SUPREME COURT OF QUEENSLAND

CITATION:	*Barrass v BHP Coal Pty Ltd* [2002] QSC 364
PARTIES:	**HENRY EDWARD BARRASS** (plaintiff/applicant) v **BHP COAL PTY LTD** ACN 010 545 721 (defendant/respondent)
FILE NO:	S11282 of 2000
DIVISION:	Trial Division
DELIVERED ON:	8 November 2002
DELIVERED AT:	Brisbane
HEARING DATE:	7 August 2002
JUDGE:	Mullins J
ORDER:	**1. It is declared that the inclusion of pain disorder due to physical and psychological factors as an injury suffered as a result of the accident on 27 December 1997 in the applicant's notice of claim dated 26 February 2002 did not preclude the notice of claim from complying with s 280 of the *WorkCover Queensland Act* 1996.** **2. The applicant's application filed on 29 July 2002 is otherwise dismissed.**
CATCHWORDS:	WORKERS' COMPENSATION – RIGHT TO PROCEED FOR DAMAGES – non-certificate injury – conditional damages certificate allowed proceeding for damages to be commenced – offer to settle by applicant in notice of claim included costs on the Supreme Court scale – whether offer complied with s280(6) of *WorkCover Queensland Act* 1996 (*Q*) – whether offer amounted to genuine offer of settlement – not a genuine offer to settle because of inclusion of costs in light of object of pre-court procedures and the constraints of the Act WORKERS' COMPENSATION – RIGHT TO PROCEED FOR DAMAGES – whether applicant assessed by relevant medical assessment tribunal for pain disorder deriving from the accident – no notice of assessment issued by WorkCover – no utility in making declaration about process of tribunal's decision making *WorkCover Queensland Act* 1996 *WorkCover Queensland Regulation* 1997 *Lau v WorkCover Queensland* [2002] QCA 244

COUNSEL: PJ Favell for the applicant
AS Kitchin for the respondent

SOLICITORS: Wide Bay Law for the applicant
Clayton Utz for the respondent

[1] **MULLINS J:** On 22 December 2000 Mr Henry Edward Barrass ("the applicant") who was born on 18 April 1940 commenced this proceeding against BHP Coal Pty Ltd ("the respondent") in respect of a claim for damages for personal injury alleged to have been caused by the negligence of, and breach of contract of employment, breach of duty of care and breach of statutory duty by the respondent. The applicant claims to have been working in the course of his employment as a fitter on a D10N Caterpillar dozer owned by the respondent at 6.30pm on 27 December 1997, when the applicant fell from the dozer and suffered injury ("the accident").

[2] By application filed on 29 July 2002, the applicant seeks declarations that he has complied with the requirements of s 280(6) of the *WorkCover Queensland Act* 1996 ("the Act"), he has been assessed for pain disorder in accordance with the Act and that he is entitled to continue this proceeding to seek damages, including damages for pain disorder.

[3] Both Counsel agreed that the relevant provisions of the Act for the purpose of this application were those found in Reprint No 2 of the Act. The references to the Act in these reasons are therefore as it stood at the time of Reprint No 2.

History of the applicant's claim

[4] On 29 December 1997 the applicant made an application for compensation in respect of the accident. He described his injury on the application as a dislocated left shoulder. The applicant was paid compensation under the Act until 30 June 1998 when weekly benefits were suspended after the applicant accepted a voluntary redundancy from the respondent.

[5] Under cover of letter dated 26 August 1998 WorkCover Queensland ("WorkCover") forwarded the applicant a notice of assessment of permanent impairment dated 26 August 1998 which set out that as a result of medical assessment, it had been determined that the applicant sustained permanent impairment from his injury, the degree of permanent impairment attributable to the injury was 16% and the WRI (work related impairment as defined by s 41 of the Act) was 12.8%. The notice of assessment stated that the injury was a non-certificate injury (which is defined by s 43(1) of the Act). WorkCover offered payment of lump sum compensation in the amount of $14,790 in that same notice of assessment.

[6] The applicant did not respond to that notice of assessment until the letter from his solicitors dated 13 July 2000 was sent to WorkCover advising that the applicant did not agree with WorkCover's decision regarding the degree of permanent impairment and requesting for arrangements to be made for the applicant to be seen by an orthopaedic tribunal.

[7] On 27 July 2000 the applicant signed the box on the notice of assessment stating that he disagreed with the degree of permanent impairment and that signed notice of

assessment was returned by his solicitors to WorkCover under cover of letter dated 25 July 2000.

[8] The applicant was examined by psychologist, Mr Peter Stoker, on 26 July 2000 who provided a report dated 30 July 2000 in which he diagnosed the applicant as suffering from a chronic adjustment disorder with mixed depressed and anxious mood (using DSM-IV) and a pain disorder due to physical and psychological factors (also using DSM-IV).

[9] By letter dated 3 August 2000 the applicant sent a copy of the report of Mr Stoker to BHP Workers' Compensation which as self-insurer had assumed the management of the applicant's claim from WorkCover and requested that the applicant be reviewed for a psychiatric injury arising out of the accident.

[10] BHP Workers' Compensation sent a letter to the applicant's solicitors dated 10 August 2000 advising that as the applicant had not responded to the notice of assessment dated 26 August 1998 within 28 days, he was considered to have deferred his decision (which accords with s 207(3) of the Act) and there was no provision for the matter to be referred to a medical assessment tribunal (cf s 204 of the Act). Information was sought in respect of the psychiatric injury, to enable the matter to be referred to the General Medical Assessment Tribunal (Psychiatric) for assessment of any permanent impairment.

[11] When the applicant's solicitors responded on 6 November 2000, relying on s 262(3) of the Act they requested a conditional damages certificate to be issued in view of the pending expiry of the limitation period on 27 December 2000. BHP Workers' Compensation issued a conditional damages certificate on 10 November 2000 in respect of the accident and the injury to the left shoulder region for which impairment had been assessed and psychiatric injury for which liability and any impairment had yet to be assessed.

[12] The respondent referred the applicant to the General Medical Assessment Tribunal - Psychiatric on 19 July 2001. The reference stated that "The insured has accepted the psychological component of the claim". That tribunal convened on 25 August 2001 and determined that the applicant had sustained a degree of permanent impairment in the nature of adjustment disorder with depressed mood and the degree of that impairment resulting from the accident was 5%.

[13] Another notice of assessment was issued in respect of an injury sustained by the applicant in the accident. This notice was dated 30 August 2001 and described the injury as "adjustment disorder with depressed mood". The notice of assessment showed the degree of permanent impairment attributable to the injury as 5% and the WRI calculated for the injury as 5%. It was stated to be a non-certificate injury. An offer of lump sum compensation was made in the notice of assessment. On 5 September 2001 the applicant rejected that offer. The signed notice of assessment was returned to BHP Workers' Compensation by the applicant's solicitors under cover of their letter dated 18 September 2001.

[14] Under cover of letter dated 5 September 2001 BHP Workers' Compensation forwarded to the applicant's solicitors an unconditional damages certificate dated 5 September 2001 in respect of the accident and dealing with 2 injuries, left shoulder resulting in moderate loss of all movements and adjustment disorder with depressed mood.

[15] Under cover of letter dated 14 January 2002 the applicant's solicitors forwarded to BHP Workers' Compensation the applicant's notice of claim. On 12 February 2002 solicitors for the respondent advised that in accordance with s 282 of the Act the applicant's notice of claim was considered non-compliant and attached a list of defects. Under cover of letter dated 26 February 2002 the applicant's solicitors forwarded an amended notice of claim signed on that date.

[16] In answer to question 40 in the amended notice of claim, the nature of the injuries sustained by the applicant because of the accident were listed as follows:

> "Dislocated left acromioclavicular joint
> Damaged rotator cuff musculature
> Chronic Adjustment Disorder with Mixed
> Depressed and Anxious Mood and Pain Disorder
> due to physical and psychological factors and
> mild organic brain damage."

[17] The amended notice of claim included an offer of settlement of "the sum of $527,059.45 (exclusive of all refunds - WorkCover, HIC, Centrelink and CRS plus standard costs on the Supreme Court Scale). In view of the fact that the applicant was making a claim for organic brain damage and pain disorder, the solicitors for the respondents sought clarification from the General Medical Assessment Tribunal - Psychiatric as to whether those injuries formed part of the assessment made on 25 August 2001. The secretary of the Medical Assessment Tribunal responded by letter dated 5 March 2002, after referring the question to the chairperson of the General Medical Assessment Tribunal - Psychiatric, that the chairperson advised:

> "The nature of the impairment was adjustment disorder with depressive mood.
> The Tribunal did not consider that Mr Barrass suffered from a psychological pain disorder."

[18] The respondent's solicitors by letter dated 22 March 2002 advised the applicant's solicitors of their view that the amended notice of claim was non-compliant on the basis that the applicant had not been assessed for pain disorder or organic brain injury or that the offer to settle which included costs to be assessed was not a reasonable offer and therefore did not comply with s 280 of the Act. Section 280(6) of the Act provides:

> "The notice must be accompanied by a genuine offer of settlement or a statement of the reasons why an offer of settlement cannot yet be made."

[19] The applicant's solicitors by their letter dated 4 April 2002 to the respondent's solicitors advised that the applicant withdrew his claim for organic brain injury.

[20] Further clarification was sought from the chairperson of the General Medical Assessment Tribunal - Psychiatric as to what process that tribunal undertook in respect of assessing the applicant's injuries on 25 August 2001. The secretary of the Medical Assessment Tribunal in the letter dated 18 April 2002 to the respondent's solicitors advised that the chairperson that:

> "• The Tribunal assessed Mr Barass *(sic)* total psychiatric condition with respect to the injury of 27 December 1997
> • The Tribunal did not find that Mr Barrass suffered from a psychological pain disorder."

[21] Further clarification was sought from the chairperson of the General Medical Assessment Tribunal - Psychiatric as to whether a pain disorder was assessed and whether a zero percent impairment was found or whether the applicant was found to not suffer and to not have ever suffered pain disorder as a result of the accident.

[22] The secretary of the Medical Assessment Tribunals advised the respondent's solicitors by letter dated 8 May 2002 as follows:

> "The General Medical Assessment Tribunal - Psychiatric was requested to assess whether Mr Barrass had sustained a permanent impairment as a result of his psychiatric injury. The Tribunal was not asked to determine injury and as such was not asked to provide a determination with respect to whether Mr Barrass ever suffered a pain disorder.
>
> The Chairperson of the General Medical Assessment Tribunal - Psychiatric of 25 August 2001 has previously confirmed:
>
> - The Tribunal acknowledged that Mr Barrass continued to have 'stiffness and pain'. Pain symptoms do not constitute a diagnosis of pain disorder.
> - The Tribunal determined that Mr Barrass sustained a degree of psychiatric permanent impairment of 5%.
> - The nature of the impairment was adjustment disorder with depressed mood.
> - The Tribunal did not consider that Mr Barrass suffered from a psychological pain disorder at the time they assessed him."

[23] The applicant's solicitors sought further advice from the tribunal about whether it had assessed whether the applicant ever suffered a pain disorder, rather than considering whether he suffered from a pain disorder at the time the tribunal assessed him. In response the secretary of the Medical Assessment Tribunal provided the applicant's solicitors with a copy of the reference document to the General Medical Assessment Tribunal - Psychiatric in respect of the applicant which had previously been provided. By letter dated 3 July 2002, the secretary of the Medical Assessment Tribunal refused to approach again the chairperson of the relevant tribunal.

[24] By letter dated 1 July 2002 the applicant's solicitors advanced the view that the amended notice of claim was compliant. In respect of whether the offer to settle was genuine, it was argued that nothing in Pt 11 of the Act placed any limitation on a claimant in seeking costs by way of a settlement offer or the self-insurer accepting an offer where costs were part of the offer and that the *UCPR* allowed the applicant at trial to claim costs should he better an offer made earlier in the proceeding. In respect of whether the applicant had been assessed for pain disorder, it was argued that as the applicant had been assessed for pain disorder and that no disorder was found, there was an assessment in respect of that injury for the purpose of the Act. The applicant's solicitors requested a response by 5 July 2002 that the applicant's notice of claim was compliant, otherwise it was foreshadowed the applicant would make an application for a declaration that s 280 of the Act had been complied with.

[25] The respondent's solicitors by letter dated 2 July 2002 confirmed their view that the applicant's notice of claim was non-compliant for failing to make a genuine offer of settlement and that the pain disorder had not been assessed.

Issues

[26] When the applicant filed the application on 29 July 2002, the matters that were in issue between the parties were:

(a) whether the inclusion of pain disorder as an injury from the accident in the amended notice of claim precluded that notice of claim from being compliant;

(b) whether the inclusion of costs in the offer of settlement was a genuine offer of settlement for the purpose of s 280(6) of the Act;

(c) whether the applicant had been assessed for pain disorder in accordance with ss 196, 197, 256 and 259 of the Act and regulation 55 and schedule 2 of the *WorkCover Queensland Regulation* 1997 ("the Regulation").

[27] The applicant also sought in his application a declaration in terms that he is "entitled to continue an action for seeking damages including damages for 'pain disorder'."

[28] As a conditional damages certificate had been issued under s 262(3) of the Act on 10 November 2000 that was made unconditional on 5 September 2001 in respect of the left shoulder injury and the adjustment disorder, the proceeding was stayed, in any case, by virtue of s 262(4) of the Act until the applicant complied with Pts 5 and 6 of the Act. Compliance with Pts 5 and 6 of the Act would include attempting to resolve the claim under s 285, undergoing any medical examination required under s 286, undertaking a formal s 293 conference and making a final written offer to settle under s 294.

[29] It was therefore common ground during argument on the hearing of the application that, as the applicant on any view would have to comply with the pre-court procedures and settlement procedure requirements of the Act before he could continue the proceeding, there was no need to make the declaration sought about the entitlement to continue the proceeding.

Inclusion of pain disorder in the notice of claim

[30] In *Lau v WorkCover Queensland* [2002] QCA 244 which was delivered on 19 July 2002 the Court of Appeal, by majority, determined that as s 74 of the Regulation required full particulars of the nature and extent of all injuries alleged to have been sustained by the claimant because of the event, a notice to claim was compliant, even when it included as an injury arising from the event one for which the claimant had not received a notice of assessment.

[31] Mr Kitchin of Counsel on behalf of the respondent properly conceded that this decision of the Court of Appeal meant that the respondent could no longer press the view that the notice of claim was not compliant for including pain disorder as an injury arising from the accident. In view of the correspondence which preceded the application, it is appropriate to make a declaration which accords with the concession made by the respondent.

Whether offer to settle was a genuine offer of settlement

[32] The object of Pt 5 of the Act is to enable WorkCover to enter into early negotiations with claimants to achieve early resolution of claims for damages before the start of proceedings (s 279 of the Act). Although this proceeding was commenced before the notice of claim was given, the object of facilitating early resolution of the claim remains applicable, as, despite the commencement of this proceeding, the applicant must still comply with Pt 5 and Pt 6 of the Act before the stay on the proceeding is lifted.

[33] Section 280(6) of the Act requires the notice to be accompanied by a genuine offer of settlement or a statement of the reasons why an offer of settlement cannot yet be made. Under s 285 of the Act WorkCover must respond to the notice of claim with a written notice which complies with s 285(4). That written notice must state whether WorkCover accepts or rejects any offer of settlement that may be made by the claimant and make a genuine offer or counter offer of settlement on the part of WorkCover, if WorkCover rejects the offer of settlement made by the claimant or the claimant did not make an offer of settlement.

[34] Section 293 of the Act provides for a compulsory conference of the parties after WorkCover has given the claimant a written notice under s 285. If the claim is not settled at the conference, each party is required by s 294(1) to make a written final offer at the conference.

[35] At this stage this proceeding is one brought by a worker with a non-certificate injury. Division 2 of Pt 11 of Ch 5 of the Act deals with costs applying to a worker with a non-certificate injury. Relevantly, subs (1) to (2) of s 325 of the Act provide:

> "325 Principles about orders as to costs
>
> (1) No order about costs, other than an order allowed under this section, is to be made by the court in the claimant's proceeding.
> (2) If a party to the proceeding makes a written final offer of settlement that is refused and the court later awards damages to the worker, the court must, in the following circumstances, make the order about costs provided for-
> (a) if the amount of damages awarded is equal to or more than the worker's written final offer-an order that WorkCover pay the worker's party and party costs from the day of the final offer;
>
> (b) if the amount of damages awarded is equal to or less than the WorkCover's written final offer-an order that the worker pay WorkCover's party and party costs from the day of the final offer.
>
> (3) If the award of damages is less than the claimant's written final offer but more than WorkCover's written final offer, each party bears the party's own costs."

[36] In view of the express terms of s 325 of the Act, the applicant's solicitors' insistence on relying on the offer to settle provisions in the *UCPR* as a justification for including a claim for costs in the offer to settle in the notice of claim appears

misconceived. There is no point in preserving the applicant's position to rely on the *UCPR* in relation to an offer to settle, when s 325 of the Act, and not the *UCPR*, governs the disposition of costs in respect of a proceeding for damages for a non-certificate injury.

[37] It was argued on behalf of the respondent that s 325 of the Act precludes a claimant from obtaining a costs order in respect of costs expended before the day of the written final offer which cannot be made until the conference under s 293 of the Act.

[38] Mr Favell of Counsel on behalf of the applicant submitted that there was no prohibition on a claimant including costs in any offer to settle accompanying the notice of claim.

[39] There is no reason to doubt that the applicant has been genuine in the offer to settle which he has made in the notice of claim, on the basis of the advice which he has received from his solicitors. That is a subjective assessment of the applicant's position. As a matter of construction of s 280 of the Act, however, the issue of what is a genuine offer of settlement cannot be resolved by looking at the matter subjectively from the applicant's viewpoint. The requirement in s 280(6) for the offer of settlement to be genuine is for the purpose of facilitating the resolution of the claim. Section 325 of the Act does not give a claimant a right to pursue WorkCover for costs prior to the date of the written final offers. That makes it extremely unlikely that WorkCover would consider settling a claim on the basis that it pays costs of a claimant to which the claimant would never become entitled, if the matter did not settle. Inclusion of costs in the offer to settle to which the claimant is not entitled, in practical terms, precludes WorkCover from being able to accept the offer and impedes the process provided for in s 285(4) of the Act, and the objective of the pre-court procedures. In order to be a genuine offer to settle, the offer must be made in the light of the constraints on the claim provided for in the Act, such as those in respect of costs. There must be an element of objectivity about whether an offer is genuine in view of the purpose of the offer and the procedures provided for by the Act.

[40] It will obviously be a question of degree in many cases whether an offer to settle is genuine. Where the offer to settle is premised on the basis of including a claim for an item such as costs where WorkCover will ultimately not be liable to pay those costs, the offer falls within the category of not being a genuine offer to settle. I therefore have concluded that the applicant is not entitled to the declaration sought that the notice of claim dated 26 February 2002 complies with s 280(6) of the Act.

Whether applicant assessed for pain disorder

[41] It was as a result of Mr Stoker's report which diagnosed that the applicant was suffering from both an adjustment disorder and a pain disorder that BHP Workers' Compensation referred the applicant's psychological injury to the relevant tribunal to be assessed under s 442(2) of the Act.

[42] A number of valid points were made on behalf of the applicant about what it was likely that the General Medical Assessment Tribunal - Psychiatric did, in fact, assess in respect of the applicant on 25 August 2001. It is difficult to consider how that tribunal did not consider whether the applicant suffered from a pain disorder, when the diagnoses of Mr Stoker were before the tribunal. The correspondence

which the parties engaged in with the secretary of the Medical Assessment Tribunal in order to ascertain what had been assessed in respect of the applicant provides strong support for the proposition that the tribunal did not find that the applicant suffered from a psychological pain disorder, but the tribunal did assess whether or not the applicant had so suffered as a result of the accident.

[43] It is therefore submitted on behalf of the applicant that there was in fact an assessment, that it appears that the tribunal has found that the applicant did not sustain a degree of permanent impairment as a result of the pain disorder and that therefore the tribunal should have made a finding that the applicant had not sustained any degree of permanent impairment in respect of that injury. Section 203 of the Act contemplates that WorkCover may give a notice of assessment stating that the worker has not sustained a degree of permanent impairment, after receiving the assessment of the worker's permanent impairment.

[44] It was submitted on behalf of the respondent that the applicant chose not to appeal from the decision of the respondent based on the finding of the General Medical Assessment Tribunal - Psychiatric in respect of any compensation that might otherwise flow from the psychological injury nor did the applicant seek judicial review of the decision of the respondent not to issue a notice of assessment in respect of the injury of pain disorder.

[45] Instead the applicant is seeking a declaration that he has been assessed for pain disorder in accordance with the Act. I am prepared to conclude that the substance of the General Medical Assessment Tribunal - Psychiatrist's decision of 25 August 2001 was an assessment for pain disorder that the applicant had sustained no degree of permanent impairment. That conclusion, however, does not assist the applicant in connection with the proceeding.

[46] What is critical for the applicant to be able to continue a claim for damages for pain disorder in the proceeding is that a notice of assessment must issue for the injury of pain disorder arising from the accident. That follows from s 259(1) of the Act which provides:

> "The claimant may seek damages for the injury only after the claimant has received a notice of assessment from WorkCover."

[47] The critical role played by a notice of assessment was referred to in *Lau v WorkCover Queensland* at para [32] per Byrne J and see also Williams JA at para [8].

[48] Although the applicant has in substance been assessed for pain disorder by the relevant tribunal, there is no utility in making the declaration sought in para 2 of the application to the extent that it relates to the process of assessment by the tribunal, when there has been no notice of assessment issued by WorkCover in respect of pain disorder arising from the accident.

Orders

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

1. It is declared that the inclusion of pain disorder due to physical and psychological factors as an injury suffered as a result of the accident on 27 December 1997 in the applicant's notice of claim dated 26 February 2002

did not preclude the notice of claim from complying with s 280 of the *WorkCover Queensland Act* 1996.

2. The applicant's application filed on 29 July 2002 is otherwise dismissed.

[50] The applicant's application also sought an order that the respondent pay the applicant's costs. As this is an interlocutory application made in a proceeding brought by a claimant under the Act for damages in respect of a non-certificate injury, s 325 of the Act appears applicable. The only circumstances in which costs for an interlocutory application may be made is if the court is satisfied that the application has been brought because of unreasonable delay by one of the parties (s 325(4) of the Act). No submissions were made specifically about costs on the hearing of the application. I will therefore defer considering what order should be made as to costs, if any, until the parties have had an opportunity to make submissions.