

INDUSTRIAL MAGISTRATES COURT OF QUEENSLAND

Court File Number: MAG00141213/09(1)

BRISBANE REGISTRY

LFR: BRISB-MAG-00019935/09

APPELLANT: BRENDON JAMES MAY

RESPONDENT: Q-COMP

APPEAL AGAINST REVIEW DECISION

Section 550 Workers' Compensation and Rehabilitation Act 2003

DECISION

Brendon May appeals against a decision of Q-Comp dated 17 June 2009 which found that he had recovered from a work related injury as at 10 February 2009 and was no longer incapacitated for work because of that injury. He seeks that this decision be set aside and a finding be made that he was at that time still entitled to compensation.

Q-Comp accepts that Mr May did suffer an injury that arose out of his employment and that was an aggravation of a pre-existing condition.

The sole question to be determined in this appeal is whether the evidence proves to the required standard that as at 10 February 2009 Mr May continued to suffer from a work related injury. If he had not then recovered from that aggravation, he remained incapacitated for work and was entitled to compensation. This question must be answered with reference to medical opinion and assessment.

Mr May lodged an Application for Compensation on 4 December 2008 in respect of an injury he sustained at work on 27 November 2008. He injured his lower back when he pulled his leg out of mud during his employment as an excavator. His claim was accepted. On 10 February 2009 he was given written notice that his entitlement to compensation was terminated as it had been determined that he was then no longer suffering the effects of the work related injury.

Mr May applied for a review of that decision to cease payments of compensation. The review confirmed the decision of WorkCover Queensland to terminate his entitlement to compensation.

Entitlement to weekly compensation stops when the incapacity because of the work related injury stops. Entitlement to medical treatment, hospitalisation and expenses stops when the entitlement to weekly compensation stops and medical treatment is no longer required because the injury is unlikely to improve with further medical treatment.

Mr May was examined by Orthopaedic Surgeon Dr Parkington in February 2009. Dr Parkington considered that his ongoing back symptoms were no longer directly related to the work injury. Dr Parkington assessed that Mr May at this time was pain free in between weekly attacks. Dr Parkington formed the opinion Mr May was clinically normal at that time apart from having difficulty straightening up. He particularly noted that Mr May had no difficulty getting on and off the examination table. However his report also records that Mr May suffered a constant background ache radiating into both his buttocks, that Mr May was sleeping poorly and was restricted in his normal domestic activities.

Dr Parkington determined that Mr May's lower two lumbar intervertebral discs are degenerative and narrowed. He found evidence of a disc prolapse at L4/5. He concluded that Mr May has severe degenerative disease at the L4/5 level. The report concludes that at that time that the aggravation had then ceased and the intermittent flare ups Mr May complained of were due to his underlying condition.

Mr May consulted Orthopaedic Surgeon Dr Dodd on 9 March 2009. Dr Dodd assessed that Mr May remained incapacitated from work at that time because the pathology of his lower spine limited his ability to bend, lift or twist. At this time Mr May was in much greater pain and had much more restricted movement than when he saw Dr Parkington the month before. Dr Dodd assessed that he suffered significant pathology at L4/5 with a central disc protrusion and some compression of the thecal sac. Dr Dodd indicated that it would be difficult to assess whether the disc protrusion was caused by the first work incident in 2007 or the one in question here in 2008. Dr Dodd assessed that Mr May was not fit for any work at all on 9 March 2009 but indicated that further medical treatment might improve that situation.

Dr Dodd sees the disc protrusion as having been the result of a specific injury where the injury event was significant and led to the disc protrusion. Dr Parkington sees it as part of a degenerative disease process that had been long standing.

The records of the Robina Hospital indicate that Mr May complained that he had reactivated chronic lower back problems when he became stuck in mud and pulled his leg out of the mud. He was medically examined, referred for physiotherapy and prescribed medication.

Dr Mahfouz is the general practitioner who treated Mr May. Dr Mahfouz issued seven Workers' Compensation Medical certificates with respect to the injury from 3 December 2008 to 20 February 2009. Dr Mahfouz diagnosed Mr May as suffering a lumbo-sacral sprain caused when he jerked his back trying to release himself when he became stuck in mud on a building site. These certificates indicate that Mr May was recovering gradually over this time. Dr Mahfouz indicates an improvement over time in Mr May's ability to return to work. On the last certificate dated 20 February 2009 Dr Mahfouz assessed that Mr May should not be required to bend, twist, squat, push or pull. Mr May's ability to lift 5 kg had improved from not at all to occasionally and then to frequently. His ability to drive and operate machinery had improved from not at all to occasionally. Ten days after the compensation stopped Dr Mahfouz assessed that Mr May still should not be required to bend, twist, squat, push or pull in his return to work plan.

Mr May gave evidence. He is twenty five years of age. He says that he did not experience back pain or difficulty prior to the earlier work related injury in 2007. He received compensation for that injury and returned to work when he recovered.

Since then his back has from time to time been painful and he has had an occasional day off from work but he was generally fit and in good health. On 27 November 2008 he was working at a very muddy building site in West End. He became stuck up to his knees in the mud and tried to wrench his work boot and foot out of the mud. Other workers had to dig him out of the mud. He re-injured his lower back. He was in significant pain and could not lift his foot. He had to be helped from the site.

Mr May says that he continues to suffer pain and restrictions because of his back. He cannot lift. He is restricted in his daily life. He is unable to engage in sexual activity. He constantly suffers pain and spasms in his back. He suffers pain in his buttocks and down his thighs. The pain increases significantly when his back is aggravated. He says that when he saw Dr Parkington his pain was eased but after performing the moves requested by Dr Parkington his was in significant pain for the next few days.

I accept Mr May as a credible and reliable witness. I do not believe that he has exaggerated his evidence. I accept that he has given a reliable and credible evidence about his ongoing symptoms and experiences.

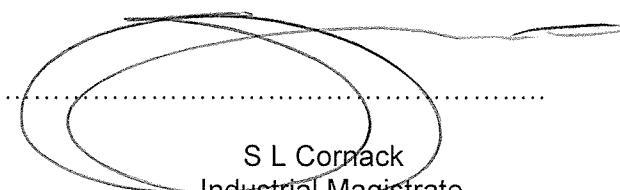
The question in this case is whether there is evidence to prove that Mr May's incapacity for work because of the injury he suffered at work on 27 November 2008 continued as at 10 February 2009. That is a difficult question given that there is no definitive medical report that shows the condition of Mr May's spine at L4/5 prior to the injury on 28 November 2008 so that it can be compared with the findings from the MRI of the lumbar spine taken on 4 February 2009. It is a question that has elicited very different responses from two qualified orthopaedic surgeons.

I am satisfied that as at 10 February 2009 Mr May was not able to bend, twist, squat, push or pull. He was in constant but bearable pain in his back, and buttocks which became intense and debilitating regularly after he engaged in a range of normal physical activities. He suffered spasms in his back. He was having trouble sleeping. He was unable to attend to normal domestic activities. He was not able to engage in sexual relations. He has not experienced an improvement or recovery of his condition other than a very slow and gradual improvement over time. I am satisfied at that time that Mr May was not fit for any work at all.

The evidence as a whole including the assessments of the general practitioner, the report and evidence of Dr Dodd and the evidence of Mr May satisfies me to the required standard that as at 10 February 2009 Mr May:-

1. continued to suffer from a work related injury,
2. that he had not then recovered from the aggravation to his underlying and pre-existing condition,
3. that he remained incapacitated for work,
4. and was entitled to compensation.

I therefore allow the appeal. I set aside the review decision. The decision made upon the hearing of this appeal is that as at 20 February 2009 Mr May was entitled to weekly compensation as well as medical treatment, hospitalisation and expenses.



S L Cornack
Industrial Magistrate
12 February 2010