

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

Christopher Richard Morris AND Q-COMP (WC/2012/308)

DEPUTY PRESIDENT O'CONNOR

5 March 2013

Appeal - Decision of Review Unit, Q-COMP - Forklift driver - Lower back injury - Back pain - Lumbago - Sciatica - Where lower back injury said to be the result of rehabilitation (physiotherapy) for an existing, compensable injury to the knee - Whether the lower back injury fell within the meaning of "injury" where the injury was said to have been sustained whilst attending a "place" mentioned in s. 35(1)(c) - Whether sufficient evidence to satisfy Commission of a "causal link" between the physiotherapy and the Appellant's lower back injury - Appeal dismissed.

DECISION

[1] This is an appeal by Mr Christopher Richard Morris (the Appellant) against a decision of the Review Unit of Q-COMP (Q-COMP) dated 2 July 2012. That Q-COMP decision confirmed an earlier decision of WorkCover Queensland (WorkCover) not to accept the Appellant's claim for compensation, contending that he did not sustain an injury within the meaning of that term in s. 32 of the *Workers' Compensation and Rehabilitation Act 2003* (the Act).

Brief History of the Claim

- [2] The Appellant was employed by Bendix Business Furniture Pty Ltd (Bendix) as a forklift driver.
- [3] The Appellant lodged an Application for Compensation with WorkCover dated 20 December 2011 (Exhibit 1) for an injury described as "Lower back, Back pain, lumbago, sciatica" which was said to have been sustained as a result of physiotherapy undertaken on the Appellant by Mark Turner on 21 November 2011. The physiotherapy undertaken by Mr Turner was part of rehabilitation for an existing workers' compensation claim.
- [4] WorkCover issued a Statement of Reasons for Decision dated 5 March 2012 (Exhibit 1) rejecting the Appellant's claim for compensation.
- [5] The Appellant lodged an Application for Claim Review with Q-COMP dated 15 May 2012 (Exhibit 1). In that claim the Appellant stated: "I have opinion from Dr Scott Campbell (see report dated 1/4/12) that my lower back injury was caused by the physio session on 10/11/11."
- [6] Q-COMP provided its Reasons for Decision dated 2 July 2012 (Exhibit 1) which confirmed the WorkCover decision and indicated that the Appellant did not sustain an "injury" within the meaning of that term in s. 32 of the Act. It is against this Q-COMP decision that the Appellant appeals.

Issues for Determination

- [7] The key issues for determination in this appeal are as follows:
- (a) whether the Appellant was a worker within the meaning of that term in s. 11 of the Act;
 - (b) whether the Appellant suffered an "injury", namely an injury to his lower back, within the meaning of that term in s. 32 of the Act; and
 - (c) whether the alleged injury sustained by the Appellant and the subsequent back pain was causally linked to the "event" which occurred while the Appellant was undertaking rehabilitative physiotherapy.
- [8] Section 32 of the Act relevantly provides as follows:

"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."

[9] Section 35 of the Act also relevantly provides:

"35 Other Circumstances

(1) An injury to a worker is also taken to arise out of, or in the course of, the worker's employment if the event happens while the worker—

...
...

(c) for an existing injury for which compensation is payable to the worker—is on a journey between the worker's home or place of employment and a place—

- (i) to obtain medical or hospital advice, attention or treatment; or
- (ii) to undertake rehabilitation; or
- (iii) to submit to examination by a registered person under a provision of this Act or to a requirement under this Act; or
- (iv) to receive payment of compensation; or

(d) is on a journey between the worker's place of employment with 1 employer and the worker's place of employment with another employer; or

(e) is attending a school mentioned in paragraph (b) or a place mentioned in paragraph (c)."

[10] It is not in dispute in these proceedings that the Appellant was at the relevant time attending a "place" as referred to in s. 35(1)(c), namely a physiotherapist, where he was undertaking rehabilitation for compensable knee injury.

[11] Section 35(1)(e) of the Act provides that an injury to a worker is also taken to arise out of, or in the course of, the worker's employment if the event happens while the worker is attending a "place" mentioned in subparagraph (c) of s. 35(1).

[12] By virtue of s. 35(2) of the Act, if it is established by the Appellant that an "event" occurred while undertaking rehabilitation then it is unnecessary for the Appellant prove that employment was a significant contributing factor to the injury.

[13] For the purposes of these proceedings, it is unnecessary for the Commission to determine whether the injury complained of is an injury within the meaning of s. 32(1) of the Act or an aggravation of a pre-existing injury by virtue of s. 32(3)(b).

[14] Q-COMP conceded that, at the relevant time, the Appellant was a worker.

Onus of Proof

[15] The Appellant carries the burden of proof on the balance of probabilities: see *Rossmuller v Q-COMP*¹. The Appellant must prove, on the balance of probabilities, that the claim is one for acceptance.

Nature of Hearing

[16] The appeal to the Commission is by way of a hearing *de novo*.

The Evidence

[17] The evidence in this matter was short in compass.

[18] The Appellant gave evidence that he worked at Bendix. On 10 August 2011 he fell after catching his foot in a heavy canvas industrial curtain at Bendix's premises and fell heavily onto his outstretched left hand and right knee.

[19] As a consequence of the fall on 10 August 2011, he sustained a fractured patella and was referred to Dr Dale Rimmington, Orthopaedic Surgeon, who performed a right ankle arthroscopy.

[20] As part of his rehabilitation for the compensable injury sustained on 10 August 2011, the Appellant attended at

¹ *Eric Martin Rossmuller v Q-COMP (C/2009/36) - Decision* <<http://www.qirc.qld.gov.au>> at para [2].

Bodyworks Physiotherapy. Mr Morris gave evidence that Mr Turner performed the physiotherapy on him by manipulating his spine by placing pressure for a prolonged period of time on his lower spine. Mr Morris described his pain as "Not extreme pain" but he felt very uncomfortable.

- [21] Following the manipulative physiotherapy procedure, Mr Morris was directed to an adjoining room which was equipped with a vibration machine, a Galileo machine and a push bike. Mr Morris underwent some treatment on the "shake machine" but declined the push bike. He told the Commission that following the physiotherapy he was in a lot of pain, particularly in his lumbar spine and subsequently found it difficult to move and walk.
- [22] Mr Morris gave evidence that his pain increased over next week and half and got "... worse and worse and worse" until such time that he could bear it no longer.
- [23] Mr Morris attended Dr Sudusinghe on 27 November 2011. In his evidence-in-chief, the following interchange took place:

"What did you say to Dr Sudusinghe on the 27th of November? - - That I was in extreme pain. Extreme pain. I wanted a needle, and while I [indistinct] – he didn't believe me. He didn't believe me one bit. He didn't send me for x-rays. I had a big argument with him at the door because he wanted to send me home with Voltaren and I just laughed at him. I was very upset. I made a bit of a ruckus at the door, so he's called me back in and given me a packet of Endone which I never asked for in the first place. I wanted a needle and for anybody to go to a doctor, especially me, and asked for a needle – I was in pain. I was in extreme pain."

- [24] The Appellant's handwritten notes (Exhibit 4) are instructive:

"Oct 26 Came Home from work 10.00am Continuous Pain knee, thighs + hip/bum.

Nov 10 start physio (sic) Mark Turner Kallangur massage/shake mach. walking funny²

Nov 15 physio (sic) Kallangur (Mark) massage/bike/shake mach

Nov. 18. physio (sic) Kallangur

Nov. 21 physio (sic) Kallangur

Nov. 27 Saw Dr. Sam I have been in extreme pain for 3 days and (indecipherable) getting worse

Nov. 28 Saw physio (sic) Gavin much pain bum and thighs

Nov. 29 Saw Dr Sam for further examination..not willing

Dec 9. Saw Dr Sam hurt myself again mowing lawn severe pain more Endones

Dec 9 physio rang, WorkCover rang. End of knee claim new one for back"

- [25] The above handwritten notes are significant in that they do not disclose any reference to the onset of pain following the physiotherapy sessions on 10, 15, or 18 November 2011.
- [26] It was not until 27 November 2011 that Mr Morris first made reference in his handwritten notes to experiencing back pain.
- [27] On that date Mr Morris recorded "... I have been in extreme pain 3 days and (indecipherable) getting worse."
- [28] The clinical notes of Dr Sudusinghe (Exhibit 3) do not reveal any record of lower back pain on or near the date of the physiotherapy treatment undertaken by Mr Turner on 10 November 2011.
- [29] Dr Sudusinghe referred Mr Morris to Dr John Albietz, Spinal Surgeon. Dr Albietz first saw Mr Morris on 21 December 2011 at the Wesley Hospital. In Dr Albietz's report of the same date, he noted that the Appellant had an MRI scan of the lumbar spine demonstrating discogenic deterioration at the L5/S1 level with relative preservation of the proximal motion segments in the lumbar spine.
- [30] In the report to Dr Sudusinghe dated 21 December 2011, Dr Albietz noted:

² This, the appellant alleged, had been occurring since the initial injury to his right knee on 10 August 2011.

"For the first time he received physiotherapy treatment to his back in November 2011. Three days following this developed intense pain in his back radiating into his legs."

[31] On this point, Counsel for the Appellant made the following submissions:

"17. On 21 December 2011 Dr Albietz examined Mr Morris. Importantly, Mr Morris provided the history of his original injury and treatment to Dr Albietz using a form completed prior to the examination. Mr Morris provided detail of his original injury to his knee, but not of the injury to his back. That same day Dr Albietz provided a report to Dr Sudasinghe outlining his proposed treatment plan. Within that report Dr Albietz comments that Mr Morris developed intense pain three days following physiotherapy treatment in November.

18. Mr Morris is clear in his evidence that he related to Dr Albietz the history of having physiotherapy to his back, and of continuing pain, increasing to a point where after three days of excruciating pain he attended Dr Sudasinghe. Dr Albietz has provided his report as to how the injury arose based upon that examination, focusing on the point of Mr Morris having received physiotherapy treatment as part of his treatment for his knee injury, and after a period of 'three days', reporting to his doctor."

[32] The above submissions of the Appellant cannot be accepted and are, in my view, inconsistent with the preponderance of evidence.

[33] Mr Morris conceded in cross-examination that on 18 November 2011 he attended at Bodyworks Physiotherapy reporting that he was feeling better and that Dr Rimmington was pleased with his progress and was happy for him to commence a gym program.

[34] Mr Morris's attendance at Bodyworks Physiotherapy on 21 and 25 November were uneventful and he did not make any complaint about suffering from back pain to either Mr Turner or Mr Rodrigues.

[35] Mr Morris' own contemporaneous file notes (Exhibit 4) disclosed no mention of back pain in the period following 10 November 2011 until 27 November 2011 when he noted "...been in extreme pain for 3 days..." and attended on Dr Sudasinghe.

[36] In his report of 13 February 2012, Dr Albietz opined:

"Chris received physiotherapy treatment in November 2011 and 3 days following this developed intense pain in his back radiating into his leg. This severe aggravation of his back pain was not related to the initial work event and I cannot directly relate this to his physiotherapy treatment with the same occurring 3 days later. There is no specific event documented to cause this severe onset of symptoms."

[37] Mr Morris attended on Dr Michael Coroneos, Neurosurgeon, on 22 February 2012.

[38] The report prepared by Dr Coroneos dated 22 February 2012 noted that it was his usual practice to show a patient the file of materials from WorkCover in order for them to confirm the accuracy of what was recorded. Dr Coroneos confirmed in his evidence that Mr Morris identified only one error on the file relating to a typographical error in respect of the injury date.

[39] Dr Coroneos confirmed that Mr Morris identified 21 November 2011 as the date he claimed he was injured by Mr Turner during the physiotherapy session.

[40] Initially, in his evidence-in-chief, Mr Morris claimed that Dr Coroneos was in error in recording 21 November 2011 as the date he suffered his injury. However, in cross-examination he conceded that he may have told Dr Coroneos that date.

[41] In cross-examination, the only explanation Mr Morris could give for the discrepancy between the date of injury which he gave to Dr Coroneos - that is, 21 November 2011 - and the date on which the physiotherapy now relied on as the "event" said to have given rise to his injury actually occurred - that is, the physiotherapy session with Mr Turner on 10 November 2011 - was that "he wasn't concentrating on dates".

[42] Dr Coroneos noted in his report the following history given to him by Morris:

"Mr Morris went on to tell me that on 21/11/2011 he was having physiotherapy with Mr Mark Turner and he was experiencing some lateral hip and gluteal pain. He told me that Mr Turner used his elbow into the gluteal region and then put him on the pushbike and he experience knee pain. He told me that he was then on the shaking machine and was asked to do squats on the machine and he experienced severe pain in his lower back and this was the first time he had experienced lower back pain."

[43] Dr Coroneos noted that:

"CT, MRI and the bone scan examinations of the lumbar spine, including pelvis, show longstanding degeneration at the L5/S1 level and to a lesser degree at the L4/5 level. There is no evidence of any acute injury to spine or pelvis as a result of the work related accident 10/08/11 or the physiotherapy treatment by Mr Mark Turner 21/11/2011."

[44] It was Dr Coroneos' opinion that he was unable to offer a neurosurgical diagnosis to account for the ongoing symptoms and incapacity referable to the spine or lower limbs because there was no evidence of any neurosurgical spinal injury on the MR imaging of the lumbar spine and pelvis and nuclear bone scan.

[45] Mr Gavin Rodrigues a physiotherapist at Bodyworks Physiotherapy, saw Mr Morris on 25 November and 28 November 2011.

[46] Mr Rodrigues gave evidence that Mr Morris attended on 25 November 2011 for a "prearranged gym session". In his evidence to the Commission, Mr Rodrigues stated that Mr Morris attended the physiotherapy practice dressed for the gym session and did not at any stage complain about being in pain.

[47] Mr Rodrigues explained that the access card to the gym did not work and so the session had to be rescheduled.

[48] It is difficult to understand why the Appellant would attend for a "gym session" if he was in pain and, at the very least, one would reasonably expect him to make some mention to Mr Rodrigues that he was suffering lower back pain.

[49] Mr Morris again attended at Bodyworks Physiotherapy on 28 November 2011 for a gym session and complained of sciatic pain down both legs and lower back pain. This onset of symptomatology was consistent with the clinical records of Dr Sudusinghe.

[50] Dr Scott Campbell, Neurosurgeon, saw the Appellant on 11 April 2012 for the purpose of preparing a medico-legal report.

[51] In the report dated 11 April 2012 (Exhibit 7), Dr Campbell opined:

"From the history obtained today from Mr Morris, it appears that the lower back pain came on following the physiotherapy session on 10 November 2011 in which he received pressure treatment followed by an exercise regime on a bike and shake machine. As the symptoms came on immediately during or after performing these activities there is direct causal link."

[52] In cross-examination, Dr Campbell accepted that in order to establish a relationship between the onset of the pain suffered by Mr Morris and the undergoing of the physiotherapy there needed to be a "direct causal link".

[53] Dr Campbell in cross-examination stated:

"... so if it came on 18 days later, then there's unlikely to be a causal link. The strength of the association weakens considerably and I would place it in the unlikely range."

[54] The combined evidence of Mr Turner, Mr Rodrigues and Dr Sudusinghe does not support the Appellant's assertion that he was suffering from the onset of symptoms consequent upon the provision of the rehabilitative physiotherapy by Mr Turner on 10 November 2011.

[55] I accept that the medical evidence supports a conclusion that the Appellant's previous asymptomatic lumbar spine condition became symptomatic in or around November 2011.

[56] However, the medical evidence does not support, in my view, a conclusion that there was any causal link between the physiotherapy performed by Mr Turner at Bodyworks Physiotherapy and the onset of symptoms in the Appellant's lumbar spine.

[57] The only evidence before the Commission which supports a conclusion of a causal link between a specific event and the onset of lumbar spine pain relates to December 9 when Mr Morris attended on Dr Sudusinghe complaining of severe back pain following hurting himself mowing the lawn.

Conclusions

[58] The Appellant bears the onus of establishing, on the balance of probabilities, that the rehabilitative physiotherapy undertaken by Mr Morris was causally related to the onset of symptoms in his lumbar spine.

[59] On the consideration of the totality of the evidence before the Commission, I am not satisfied that the Appellant has established that he has suffered an injury within the meaning of s. 32 of the Act.

[60] Accordingly, I make the following orders:

1. That the appeal be dismissed;
2. That the decision of the Q-COMP Review Unit dated 2 July 2012 be confirmed; and
3. That the Appellant pay Q-COMP's costs of and incidental to the appeal to be agreed or failing agreement, to be the subject of a further application to the Commission.

D. L. O'CONNOR, Deputy President.

Hearing Details:
2013 February 20, 21

Released: 5 March 2013

Appearances:
Mr S. R. Grant of Counsel, instructed by Colwell Lyons Lawyers
for the Appellant.
Mr S. P. Sapsford of Counsel, directly instructed by Q-COMP.