ALERT

Independent Review Office

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Anshun Estoppel is available for use to defend proceedings in the PIC

In *Geary v UPS Pty Ltd* [2021] NSWPICPD 47 (decision dated 17/12/2021), President Phillips DCJ found that a worker was estopped from pursuing a claim for compensation for disease under s 4(b)(ii) *WCA* based on the principles set out in *Port of Melbourne Authority v Anshun Pty Ltd* (*Anshun*).

This decision highlights the importance of accurate and comprehensive pleadings in respect of the nature and cause of injuries in proceedings in the PIC.

Background

The appellant alleged that he injured both shoulders and his cervical spine at work and he ceased work on 1/02/2018, after suffering severe right shoulder pain. He claimed compensation under s 66 *WCA* for alleged 37% WPI with respect to the cervical spine and both upper extremities, based on assessments from Dr Guirgis, and the costs of future left shoulder surgery under s 60 *WCA*.

The respondent disputed the claim and the appellant commenced proceedings in the WCC.

On 29/11/2019, the WCC issued Consent Orders, which: (1) amended the ARD to plead physical injuries to the right shoulder and cervical spine and consequential injuries to the left shoulder and neck; (2) entered an award for the respondent with respect to the alleged injury and consequential injury to the cervical spine; (3) discontinued the s 66 claim. The respondent agreed to meet the costs of the left shoulder surgery under s 60 WCA.

On 14/01/2021, the appellant commenced further proceedings in the WCC, claiming compensation under s 66 *WCA* for 46% WPI, based on assessments from Dr Endrey-Walder. He alleged disease injuries to the cervical spine and both upper extremities and consequential scarring (deemed date: 1/02/2018). The respondent disputed the claim.

On 9/02/2021, the appellant sought leave to rely upon an amended ARD, which pleaded injury as follows:

> As a result of the nature and conditions of his employment from 2013 to 12 December 2018, the [appellant] sustained physical injuries to his neck. In the alternative, as a result of overuse, overcompensation and overload following on from the right and left shoulder injuries and surgeries, the [appellant] sustained consequential injuries to his neck.

Decision at first instance

On 10/05/2021, ***Member Perry*** issued a COD and SOR, which determined that the appellant was estopped from pursuing the allegation of disease injury to his cervical spine, including on the basis of the nature and conditions of employment, based upon the principles set out in *Anshun*.

The appellant conceded a res judicata and issue estoppel in respect of a claim for WPI for the cervical spine due to a frank injury or as a consequential condition, but maintained his claims for a disease in both shoulders and the cervical spine due to the nature and conditions of employment. However, he argued that the 2019 COD must be read in light of the pleadings, which alleged a frank injury, and the argument that they related to a different cause of injury belies common sense.

The appellant also argued that the only dispute that was determined in 2019 was the claim for left shoulder surgery, and it was not unreasonable that disease injuries to the cervical spine and left upper extremity were not pleaded. He also argued that the discontinuance of the s 66 claim meant that an *Anshun* estoppel did not apply and that it would not align with the PIC's practice to apply *Anshun* to

"*mechanisms of injuries and body parts, the liability for which was only required to be determined in respect of a claim that was discontinued and hence not so determined*". He argued that "*a worker is entitled to pursue his rights independently*".

The respondent argued that a consent judgment can create estoppels "*only as to matters which are necessarily decided*", and that a reasonable person: (1) would have construed the 2019 COD to have decided the cervical spine issue with finality; and (2) would have understood that the words "*in respect of the allegation of injury … to the cervical spine*" were intended to include a disease injury, particularly when construed based on Dr Guirgis' opinion.

The respondent relied upon the comments of McColl JA in *Habib v Radio 2UE Sydney Pty Ltd* and argued that it was unreasonable for the appellant not to plead and ventilate a disease injury in the 2019 proceedings. The dispute in the 2021 proceedings was the same as the 2019 proceedings, and there was no valid reason these were not pleaded or litigated in 2019, noting that the medical opinions of Dr Endrey-Walder and Dr Guirgis were premised on a similar history and they each made similar findings.

With respect to the cervical spine, the Member cited the principles set out in *Fourmeninapub Pty Ltd v Booth*, *Habib* and *Secretary, Department of Communities and Justice v Miller & Anor (No 9)*, and considered whether the claim made in the 2021 proceedings was so closely related to the 2019 proceedings that it would have been reasonably expected to have been raised at the time, having regard to the substance of the proceedings.

The Member:

- Found that disease was "*integral to the dispute between the parties about injury*", as Dr Guirgis attributed 90% of the appellant's injuries to a disease and that Dr Bosanquet and Dr Herald (in respect of the shoulder) diagnosed a disease and Dr Endrey-Walder's opinion was similar to Dr Guirgis'.
- Held that the discontinuance of the s 66 claim did not mean that an *Anshun* estoppel did not apply, as the doctrine is concerned with substance and not form: see *Habib*. He found that there was a great overlap between the facts underlying the 2019 proceedings and the 2021 proceedings and that they were "*essentially the same*".
- Found that consent orders may create an estoppel and that it was clear that the parties intended for an injury to the cervical spine to be pleaded and for there to be an award for the respondent with respect to that alleged injury and/or consequential injury.
- Referred to the decision in *Thompson v George Weston Foods Ltd* [1990] NSWCC 18, and found that it did not matter that the s 66 claim was discontinued because the consent determination "*makes it clear enough that the applicant 'could not succeed in gaining compensation for a consequential benefit', including lump sum benefit notwithstanding that aspect of the proceeding being discontinued*".

Appeal

On appeal the appellant alleged that the Member erred as follows: (1) in determining that a disease injury to the cervical spine was a "*claim or issue*" so connected with the subject matter of the 2019 proceedings so as to have made it unreasonable not to have been raised in those proceedings; (2) at law in determining the issue of *Anshun* estoppel without regard to the discontinuance of the lump sum claim in the 2019 proceedings; (3) at law in applying principles of issue estoppel to the determination of the question of *Anshun* estoppel; and (4) in law and fact in determining that there would be the creation of conflicting or contradictory judgments.

President Phillips DCJ dismissed the appeal and his reasons are summarised below.

- *Anshun* estoppel is available for use to defend applications brought before the PIC. In *Israel v Catering Industries (NSW) Pty Ltd* [2017] NSWCCPD 53, Wood DP set out at [114]–[119] various authorities, principally from the Compensation Court, dealing with the application of *Anshun* estoppel: (at [187]).

- The mere fact that a party makes a choice to litigate a matter in other proceedings in and of itself is insufficient to ground an *Anshun* estoppel. However, this does not mean that every decision in a workers compensation matter to litigate separate claims will always be permissible from an *Anshun* point of view. Rather, such a decision will only give rise to an *Anshun* estoppel if it was unreasonable not to have pleaded this cause in the earlier action: (at [194]).
- Judge Neilson summarised the principles distilled from the various authorities in ***Bruce v Grocon Ltd*** [1995] NSWWCC 10, as follows:

  > (a) the principle in [*Anshun*] extends to claims as well as to defences: *O'Brien's case* in the Court of Appeal and *Boles' case*;
  >
  > (b) estoppel will arise if in second or further proceedings there would be a judgment inconsistent with a judgment in the first proceeding or the granting of remedies inconsistent with the remedy originally granted or the declaration of rights of parties inconsistently with the determination of those rights made in the earlier proceedings;
  >
  > (c) the matter being agitated in the second or further proceedings must be relevant to the original proceeding; and
  >
  > (d) it was unreasonable not to rely on that matter in the original proceedings; such unreasonableness would depend on the facts of each particular case: *Boles' case*.

- There is no provision in the 2020 Act that would modify or derogate from the approach taken to questions of *Anshun* estoppel in the WCC or Compensation Court.
- His Honour rejected ground (1).
  - He held that the disease injury to the neck was a claim or issue connected with the subject matter of the 2019 proceedings, the Member was exercising a discretion of the type in ***House v The King***[1936] 55 CLR 499 at 504-505 (*House*). In accordance with that decision, the appellant must prove as follows:

    > It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution, for his if it has the materials for doing so.

  - The appellant did not allege a *House*-type error. Rather, he analysed how the matter was pleaded and ultimately disposed of in an effort to make good the allegation that the neck claim was not a claim or issue connected with the 2019 proceedings. This does not assist in terms of revealing the necessary type of error.
  - The problem with the appellant's argument is that it concentrates on the ultimate conclusion in the 2019 proceedings and not the principles associated with *Anshun* estoppel. In *Habib*, McColl JA stated that the doctrine is concerned with substance and not form and the substance of the matter s clear.
  - Before the commencement of the 2019 proceedings, the appellant was suffering from pain in his neck and Dr Guirgis stated that this was due to the nature and conditions of employment. The 2019 proceedings pursued a claim for a neck injury initially of a consequential nature, and by way of consent orders, a claim for frank injury on 1/02/2018. However, at all times during the 2019 proceedings, he pursued a claim under s 66 *WCA* with respect to his neck and this is the same claim that is made in the current proceedings, although a different mechanism of injury is alleged.
  - The appellant did not challenge the Member's finding that the extent of the overlap between the facts in both proceedings were such that they are essentially the same.

- The Member found that there was no explanation from the appellant about any difficulties that existed or might reasonably have been perceived in raising the disease injury earlier and this pointed towards it being unreasonable for him not to have relied on disease injury in the 2019 proceedings. The appellant did not challenge this approach or allege that this finding of unreasonableness was made in error.
- It is artificial in the extreme for the appellant to assert that the claim in relation to the neck injury was not a claim or issue connected with the 2019 proceedings. It cannot be said that he or his solicitors were ignorant about the medical evidence regarding his condition before and those proceedings.
- He referred to his decision in *Miller No 9* and held that it is possible in the context of workers compensation cases to pursue different statutory benefits in different proceedings, but this does not mean that every decision in a workers compensation matter to litigate separate claims will always be permissible from an *Anshun* point of view. The question is whether it was unreasonable not to have pleaded the cause in an earlier action.

- His Honour rejected ground (2) and he noted that the appellant's argument, that the resolution of the matter as reflected in the 2019 COD was a "*bar*" to making an *Anshun* order, was not argued before the Member. By definition, the Member cannot have erred in law in relation to an argument that was not put to him. While the appellant essentially alleged a *House*-type error by the Member, namely a failure to consider the 2019 COD, the Member carefully considered and construed the 2019 consent orders.
- His Honour rejected ground (3).
  - He found that the Member did not rely upon the decision in *Thompson* in terms of the principles it espoused regarding issue estoppel. Rather, he used *Thompson* as an example to make good his point that an injury – whether by way of disease or personal injury – is the underpinning foundation for entitlement to benefits under *WCA*.
  - Reading the decision as a whole, it is abundantly clear that the Member carefully considered the *Anshun* line of authority and applied it in finding that the appellant is estopped from relying upon a disease injury claim to his neck in the 2021 proceedings. This decision, was based on the *Anshun* principles and not principles pertaining to issue estoppel.
- His Honour also rejected ground (4).
  - He noted that the appellant was effectively arguing that different causes of action were pursued in the 2019 proceedings as opposed to the 2021 proceedings. In *Anshun*, the High Court said:

    > By 'conflicting' judgments we include judgments which are contradictory, though they may not be pronounced on the same cause of action. It is enough that they appear to declare rights which are inconsistent in respect of the same transaction.

  - The High Court's finding in *Anshun* is entirely relevant to a consideration of this appeal point. The Member made a finding, which is not challenged on appeal, that the two sets of proceedings were "*essentially the same*". He concluded:

    > 121. In truth what the appellant was attempting to do in the 2021 proceedings was to pursue rights in relation to the same transaction, albeit by a differently pleaded path. This is exactly what happened in *Anshun* and was an approach which found no favour with the High Court in that matter.

Accordingly, His Honour dismissed the appeal and confirmed the COD.

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