

# TRANSCRIPT OF PROCEEDINGS

MAGISTRATES COURT

MAGEE, Magistrate

MAG-00126318/07(03)

MALCOLM TOLHURST

Appellant

and

Q-COMP

Respondent

SOUTHPORT

..DATE 31/07/2009

DECISION

**WARNING:** The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

BENCH: This is an appeal by Malcolm Tolhurst against Q-Comp's confirmation of WorkCover's decision to refuse Mr Tolhurst's application for workers compensation for an injury suffered to Mr Tolhurst's left shoulder in a work incident occurring on the 12th of October, 2004.

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The history of this matter briefly is that on the 29th of November, 2004, Mr Tolhurst applied for workers compensation for a strain to his lower back suffered on the 12th of October, 2004.

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On the 14th of July, 2005, he applied for workers compensation for a lower back and left shoulder injury suffered on the 12th of October, 2004 and on the 2nd of March, 2006, he applied for workers compensation for a left shoulder and a right side back injury suffered on the 12th of October, 2004.

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By a letter dated the 16th of February, 2006, WorkCover rejected the application dated the 24th of November, 2004. They made no mention of the subsequent applications but it appears that they were the subject of that rejection.

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In March, 2006, Mr Tolhurst sought a review of that decision from Q-Comp. Upon review on the 28th of April, 2006, Q-Comp confirmed WorkCover's decision and it is that which is the subject of this appeal.

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There is undisputed medical evidence that Mr Tolhurst suffers a significant disability of his left shoulder. At issue is

whether injury is compensable under the Workers Compensation and Rehabilitation Act of 2003.

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To be compensable, Mr Tolhurst's injury must be one as defined by section 32 of that Act. Relevantly, injury is defined in the following terms.

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"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. Subsection 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. 1. A personal injury, 2. A disease, 3. A medical condition, the condition becomes a personal injury or disease because of the aggravation".

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Mr Tolhurst gave evidence that on the 12th of October, 2004, he was employed as a handy man. He was instructed to go to a jobsite to reposition a fence. The job required a post approximately 3.2 metres long and 85 kilograms in weight, to be transported and concreted into the ground.

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Whilst Mr Tolhurst received assistance in placing the post on his vehicle, he received no such assistance at the jobsite. At the jobsite, he lifted the post onto his right shoulder and held onto it with his right hand.

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Reading now from the transcript at page 17, Mr Tolhurst said, "I then proceeded to bring the front of the post up the front rack of the van over the bonnet. I thought I had it balanced and it wasn't and when the post began to fall, I had to use extra strength to pop it up with my right hand".

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I pause there to say that it seems common ground that Mr Tolhurst meant to say that he used extra strength to pop it up with his left hand.

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He then goes on to say, "At that time, I felt the muscle tissue at my back go and I had instant pain in my back. The pain in my shoulder didn't come on until about - it would've been a couple of days after that".

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It is not in dispute on the evidence that Mr Tolhurst consulted is general practitioner, Dr Chu on the following day, complaining of lower back pain on the right-hand side and numbness of the right hand. He made no complaint of any pain in his left shoulder which would be consistent with his evidence that the pain in his shoulder didn't come on until some days later.

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At that time, or at the time of the injury, Mr Tolhurst was taking 400 milligrams of Celebrex, an anti-inflammatory per day for a pre-existing but unrelated condition.

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Dr Chu, when he saw Mr Tolhurst the following day, prescribed a further anti-inflammatory and a pain killer.

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Mr Tolhurst saw Dr Chu again on the 2nd of December, 2004 and made no mention then of any difficulties with his left shoulder.

Mr Tolhurst saw Dr Chu on the 18th of January, 2005 and for the first time, mentioned to Dr Chu that he had a problem with his left shoulder, although there is some suggestion that Mr Tolhurst may have seen an orthopaedic surgeon, Eric Morgan, in relation to a problem with his left shoulder on the 20th of December, 2005.

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Mr Tolhurst said he tried to self treat his left shoulder problem and that his general practitioner was away from the 17th of December. He said in his evidence that he made an appointment to see Dr Chu soon after his return from holidays.

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In his evidence, he said that this was the 10th of January, but it is clear from Dr Chu's records, that this consultation was on the 18th of January, 2005, however, nothing turns on this point.

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Dr Chu diagnosed tendonitis of the left shoulder. The problem with Mr Tolhurst's left shoulder continued to deteriorate. X-rays taken on the 24th of January, 2005, revealed calcification tendonitis, degenerative changes with the acromioclavicular joint and inferior spurring on the acromion.

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An ultrasound on that date showed the thin bicep and subscapularis tendon, plus calcification of the supraspinatus tendon with full thickness.

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Dr Chu referred Mr Tolhurst to an orthopaedic surgeon and he saw Dr Pitchford at the Gold Coast Hospital.

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It is not disputed that in 1994, Mr Tolhurst sustained an injury to his left shoulder when he got dumped in the surf. He had arthroscopic surgery in 1995 and he was symptom free from that time until some time after the 12th of October, 2005.

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Dr Pitchford gave evidence by telephone. On the 22nd of June, 2005, he operated on Mr Tolhurst to repair a large L-shaped multifocal tear of Mr Tolhurst's left rotator cuff.

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He gave evidence that most rotator cuff tears are caused by degeneration but a minority are as a result of acute injury. He did not consider the mechanism of injury described by Mr Tolhurst to him to have caused the rotator cuff to tear. He expressed the opinion that if the rotator cuff had been torn in the incident which occurred on the 12th of October, 2004, the symptoms would be present immediately. He did not think the Celebrex medication which Mr Tolhurst was taking at that time would have affected this.

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He noted that x-rays taken on the 24th of January, 2005, showed long term degeneration and he described Mr Tolhurst as having 10 years of chronic shoulder pathology referable to his 1994 injury.

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Dr Pitchford also indicated that had there been an aggravation of the degenerative condition occasioned by the incident on

the 12th of October, 2004, he would've accepted the symptoms caused by degeneration to have been immediate.

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Dr Dodd is an orthopaedic surgeon who was engaged by the respondent to examine Mr Tolhurst which he did in February, 2006.

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He provided a report on the 13th of February 2006, which is contained in Exhibit 8, in which he expressed the opinion that the current condition of Mr Tolhurst's left shoulder related to the pre-existing condition and surgery rather than any new condition occurring on the 12th of October, 2004.

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He opined that the work related condition was possibly an aggravation of a pre-existing degenerative condition, that the effect of this would have ceased within a few weeks.

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Dr Dodd gave evidence by telephone. Like Dr Pitchford, he was of the opinion that if Mr Tolhurst had sustained a tear of the rotator cuff on the 12th of October, 2004, the pain would have been immediate or at least would have occurred within - would have been immediate and not masked by the Celebrex which Mr Tolhurst was taking at the time.

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Dr Dodd did say that the attention given to the back pain caused at the time of the incident may have masked the condition for 24 hours or so. However, Mr Tolhurst states that he did not experience any pain for a couple of days.

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Dr Dodd thought this inconsistent with any injury being suffered to the left shoulder on the 12th of October.

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Further, the fact that Mr Tolhurst made no complaint of any left shoulder pain at the time he saw Dr Chu on the 10th of December, 2005, was an indication to Dr Dodd either that any aggravation had passed by that time or was not of sufficient degree to have occasioned him to complain to his treating medical practitioner of pain at that time.

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I am not satisfied on the balance of probabilities that Mr Tolhurst suffered an injury within the meaning of section 32 of the Act on the 12th of October, 2005.

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I find that he suffered from a significant degenerative but asymptomatic condition as at the 12th of October, 2005.

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If he had suffered an injury or an aggravation of a pre-existing degenerative condition on the 12th of October, 2005, I find that his symptoms on the 2nd of December, 2005, would not have been sufficiently mild to have been controlled by medication to such an extent that Mr Tolhurst did not consider his symptoms worthy of being mentioned to Dr Chu.

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I find the symptoms which he experienced in relation to his left shoulder subsequent to the 12th of October, 2005, to have been entirely due to his pre-existing condition and the fact that the degenerative condition became symptomatic sometime after the 12th of October, 2005, to be coincidental.

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In the circumstances, the appeal will be dismissed.

MR McLEOD: Your Honour, the respondent would seek it's costs. The relevant scale is scale E of the [indistinct].

BENCH: What are the provisions in the Act that entitle you to claim and I'll go and have a look at them, because I hadn't directed my mind to that issue, I must say.

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MR McLEOD: Just excuse me. Section 558 of the Workers Compensation and Rehabilitation Act, 558 subsection 3 provides that costs of the hearing are in the appeal body's discretion except to the extent provided under a regulation and the regulation, your Honour has to go to is the relevant regulation which was the Workers Compensation and Rehabilitation Regulation and it's - that's section 113 and that refers the Court to scale E of the Magistrates Court costs scale.

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BENCH: Is there anything to indicate the factors that I should take into account in exercising my discretion in relation to costs?

MR McLEOD: Not that I'm aware of, your Honour.

BENCH: Are there any authorities that indicate whether it is normal in this jurisdiction for costs to follow the event?

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MR McLEOD: My experience both the Industrial Relations Commission that has [indistinct] restriction with this Court and Magistrates sitting as industrial Magistrates do award costs. Ultimately, it depends upon costs are always at the discretion of the Court.

BENCH: Yes.

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MR McLEOD: And that depends upon no doubt, each matter that comes before the Court. If I could-----

BENCH: Yes?

MR McLEOD: Sorry, your Honour, if I could be of assistance, the respondent would be seeking the following costs under scale E item 6F, that's counsel's fee on brief in the amount of \$980 over a fresher fee of \$655 for counsel which is item 6G, item 8B, twice, it's \$245 for a clerk instructing counsel and that comes to \$490 and witness expenses for Dr Dodd which is \$74 and the amount comes to \$2,199.00.

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BENCH: How much is the - Dr Dodd's fee-----

MR McLEOD: \$74.

BENCH: He'll be running that one at a loss.

MR McLEOD: That's according to the scale.

BENCH: And the total comes to?

MR McLEOD: \$2,199.00.

BENCH: Mr Tolhurst, what do you say about costs?

APPELLANT: The workers compensation [indistinct] Queensland CCH Australia Limited page 6, on appeal, the Industrial Magistrates Court may order a party to pay costs incurred by another party only if satisfied that the party made applications vexatiously-----

BENCH: Vexatiously.

APPELLANT: -----or without-----

BENCH: Is it vexatiously?

APPELLANT: Vexatiously or without reasonable cause. I believe I had reasonable cause.

BENCH: All right. Now, that's a matter for me. Do you accept that that's the-----

MR McLEOD: I think that's in relation to costs in the Industrial Court not in the Industrial Magistrates Court because the-----

BENCH: Okay, so what paragraph are you referring to because I have that on line.

MR McLEOD: Page 6, paragraph 3 I think - four.

BENCH: What section's the commentary under?

MR McLEOD: Section - commentary, 42 dash 130, powers of industrial Magistrate.

BENCH: All right. So, you're saying that it's only appropriate for me to order costs if I consider that you've brought these proceedings vexatiously or without reasonable cause.

APPELLANT: Yes.

BENCH: All right. Well, I'll just stand down for 10 minutes while I just have a quick review of the legislation because I do remember now that the - I have been under the impression [indistinct].

MR McLEOD: Your Honour, before you-----

BENCH: Yes?

MR McLEOD: -----stand the matter down, rule 563 is costs of appeal to the industrial Court and it says on an appeal the industrial Court may order a party to pay costs incurred by another party only if satisfied the party made the application vexatiously or without reasonable cause.

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BENCH: All right. Thank you.

APPELLANT: Excuse me, Ma'am before you go, sorry, Ma'am-----

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BENCH: Yes.

APPELLANT: -----I was under the belief that this was the rehearing of the evidence not an appeal.

BENCH: This is an appeal from the decision of Q-Comp you - it's an appeal from the decision of Q-Comp to an Industrial Magistrate. That is the process that we have been undertaking.

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Now, on appeal, I consider the matter afresh, all right?

APPELLANT: So, I-----

BENCH: I decide regardless of what WorkCover decided, regardless of what Q-Comp are - decided, I hear the evidence and I decide. But it is called an appeal from the decision of Q-Comp but on appeal I consider the matter afresh. Is that a fair representation, Mr McLeod?

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MR McLEOD: Oh, yes. The Industrial Court on numerous occasions have said it's hearing denovo and-----

BENCH: Yes.

MR McLEOD: -----the decisions of WorkCover or a self insurer or Q-Comp are effectively parked to one side-----

BENCH: Yes.

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MR McLEOD: -----and the Court itself stands in the shoes as-----

BENCH: Yes.

MR McLEOD: -----the decision maker.

BENCH: Yes.

MR McLEOD: So, it's a total rehearing of the whole evidence.

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BENCH: It is, but it is still called an appeal.

APPELLANT: So, is there an avenue still open to me to appeal this decision?

BENCH: There most certainly is.

APPELLANT: Ma'am.

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BENCH: You have the same rights that you had in relation to the decision of Dr Kilner.

APPELLANT: Ma'am.

BENCH: But I'll just make my decision in relation to costs anyway.

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THE COURT ADJOURNED

THE COURT RESUMED

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BENCH: Yes, thank you. In relation to the application for costs, I have an unfettered discretion under section 558 of the Workers Compensation and Rehabilitation Act 2003.

The only conscription on that is subject to the regulations which indicate that if in my discretion I decide to award costs, I must apply a certain scale.

It is unlike other jurisdictions where there is a primary rule that costs follow the event and I have not been referred to any authorities that indicate how it is that I should exercise the discretion and in the circumstances I consider that I should award costs if I think it a fair and appropriate thing to do so.

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In this regard it is to be noted that Dr Dodd in his report of the 13th of February 2006, did indicate or refer to the possibility that the work related condition was an - possibly an aggravation of pre-existing degenerative changes but the effect of this would have ceased within a few weeks of the condition.

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Now, from Mr Tolhurst's point of view, he has been symptomatic since some time after the 12th of October, 2005 and if I had found that the continued symptoms was due to the underlying degenerative condition but for the intervening work incident he was have remained asymptomatic, my decision may well have been different.

Further, prior to the Court proceeding the evidence was really not much higher than that and Mr Tolhurst had a report from his treating general practitioner who had provided a diagnosis that the injury to the left shoulder was consistent with the work incident occurring on the 12th of October, 2004.

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In light of those facts and in light of the fact that this legislation is intended to be remedial in nature I think it would be unfair to oblige Mr Tolhurst to pay the costs of the

proceeding. I think it was a matter that warranted litigating and in the absence of a general rule that costs follow the event on this occasion, I am disinclined to make an award of costs in favour of Q-Comp.

Is there anything else?

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