

Edwards v Territory Insurance Office [2009] NTSC 6

PARTIES: EDWARDS, MALCOLM

v

TERRITORY INSURANCE OFFICE

TITLE OF TRIBUNAL: MOTOR ACCIDENTS
(COMPENSATION) APPEAL
TRIBUNAL

JURISDICTION: APPEAL PURSUANT TO S 29 MOTOR
ACCIDENTS (COMPENSATION) ACT NT

FILE NO: M1 of 2008 (20801497)

DELIVERED: 5 March 2009

HEARING DATES: 15 – 19 December 2008

DETERMINATION OF: ANGEL J

REPRESENTATION:

Counsel:

Applicant: Ms S Gearin
Respondent: Ms J Kelly SC

Solicitors:

Applicant: Withnalls
Respondent: Minter Ellison

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IN THE MOTOR ACCIDENTS
(COMPENSATION) APPEAL TRIBUNAL
DARWIN REGISTRY

Edwards v Territory Insurance Office [2009] NTSC 6
No. M1 of 2008 (20801497)

BETWEEN:

MALCOLM EDWARDS
Applicant

AND:

TERRITORY INSURANCE OFFICE
Respondent

CORAM: ANGEL J

REASONS FOR DETERMINATION

(Delivered 5 March 2009)

- [1] This is a reference pursuant to s 29 Motor Accidents (Compensation) Act NT from a decision of the Territory Insurance Office Board dated 17 December 2007 upholding a decision dated 28 April 2007 of the designated person that the applicant Malcolm Edwards was not entitled to s 13 benefits from 28 February 2007 because he was capable of engaging in full time employment. The hearing of the reference is a hearing *de novo*: s 29(4).
- [2] The applicant sustained a comminuted fracture of the right patella as a result of a motor vehicle accident at Palmerston on 12 December 2002. Following the accident his knee was internally fixed. It continued to cause him difficulties and he was referred to Dr Sharland an orthopaedic surgeon.

In September 2003 Dr Sharland performed an arthroscopy on Mr Edwards' knee and removed two wires. Dr Sharland saw the applicant again in November 2003, December 2003 and December 2004.

- [3] On 5 May 2003 the applicant applied for benefits under the Motor Accidents (Compensation) Act. The respondent accepted the applicant's claim on 15 May 2003 and the applicant was paid benefits for the loss of earning capacity pursuant to s 13 of the Act from that date.
- [4] On 4 January 2005 at the request of the respondent Dr Sharland provided the respondent with a medico-legal report concerning the applicant's level of impairment. He said, inter alia:

“Mr Edwards is suited to a sedentary occupation where he can change position on a regular basis as prolonged sitting is also exacerbating to his condition.

He is able to perform a light manual job if he can alternate between sitting and standing as he cannot stand for more than two hours without significant pain.

He is unable to perform medium or heavy physical jobs. He cannot perform any lifting. He cannot squat. He cannot climb stairs.”

- [5] Earlier, on 3 February 2004 at the request of the respondent the applicant had seen another consultant orthopaedic surgeon Dr Lewis. Dr Lewis provided the respondent with a report dated 5 February 2004 wherein he said:

“He (the applicant) could perform work, which did not involve standing for lengthy periods, walking further than 200 metres or so or squatting and kneeling and going up or down stairs.”

- [6] Dr Lewis saw the applicant again on 16 August 2005. The applicant told Dr Lewis that the pain in his right knee was more severe than it had been 18 months before, that it was present virtually all the time and made worse by walking, standing or sitting, that he could walk for approximately half a kilometre but then suffered significant pain in his knee and that he could not run or walk quickly.
- [7] In early 2006 the respondent obtained a short surveillance video of the applicant playing cricket in his yard with his children, walking out on the road. This was sent to Dr Sharland who was asked for a further opinion on the applicant’s capacity for employment. Dr Sharland reported that the video indicated there had been some slight exaggeration on the applicant’s part in terms of how far he could walk and an inability to walk quickly but that he was not inclined to change his assessment in broad terms from that given in his previous report.
- [8] In April 2006 the respondent sent Dr Sharland another brief surveillance video and requested a further opinion on the applicant. Dr Sharland replied in a report dated 20 April 2006 that the video was consistent with his earlier opinions which he summarised as follows:

“I stated that Mr Edwards can work on a full time basis in a sedentary occupation, or a light manual job that he can alternate

between sitting and standing, as he has difficulty standing for more than two hours without significant pain.

I stated he was unable to perform medium or heavy physical jobs.

That remains my current position, and certainly not that he is totally unsuited to any work.”

[9] On 28 February 2007 Dr Sharland saw the applicant again and provided the respondent with a report dated 7 March 2007 wherein he expressed the opinion that the applicant “had the capacity to do many of the jobs” which Denise Dixon, a psychologist who performs vocational assessments, had listed as suitable for the applicant, taking into account his areas of interest. Among those jobs was stock control clerk (provided the applicant could alternate between sitting and standing) service station attendant, accounts receivable clerk, security officer, car park attendant, maintenance scheduler (if the applicant could get up and down), registry or filing clerk, purchasing officer and courier driver (as long as the packages were very light, less than two kilograms). On 28 March 2007 Dr Sharland certified the applicant as currently medically fit for full time employment in certain very light (sedentary) occupations.

[10] By a decision of the designated person made on 28 April 2007 the respondent determined that applicant was not entitled to s 13 benefits from 28 February 2007 on the basis of the medical assessments obtained by the respondent that the applicant was capable of engaging in full time employment. The applicant requested that the matter be referred to the

Board which on 17 December 2007 confirmed the decision of the designated person.

[11] In October 2007 the applicant's solicitors referred the applicant to Dr Millons, an orthopaedic surgeon who saw the applicant on 16 October 2007. During that consultation the applicant told Dr Millons:

(a) that the applicant needed a walking stick when home and out and about;

(b) that he could barely walk one block before having to have a spell;

(c) that his right knee was "always painful";

(d) that he had problems negotiating stairs and slopes;

(e) that he could not drive very far;

(f) that he still tried to walk and swim a few times a week.

[12] Dr Millons concluded that the applicant's knee problems "would restrict him to working in a suitable capacity perhaps four hours a day and then only if the position was suitable".

[13] On 31 March 2008 the applicant saw Dr Geoffrey Graham at the request of his solicitors. In his report of 8 April 2008 Dr Graham said the applicant "can undertake positions which are primarily sedentary but which enable him to move about should his knee symptoms increase". Dr Graham said that jobs as stock control clerk (if the applicant had an opportunity to sit and rest when necessary), accounts receivable clerk (if he is able to vary his

position), car park attendant (if it involved cashier duties within a booth with the ability to vary his posture), maintenance scheduler, registry or filing clerk and purchasing officer were appropriate jobs for the applicant. Dr Graham said that the applicant could work full time as an accounts receivable clerk, maintenance scheduler, registry or filing clerk or purchasing officer.

[14] In August 2008 the respondent arranged for the applicant to be seen by Dr Phillips, a consultant orthopaedic surgeon. The applicant saw Dr Phillips on 7 August 2008. In his report of 19 August 2008 Dr Phillips said the applicant presented with a stiff legged gait on the right, a marked lean or falling to the left whilst using a walking stick on which he leaned heavily, and that to Dr Phillips the applicant's gait derangement was unusual and exaggerated. Dr Phillips agreed with Dr Sharland's assessment of the applicant's capacity for work.

[15] The respondent arranged for a Mr Harris of Western Investigations to conduct covert surveillance on the applicant and to take video footage. Video footage was taken on 3, 4 and 5 October 2008. On each day the applicant walked a route that took him from his house in Driver Avenue, Palmerston up to shops in the same street, back down Driver Avenue, through a park, along Erldunda Avenue, University Avenue, Chung Wah Drive, Temple Terrace, Tilston Avenue, back along the other end of Erldunda Avenue, back through the park and along Driver Avenue to his house. The route was a little over seven kilometres. It involved a number of

up hill and down hill segments and a set of stairs leading up to a rotunda where he met his son. He did not appear tentative or use a stick and walked briskly at times. The video footage showed the applicant driving to a service station and to the hospital. He did not use or carry a stick at the service station but did so at the hospital. He got into and out of the car bending both knees to approximately 90 degrees.

[16] On 8 October 2008 the applicant saw Dr Sutcliffe an experienced occupational physician. He presented with a walking stick and walked with a limp. He told her that:

- (a) he continues to use walking stick constantly;
- (b) he continues with medication for pain which is constantly present;
- (c) he had pain in the anterior of his right knee at an intensity of seven on a scale of nought to ten where nought is no pain and ten is the worst pain imaginable;
- (d) the pain increased to an intensity of nine at times;
- (e) the pain was sharp and throbbing in nature;
- (f) the pain decreases only when lying down;
- (g) there is increased pain on walking and sitting;
- (h) the pain in his right knee is increased with activity and standing is limited to ten minutes as a result;

- (i) walking is also limited and results in increased pain;
- (j) sitting is limited to 30 minutes;
- (k) he avoids using stairs and has in the past noted increased pain so that he cannot get up stairs;
- (l) his knee has given way coming down stairs;
- (m) he has similar difficulty with slopes;
- (n) driving is limited to short distances locally;
- (o) he is able to undertake a little swimming and can use a treadmill with handrails for limited period.

[17] Dr Sutcliffe concluded that the applicant “has no capacity for full time employment and ... his employment must now be limited to about four hours a day, and must be very substantially restricted in nature”.

[18] The respondent concedes that the applicant has suffered a loss of earning capacity as a result of the admittedly severe injury to his knee.

[19] The applicant is a 40 year old former mechanic and stevedore. He is an insulin dependant diabetic, having been first assessed as diabetic at the age of five. As a consequence of the injuries he sustained in the motor vehicle accident he is unable to kneel, unable to squat, unable to sit or stand or drive for prolonged periods, suffers periodic pain and swelling in his knee and needs at times to take prescription pain killing medication (panadene forte)

and anti inflammatory medication, the former up to a maximum of eight tablets per day. All the medical practitioners who gave evidence, Dr Sutcliffe, Dr Sharland, Dr Phillips, Dr Graham and Dr Millons agreed that the applicant suffered a serious injury to his right knee.

[20] The respondent's concession that the applicant has suffered a loss of earning capacity does not necessarily mean compensation is payable. Compensation ordinarily payable pursuant to s 13(1) Motor Accidents (Compensation) Act is by reason of s 13(2)(b)(ii) not payable for any weekly period that the Board determines the person is capable of working full time, regardless of the type of work. The respondent says the applicant is not entitled to compensation pursuant to s 13(1) because during the relevant period he was capable of working full time. The issue for determination is whether the applicant was capable of working full time at some occupation "regardless of the type of work". If so, he is thereby ineligible for benefits.

[21] It was submitted that the designated person on 28 April 2007 could not determine that the applicant was not entitled to s 13 benefits from 28 February 2007. It was submitted that this was an "unlawful retrospective cancellation of benefits".

[22] There is no substance in this submission. Section 13(2)(b)(ii) provides that compensation is not payable under s 13(1) for "*any weekly period* that the Board determines the person is capable of working full time, regardless of the type of work". There is no reason to think the relevant weekly period can

not be a weekly period preceding the date of determination. There is no reason why the decision of the designated person should not be retrospective in the sense of stating that the entitlement to benefits ceased on a date prior to that determination. Even if there were a defect in the decision of the designated person such defect would be rendered irrelevant by the decision of the Board and in any event by the reference to this Tribunal. The hearing by the Tribunal, as I have said, is a hearing *de novo*, the Tribunal having to determine whether for “any weekly period” the applicant is or was capable of working full time regardless of the type of work.

[23] Having considered all the evidence I have reached the conclusion that the applicant, while suffering residual physical limitations as a consequence of his serious injury, does not suffer physical limitations such as to render him incapable of performing the flexible sedentary jobs described by the witness Mr Williams (security guard in a static guardhouse) and Mr Neil (Darwin City Council clerk) on a full time basis. Nor would the applicant’s residual disabilities preclude him from the occupations of maintenance scheduler, registry or filing clerk or purchasing officer.

[24] A medical assessment of a person’s earning capacity for the purposes of s 13 must only have regard to residual disabilities arising from the accident and not factors such as the availability of employment or the person’s level of education, vocational skills, numeracy and literacy skills or employment or other experience: s 4(c) of the Motor Accidents (Compensation) Amendment Act 2002.

[25] The preponderance of the medical evidence is that the applicant would be physically capable of full time employment in the jobs I have mentioned. I am unable to accept Dr Sutcliffe's conclusion that the applicant has or had "no capacity for walking" in an occupation. I am of the opinion the applicant has exaggerated his disabilities and that Dr Sutcliffe's apparent reliance upon his account renders her conclusion unreliable.

[26] I do not accept the applicant's evidence that he has "good" and "bad" days, "good days", when he can walk seven kilometres, and "bad days", when he is in severe pain and badly disabled. That evidence, as was submitted, is contradicted by what he consistently told medical practitioners over a number of years and his use of and evidence about using a walking stick. It is inconsistent with his evidence that the pain in his knee was usually seven on a scale of nought to ten at times increasing to nine. It is inconsistent with his walking seven kilometres on three successive days and his story that he always used a walking stick. Significantly, he did not mention "good" days and "bad" days to doctors. Nor did he mention his seven kilometre walks to doctors. The inconsistencies between the applicant's account to doctors of his walking ability, the very limited flexion of which he said he was capable both to doctors and to the Tribunal when giving evidence and the flexion demonstrated in the video surveillance footage of him getting into and out of his car indicate that the applicant has grossly exaggerated his level of pain and disability.

[27] Dr Sutcliffe gave evidence that she wondered whether the applicant was suffering from some cognitive deficiency. I must say the applicant at times when giving evidence appeared somewhat slow mentally and to have intellectual difficulties. There was no psychological evidence called. The applicant, while claiming to be always in pain, called no evidence to suggest he suffered from chronic pain leading to adverse psychological consequences which rendered him unfit for employment.

[28] The Tribunal determines that the applicant is and has been since the date determined by the designated person capable of engaging in full time employment. Accordingly he is not entitled to compensation by reason of s 13(2)(b)(ii) of the Act.
