# INDUSTRIAL MAGISTRATE - QUEENSLAND

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| **CITATION:** | *Le Guinio v. Q-Comp (No 2)* | |
| **PARTIES:** | **Anne Alice Le Guinio** | Appellant |
| | **V** | |
| | **Q-Comp** | Respondent |
| **FILE NO:** | MAG-00222013/08(9) | |
| **PROCEEDING:** | Appeal under *Workers' Compensation and Rehabilitation Act 2003* | |
| **ORIGINATING COURT:** | **Brisbane** | |
| **DELIVERED ON:** | 10 ~~4~~ **December 2009** | |
| **DELIVERED AT:** | **Brisbane** | |
| **INDUSTRIAL MAGISTRATE:** | **BL Springer** | |

**ORDER:** Appeal dismissed. Decision of Q-Comp confirmed.

## Introduction

[1] Ms Le Guinio (the appellant) had filed an application for compensation with Workcover in September 2006. That claim related to incidents in the workplace between May and August 2006. That is subject to a separate appeal before me in which I have today delivered my decision and published written reasons. She also filed a later application for workers compensation, following her reaction to an incident in the Brisbane School of Distance Education (BSDE) involving a cancelled meeting, a purported failure to disclose a joint investigation by 2 teachers until disclosure to her of documents under freedom of information processes, and the FOI disclosure itself. Her later application dated 15 October 2007 has been rejected as being out of time. The respondent's decision to reject the appellant's review application is dated 22 October 2008. These reasons relate to her appeal against that rejection decision.

[2] On the first day of the hearing of the appeals, I determined that the appeals should be heard together as some, but not all, evidence was relevant to both appeals. Counsel for the appellant made clear at which point he was eliciting evidence only in relation to the second appeal.

[3] On the fifth and final day of the hearing, which dealt solely with this appeal, an issue was raised about the lack of an attachment to the second application for workers compensation, as that application was tendered as part of the jurisdictional documents. The respondent QComp objected to its tender. I ruled that it should be admitted as it was clearly referred to in the pre-printed application, and that its admissibility was only on the basis that it identified the stressors the appellant was complaining about at the time she made that application.[1]

## The legislation relevant to this appeal

[4] The *Workers Compensation and Rehabilitation Act 2003* ("the Act") in section 108 (Compensation entitlement) provides that compensation is payable under the Act for an injury sustained by a worker.

[5] Section 131 states that an application for compensation is valid and enforceable only if the application is lodged by the claimant within 6 months after the entitlement to compensation arises. Section 141(1) specifies that the entitlement to compensation for an injury arises on the day the worker is assessed by a doctor. On a full reading of section 141, it is clear that the assessment must be of the injury claimed to have been suffered by the worker. The obligation to lodge the claim within 6 months may be waived if the insurer is satisfied that a claimant's failure to lodge the application was due to, among other things, a reasonable cause (s131(5)).

[6] Section 131 appears in Part 5 of the Act (Compensation application and other proceedings), whereas section 141 is in Part 7 – Payment of Compensation. Although the same terminology appears in both Parts, it need not automatically follow that the expression should have the same meaning in the two different Parts.

[7] Section 132 requires an application for compensation to be accompanied by a certificate in the approved form by a doctor who attended the claimant. The evidence before me does not establish that any medical certificate was lodged with the application, although the Reasons for Decision from the respondent refer to a Workers' Compensation Medical Certificate of Dr Roslyn Gilbert dated 12 July 2007. That was

[1] Transcript Day 5, pp3-5

not tendered in this appeal (cf exhibit 58 comprising certificates dated 12 February 2007 and 14 January 2008).

[8] The Act appears to provide only one definition of 'injury' which is contained in section 32 as meaning "personal injury arising out of, or in the course of, employment if the employment is a significant contributing factor". However, that definition, if used in section 141(1) creates particular difficulties because at the time a doctor becomes involved, there has been no determination, as a matter of law, as to whether the injury fits within section 32.

[9] Although both the appellant and respondent appear to rely on section 141(1) as providing the starting point for determining when an entitlement to compensation arises, I am not persuaded that section determines that issue in all cases.

[10] In *WorkCover Queensland v Downey* [2001] QIC 76 Hall P considered the predecessor of the current sections 131 and 141:

> ... it is correct but unhelpful to start with the proposition that only WorkCover Queensland (or an appellate tribunal) can determine entitlement to compensation. A period of limitation which commences upon success of a claim would be a futility. Given that the expression "after the entitlement to compensation arises" is not to be given its natural meaning, one would (prima facie) expect that a statutory meaning would be provided. It seems to me that **at least one meaning** is provided by s168(1)(2). (My emphasis).

[11] Referring to section 168(2), (being the predecessor of the current section 141(2)) His Honour also stated that:

> the expression "assessed by a doctor" must be taken to mean "assessed by a doctor as resulting in total or partial incapacity for work", ie **where the commencement of the limitation period is said to be triggered by the activity of a doctor**, it is necessary to show that a doctor has assessed the alleged injury as involving partial or total incapacity.[2] (My emphasis).

[12] Those extracts suggest that the meaning of the phrase "after the entitlement to compensation arises" may be found in other than a doctor's (or dentist's) assessment, although it is not immediately plain where another interpretation may be found (other than in s141). There will, however, be situations where a physical injury which occurs in the workplace is so manifestly obvious (for example, the loss of a finger from machinery in a workplace) that there can be no doubt that there has been an injury for which compensation is payable, as stated in section 108. It seems that in such a situation, section 141 would then operate to determine from what date the compensation is payable, rather than establishing the entitlement to compensation. With a purported psychological injury (as here) it would seem necessary to look to section 141 to establish when the entitlement compensation arose.

[13] In my view, it is only after consideration of whether the time for lodging the application has already passed and concluding that it has, does one take the approach outlined in *R v The Workers Compensation Board of Queensland Ex parte Heffernan*[3], namely to consider whether the failure to make the application within time was due to mistake, absence from Queensland or other reasonable cause. For the reasons set out below, I do not need to consider that.

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[2] Section 168 of the *WorkCover Queensland Act 1996*.

[3] [1979] Qd.R 563 at 567

## The medical evidence

[14] I turn now to the medical evidence that was adduced in relation to this appeal. Dr Gilbert had seen the appellant on several occasions between 12 February 2007 and up to 30 March 2009. Dr Gilbert had issued two certificates for workers compensation: 3 December 2007 and 14 June 2008. Other certificates (not workers' compensation) were prepared by her between 28 March 2007 and 25 March 2008.[4]

[15] Dr Gilbert, when seeing the appellant for the first time on 12 February 2007, had recorded the appellant's history as including "not sleeping, she was having nightmares about work ... and she was quite anxious".[5] The appellant described anxiety and she was distressed and crying during the interview. Following an appointment with the appellant on 15 February 2007 Dr Gilbert diagnosed the appellant as having anxiety, depression and an adjustment disorder. The appellant had difficulties with attention and concentration "due to triggers of thinking about work".[6] In providing her history to Dr Gilbert the appellant had referred to the "work harassment that dated back to the middle of the previous year". The doctor also referred to the appellant's concern about her ill mother (who lived in France).

[16] Dr Gilbert's evidence about the 'normal medical certificates' (which became exhibit 59) was that the appellant "was still suffering from anxiety and ... well, the anxiety had not improved. ... [D]efinitely ... she's been suffering from the anxiety related to the workplace".[7] The doctor expanded on what she understood the workplace issues to be: "harassment and bullying and an inability to go to back to the workplace due to the increase of anxiety related to the situation and, also, whenever she thought it or spoke to people in the workplace, it was a trigger for the symptoms of extreme anxiety".[8]

[17] Dr Gilbert's evidence about seeing the appellant on 29 October 2007 includes that she had made a note about the appellant having submitted a Workcover claim. She had not been called upon at the time to form any views in relation to that claim or about any conditions she might be suffering at that time.

[18] The appellant's evidence does not clearly disclose whether the appellant had raised the issue of a later injury with Dr Gilbert. In the context of questioning about later incidents being relied, this question was asked:

> What condition did you visit Dr Gilbert in relation to?—I would say that it was a depression anxiety. I don't know what the medical term ... Dr Gilbert is using, but that's why I went to see her. I was crying and I didn't raise problems with depression.[9]

[19] Dr Gilbert had not gone into detail with the appellant about what factors were in play and contributing to her distressed and anxious state; she saw the appellant's symptoms as a continuation of her condition from the previous year.

## Appellant's Submissions

[20] The appellant's submissions in relation to this appeal are put on 2 bases:

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[4] T Day 5 p 10. The existence of a third application dated 14 January 2008 was referred to in the evidence of Dr Gilbert but, if such an application had in fact been lodged with Q-Comp, it is not before me and I have therefore disregarded reference to it.
[5] T Day 5 p10
[6] T Day 5 p11
[7] T Day 5 p 16 L10
[8] T Day 5 p 16 L35
[9] T Day1 p72, L25

(i) that the appeal was not out of time because there has been no assessment of her condition by a doctor (s141 Time from which compensation is payable) and that, accordingly, even now she is not out of time; and

(ii) the appellant's "injury" arose in August 2007.

[21] Here, the appellant identifies three possible incidents that are work related and, by inference, led to her suffering an injury, namely:

- The meeting scheduled for 23 October 2006 was cancelled by Mr Baker, who had sought the meeting. She was at that time on a return to work program. When the meeting was cancelled, the appellant returned to her desk but was unable to continue working and broke down completely.[10] The respondent concedes that only for the purpose of considering the merits of the applicability of section 131, that incident and result is sufficient to satisfy the definition of "injury".

- The appellant gave no evidence at the impact of receiving a letter about problems with cross-marking. The appellant had thought that the school principal, Mr Baker, wanted to have an investigation or to question her about it.

- At a time after she had commenced her first appeal, in August 2007 she received some information in documents connected with her litigation against the respondent in the first appeal. Her reading of those documents upset her.

[22] The timing of those latter 2 incidents came to the appellant's attention at a time when she was on sick leave associated with her earlier claim for compensation.

## Analysis of the issues

[23] The appellant's application was dated 15 October 2007. I accept that was received by the respondent on 18 October 2007.

[24] The appellant carries the onus of establishing that her appeal should be allowed. She should adduce all evidence favourable to her case. The appeal is a hearing de novo with the powers available to an Industrial Magistrate as set out in section 558.[11] In my view, in the absence of evidence before me about the inclusion of the mandatory workers' compensation certificate referred to in section 132 of the Act, she has not established that she complied with the conditions associated with lodgement of her application. That would mean that as a threshold issue, her appeal should fail. If I am wrong about the need for and absence here of that certificate, I turn now to consider other factors.

[25] The context here involves a worker in the throes of an existing worker's compensation claim involving a psychological injury, who on the basis of a second

[10] T Day 1, p66 L50 and following

[11] Section 558 reads: (1) In deciding an appeal, the appeal body may—
(a) confirm the decision; or
(b) vary the decision; or
(c) set aside the decision and substitute another decision; or
(d) set aside the decision and return the matter to the respondent with the directions the appeal body considers appropriate.

workers' compensation application, asserts she has suffered a further psychological injury beyond that which applied to the earlier claim. It appears that she was acting on legal advice in lodging her second application. She relies on three stressors. As I interpret the appellant's case, it is the combined effect of the three stressors identified above that are said to be productive of injury.

[26] I am not persuaded that it is appropriate in effect to consider that there might have been three separate injuries, noting it is the purported 'injury' that must be assessed, and not the stressor(s) that might have led to it.

[27] The appellant continued to consult medical practitioners about her condition relevant to the earlier claim. After the October 2006 cancelled meeting, she apparently consulted a Dr Fraser and a Workers' Compensation certificate dated 25 October 2006 was obtained (exhibit 44). Dr Fraser's certificate refers to "workplace stressors" as the worker's stated cause of injury and he diagnosed "Anxiety and depression". The certificate also includes the date of 1 September 2006 as the first date the worker was seen for that injury. Dr Fraser was not called to give evidence. The terms of the certificate provided by Dr Fraser points to his viewing the appellant's condition as a continuation of an earlier condition. Further, the appellant told Ms Zimmerman (the psychologist who was treating her at the time) of her reaction to the cancelled meeting.[12] Ms Zimmerman's advice was for the appellant to inform Workcover of that. There was no further compensation application lodged following that incident until that dated 15 October 2007 – more than 12 months after the disclosure to Ms Zimmerman.

[28] In relation to the two later stressors referred to above, the appellant appears not to have disclosed events or incidents related to those to her treating team, which might have prompted an assessment of any then extant injury. <u>After</u> she has lodged her application, she again consulted her general practitioner and the subject of the appellant's second workers' compensation claim was at that time discussed with her. As at 3 December 2007 – that is after the relevant application for compensation had been lodged – Dr Gilbert's clinical notes referred to the need for a certificate for Workcover and the certificate "was going to be written under Workcover and <u>it was a continuation of the original Workcover certificate and condition</u>" (emphasis added). That certificate referred to "workplace harassment and bullying" (exhibit 58) and was provided after the application for compensation (the subject of this appeal) was lodged. It is hardly surprising that Dr Gilbert had concluded that the appellant was experiencing a continuation of an existing injury, as had Dr Fraser earlier.

[29] Despite work-related symptoms of anxiety, the appellant had continued to function at a very high level, focussing on her PhD studies and looking for University tutoring work. However, Dr Gilbert's evidence was that the appellant was "physically sick thinking about work and the workplace and anything associated with work.[13]

[30] The appellant submits that her injury has not been assessed by a medical practitioner and therefore she remains 'within time' for the purposes of 131. Where there is any doubt as to the construction of the Act, it should be construed consistently with it being beneficial legislation in that it provides an entitlement to workers' compensation.[14]

[31] Section 131(1) of the Act contemplates that an entitlement to compensation will pre-date an application, as the application is "valid and enforceable only if the

[12] T Day 3 p37 L25-40

[13] T Day 2 p5, L55

[14] See, for example, *Cloncurry Shire Council v Worker's Compensation Regulatory Authority & Anor* [2006] QSC 362, paragraph [27].

application is lodged by the claimant with 6 months <u>after</u> the entitlement to compensation arises" (emphasis added). Further, the requirement for a doctor to provide a workers compensation certificate (s132) confirms the need for the entitlement to compensation to have already crystallised. Here the application the subject of the rejection decisions by Workcover and Q-Comp was lodged before there was any assessment of the purported second injury which gave rise to the application the subject of the current appeal.

[32] If I am wrong in that approach, I turn now to an alternative basis as to why, in my view, the appeal should fail. The appellant was already absent from work on sick leave at the times of the two later incidents relied on. If I am correct in understanding that the appellant relies on the combined effect of the three stressors identified above as being productive of injury, I note that there was a gap of about 9 months between the first stressor and the second. This suggests that in the scheme of the stressors relied on, the earliest should be regarded as of lesser important to the two later stressors. While the three incidents could be said to have arisen out of her employment, I am not persuaded that the employment was a significant contributing factor to any injury (assume one were found to have been sustained), because at the time she was on sick leave and not actually working. In my view, the phrase "the employment was a significant contributing factor" should be construed as if the words "in which the worker was then engaged" were inserted after 'employment'. That interpretation produces the conclusion that any injury she may have suffiered was not then an injury within section 32.

[33] Given the lodgement of the application for workers' compensation before any assessment, I take the view that the application is invalid, and accordingly, it is not necessary to consider whether the discretion in section 131(5) should be exercised as, in my opinion, that subsection relates only to failure to lodge an application within 6 months <u>after</u> the entitlement to compensation arises.

[34] Ms Le Guinio's appeal is dismissed. The review decision of 22 October 2008 (to reject the application for compensation) is confirmed.

**BL SPRINGER**
Industrial Magistrate
Brisbane

10 December 2009