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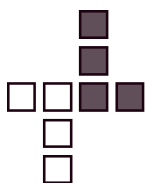
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Confirmation that a Review Panel can consider all aspects of a MAS Assessment afresh

MCKEE V ALLIANZ AUSTRALIA INSURANCE LIMITED [2007] NSWSC 1067

Clause 10.17.1 of the Motor Accidents Authority Medical Assessment Guidelines provides that a review panel conducting a review of a medical assessment is to “consider afresh all aspects of the assessment under review”. The validity of this provision was challenged in the Supreme Court recently in *McKee v Allianz Australia Insurance Limited*, with TL lawyers acting for Allianz.

Background

As a result of a motor vehicle accident on 9 June 2002, the plaintiff sustained injuries to his knees, left shoulder and spleen. He subsequently underwent a splenectomy.

The plaintiff made a claim for damages, and a dispute arose as to his degree of permanent impairment. He was referred to MAS and Dr Long assessed whole person impairment at 9%, consisting of 1% for the left shoulder, 0% for the splenectomy, 8% for the left lower leg and 0% for the right lower leg.

The plaintiff subsequently filed an Application for Review of Dr Long’s assessment, arguing that Dr Long should have allowed 3% whole person impairment for the splenectomy.

The matter was referred to a review panel, who agreed that 3% should have been allowed for the splenectomy. However, the panel also found that Dr Long incorrectly assessed whole person impairment of 8% in respect to the left knee injury. The review panel concluded that only 6% should have been allowed for the left knee. Therefore, the review panel assessed the plaintiff to have a whole person impairment of 10%.

Supreme Court decision

The plaintiff lodged a Summons in the

Supreme Court alleging the review panel had made an error of law and/or jurisdiction by conducting a review of Dr Long’s entire assessment, rather than confining themselves to the error alleged in the Application for Review (i.e. whether Dr Long had correctly assessed the splenectomy). It was submitted that clause 10.17.1 of the Medical Assessment Guidelines was inconsistent with section 63 of the *Motor Accidents Compensation Act, 1999* and was therefore invalid. Particular reliance was placed on some remarks made in *Campbelltown City Council v Vegan and Ors* [2006] NSWCA 284, a case concerning the *Workplace Injury Management and Workers Compensation Act 1998* (“WIM Act”).

Justice James conducted a review of the relevant provisions of the WIM Act and concluded it was sufficiently different to the *Motor Accidents Compensation Act, 1999* to render the comments made in *Vegan* inapplicable. He held that section 63 empowers a review panel to reconsider all aspects of the assessment under review, and if necessary, to reassess whole person impairment and issue a fresh certificate.

The plaintiff is appealing the decision of Justice James.

Comment

This case serves as a valuable reminder that a review panel will essentially conduct a re-assessment of the plaintiff’s injuries, with the result that any incorrect finding of the original assessor (whether favourable or unfavourable) is susceptible to being overturned.

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Judicial review of a decision to allow a further MAS Assessment

WILKIE v MOTOR ACCIDENTS AUTHORITY OF NSW & ANOR [2007] NSWSC 1086

The manner in which an Application for Further Assessment was granted, and the nature of the information considered in making that decision, were the subject of recent proceedings seeking judicial review. TL lawyers acted on behalf of the insurer in this matter.

Background

On 30 September 2001, the plaintiff was involved in a motor vehicle accident and sustained injury. She made a claim for damages, and was referred to MAS for determination of a medical dispute. When the plaintiff was assessed by Dr Thompson, he did not have before him any medical reports from QBE. He issued a Certificate and Statement of Reasons dated 3 June 2005, providing an overall whole person impairment of 34%.

In February 2006, the plaintiff was examined on the insurer's behalf by Dr Lim, who assessed whole person impairment at 4%. The insurer subsequently lodged an Application for Review and an Application for Further Assessment, each relying on the report of Dr Lim.

The Application for Review was rejected, but the Application for Further Assessment was granted by the Proper Officer of MAS. A further assessment was then conducted by Assessor McLeod, who assessed the plaintiff's whole person impairment at 5%.

Supreme Court decision

On 24 January 2007, the plaintiff filed a Summons in the Supreme Court of New South Wales seeking to have the further assessment set aside or rejected, and the original

assessment declared valid and binding. Several bases for the Summons were alleged:

- The Proper Officer's failure to give reasons for her decision to allow the further assessment constituted a denial of procedural fairness;
- The words "additional relevant information about the injury" in section 62(1) of the *Motor Accidents Compensation Act, 1999* had been misinterpreted;
- The way in which the further assessment was conducted involved a denial of procedural fairness.

Associate Justice Malpass rejected the first argument. He noted it was common ground that the Act itself did not impose any statutory obligation to provide reasons. Further, clauses 8.4 and 8.5 of the Medical Assessment Guidelines made it clear that the Proper Officer was not obliged to give reasons when a decision was made to refer a matter for further assessment (brief reasons for the decision were required only when the application was refused).

In relation to the second argument, His Honour noted the Act did not define the words "*additional relevant information about the injury*". However, he did not accept the plaintiff's submission that the additional relevant information about the injury must refer to a deterioration. Rather, he was of the view that the section was intended to provide two separate and alternative grounds upon which referral for a further assessment may be made (i.e. deterioration or additional relevant information).

The plaintiff also argued that "additional information" should be restricted to information which was not available, or could not have been reasonably obtained, at the time of the first assessment. The defendant argued in

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response that if any such restriction had been intended, it would have been specified in the legislation. Although His Honour did not consider it necessary to express a final view in the present case, he indicated he preferred the defendant's argument.

The plaintiff's final argument was supported by an affidavit of the plaintiff, setting out various complaints in relation to how Assessor McLeod conducted his assessment. His Honour noted that the judicial review process was not a forum for determining issues of fact, and concluded the affidavit was irrelevant to the proceedings. The plaintiff also alleged that Assessor McLeod failed to make his own independent assessment of the plaintiff's shoulder. His Honour was of the view Assessor McLeod clearly carried out a medical examination of the left shoulder, and also complied with the Guidelines, and therefore this argument was also rejected.

Interestingly, although His Honour dealt with each of the arguments raised by the plaintiff, he also stated that he would, in any case, have declined to grant any remedy to the plaintiff on the basis of discretionary considerations. His Honour pointed out that, in proceedings seeking judicial review, the Court has a discretionary power to grant relief. He considered this power should not be exercised in favour of the plaintiff in the present case on the grounds that the plaintiff:

- Did not immediately challenge the referral of the matter for further assessment, and allowed the further assessment to take place by attending the medical examination;

- Did not take action in respect of her complaint until after she had received the result of the further assessment; and
- Chose not to pursue the alternate remedy available by way of an Application for Review, pursuant to section 63 of the Act. His Honour noted that a review offered the plaintiff a more satisfactory remedy and also a quicker determination.

Associate Justice Malpass dismissed the Summons and ordered that the plaintiff pay the costs of the Summons.

Comment

This case confirms that a Proper Officer need not give reasons for a decision to refer a matter for further review, and that the "additional material" relied upon in the application for further review need not relate to a deterioration.

Further, and perhaps more importantly, this case also serves to emphasise that it is not enough, in seeking judicial review, to establish that there has been an error of law or jurisdiction – rather, it is also necessary to satisfy the Court that the circumstances of the case and the conduct of the applicant are such that the Court should exercise its discretion to grant the relief sought.

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UCPR rules re Offers of Compromise do not apply to matters that have been through CARS

SAN V RUMBLE [NO 2] [2007] NSWCA 259

The previous edition of *Total Legal* included a case note on *Vale v Eggins (No 2) [2007] NSWCA 12*, which was titled "When costs consequences of Offers of Compromise don't apply".

This issue has arisen again, this time in the case of *San v Rumble [No 2]*. Unlike *Vale v Eggins [No 2]*, however, the case of *San v Rumble [No 2]* involves significant issues of principle which will have a considerable impact on the law in this area.

Background

The appellant, San, was injured when a motor vehicle driven by the opponent, Rumble, hit the rear of her vehicle in August 2001.

Liability was admitted, and the appellant's past economic loss and past out-of-pocket expenses were agreed. It was also agreed the appellant was not entitled to damages for non-economic loss, as she did not exceed the 10% impairment threshold. The only remaining areas of contention were the appellant's entitlement to damages for future economic loss and future out-of-pocket expenses.

The matter proceeded through CARS, and was assessed in November 2005. The appellant was awarded \$5,535.99 for past economic loss and past out-of-pocket expenses. The Assessor rejected the appellant's claim for future economic loss and future out-of-pocket expenses.

The appellant did not accept the Assessor's award, and subsequently commenced proceedings in the District Court. The trial judge rejected each of the appellant's claims for future economic loss and future out-of-pocket expenses, and consequently gave

judgment for the appellant in the amount of \$7,292.94.

The appellant's application for leave to appeal was dismissed with costs in July 2007.

During the course of the litigation, the opponent had made two Offers of Compromise. The first, in the sum of \$34,000.00 plus costs, was made before the hearing in the District Court. The second, in the sum of \$15,000.00 plus costs, was made in November 2006, soon after proceedings had been instituted in the Court of Appeal. On the basis of the latter offer, the opponent sought an order for indemnity costs from 15 November 2006. The appellant argued that the proper order was for each party to pay its own costs.

Court of Appeal decision

The Court noted that the opponent's application for indemnity costs was based on rule 42.15 of the *Uniform Civil Procedure Rules*, which essentially provides that if a plaintiff obtains a judgment which does not better an Offer of Compromise served by the defendant, the defendant is entitled to an order that the plaintiff pay its costs on an indemnity basis from the day after the offer was made.

The appellant's argument, on the other hand, was based on Chapter 6 of the *Motor Accidents Compensation Act, 1999*. Section 151(2) of that Chapter provides that, where District Court proceedings are brought after a CARS assessment has been made, the costs of those court proceedings are payable as follows:

- If the judgment exceeds the CARS assessment by a certain amount (\$2,000.00 or 20%, whichever is greater), the Insurer is liable to pay the claimant's costs;

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- If the judgment does not exceed the CARS assessment, the claimant is liable to pay the Insurer's costs (to a maximum of \$25,000.00); and
- In any other circumstances, the insurer and claimant pay their own costs.

In the present case, the judgment exceeded the CARS assessment (so the claimant was not liable for the Insurer's costs), but it did not exceed it by enough that the Insurer was liable for the claimant's costs. Therefore, according to this provision, the insurer and claimant were each to pay their own costs.

Accordingly, the issue for the Court was which of these two statutory regimes applied in relation to the Court of Appeal proceedings. The Court noted that the two regimes simply could not live together, as the consequences of each rule were different.

After considering various arguments involving statutory construction, as well as the legislative purpose of the *Motor Accidents Compensation Act, 1999*, the Court concluded that the way of resolving the conflict was for the more specific provision, being section 151(2), to prevail. Therefore, rule 42.15 of the *Uniform Civil Procedure Rules* could not apply.

This did not mean, however, that the making of an Offer of Compromise was irrelevant. Rather, it was a matter which could be taken into account in determining whether the Court was entitled to make a different order on the basis that this was "an exceptional case and for the avoidance of substantial injustice". The Court noted that a party who seeks to rely on this exception, which is set out in section 153(1) of the *Motor Accidents Compensation Act, 1999*, bears the onus of proving facts and presenting argument that persuades the court that it is appropriate to make such an order.

The Court confirmed that an "exceptional case" involves circumstances which are unusual, or out of the ordinary, although they

need not be unique, unprecedented, or very rare. Therefore, whether a case was exceptional would depend upon the facts of the individual case.

Turning to the facts of this particular matter, the Court concluded that the case was exceptional, given that the applicant failed in making the same case before the assessor, in the District Court, and in the Court of Appeal, and that she did not accept an Offer of Compromise of a significant amount that was made soon after the appeal was instituted. It was also a case where it would be a "substantial injustice" if the opponent was to bear its own costs of the appeal. However, the Court declined to make an order for indemnity costs, on the basis that an order for party party costs was a sufficient remedy.

Comment

This case establishes that, where a claim has been assessed by CARS and then proceeds to court, the default costs consequences of Offers of Compromise set out in the *Uniform Civil Procedure Rules* will not apply. Rather, the relevant costs provisions are those set out in section 151 of the *Motor Accidents Compensation Act, 1999*. However, a plaintiff's failure to accept an Offer of Compromise may be still be a relevant circumstance to raise in arguing that the court should make a different order as the matter is "an exceptional case and for the avoidance of substantial injustice".

It is also important to note that the situation will be different where matters have **not** been assessed by CARS. Section 152 of the *Motor Accidents Compensation Act, 1999* provides that where there has been no claims assessment, the rules of court concerning offers of compromise do apply to any such offer in those proceedings.

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