



INDUSTRIAL MAGISTRATES COURT OF QUEENSLAND

PARTIES: Mauro John BERNAZZA.
V
Q-COMP
AFFINITY HEALTH PTY LTD

FILE NO: MAG -00056791/09(4)

PROCEEDING: Appeal

ORIGINATING COURT: BRISBANE INDUSTRIAL MAGISTRATES COURT

DELIVERED ON: 17 November 2009

DELIVERED AT: BRISBANE

MAGISTRATE: P.M.Kluck

ORDER: Appeal Dismissed. Decision of Q-Comp of 10 March 2009 is confirmed.

Mr. Mauro Bernazza, represented by Mr. O'Neill of counsel, appeals pursuant to s. 550 of the Workers Compensation and Rehabilitation Act 2003 (the Act) from a decision of the Review Officer of Q-Comp to reject his application for compensation.

He bears the onus of proving, on the balance of probabilities, that he sustained a personal injury and that it arose out of, or in the course of, employment and that the employment is a significant contributing factor to the injury (s.32 of the Act).

Mr. Bernazza was a patient services attendant or wardman at the Pindara Private Hospital at Benowa and it is not in dispute that he was a "worker" in terms of the Act. Part of his duties involved his using a hoist for handling immobile patients. On 25 June 2008 the hoist was faulty and had been for some time in that the wheels were jamming. This made it difficult to manoeuvre particularly when heavy patients were on-board. It required the combined efforts of Mr. Bernazza and another, one kicking and pulling, the other pushing, to get it moving and to keep it moving. Mr. Bernazza said this necessitated him twisting and turning and straining his back.

The uncontested evidence is that on 25 June 2008 the workload for Mr. Bernazza was unusually heavy with many patients to move and some were quite heavy meaning the hoist had to be used. He said the sweat was pouring from him.

In evidence in chief Mr. Bernazza said that with the pushing and pulling of the hoist his back was very sore from the middle of his shoulder blades to the middle of his lower back. He said he used the hoist to move five patients that day and sometimes up to seven times on the one patient. He had started work at 6.30 am that day and at 11.30 he washed up and went to lunch for half an hour. He had his lunch at an outside barbeque area a short walk of about one and half minutes from his work area.

He returned from lunch at 12 o'clock and was cleaning up a room in which a patient had just died and he bent over to pick up a pillow. He immediately felt excruciating pain eight inches or so above the lowest point of his back. He said it felt like someone had thrown a dart into his back. He said it took his breath away and he couldn't do anything. At 12.15 pm he wrote an incident report (Exhibit 2).

In that report he wrote in the section provided that the specific part of his body injured was "the middle of back". Further over on the form he wrote "between shoulder blades". In the box titled 'describe what happened' he wrote,

"a very heavy ward. I assisted a lot of patients on hoist. Large frame hoist is faulty & impossible to push. I did not feel it at the time. I then went to lunch. When I came back to work I then had cooled down & felt a very sharp pain between shoulder blades.

He left that report with his area manager. The health and safety manager, Pieta Neilsen, wasn't able to be contacted on that day. He tried to see a doctor that afternoon but couldn't get an appointment. On the next day he went to the Medical Centre and after seeing a doctor he went to see M/s Neilsen to make sure that she had got his incident report. He did see her but he said that she would not accept the report for reasons which I will return to shortly.

He then filled out another report (Exhibit 3.) In this report he wrote,

"on returning from lunch patient 208 had passed away I went into his room to tidy it up I reached out to get a pillow from a chair & I felt a very sharp pain between my shoulder blades. Then I went & reported it to Michelle Friske & Area Manager."

Mr. Bernazza's application for compensation was filled out on the same day as his second report. In the section titled 'How did the injury happen?' he wrote,

"I did not feel it at 11.30 only after I came back to work after lunch at 12.00."

On each of the three forms the time of the injury is entered as 11.30. Mr. Bernazza in his evidence said that on the incident reports the writing of this time is not his. But there was nothing in the evidence to suggest the writing of the time on the application for compensation was not his. The writing appears to be consistent and of course it goes in his favour for him to say consistently that the injury occurred at 11.30. So nothing adverse to Mr. Bernazza turns on that.

Dr. Campbell, Neurosurgeon, in his report dated 11 October 2008 states that Mr. Bernazza sustained an injury to the mid back region. In the history he took he stated that Mr. Bernazza told him that he was manoeuvring patients on a large frame hoist with faulty wheels which made it difficult to push and after a 30 minute break and upon resuming his duties, noted the sudden onset of pain.

Dr. Parkington, Orthopaedic Surgeon, in his report of 22 July 2008 noted that Mr. Bernazza told him that he already had an L4/5 disc prolapse which was due to his work. He states that Mr. Bernazza experienced sharp interscapular pain when he bent to pick up a pillow. Dr. Parkington states that Mr. Bernazza blamed his symptoms on the wheels of a hoist which were stiff and was therefore difficult to push but the doctor notes his opinion that there was no actual injury whilst doing this.

Mr. Bernazza caused some confusion in his evidence as to the actual location of his back pain. He used the term T10 which is, as I understand it, the mid back. He used this term together with the phrase "between the shoulder blades" which on Dr. Campbell's evidence would be T 4, 5 or 6. But Dr. Campbell in cross examination also said the interscapular region, which I take to mean "between the should blades" can range from T1 probably down to T10. Certainly in his demonstration in the witness box Mr. Bernazza indicated his mid back region as the site of his pain.

In his evidence, Mr. Bernazza stated that the pain he felt pushing the hoist was in the same region of his back that he felt after lunch. Of course there are some glaring inconsistencies in his evidence about whether he actually felt pain when pushing the hoist before he went to lunch.

As noted, in the two incident reports and the application for compensation he stated that he didn't feel "it" at the time or at 11.30. In context "it" can only mean "the pain".

As noted, in evidence in chief, he said his back was very sore from his shoulders to the middle of his lower back.

During cross examination by Mr. Dwyer of counsel, who appeared for Affinity Health Pty Ltd a party given leave to appear, in explaining why he didn't say in the reports that he had pain pushing the hoist before lunch, he said that the pain he felt was not the sharp pain like after lunch. He then said that he ran out of room on the form. Later he said that it was hard to think straight when writing out the form when he was in pain. Although he agreed with the suggestion that the pain he felt pushing the hoist was unusual, he also said that he thought at the time that "oh, you just think it goes away....oh well, I've got a bit of pain. It will go away....Oh I think it's a bit wussy. If I was to do that every time I felt a bit of pain if I was to write something I'd, you know, I was struggling."

He said that M/s Neilsen asked him, when he went to see her, to tell her exactly the second he felt the pain. He said he had to think back and he said "when I went into the room to tidy it up." He said M/s Neilsen then told him that she didn't want to hear anything about the hoist and that he therefore just followed M/s Neilsen's instructions to fill out the second incident report. He said in cross examination that the pain before lunch was "just stiffness, real stiff, soreness" yet very soon after he said "it was murder on my back. Killing – it was really murder pushing that hoist."

Mr. Bernazza, when cross examined by Mr. Gray of counsel who appeared for Q-Comp, similarly explained the reason he didn't put in the incident reports about feeling any pain pushing the hoist. He said it was not that sharp pain he felt after lunch. He said that "it (his back) was all stiffening up really hard, it was painful."

Mr. Bernazza's evidence as to whether or not he told the doctors about pain when pushing the hoist was also somewhat confusing. He seemed to suggest that he did tell Dr. Parkington but agreed that he didn't tell Dr. Campbell. After hearing Dr. Parkington give evidence, reading his reports, hearing about how he takes a history from a patient, and having regard to Mr. Bernazza's contradictory evidence on that point, I am satisfied that Mr. Bernazza did not tell Dr. Parkington about any pain he experienced when pushing the hoist.

Dr. Campbell states that Mr. Bernazza has suffered a soft tissue musculoligamentous injury of the thoracic spine and when he has cooled down the full extent of the injury

has presented itself. He notes the history of previous lower back pain and X-ray results showing degenerative changes and diffuse idiopathic skeletal hyperostosis (DISH) and the fact a bone scan showed no acute fractures. Dr. Campbell, unlike Dr. Parkington, didn't actually look at the X-ray films and simply relied on the radiologists report. Although Dr. Parkington agrees with what the radiologist reported and that therefore it may not particularly matter that Dr. Campbell didn't look at the films, it is reasonable to expect that some advantage would be gained by looking at them. For instance the extent and progression of the degenerative changes may perhaps be better gauged.

Dr. Campbell considers it is a soft tissue injury because he was completely well prior and his symptoms had remained similar over the prior 12 to 13 months. He said a degenerative problem would be evidenced by a slow increase with no sudden onset of injury. Dr. Parkington agreed that the sudden onset of pain was unusual for an aggravation of DISH.

Dr. Parkington says that Mr. Bernazza is developing ankylosis in the thoracic spine and that this is due to an underlying constitution disease. He says he has developed acute mechanical pain in association with this and all his symptoms are reproduced by any thoracic spinal movement.

In response to Dr. Campbell's diagnosis, Dr. Parkington says that there is no evidence of any damage to any muscle or ligament and Dr. Campbell in evidence could not point to any in particular. Dr. Parkington says that as Mr. Bernazza's spine is very stiff and becoming fused, the muscles and ligaments will be ceasing to function, the ligaments in particular, as they are ossifying. He says that the bone scan shows evidence of mild increased uptake in the mid-thoracic spine and he believes that this most likely reflects the source of his discomfort i.e. it is skeletal and not soft tissue in nature. Dr. Campbell in evidence stated that while he doesn't believe that the degenerative changes or pre-existing DISH have played any part in Mr. Bernazza's injury, he would be prepared to yield and say that 5% of his overall impairment of 8% could be so attributed. So that would be .4% total impairment he says.

Both doctors are in agreement that an unspecified soft tissue injury would not normally be expected to cause permanent pain although Dr. Campbell considers that five per cent of such injuries will persist for one or two years and another five per cent will persist and become chronic.

Dr. Parkington said he would have expected Mr. Bernazza to have experienced pain when pushing the hoist if the hoist was the cause of the problem. He thinks that Mr. Bernazza has rationalised his complaint and blamed his pain on the hoist and that would be a normal thing to do. Having regard to the contradictory nature of his evidence, I find that I can't be satisfied that Mr. Bernazza felt any pain when pushing the hoist. I consider that he has gone through the same rationalizing process Dr. Parkington spoke of when giving evidence but on an elevated scale introducing positive evidence of feeling pain which, for the reasons given, I do not accept.

That of course does not mean that using the hoist was not the cause of his pain. There is obvious merit in each of the doctor's opinions but on balance I prefer the evidence of Dr. Parkington over that of Dr. Campbell because of the undisputed evidence of a degenerative back condition, the fact Dr. Parkington actually looked at the X-Rays which I consider gave him a better appreciation of Mr. Barnazza's condition, my finding that Mr. Bernazza did not feel pain whilst pushing the hoist and that therefore he felt pain only when he bent over after lunch. Therefore I am not satisfied on the balance of probabilities that the use of the hoist has played any part in Mr. Bernazza's pain.

What I am satisfied of however, is that he has suffered an injury in the nature of an aggravation of his degenerative back. Notwithstanding the concerns expressed about his evidence, on balance I accept that he did experience pain after his lunch break. That injury arose in the course of his employment because whatever the cause, his pain came on when he was cleaning up a deceased patient's room. *Pleming v. Workers' Compensation Board of Queensland (1996) 152 QGIG 1181* is authority for that. However for an injury to become an injury under the Act, his employment must be a significant contributing factor. In *Pleming*, op.cit., this was not established.

Both doctors in the present case did not think that the activity of bending over to pick up a pillow whilst cleaning up the room was a significant contributing factor. Dr. Parkington said, holding firm to his diagnosis of DISH, that bending down to pick up a pillow didn't cause his DISH. That was there beforehand. He said if Mr. Bernazza's back was X-rayed the day before the incident and X-rayed the day after the incident, you wouldn't have seen any difference. He said that bending over is a normal activity of daily living and it's a trivial activity which would not normally be expected to give rise to injury.

Dr. Campbell agreed in cross examination that bending down to pick up a pillow isn't going to cause an injury. He said it shouldn't do but very rarely it will, as can sneezing and coughing, but on the balance of probability it's unlikely.

In *Qantas Airways Limited v. Q-Comp and Michelle Blanch (C/2009/9)* President Hall stated, which respect to the meaning to be given to "significant" in s.32(1) of the Act, that;

"on the balance, I am not prepared to accept the submission that "significant" bears the meaning of "large", "great", "weighty" or "substantial". I regret that I am unable to be more precise than fixing the meaning of "significant" as towards the lower end but not at the base of the spectrum, and (to the extent that adjectives may be used without supplanting the statutory language) using words such as "strong", "important" or "of consequence".

In *Sue- Ellen Mary Carman and Q-Comp (C/2007/29)* a case involving an aggravation of an underlying degenerative spinal condition, the issue of proximity of time between the work-related incident and the onset of pain was raised. In that case the President said the connection was temporal and relied only on the evidence of the appellant, as opposed to the proximity established in *Goodman Fielder v. WorkCover Queensland (2004) 175 QGIG 871*. and as is evident in the present case.

The appellant places some reliance on *Goodman Fielder*, op.cit. There the President stated that what happened to the worker with a degenerative spinal disease might well have happened to him at his home, on a council bus or at a religious service but that

once the Industrial Magistrate accepted that the relevant incident in that case occurred (stacking of bread crates) and in the absence of any evidence about a competing cause, it was inevitable that there would be a conclusion that the employment had been a significant contributing factor. But of course it is evident that the President in the later case of *Carmen*, op.cit., (referring to *Pleming*, op.cit.,) makes it clear that a worker afflicted by a degenerative back does not suffer an injury if the back becomes painful at work or if the work is a cause of the onset or intensification of pain. He emphasises that the employment must still be a significant cause of the onset or intensification of pain.

In *Carman*, op.cit., the President said that if the appellant's evidence of heavy work was rejected (as it was), even if it be assumed that her back became painful at or after work, there is no basis for a finding that the work was a "significant contributing factor" to the pain rather than an occasion for its expression.

The case of *Workcover Queensland v. BHP (Qld) Workers' Compensation Unit [2002]QIC 27* also involved a worker with a degenerative spinal disease. It was held that the act of removing his work boots at work after a shift, whilst that was an activity arising out of his employment, his employment was not a significant contributing factor. President Hall said it was open for the Industrial Magistrate to make that finding based on the opinion of one of the doctors on that point and after rejecting the other doctor's opinion.

Considering the medical evidence and opinion on the point and being guided by the above case authorities, I am not satisfied on the balance of probabilities that Mr. Bernazza's employment, specifically the act of bending down to pick up a pillow, was a significant contributing factor to the aggravation of his degenerative back disease.

I find therefore that Mr. Bernazza has not sustained an injury within the meaning of s.32 of the Act. The Appeal is dismissed and the decision of the Review Officer of Q-Comp of 10 March 2009 to reject the application for compensation is confirmed.

P.M.Kluck
Industrial Magistrate.