CITATION: *Theresa Helen Ward AND Q-COMP (C/2011/39) - Decision* <*http://www.qirc.qld.gov.au*>

INDUSTRIAL COURT OF QUEENSLAND

Workers' Compensation and Rehabilitation Act 2003 - s. 561(1) - appeal against decision of industrial commission

Theresa Helen Ward AND Q-COMP (C/2011/39)

PRESIDENT HALL 7 December 2011

DECISION

[1] On 19 July 2010, Ms Theresa Helen Ward lodged a Notice of Claim for Damages with WorkCover Queensland for unassessed injuries. The injuries to her lower back and right knee were said to have been sustained over a period of time* *viz.*, 12 August 2007 and 5 January 2008, and said to have become symptomatic in or about December 2007. A second Notice of Claim for Damages about the same injuries was lodged on 25 August 2010. The second Notice carried the necessary attachments. Both Notices asserted that the injuries were sustained in the course of her employment by Retail Food Group Australia CMF Pty Ltd trading as Donut King. [*With hindsight, on the evidence of Dr Bloom, Ms Ward could not have given particulars of the date, time and place of an event causing her injury: see *Workers' Compensation and Rehabilitation Regulation 2003*, s. 111(1)(b)(i) and *Sayers v Hansen t/as Alguard Security Services*[1] at [9] per de Jersey CJ.

[2] By a letter dated 10 September 2010, WorkCover Queensland rejected Ms Ward's Claim for Damages. Ms Ward sought a Statutory Review. By a decision dated 14 February 2011, Q-COMP confirmed WorkCover Queensland's decision. Ms Ward appealed to the Queensland Industrial Relations Commission (the Commission). By a decision of 26 September 2011 and released the same day, the Commission dismissed the appeal. Ms Ward now Appeals to this Court.

[3] The Appellant's first attack is on paragraph [130] of the Commission's reasons for decision whereat the Commission observed:

> "The next issue for determination is whether the Appellant's employment with the Employer was a significant contributing factor to any injury suffered i.e. whether the work activities undertaken by the Appellant in the course of her employment with the Employer were a significant contributing factor to the injuries for which the Appellant is claiming. This is a question of fact that I must determine, taking into consideration the opinions of the various medical practitioners.".

With respect to the Commission, the question "whether the Appellant's employment with the employer was a significant contributing factor to any injury suffered", is a question of mixed law and fact, see *Newberry v Suncorp Metway Insurance Limited*[2] at 40 per Keane JA, de Jersey CJ and Muir J agreeing. However, the error is about infelicitous expression. The Commission, at all times, treated the question as one of mixed law and fact. So much is apparent from the citation and discussion of authority at paragraphs [118] and [119] of the decision. Ironically, *Newberry v Suncorp Metway Insurance Limited*, *ibid*, is one of the authorities discussed.

[4] Paragraph [130] of the Commission's reasons for decision (set out at [3] above) is attacked on the further ground that, to the extent that the question whether Ms Ward's employment was a significant contributing factor to any injury is a question of fact, it is a question to be decided by the Commission on all of the evidence, i.e. it is not a medical question to be decided on the medical evidence alone, at least where the state of medical knowledge does not preclude an inconsistent inference. I agree. If authority be required, see *Adelaide Stevedoring Co Ltd v Forst*[3] at 563 per Rich ACJ, *Fernandez v Tubemakers of Australia Ltd*[4] at 199 to 200 per Mahoney JA and at (1976) 50 ALJR 720 at 725 per Mason J with whom Barwick CJ and Gibbs J agreed, and *Dahl v Grice*[5]. However, the Commission did not confine the resolution of the question to the competing evidence of Drs Bloom and Gillett because of underestimation of the permissible scope of intuitive reasoning. The problem was with the quality of the lay evidence. Earlier on in the reasons for decision, the Commission summarised the evidence of the lay witnesses, *viz.*, Mesdames Drury, Hammond and King, Mr King and Ms Ward herself. The Commission published an analysis of the evidence and concluded that it was unreliable. The evidence of the engineer, *viz.*, Mr McDougall, was put aside because he acted on an inaccurate history. The evidence of the general practitioner *viz.*, Dr Wong, was largely put aside because his notes were inadequate and his history not

[1] *Sayers v Hansen t/as Alguard Security Services* (2011) QSC 70
[2] *Newberry v Suncorp Metway Insurance Limited* [2006] QdR 519
[3] *Adelaide Stevedoring Co Ltd v Forst* (1940) 64 CLR 538
[4] *Fernandez v Tubemakers of Australia Ltd* (1975) 2 NSWLR 190
[5] *Dahl v Grice* [1981] 1 VR 513 (Full Court)

entirely accurate. The Commission's findings and the steps which the Commission took were reasonably open on the evidence. There is no error to correct.

[5] Paragraph [140] of the Commission's reasons for decision is also the subject of attack. The Commission observed:

> "[140] I thus find that the Appellant suffered a temporary exacerbation of patellofemoral degenerative change in her right knee and also some temporary exacerbation of some early degenerative changes in the facet joints and sacroiliac joint of the lower back whilst employed by the Employer. The work performed by the Appellant for the Employer did not cause the underlying condition nor did it influence the course of the underlying condition. In those circumstances the Appellant has not proved, on the balance of probabilities that her claim for lower back and right knee injury is one for acceptance.".

As a stand-alone paragraph the passage is very difficult. The statutory definition of "injury" at s. 32 of the *Workers' Compensation and Rehabilitation Act 2003*, includes the aggravation of an injury "which arises out of or in the course of the employment". It has long been settled that the activation of pain is equated with aggravation of an underlying disease i.e. that it is sufficient that an asymptomatic underlying degenerative disease becomes painful, even if there is no change to the underlying pathology, see *Pleming v Workers' Compensation Board of Queensland*[6] at 1182 per de Jersey P, and *WorkCover Queensland v BHP (Qld) Workers Compensation Unit*[7] at 143 per Hall P. If indeed, Ms Ward's degenerative back and/or her degenerative right knee had become symptomatic, i.e. painful, whilst she was doing that which she was employed to do, I should have thought that the only sustainable conclusion was that she had suffered an injury in the course of her employment.

[6] The difficulty disappears if the passage at paragraph [131] is read in light of the evidence of Dr Bloom (the expert whose evidence the Commission preferred). Dr Bloom characterised the pain as an exacerbation rather than an aggravation of the underlying degenerative conditions with which Ms Ward's lower back and right knee were affected because to the extent that the pain was real it was brief and easily dealt with. When Ms Ward stopped what she was doing at the onset of pain, the pain went away. The degenerative conditions had not become worse. The symptoms went away and Ms Ward's lower back and right knee returned to their pre-exacerbation state. The case is analogous to *Heald v Q-COMP*[8] at 771.

[7] I dismiss the Appeal. I reserve all questions as to costs.

Dated 7 December 2011.

D.R. HALL, President.

Released: 7 December 2011

Appearances:
Mr M. Horvath, instructed by Smiths Lawyers for the Appellant.
Mr S.P. Gray, directly instructed for Q-COMP.

[6] *Pleming v Workers' Compensation Board of Queensland* (1996) 152 QGIG 1181
[7] *WorkCover Queensland v BHP (Qld) Workers Compensation Unit* (2002) 170 QGIG 142
[8] *Heald v Q-COMP* (2004) 177 QGIG 769