Wright v Glencore Queensland Limited [2016] QSC 247

In the recent decision of Wright v Glencore Queensland Limited [2016] QSC 247, the Queensland Supreme Court clarified the rights of insurers and workers regarding assessments for permanent impairment under the Workers' Compensation & Rehabilitation Act 2003 (the Act). Caillan Massey and Mark Wiemers now of Barry.Nilsson. acted on behalf of the self-insurer.

Key takeaways

1. Insurers should review assessments to ensure that the doctor complied with the requirements of the Guidelines for the Assessment of Permanent Impairment (GEPI);
2. If the doctor has not complied with the GEPI, as required by the Act, an insurer is within its rights to refuse to issue a Notice of Assessment under section 185 of the Act and may refer the worker to another doctor for a fresh assessment; and
3. If a worker is dissatisfied with their assessment and the insurer agrees to a reassessment by another doctor under section 186(3) of the Act, the insurer or worker may withdraw their agreement to the identity of the doctor who will perform the reassessment until such time as the reassessment has taken place - provided they are acting reasonably.Valid grounds for a withdrawal of agreement will likely include a doctor's lack of availability or lack of expertise to assess the injury.

Decision

In accordance with section 179 of the Act, the worker was assessed for permanent impairment. The assessment was carried out by Dr David Ness, orthopedic surgeon,

who assessed a degree of permanent impairment (DPI) of 3%.

As the injury was subject to the 5% DPI threshold (applicable to injuries sustained between 15 October 2013 and 31 January 2015), the 3% assessment would have prevented the worker from seeking common law damages. Accordingly, the worker disagreed with the assessment and requested that the self-insurer have his injury assessed again by another doctor - in accordance with the procedure set out in section 186(2)(b)(i) of the Act.

The insurer agreed to the worker's request and shortly thereafter Dr Shaw performed the reassessment and assessed a DPI of 7%, which would have entitled the worker to seek common law damages. The self-insurer sought clarification regarding the assessment which resulted in Dr Shaw conceding that he had not complied with some of the requirements in the AMA5 for measuring range of motion. Based upon Dr Shaw's concession, the self-insurer refused to issue a Notice of Assessment under section 185 of the Act on the basis that Dr Shaw had not performed an assessment for permanent impairment under section 179 because the section requires that the assessment be performed in accordance with the GEPI (which in itself incorporates the methodology of the AMA5).

The worker then filed an application seeking a declaration that he was entitled to a Notice of Assessment based upon Dr Shaw's reassessment. That application however was withdrawn by the worker when it became common ground that Dr Shaw's reassessment had not been in accordance with section 179 of the Act.

The worker then insisted that the matter be referred back to Dr Shaw to undertake a fresh assessment according to law. The self-insurer did not agree to this and advised by letter that it withdrew its agreement to Dr Shaw performing the reassessment. In doing so, the self-insurer put forward a panel of three other doctors to perform the reassessment.

The worker did not pick a doctor from the panel and instead filed an application seeking an order that the self-insurer was bound by its agreement to Dr Shaw performing the reassessment.

The relevant part of section 186 provides:

(2) The worker must advise the insurer within 20 business days after the original notice is given (the decision period) that the worker—

(a) does not agree with the degree of permanent impairment; and

(b) requests—

(i) that the insurer has the worker's injury assessed again under section 179 by an entity mentioned in section 179(2) and agreed to by the worker and the insurer, (other than the entity that gave the report to the insurer under section 179(3)); or

(ii)that the insurer refer the question of degree of permanent impairment to a tribunal for decision.

(3) If the worker makes a request mentioned in subsection (2)(b)(i), the insurer must decide, within 10 business days after receiving the request, whether to have the worker's injury assessed again under section 179 to decide if the worker's injury has resulted in a degree of permanent impairment.

The worker argued that the decision by the self-insurer under section 186(3) was to have a reassessment performed by Dr Shaw. The self-insurer argued however that its decision was to have a reassessment performed by a doctor and that the agreement about the identity of the doctor who performed the reassessment was a separate step. Accordingly, while the self-insurer was bound to have a reassessment performed by a doctor, it could withdraw its agreement as to who that doctor was up until the time that the reassessment was performed.

Upon review of the legislation, Henry J agreed with the self-insurer's argument and found that under section 186(3) of the Act the self-insurer had to decide (within 10 business days after the request) whether to have the injury assessed again by a doctor. That decision however did not include agreeing to the identity of the doctor who would perform the reassessment because that was a separate decision. As far as who would perform the reassessment, that was for the parties to agree on however the self-insurer was entitled to withdraw its agreement provided it was exercising its discretionary power under statute reasonably.

The application was dismissed, and the worker was ordered to pay Glencore's costs.

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