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Alcoa of Australia Limited v Blay [2015] WADC 62

Background

Mr Blay was employed by Alcoa of Australia Limited (**Alcoa**) as a machinist at their refinery when he developed a lung condition in the form of a respiratory infection.

Mr Blay contended that the lung condition was caused or aggravated by him inhaling caustic fumes within the refinery and/or bushfire smoke at his workplace on or about 15 December 2009.

Alcoa was of the position that the respiratory disease was the result of the caustic fumes and/or bushfire, however, they believed it to be a non-atopic disease and this did not constitute an injury as defined by the *Workers' Compensation and Injury Management Act 1981* (the Act).

As the dispute was not able to be resolved at conciliation the matter progressed to arbitration before Arbitrator Rutherford in August 2013. The Arbitrator made the following factual findings:

- Mr Blay did not suffer from a respiratory condition before December 2009 and was generally in good health. There were no hereditary factors which may otherwise explain Mr Blay's respiratory illness. For years he was able to work at Alcoa performing broadly the same tasks as he was performing in December 2009 without incident. His illness was caused by something other than his normal day to day working and living conditions.
- On 15 December 2009 Mr Blay inhaled an amount of caustic vapour, sufficient in quantity to at least catch him by surprise and to have him stop work, at least initially.
- In early December 2009, there was a bushfire in the Pinjarra area as a result of a CALM burn off. Between 14 December 2009 and 21 December 2009 smoke resulting from the bushfire entered the refinery and workshop in Pinjarra where Mr Blay was working.
- The smoke from the bushfire was at its most intense in or around the period of 14 and 15 December 2009. The smoke was sufficiently thick to cause Alcoa to issue a notice to the workforce about safety and health measurers.
- The smoke was not prevalent at Mr Blay's place of residence due to the presence of the sea breeze.
- Mr Blay inhaled smoke at work on either or both 14 and 15 December 2009.
- Mr Blay felt unwell on the evening of 15 December 2009 and felt more unwell as time progressed. The next day he was rostered off work. His symptoms worsened and he tried to see a doctor on 17 December 2009 but was unable to see his doctor until 18 December 2009. Thereafter Mr Blay saw his doctor and Alcoa medical staff on a number of occasions, with his lung function deteriorating.

The Arbitrator found that Mr Blay suffered a reactive airways dysfunction syndrome (**RADS**) contracted by him in the course of his employment. The Arbitrator ordered that Alcoa pay to the respondent the sum of $9,175.23 comprising of statutory allowances under the Act.

Alcoa applied to the District Court for leave to appeal against Arbitrator Rutherford's decision.

Alcoa's Position and Grounds of Appeal

Ground of Appeal 1

The Arbitrator erred in law in relaying on the medical report of Dr Prichard in coming to his decision on the issue of causation.

This was a report that Mr Blay sought to rely on at arbitration, however the Arbitrator did not allow it on the basis the material was being filed outside the time limits and the Arbitrator would not admit the report into evidence.

The report of Dr Pritchard was included in a book of documents tendered as an exhibit by Alcoa. The report was also in the book of documents tendered by Mr Blay.

The Arbitrator referred to Dr Pritchard's report within these books of exhibits when explaining his decision.

Ground of Appeal 2

The Arbitrator erred in law in relying on Dr Prichard's report as the factual basis for the opinions expressed by Dr Prichard had not been established by primary evidence and, in any event, were contrary to the facts as found by the Arbitrator.

When the Arbitrator referred to Dr Prichard's report he did state that the chronology of events upon which Dr Prichard based his opinion on was not entirely correct and on that basis Dr Prichard's opinion would be accorded less weight.

Ground of Appeal 3

Alcoa was denied procedural fairness due to the Arbitrator's reliance on the medical reports of Dr Prichard and Professor Thompson. The parties were led to believe that the Arbitrator would not rely on the medical evidence of Dr Prichard or Professor Thompson. The Arbitrator referred to the report of Professor Thompson to provide a clinical history.

Alcoa claimed that in any event the reliance on Dr Prichard's report was contrary to rule 59 of the Act as Dr Prichard was a treating specialist in the same area as a report already tendered as evidence by Mr Blay (report of Dr Bucens).

Ground of Appeal 4

The Arbitrator erred in law in failing to make sufficient findings and give sufficient reasons for his conclusion that Mr Blay's symptoms and medical condition after December 2009 were due, in whole

or in part, to exposure to bushfire smoke as there was no evidence, or any adequate evidence, to support the Arbitrator's finding.

Ground of Appeal 5

The Arbitrator erred in law in failing to make sufficient findings and give sufficient reasons for his conclusion that Mr Blay's symptoms were due, in whole or in part, to exposure to caustic fumes.

Ground of Appeal 6

The Arbitrator erred in law in failing to make sufficient findings and provide sufficient reasons for not accepting the evidence of Dr McGrath that Mr Blay's symptoms and disabilities after December 2009 were due to non-atopic adult onset asthma.

Alcoa relied on Dr McGraths report that disagreed with the diagnosis of RADS.

Ground of Appeal 7

The Arbitrator misapplied established principles and failed to give adequate reasons or otherwise explain why he preferred the expert medical opinion of Dr Bucens to that of Dr McGrath.

Ground of Appeal 8

The Arbitrator erred in law in finding, on the basis of 'common-sense', that Mr Blay's recovery on previous occasions from pulmonary infections suggested an agent other than a virus was causative, when it was a view not expressed by any of the medical practitioners and was contrary to the medical opinion of Dr McGrath.

Ground of Appeal 9

The Arbitrator misconstrued the evidence in relation to Alcoa's work practice when he found that it was likely, as a matter of common sense, that a tag fell off the pump on which Mr Blay claimed he worked on. The consequence of this tag falling off was what caused Mr Blay to be exposed to high levels of caustic fumes. The evidence was that Alcoa's business practice was to apply two tags to each pump entering the workplace and there was no evidence led that a tag had fallen off.

Ground of Appeal 10

The Arbitrator took into account irrelevant considerations in excluding the expert opinion of Dr Drew at an interlocutory stage, when Dr Drew's evidence would have materially affected the final outcome in relation to the nature and extent of any exposure to caustic.

Alcoa sought leave to rely upon this evidence however it was dismissed as it was contrary to the act to allow it.

Ground of Appeal 11

The Arbitrator erred in excluding the evidence of Mr Turner, and such evidence would have materially affected the final outcome in relation to the nature and extent of any exposure to caustic.

Mr Turner was an occupational hygienist employed by Alcoa. Mr Turner's evidence included a description of a system of monitoring caustic mist levels in the refinery. However it was agreed that there was no monitoring around the time of the accident at the location where Mr Blay says he inhaled the caustic vapour.

The Law

Rue 59 of the Act provides:

(1) Except with the leave of an Arbitrator, in any proceeding —

> (a) a medical report by a medical practitioner in a particular area of medical practice may not be lodged or admitted in evidence on behalf of a party to a proceeding if another medical report by another medical practitioner in that area of medical practice has been lodged or admitted in evidence on behalf of that party; and
>
> (b) …

(2) …

(3) …

(4) This rule does not affect the lodging or admission in evidence of a medical report required to be obtained because —

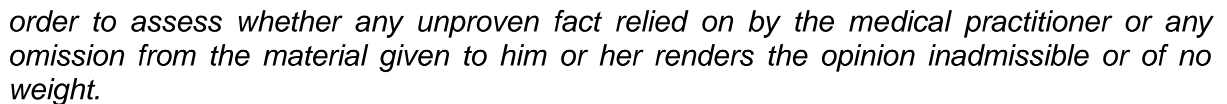
> (a) …
>
> (b) a worker attends a general medical practice and is seen by more than one medical practitioner in that same practice from time to time.

The principles in *Pollock v Wellington* and *Beer V Duracraft* were said to be have been misapplied by the Arbitrator. In Pollock a fundamental principle of expert evidence was stated by Anderson J:

> *Before an expert medical opinion can be of any value the facts upon which it is founded must be proved by admissible evidence and the opinion must actually be founded upon those facts.*
>
> *As with any other evidence, expert opinion must be comprehensible and the conclusions reached must be rationally based. A court ought not to act on an opinion, the basis for which is not explained by the witness expressing it.*

In Beer, McLure J stated as follows:

> *In this case, as with the majority of cases involving medical expert evidence, the relevant history supplied by the claimant provides the factual foundation for the statement of expert opinion. In many cases there is not an exact correlation between the facts proven in evidence and the facts relied upon by the medical practitioner upon which his or her opinion is based. The role of the decision maker is to examine any variation between the two in*



order to assess whether any unproven fact relied on by the medical practitioner or any omission from the material given to him or her renders the opinion inadmissible or of no weight.

<u>In relation to the interlocutory ruling made by the Arbitrator in not allowing Alcoa to lodge the report of Dr Drew out of time Rule 30 of the Act provides:</u>

(1) In any proceeding, any document, material or information not lodged within the time limits prescribed in these rules must not be adduced in evidence in the proceeding by any party to the proceeding without first obtaining the leave of the Arbitrator.

(2) An Arbitrator must not give leave unless —

> (a) no other party is prejudiced by the relevant document, material or information being adduced in evidence; or
>
> (b) in any event, the other parties consent to it being adduced; or
>
> (c) in the opinion of the Arbitrator it is required to be admitted in evidence in the proceeding in the interests of justice.

Conclusion

Grounds 1 and 3

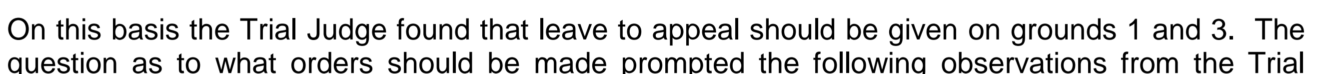
The Judge considered the two grounds of appeal which dealt with the reports of Dr Prichard and Professor Thompson.

In relation to the evidence of Professor Thompson, the Judge found that there was no error of law as the Arbitrator only used the report of Professor Thompson to provide a clinical history. This was the purpose of Professor Thompsons report being included in the book of documents tendered by both parties.

The Judge stated that there was an error of law in the Arbitrator relying upon the opinion of Dr Pritchard in relation to the issue of causation. The Arbitrator had led the parties to believe that Dr Pritchard’s report would not be used on the question of causation.

The Judge did make note, however, that when Alcoa included this report in its book of documents they should have redacted the portions of the report dealing with causation so as to avoid confusion. The Trial Judge also noted that Alcoa’s Counsel made reference to the opinions expressed by Dr Prichard when making submissions.

In relation to ground 3, the Judge opines that as Dr Prichard and Dr Bucens were treating specialists in the same area of medicine leave of the Arbitrator was required under rule 59 of the Act before reliance could be made on the report.



On this basis the Trial Judge found that leave to appeal should be given on grounds 1 and 3. The question as to what orders should be made prompted the following observations from the Trial

Judge:

- Even if the Arbitrator ignored the opinions of Dr Prichard he would have reached the same conclusion;
- The Arbitrator stated that Dr Prichard's opinion was to be given less weight;
- The Arbitrator rejected the opinion of Alcoa's medical expert, Dr McGrath; and
- The Arbitrator accepted the report of Dr Blay's other medical expert, Dr Bucens. The use of Dr Prichard's opinion was limited and the Arbitrator simply observed this opinion having found that it coincided with Dr Bucens' opinion to which he agreed.

As the Trial Judge was not persuaded that the Arbitrator's decision should be altered on the basis of these grounds of appeal, they were dismissed.

Ground 2

Alcoa presented no submissions in respect of this ground of appeal. The Judge stated that the ground was superfluous in any event given his comments in respect of grounds 1 and 3. Accordingly, the ground of appeal was dismissed.

Ground 4

Alcoa contended that neither Dr Bucens nor Dr McGrath expressed an opinion that the inhalation of bush fire smoke was causative of Mr Blay's respiratory illness. Alcoa submitted that the Arbitrator should not have found that the bushfire smoke was causative either wholly or in part of Mr Blay's illness as there was no evidence to support this.

The Judge notes that although none of the doctors expressly gave the opinion that the bushfire was causative of the respiratory illness neither medical expert expressly excluded the possibility smoke inhalation ether caused or contributed to Mr Blay's illness. Dr Bucens also stated in his report that the criteria for the diagnosis of RADS included exposure to smoke.

Alcoa's main contention was that bushfire smoke being causative of the injuries was not described in Mr Blay's application for arbitration and therefore they were unable to successfully prepare a case to meet this allegation.

The Judge made the following comments:

- The granting of relief or redress under the Act is not necessarily restricted to the specific claim made;
- The first medical certificate lodged by Mr Blay referenced bushfire smoke contributing to his injury;
- Witness statements filed by Mr Blay referenced exposure to the inhalation of bushfire smoke at the time of his alleged injury plus the book of documents filed by Mr Blay included a written bushfire smoke health warning issued by Alcoa;
- Mr Blay's written opening submissions references Mr Blay inhaling bushfire smoke

which caused or aggravated a respiratory illness;

- Alcoa's opening submissions acknowledged that Mr Blay's claim included a claim that a contributing cause of his injury was exposure to bushfire smoke in the workplace;
- Alcoa's Counsel cross examined Mr Blay in relation to the exposure to bushfire smoke; and
- In the closing submissions Alcoa's Counsel acknowledged that inhalation of bushfire smoke was an issue.

On the basis of the above, the Judge found that there was evidence to support a finding that bushfire smoke was wholly or partly causative of Mr Blay's respiratory illness and that Alcoa had prepared a case to meet an allegation that bushfire smoke was causative of Mr Blay's injury. In light of this, the ground of appeal was dismissed.

Ground 5

Critical to the Arbitrator's decision in concluding that Mr Blay's illness was caused or contributed to by the exposure to caustic fumes was his acceptance of Mr Blay's credibility and evidence on inhaling a large quantity of vapour on 15 December 2009.

These findings led the Arbitrator to reject the opinions of Dr McGrath and to accept the opinion of Dr Bucens because this opinion was based on assumed facts closely correlated to the factual findings made by the Arbitrator.

The Judge found that the ground had no merit on the basis of the above and it was dismissed.

Ground 6

The Judge found that the Arbitrator did give enough reasons for rejecting the opinion of Dr McGrath. The Arbitrator's reasons were tied to the findings that Mr Blay had inhaled significant quantity of caustic fumes and bushfire smoke coinciding with the appearance of his symptoms. The Judge therefore dismissed the ground of appeal.

Ground 7

The Judge found that the Arbitrator in reaching his decision did follow the principles detailed above in *Pollock v Wellington* and *Beer v Duracraft*.

The Judge found that critical to the Arbitrator's decision was his findings as to Mr Blay's credibility along with the findings of fact. The Arbitrator relied on Dr Bucens' report however Alcoa contends that Dr Bucens did not apply the testing criteria for RADS on Mr Blay nor did Dr Bucens state why he ruled out a number of other possible causes for Mr Blay's asthma. Dr Bucens did say in his report that Mr Blay fulfilled the criteria for RADS and Alcoa did not identify which If any of the criteria was not supported by the evidence and factual findings of the Arbitrator.

The Judge stated that the Arbitrator is only required to be satisfied on the balance of probabilities as to the correctness of the opinion of medical evidence. It is not necessary for the Arbitrator to make

factual findings of every diagnostic criteria listed in that report.

The Judge was of the view that when the Arbitrator rejected the opinion of Dr McGrath it was open to him to conclude that the findings of fact made by him correlated more with a finding of RADS. The Judge gave leave to appeal on the above ground but in light of his above comments the ground of appeal was dismissed.

Ground 8

The Judge found that the Arbitrator did not rely solely on the evidence that as Mr Blay had recovered from previous viral complaints he should reject the opinion of Dr McGrath that the illness suffered was a non-atopic asthma. The Judge found that there were a number of factors taken into account by the Arbitrator including a temporal link between the occurrence of the illness and the episode of inhalation of caustic fumes and bushfire smoke.

The Judge found that the ground of appeal had no merit and was accordingly dismissed.

Ground 9

In respect of Alcoa's ninth ground of appeal the Judge found that this was purely a factual matter and the ground was dismissed.

Ground 10

The Arbitrator's decision to not grant leave for Alcoa to file the report of Dr Drew was a discretionary decision that the Arbitrator had a right to make under rule 30 above. The Arbitrator acknowledged that the report was relevant, however, the purpose of the Act is to resolve matters, fairly, justly, economically, informally and quickly.

The Judge found that there was no implied or express error made by the Arbitrator in coming to the decision not to grant leave for Dr Drew's report to be relied on. The Judge was satisfied that the Arbitrator took into account all relevant considerations. Even without the complication of including a further report, the hearing still took four days and there was voluminous material tendered. The Judge was of the opinion that the Arbitrator exercised his discretion correctly and was entitled to reject the application. On these grounds the ground of appeal was dismissed.

Appeal 11

Mr Turner's evidence included a description of a system for monitoring caustic mist levels in the refinery, although the location where Mr Blay inhaled the caustic vapour was not monitored. Mr Blay did not argue that his injury was due to caustic vapour in the general atmosphere in the refinery but instead due to a discrete episode of exposure to a substantive amount of vapour.

The Judge found that the Arbitrator did not exclude the evidence of Mr Turner but concluded that because it did not relate to the "good whiff" of caustic vapour Mr Blay experienced but instead general levels of caustic mist in the refinery its relevance "fell away".

The Judge notes that in any event under s213(4)(c) and s213(4)(d) of the Act the reasons for the Arbitrators decision need not canvass all the evidence given in the case and need not canvass all

the factual and legal arguments or issues arising in the case.

The ground of appeal was therefore dismissed and Alcoa was unsuccessful in their application for leave to appeal the Arbitrator's decision.

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