QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*RW & G Johnston Pty Ltd v Workers Compensation Regulator* [2022] QIRC 078
PARTIES:	**RW & G Johnston Pty Ltd** (Applicant) v **Workers Compensation Regulator** (Respondent) & **Peta Durston** (Interested Party)
CASE NO:	WC/2021/146
PROCEEDING:	Application in existing proceedings
DELIVERED ON:	7 March 2022
HEARING DATE:	7 March 2022
MEMBER:	Industrial Commissioner Dwyer
HEARD AT:	Brisbane
ORDER:	**1. Application granted.** **2. Full orders as per last page of decision.**
CATCHWORDS:	INDUSTRIAL RELATIONS – WORKERS COMPENSATION APPEAL – application in a proceeding – application by Appellant for order that the worker submit for medical examination – whether Commission should exercise its discretion to make an order - application granted
LEGISLATION:	*Workers Compensation and Rehabilitation*

	Act 2016 (Qld) s 32, 556
CASES:	*Grant v BHP Coal Proprietary Limited (No 2)* (2015) 67 AILR 102
	Gray v Hopcroft & Anor [2000] QCA 144
	Yarrabee Coal Company Pty Ltd v Simon Blackwood (Workers' Compensation Regulator) [2014] QIRC 028
APPEARANCES:	Mr G. Cross of Counsel instructed by Everingham Lawyers for the Applicant.
	Mr M. Cutting of the Workers' Compensation Regulator, Respondent.
	Mr K. Stegeman of GKS Law for Ms Peta Durston, interested party.

Reasons for Decision

Delivered ex tempore on 7 March 2022

Background

[1] On 15 February 2022, the Appellant in the substantive appeal (matter WC/2021/146) filed an application in proceedings ('the application') seeking *inter alia*, an order pursuant to section 556 of the *Workers Compensation and Rehabilitation Act* ('the Act') that:

> the worker submit to a personal examination by Dr Martin Nothling, psychiatrist, on the 14th of April 2022 at 9.30 am.[1]

[2] The application is accompanied by an affidavit sworn on 15 February 2022 by Mr Paul Everingham, solicitor for the Appellant. The affidavit of Mr Everingham contends that the medical condition of the claimant is a 'substantive issue' in the appeal.

[3] In the affidavit, Mr Everingham notes that the only medical evidence that is on record has been supplied by the Respondent in the substantive appeal namely, the Workers

[1] Form 4 filed 15 February 2022.

Compensation Regulator ('the Regulator'). At the time of filing of the affidavit the only medical evidence available was from:

- Dr Lucy Ritchie, a general practitioner; and
- Mr Brendan Elliott, a psychologist.

[4] Mr Everingham in his affidavit contends that it is 'just and equitable' that the Applicant be allowed to procure a medical report of its own.

[5] Subsequent to the filing of the application and affidavit of Mr Everingham, the Regulator disclosed to the Applicant further medical evidence in the form of a medico-legal report from Dr Charana Perera, consultant psychiatrist. The report of Dr Perera is dated 24 February 2022 and appears to have been produced at the request of WorkCover Queensland, that is, it was not produced at the request of the Regulator or at the request of the injured worker in contemplation of the substantive appeal proceedings in this matter.

[6] It is not entirely clear, but it would seem from the multiple consultations referred to in Dr Perera's report that Dr Perera may be the injured worker's treating psychiatrist. The disclosure of the report of Dr Perera did not assuage the Applicant's concerns.

[7] Prior to the disclosure of Dr Perera's report, correspondence was exchanged between the Applicant's solicitors and the Regulator foreshadowing the request for a medical examination. In the course of this correspondence, the Regulator informed the Applicant that the injured worker (Ms Peta Durston) was legally represented. Subsequent discussions ensued between the Applicant, the Regulator and the injured worker's solicitor.

[8] Prior to the disclosure of Dr Perera's report, solicitors for the injured worker indicated consent to their client submitting to an examination by a doctor but identified a doctor (Dr Joseph Matthew) who had capacity to see the injured worker approximately four weeks before the proposed medical examination by Dr Nothling on 15 March 2022.

[9] Prior to disclosure of the report of Dr Perera, the injured worker was not opposed to submitting to a medical examination as foreshadowed by the Applicant. The only contest was whether it should be sooner (with Dr Mathew) or later (with Dr Nothling).

[10] At hearing of the application today, solicitors for the injured workers were given leave to appear and make submissions on the application. The solicitor for the injured worker seemed less convinced of the need for an examination in the context of Dr Perera's report being disclosed but ultimately did not resile from the consent for examination by the injured worker. The submission was that the earlier consultation with Dr Mathew was preferred.

[11] At all times in this issue, the Regulator has taken a passive approach to the application.

Consideration

[12] Section 556(2) of the Act relevantly provides:

> (1) This section applies if—
>
> (a) the condition of a claimant or worker who has, or is said to have, sustained an injury is relevant to the appeal; or
>
> (b) the cause, nature or extent of the injury or incapacity arising from the injury is relevant to the appeal.
>
> (2) The appeal body may, at any time before or after the start of the hearing, order the claimant or worker to submit to a personal examination by 1 or more specified registered persons.

[13] Section 556(2) of the Act contains a discretion for the Commission to make orders requiring a medical examination. The discretion can be exercised where the circumstances of section 556(1) are met.

[14] The discretion is one that ought to be exercised with care. Ordering a medical examination of an individual, especially against their will, is a significant step.

[15] In her decision of *Grant v BHP Coal Proprietary Limited (No 2)*[2] Collier J examined the common law and statutory history of orders for medical examination and concluded (at paragraph 127 of that decision) that:

> Examining these authorities, the following is clear:
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> - as a general proposition, a person is not obliged to submit to a medical examination without his or her consent. A forced examination of a person without the consent of the person is assault.
> - Legislation can require a person to submit to a medical examination without his or her consent, however, such legislation must be clear and unambiguous.
> - …
>
> (Citations removed)

[16] There are two notable facts in the matter before me: firstly, the legislation granting the power to order a medical examination is clear and unambiguous and secondly, the injured worker consents to an examination, albeit there is a dispute as to the timing and the doctor.

[17] Notwithstanding the statutory power is clear and there is consent by the injured worker, it remains necessary for me to determine whether the circumstances of section 556(1)

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[2] [2015] FCA 1374.

are met. Before turning to the provisions of section 556(1), it is necessary to consider the nature of the substantive dispute between the parties.

[18] In essence, the injured worker contends that she was subject to abusive and aggressive behaviour from her employer on 9 March 2021. It is a singular event that led to her injury and she has been diagnosed (variously) as suffering from:

- major depressive disorder by Dr Perera;
- acute stress reaction with panic attacks by Dr Ritchie; and
- adjustment disorder with mixed anxiety and depressed mood by Dr Elliott.

[19] I note that each of these diagnoses meets the definition of 'personal injury' for the purposes of section 32(1) of the Act.

[20] The Applicant contests the acceptance of the injured worker's claim by WorkCover and subsequently by the Regulator. The basis of the appeal made by the Applicant in the substantive matter is wholly a factual challenge. That is to say, it is broadly contended by the Applicant that the injured worker's assertion of verbal abuse is false. It is further contended (by reference to the workers compensation claim) that the injured worker had been 'setting this up for weeks'. The employer broadly denies being abusive or aggressive and refers to the injured worker as 'no shrinking violet'. I note that these are factual arguments without any medical element.

[21] Relevantly however, both the appeal notice and the statement of facts and contentions also contend that the conversation on 9 March 2021 was not such that would give rise to an 'acute stress reaction and panic attacks' (which is a direct reference to the diagnosis of Dr Ritchie).

[22] While it is clear that the basis of the appeal in the substantive matter is wholly factual, it would also seem that this secondary argument relies on resolving a question about whether the conduct of the employer (whatever it might be found to be) could produce the condition said to be the injury. The condition of the injured worker is therefore relevant.

[23] In these circumstances it would seem that the threshold set out in section 556(1)(a) for the exercise of the discretion, is met.

[24] It only remains to determine the question of which doctor ought to be the examiner. Before dealing with this I say as an aside that I am only narrowly persuaded to exercise my discretion in the Applicant's favour. I say this because the emergence of the report of Dr Perera (produced independently by WorkCover) could have potentially addressed the question of diagnosis in an entirely comprehensive way in that, there are now opinions from a general practitioner, a psychologist and a psychiatrist. Any of the

factual challenges relevant to diagnosis and that form the basis of the substantive appeal by the Applicant could have been made through questioning of the various doctors and challenges to their opinions based on a different version of the facts alleged or established by the Applicant.

[25] I note the Applicant relies on *inter alia* the decision of *Gray v Hopcroft & Anor*[3] in its submission that they are entitled to rely on a medical expert in whom they have confidence and who, in this instance, is Dr Nothling.

[26] While there are distinctions to be made with the circumstances in *Gray v Hopcroft & Anor,* I ultimately accept that an Appellant in proceedings under the Act has a significant onus to discharge and they ought to have a fair opportunity to present evidence that they have confidence in. Of course, it remains unknown what evidence will eventually be produced by the examination, but the Applicant has acknowledged it will be bound by the opinion it receives.

[27] The Applicant presses for an order that Dr Nothling conduct the examination on 14 April 2022. The Applicant rejects the suggestion of Dr Mathew from the injured worker, even though that would expedite the process of examination by four weeks.

[28] There is no basis to say that an advantage flows from the process of engaging or even identifying the availability of a particular medical expert. There is no basis for the Applicant to say they could not have confidence in Dr Mathew given that there is no existing relationship between him and the injured worker alleged, and that there are no other factors asserted to suggest he is anything other than entirely independent.

[29] However, confidence in an expert witness is not entirely a product of logistics. Often, confidence in an expert is a product of previous experience, knowledge of the expert's experience as a witness, or the known professional standing of an expert, and the intuitive views of a legal representative engaging that expert.[4]

[30] While no distinction is overtly identified between Dr Nothling and Dr Mathew, I accept that the Applicant has a preference for Dr Nothling for reasons such as these. Further, I do not consider that four weeks creates any particular prejudice to the injured worker given that her matter is at a fairly early stage of its progress through the Commission and is yet to proceed to its first section 552A conference.

[31] I note that the injured worker remains on workers compensation benefits at this time and that the Applicant will bear the cost of the examination, so there is no financial hardship that can be alleged. While a delay of four weeks may trigger some anxiety in the injured worker, she ought to be comforted by the fact that there is also a possibility

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[3] [2000] QCA 144.
[4] *Gray v Hopcroft & Anor* [2000] QCA 144 [15].

that a report from Dr Nothling may well produce evidence supporting her claim, in which case, the appeal could well be resolved.

[32] I should say, as a final aside, that had the delay been something greater than four weeks, or had the examination disrupted a scheduled hearing of the matter, I may not have been prepared to exercise my discretion in this fashion.[5]

[33] However, in all of the circumstances, I am prepared to make the order as per the draft provided by the Applicant in their material this morning with some amendments.

[34] I consider that it is appropriate that the Appellant provide to the injured worker (or her representative) and to the Regulator a copy of all material provided to Dr Nothling in preparation for the examination 7 days prior to the scheduled appointment.

Orders

1. **Ms Peta Durston is required to submit to a medical examination with Dr Martin Nothling, Psychiatrist on 14 April 2022 at 9.30am.**

2. **The Applicant is to provide Ms Peta Durston (or her legal representatives) and the Respondent, with a copy of all material provided by the Applicant to Dr Nothling in preparation for the medical examination by 4.00pm on 7 April 2022.**

3. **The Applicant pay the fees of Dr Martin Nothling, Psychiatrist for the examination and the report.**

4. **The Applicant provide the Report of Dr Martin Nothling, Psychiatrist to the Respondent and Ms Peta Dustron (or her legal representatives) within fourteen days of receipt.**

5. **The costs of the application be reserved to the member hearing the appeal.**

[5] See *Yarrabee Coal Company Pty Ltd v Simon Blackwood* (Workers' Compensation Regulator) [2014] QIRC 028.