

Queensland Hibernian Friendly Society Ltd AND Q-COMP AND Craig Barry Borich
(WC/2008/102)

COMMISSIONER FISHER

23 April 2010

Appeal against decision of Q-COMP - Employee sustained injury to lower back - Onus on employer that decision wrongly made - Issue how injury sustained - Event that gave rise to an injury - Evidence - Appellant not discharged its onus - Elements of s. 32(1) of Act satisfied - Determined employee suffered a personal injury in the course of his employment - Employment a significant contributing factor - Appeal dismissed.

DECISION

[1] Queensland Hibernian Friendly Society Ltd (Hibernian) has appealed against the decision of the Review Unit, Q-COMP to vary the decision by WorkCover, which had accepted Craig Borich's claim for lower back strain, by accepting the claim as a "strain of his lower back with aggravation of pre-existing lumbar spondylosis".

[2] Hibernian operates the BallyCara Retirement Village (BallyCara) where Mr Borich was employed as a chef. He claimed to have sustained an injury to his lower back while working in the kitchen of BallyCara on 28 April 2008. Mr Borich stated that he had slipped and fallen, landing on his left buttock. The evidence of Dr McPhee, the Spinal Surgeon to whom WorkCover had referred Mr Borich, concluded that the injury Mr Borich sustained was consistent with the version of events he had given and "The circumstances relating to the incident constitutes an injury within the meaning of the Worker's Compensation Act".

[3] Hibernian and the two respondents, Q-COMP and Mr Borich, agreed that the onus on an employer in an appeal against a decision of Q-COMP is to show the decision was wrongly made: *State of Queensland (Queensland Health) v Q-COMP and Beverley Coyne*.¹ Hibernian said the decision of Q-COMP had been wrongly made because it accepted Mr Borich's description of how the injury had been sustained, that is, he had fallen backwards onto his buttocks whilst performing duties as a chef. Hibernian submitted that Mr Borich did not fall backwards onto his buttocks but that he tripped, fell forwards towards a sink and then lowered himself to the ground. Hibernian also submitted that the incident occurred in the context of Mr Borich having complained about lower back pain over the preceding six months and having seen his General Practitioner four days prior to the alleged incident about lower back pain. Hibernian contended that Mr Borich's version of what caused his injury was a concoction with the result that the version of events relied on by Q-COMP could not be accepted. Consequently, there was no event that gave rise to an injury, the injury did not arise out of, or in the course of, employment and employment was not a significant contributing factor.

Evidence

[4] The following witnesses were called:

Appellant

Janice Maria Hempenstall, Domestic, BallyCara;
Lewise Colleen Thompson, Cook/Domestic, BallyCara;
Roberta Suzanne Milliken, Domestic, BallyCara;
Sheryl Ann Bourke, Night Attendant, BallyCara; and
Dr Ian McMurchy, General Practitioner.

Second Respondent

Craig Barry Borich, Claimant and Second Respondent;
Anne McAulay, Partner of Craig Borich;
Dr (Ian) Bruce McPhee, Spinal Surgeon; and
Vanessa Maree Rafferty, Dining Room Attendant/Kitchen Hand, BallyCara.

Considerations

[5] It is not my intention to summarise the evidence and submissions that have presented in this matter. It is sufficient to record that all material before me has been considered in reaching this decision.

¹ *State of Queensland (Queensland Health) v Q-COMP and Beverley Coyne* [2003] 172 QGIG 1447.

The incident

- [6] Only Mr Borich, Ms Milliken and Ms Bourke were in the kitchen on 28 April 2008 when the incident was alleged to have occurred.
- [7] Mr Borich was preparing the main meals for the Retirement Village. He said he was holding tea towels in each hand and carrying at about waist height a 20 litre pot filled with boiling water and six kilos of pasta from the stove to the sink to strain it when he slipped. At that stage he was about one metre away from the sink. He said his left foot went out from underneath him and he fell towards his left side. As he was falling he threw the pot out in front of him into the sink. Mr Borich said he hit the ground on his left buttock and felt an extreme amount of pain shooting down into his back which radiated across both sides and into his left leg. He recalled trying to sit up and pull himself back up onto his feet by using the legs of the sink.
- [8] Ms Milliken was working in the kitchen making sandwiches. Earlier in the morning she and Mr Borich had exchanged words with the result that Mr Borich was banging pots around the kitchen. She was standing at a bench which is located about one metre to the left of the sink. She could have turned either way but just happened to turn to her right when Mr Borich was carrying the pot towards the sink. She could see Mr Borich from about the waist up but could not see his feet which were obscured by the bain marie. She believed that the movement she saw was a trip rather than a slip. Ms Milliken said Mr Borich lunged and threw the pot into the sink.
- [9] In her evidence to the Commission Ms Milliken said that Mr Borich fell forward and to the left, throwing the pot into the sink, then grabbed the sink, was hanging on to the side of it and lowered himself down. She said he never really touched the ground. In a statement that Ms Milliken wrote about an hour after the incident occurred she said "turn(ed) to see him trip over his feet and fall to his side and on his back moaning. Didn't see any water anything to fall over".
- [10] In cross-examination Ms Milliken agreed that when she went to Mr Borich he was in distress, was pale-faced and was in pain. Ms Milliken said she suggested to Mr Borich that she call an ambulance which he refused.
- [11] Ms Bourke was also present on the day of the incident. She heard Mr Borich banging pots then she heard a big bang. Ms Bourke called out to ask Mr Borich if he was alright and heard a groan. At that point she came around from the dishwasher and found Mr Borich hanging onto the leg of the sink facing towards her. His legs were together but with one knee bent and were parallel to the sink. He was sort of in a sitting position as if he was about to try to pull himself up. She could not tell whether his buttocks were touching the floor. Ms Bourke told Mr Borich not to move and noticed that he was hanging on very tightly and was shaking. She fetched a pillow and asked him to try to lie down so that she could assess him. Ms Milliken then went to notify the Director of Services.
- [12] In cross-examination Ms Bourke said that Mr Borich appeared to be in obvious pain, was shaking and his grip on the sink was really intense.

The context

- [13] All of the witnesses employed at BallyCara, including Ms Rafferty, gave evidence that Mr Borich complained of back pain.
- [14] Ms Hempenstall gave evidence that during a rest break in the month before his accident Mr Borich had told her that he had gone to the Redcliffe Hospital for a morphine injection for his back as he had not slept that night. Mr Borich had complained that he was sick of BallyCara, his back was really sore and he should claim "compo". Ms Hempenstall replied that "Yes, it's a pity you haven't hurt your back at work" to which Mr Borich responded with words to the effect "Oh, that's easy fixed". Ms Hempenstall added that when Mr Borich said this she believed him to be joking.
- [15] Ms Thompson gave evidence that Mr Borich had also complained to her about his back pain and on one occasion in early to mid-April he had said that he needed to have an MRI scan on his back. Ms Thompson had replied that she had had a similar scan and it was very expensive. Mr Borich said that was why he had not had one at that stage but that he was going to his doctor to obtain pain relief. A few days later he informed Ms Thompson that his wife had made an appointment for a scan for him.
- [16] Mr Borich admitted that he had complained to his co-workers about back pain but denied that he had any of the conversations recounted above. He had never received a morphine injection for his back and the records from the Redcliffe Hospital support this. He had only had an MRI scan after he sustained his back injury on 28 April 2008 and again the records from the Redcliffe Hospital support this.

The medical evidence

- [17] Mr Borich had suffered an injury to his lower back while working at the Everton Park Hotel in 2000. He said that injury was treated by a few sessions of physiotherapy. He could not recall whether he had taken any time off work as a result but said he may have taken a couple of days.
- [18] The medical records from Dr McMurchy, Mr Borich's General Practitioner, do not show that Mr Borich had attended on him for back pain from 2000 until 24 April 2008. Mr Borich said he attended Dr McMurchy then after being nagged by his partner as he had been complaining of back pain for a few days. He said the back pain was the result of standing in the one position at work rolling out pastry to make apple pies and his leg had given way as he walked away from the bench. On that occasion Dr McMurchy recorded that Mr Borich was suffering from "sudden sharp lower back pain in the left lumbar sacral region with radiation down the left leg 19/4/08. Was standing at work and took a step. Fell over". Dr McMurchy believed he was treating a soft tissue inflammation and prescribed Naprosyn which relieves pain due to inflammation. Mr Borich said that after a few days rest over the weekend his back felt good and he returned to work.
- [19] As a result of the incident at work on 28 April 2008 Mr Borich was taken by ambulance to the Redcliffe Hospital where he was X-rayed and given pain relief. Mr Borich was sent home later that day. Ms McAulay described Mr Borich as being pasty.
- [20] Mr Borich attended Dr McMurchy on 1 May 2008 as he found that the pain relief he had been given by the Redcliffe Hospital was causing him to vomit. This was the earliest appointment with Dr McMurchy he could obtain. Dr McMurchy recorded that Mr Borich "fell at work 28/4/08, carrying a large pot. Seen at emergency department. X-Ray taken - no abnormalities demonstrated". Dr McMurchy noted that Mr Borich was complaining of lumbar sacral pain so he suggested physiotherapy, prescribed Endone, which is a narcotic analgesic, and gave Mr Borich a workers' compensation certificate stating that he was unfit for work until 7 May 2008.
- [21] Dr McMurchy agreed with Counsel for Q-COMP in cross-examination that it was plausible that Mr Borich had sustained his back injury as a result of carrying a heavy pot and either tripping or slipping.
- [22] Mr Borich was referred by WorkCover to Dr McPhee. He confirmed that Mr Borich had provided him with the mechanism of the injury as contained within his report of 10 July 2008, that is, that he was a carrying a pot, he slipped and fell, landing on his buttocks. Mr Borich had also reported his previous history of slipping and falling onto his buttocks in 2000.
- [23] Dr McPhee was clear that it did not matter whether Mr Borich had tripped or slipped. It was his opinion that an external force had happened. He regarded Mr Borich's version as inherently plausible.
- [24] In cross-examination by Counsel for Hibernian, Dr McPhee said that Mr Borich had not told him that he attended his General Practitioner four days before the injury complaining of back pain. However, this omission did not affect his opinion that an extraneous force had occurred and it caused immediate pain. It was not relevant how much trouble Mr Borich had experienced beforehand. Dr McPhee said that natural progression of a degenerative condition would only be likely if there was no history of a fall. However, unless the fall could be refuted by independent observation then the incident was significant.
- [25] Dr McPhee said that even if the scenario was that a worker had tripped while carrying a 25 kg pot of pasta, the fact that s/he had lost balance carrying that weight is going to subject the lower part of the worker's back to a force that it probably was not prepared to take.
- [26] Dr McPhee's conclusion was that "As a result of the fall at work on the 27th April 2008, Mr Borich has suffered a strain of his lower back with aggravation of pre-existing lumbar spondylosis".

Conclusions

- [27] The Commission accepts that Mr Borich complained on occasion to his work colleagues of pain in his lower back. Those witnesses who worked in the kitchen at BallyCara said the work was hard, involving heavy lifting. Several witnesses also acknowledged suffering back complaints and complaining to their colleagues. It is hardly surprising in those circumstances that colleagues would complain to each other about their ailments. I accept that Mr Borich was complaining about his lower back in the weeks before 28 April 2008.
- [28] However, as Counsel for Mr Borich submitted, the only evidence that Hibernian had to rely on that he had concocted an event was Ms Hemenstall's evidence. In that evidence she related the exchange she had had with Mr Borich in which he was alleged to have said that there were ways around not having hurt his back at work in

order to claim worker's compensation. As Counsel for Mr Borich also noted Ms Hennenstall thought Mr Borich was joking.

[29] It was submitted on behalf of Mr Borich and Q-COMP that Ms Hennenstall's evidence could not be relied on because it was her objective to paint Mr Borich in a poor light. There was evidence from Mr Borich and Ms McAulay that Ms Hennenstall's partner had been asked to leave a function at their house on Good Friday 2008 because of inappropriate comments he had allegedly made. Ms Hennenstall denied that her partner had made any such comments and that they were asked to leave.

[30] I accept the submission made by Counsel for Q-COMP that it was unlikely that Mr Borich made comments about morphine or an MRI if he was planning to contrive an incident in which he was to sustain a back injury in the result. However, I do not find that it matters whether Mr Borich had told Ms Hennenstall and Ms Thompson untrue stories and that Ms Hennenstall's evidence did not present Mr Borich positively. Ultimately, neither Ms Hennenstall nor Ms Thompson was present in the kitchen of BallyCara on 28 April 2008. It is clear from the evidence of one of Hibernian's own witnesses, Ms Milliken, that an event occurred in the kitchen of BallyCara on 28 April 2008 where Mr Borich injured his back.

[31] I acknowledge that Ms Milliken has given slightly different versions of the events on the day to her evidence in the Commission. Ms Milliken said she did not believe them to be different because she was not "a writing person". Her evidence given not long after the event is that Mr Borich tripped, fell to his side and on his back moaning whereas her statement given to Hibernian's Solicitors in September 2008 and repeated in evidence to the Commission is that he fell forward and to his left and eased himself to the ground. Both versions say that he fell to his left which is supportive of Mr Borich's own account. The main differences are whether he fell forward and whether his buttocks hit the ground. In my view the first version which she gave shortly after the incident is more likely to be accurate because, although brief, it is the most proximate to the event.

[32] I am further satisfied that an incident in which Mr Borich injured his back at work occurred because Ms Milliken's witnessing the incident was entirely happenstance. She simply turned to her right at the particular time the incident occurred. She could have just as easily turned to her left. Had Mr Borich wanted to concoct a lower back injury it would have been extremely unlikely that he could have staged an incident at the precise moment that Ms Milliken turned around, given that her turning to the left was mere chance. In addition, having heard the evidence of the witnesses that the work was heavy it would have been more likely, had Mr Borich wanted to concoct an injury, that he would have done so while undertaking other work such as winding the bratt pan up or down and cleaning it or lifting heavy hot boxes. To choose to concoct an injury by falling while carrying a heavy pot filled with boiling water and pasta where spillage is likely to result in burns is to me not only unlikely, but fanciful.

[33] Ms Bourke's evidence is that when she reached Mr Borich his legs were parallel to the sink. In my view the position of his legs is more likely to confirm that he fell to his side than that he fell forward and lowered himself to the ground. If he had fallen forward it could reasonably have been expected that his legs were at a right angle to the sink.

[34] Both Ms Milliken and Ms Bourke attested to Mr Borich being in obvious pain. Ms Milliken also said that Mr Borich was in distress and pale-faced while Ms Bourke said that Mr Borich was shaking. All of these physical signs point to an incident of some significance having occurred and were confirmed by Dr McPhee as being consistent with the injury he had identified.

[35] Dr McPhee, a medical practitioner independent of the parties to this Appeal, gave evidence that for the injury to occur an external force was required. A trip or a slip resulting in a fall was such a force. He described the incident as significant. Dr McPhee was aware of Mr Borich's previous injury he had suffered in other employment in 2000 and although he was unaware that Mr Borich had attended on his general practitioner on 24 April 2008 for back pain, said that his opinion had not changed as to the cause of the injury being a significant incident. Having heard Dr McPhee give evidence he was firm in his views that there had been a significant incident and was dismissive of the propositions concerning degeneration put to him by Hibernian. Both Dr McPhee and Dr McMurchy agreed that it was inherently plausible that his injury was consistent with the version of events given to them by Mr Borich.

[36] On the evidence before me I simply cannot find that Mr Borich concocted his injury. On the contrary, I find that Mr Borich's injury was sustained as a result of an external force, either a trip or a slip resulting in him falling and landing on his left buttock in the kitchen of BallyCara on 28 April 2008. Hibernian has not discharged its onus with the consequence being that I find the decision of the Review Unit, Q-COMP was not wrongly made. Further, and based on the evidence of Dr McPhee, the elements of s. 32(1) of the *Workers' Compensation and Rehabilitation Act 2003* have been satisfied in that:

- Mr Borich suffered a personal injury, viz, strain of his lower back with aggravation of pre-existing lumbar spondylosis;

- the injury arose out of or in the course of Mr Borich's employment; and
- his employment was a significant contributing factor.

[37] The Appeal is dismissed and the decision of the Review Unit, Q-COMP is confirmed.

[38] Order accordingly.



G.K. FISHER, Commissioner.

Hearing Details:

2010 24 and 25 March

Released:

Appearances:

Mr C.J. Murdoch, Counsel instructed by MVM Legal for the Appellant.

Mr P.B. O'Neill, Counsel instructed by Q-COMP for the First Respondent.

Dr G.J. Cross, Counsel instructed by Everingham Lawyers for the Second Respondent.

