



The Queensland Government

Industrial Gazette

PUBLISHED BY AUTHORITY

PP 451207100086

Annual Subscription \$358.00 (GST inclusive)

ISSN 0155-9362

Vol. 189

FRIDAY, 28 NOVEMBER, 2008

No. 16

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Workers' Compensation and Rehabilitation Act 2003 - s. 550 - appeal to commission

Emmanuel Bojanovic AND Q-COMP (WC/2008/62)

COMMISSIONER THOMPSON

18 November 2008

Appeal under s. 550 *Workers' Compensation and Rehabilitation Act 2003* - Witness evidence - Medical evidence preferred - No pre-existing condition - Appeal upheld - Decision of Q-COMP set aside.

DECISION

Introduction

A notice of appeal was filed with the Industrial Registrar on 12 August 2008 by Emmanuel Anthony John Bojanovic (the appellant) pursuant to s. 550 of the *Workers' Compensation and Rehabilitation Act 2003* (the Act) against a decision of the Review Unit released by Q-COMP on 14 July 2008.

The appellant, a 38 year old labourer/forklift driver, commenced work at Peoples Resourcing Pty Ltd on 25 May 2007.

The employment was of a casual nature, and of a type that required the appellant to lift 20 litre drums of cooking oil for significant periods during the working day.

During his lunch break on 5 August 2007, the appellant became aware of pain and stiffness in his lower back which he believed was due to the repetitive heavy lifting aspect of the employment.

The appellant completed his shift and the following day sought treatment from a general practitioner.

Following a series of treatments, the appellant returned to work some ten days later, continuing to work until November 2007 when he again experienced lower back pain.

The appellant lodged an application for compensation on 26 February 2008 and was advised by WorkCover in correspondence dated 31 March 2008, that his claim had been accepted for "OA of L 4/5, disc prolapse L 4/5 sustained on 5 August 2007".

WorkCover went on to inform the appellant that the acceptance of the claim was as a work-related aggravation of a pre-existing condition and that his entitlement was for compensation benefits for the aggravation only.

Medical expenses relating to the injury were also to be met by WorkCover.

In correspondence (also dated 31 March 2008), WorkCover advised the appellant of their decision to cease his claim for the aggravation of "your pre-existing condition" on the basis that he was no longer incapacitated for work or suffering the effects of aggravation.

Reasons advanced for the ceasing of the claim were shown in the correspondence as:

"You were employed by People Resourcing Pty Ltd as a labourer/fork lift operator. You applied for compensation for pain lumbar spine, OA of L 4/5 apophyseal joint, disc space, narrowing L 4/5 that your claim occurred at work on 5 August 2007 while lifting and moving around drums of cooking oil repeatedly.

In a medical certificate from Dr Andrew Tucker dated 21 February 2008 he diagnosed you with OA of L 4/5; disc prolapse of L 4/5.

In a report from Dr David Ness dated 26 March 2008, Dr Ness diagnosed you with lumbar spondylosis. Dr Ness stated that given your pain developed following repetitive lifting rather than a single specific traumatic event the aggravation of your underlying condition has ceased."

On 27 June 2008, the appellant sought to have the decision of WorkCover reviewed by Q-COMP.

In a decision released on 14 July 2008, Q-COMP confirmed the decision of WorkCover.

Relevant Legislation

The sections of legislation to which the Commission must have regard in the determination of this matter are:

"11 Who is a *worker*

- (1) A *worker* is a person who works under a contract of service.
- (2) Also, schedule 2, part 1 sets out who is a *worker* in particular circumstances.
- (3) However, schedule 2, part 2 sets out who is not a *worker* in particular circumstances.
- (4) Only an individual can be a *worker* for this Act."

"32 Meaning of *injury*

- (1) An *injury* is personal injury arising out of, or in the course of, employment if the employment is a significant contributing factor to the injury.
 - (2) However, employment need not be a significant contributing factor to the injury if section 34(2) or 35(2) applies.
 - (3) *Injury* includes the following-
 - (a) a disease contracted in the course of employment, whether at or away from the place of employment, if the employment is a significant contributing factor to the disease;
 - (b) an aggravation of the following, if the aggravation arises out of, or in the course of, employment and the employment is a significant contributing factor to the aggravation-
 - (i) a personal injury;
 - (ii) a disease;
 - (iii) a medical condition if the condition becomes a personal injury or disease because of the aggravation;
- ...".

Onus of Proof

In an appeal where a worker seeks to receive a payment of compensation, the appellant must, on the balance of probabilities, show it is more probable than otherwise that the worker has suffered an injury arising out of, or in the cause, employment and that the employment was a significant contributing factor to the injury.

Evidence

Evidence was adduced from three witnesses in the course of the proceeding, with a further witness, Roger Kahler, not being required for the purposes of cross-examination. However, a report (Exhibit 8) prepared by him was tendered by Counsel for the appellant and admitted into evidence.

The Commission intends to précis the evidence of each of the witnesses for the purpose of this decision and notes that all evidence which formed part of the proceedings will be subject to consideration, whether mentioned in the body of this decision or otherwise.

Witness Lists

Appellant

- Emmanuel Bojanovic - Appellant
- Dr Malcolm F. Wallace - Orthopaedic Surgeon

Q-COMP

- Dr David Ness - Orthopaedic Consultant - Independent Medical Examiner

Appellant

Bojanovic

The appellant gave evidence in relation to his work history where he described a number of positions he had held since leaving school at 15 or 16 years of age.

Each of the occupations referred to were positions that fitted within the scope of the definition of manual labour and, in some cases, appeared to be quite physically demanding.

The appellant stated that he had not suffered injuries previously from motor vehicle or motor bike accidents but acknowledged that in 1984 he had undergone a coracoid process as a result of a football injury and had "split his knee" in a boating accident in the same year.

The only other injury was when he had broken both little fingers in connection with other employment.

The appellant described, in detail, the nature of his work with People Resourcing Pty Ltd from commencement of employment on 23 May 2007 which included the type and method of the work.

It was his evidence that he physically moved between four and seven tonne of product each day of his employment and was required to comment on various aspects of a report undertaken by the InterSafe Group Pty Ltd.

When giving his evidence-in-chief as to the day (5 August 2007) on which he first felt pain, he stated (at page 1-23 of transcript):

"I went down and did my normal job, emptied a few pales, a couple of hundred pallets. Went out for smoko, I was fine, I went back to work - I think I was doing - I think we had an audit and I was just cleaning, because we used to get audited all the time, as you do when you're a big industrial company. We were cleaning or whatever and I went down at lunch, and when I went to get up from lunch, I couldn't get up. Went backwards and just keeled over. So I went to the doctor and they said - sent me for X-ray - - .".

The appellant denied in cross-examination that he had informed Dr Tucker (a General Practitioner) of previous trauma associated with his back.

Wallace

Dr Wallace undertook an examination of the appellant's circumstances on 6 June 2008, at the request of Dempsey's Lawyers.

In a report (Exhibit 9), Dr Wallace formed an opinion that the appellant had sustained lower back pain from the nature and conditions of his work which were described as heavy and repetitive work.

Work was said to be a significant contributing factor to his current problems (as at 6 June 2008).

The appellant had informed Dr Wallace that he had no history of any lower back pain.

A second report (Exhibit 10) dated 27 June 2008, contained the following statement from Dr Wallace:

"It is my opinion that your client's impairment is due solely to the incident described and not due to any previous condition.

The disc dehydration is a constitutional phenomenon, and was not causing any prior symptoms or impairment."

In a third report (Exhibit 11) dated 1 July 2008, a response was given by Dr Wallace to an inquiry from Dempsey's Lawyers as to whether the appellant's injury was a new injury or an aggravation:

"Your client states categorically at my interview with him on the 6th of June 2008 that he had no prior history of back pain.

I note that his MRI scan on the 22nd of March 2008 revealed disc desiccation at L4/5 and L5/S1 which would be consistent with age related changes and do not necessarily indicate that this is a pre-existing condition. On the evidence made available to me, it is my opinion that your client's lower back injury is directly related to the incident described in 2007 and not to any pre-existing condition."

Finally in a fourth document (Exhibit 12), Dr Wallace took exception to comments in the review decision (Exhibit 4) which alluded to an inconsistency (on his part) in his report where he refers to an MRI scan of 22 March 2008, relating to disc desiccation at L4/5 and L5/S1 which was said to be consistent with age related changes.

The comment in the review and the witness's response was set out as follows:

"I refer to paragraph 2 of Mr Jenkins' decision where he states 'there are no pre-existing changes in the claimant's back to warrant a diagnosis of aggravation'. I did not say this. I stated that there were pre-existing changes in the claimant's back and that these are consistent with age related changes."

In cross-examination, Dr Wallace was asked if underlying age-related changes could have been aggravated, to which he replied (at page 1-32, line 15 of transcript):

"If he was previously symptomatic, yes, but the evidence that I have is that he had no - he was previously asymptomatic, and the fact that he has disc desiccation on MRI scanning does not mean that those desiccated discs are causing his pain."

On whether there had been, as Dr Ness had suggested, a temporary aggravation, Dr Wallace stated (at page 1-34, line 39 of transcript):

"I don't accept it because he had - he didn't have any pain in his back prior to the - to the work injury. So that - and now he has pain. So he has a - a permanent - if we accept that the disc is causing a pain then he has a permanent aggravation."

Mr Rashleigh, of Counsel (at page 1-34 of transcript), put to Dr Wallace that "the situation (at hand) may very well be that this was an asymptomatic condition that was made symptomatic temporarily by the work but that the continuing symptomology is related to the underlying condition rather than any aggravation". Dr Wallace, in reply, stated:

"Assuming that the disc, that the desiccated disc, is causing his pain which we don't - we don't know. But I would accept - I'll be - taking that into account I would accept what you say is - yes, I would."

Kahler - Report

Dempsey's Lawyers, on behalf of the appellant, commissioned a report in respect of the work performed by the appellant.

Roger Kahler B.E. (Mech) R.P.E.Q., MISFP, MESANZ from The InterSafe Group Pty Ltd, authored the report (Exhibit 8) which was tendered in the proceedings by Counsel for the appellant.

The report went to a range of issues including:

- Description of work performed by the appellant
- Plan view of the plant
- Dimensions of the work station
- Lifting of 20 litre drums (page 7 of the report):

"With respect to the 20 litre drums, the following picture emerges:

- of a person undertaking very frequent lifting;
- of them slipping while lifting but not falling;
- of having to support a 20 litre drum inverted in front of the torso while trying to locate the drum over a spear;
- and twisting of the person recovering drums from foot level to recovering drums full from the region of shoulder and head height."
- Weights handled
- Analysis of the tasks (page 14 of the report):

"The Manual Tasks Advisory Standard 2000 identified that musculoskeletal disorder could occur in two ways, one being an 'over time' component and the other sudden, intense, strenuous activity creating damage. In Mr Bojanovic's case it is entirely probable that there has been an 'over time' component.

Musculoskeletal disorders occur in two ways:

- *Gradual wear and tear caused by frequent or prolonged periods of muscular effort associated with repeated or continuous use of the same body parts, including static body positions*
- *Sudden damage caused by intense or strenuous activity, or unexpected movements such as when materials being handled move or change position suddenly."*
- Repetition and duration
- Predicting this incident
- Summary and conclusions (page 33 of the report had the following comment):

"The damage to Mr Bojanovic has been set in the context of the overall burden of injury. The report has described predictive strategies available to an organisation.

In addition, the report analyses the handling of a 20 litre drum and concludes that the handling of the 20 litre drums of oil had significant opportunity for musculoskeletal overload. Also, based on the assumptions that are made, the tilting of half full 200 litres of lard also had opportunity for musculoskeletal overload."

Q-COMP**Ness**

Dr David Ness, an Orthopaedic Consultant, was requested by WorkCover to conduct an independent medical examination of the appellant and to then furnish a report.

The appellant presented to his practice on 12 March 2008 and was examined in regard to the condition of his lumbar spine and its relationship to work.

The report (Exhibit 6) described the appellant as a 38 year old male who had worked in a variety of manual jobs in the course of his working life.

His (then) employment required "quite a deal of lifting, mostly drums of cooking oil" over forty hours per week.

The appellant had, on 5 August 2007, developed pain and stiffness in his lower back when resting during his lunch break. He had put the condition down to repetitive heavy lifting that he had been doing that morning.

A general practitioner (Dr Tucker) had referred him for x-rays which was followed by treatments from another general practitioner (Dr Vladimir Hasa).

The appellant returned to work undertaking normal duties some ten days later, however went off in November 2007 when he again developed lower back pain.

The appellant had stated that there was no history with his lower back prior to 5 August 2007.

Dr Ness's examination findings were set out in the report as:

"I examined the claimant on the 12.03.08. His gait was normal. He stood with a forward tilt but was able to correct this when asked. On examining the cervical spine there was no tenderness. There was mild decrease in extension with a feeling of stiffness reported. He said that he does from time to time have trouble with his neck. Other movements of the cervical spine were full range and pain free.

On examining the thoracic and lumbar spine regions there was tenderness over the lower lumbar levels. There was a full range of flexion, extension, lateral flexion to the right and rotation to both sides. Lateral flexion to the left was mildly restricted with left sided low back pain reported. Pain was also reported on returning from the forward flexed position. There was no sign of nerve root involvement on examination of the lower limbs. Both hip joints were normal."

A review of the x-rays detected no abnormality in the pelvis or thoracic spine. There was decreased disc height at the L4/5 and L5/S1 levels.

The report radiologist had described "narrowing at the L4/5 disc space in keeping with degenerative change".

In terms of the work-related aspects of the report, it was stated:

"From the history obtained, my findings on physical examination and review of plain x-rays it is likely that the claimant has degenerative disease affecting his lower lumbar spine."

The appellant underwent an MRI on 20 March 2008, which showed "disc desiccation at the L4/5 and L5/S1 level".

In response to a question from Mr Fleming of Counsel on the MRI as to how extensive the damage was to the appellant's spine, Dr Ness (at page 1-38, line 25 of transcript) stated:

"It's not extensive. I would refer to it as degenerative disease in the early stage where there's some desiccation or drying out of the lower two discs in his spine."

A second report (Exhibit 7) from Dr Ness prepared on 26 March 2008 gave the following diagnosis in respect of the appellant's condition:

"The claimant has degenerative disease of the lumbar spine (lumbar spondylosis). This is an underlying pre-existing condition and, on his history, was asymptomatic until the 05.08.07. It is likely that the type of work he was doing at that time aggravated this pre-existing condition. Given that his pain developed following repetitive lifting rather

than a single specific traumatic event it also likely that the work related aggravation of his underlying condition has ceased. Therefore I conclude that his current clinical picture is due to the pre-existing condition of lumbar spondylosis which has now reached a time in his life where it has become symptomatic."

The prognosis was that whilst the underlying pre-existing lumbar spondylosis had ceased, there remained a risk of further aggravations into the future.

In cross-examination, Dr Ness was asked to consider the appellant's "fairly heavy workload" of lifting drums at least 190 times per day. Dr Ness (at page 1-39 of transcript) acknowledged, on the description of the tasks given to him, that his work was a heavy job.

In response to a proposition that turning the body and carrying loads is not good for the body, Dr Ness went on to state "It does make one more prone to injury, yes".

On whether the lifting of the drums could be responsible for the pain that caused the appellant's injury, Dr Ness (at page 1-42, line 6 of transcript) stated:

"I haven't found any evidence of any particular injuries caused. But is it possible? I'd say it's possible, but unlikely. I'd say it's more probable that the explanation is the one I've put forward . . . in my report."

Submissions

Appellant

The appellant's application for compensation was accepted as a work-related aggravation of a pre-existing condition, meaning that an entitlement existed for the aggravation only.

It appears clear from both Dr Wallace and Dr Ness that the appellant had an underlying pre-condition, however they differ in respect of the cause.

The appellant disputes that the WorkCover advice of 31 March 2008 (Exhibit 2), indicating that he was no longer incapacitated or suffering the affects of the aggravation, was demonstrably wrong.

On the medical reports before the Commission, it was submitted that the view arrived at by Dr Wallace was one for acceptance.

Dr Wallace was said to be more consistent with the facts as they related to heavy lifting and pain felt by the appellant.

Whilst it may be that each of the medical specialists were, to some extent, speculating in their findings, the Commission was encouraged to accept the finding of Dr Wallace that there was not any symptomatology prior to the incident of heavy lifting.

The Commission should set aside the findings of the Q-COMP review on the basis of the appellant having no pre-existing condition.

Q-COMP

The Commission was addressed, in the first instance, on the appellant's history, relied upon by Dr Ness, which was said to be consistent with the evidence given by the appellant in the proceedings.

The medical evidence was said to leave the Commission with only one conclusion, that being that there had been an aggravation of an underlying process by the work the appellant engaged in between May and August 2007.

There was no dispute that the appellant had suffered a work-related injury.

The Commission has to determine whether to accept the position advanced by Dr Ness that the appellant had an underlying condition, or that advanced by Dr Wallace which was not supported by "hard evidence".

The tenor of the submission was that the appeal should be rejected.

Conclusion

The appeal before the Commission sought to overturn the findings of a review undertaken by Q-COMP (14 July 2008) whereby they had confirmed a decision of WorkCover (31 March 2008) to accept a claim by the appellant on the basis of an aggravation of a pre-existing condition thus providing compensation benefits for an aggravation only.

The appeal process is one where it becomes a hearing *de novo* with all matters in respect of the claim subject to consideration.

The status of the appellant as a "worker" within the meaning of s. 11 of the Act was, on this occasion, uncontested.

Also uncontested was the fact that the appellant had suffered an injury in the course of his employment and that the employment was a significant contributing factor in respect of the injury sustained.

The nature of tasks undertaken by the appellant in the course of his employment, were of heavy manual labour with the nature of work not under contention.

In essence, the question for the Commission was to determine whether an injury had occurred in accordance with s. 32(1) of the Act, or whether a pre-existing condition had been aggravated by the employment in line with the provisions of s. 32(3)(b) of the Act.

The appellant in evidence, was able to give a detailed account of his work situation at the time of sustaining an injury and in particular, the physical nature of the work.

The appellant said that he had no previous history of trauma associated with any form of back injury and his evidence on that issue was consistent with the history given to Dr Ness at the time of examination.

The first sign of pain occurred at the conclusion of his lunch break when, in effect, he had great difficulty in getting up to return to work.

Dr Ness formed the view that the appellant had a degenerative disease of the lumbar spine which was said to be an underlying condition and was asymptomatic until 5 August 2007.

Dr Wallace had an alternate view that the MRI had revealed disc desiccation that was consistent with age-related changes, which did not necessarily indicate a pre-existing injury.

Dr Wallace opined that the incident described in 2007, was directly related to the appellant's injury.

There was some disquiet in respect to whether an incident (as such) had occurred at all, bearing in mind the appellant was at the end of his lunch break when he first experienced pain.

In the matter of *Starkey v Q-COMP (WC/2007/9)* QIRComm 68 (4 October 2007) Bloomfield DP, the issue of a delay between an incident and the onset of symptoms was canvassed as follows:

"Dr Allan Cook, Specialist Orthopaedic Surgeon, examined Mr Starkey on 20 November 2006 and reported that Mr Starkey was completely asymptomatic at that time. Dr Cook said that based upon his experience there could be a delay between an incident and the onset of symptoms of up to 2 weeks. However, the more normal situation would be for symptoms to be experienced reasonably close to the event. As such, he would have expected that if Mr Starkey had suffered any injury, or aggravation, on Thursday 20 or Friday 21 October 2005 he would have felt pain sooner than on the following Sunday afternoon."

The case for the appellant was that the repetitiveness of heavy manual work involving very frequent lifting and twisting had, over time, been the genesis of the injury (Exhibit 8).

In the matter of *Pepper v Q-COMP [2005] QIC 68; 180 QGIG 1127* (30 November 2005), Hall P outlined a set of circumstances very similar to those of the appellant in respect to the type of work undertaken and likely consequences of that work.

The President, in arriving at a decision, recorded the following comment:

"As a matter of first impression, the case which Mr Pepper advanced before the Industrial Magistrate was a strong one. His work involved reaching into tubs of water, seizing sheep skins and throwing the skins onto pallets. It involved bending, lifting, twisting and throwing. The work was repetitive. There were ninety to one hundred and

twenty skins per tub of water. There were seventeen tubs to be worked through in the course of a day. Mr Pepper worked through ten to eleven of those tubs. The work was arduous. When wet, the skins weighed about twenty kilograms. It was just the sort of work which was likely to cause a lower back injury. And on that point, Mr Pepper had the support of the only specialist who gave evidence, viz Dr John Pentis, an orthopaedic surgeon.

Dr Pentis opined that:

'The gentleman has suffered a lumbar disc protrusion and extrusion. It is more than likely that the work that he has undertaken caused this. He may have had some slight degeneration before it but the overall problem is due I'd say to the lifting of hides, twisting, throwing them onto racks. This is a force that will cause a disc disruption and it can present the way he mentions, where he woke up one morning with pain.'"

Whilst the appeal was subsequently dismissed, it was more for other factors than the aspect of the work itself.

Dr Ness was not of a view that the lifting of the drums could be responsible for the pain, however in cross-examination, made the slightest of concessions (at page 1-42, line 6 of transcript) where he stated:

"I haven't found any evidence of any particular injuries caused. But is it possible? I'd say it's possible, but unlikely. I'd say it's more probable that the explanation is the one I've put forward . . . in my report."

The work of the appellant was the subject of examination through the activities of Roger Kahler with regard to compiling a report (Exhibit 8) for the appellant's solicitors.

The findings of the report in respect to the heavy nature of the work was acknowledged by the parties in the course of the proceedings.

When one scrutinises the factors pertaining to the employment, along with the commentary of President Hall in *Pepper v Q-COMP*, it is certainly probable that the repetitive heavy lifting and twisting associated with the work, over time has the potential to be the cause of an injury.

On the matter of the appellant having a pre-existing underlying condition that was asymptomatic until 5 August 2007, the Commission is inclined to accept the argument of Mr Fleming that the medical specialists' views could only, in this case, be speculative.

Certainly, on the material before the proceedings in relation to the appellant's history, it would be reasonably safe to conclude that at 5 August 2007, there was no "known" evidence of symptoms of back pain or trauma.

The evidence of each of the medical specialists was always going to be fundamental to the outcome of the appeal and, after careful consideration, the Commission is inclined to prefer the opinion advanced by Dr Wallace that the injury to the appellant was as a direct result of the appellant's work and not an aggravation of any pre-existing condition.

Having considered the evidence, material and submissions before the proceedings, I have determined that the appeal be upheld and that the decision of Q-COMP dated 14 July 2008 be set aside.

The claim by the appellant for compensation for an injury in accordance with s. 32(1) of the Act is one for acceptance.

On the question of costs, I reserve my position.

J.M. THOMPSON, Commissioner.

Hearing Details:
2008 3 November

Released: 18 November 2008

Appearances:

Mr K. Fleming, QC, and with him Mr S. Cilento, instructed by Ms S. Price of Dempsey's Lawyers, for the Appellant.
Mr P. Rashleigh, of Counsel, instructed by Ms R. Jamieson and Ms L. Hedges, for the Respondent.

CONTENTS

(Gazette No. 16—pp. 791-800)

INDUSTRIAL COURT NOTICES

	Page
DECISION—	
Emmanuel Bojanovic AND Q-COMP	791-799