CITATION: *Rupe v Beta Frozen Products* [2002] NTMC 020

PARTIES:	CLINTON DOUGLAS RUPE
	v
	BETA FROZEN PRODUCTS
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	WORK HEALTH ACT
FILE NO(s):	9828002
DELIVERED ON:	31 May 2002
DELIVERED AT:	DARWIN
HEARING DATE(s):	3 April 2002
JUDGMENT OF:	MR HUGH BRADLEY CM

CATCHWORDS:

Workers Compensation – Work Health – Partial Incapacity

Work Health Act 1986 (NT) s 65, s 68

REPRESENTATION:

Counsel:

Worker	Mr M Grant
Employer:	Mr C McDonald QC

Solicitors:

Worker:	Hunt & Hunt
Employer:	Cridlands

Judgment category classification:	B
Judgment ID number:	[2001] NTMC 020
Number of paragraphs:	36

IN THE WORK HEALTH COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 9828002

[2002] NTMC 020

BETWEEN:

CLINTON DOUGLAS RUPE
Worker

AND:

BETA FROZEN PRODUCTS
Employer

REASONS FOR JUDGMENT

(Delivered 31 May 2002)

Mr BRADLEY CM:

BACKGROUND

1. This decision forms part of an apparently ongoing process to determine the entitlement of Mr Rupe to Work Health Benefits in respect of the period subsequent to 4 December 1998. Mr Rupe had sustained an injury at work to his achilles tendon on 27 February 1998. He applied for and received Work Health benefits until weekly payments were ceased after the service of a Form 5 notice. On 8 March 2000 this court handed down a decision *Rupe v Beta Frozen Products* [2000] NTMC 008 *(Rupe 2000)*. That decision was in respect of the workers original appeal from the decision by the employer (Beta) to cease payments pursuant to the Form 5 notice served on 4 December 1998. Those proceedings also contained a counter claim alleging that the worker had ceased to be or was only partially incapacitated for work. In my reasons I found that a ground of a Form 5 had been made out in that Mr Rupe was able to resume his employment with Beta and that

therefore was not entitled to a continuation of weekly benefits. Given that finding I did not, at the time, think it necessary to also proceed to determine all the issues on the counter claim.

2. On appeal to the Supreme Court the Form 5 was found to be invalid because of an unsatisfactory medical certificate attached to it. The court held that since the Form 5 was not accompanied by a valid medical certificate the appeal must succeed. The original order of this court was set aside. In *Rupe v Beta Frozen Products* [2000] NTSC 93 His Honour Mr Justice Riley held that were he able to do so he would have remitted the matter to myself to enable me to dispose of the balance of the matter. He indicated that he felt unable to do that and therefore the matter fell to be determined by this court in accordance with its own procedures.

3. The matter was referred back to me by the managing magistrate and in *Rupe v Beta Frozen Products* [2001 NTMC 55] I held, over the objection of the worker, that for the reasons published I should proceed to determine the issues which remained outstanding. An appeal against that decision was held by the Supreme Court to be incompetent. The matter cannot therefore go back to the Supreme Court until I finalise the proceedings.

THE ISSUES

4. The issues essentially left to be determined on the pleadings are those raised by the counter claim and the defence to the same. The employers counter claim is in the following terms:

> "17. The worker failed to comply with his return to work program with the employer as a Grade 1 General Butcher.
>
> 18. Pursuant to s 75B the worker is deemed to be able to undertake employment as a Grade 1 Butcher.
>
> 19. Further and alternatively, on and from 2 December 1998 the worker has ceased to be incapacitated for work.

20. Further and alternatively, on and from 2 December 1998 the worker has only been partially incapacitated for work.

21. AND THE EMPLOYER CLAIMS Rulings that:

21.1 by virtue of s 75B of the Work Health Act the worker is deemed to be able to undertake employment as a Grade 1 Butcher;

21.2 on and from 2 December 1998 the worker ceased to be incapacitated;

21.3 alternatively, on and from 2 December 1998 the worker has only been partially incapacitated and the employer further seeks rulings as to:

21.3.1 the extent of the worker's partial incapacity;

21.3.2 the worker's earning capacity."

5. The defence to the counter claim is in the following terms:

"1. The worker denies paragraph 17 of the employer's counterclaim and repeats the matters contained in paragraphs 10 – 13 of the worker's Amended Statement of Claim.

2. The worker denies paragraph 18 of the employer's counter claim. In particular, the worker says that:-

(a) The employer terminated the workers employment

(b) The employer failed to take reasonable or any steps to provide the worker with suitable employment

(c) The employer has failed to take reasonable or any steps to find the worker suitable employment with another employer

(d) The employer has failed to take any steps or to participate in efforts to retrain the worker.

Further and in the alternative, the worker states that employment as a Grade 1 Butcher is not reasonably available to him.

3. The worker denies paragraph 19 of the employer's Counterclaim.

4. The worker admits paragraph 20 of the employer's Counterclaim and states that since cessation of the workers weekly payments as a result of the Form 5 notice the worker has taken all reasonable steps to obtain suitable alternative employment taking into account his continuing partial incapacity.

5. Further the worker states that the employment which he has been able to find as referred to in paragraph 4 above is the most profitable employment reasonably available to him taking into account his continuing partial incapacity and the matters set out in sections 65 and 68 of the Work Health Act."

6. In the original proceedings the relevant factual finding made by the court was essentially that Mr Rupe was able to resume his pre-accident work with Beta and that therefore the employer was entitled to cease making weekly compensation payments. The cessation of payments 14 days after the delivery of the notice ie. 18 December 1998 was found by the Supreme Court to be flawed as indicated above and I must now proceed to decide the workers rights on the basis of his incapacity (if any) and the terms of the counter claim and defence thereto.

7. The employers claim in paragraphs 17 and 18 that the worker failed to comply with a return to work program and is deemed by s 75B to be able to undertake employment as a grade 1 butcher was not pursued at trial or now. The reason for this is that the return to work program was not provided by an "accredited vocational rehabilitation provider" as required by s 75B(1A). It should also be mentioned that the worker was not employed as a grade 1 butcher; he was never even indentured. The evidence of the employer was that he was paid on that scale notwithstanding that he held no qualifications. The presumption in s 75B(2) is that the worker is deemed to be able to undertake "such employment". In my view, that refers to the particular employment engaged in by the worker during the return to work program not to the descriptive job title under which he was paid. It is not necessary for me to say what flows from this distinction because the employer has

accepted and I hold that s 75B does not apply because of the failure to comply with s 75B(1A).

8. At the hearing and now the employer relies in particular on paragraphs 19 and 20 of the counter claim namely, the assertions that the worker has ceased to be or is only partially incapacitated for work. The workers defence to that counter claim essentially acknowledges that the worker was only partially incapacitated for work from the relevant date but that his employer terminated the employment and took no reasonable steps to find suitable employment for the worker. In addition the worker asserts in essence that although he has tried, he has not been able to find any suitable alternative employment.

9. At this stage of the proceedings the employer, who carries the relevant onus, argues that I should;

    2.1 Simply amend in essence the words used in paragraph [62] of my original reasons for decision so that they read "On the above basis ***I find that the worker is no longer incapacitated and*** a basis of the Form 5 is made out and the workers claim must fail" (amendments shown in bold italics).

    2.2 Make a further finding that as at 4 December 1998 the worker no longer suffered from an incapacity as defined in section 3 of the Act namely, that there was no longer "an inability or limited ability to undertake paid work because of an injury".

    2.3 Find that on the evidence Mr Rupe was not dismissed and there was work available with Beta or;

    2.4 Find that in addition to work at Beta there is other work reasonably available to Mr Rupe which would enable him to earn as much or more than he could at Beta.

10. The workers case in response is that notwithstanding my earlier finding that he was able to work at Beta he still suffered from a physical incapacity and;

    2.1 That incapacity resulted in a limited ability to undertake paid work.

2.2 That he was by the employers conduct "constructively dismissed" from his employment at Beta.

2.3 That the employer, who bears the onus, failed to provide alternative work or prove that remunerative work was reasonably available to him and the amount he could thereby earn.

INCAPACITY

11. Incapacity is defined as an inability or limited ability to undertake paid work. After 26 weeks of incapacity s 65 provides that a worker is entitled to "compensation equal to 75% of his or her loss of earning capacity…". Section 65(2) then defines loss of earning capacity as follows:

> "For the purposes of this section, loss of earning capacity in relation to a worker is the difference between -
>
> (a) his or her normal weekly earnings indexed in accordance with subsection (3); and
>
> (b) the amount, if any, he or she is from time to time reasonably capable of earning in a week in work he or she is capable of undertaking if he or she were to engage in the most profitable employment, if any, reasonably available to him or her, and having regard to the matters referred to in section 68."

12. Normal weekly earnings are agreed between the parties; my task is to determine the amount Mr Rupe is reasonably capable of earning in the most profitable employment reasonably available to him.

13. I have already found that the worker was capable of returning to work full time with Beta (see [55] – [61] of *Rupe 2000*). If that employment remained available to him on a five day a week basis then he would have had no ongoing loss and therefore no further entitlement to Work Health. If however there is any remnant incapacity and the number of hours available to him is reduced then there may be a further entitlement.

14. Unfortunately there is a paucity of evidence available as to Mr Rupe's capacity to undertake employment in 1999. The last medical assessment was undertaken by Dr Millons in March of 1999 and, as I have found, that assessment was distorted by Mr Rupe's exaggeration of his condition. Mr Grant has however conceded that on the basis of Mr Rupe's evidence itself he was no longer incapacitated at the time that he gave evidence on the 1 November 1999. I am unable, in the absence of additional evidence, to find precisely when it was that his incapacity ceased. Since the onus of proving a capacity to earn under the counter claim lies on the employer I hold that Mr Rupe was partially incapacitated until 1 November, 1999 when I observed that even then he had muscle wasting to his left calf. It seems from the evidence that he was employed by Top Bananas for the period 16 March to 24 March as a casual probationary farm labourer. At that time he was paid the rate of $10.00 per hour but left the employment. The reason for leaving appears to be given variously as a dispute with the employer, an accident or, as the employer says that his "achilles tendon was hurting and he was having trouble doing the work". He also worked for Melaluca Station for a short time. Unfortunately counsel have not assisted me by eliciting either the period of employment or pay received for this work. I conclude from the tenor of the evidence that both these jobs were on a full time i.e. five day per week, basis.

15. In determining the degree of incapacity I am conscious of the findings that I made in *Rupe 2000* and after reviewing those findings and the evidence, I am satisfied that from December 1998 Mr Rupe was fit for all but sustained heavy work. Relevantly I find that not only was he fit for work at Beta but also for any similar butchering position (his chosen profession) and for any light to medium duties including medium labouring employment in the general market place. I am conscious that Mr Rupe may have had difficulties carrying out the work on the Banana Farm but the evidence was that that was heavy work involving the carrying of large bunches of bananas

and constituted a strain on all of his body including his leg. Dr Millons seemed to accept that from March 1999 onwards he was able to do work not involving ladders, excessive squatting or difficult situations.

16. In assessing the degree of Mr Rupes incapacity as defined and the economic consequences thereof I am conscious of the provisions of s 65 and s 68 of the Work Health Act. Mr Rupe was a young and untrained person who had not undergone any formal training or apprenticeship in the butchering or any other trade. He was and is nevertheless on my assessment of him a reasonably intelligent and capable young man who described himself as being able to learn as fast as other people, having initiative and good work habits. In evidence he indicated he would have no difficulty in being able to sell across the counter.

EMPLOYMENT AT BETA

17. On 4 December 1999 the employer delivered the invalid Form 5 notice to Mr Rupe and advised that work was thereafter available to him on a five day per week basis. This is not disputed by Mr Rupe. The court has already determined on the evidence that he could have done the five days per week with Beta at that time. This would result in no financial loss and therefore no weekly compensation payable pursuant to s 65 of the Act. Had Mr Rupe's employment continued with Beta on the basis of five days per week then there would be no ongoing issue between the parties.

18. The evidence however indicates that after 25 December 1998 there was less than five days per week available until March 1999 and therefore a different scenario arises. Had Mr Rupe been fully fit then, since he was a casual employee, he would not be paid for any down time at Beta. I have however found that there were still some limitations in his employability and therefore the formulas provided within s 65 of the Act must still be applied. The effect is that when Mr Rupe is stood down for whatever reason whilst he still remained in employment of Beta the employer was and is obliged by

s 65 to make up payments to Mr Rupe to 75% of the difference between what he earned on the days available to him and his normal weekly earnings as determined and indexed as required by the Act. Thus a partially incapacitated person gets down time made up by the employer but a fit person does not. If the loss of work persisted for a long time then one would need to assess what the worker's earning capacity is in alternate employment. It is the courts role to determine Mr Rupe's rights based on his ongoing employment history between 18 December 1998 and 1 November 1999 in accordance with the Act. I say 18 December 1998 because although the Form 5 notice indicates an intention to cease payments immediately it seems that full payment continued until 18 December 1998 (see evidence of Mr Power). In any event I have found that work was available at Beta and he was capable of doing it.

19. Mr Grant, for the worker, argues that Mr Rupe was constructively dismissed by the employers conduct over the January, February period of 1999. There is no doubt that the relationship between Mr Rupe and his employer was less than satisfactory and one would have expected in the ordinary course for that relationship to break up some time in the future for one reason or another. The evidence in this case however from both Mr Power (the employer) and Mr Rupe is that he continued on as an employee at least until early January 1999 when he was told in or about the second week of January that there will be not much work available for him until March. I find that, because he was a casual employee, Mr Rupe was not thereby terminated. It is probable that the employer may not have realised the effect of s 65 or his obligations to a partially incapacitated worker; I cannot speculate on this. On Friday 9 January 1999 Mr Rupe brought an action in the Industrial Relations Commission for wrongful dismissal. He did not return to Beta to work. In my view it seems that that date is an appropriate time to determine that the relationship of employer and employee no longer existed between

the parties. I therefore proceed to assess Mr Rupes entitlement based on his decision to withdraw from Beta at that date.

20. It is convenient to break up the period to 1 November 1999 into three separate sections;

    2.1 The period from 18 December 1998 when full payment under the Work Health Act ceased to 8 January 1999 when Rupe commenced the proceedings for wrongful dismissal and the employment relationship thereby ceased to exist.

    2.2 The period from 9 January 1999 to 1 March 1999 being the period during which the employer indicated to Mr Rupe that there would be, as I find, limited amount of work available to him, and

    2.3 The period from 1 March 1999 to 1 November 1999 during which the worker accepts that he was only partially incapacitated.

21. The evidence as to what days were available to the worker is unsatisfactory however doing the best I can on the evidence, I proceed to assess those three periods as follows.

PERIOD 18 DECEMBER 1998 – 8 JANUARY 1999

22. On 4 December 1998 Mr Rupe was advised by the employer that he would henceforth be employed on a five day a week basis. Mr Rupe resisted this but it seems that such work was reasonably available to him at the time. Mr Rupe is therefore not entitled to Work Health payments for any week during which there was five days of work available to him. I note however from Mr Power's evidence and in particular his exhibit E4 that the business practically closed down between 25 December 1998 and 4 January 1999. I also note that during the first week of employment in January ie. 5 January 1999 to 8 January 1999 Mr Rupe was only required to work 2 days. (see exhibit E4).

23. It seems therefore that Mr Rupe is entitled to have his compensation made up to the full weekly amount during the whole of the period from 25 December, 1998 through to 8 January, 1999 on the basis of five days work per week notwithstanding the public holidays etc. It is noted that Mr Rupe only worked for one and a half days in January and so I leave it to the parties to determine what in fact he was paid and the balance of his entitlement for that period.

PERIOD 9 JANUARY, 1999 – 1 MARCH, 1999

24. During this period Mr Rupe was, at least for the most part visiting relatives in Perth and it would seem he made no attempt to come to work or to find alternative employment during that period. On the employers evidence he had expected Rupe to return to full time employment with him in or about the beginning of March 1999 but that in the mean time I find that there was only two days per week available to him. Given that Mr Rupe only recently left his employment and would need to reassess his abilities and placement elsewhere I assess his earning capacity during that period to be the two days of work which I find would have been available to him had he been present and turned up for work. Mr Rupe is therefore entitled to be compensated for the remaining three days per week that he was not able to be employed.

PERIOD 1 MARCH 1999 – 1 NOVEMBER 1999

25. In relation to this period the matter needs to be assessed on a broader basis. During the period Mr Rupe worked on the Banana Farm, at the Melaluca Station and by hunting pigs for sale. On the evidence the worker did not register for unemployment benefits until in the latter part of that year. It is said that he made some applications to butcher shops but it seems that they may have been a little desultory. There is no other evidence of Mr Rupe making consistent efforts to find employment of different kinds to which he was undoubtedly suited. Mr Rupe had no handicap other than to his left leg and would have been able to carry out a wide range of activities. I find

overall in the circumstances that he made relatively little effort to find real employment during that period.

26. Notwithstanding the paucity of evidence I find on the balance of probabilities that had the relationship between the employer and the employee not broken down then there would have been, generally speaking, five days per week available to Mr Rupe with Beta during the whole of that period. A question therefore arises whether or not Mr Rupe was himself responsible for closing off that opportunity. Mr Rupe's counsel has submitted that notwithstanding Mr Rupe commencing proceedings in the Industrial Relations Court and failing to return to Beta in March 1999 when he was told work would be available again, it was the employer who terminated the contract of employment. I do not accept this because the basic facts are, as the Rupe concedes, he was employed on a casual basis and that work would be available again from March 1999. Mr Rupe's decision to go on leave was his own. He decided to commence Industrial Proceedings on the basis of wrongful dismissal. He may have made that decision because he was unhappy with his employer taking him off compensation or because of the limited work available to him; whatever the reason the decision to withdraw from employment with Beta was his.

27. Beta was, on the evidence, an ongoing business and there is no evidence that there would be any less work available for Mr Rupe from March onwards than there was the year before. I therefore find that five days per week were available to Mr Rupe with Beta during the period March to November 1999. In so deciding I acknowledge that work would only be likely to be available if Mr Rupe and Mr Power were able to get on. Given Mr Power's participation in the return to work program despite Mr Rupe's failure to cooperate and the employer's ongoing responsibility to provide work to Mr Rupe while he was partially incapacitated I am satisfied the work would have been made available to Mr Rupe.

28. On this basis Mr Rupe is not entitled to Work Health payments for this period.

29. If I am wrong about this then I need to assess his loss of earning capacity for the period. As I have found Mr Rupe was able to carry out all but sustained heavy work. Mr Rupe maintained he could sell over the counter as well as work as a labourer in the butchering trade. He also said he had some preliminary qualification in sheet metal work but did not seek to utilise this skill because he did not like it.

30. The evidence from the employer's witnesses indicate positions became available in retail areas including fuel distribution and automotive parts. Many other forms of employment were also generally available as the evidence of Mr Cassidy and others made clear. He presented a bulk of material including wage rate and availability of jobs on enquiry, being advertised in the newspaper and through the internet. Jobs were available as a butcher, as cleaners, security agents, sheet metal work, hospitality and others. An example is shown on Exhibit 25 of the work generally available with the Northern Territory via internet enquiry as at 23 October 1999. The enquiry showed 813 jobs listed as being available at that time including: six apprenticeships, 88 bar and wait staff, two butchering and meat trade jobs, 35 cleaners, four factory hands, 190 farming and fishing, eight nursery, 22 labouring, 81 sales assistants, 1 service station attendant, 22 storepersons and nightfillers and 10 traineeships. This list is the one available on one internet site and there are of course the other sources referred to above.

31. Mr Rupe is able to carry out most of the above jobs. His age and experience are the most serious drawbacks for selection at any one particular job but that would not prevent him obtaining employment after reasonable efforts; to say otherwise would be to say that no young person with limited experience could get work which is plainly not the case.

32. Specific employers were called to give evidence of employment available at their specific companies. On the evidence I find that it was probable that it was unlikely that Mr Rupe would succeed in the rather more limited opportunities in the motor parts industry but I am satisfied he had reasonable prospects in the service station environment either with Mr Egan's employer or one of the other employers in that industry. I find he could carry out that work full time, part time or on shift as he pleased. I see no reason why these employers are not representative of the many other areas of employment some of which are listed above; that is that some will provide reasonable prospects for Mr Rupe and in others he may be lucky to be accepted.

33. In the service station area I note in particular that the workforce is transient; that is there is a high turnover and training is available because they are not always able to find people with experience. The evidence of Mr Egan was that the pay rate was $12.20 and people worked up to 38 hours per week. That pay rate was supplemented by shift allowance but I was not informed what other allowances applied.

34. Whilst some summaries of awards were provided they are not sufficient for me to determine what would be paid to a young man such as Mr Rupe. I was not provided with information as the pay scales or actual salaries paid in many of the various fields of employment open Mr Rupe. All I can do in the circumstances is to say that on the evidence, employment in the areas of service station attendant and other employment types were reasonably available to Mr Rupe and his earning capacity ought to be determined accordingly.

35. If the parties are not able to agree on the precise earning capacity of Mr Rupe in dollar terms then I will need to receive evidence of rates of pay in a significant number of areas to be able to reach a conclusion on this issue.

36. I propose to adjourn to allow counsel to consider their reasons and to settle on the terms of any agreed order.

Dated this 31st day of May 2001.

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HUGH BRADLEY
CHIEF MAGISTRATE