Detchon v Department for Correctional Services **[2005] SAWCT 108**

WORKERS COMPENSATION TRIBUNAL (SA)

DETCHON, David

v

DEPARTMENT FOR CORRECTIONAL SERVICES

JURISDICTION: Judicial Determination

FILE NO/S: 2062 of 2005

HEARING DATES: 12 September 2005

JUDGMENT OF: His Honour Deputy President Judge JP McCusker

DELIVERED ON: 15 December 2005

CATCHWORDS:

Judicial Determination - Worker suffers from an underlying asthmatic condition which is not work-related - Continual exposure to heavy smoke in the workplace exacerbated worker's symptoms - Symptoms ease when not exposed to smoke - Condition now more reactive and more difficult to treat - Whether disability transient or results in a ongoing partial incapacity - Whether worker is entitled to weekly payments of income maintenance based on partial incapacity - Workers Rehabilitation and Compensation Act 1986.

Asioty v Canberra Abattoir Pty Ltd (1989) 167 CLR 533
Caldipp Pty Ltd t/as Slaven Motors v Delov [2002] FCAFC 352
Holt v Comcare [2003] FCAFC 221

REPRESENTATION:

Counsel:
Applicant: Mr S Blewett
Respondent: Mr B Ikonomopoulos
Solicitors:
Applicant: Lieschke & Weatherill
Respondent: Crown Solicitors Office

1 This is a claim for ongoing entitlement to compensation on the basis of partial incapacity. The parties have described the issues as follows (TB 3):-

> "1. Whether the worker's exacerbation of his pre-existing asthma on 4 January 2005 has resulted in incapacity for work and, if so, what was the duration and extent of such incapacity?
>
> 2. Whether the January 2005 exacerbation of the worker's asthma has resulted in an entitlement to weekly payments of income maintenance based on an ongoing partial incapacity for pre-injury work?"

2 The worker, now aged 36, commenced employment with the Department for Correctional Services in July 2001 (TB 12). He was engaged as a warden at Mobilong Prison. His duties included unlocking and inspecting the prisoner's cells. The prisoners were allowed to smoke in their cells with the doors closed. Smoking was also tolerated in the adjoining areas. These circumstances created a smoke filled atmosphere which was particularly heavy when entering the cells or when the cells were opened in the mornings. As Mr Blewett, counsel for the applicant, submits (tr 52) there is little question but that the worker was exposed to high levels of tobacco smoke in his daily work at that time.

3 The worker has had asthma since childhood. It improved in adulthood. However he says that towards the middle of 2004 he noticed his asthma was becoming a serious problem. He believed this was because of the exposure to smoke at Mobilong during the six to eight months prior to the middle of 2004 (tr 38). It was a generalised decline (tr 8). The signs and symptoms were tightness of the chest, a scratchy throat, eyes running, nose running, difficulty in concentration and a lethargic feeling. While he had had symptoms of this type previously, due to his exposure at Mobilong the symptoms became worse, more frequent and more resistant to correction by medication (tr 8, 9). He also became more vulnerable to small levels of exposure (tr 9). He described the change in the following terms (tr 9):-

> "About how regularly before coming to Mobilong did you experience an asthma attack?---Maybe once a year particularly if I had a cold, flu.
>
> …
>
> Was there any change in frequency of attacks that you had noticed by about the middle of 2004 as compared with your adult life up until that point?---Yes, it was becoming more

> frequent. At work I was having to use Ventolin or Bricanyl to - I'd have to use it at work, which prior to that I was not - I wasn't needing it. Towards the middle of 2004 I was probably using it a couple of times a week at work."

Prior to Mobilong the worker had taken Ventolin or Bricanyl about three times a year, but by the middle of 2004 he was using it at work three or four times a week (tr 12). These medications are used to manage the acute phases of asthma (tr 17).

4 The contemporaneous documents confirm the worker's difficulties. He made an occupational health and safety accident injury report on 21 July 2004 detailing an asthma attack on inhaling smoke during lock-up in the Light Unit (Exhibit A2). The matter was processed from that perspective. However on 4 January 2005 the worker had a particularly bad asthma attack due to cigarette smoke (TB 14). It forced him to leave work and attend his doctor.

5 A prescribed medical certificate was issued by his general practitioner Dr Martin (TB 39). The worker says that from that time to the present he has remained sensitive to smoke and cannot remain in an area with any cigarette smoke (TB 14). On 6 January 2005 he was transferred to the gatehouse in Mobilong, a workplace free of any smoke, (TB 15, 16). However there is now a differential in his weekly wage (TB 16). While the level of asthma attacks has returned to its previous state, he only needs any exposure to smoke to have a relapse (TB 16, tr 40).

6 Dr Martin's reports were received into evidence. He stated the cause of the worker's "exacerbation" was his exposure to cigarette smoke (TB 18). He stated that the worker did not have an incapacity to work, but could not be exposed to cigarette smoke. If he was exposed it would initiate an asthma attack and could cause chronic damage to his lungs (TB 19).

7 Dr R Antic, a respiratory physician, gave evidence. He saw the worker on 31 January 2005. He also performed lung function tests. He obtained a history of childhood asthma. The worker had experienced substantial improvement in his adult years though still requiring preventative medication, Seretide twice daily and Bricanyl as needed. His complaint to Dr Antic was that over the previous 12 months and particularly in the last six months he had problems when exposed to cigarette smoke at work. He had signs and symptoms of chest tightness, runny eyes and a scratchy and sore throat when suffering an acute phase. It left him exhausted.

8 Dr Antic described the illness as a temporary aggravation of pre-existing asthma due to cigarette smoke (TB 21). It was a transient exacerbation and resulted in temporary incapacity. The report states (at par 10):-

> "**Is Mr Detchon's condition likely to be ongoing or will he suffer further problems if exposed to cigarette smoke?**
> Mr Detchon's asthma can be fully controlled and cause no symptoms, as on the day I saw him. The predisposition to asthma is longstanding, not work related and permanent. The predisposition for cigarette smoke to temporarily aggravate his asthma is likely to be permanent and may have existed before the incident of 4 January 2005. It was heightened by the exposure on that day. It is likely to be ongoing, and it is possible that he may have further, more persistent problems if exposure to cigarette smoke continues on a regular basis. This should be avoided be it work or at home/leisure activities.

He concluded there was no permanent effect on the worker by reason of the work related aggravation (TB 24).

9 Dr Antic described asthma as an inflammatory process which under certain circumstances leads to the airways being more irritable and as a result constricting inappropriately (tr 15). The effect is not necessarily totally irreversible. He stated:-

> "… A person may have one only life-time incident where the clinical component of narrowing and other things are evident. Whether or not – and if the problem is to one only substance and that substance is never exposed to ever again, then one can actually have no asthma. In other words, one can have a cure from asthma. A proportion of those people, if tested very thoroughly, may show increase in irritability of the air passages even though the air passages are lifelong thereafter as large as the normal population's airways. So the issue of complete resolution of a problem is a possibility but people may retain the tendency to react to other abnormal inciting substances just because of the one only insult in the past."

10 From Dr Antic's explanation I conclude that asthma is describing a condition in the lining of the air passages leading to the lungs. It describes a tendency of that lining to become irritated and react by constricting. Therefore if the ease with which the air passages are irritated changes then irrespective of their otherwise dormant state, there is an injury in the requisite sense described in the Act, (see the definitions of "disability" and "disease" in s 3). That is the case as framed by the worker (tr 55). That makes the tests of forced expiratory volumes, forced vital capacity and diffusing capacity measurements useful but not conclusive (tr 19). The worker may be in the dormant phase and the air passages leading to the lungs operating normally.

11 As I understood Dr Antic the history of the matter was of crucial importance in reaching a conclusion (tr 25). He understood the incident of 4 January 2005 was a transient aggravation (tr 21) and there was no evidence of any change in the behaviour of the asthma to suggest a more permanent injury resulted (tr 21).

12 In cross-examination Dr Antic shifted somewhat in his opinion. He stated (tr 23):-

> "I think that your evidence is that this particular episode of 4 January hasn't resulted itself in any permanent effect on the underlying condition?---Yes.
>
> And that is no permanent sort of effect on the pathology of the condition?---Yes.
>
> Is that right?---Yes.
>
> But, I mean, one of the features of asthma is that people can become hypersensitive to a particular trigger?---Yes.
>
> Which would then make more likely an asthma attack from exposure to that trigger than had previously been the case?---That can happen, yes.
>
> And it might increase the frequency of attacks when exposed to that particular trigger?---Yes.
>
> Or the severity of an attack when it occurs?---Yes.
>
> Or the difficulty of bringing it back under control once it has occurred, through medication?---Yes, that can happen."

13 Dr Antic then went on to separate two styles of hyper-irritable states. The first was due to exercise and cold air which are more likely to cause a transient abnormality without changing the long term behaviour. The second was due to chemicals, a virus or animal fur which may change permanently the irritability in the air passages. He then added (tr 24):-

> "… So I think the key issue is to subdivide it, try to understand whether cigarette smoke belongs to the transient thing or whether it belongs to a sensitising reaction that occurs from some of the other substances that I've mentioned."

14 Dr Antic then expressed the view that cigarette smoke was more likely to fall into the transient than the hyper-sensitising group and while in a given case it could fall into the latter it was unlikely. He then added separately the case where a person is exposed to cigarette smoke on a continuous and regular basis (tr 24):-

> "… Aren't you saying there that if he is exposed to cigarette smoke on a regular basis he may develop this hypersensitivity?---Yes, I am saying that and you're quite right in interpreting in that way, is that if there is an ongoing, very regular exposure - and the question is what is very regular here in the situation - then it is more likely, still only possible but more likely that cigarette smoking will change the long-term behaviour rather than the transient behaviour of the air passages. …
>
> I guess on the material you had available to you at the time you saw Mr Detchon you did not form the view that his exposure had been sufficiently regular to lead to this sort of hypersensitising effect that I've talked about?---I think that that was the conclusion I had come to."

15 Dr Antic was asked to assume as accurate the history the worker gave to this Tribunal. On that assumption he said (tr 26):-

> "… I'm not going to use the word 'sensitised' but I think I understand that they're more responsive, if you like, rather than sensitised, to cigarette smoke - might be okay. I would - to add the balance to it - would say that other factors would equally have caused the same situation, but it's quite possible that cigarette smoke was a party to it.
>
> I guess in a nutshell, assuming that history or that evidence to be accurate, it appears that he has become more prone to attacks?---Yes.
>
> It appears that he has been more symptomatic of asthma?---Yes.
>
> That increase in symptomatology is consistent with the sorts of exposure to cigarette smoke that he talks about?---Yes.
>
> It may be that there are other factors at play as well?---Yes.
>
> But in the absence of there being any change in relation to those other factors, doesn't it make it more likely that it's cigarette smoke exposure that is linked to this increase in symptomatology?---If there are no other changes then cigarette smoking has to be a focus.
>
> …
>
> … for whatever cause it appears that his asthma has become more symptomatic?---Yes, I think that that - if the history as

> you have presented to me is accurate then that is the conclusion that I would reach."

16 I find that the assumed history put by Mr Blewett to Dr Antic was accurate. It is the accurate recount of the worker's evidence. I would add for completeness that on Dr Antic's evidence there remains a chance at some stage in the future that sensitivity will resolve as a result of further avoidance of smoke exposure (tr 27). But at the present the aggravation is still operative.

17 I accept the point made by Mr Ikonomopoulos, counsel for the respondent, that there is no connection between employment and the underlying asthmatic tendency. That is the vulnerability of the air passages leading to the lungs at the point in time before he worked at Mobilong and suffered the effects of the cigarette smoke (tr 43). He submitted the question I had to ask was whether the status had changed (tr 44). He argued Dr Antic had been as supportive of the respondent's case as the applicant's (tr 45). In the alternative he argued that there had to be an operative disability, not one dependent on the presence of the irritants affecting the air passage lining. Mr Blewett argued that the susceptibility of the worker had changed to a higher susceptibility by the long term exposure to tobacco smoke. That was sufficient to satisfy the requirement of a "disability" and to give rise to an ongoing partial incapacity.

18 In *Asioty v Canberra Abattoir Pty Ltd* (1989) 167 CLR 533 at p 540 Toohey J, dealing with condition of dermatitis stated the proper rule as follows:-

> "While it is apparent that an aggravation of the appellant's underlying dermatitis may take the form of immediate incapacitating symptoms, the existence of some more permanent aggravation is not precluded because those symptoms abate on each occasion that the appellant ceases work. The proper conclusion is that the condition of the appellant's hands, with their now enhanced susceptibility to dermatitis, has intensified the disease from which the appellant suffers. This enhanced susceptibility constitutes an aggravation of the disease and, in the circumstances, falls within the language of the Ordinance."

19 In *Caldipp Pty Ltd t/as Slaven Motors v Delov* [2002] FCAFC 352 a case concerning fibromyalgia, Madgwick J at par 85 stated the position as follows:-

> "(3) If, after and because of one or more such intensifications of symptoms, the disease is made harder to treat *or*

> symptoms are more readily precipitated *or* the symptoms are worse when they occur *or* the physical or mental causes of the disease worsen, *and* inability to perform work is caused by, respectively, such difficulty of treatment, precipitation of symptoms, worsened symptoms or deterioration of pathology, then there has also been a compensable aggravation/exacerbation of the disease. It is important to recognise the significance both of the multiple ways in which a disease might be aggravated by work-related factors and of the requirement that the incapacity be caused by the disease as so aggravated."

20 In *Holt v Comcare* [2003] FCAFC 221, an asthma case, the Full Court made the critical distinctions necessary in cases like the one before me. It said (par 36):-

> "The appellant failed to persuade the Tribunal that she suffered a permanent aggravation of her asthmatic condition by reason of work-related factors. It was not sufficient for her to prove that a return to work, under conditions similar to those the appellant had experienced between 1982 and 1985, would again aggravate her asthma. To establish that factual proposition would only be to establish that a resumption of work involving the same conditions would cause a further aggravation of the underlying condition. The question before the Tribunal was not whether there would be a further aggravation in the event of a return to work, but whether the aggravation that had occurred by 1985 was a continuing condition as at October 2000."

And having analysed *Asioty* the Full Court said (par 42):-

> "… *Asioty* was a case that turned on its facts. It did not establish any principle of law that every case of aggravation of an underlying condition had to be treated as a case of enhanced susceptibility, or had to be considered as if it might raise that possibility. Each case must be determined according to the evidence."

21 These cases provide the necessary guidance to the analysis of fact in this case. If I am to believe the worker he remains materially worse in his sensitivity and response to smoke. I do accept his evidence in this regard. On the basis of the evidence I find there has been a change in the reactivity and sensitivity in the lining of the air passages leading to the worker's lungs. This change has been brought about by the cigarette smoke he was exposed to at work. It has led to a disability and an ongoing

incapacity in the sense that it is still operative. It makes the worker unfit for any work where he might be exposed to any cigarette smoke. My conclusions to the statement of issues are:-

(1) Incapacity for work has resulted and is ongoing to the present though the future is indeterminant.

(2) The worker is entitled to weekly payments of income maintenance based on the ongoing partial incapacity for his pre-injury work from 4 January 2005 to the date hereof and continuing.

22 The worker's claim is upheld. I will hear counsel as to orders.

NOTE CAREFULLY:

Parties are advised that if a party wishes to appeal against any part of this decision which is appealable pursuant to s 86(1) of the Act such appeal must be filed with the Registrar in accordance with the form titled Notice of Appeal within 14 days of the delivery of this decision and must be served on all parties.