

IN THE MAGISTRATES COURT OF VICTORIA
AT MILDURA

WORKCOVER DIVISION

Case No. D11301898

ROBERT BRUCE

Plaintiff

v

CONTRACT CONTROL SERVICES PTY
LTD

Defendant

<u>MAGISTRATE:</u>	S GARNETT
<u>WHERE HELD:</u>	MILDURA & MELBOURNE
<u>DATE OF HEARING:</u>	20 NOVEMBER 2014, 6 FEBRUARY & 30 MARCH 2015
<u>DATE OF DECISION:</u>	14 APRIL 2015
<u>CASE MAY BE CITED AS:</u>	BRUCE v CONTRACT CONTROL SERVICES

REASONS FOR DECISION

Catchwords: Rejection of claim: hernia condition – credit issues – causation – conflicting evidence as to whether incident and injury reported – no complaint of pain or injury to treating doctor for 9 weeks after alleged incident and 4 weeks after ceasing employment. Claim Dismissed.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr Goldberg	Maurice Blackburn
For the Defendant	Mr Middleton	Hall & Wilcox

HIS HONOUR:

- 1 Mr Bruce is aged 60 years and was employed by the defendant from 10 January 2011 as a labourer until 17 May 2012 when he was retrenched. He alleges that he sustained a hernia condition on 16 April 2012, whilst manoeuvring temporary fencing panels at Merbein P10 College, in the course of his employment.
- 2 Mr Bruce lodged a workcover claim form dated 19 September 2012 which was rejected by Xchanging Integrated Services on 12 November 2012 pursuant to s 109 of the Accident Compensation Act 1985 on the grounds that he did not sustain an injury arising out of or in the course of his employment.
- 3 Mr Bruce gave evidence that his duties required him to perform general labouring work which included; cleaning up work huts, toilets, the office area and the 1st aid room. He said he was also required to erect or dismantle temporary fencing that was being used to keep students away from the areas where the building works were being performed. He told the court that Scott Brown was the site foreman and Mark Henwood was the project manager who visited the site every 6 weeks or so.
- 4 Mr Bruce gave evidence that in 1993 he suffered prior hernia problems which required surgery and resulted in him being off work for a limited period. He told the court that on 16 April 2012, he opened the work site at 6.30 a.m. and commenced his walk through when he noticed some of the temporary fencing had been pushed over and was tangled up and twisted. When questioned as to how long this area of fencing was he said it was, "200 metres". Mr Bruce told the court that he climbed over the fencing and proceeded to let the contractors on site and then went back to the fencing to try and clear a path. He said that in order to untangle it, he had to unbolt some of the panels and in doing so felt pain in his stomach. He said that at the time he was the only one on site and waited for others to arrive and then reported his injury to Scott

Brown at approximately 7.30 a.m. who told him to use one of the apprentices to help. He said he asked “Beau” to help and told him of his injury as well. Mr Bruce said that his injury did not prevent him from working so he continued to do so until he was retrenched in May 2012, but noticed a lump developing in his groin since the incident. He told the court that he reported the injury to Scott Brown on the day it occurred and also told him on the following day that he was still experiencing pain in the groin. He said he did not fill in an incident report form because “I can’t spell”. Mr Bruce gave evidence that the pain did not go away and he thought he had hurt the muscle but then it started to “swell”. He said he subsequently showed the nurse from whom he was receiving treatment for his diabetic condition and she referred him to a doctor who ultimately performed surgery on 20 June 2012. Mr Bruce said that when he showed the nurse his abdomen, “It come up like a little bubble ... about a...half the size of a fist”. Mr Bruce told the court that he has undergone multiple surgical procedures since then, the last being in December 2014, and his condition has precluded him from returning to work.

- 5 In cross examination, Mr Bruce agreed that he continued performing normal duties until he was retrenched and also agreed that his employment with the defendant was for a fixed period until the job at Merbein College was completed. He disagreed that his job did not involve any heavy labouring work or that he refused to do any job requiring physical effort. Mr Bruce agreed that he did refuse to paint and also refused to do concreting work because of what he described as his “arthritic knees”. He disputed that the defendant had to employ another worker to perform his tasks because he refused to perform them. He told the court that the pain was located in the centre of his abdomen and he originally thought it was a muscle strain but became more concerned when the pain did not go away. He agreed that although he attended his treating doctors and nurse on a number of occasions between 16 April and 21 June 2012 he did not mention his groin complaint. Mr Bruce said he did not do so because he thought the pain “would go away”. He also agreed that when

he first mentioned his pain to his nurse on 21 June he did not provide a history that it had occurred at work. Mr Bruce also conceded that although the name of an apprentice carpenter, "Beau" was nominated on his claim form as a witness, he did not witness the alleged incident.

6 Mr Bruce said that he did not complete a workcover claim until September 2012 because he had lodged an Incolink claim which was returned to him on the basis that the information he had supplied indicated it was a workcover matter. He said that it was at that stage that he consulted lawyers who helped him complete the workcover claim form. He agreed that he had a "keen" interest in occupational health and safety issues and did have experience in workcover matters having lodged a previous claim for a hernia condition in 1989. He said that on that occasion the hernia developed into a lump immediately whereas on this occasion a lump did not develop for a "month or so" and then got bigger and bigger like the size of a "fist".

7 Mr Bruce gave evidence that he had arranged to commence another job as a full time labourer at an Almond farm after his work at Merbein College had ended but was unable to commence it due to his injury.

8 Mr Henwood, Project Manager was called to give evidence on behalf of the defendant. He told the court that Mr Bruce was employed as an OHS representative and "Peggy", being a person who cleaned the sheds. He said that Mr Bruce was required to perform general labouring duties as part of his job. He said that Mr Bruce did general clean up duties, assisted the tradesmen and may have worked with scaffolding. He said that Mr Bruce was "reluctant" to perform labouring duties and was not "forthcoming" in doing hands on work and took the view that his role as OHS representative and 1st aid officer took priority over other tasks. He told the court that as a consequence of his attitude the defendant employed a young labourer, Anthony Wiesneski, to perform his general labouring duties. Mr Henwood said that he would normally visit the site every fortnight as he was working on a

number of different sites at the time. He said he normally attended the site between Thursday and Friday afternoons and also attended site meetings during those times. He said that he never witnessed Mr Bruce performing physical work on site and that he virtually turned the 1st aid room into his office. He told the court that Mr Bruce had raised OHS issues with him and Scott Brown but had never complained to him that the work was too heavy or strenuous and did not report to him that he had sustained an injury. Mr Henwood gave evidence that from time to time there were break-ins on site which included temporary fencing being knocked over. He said that normally the site foreman would arrange for the tradesmen to fix them. He also said that the footings of the fencing were either concrete or water based and would weight between 10-20 kgs which are heavier than the steel panels which are approximately 2.4 to 3 metres in length.

9 Mr Brown gave evidence at the request of the defendant. He told the court that he was employed by the defendant as the Site and Construction Manager from early 2011. He confirmed that Mr Bruce was employed as the Occupational Health and Safety Officer on site and was also under his supervision as a site labourer. Mr Brown told the court that Mr Bruce's duties involved cleaning the huts, toilets and "smoko" room as well as the three large buildings on site. He said that Mr Bruce did not work to his satisfaction and he arranged for another labourer, Anthony Wiesnieski, to be employed as his labourer at the Merbein site from mid 2011. He said that at times, "Beau", an apprentice carpenter may have assisted Mr Bruce with his duties. Mr Brown said that Mr Bruce ceased work at the site in approximately April 2012 and the project concluded in mid May 2012.

10 Mr Brown gave evidence that Mr Bruce never complained to him that he had sustained an injury at work and he is surprised that he did not do so if it occurred because he said Mr Bruce, as Occupational Health and Safety Officer, was aware that injuries must be reported and recorded and that he

was “a stickler for the rules”. Mr Brown agreed that temporary fencing was erected on site and that on occasions Mr Bruce would perform the role of a “spanner man” and undo or tighten nuts and bolts on the clamps which secure the panel fencing. He said that he never witnessed Mr Bruce manoeuvring the panels but cannot dispute that he may have done so from time to time. Mr Brown also told the court that he cannot recall the alleged episode on 16 April 2012, when “200 metres” of temporary fencing needed to be erected as a consequence of it being pushed over. He confirmed that Mr Bruce would be responsible for opening the site between 6.00 a.m. and 6.30 a.m., and that he would not normally arrive on site until approximately 7.00 a.m. along with the other workers. He also questioned whether “200 metres” of fencing was on the ground as he said this would be a highly unusual event for such a large section to be displaced. Mr Brown said he could not recall helping Mr Bruce or Anthony reconstruct the temporary fencing on the day in question as alleged by Mr Bruce. He also told the court that he could not recall Mr Bruce being required to perform concreting work.

11 Mr Brown gave evidence that Mr Shepherd was employed as the Occupational Health and Safety officer at the Arts Centre site and recalled him visiting Mr Bruce on one or two occasions at the Merbein P10 site around “smoko” time between 10 a.m. and 10.30 a.m. or on the odd occasion to collect shared tools between the sites.

12 During cross examination, Mr Brown agreed that he has no recollection of what occurred on 16 April 2012. He said he cannot dispute the evidence of Mr Bruce that he disentangled the fencing that morning. He also said he could not dispute that prior to Christmas 2011 Mr Bruce was involved in re-erecting the fencing after it had been removed in order for tree loppers to prune trees on the grounds. He also agreed that it was part of the duties of Mr Bruce to monitor site security which necessarily involved him ensuring that the temporary fencing was in place at the start and end of the day and that from

time to time the fencing was interfered with either by tradesman or outside influences, particularly on weekends. Mr Brown agreed that on occasions it was difficult to erect the temporary fencing particularly if it was situated on uneven ground as it requires the fencing to be lined up with the holes in the concrete footings.

13 Mr Brown was adamant that Mr Bruce did not inform him that he had sustained an injury on 16 April 2012 or the following day. He disputed that because he was involved in the management of 20-25 workers on site that he may have forgotten that Mr Bruce reported the injury to him.

14 Mr Shepherd was called to give evidence by Mr Bruce. He said that he is friends with Mr Bruce and would see him 3-4 times a year on social occasions. He told the court that he was employed by the defendant as a labourer at the Arts Centre precinct in 2012. He said that from time to time he would attend the Merbein P10 site as tools were shared between the sites and that he would also attend to assist with re-erecting the temporary fencing at the end of the day. He estimates he attended the site on approximately 6-10 occasions in 2012. Mr Shepherd said it was not unusual for the fencing to be interfered with during concrete pours, if cranes were being used or if timber was being delivered on site. He said that when he attended at the end of the day he would assist Mr Bruce in re-erecting the fencing panels. He told the court the panels were 1800cm high, 2400 to 3 metres in length and would weigh approximately 10-15 kgs. He estimated the weight of the footings to be 15-20 kgs and said it was a difficult task to align the panels with the concrete footings, particularly if they were situated on uneven ground. He said it was not unusual for the clips on the panels to be broken which would also make it difficult to align the panels with each other.

15 During cross examination, Mr Shepherd said that on 5 to 10 occasions he was rung by Mr Bruce to attend the Merbein P10 site to assist in securing the site at the end of the day. He said that he told his supervisor, Max Hall on most

occasions that he had been asked to attend the other site. He told the court that he would normally arrive at approximately 5.30 p.m.. When questioned as to those dates and the last time he attended at the request of Mr Bruce he said the information was contained in his diary which had been “stolen” by Mr Brown or an “Irishman”. Mr Shepherd said that he was never asked by Mr Bruce to attend the Merbein P10 site in the morning.

Medical Evidence

- 16 The medical records of Dr Saluja from the Tristar Medical Group, Mildura were tendered. They record that Mr Bruce has suffered from diabetes mellitus and hypertension since 2004. The records reveal that Mr Bruce attended the clinic on 24 April 2012 and was seen by Ms Case, registered nurse. He made no mention of the incident or the injury allegedly occurring on 16 April. He next attended the clinic on 26 April and saw Dr Saluja in relation to a referral to a podiatrist, flu symptoms and medication and then attended on 23 May for his diabetes review. The first mention of a possible hernia occurred on 21 June 2012 when he attended Dr Saluja but no history was given regarding causation. Dr Saluja recorded that Mr Bruce had a fairly large para umbilical hernia and noted that he had it repaired in 1994 but it “came back soon”. Dr Saluja then referred Mr Bruce to Mr Chaloob, surgeon. On 5 July, he recorded that Mr Bruce was due to have a hernia operation the following week and needed a certificate for Centrelink. Mr Bruce attended on 21 July with Dr Saluja recording that he had surgery a week ago and that he needed insurance forms completed. On 19 September 2012, Dr Saluja recorded that the insurance claim was refused on the basis that the hernia was caused by heavy work and a WorkCover claim needed to be lodged. He provided Mr Bruce with a WorkCover certificate.
- 17 A report from the Mildura Base Hospital indicates that Mr Bruce underwent an open ventral hernia repair with paritex mesh by Associate Professor Chaloob on 11 July 2012. The defendant arranged for Associate Professor Buzzard to

assess Mr Bruce on 31 October 2012 and 22 October 2013. He obtained a history from Mr Bruce that he had experienced pain in his central abdomen area in April 2012 when pulling on broken fencing. Mr Bruce also told him of his prior hernia repair operation in 1994 which required two months off work on WorkCover without further symptoms. Associate Prof Buzzard diagnosed that Mr Bruce had a recurrent incisional/umbilical hernia which had been treated surgically and appears to have recurred. On the basis of the history provided he opined that the condition was caused by the incident at work in April 2012.

- 18 On review, Associate Professor Buzzard reported that Mr Bruce was continuing to experience abdominal pain and had been advised to have further surgery involving the use of mesh. He opined that Mr Bruce remained unfit for work involving lifting, bending, stooping or straining but would be fit for sedentary work. Mr Brearley, General Surgeon, assessed Mr Bruce on behalf of his lawyers on 5 September 2013. He obtained a history from Mr Bruce that he felt pain in his central abdominal area when trying to reinstate fencing which “had been taken down as a temporary measure” and had lifted heavy concrete blocks and fencing panels on 16 April 2012. Mr Bruce told Mr Brearley that he was able to continue working with the assistance of another labourer and continued to do his usual heavy work. Mr Bruce also told Mr Brearley of his past hernia repair operation in 1994 and that he had experienced no further problems until 16 April 2012. Mr Brearley opined that Mr Bruce has suffered a recurrence of the umbilical hernia requiring surgery and that he developed a large fluid collection for which he has had repeated aspiration. He noted further surgery was to be performed to drain the fluid and that Mr Bruce was unfit for work until that occurred and would then be fit for sedentary employment.

Conclusion

- 19 I am not persuaded that Mr Bruce sustained the hernia condition on 16 April

2012 as alleged. I accept the evidence of Mr Brown that Mr Bruce did not report the injury to him as was alleged. I find that as an experienced occupational health and safety officer and a “stickler for the rules”, as described by Mr Brown, and having prior experience in lodging workcover claims, that Mr Bruce would have both reported the incident and lodged a claim if the incident and injury occurred in the workplace as he alleged. I do not accept his evidence that although the pain did not subside he did not see fit to mention the pain or injury to his treating practitioners until 21 June 2012, some 9 weeks after the alleged incident and 4 weeks after ceasing employment with the defendant, because he thought the pain “would go away”, particularly when considering his evidence that the lump in his abdomen developed over a month or so. Furthermore, the records reveal that he attended his treating doctors clinic on no less than 6 occasions between 16 April and 21 June 2012 without mentioning the pain or subsequent lump in his groin and when he finally told Dr Saluja on 21 June, he made no mention of it being work related. It was not until 19 September 2012, some 5 months later that his work with the defendant is recorded as a cause of the hernia. I accept the defendant’s submission that Mr Bruce lodged the workcover claim as an “afterthought” when his Incolink claim was rejected and that he has in effect, reconstructed events in order to pursue a workcover claim.

20 Accordingly, the claim is dismissed.