

Aggravation

Presented by Mr Stuart Sapsford

Scope of this Paper

This paper is confined to a consideration of significant contributing factor as relates to aggravation only. Particular regard will be had to the following:-

- (a) the legislation;
- (b) aggravation of orthopaedic injuries;
- (c) aggravation of psychiatric injuries.

Legislation

The current legislation is the *Worker's Compensation and Rehabilitation Act 2003* and the relevant section is s.32 (3) which provides as follow:-

“(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.”

Patently paragraph (b) is different from sub-paragraph (a) of s.32 (3) of the Act in so far as it relates to an aggravation of a personal injury or a disease or a medical condition (if the condition becomes a personal injury or disease because of the aggravation).

In reality the distinction between injury, disease and medical condition is not one which has fallen for consideration by the courts. This is not surprising in circumstances where an applicant claiming an aggravation of a pre existing injury generally has a well diagnosed injury or condition upon which the aggravation takes place.

The distinction in sub-paragraph (iii) between a medical condition and a personal injury or disease appears somewhat facile having regard to the decisions of *Pleming*¹ (orthopaedic) and *Groos*² (psychiatric).

It should be noted that there is no necessity in order that a claimant might enjoy the benefit of this legislation for that claimant to prove that the original injury or condition was work related. This is of particular significance in relation to orthopaedic injuries which occur by way of a minor incident aggravating an already degenerative spine. In circumstances where the aging process inexorably leads to degenerative spines in human beings it is not surprising that aggravation by way of a previously asymptomatic spine becoming symptomatic make up the greater majority of cases in this category.

Orthopaedic

As stated *Supra* it is not necessary in order that an applicant may be successful to establish that the primary injury which is aggravated was caused by a work related event.

What is necessary and is the subject of the greater majority of decisions in this area is to establish that the aggravation was “work related”.

¹ *Pleming v WCBQ* [1996] 152 QGIG 1181

² *Groos v WorkCover Queensland* [2000] 165 QGIG 106

One of the earlier decisions was that of *Turton*³ which was dispositive of this issue on the basis of an inability to reopen a previously compensable claim.

In *Turton* it was argued by the now Chief Magistrate Marshall Irwin that the sublime manifestation of symptomatology by Mr Turton in his workplace was due to previous compensable injuries.

In circumstances where there was no work related injury relating to the exhibition of symptomatology consideration was had in relation to the ability of the worker to “re-open” his previously successful application. That case was decided on the point that there was no provision for such a re-opening. However, it would seem, should there have been a workplace incident which aggravated the pre-existing injuries then Mr Turton may well have been compensable.

In relation to whether or not the workplace was a **significant contributing factor** to the contraction of the aggravation two recent cases highlight the dichotomy of approach taken by the courts both at trial level and on appeal before the Industrial Court.

The first of these in time *WorkCover Queensland v BHP*⁴ involved a man by the name of Schmidt who was employed by BHP Coal at their Saraji Mine. The facts are of some relevance in the consideration of the conclusion reached by the court and they are as outlined by His Honour The President in the decision as follows:-

“On 9 February 2001 he had completed his shift. His duties had included cleaning, general duties, hosing, sweeping and off-siding for a fitter performing such tasks as the removal of hydraulic hoses off loaders, removing grease lines and handing tools to the fitter. Having concluded his shift, he went to the change room on the site to change out of his work clothes. In doing so, he removed his work boots. As he bent down to pick up his boots, he experienced a sharp pain across his lower back. The incident occurred at approximately 6.15p.m. The evidence of Mr Schmidt, which was not challenged, was that he sat down on a seat for a while trying to straighten up. After a few minutes the pain eased. He then stood up and picked up his boots. After this he walked out to the car park and waited for his lift home. Bevan Morgan was the driver. When he saw Mr Schmidt stooped over he asked him what had happened. When Mr Schmidt awoke the next morning he was in considerable pain ... an application was lodged for compensation ...”

The greater majority of cases in this area recognise the possibility of significant back injury occasioned by a relatively minor activity operating as an aggravation on a previously degenerative spine.

What was interesting about this decision is that the activity was the subject of considerable evidence from orthopaedic experts and having regard to their evidence the Learned Industrial Magistrate found that while work was a contributing factor to the aggravation it was not in the circumstances a significant contributing factor.

In upholding the decision of the Magistrate His Honour The President said as follows:-

“Two orthopaedic surgeons, Messrs North and Shore, gave evidence. On Dr Shore’s evidence the incident involving the boots was a significant contributing factor. However, it is plain from the transcript, that Dr Shore would have said that of any incident which was the irritant triggering the pain. On Dr North’s evidence, of roughly 10 factors contributing to the pain, the incident involving the boots “.....comes a long way down the list”. On that evidence it was open to the Industrial Magistrate to conclude that the incident involving the boots was not a significant contributing factor to the aggravation.”

His Honour went on to pay due deference to the view reached by the Industrial Magistrate which he considered in the circumstances was reasonably open.

This is seemingly difficult to reconcile with the latter case of *Fielder*⁵.

³ *Turton v Workers’ Compensation Board of Queensland* [1996] 158 QGIG 461

⁴ *WorkCover Queensland v BHP (Qld) Worker’s Compensation Unit* [2002] 170 QGIG 142

⁵ *Fielder v WorkCover Queensland* [2004] 175 QGIG 871

That case related to a worker by the name of Leupena Vaafusuaga who lodged an application for compensation relating to an injury sustained in the work place while performing the task of lifting empty plastic bread crates. It was accepted by both the Industrial Magistrate's Court and Industrial Court that this was a relatively minor activity however it was found by both the Industrial Magistrate and the President that the activity having been identified and having occurred in the work place was sufficient to establish that employment was a significant contributing factor to the aggravation of the pre-existing degenerative spinal disease.

Interestingly, having regard to the above referred case of *WorkCover Queensland v BHP* His Honour stated in *Fielder* the following:-

“the medical evidence is such that one must accept, as has been accepted in other cases, that the degenerative spinal disease had reached the point at which it might be exacerbated and rendered symptomatic by stretching to get something out of a pantry, **bending over to tie shoe laces** or turning over in bed. What happened to the worker in this case might well have happened to him at his home, on a council bus or at a religious service. However, once the Industrial Magistrate accepted that the incident of 3 April 2001 did in fact occur and accepted that there was proximity of time between the incident and the onset of the pain it was, in the absence of any evidence about a competing causal incident, inevitable that the Industrial Magistrate would conclude on the balance of probability that the worker's employment had been “a significant contributing factor to the aggravation”. On the state of the evidence any other conclusion would be speculation.” (Bolding added)

It is submitted that the only way to reconcile the two above referred decisions is in each and every case to examine the particular circumstances of the aggravation together with the medical evidence as to its significance particularly having regard to possible other causes.

Psychiatric

There is little doubt that the provisions of s.32(3)(b) apply equally to a psychiatric injury.

This was complicated when the legislation included the “reasonable person test”⁶. Under that legislation it was necessary for an applicant for compensation in relation to psychiatric injury to establish that the injury sustained would have been sustained by a reasonable person in the same circumstances. Needless to say, that legislation put a huge dent in the ability of workers to claim an aggravation of a pre-existing psychiatric condition.

That is now no longer the legislation and an employer must take the worker as he finds them whether the pre-existing injury be orthopaedic or psychiatric.

Indeed, it is apparent that an employer who has knowledge of the existence of a psychiatric injury must take additional care to ensure the safety and well being of that worker⁷.

Leaving aside questions of reasonable management action as provided for by s.32(5) of the Act it would seem to be axiomatic that where a worker complains of matters within his workplace that have led to a diagnosed psychiatric injury then they will (in the presence of a pre-existing psychiatric injury of a similar nature) be regarded as an aggravation of that injury.

It would be surprising to find a psychiatrist who opined otherwise.

Recent Cases

I note that the coversheet for this presentation provides in part that it is in relation to “Latest Key Industrial Court and Industrial Magistrate Decisions” and in the circumstances feel constrained to refer to some recent decisions regarding aggravation and significant contributing factors.

⁶ This “test” was first incorporated into the legislation by the WorkCover Queensland Act 1996 and applied to injuries from 1 February 1997 to 1 July 1999 when it was repealed by the WorkCover Queensland Amendment Act 1999.

⁷ See *WorkCover Queensland v Kehl* [2002] 170 QGIG 93

While indicative of the approach of the Court (Magistrates and Industrial) towards the particular set of circumstances the subject of those decisions they should not with respect be regarded as definitive of the approach to be taken by a Court in any particular case as that will depend inevitably upon the individual facts.

Pepper⁸

This case involved a man who had a rich history of heavy manual work. The only Orthopaedic Surgeon who gave evidence, Dr John Pentis opined as follows:-

“The gentleman has suffered a lumbar disc protrusion and extrusion. It is more 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.”

The problem for Mr Pepper was that he did not attribute the severe onset of pain (when he woke in the morning) to his work activities. There was ample evidence from Mr Pepper's workmates as to what he told them in this regard. This combined with the evidence of a general practitioner that it was not until Mr Pepper's second visit that he sought to attribute the pain suffered to his employment was sufficient to lead the Industrial Magistrate to conclude that his work was not a significant contributing factor to his injuries. The Industrial Court declined to interfere with this conclusion.

The question raised by this case is whether or not the continuous and repetitive insult to a spine by the nature of work performed for example by Mr Pepper can be regarded as producing the ultimate symptomatology when no evidence is at hand as to whether or not it was the work or natural degeneration which lead to the state of the spine just prior to injury.

While a tempting conclusion in this case particularly having regard to the fact that the only Orthopaedic Surgeon attributed the aetiology to the workplace the contention that work was a significant contributing factor was displaced by other evidence.

Briffa⁹

The issue in that case and the circumstances are summarised in the judgment as follows:-

“The Industrial Magistrate accepted on the evidence of Dr D. R. Tomlinson a Neuro-surgeon, that on 25 March 2003 (when Tomlinson examined Mr Briffa for the purposes of providing a medico-legal report) Mr Briffa was suffering a physical injury to his cervical spine. No issue was taken about that finding by either party to the Appeal to this Court. What is challenged is the further finding by the Acting Industrial Magistrate that the physical injury was not caused by an incident which occurred somewhere between August and September 2001 at or about 1.00 p.m. to 2.00 p.m. whilst the Appellant was at work.”

In this case the unsatisfactory nature of the worker's evidence particularly where it conflicted with other witnesses was such as to lead the Acting Industrial Magistrate to the following conclusion:-

“I find there appear (sic) to be too much conflict in the evidence to make a finding in favour of Mr Briffa”.

Here is a factual set of circumstances in which Mr Briffa experienced an incident at work and it was accepted by the Court that immediately after it he was required to take a period of time off work.

Other incidents (non-work related) and the unreliability of the evidence of Mr Briffa were sufficient to displace what would ordinarily be a natural assumption that work was a significant contributing factor.

⁸ *Pepper v Q-COMP* [2005] 180 QGIG 1127

⁹ *Briffa v QCOMP* [2005] 180 QGIG 70

Munce¹⁰

In this matter Mr Munce (a jockey) contended that his current allegedly compensable condition was causally related to a fall in track work in 1994. It was not in dispute that Mr Munce suffered from back pain and the essential question for the Industrial Magistrate was whether or not that back pain was linked to the injury of 4 June 1994.

In the period between original injury and application for compensation Mr Munce had engaged in some quite extraordinary activities such as horse-breaking, had suffered further falls from a horse and had established a cleaning business which he was unable to continue with due to the state of his back. As stated by the President:-

“Mr Munce, who is burdened with the onus or proof, was always going to face difficulty with the first issue. Over the period between the fall of 4 June 1994 and the claim of 6 May 2002, Mr Munce had followed vocations inherently likely to damage a back, e.g. he had ridden track work; he had broken horses; and he had suffered a further three falls from a horse. Additionally, having formed a view that horse riding/breaking was doing his back no good, he established a cleaning business in which he was involved in bending and in lifting heavy objects and containers. To succeed, Mr Munce had to develop a case tracing the pain to the incident of 4 June 1994 rather than to the subsequent activities. Additionally, Mr Munce suffered from spondylolisthesis. Whilst it was accepted that the spondylolisthesis had been asymptomatic prior to the fall of 4 June 1994, Mr Munce had to deal with the thesis that any pain attributable to the fall of 4 June 1994 had dissipated relatively shortly thereafter and the subsequent pain was attributable either to the natural progression of the condition or to the arduous work periodically prodding the condition into pain.”

Not surprisingly the President upheld the Industrial Magistrate’s finding that he could not accept a link between the current symptomatology and the fall in 1994.

Conclusion

As will be seen from the above referred cases matters involving aggravation of pre-existing injury and whether or not work is in the circumstances a significant contributing factor will involve in each and every case a careful analysis of the factual scenario surrounding the alleged injury. The complication of pre-existing degenerative change and the identification or otherwise of that disease will always be a problem for a plaintiff burdened with the onus of proof.

S.P.SAPSFORD
Chambers 22 May

¹⁰ *Munce v WorkCover Queensland* [2005] 179 QGIG 449

Cases Referenced

Pleming v WCBQ [1996] 152 QGIG 1181

Groos v WorkCover Queensland [2000] 165 QGIG 106

Turton v Workers' Compensation Board of Queensland [1996] 158 QGIG 461

WorkCover Queensland v BHP (Qld) Worker's Compensation Unit [2002] 170 QGIG 142

Fielder v WorkCover Queensland [2004] 175 QGIG 871

See *WorkCover Queensland v Kehl* [2002] 170 QGIG 93

Pepper v Q-COMP [2005] 180 QGIG 1127

Briffa v QCOMP [2005] 180 QGIG 70

Munce v WorkCover Queensland [2005] 179 QGIG 449