



RANKIN ELLISON CASE NOTES

UNWARRANTED JUDICIAL REVIEW OF CRPS

Elsworthy v Forgacs Engineering Pty Ltd [2018] NSWSC 1638

An injured worker's Application for judicial review of a Medical Appeal Panel decision has been dismissed with an Order for costs. The Supreme Court rejected the Application in its entirety, finding (amongst other things) that it lacked merit.

Material facts

The Plaintiff, Stephen Elsworthy, was employed by the First Defendant, Forgacs Engineering Pty Ltd, as a boilermaker. On 2 May 2011, he tripped at work falling onto his outstretched hands sustaining injury to his left wrist, elbow, and knee. The Plaintiff alleged that he subsequently developed a Complex Regional Pain Syndrome (CRPS) at the left wrist. He commenced proceedings in the Workers Compensation Commission (Second Defendant) for lump sum compensation in respect of that condition and the matter was referred to the Fourth Defendant, an Approved Medical Specialist ("AMS"), for assessment. The AMS was not satisfied that the Plaintiff met the diagnostic criteria under Table 17.1 of the Guidelines for CRPS. Rather, he found that the Plaintiff's condition was more consistent with Fibromyalgia. Nevertheless, the Plaintiff's condition could not be rated and AMS therefore assessed there to be 0% WPI.

The Plaintiff Appealed against the Medical Assessment Certificate ("MAC") on the basis that it was made on incorrect criteria and contained demonstrable error. On Appeal, the third Defendant, the Medical Appeal Panel ("Panel"), found no error and confirmed the MAC.

The Plaintiff then made an Application to the Supreme Court of NSW for judicial review of the Panel's decision. He sought

a Declaration that the Panel's decision was void, an order that same be set aside, and an extension of time by which to seek judicial review of the MAC. The primary bases of that Application were:

1. The Panel erred in failing to find that the AMS had misapplied Table 17.1 of the Workers Compensation Guidelines for the Evaluation of Permanent Impairment ("Guidelines"); and
2. The Panel erred by failing to examine him.

Supreme Court's Judicial review

The Plaintiff made a number of submissions in respect of the first limb of the Application which we summarise as follows:

- The Panel ought to have found that the AMS misapplied the Guidelines by eliminating each of the observed signs and symptoms on the basis that they could be explained by another condition (ie. Fibromyalgia).

The Plaintiff contended that the AMS should have considered his signs and symptoms holistically before making a diagnosis. Justice Fagan rejected that argument on the basis that the proposed application of the Guidelines was rigid and restrictive. It was determined that, provided all of the observed signs and symptoms are considered, an assessor is not precluded from weighing up whether one or more of the clinical signs was more consistent with an alternate diagnosis.

- The Panel ought to have found that the AMS had erred by considering whether, separately and individually, his

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signs and symptoms which satisfied Table 17.1 of the Guidelines resulted from CRPS.

That submission was taken to be an assertion that the Panel ought to have found that the AMS made a demonstrable error in his determination as to whether the requirements of Table 17.1 of the Guidelines were satisfied. Justice Fagan identified no identifiable error in the AMS's reasoning, stating that he had "set out in very clear terms precisely the basis upon which [certain components of Table 17.1] were not satisfied by his clinical findings".

- The Panel ought to have found that the AMS erred by taking certain criteria set out in the Guidelines (ie. whether the diagnosis of CRPS had been present for at least one year, whether the diagnosis had been verified by more than one examining physician, and whether other possible diagnoses had been excluded) as being directed to a particular diagnosis rather than being factual enquiries directed to the history and management of the worker's condition.

Justice Fagan found that the diagnostic criteria in Table 17.1 of the Guidelines were a necessary precondition to the diagnosis of CRPS. Accordingly, if an injured worker does not satisfy those diagnostic criteria then he/she cannot attract such a diagnosis. Since the Claimant was found not to satisfy the diagnostic criteria, a diagnosis of CRPS was ruled out and it was therefore not necessary for the AMS or the Panel to consider the "factual enquiries" (as described by the Plaintiff).

With respect to the second limb of the Application, the Plaintiff argued that the Panel should have conducted its own clinical examination. It was found that in the circumstances clinical re-examination was not necessary. The nature of the Plaintiff's Appeal to the Panel and the scope of his submissions in support were such that an examination of the Plaintiff could not have possibly altered the outcome of the Appeal. Justice Fagan therefore found no appealable error in the Panel's finding that it could decide the Appeal on the papers.

Finally, it was determined that the Plaintiff was out of time to seek judicial review of the MAC. The Summons initiating the Supreme Court proceedings was filed more than six months after the MAC was issued, which was well outside the legislative 28 day timeframe. As such, the Plaintiff required an extension of time to bring such an Application. The First Defendant opposed an extension of time on the basis that it would be futile given "...everything of substance as to whether the AMS made reviewable error was before the [Supreme Court] upon review of the MAP's decision". Justice Fagan accepted that submission. He concluded that an Application for judicial review of the MAC would fail in any event due to a lack of substance as the AMS had fully and adequately justified his findings.

Justice Fagan dismissed the Application and made a costs Order against the Plaintiff.

Implications

The Supreme Court's decision gives some clarity as to the application of the diagnostic criteria for CRPS in Table 17.1 of the Guidelines. Evidently, an AMS is not bound to any particular method of assessment provided he/she satisfactorily considers the relevant aspects of the Guidelines. Further, it is at the Medical Appeal Panel's discretion as to whether or not a clinical assessment of an Appellant worker is necessary.

This decision also serves as a valuable reminder to litigants in respect of the costs implications of commencing frivolous legal actions.

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