

The claim for compensation was stopped by WorkCover Queensland in accordance with notification dated 10 October 2007 which is also part of exhibit 2. An Application for Review of that decision was lodged by Mr Gibbons on 17 October 2007¹.

The decision of Q Comp from the Application for Review by the worker is before me², dated 30 October 2007, which decision was to confirm the original decision by WorkCover Queensland that the applicant's claim be stopped. The reason for rejection is twofold. The work related injury had stopped on 4 October 2007; and the worker no longer required medical treatment for the management of the work related injury from 4 October 2007. This review decision confirmed the decision made by WorkCover Queensland on 10 October 2007.

On 27 November 2007, the worker lodged a Notice of Appeal for hearing by an Industrial Magistrate, pursuant to s549 of the Act. This is the determination of that hearing as requested by the applicant.

By application dated 05 September 2007, part of exhibit 1 in these proceedings, Craig Anthony Gibbons ("the worker") sought compensation for an injury which he described at that time as "LH shoulder muscle torn – ruptured supraspinatus". The applicant states the injury was sustained by him while working as a CW8 driver in February 2007 at River Links, Hope Island Road, Hope Island.

¹ in these proceedings also forms part of exhibit 2

² as part of Exhibit No. 2

In answer to question 20 on the worker's Application for Compensation "How did the injury happen", the worker answered "Standard work procedures e.g. climbing in and out of machine lifting engine cover (ext)".

The claim for compensation was rejected by WorkCover Queensland in accordance with notification dated 24 October 2007 which is also part of exhibit 1. An Application for Review of that decision was lodged by Mr Gibbons on 14 July 2008³.

The decision of Q Comp from the Application for Review by the worker is before me⁴, dated 17 April 2009, which decision was to confirm the original decision by WorkCover Queensland that the applicant's claim be rejected. The reason for rejection is that whilst the worker sustained an injury, the personal injury did not arise out of the applicant's employment and the employment was not a significant contributing factor. In effect the worker did not sustain an injury within the meaning of s32 of the Act. This review decision confirmed the decision made by WorkCover Queensland on 24 October 2007.

On 21 May 2009, the worker lodged a Notice of Appeal for hearing by an Industrial Magistrate, pursuant to s549 of the Act. This is the determination of that hearing as requested by the applicant.

By consent, both of these appeals were heard together on 26 November 2009 and following the completion of evidence, I reserved my decision to a date to be fixed.

³ in these proceedings also forms part of exhibit 1

⁴ as part of Exhibit No. 1

The issue for determination in relation to the appeals before me is whether the injuries suffered or aggravated by the appellant Craig Anthony Gibbons arose out of the worker's employment which was a significant contributing factor to the injury or aggravation.

There is no dispute that Mr Gibbons is a "worker" within the meaning of section 11 the Act.

Relevant Legislation

Workers Compensation and Rehabilitation Act (2003)

Section 32

(1) An injury is a personal injury arising out of, or in the course of employment if the employment is a significant contributing factor to the injury.

.....

(3) Injury includes the following –

(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;

- (4) For subsection (3) (b), to remove any doubt, it is declared that an aggravation mentioned in the provision is an injury only to the extent of the effects of the aggravation.

Section 108

- (1) Compensation is payable under this Act for an injury sustained by a worker.

Section 168

- (1) An insurer may, from time to time, review an entitlement to compensation
- (2) On a review, an insurer may terminate, suspend, decrease or increase an entitlement

Section 177

- (1) The entitlement of a worker to weekly payments under this Act stops when ...
 - a. The incapacity because of a work related injury stops

There are other sections of the Act which also applied to the original application, all of which are mentioned and contained in exhibits 1 and 2, and which I do not intend to repeat here.

Evidence

The evidence has been fully recorded and it is not my intention to summarize all of the evidence however I will deal with some evidence in more detail than I will other evidence, and make findings based on the evidence before me. I wish to make it quite clear that I have considered the whole of the evidence, and not only those parts to which I refer. If matters have not been stated by me it does not mean that I have

disregarded them or given them insufficient weight, or because matters have been mentioned does it mean that I have given them undue weight.

The appellant gave evidence that at the time of the injury he was employed as an excavator driver by Daniel and Delwyn Baumann trading as Peachey Constructions. It was during this employment he says that he was required to open and close the engine cover on the Hitachi "long arm" excavator machine. His evidence is that the engine cover is about 2 metres long, approximately 1 metre wide and about 250 mm high and extremely heavy because it was made of 2.3mm reinforced steel. To complicate matters he stated that the spring which assisted in lifting the cover was inoperable, so his task was made all the more difficult because he had to lift one end of the engine cover above shoulder height until it locked, and then when he had finished the task of checking that everything was operational, he was required to take all of the weight of one end of the cover to bring it down – in his words "I would dog the engine cover down". His evidence was that he lifted the engine cover up to 2 to 3 times per day.

The claims with respect to both shoulder injuries state that he received the injuries in February 2007 – right shoulder on 1 February and the left shoulder sometime during that month. In cross examination by Mr Sapsford, the appellant's evidence is that whilst he reported the injuries to his foreman on 1 March 2007, he did not consult a doctor until much later, in fact after he had finished worked with that employer. He cannot remember any particular incident which caused the injuries to his shoulders. Interestingly his evidence in cross examination is that the pain in his left shoulder was worse than in his right, and the left shoulder came particularly worse after an accident at home the day after he finished work. However, Mr Gibbons in cross examination

stated that it was his right shoulder that was worse until after he had the mishap at home, when his left shoulder became more painful. In fact he lost the use of his arm for a short time. The appellant saw Dr Stabler on 1 October 2007 and stated in cross examination that he still has pain in his shoulders, but tailors his work to manage the pain.

Dr David Stabler's evidence is that he examined the appellant on 1 October for the primary purpose of providing medical treatment for the complaint of pain in both shoulders. He provided two reports dated 1 October 2007 and 21 July 2009, in both of which he opined that the conditions in both shoulders were not work related, and he advised Mr Gibbons of his opinion accordingly. In his evidence, Dr Stabler was emphatic that the work conducted by the appellant did not cause any injury to his shoulders. In his report of 1 October 2007 states that the x-rays and ultrasound scans confirm his belief that the appellant had "constitutional conditions in both shoulders" of which there may have been some exacerbation by work duties, but are in no way caused by his work as a significant contributing factor. There is no evidence, in his opinion, of any actual aggravation through work.

Dr Stabler's second report, dated 21 July 2009, confirms his diagnosis that pain in both of the appellant's shoulders was as a result of constitutional degeneration which was not work related. He was clear in that report that whilst symptoms may have increased during his work related activities, there was no aggravation of the appellant's shoulder condition – in other words no permanent worsening to his shoulder conditions occurred due to work duties either by causation or acceleration of the degeneration process in the appellant's shoulders.

His opinion is of course at odds with Dr Pentis, which is mentioned in this second report. I will not rekindle the majority of the report but it is clear that Dr Stabler maintains his view that the appellant's condition is not a work related injury and that surgery is required. Both doctors agree that the appellant's condition in both shoulders is due to constitutional degeneration. Dr Stabler's evidence is also that the appellant did not advise him about incident at home where he hurt his left shoulder, and that when he asked the patient about any injury, he was informed by Mr Gibbons that his shoulders "just got sore".

In cross examination by Mr Pope, Dr Stabler was referred to a number of reports contained in his affidavit from radiologist Dr Ross. It is Stabler's evidence that he disagrees with the report of Dr Ross dated 8 August 2007. There is no evidence as to whether these x-rays are those referred to by Dr Stabler in his report of 1 October 2007, however Dr Ross's report indicates that there is no rotator calcification in either shoulder and that the joints and bones appear normal. I have taken particular note that the Dr Stabler's assessment of x-rays in his report is significantly more detailed than the radiologists report. His assessment of ultrasounds on both shoulders is also more clinically detailed than that of Dr Ross's report dated 13 August 2007, however both reports confirm mucoid degeneration in the right shoulder. Dr Stabler confirmed in cross examination that such degeneration is not caused by injury but rather constitutional degeneration caused by ageing.

When specifically cross examined about whether lifting of the engine cover would aggravate or cause any injury, Dr Stabler gave evidence that it might cause a

symptomatic increase in the pre-existing condition in the appellant's shoulders. It is also his evidence however, that the work that the appellant was doing could possibly, and I emphasise possibly, have the potential to aggravate his shoulder injury however he was emphatic that it was not a probability.

Dr John Pentis gave evidence that he saw the appellant on 24 January 2009 and provided a report which forms part of his affidavit. In that report he indicates that the appellant has rotator cuff disease in both shoulders and that whilst the conditions were pre-existing before the appellant worked on the excavator, the problems experienced by the appellant whilst working on the excavator aggravated the injury. His evidence in the report is that it is difficult to say how much is due to pre-existing problems and how much due to effect of work activities. He adds further "It is more than likely the majority is due to degenerative problems in the region and minority due to effects of the accident". I use the word accident because there has been no evidence from anyone, including the appellant that can point to any accident.

In cross-examination Dr Pentis was unclear as to what he was told by the appellant when he asked him what had happened prior to his injuries. In fact it was only when he was informed during these proceedings that the Doctor aware of the actual situation with the appellant lifting the engine cover, which interestingly is despite his affidavit evidence where he states that he was aware of the appellant lifting the engine cover. His view is that the appellant lifting the engine cover could contribute to his shoulder injuries. That the doctor was not informed by the appellant about lifting the engine cover seems quite extraordinary in the circumstances of this claim. Dr Pentis was in fact unsure as to the source of his information, and it could have been either

during or after the consultation he presumes, but clearly stated that his report is based on a consultation with the appellant on 24 January 2009. He also indicated that the injury to the appellant's left shoulder at home may have been as a result of a predisposition to the rotator cuff injury in his shoulder.

Dr Pentis agreed with Mr Sapsford in cross examination that the rotator cuff condition would cause the appellant pain at work and the only way to avoid that pain was a change in occupation and that it was difficult to determine how much of any residual incapacity was due to work and how much to pre-existing conditions. He clarified it further when he said that it was more likely that the majority of the condition is due to degenerative problems.

Relevant Law

This appeal conducted as a hearing de novo, is primarily concerned to determine whether the appellant's employment significantly contributed to or aggravated the injury to his shoulders. There is significant common law which lends itself to this subject however I refer particularly to *Sutherland v Q Comp* (2009) 190 QGIG 106, which endorsed Carman's case – *Carman v QComp* (2007) 186 QGIG 512 - which dictates in my view what I need particularly consider in this matter. I refer particularly to that passage from *Carman*, at p513:

“It must be remembered that *Pleming v Workers Compensation Board of Queensland* (1996) 152 QGIG 1181 is an often cited but ageing authority.....
Pleming v Workers Compensation Board of Queensland, *ibid*, does not decide that a worker afflicted by a degenerative back suffers an injury if the back becomes more painful at work. Neither does *Pleming, op. cit.*; establish that a

worker with a degenerative back suffers an “injury” if the work is a cause of the then onset or intensification of pain. *Pleming, op. cit.* establishes that a worker with a degenerative back will suffer an injury where the back becomes painful or more painful and the employment is a significant cause of the onset of intensification of pain.”

Credit

I have had the opportunity of listening to and observing the demeanour of the appellant who gave evidence in person and this has assisted me in arriving at my determination. Both doctors gave evidence by telephone, and there have been no issues of credit in their evidence. Refreshingly, credit is not an issue in this appeal. All witness gave forthright credible evidence which was thoroughly tested through cross examination.

Conclusion

The appellant of course bears the onus of proof in this matter on the balance of probabilities and if I am to find in his favour, I must be satisfied on the balance of probabilities that the injuries or the aggravation of the injuries to his shoulders were as a result of his employment being a significant contributing factor. There is clear evidence from both Drs Pentis and Stabler that the appellant has had for a considerable period of time a degenerative condition in both shoulders due to constitutional degeneration, which in my view refines the issue further to the extent that for the appellants appeals to be successful, I must be satisfied that his employment was a significant contributing factor to his aggravating that pre-existing

condition. Both specialist doctors have disagreed on this point and I therefore must turn to the circumstances in which Mr Gibbons alleges he aggravated his condition.

I have no doubt that the appellant suffered pain as a result of his operating the excavator whilst employed by Peachey Constructions. To answer the question regarding any aggravation, and in order to locate a definitive time or period over which Gibbons aggravated his condition I must turn to his actual claims for compensation; his actions prior to those claims; his seeking medical attention; and information provided to Drs Pentis and Stabler.

The appellant's evidence is that he began experiencing symptoms in February 2007. His claim for the right shoulder indicates 1 February and the left shoulder during the month of February, however the first positive step he took was not until March when he reported it to his employer – his foreman – but he didn't seek any medical attention using an excuse was that he was simply too busy at work. I think it entirely implausible that the appellant was experiencing prolonged periods of debilitating pain yet he continued to work and didn't see a doctor.

To further complicate his claim, it is the case and I find that he has given different versions of the condition of his shoulders to both doctors. It is certainly the case that he told Dr Stabler that he finished work on 27 August 2007 although there is no direct evidence as to when he saw a doctor, other than Dr Stabler's report where he saw the appellant following a referral from Dr Kyranis dated 3 September 2007. Stabler saw the appellant on 1 October 2007. Gibbons told Dr Stabler that he could not recall any single episode of injury at work and that there was no particular activity which was

painful at work. It was certainly the case that the appellant did not advise Dr Stabler, or Dr Pentis for that matter, that he had an accident at home in which he injured his left shoulder. The evidence also shows that there is also confusion about what he told Pentis regarding how he came by his condition. For example, Dr Pentis's affidavit mentions the appellant lifting an engine cover yet his notes reveal no such entry, which is puzzling.

Taking the appellant's recollection of events into account, there appears to be an absence of any real attempt to deal with the problem until after he finished work with Peachey Constructions which is evidence by the claims in exhibits 1 and 2. That he was in significant pain and discomfort and yet sought not to seek medical advice and simply gave the excuse that he was too busy at work, I find puzzling and atypical as I have mentioned. This absence of action on the appellant's part is concerning at the very least. Details he gave to the doctors were sketchy and consequently they could only report on what they were told, which was not the full picture. That the appellant did not tell the doctors about his accident at home to his left shoulder is in my view without doubt at the very least careless and thoughtless and at worst deceitful, although I note Mr Sapsford has not sought to cast a shadow on the appellant's credit but rather to cast a doubt on the appellant's historical recollection.

As I have mentioned previously, for Mr Gibbons to be successful in his appeal he must show that the aggravation of his injuries was a result of his employment, and part of that process involves his evidence being reliable, especially regarding how his injuries came about, and it is not. The medical evidence clearly points to Mr Gibbons having a degenerative condition that affects both shoulders which caused him periods

of pain during his employment with Peachey Constructions, especially on occasions when he had to lift the engine cover on the excavator and I find accordingly. Whilst there is evidence before me which suggests that there may be a possibility that some of his incapacity and impairment could be as a result of his employment, it is my view having regard to the totality of the evidence, I would tread a treacherous path were I to find that this possibility would be sufficient to support a successful appellant's case. I am of the opinion that the evidence points to the condition in his shoulder worsening as a result of ageing, rather than an injury or aggravation of the condition at work.

The law is quite settled in these types of matters. As I have stated previously, the appellant must prove that his degenerative shoulders suffered an injury where they became painful or more painful and his employment was a significant cause of the onset of intensification of pain. It is my view on the balance of probabilities having regard to all of the evidence that he has not.

On the evidence before me I am satisfied that the respondent was entitled to stop the appellant's first claim regarding the right shoulder, and also to reject his second claim regarding his left shoulder. Therefore, in the circumstances the appeals fail and they are dismissed accordingly. I confirm the Respondent's decisions dated 30 October 2007 and 17 April 2009 respectively.

G.J. Finger

Acting Industrial Magistrate

8 January 2010