personal injury that arose out of, or in the course of, her employment with the State; and or in the alternative
- Whether Ms Alker's employment with the State was a significant contributing factor to her injury, within the meaning of s 32(1) of the WCR Act.

[9] I note that the State is content with the documents WorkCover has provided to them with regards to file number S18YA611420. Their Application only seeks compliance with the Notice insofar as it relates to file number S18RT582048, and they confirmed as much to me at the hearing of this matter.

Has the Notice been stayed by an objection, and if not should the timeframe for objecting be extended so as to stay the Notice?

[10] The State's primary argument is that the Notice has not been objected to in accordance with the Rules, and as such should be enforced under r 64H. In order to consider that submission, it is useful to summarise the relevant provisions of the Rules:

² 'WCR Act'.

- A party to a proceeding may, by notice of non-party production, require a person who is not party to the proceeding (the *non-party*) to produce to the party, within 14 days after service of the notice on the non-party, **a document directly relevant to a matter in issue in the proceeding**.³
- The non-party, or a person who has been served with a copy of the notice under rule 64D, may object to the production of some or all of the documents mentioned in the notice **within 7 days after its service or, with the leave of the industrial tribunal, a later time**. The objection must be written, be served on the party, **and clearly state the reasons for the objection**.⁴
- Service of an objection under rule 64E operates as a stay of the notice.⁵
- Unless the operation of a notice is stayed, and subject to any order under rule 64G(2), the non-party must produce the document specified in the notice for inspection by the party at the place of business of the non-party, or the non-party's lawyer, within ordinary business hours or at another place or time agreed by the party and the non-party. If the non-party does not produce those documents, the party may apply to the industrial tribunal who may order compliance and make another order the industrial tribunal considers appropriate.⁶

[11] In the affidavit of Ms Mair filed 24 July 2020, she deposes that WorkCover received the Notice on 1 June 2020, and emailed the State by way of Crown Law on 15 June 2020 objecting to the Notice ('Ms Mair's email'). As such, the objection is not automatically effective to stay the Notice as it was beyond the 7-day period.

[12] I am empowered by r 64E(1) to extend the period within which a party may object. Despite being made aware of the State's position that the Notice was not stayed because the objection was sent out of time,⁷ WorkCover did not expressly seek an extension in their written material, and did not attend at the hearing of this matter to make any further submissions.

[13] The statutory timeframe of 7 days to object must be respected and should not be departed from without good reason. There is no reason to extend the timeframe for WorkCover's objection under r 64E.

[14] Further, the Rules require that the reasons for the objection be clearly stated. Ms Mair's email posits that:

- The two files relate to different psychological injuries;
- Different factors were nominated for each of the claims;

³ *Industrial Relations (Tribunals) Rules 2011* (Qld) r 64B.

⁴ *Ibid* r 64E.

⁵ *Ibid* r 64F.

⁶ *Ibid* r 64H.

⁷ By virtue of the affidavit of Ms P Tyquin filed 9 July 2020.

- Both claims were determined separately by WorkCover on their own merits, and only one claim is subject of the Appeal;
- Therefore, the information in one file is not relevant to the appeal of the other.

[15] The State submitted that such a response was deficient as it did not sufficiently particularise the reasons for the objection. While I accept that the objection is not sustainable, I do not agree that it was not accompanied by reasons. Compliance with the rules does not require that the objection be well-reasoned, but merely that reasons be expressed. Ms Mair's email meets that standard. In reading Ms Mair's email, WorkCover's reason for objecting was on the basis of relevance.

[16] The Notice should be varied in the terms of the Application filed on 9 July 2020 by the State, such that it only relates to S18RT582048, and the varied Notice should be complied with by WorkCover.

[17] Even so, for the sake of completeness, I have also determined to deal with the substance of the objection.

Should any stay on the Notice be lifted, and on what terms?

WorkCover's objections to production

[18] Ms Mair's email dated 15 June 2020 to the State objected to the Notice on the following grounds:

- The Appeal before the Commission relates to a decision of the Workers' Compensation Regulator to accept Ms Alker's claim for a psychological injury during the course of her employment with the State, file number S18YA611420. That claim was originally rejected by WorkCover, but the review decision of the Regulator's appeal unit was to accept that claim.
- Ms Alker had a separate, previous claim, file number S18RT582048, which also related to a psychological injury. That claim was rejected by WorkCover, though was not reviewed by the Regulator.
- Although both claims were for psychological injuries, different factors were nominated for each of the claims.
- The documents sought with regard to file number S18YA611420 are therefore largely relevant, exempting some documents within that file which contain non-relevant personal information or are otherwise non-relevant. As such, relevant documents in file S18YA611420 were provided, though redacted in part.
- The documents sought with regard to file number S18RT582048 are not relevant to an appeal regarding file number S18YA611420, as both claims were determined

separately by WorkCover on their own merits, and only S18YA611420 is before the Commission for appeal.

[19] Ms Mair's affidavit follows in the same vein, wherein she deposes that:

I respectfully submit my decision in relation to the production of the documents the subject of the (Notice) was reasonable and that the documents that are the subject of the (Notice) relate to different events alleged to have resulted in a psychological condition in circumstances relating to two different claims.

The State's submissions regarding the objections

[20] The affidavit of Ms P Tyquin of Crown Law sets out the State's position as to why the documents are sought, and their response to the objections of WorkCover. In summary:

- The issues in dispute in the appeal are as set out in paragraph [9] of this decision, with the additional notation that Ms Alker's alleged injury may be an aggravation of a pre-existing psychological injury.
- Ms Alker has been continuously absent from the workplace since 14 February 2019.
- Around 18 February 2019, Ms Alker lodged a claim for workers' compensation in relation to an injury described as 'psychological stress' which she alleges she suffered on 11 February 2019 as a result of aspects of her employment. That was claim number S18RT582048. That claim was rejected by WorkCover on 2 April 2019 on the basis that the injury arose out of reasonable management action.
- Around early June 2019, Ms Alker lodged a new claim for workers' compensation, claim number S18YA611420. That claim was subsequently withdrawn by Ms Alker.
- Around 2 July 2019, Ms Alker's claim S18YA611420 was re-opened by WorkCover. The claim related to an injury Ms Alker was said to have suffered on 30 April 2019. The medical information to date suggests that Ms Alker was first seen by a medical practitioner in respect of the alleged injury on 23 May 2019.
- On 8 October 2019, WorkCover rejected the claim in file number S18YA611420. That was subsequently overturned by the Regulator on 21 April 2020. It is that decision by the Regulator which is the subject of the Appeal. The Regulator found that the personal injury Ms Alker suffered was "in the nature of an aggravation of an existing psychological condition".
- The timeframe of those events, with both alleged injuries said to be of a psychological nature and arising or connected to employment, suggests that the documents requested in regard to file number S18RT582048 are relevant to

determining the issues related to file number S18YA611420. That is particularly true in circumstances where Ms Alker's alleged injury is said to be an aggravation of a pre-existing psychological injury.

[21] On 31 July 2020 the State also filed an outline of argument and an affidavit of Ms A Wells of Crown Law. Those materials largely reflect and reiterate the position enunciated in Ms Tyquin's affidavit and the Application, though emphasise that:

- The objection on behalf of WorkCover does not go beyond baldly asserting that the materials sought are not relevant. The objection is insufficiently particularised, and therefore does not meet the requirements of r 64E to implement a stay of the Notice.
- The claim accepted by the Regulator which forms the basis of the substantive appeal is that Ms Alker sustained an aggravation of a pre-existing psychological injury. The nature of that pre-existing condition is not entirely clear, but if that pre-existing condition is not supportable then it follows that there cannot have been any aggravation.
- The probative link between the injury subject to the current appeal and file number S18RT582048 becomes further evident when one considers the timeframe of the following events:
 - On 22 February 2019 Ms Alker claims WorkCover for 'Chronic psychological stress (S18RT582048)'.
 - Ms Alker does not return to work.
 - On 13 June 2019 Ms Alker makes a further claim for 'Psychological stress S18YA611420', and this claim is ultimately accepted by the Regulator as an 'aggravation' injury.

[22] At the hearing of this matter, Ms Marr as Counsel for the State relied upon the those affidavits of Ms Tyquin and Ms Wells and the written submissions filed 31 July 2020. She further emphasised the logical and probative connection between the two files, and in particular the relevance of the accepted injury being an aggravation. Ms Marr also pressed the issue of costs.

Analysis

[23] WorkCover's objection is effectively that material in S18RT582048 is not relevant to determining the appeal regarding S18YA611420. The test set out in the rules is whether the documents are directly relevant to a matter in issue in the proceeding. In *Mullins v Workers' Compensation Regulator; Ex parte Drake International Pty Ltd (No. 2)*

[2020] QIRC 003, Commissioner Black considered that test (emphasis added, citations removed):

In *Xstrata Queensland Ltd v Santos Ltd & Ors*, McMurdo J was asked to consider the distinction between the test of relevance under the general law and the requirement of the Uniform Civil Procedure Rules 1999 (Qld) (UCRP) which is that only directly relevant documents must be disclosed. In this respect, McMurdo J said that **“a document is directly relevant in this sense only if it tends to prove or disprove an allegation in issue in the proceedings.”**

- [24] The Regulator found that Ms Alker has a psychological injury, being an aggravation of an existing psychological condition, that arose in the course of employment and not from reasonable management action taken in a reasonable way.⁸
- [25] The State’s appeal against that decision touches on each of the elements of the definition of injury under the WCR Act, including that the injury arose out of or in the course of her employment, and that her employment was a significant contributing factor.
- [26] In February 2019, Ms Alker lodged a claim to WorkCover on the basis that she suffered a psychological injury at work earlier that month. That claim was rejected by WorkCover and not appealed. In June 2019 Ms Alker filed another claim for an injury in what appears to be a similar vein, which was eventually accepted by the Regulator and is the subject of this appeal.
- [27] The cause and nature of a psychological injury can be difficult to determine, and a conclusion that an injury was work-related requires careful consideration of all of the circumstances which affected a person’s psychological health. Any other psychological injuries which were said to have arisen closely in time to the accepted injury could certainly be relevant to determining whether the injury was connected with work.
- [28] It is noteworthy that this Application in existing proceedings does not conclude the matter of whether the documents will be admissible in the appeal. It is only necessary to consider whether the document tends to prove or disprove an allegation in issue in the appeal. The documents sought in the Notice seem effectively to be WorkCover’s entire file number S18RT582048. That would no doubt include Ms Alker’s version of events as to why she had suffered a psychological injury at that time. That version of events would foreseeably weigh upon the veracity of Ms Alker’s version of the relevant stressors, and subsequently whether Ms Alker did indeed suffer an injury in the manner described.
- [29] That the injury is said to be an aggravation is also pertinent. In a broad sense, I agree with Ms Marr’s submission that, because the injury is said to be an aggravation of a pre-existing condition, the validity of that pre-existing condition may also become relevant in the substantive appeal. In the appeal, it will be necessary to consider the

⁸ Decision of Regulator dated 21 April 2020 in file number S18YA611420, page 10.

nature of the pre-existing condition, and then distinguish that from the distinct aggravation injury found by the Regulator to have arisen. Ms Alker's statements to WorkCover in S18RT582048 could foreseeably tend to prove or disprove whether a pre-existing condition did exist, whether an aggravation has occurred, and then whether it occurred in the manner described by Ms Alker to the Regulator and her treating Doctor.

Conclusion

[30] WorkCover's email of 15 June 2020 to the State did not constitute an objection in compliance with r 64E. It was out of time without sufficient reason. On that basis alone, I will order the disclosure of the documents on the terms sought by the State.

[31] Further, even if the stay were operable, I would order that it be lifted on the terms sought by the State. I am satisfied that the documents requested by the State in the Notice comply with the criteria expressed in 64B(1) of the Rules. That is, the documents requested by the State are directly relevant to matters at issue in the appeal, and in the possession or under the control of WorkCover.

Costs

[32] The Rules, at r 64G(3), provide that:

- (3) Unless the industrial tribunal otherwise orders, each party to an application to decide an objection must bear the party's own costs of the application.

[33] Further, reg 132 of the *Workers' Compensation and Rehabilitation Regulation 2014* (Qld) provides that:

132 Costs—proceeding before industrial magistrate or industrial commission

- (1) A decision to award costs of a proceeding heard by an industrial magistrate or the industrial commission is at the discretion of the magistrate or commission.

[34] Ms Marr also took me to s 536 of the *Industrial Relations Act 2016* (Qld), which provides (emphasis added):

536 Interlocutory proceedings

For conducting proceedings under this Act or another Act, the court, commission or registrar may make orders or give directions the court, commission or registrar considers just and necessary in relation to interlocutory matters to be taken before the hearing of the proceedings, including matters about the following—

- (a) naming and joinder of parties;
- (b) persons to be served with notice of proceedings;
- (c) calling of persons to attend in proceedings;
- (d) particulars of the claims of the parties;
- (e) the issues to be referred to the court or commission;
- (f) admissions, discovery, interrogatories or inspection of documents or property;

- (g) examination of witnesses;
- (h) costs of the interlocutory proceedings;**
- (i) place, time and mode of hearing of the cause.

[35] The State filed the Notice with the Industrial Registry on 26 May 2020. WorkCover objected to that notice by email dated 15 June 2020. To obtain the information sought, the State was subsequently required to file this Application in existing proceedings on 9 July 2020.

[36] The parties were issued with a Notice of Listing from the Industrial Registry on 21 July 2020, setting the matter down for hearing.

[37] The State filed two affidavits, written submissions, and attended at the hearing of this matter with Counsel.

[38] WorkCover filed an affidavit in these proceedings on 24 July 2020, evincing an intention to defend their position with respect to the objection. They did not advise the Industrial Registry or my Associate that they no longer sustained their objection. They also did not advise the Industrial Registry or my Associate that they were not intending to attend that hearing. That was despite being in communications with the State at the time of the hearing, and the hearing being delayed for 30 minutes so that they might either resolve the matter or attend.

[39] On its face, the objection had no reasonable prospects of being sustained. It contained significant procedural and substantive deficiencies.

[40] The outcome which best reflects the conduct of the parties, and the outcome of these interlocutory proceedings, is that WorkCover Queensland pay the State of Queensland (Department of Health)'s costs of and incidental to this Application in existing proceedings. I will order accordingly.

[41] **Orders:**

1. **That the Application in existing proceedings filed 9 July 2020 by the State of Queensland (Department of Health) is granted.**
2. **That, pursuant to r 64G and r 64H of the *Industrial Relations (Tribunals) Rules 2011* (Qld):**
 - a. **The Notice of non-party disclosure filed 26 May 2020 be varied under the heading 'Schedule of documents' to read:**

All documents (including but not limited to, medical certificates and reports, correspondence, communication reports etc) in the nominated party's possession or control, and which do not contain

any deleted or redacted information, relating to the application for workers' compensation lodged by AMY LEE ALKER (DOB 20/08/1988), statutory claim file number S18RT582048.

- b. WorkCover Queensland is to comply with the Notice of non-party disclosure, as varied in Order 2a above, by delivering the documents to the solicitors of the State of Queensland (Department of Health) by 4pm on 13 August 2020.**
- 3. That, pursuant to s 536 of the *Industrial Relations Act 2016* (Qld), WorkCover Queensland is to pay the State of Queensland (Department of Health)'s costs of and incidental to the Application in existing proceedings filed 9 July 2020.**