

CITATION: *Willhelm Rauch V Bikes Top End Pty Ltd*
[2023] NTWHC 2

PARTIES: *Willhelm Rauch*

v

Bikes Top End Pty Ltd

TITLE OF COURT: WORK HEALTH COURT

JURISDICTION: WORK HEALTH

FILE NO(s): 2021-01291-LC

DELIVERED ON: 3 February 2023

DELIVERED AT: Darwin

HEARING DATE(s): 9th December 2022

DECISION OF: Judge Fong Lim

CATCHWORDS:

Practice and procedure - amendment of pleadings - merits of proposed amendment - stage of the litigation and impact of occasioned by the amendment - explanation for amendment - opportunity to amend earlier - strain of uncertainty caused by delay - prejudice

Practice and procedure - onus of proof - evidentiary onus - rehabilitation - Work Health - Worker overseas - condition precedent - rehabilitation complete - onus of proof - dux litis

Workers Rehabilitation and Compensation Act 2011
Return to Work Act 1986
Work Health Court Rules 2006

Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175
Queensland v JL Holdings Pty Ltd [1997] 189 CLR 146
Kevin Shephard v Northern Territory of Australia [2013] NTMC 013
Maddalozzo v Maddick [1992] NTSC 46

REPRESENTATION:

Counsel:

Worker: Mr McConnell SC

Employer: Mr Lindsay SC

Solicitors:

Worker: Halfpenny's

Employer: Hunt & Hunt

Decision category classification: A
Decision ID number: 2023 NTWHC 2
Number of paragraphs: 79

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

No. 2021-01291-LC

BETWEEN:

Willhelm Rauch

Worker

AND:

Bikes Top End Pty Ltd

Employer

REASONS FOR DECISION
(Delivered 3rd February 2023)

JUDGE FONG LIM

1. **Factual Background** – The Worker is a German national who suffered a partial amputation of the right arm while working as a bike mechanic for the Employer. The work accident occurred on the 9th October 2011. The physical consequences of the injury are that Worker has been left with a right arm and hand which have very little function and a predisposition to infections in the arm. The Worker has undergone several surgeries over the years and despite recommendations of some surgeon for the amputation of the arm the Worker has refused to have his arm amputated.
2. The Worker returned to Germany in December of 2011 and has received his ongoing treatment in Germany. The Worker has never received weekly benefits on the basis the Worker fell within the meaning of section 65B of the Workers Rehabilitation and Compensation Act 2011¹ which provided

“A Worker is not entitled to be paid compensation under section 64 of 65 during any period the Worker resides outside Australia unless the Worker’s rehabilitation is complete”
3. The Worker’s case is that since about January 2014 his rehabilitation was complete because on medical advice there is nothing more that can be done surgically or medically to improve the functionality of his arm. He claims weekly benefits from January 2014 on the basis that he can only work 2 hours per day managing spare parts at a bike shop.
4. The Employer’s case is that the Worker is prohibited from weekly compensation while he is overseas unless he can prove his rehabilitation is complete. The Employer denies the Worker’s rehabilitation is complete.

¹ Act has since been replaced by the present act being the Return to Work Act 1986

Applications:

5. The Court has before it two applications. The Employer's application to file an amended Defence to the Amended Statement of Claim and the Worker's application to strike out some aspects of the Defence and for a ruling that the Employer is *dux litis* in the substantive proceedings.
6. Both applications require this Court to consider the operation of section 65B in particular who has the legal and evidentiary burden to prove the Worker's rehabilitation is complete for the purposes of section 65B.
7. There is a clear tension created by section 65B and the operation of sections 75 and 75B of the Act.
8. If section 65B creates an obligation in the Worker to prove his rehabilitation is complete against the background where the Employer has a continuing obligation to rehabilitate the Worker (even though he lives overseas)². The Worker would have to rely on the Employer to take all necessary steps to offer rehabilitation services to him before he could be in a position to prove he had taken all necessary steps. On the other hand for the Employer to arrange all the necessary rehabilitation services for a Worker who lived overseas would be a very difficult task which the Employer submitted is recognised through the operation of section 65B. The Employer urged the Court to accept it is the Worker's onus to prove what steps he has taken towards rehabilitation even though that would seem to be a harsh result. The operation of section 65B will be discussed more fully below.
9. I will first consider the Employer's application to amend its Defence as my ruling in the Employer's application will influence the outcome of the Worker's application.
10. **Amendment of pleadings** - the leading authority is the High Court in *AON Risk Services Ltd v ANU*³. Their Honours, in considering a ruling to allow an amendment of a statement of claim on the 3rd day of a four week trial, set out case management principles particularly in reference to the Court Procedure Rules (ACT) rule 21(2)⁴.
11. Their Honours made it plain that the court should consider all applications to amend pleadings balancing all factors to ensure the fair, effective, complete, prompt and economical determination of the proceeding. The Court disapproved the ruling in *Queensland v JL Holdings Pty Ltd*⁵ that if a proposed amendment raised an arguable case and any prejudice could be addressed by an order of costs then the amendment should be allowed.
12. It is also incumbent on this Court to consider these applications in light of the beneficial nature of the Workers Rehabilitation and Compensation Act (as it then was) when interpreting the operation of its provisions.

² Section 75 & 75B

³ [2009] 239 CLR 175

⁴ the equivalent rule in the Local Court (Civil Jurisdiction) rules (NT) is Rule 1.11(2)

⁵ [1997] 189 CLR 146 at 154 -155

13. The Court's power to amend pleadings is contained in Rule 8.08 of the Work Health Rules and amendment of pleadings should be considered

"when they are necessary for determining the real questions at issue between the parties even though the effect would be to add or substitute a cause of action which arose after the commencement of the proceedings"
14. **The proposed amendment to the Defence** - The proposed amendment to the Defence is to add paragraph 15A which the Employer submits details the real issue between the parties by outlining the Worker's obligations to submit to assessment and rehabilitation and training to improve his fitness for work.
15. The Employer submitted the "completion" of the Worker's rehabilitation must be read in reference to the broader definition of "rehabilitation" set out in the Workers Compensation and Rehabilitation Act⁶.
16. The original Defence claimed the Worker had not completed his rehabilitation because he had failed to undertake the recommended amputation of his arm and the consequent fitting of a prosthesis⁷.
17. The Employer submitted that the receipt of the report of Professor Giunta in early 2022 made it clear that the Worker had made a firm decision not to amputate his arm necessitating the Employer to now consider the rehabilitation of the Worker to increase his employability accepting his decision to refuse amputation.
18. The Worker resists the amendment on the basis that the amendment is a tactical manoeuvre by the Employer to shore up their Defence to the Worker's claim because they have now realised their previous stance was doomed to fail.
19. The Worker submitted the Employer has always defended the Worker's claim on the basis that the Worker's failure to accede to the amputation equated to a failure to complete rehabilitation. The amendment is an attempt to broaden the Employer's Defence. The Employer has not until very recently taken steps to assess the Worker's employability and should not be able to now raise this as an issue in these proceedings at this late stage.
20. The Employer accepted they have not previously looked at the broader rehabilitation aspects of the Worker's situation but put forward the broader aspects of rehabilitation only became an avenue to be explored when the Worker made a firm decision not to have the amputation once provided with all the relevant information.
21. The correspondence annexed to the affidavits from the solicitors for the Worker and the Employer demonstrate the Worker has always refused to take the option of amputation of his arm and that the Employer has always maintained that the Worker's refusal to undertake the amputation was unreasonable.

⁶ Reprint 1 September 2011

⁷ See paragraph 13 of the Defence

22. **Questions to answer in Employer's application to amend**
- a. Does the amendment jeopardise the hearing dates?
 - b. Does the amendment ensure the proceedings will decide the real issues between the parties and avoid a multiplicity of proceedings?
 - c. Has the Employer had ample opportunity to plead its case and is there a reasonable explanation for the delay in the pleading?
 - d. Will the amendment cause delay and prejudice and strain to the Worker which cannot be compensated for by an order for costs?
 - e. Has the Employer made a tactical decision which it now seeks to change by way of the amendment?
23. In balancing the answers to the above the Court must consider whether it would be just in all the circumstances to allow the amendment.
24. Does the amendment jeopardise the hearing dates?
25. There was some confusion as to whether the matter had been listed for hearing commencing the late February early March 2023. In fact the proceedings had never been set down for hearing. The parties were advised by email that the court was prepared to set aside those days on the basis that the parties were to advise whether all witnesses were available to give evidence and the logistics of taking evidence given all witnesses reside in Germany. There was never a confirmation of those hearing dates.
26. Worker submitted they were ready to proceed in March however had not taken into account the limited hours the court would sit given the time difference with Germany and other practicalities such as the availability of witnesses. They had not communicated with the Court they wanted the March dates confirmed despite having had several pre hearing conferences where they had the opportunity to do so.
27. At the time of hearing these applications only one of the two weeks remained available and it became clear should the hearing commence in March this would result in the real possibility of the matter being adjourned part heard to a date later in the year.
28. Taking into account this courts limited ability to allocate dates for lengthy hearing this matter was then listed for hearing in June of 2023 some 6 months away.
29. In those circumstances the answer to the question is no.
30. Does the amendment ensure the proceedings will decide the real issues between the parties and avoid the multiplicity of proceedings?
31. The Employer submitted one of the real issues before the court is whether the Worker had completed his rehabilitation. The Employer has always maintained the Worker had not completed his rehabilitation by refusing to accept an amputation and the fitting of a prosthesis.

The Employer has always accepted that subsequent to the amputation they would have to pay for any treatment, physiotherapy and other retraining of the Worker⁸.

32. Until very recently the Employer took no steps to assess the employability of the Worker or his capacity to earn even though they were made aware that the Worker had obtained himself some part time work managing spare parts for a bike shop and had been undertaking that work for 9 years.
33. The correspondence between the Insurer and the mother of the Worker shows the Insurer advised the Worker's claim for weekly benefits was rejected because he lived overseas but accepted he should be reimbursed for reasonable medical expenses.
34. On the 12th May 2016 the Insurer mentioned the possibility of engaging a rehabilitation provider for retraining and employment services⁹ however then there is no further mention of rehabilitation providers until about September of 2022.
35. The provisions of the Workers Rehabilitation and Compensation Act create a continuing obligation on the Employer to support the Worker in his rehabilitation¹⁰. This obligation is not affected by section 65B and survives a Worker's move overseas. The Employer is required to provide the Worker with support including paying for the cost of such reasonable rehabilitation including retraining etc. to, as far as is practicable, get the Worker back to his same physical economic and social condition he was in before the injury.
36. The Employer submitted the amendment would ensure there is not a multiplicity of proceedings because if they are not permitted the amendment then there may be the need for further proceedings in the future regarding the further rehabilitation of the Worker.
37. The Worker responded to that submission by pointing out that the Employer has always been aware of its obligations to provide the vocational rehabilitation as is evidenced in the email of the 12 May 2016 but until now has not taken any steps to assess and assist the Worker in vocational rehabilitation.
38. The Worker also submitted because the Employer had a continuing obligation to support the Worker through his rehabilitation even if the amendment is allowed and the issue of the Worker's present incapacity is decided in these proceedings there is always the possibility of circumstances changing necessitating reassessment of the Worker's incapacity and further litigation. I agree with the Worker's submission on this point.
39. Another real issue between the parties is the level of the economic loss occasioned by the Worker's physical incapacity from January 2014 to present time. Any change to his circumstances may result in a change to that loss but until then the Worker is entitled to have a ruling from the Court in relation to his earning capacity without speculating on vocational assessments and retraining which has yet to occur.
40. I do not accept that the amendment would necessarily avoid the multiplicity of proceedings.

⁸ Refer to affidavits in support so the applications annexures of correspondence between the parties

⁹ Annexure CLS15 to the affidavit of Spurr of the 7th December 2022

¹⁰ See Division 4 Part V Workers Compensation and Rehabilitation Work Health Act (NT) in particular section 75 and 75B

41. Has the Employer had ample opportunity to plead its case and is there a reasonable explanation for the delay in the pleading?
42. The Employer has had ample time to plead its case as the Worker filed his amended Statement of Claim in October 2021.
43. The Employer's explanation for delay in the amendment to pleadings is that the Worker's recent ultimate decision not to amputate his arm triggered the need to move toward vocational assessment etc. instead of surgery, fitting of prosthesis and rehabilitation in the use of that prosthesis.
44. The difficulty with that submission is that it has always been the Worker's position that he did not want his arm to be amputated and the Employer has always maintained the Worker's refusal to amputate means he has not completed his rehabilitation.
45. The Statement of Claim seeks weekly benefits from the 1 January 2014, the date upon which the Worker claims his rehabilitation was completed based on medical advice that nothing more could be done for his arm and that he has reasonably refused the amputation.
46. In the original Defence filed in answer to the Worker's claim in paragraph 13 that he had reasonably chosen not to amputate the Employer has plead:

"the Worker has failed to mitigate his loss or participate in rehabilitation by not accepting an amputation and subsequent prosthesis"
47. In answer to the Worker's claim in paragraph 15 the Employer responded:

"says the Workers rehabilitation is not complete.. for the reasons set out in paragraph 13"
48. The original Defence has always referred to the amputation and subsequent consequences.
49. The Employer submitted that the amendments sought are not seeking to introduce a new issue they are seeking to make it clear that they are relying on the broader definition of rehabilitation to include vocational assessment and retraining.
50. The Employer also submitted the retraining and vocational assessment of the Worker really only became a path available to the Employer once the Worker made the firm decision regarding the amputation therefore the Worker's capacity to earn is a real issue between the parties and ought to be allowed to be agitated at the hearing in these proceedings
51. I do not accept the submission the amendment merely seeks to particularise the rehabilitation which is not complete and not add a new Defence to the Worker's claim.
52. There is presently no evidence which supports any claim that the Worker would be able to participate in further employment which in turn would produce more income than he presently earns. The Worker has been working in his limited capacity for some 9 years and the Employer has not attempted to have the Worker engaged in any sort of vocational rehabilitation or return to work program, the proposed amendment in paragraph 15A is speculative and in my view a cynical attempt by the Employer to change tact in its Defence of the Worker's claim.

53. Although the rules of court allow for amendment of pleadings “to add or substitute a cause of action which arose after the commencement of the proceedings” the Employer’s amendment is not such an amendment. The Defence of the Worker’s claim for benefits on the basis that his rehabilitation is not complete has always been available to the Employer they chose not to defend the claim on the basis that he had not undertaking vocational assessment and possible return to work programs.
54. It should be noted even if I do not allow the amendment to the Defence the Worker will still have to establish the level of his capacity to earn and the Employer will still have ability to defend that claim with evidence contrary to what is claimed by the Worker.
55. Will the amendment cause delay and prejudice and strain to the Worker which cannot be compensated for by an order for costs
56. The Worker highlighted the probable delay in the resolution of his application for weekly benefits and the emotional strain of prolonged litigation as prejudice which will be caused by the amendment.
57. The Worker also pointed to the lost opportunity which he may have had if his retraining and rehabilitation had been arranged at an earlier time however that is not a prejudice he would suffer if the amendment to pleadings is allowed - that is a missed opportunity he already suffers.
58. The strain of further prolongation of the litigation is real. Should the amendments be allowed the Worker will face a new process of assessment and possible return to work programs while continuing to live on limited income before having his claim for weekly benefits resolved.
59. If the amendments are not allowed there is nothing to stop the Employer fulfilling its obligation under sections 75-75B of the Act. If the Employer is allowed the amendment, then workers application for weekly benefits could be subject to continuing delays at the hands of the Employer while they arrange his further rehabilitation.
60. In those circumstances possible delays in the Workers application for weekly benefits would be significant.
61. Has the Employer made a tactical decision which it now seeks to change by way of the amendment
62. I refer to my comments above in paragraph 49 and confirm my view the Employer has indeed changed direction in its defence of the Workers claim.
63. **Ruling** – In balancing all of the above and considering what would promote the fair and efficient resolution of the Worker’s claim it is my view the insertion of paragraph 15A into the Notice of Defence ought not to be allowed. The Employer, through that amendment is introducing a fresh basis to defend the Worker’s claim and by doing so would expose the Worker to the fresh process of vocational assessments and all the may result from those assessments which will cause a further lengthy delay in the Worker’s case.
64. The Employer has a continuing obligation to rehabilitate the Worker and Worker has an obligation to engage in that process. If the Worker does not engage in the process then the

Employer would have recourse to the Court in due course. There is no prejudice to the Employer. Presently there is no basis upon which the Employer can claim the Worker has unreasonably refused to participate in rehabilitation by way of return to work programs etc. and the Worker is entitled to press for a ruling on the level of weekly benefits he is entitled to as well as a ruling as to whether those benefits are payable.

65. The Employer's application to amend its Defence is refused.
66. **Worker's application - Dux litis** – it is trite that the person who makes application to the court and who seeks a remedy bears the burden and goes first. It is also generally agreed in the Work Health Court if a Worker makes a claim for benefits which have been initially refused then the Worker is dux litis. It is also agreed that the issue of dux litis is within the discretion of the court and the decision should be made to promote the efficient disposal of the proceedings.
67. In considering who is dux litis, the court should consider, what is the central proposition with respect to the issue.¹¹
68. In the present matter the Worker's injury and the continuing physical effects of that injury are not at issue in fact his original claim was accepted. It is the Worker's entitlement to be paid weekly benefits while living overseas and the reasonableness of the medical and treatment expenses claimed which are at issue.
69. The Statement of Claim recognises that the Worker's entitlement to be paid weekly benefits under section 65 is affected by the operation of section 65B of the Act¹². It should be noted at this point the Employer's obligation to pay for all reasonable medical expenses is not affected by the operation of section 65B.
70. The Employer submitted when applying the reasoning the *Maddalozzo and Ors v Maddick*¹³ the Court must come to the conclusion that the completion of the rehabilitation is a pre-condition to the payment of weekly benefits to a Worker who resides overseas. The Employer also submitted if the completion of rehabilitation is a precondition to the entitlement to compensation then it is for the Worker to prove that completion to be entitled to weekly benefits. The Employer submitted, the completion of rehabilitation must be a precondition to the entitlement to weekly benefits because of the difficulties the Employer would have in referring a Worker to services overseas. If the Worker has removed himself from Australia away from the services readily available to him then he should be responsible for arranging his own rehabilitation, and therefore bears the burden to prove that rehabilitation is complete.
71. The Worker submitted to the contrary the word "paid" should be not ignored and given full effect. If the Worker can prove all necessary elements that form the basis of an entitlement to compensation that he falls within the definition of Worker, he has had an injury out of or in the course of employment and that injury has resulted in his loss of earning capacity, then the fact of him being overseas and not having completed his rehabilitation is not a pre-condition to his entitlement to compensation, but a precondition to his entitlement to be paid his compensation.

¹¹ Refer to Dr Lowndes' analysis in *Shepherd v Northern Territory of Australia* [2013] NTMC 013

¹² Paragraph 15 of the Amended Statement of Claim

¹³ [1992] NTSC 46

72. Strength is added to the Worker's submission by the fact that the Employer's obligation to pay for reasonable medical expenses is not affected by the Worker living overseas. The Workers' entitlement for that type of compensation survives a move overseas.
73. Further section 65B refers to the Worker residing outside of Australia "during any period". In my view those words recognise the restriction on the Worker getting paid compensation would be lifted if the Worker returned to Australia at any time
74. I agree with the Worker's analysis of the effect of section 65B and that is the section does not affect essential elements of the Worker's entitlement to benefits, but rather provides a basis for which the Employer can refuse to pay the weekly benefits. It is the Employer who has the obligation to rehabilitate the Worker and it cannot rely on its own omissions not to offer vocational retraining, return to work programs and so on as a basis to claim the Worker has failed in his obligation to participate in rehabilitation.
75. In the present case as it is accepted by the Employer, that the Worker has suffered a compensable injury. The Worker has the legal and evidentiary burden to prove his level of incapacity to earn and the reasonableness of medical expenses claimed. The Employer then has the burden to prove the Worker's rehabilitation was not complete as at January 2014. The Employer also has the legal and evidential onus to prove the Worker has failed to mitigate his loss as pleaded in its Defence.
76. In those circumstances one of the central issues must be the Worker's capacity to earn and another his entitlement to any weekly benefits. Only the Worker can call evidence as to his present incapacity and his limitation on what he can and cannot do with his arm. The Employer could then call evidence to support its Defence that the Worker's rehabilitation is not complete and any evidence to support a finding that the Worker's capacity to earn is higher than he claims.
77. Accordingly, the balance of convenience and the efficient progress of the proceedings support a finding that the Worker should be *dux litis*.

Strike out application

78. Given my ruling above, the words "the Worker has failed to show that" in paragraph 21 (c) of the Defence are struck out and the Employer has leave to amend accordingly to reflect the omission of those words.
79. **Costs:** I will hear the parties on costs