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ROUSSOS
LEGAL ADVISORY

Strategic Business Counsel



Update – Secondary Psychiatric Injury

Philip Banks v Andersfurn Pty Ltd [2014] NTMC 027

Andersfurn Pty Ltd v Philip Banks [2015] NTSC 43

This case note relates to a claimant, Mr Philip Banks, 47 years of age, who sustained a lower back injury; resulting in surgery that left him with scarring around some nerves where they exited from his spinal cord in his lower back. The result was severe neuropathic pain. Later, Mr Banks developed a consequential, and secondary, psychological medical condition. The employer agreed there was depression; but disputed the secondary condition was Major Depressive Disorder (MDD).

The matter went to hearing in the Work Health Court; and the Court found, on the evidence, the secondary condition could be diagnosed as MDD under the *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition (DSM IV). The Court concluded that ‘on the balance of probabilities ... Mr Banks’s mental injury arose as a consequence of the injury and the physical injury ... [T]he severe neuropathic pain experienced by Mr Banks over the years from 2008, directly and materially contributed to the development and persistence of the Major Depressive Disorder.’

The hearing started on 25 February 2013 and went for five days. A further four days were required later in the year. The matter was decided on 11 November 2014. The employer appealed to the Northern Territory Supreme Court on certain procedural and evidence grounds. The appeal was heard over three days in March and May 2015. On 29 July 2015, the Supreme Court dismissed the appeal.

CLAIM DEVELOPMENT

On 20 May 2008, Mr Banks sustained a back injury as the result of a fall in the course of his employment while moving furniture. He made a claim for Northern Territory workers compensation; and the claim was accepted. Over the years, Mr Banks had several medical procedures:

18 Jul 08	C.T. guided nerves root block
10 Sep 08	decompressive laminectomy at L3/L4 and L4/L5 and rhizolysis (interruption of spinal nerve roots by coagulation with radiofrequency waves)
13 Feb 09	C.T. guided nerves root block
2 Sep 09	spinal cord stimulator is implanted
Feb 10	reprogramming of spinal cord stimulator
Oct 10	a fall at home when entering his pool for physiotherapy causing a fracture associated with L4 vertebra leading to 11 days as a hospital inpatient
Oct 10	another reprogramming of the spinal cord stimulator
Sep 11	reduced mobility leading to Mr Banks’s needing to use a 4 wheel walker
1 Feb 12	replacement of the first spinal cord stimulator implant with a newer model
Aug 12	Ketamine infusion
Sep 12	reprogramming of the second spinal cord stimulator

Mr Banks was also prescribed medication:

panadol	panadeine forte	endone
tramadol	amitriptyline	lyrica
gabapentin	stilnox	valproate
duloxetine	epilim	cymbalta
methadone	kapanol	efexor
oxynorm	mexiletine	movicol
diazepam	seroquel	

In Court, in February 2013, the employer agreed with the above; and agreed Mr Bank was suffering depression arising out of the severe neuropathic pain.

WHY DID THE MATTER END UP IN A COURT HEARING?

There was a dispute between Mr Banks and the employer about whether the psychiatric medical condition was permanent and could be diagnosed as MDD. The distinction was relevant because Mr Banks' treating psychiatrist assessed his 'overall whole body impairment' at 25% based on the MDD.

There were some other issues between the parties, including a claim for back pay and interest (which were resolved by payment); and in relation to household services, home modifications and transport costs; but these were not addressed by the parties at hearing.

On the issue of what to make of the mental medical condition:

- the employers psychiatrist (IME) thought Mr Banks was feeling depressed as a consequence of his pain and disability; but that 'this was a reaction to his circumstances arising from his severe neuropathic pain and was a symptom, not a diagnosis.' The IME 'distinguished this symptom of depression from any formal diagnosis of a depressive illness, and specifically from a Major Depressive Disorder.'
- the treating psychiatrist diagnosed Mr Banks as suffering MDD.

INFORMATION AND EVIDENCE AT HEARING

Even though the workers compensation claim was accepted when made, Mr Banks had to prove the consequential mental medical condition; and prove MDD, on the balance of probabilities.

The DSM IV diagnostic criteria for MDD state, in part, these clinical findings to be made:

- depressed mood or a loss of interest or pleasure in daily activities for more than two weeks. Mood represents a change from the person's baseline. Impaired function: social, occupational, educational.
- specific symptoms, at least 5 of these 9, present nearly every day – depressed mood or irritable most of the day, nearly every day; decreased interest or pleasure in most activities, most of each day; significant weight change (5%) or change in appetite; change in sleep: insomnia or hypersomnia; change in activity: psychomotor agitation or retardation; fatigue or loss of energy; guilt/worthlessness: feelings of worthlessness or excessive or inappropriate guilt; concentration: diminished ability to think or concentrate, or more indecisiveness; suicidality.

Mr Banks gave personal evidence at the trial; along with his wife and his treating clinical psychologist treating psychiatrist; orthopaedic surgeon; rehabilitation specialist; and pain management specialist.

Mr Banks explained his experience with chronic pain; greatly reduced energy levels; that he has reduced mobility, and need to use a walking frame; that he spends most of his days at rest; his concentration is affected; and he gained weight going from 92kg to 120 – 130kg.

The employer generally accepted these effects on Mr Banks; and agreed with Mr Banks's 'evidence as to his levels of pain, his uncontrolled muscular spasms, his reduced energy levels, his reduced mobility, his lack of motivation and feelings of uselessness and worthlessness and his symptoms generally, from time to time, all arising from the injury and the physical injury.'

MEDICAL EVIDENCE

In this particular case, weighing up the evidence from the employers independent psychiatrist (IME); and the treating psychiatrist, the Work Health Court noted the:

- IME 'was engaged in this matter to provide a medico-legal opinion to the Employer ... He was provided with medical records and reports. He met with and examined Mr Banks on one occasion only, 22 March 2012. He has never been involved in Mr Banks's treatment.'
- the treating medical practitioner 'was directly involved with Mr Banks as his treating psychiatrist for two and a half years from 16 August 2010 up to the hearing of these proceedings. Over that time she saw Mr Banks himself on 14 occasions...'

The Court concluded:

- on the basis of the treating psychiatrist's 'overwhelming advantage over [the independent examiner] when it comes to forming any clinical assessment of Mr Banks I have no hesitation in preferring [the treating psychiatrist's] assessment of her patient and his symptoms over that' of the IME; and found Mr Banks suffered from MDD.
- the treating psychiatrist's 'opinion and diagnosis accord sufficiently with the criteria in the relevant Chapter of DSM IV to provide a proper basis for her diagnosis of Major Depressive Disorder in the context of her clinical knowledge and observations of Mr Banks.'

On appeal to the Supreme Court, the employer contended the treating psychiatrist's 'report was defective in a number of respects, including that it did not clearly identify at least five of the criteria for MDD and did not assert that they were all present during the same two week period and represent a change from previous functioning.' However, the Supreme Court decided the Work Health Court was entitled to accept the treating psychiatrist's opinion 'without engaging in a cookbook exercise', where the diagnostic criteria is mechanically applied.

The Supreme Court also noted the treating psychiatrists report:

- 'was tendered and admitted into evidence at the commencement of her oral evidence without any objection, qualification or complaint about its inadequacy.'

- contained extensive information regarding the factual basis for her opinions; and this ‘was supplemented by much of the other evidence at trial, both oral and documentary’; and
- the IME did ‘not appear that he was critical of [the treating psychiatrist’s] opinion because of her alleged failure to clearly demonstrate the existence of the five criteria within a two week period or to explain the term ‘multi-axial diagnostic classification’.’

REGARDING DSM IV

The Work Health Court and Supreme Court made some observations about applying DSM IV.

Particularly on appeal to the Supreme Court, the employer made an issue about whether the treating psychiatrist followed DSM IV to the letter. The employer argued some of the relevant requirements in the DSM-IV had not been satisfied.

Regarding the Diagnostic Manual, the Work Health Court and Supreme Court noted that there must be some flexibility in the application of the criteria; it is a text book; and represents ‘distillations of psychiatric and psychological expertise and consensus and are of great value in the diagnosis and treatment of mental disorders. This does not mean that such texts including DSM IV are holy writ to be applied rigidly to each and every case.’

Each of the Work Health Court and Supreme Court agreed the DSM-IV criteria are guidelines only, and not to be applied mechanically as though one were using a cookbook. In one Court decision, the Court ‘cautioned that DSM 4 is not a ‘cookbook for amateurs. It is a diagnostic tool for use by mental health care professionals...[T]he Court does not have a warrant, by using the criteria specified in DSM 4, to embark on a diagnosis itself. That is very much the province of trained and skilled experts’; and ‘it is to be interpreted with the benefit of their insight and experience.’

For further information please get in touch with our lawyers at RLA

office@roussoslegaladvisory.com
+61 8 8981 8783
www.roussoslegaladvisory.com
GPO Box 457 Darwin Australia 0801

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