QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*Hart v the Workers' Compensation Regulator* [2016] QIRC 085
PARTIES:	**Hart, Julie Ann** (Appellant) v **the Workers' Compensation Regulator** (Respondent)
CASE NO:	WC/2015/292
PROCEEDING:	Appeal against a decision of the Workers' Compensation Regulator
DELIVERED ON:	15 August 2016
HEARING DATES:	9 and 10 May 2016 7 June 2016 (Respondent's submissions) 16 June 2016 (Appellant's submissions)
HEARD AT:	Hervey Bay
MEMBER:	Industrial Commissioner Fisher
ORDERS:	**1. The appeal is dismissed.** **2. The decision of the Regulator is confirmed.** **3. The Appellant is to pay the costs of and incidental to the appeal. Failing agreement, the Respondent is granted liberty to apply.**
CATCHWORDS:	WORKERS' COMPENSATION - APPEAL AGAINST DECISION - whether neck strain occurred as a result of work - whether appellant sustained an injury being an aggravation of a pre-existing injury at work - whether the aggravation arose out of or in the course of employment - whether employment was a significant contributing factor to any injury - where appellant had a range of symptoms - where appellant has a pre-existing condition of cervical spondylosis - where evidence of inflammatory condition - where a majority of specialists could not make a diagnosis
CASES:	*Workers' Compensation and Rehabilitation Act*

2003, s 32

R v Turner [1975] QB 834
Davidson v Blackwood [2014] ICQ 008
Heald v Q-COMP (2004) 177 QGIG 769
JBS Australia Pty Ltd AND Q-COMP (C/2012/35) - Decision <http://www.qirc.qld.gov.au>
Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305
National Justice Compania Naviera SA v Prudential Assurance Co Ltd ("The Ikarin Reefer") [1993] 2 Lloyd's Rep 68

APPEARANCES: Mr R. Myers, Counsel instructed by Hall Payne Lawyers.
Ms D. Callaghan, Counsel directly instructed by the Workers' Compensation Regulator.

Decision

[1] Julie Hart has appealed the decision of the Workers' Compensation Regulator which confirmed the decision of Local Government Workcare (LGW) to reject her application for workers' compensation. Ms Hart's claim was for a neck strain said to have occurred as a result of work on 14 June 2015.

[2] The Regulator concedes, and the Commission accepts, that Ms Hart was a worker as defined by the *Workers' Compensation and Rehabilitation Act 2003.*

[3] The Regulator also concedes, and the Commission accepts, that Ms Hart had a pre-existing degenerative cervical condition.

[4] The case for Ms Hart is that working a 12 hour shift for the first time on 14 June 2015 under poor ergonomic conditions, together with the system of work, caused her to aggravate her underlying cervical condition. The issues for determination are whether, on the balance of probabilities:

(i) Ms Hart sustained an injury, being an aggravation of a pre-existing condition, at work on 14 June 2015;
(ii) the injury arose out or in the course of Ms Hart's employment; and
(iii) her employment was a significant contributing factor to any injury.

[5] To understand Ms Hart's appeal it is necessary to explain Ms Hart's working environment and system of work as well as to provide a chronology of her symptoms.

Ms Hart's employment

[6] Ms Hart was employed from 2 December 2013 as a casual Gate House Attendant at the Bundaberg Waste Management Facility operated by the Bundaberg Regional Council. She worked a maximum of three days a week in shifts of six and a-half

hours. Ms Hart's primary function was to collect and receipt monies from customers who visited the facility.

[7] The hut in which Ms Hart worked was located next to the weighbridge, albeit there was a distance of about 450 mm between the edge of the hut and the vehicle. A minority of customers alighted from their vehicle to pay the required fee. For those who remained in their vehicles, payment had to be collected by the Gate House Attendant from the driver on the weighbridge.

[8] The system of work was that Ms Hart would step up on a stool, reach out of the gatehouse window to the customer to take the money, step down, process the transaction and then reverse her actions. Where the driver was parked further than the middle of the weighbridge, simply reaching out of the window was insufficient. In those cases, the process was essentially the same except that Ms Hart would reach out of the window extending a piece of pipe with a bucket attached to the customer and then withdraw it. If a customer did not require a receipt, which Ms Hart estimated to be in 20 per cent of cases, then there was no need for the reverse of the process to occur.

[9] Dr Cunneen, Occupational Physician, explained in his report and oral evidence the system of work in the following way: that Ms Hart had to stand up on a stool (200 mm high), forward flex and rotate slightly as well as extending one of her limbs up to 600 mm beyond the window on a repetitive basis.

[10] On 14 June 2015, Ms Hart was rostered for a 12 hour shift for the first time in her employment at the facility. Counsel for the Appellant said in the examination in chief of Ms Hart that the Current Ticket Report, which is a report produced by the Council, shows that during her shift on 14 June Ms Hart performed 270 transactions. However, not all of these transactions required her to take payment from customers in their vehicles. Some involved the customer going to the gatehouse window to pay whereas others involved the customer going to the facility shop. Counsel for the Regulator said that 107 transactions were "on button" transactions where Ms Hart pushed a button on the console and did not lean out of the window.

[11] Adrian Frame, a Building Surveyor with the Council, gave evidence that he failed the certification of the gatehouse and issued a non-compliance notice because he considered that the building was not being used in a safe manner and it did not have disabled access. His concerns about safety included employees leaning out of the window and standing on a makeshift box.

[12] The evidence from Janelle van Iren, the Rehabilitation Officer for the Council, was that an occupational therapist was commissioned by the Council to review the workplace in 2011 following a workers' compensation claim. Ms van Iren also recorded in her notes of Ms Hart's case on 23 June 2015 that modifications were being made to the gatehouse in the next couple of weeks to reduce the need for staff to lean out of the window.

Chronology

[13] The description of the symptoms is primarily taken from Ms Hart's evidence.

17 April 2015	Consultation with Dr Whittle. Advised of neck stiffness, dizziness and headaches.
20 April	Had not worked for 3 days. Consultation with Dr Whittle. Persistent dizziness, headache and neck stiffness.
6 & 7 June	Not rostered.
8 June	Not rostered. At home picking strawberries. Dizzy spells, pain in left side of neck and shoulder. Made appointment to see Dr Whittle on 15 June because of dizzy spell.
8-14 June	Neck pain, stiffness and dizziness continued in 30 minute to 1 hour episodes.
14 June	Worked 12 hour shift as gatehouse attendant for the first time. 3.30 p.m. - lower back ache. 4.00 p.m. - stiff neck. 5.00 p.m. - lower back spasms. At home, pain in neck worsened. Had pain from head to neck and between shoulder blades and both arms. Pins and needles on left side of face and head and left arm.
15 June	Consultation with Dr Whittle. Sent for X-rays.
16 June	Not rostered. X-rays taken.
17 June	At work - 6 or 7 hours training in sedentary position. Experienced discomfort because of neck. No complaint to Council about neck problem.
18 June	6 hours training a co-worker. Made complaint about a work injury to Jenny Fritz (Supervisor) and was encouraged to make an incident report.
19 June	Returned to normal duties on 6 hour shift. Worked without restriction but had neck pain and discomfort. Met with Janelle van Iren (Council Rehabilitation Officer) and Ms Fritz and advised she had been experiencing dizziness, pins and needles, burning in neck for months before her shift on 14 June.
20 June	Appointment with Dr Whittle to review scans.
21 June	Ms Hart uncertain whether she worked that day.

22 June	Worked 6 hours as gatehouse attendant without restriction but with pain and discomfort. Last day of work in gatehouse.
23 June	Told Ms Fritz and Ms van Iren of discomfort in neck during Sunday and Monday shifts. Physiotherapy treatment led to headaches for 2 days and tingling in face and burning in shoulder. Continued to experience fluctuating symptoms in her neck, dizziness, tingling in face and neck and eye spasms.
14 July	Medico-legal examination by Dr Coroneos, Consultant Neurosurgeon.
16 & 17 July	Light duties. Uncertain whether she worked on 17 July. On one of those days, Ms Hart had dizzy spell before work. Discomfort driving to and from work but no problems at work. Using clutch aggravated lower back. Using gear shift aggravated shoulder.
Mid-late July	Looking up at people caused neck pain.
Late July	Dizzy spells and loss of balance. Was hospitalised and treated by Dr Van der Westhuizen, Orthopaedic Surgeon on 23 July. Pathology tests ordered. After leaving hospital, continued to experience fluctuating neck pain or discomfort that worsened with driving, eye spasms, dizziness, loss of balance and soreness in left ear.
27 August	Medico-legal examination by Dr Cunneen, Occupational Physician.
13 November	Consulted Dr Van der Westhuizen as private patient.
18 February 2016	Medico-legal examination by Dr Campbell, Neurosurgeon.

Medical Opinions

[14] The treating General Practitioner, Dr Whittle did not give evidence in the proceedings nor were his medical records tendered. Evidence was given by four medical specialists. Drs Cunneen and Campbell were called by Ms Hart. The Regulator called Drs Coroneos and Van der Westhuizen. Drs Cunneen, Campbell and Coroneos had been provided with video footage showing Ms Hart performing her duties on 14, 19 and 22 June 2015. The footage was not tendered in evidence.

Dr Cunneen, Occupational and Environmental Physician

[15] Dr Cunneen examined Ms Hart within a few weeks of her discharge from hospital. In his report of 27 August 2015, Dr Cunneen stated that he "found Ms Hart's medical

history quite confusing and it took almost 2 hours to define the exact medical problems for this claimant." On examination he found that most cervical motion caused pain, she had a restricted range of motion, tenderness over the left cervical pillar and acute muscle spasm.

[16] He opined that based on the medical evidence on file and his clinical examination, Ms Hart had sustained work-related injuries to both her cervical and lumbar spine regions while having to work a prolonged shift of 12 hours on 14 June 2015 (0600 to 1800 hours). His opinion of her work-related injuries was:

> "A. Aggravation of pre-existing degenerative Cervical Spondylosis (Osteoarthritis).
> B. Exacerbation of pre-existing degenerative Lumbar Spondylosis (Osteoarthritis)."

[17] He also opined that Ms Hart's recurrent episodes of light headedness/dizziness should be referred for investigation.

[18] Dr Cunneen viewed nine interactions of Ms Hart with customers from the video footage. In a file note dated 19 April 2016, Dr Cunneen confirmed that the mechanism described by Ms Hart and demonstrated in the footage was consistent with having caused an injury being a work-related aggravation of her pre-existing degenerative cervical spine over a period of time. Dr Cunneen described the working conditions at the gatehouse as "ergonomically poor and biometrically problematic." He was of the opinion that the design of the workplace, the method of work and the shift length contributed to the aggravation.

[19] Dr Cunneen accepted in his evidence that Ms Hart was "really stiff" as compared to when she was seen by Dr Coroneos. However, he added that she had "improved somewhat" when she saw Dr Campbell. This evidence is not consistent with the evidence of Dr Campbell who said he observed Ms Hart as walking with a slow cautious gait and who sat in discomfort with a decreased range of movement by 75 to 80 per cent. Further, it was inconsistent with Ms Hart's evidence that her symptoms had increased over the three assessments commencing with that of Dr Coroneos in July 2015 and the last performed by Dr Campbell in January 2016.

[20] Dr Cunneen accepted that Ms Hart had experienced symptoms for up to two months before 14 June. He said that there was a temporal and causal relationship between the hours which increased over the period from April to June 2015 and there were work related events over this period. The work events caused some symptoms which settled down and the work event on 14 June was the significant one, or the "final straw", which exceeded her functional capacity and caused not only stiffness but also severe pain on her left side.

[21] This opinion is not supported by Ms Hart's evidence which did not reveal any work events earlier than 14 June causing symptoms. Further, her evidence was that her shifts were of a similar length with longer hours being worked for the first time on 14 June.

[22] Dr Cunneen was unaware of the reports of Dr Van der Westhuizen. When informed of the results of the pathology tests which showed significant C1/C2 arthritis of an

inflammatory type, Dr Cunneen was prepared to accept that Ms Hart had a concurrent second medical condition but not an underlying inflammatory joint condition. He thought the concurrent second medical condition may be in the higher area of C1 and C2 and may have caused the facial and skull symptoms but not the neck stiffness and the pain in her left shoulder and mandible region.

[23] He considered the symptoms of dizziness and light headedness were not just due to her neck but to some other issue, for example, a vascular issue, an inner ear or a metabolic problem.

[24] The Regulator was critical of Dr Cunneen for being unresponsive to questions in cross-examination and at times reluctant to make concessions that were consistent with his own evidence. The Regulator submitted that Dr Cunneen had been provided with incomplete information at the time of his examination and not provided with disclosed documents to consider prior to giving evidence. He had also been provided with material not in evidence which he tried to rely on when giving his oral evidence and was reluctant to consider evidence that was before the Commission.

[25] In *R v Turner,* Lawton LJ said:

> ". . . Before a court can assess the value of an opinion it must know the facts upon which it is based. If the expert has been misinformed about the facts or has taken irrelevant facts into consideration or has omitted to consider relevant ones, the opinion is likely to be valueless. In our judgment, counsel calling an expert should in examination in chief ask his witness to state the facts upon which his opinion is based . . .".[1]

[26] The Regulator's criticisms are generally accepted. When added to the deficiencies in the evidence of Dr Cunneen as noted above, much of his evidence is unreliable. However, I consider his evidence about the system of work and the conditions under which the work was performed to be useful given his specialty area.

Dr Campbell, Neurosurgeon

[27] Dr Campbell interviewed and examined Ms Hart on 18 February 2016 at the request of her Solicitors. In his report of the same date, he diagnosed Ms Hart as having a "musculo-skeletal injury cervical spine". He opined that "[a]t about the same time Ms Hart developed blephara spasms which would seem completely unrelated to the work accident." He said the musculo-skeletal injury occurred over a period of time from 17 April 2015 to 14 June 2015. He considered there was a direct causal link between the work performed on the 12 hour shift on 14 June and her neck pain symptoms.

[28] After reviewing the video footage of Ms Hart from 14 June, Dr Campbell confirmed in his File Note of 20 April 2016 that Ms Hart's movements "were not overly arduous but were on the spectrum of activities that were likely to cause a neck injury over a period of time." The period nominated was from December 2013. He agreed with Dr Cunneen's assessment that the workplace was ergonomically poor.

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[1] *R v Turner* [1975] QB 834, 835.

[29] In his oral evidence Dr Campbell said the injury occurred at work on 14 June 2015.

[30] In answer to a question from the Commission about when the injury occurred, given the variation in his opinions, Dr Campbell said "her neck injury is due to an over-a-period-of-time injury from December 2013 with onset of symptoms in April 2015 and a significant aggravation of symptoms on the 14th of June 2015."

[31] Dr Campbell acknowledged that Ms Hart's onset of symptoms in April and May 2015 occurred outside of the course of her employment but the activities on 14 June were the "straw that broke the camel's back" resulting in ongoing, permanent neck symptoms. He was unaware at the time he was writing his report that Ms Hart had experienced an episode of dizziness and pain in the shoulder and neck on 8 June.

[32] Dr Campbell agreed in cross-examination that his description of the injury as a "musculoskeletal injury to the cervical spine" was general as it was very hard to pinpoint the exact focus of pathology. Later he said that the case was "grey" in respect of diagnosis. Dr Campbell was prepared to accept that the pathology test showed that Ms Hart might have some inflammatory condition and ultimately agreed that the contribution to her neck injury was multifactorial with employment having the greatest contribution.

[33] His evidence shows quite some variation as to when the injury occurred. Because of this I consider that Dr Campbell's opinion is not reliable.

[34] In addition, I did not find his evidence about the contribution of work to be convincing. In his oral evidence Dr Campbell said that the work performed by Ms Hart was not arduous and at the "bottom end of the spectrum" of activities and that up to 50 per cent contribution was from external factors. He later said that work was "the most likely cause for the vast majority of her symptoms", although he added that external factors were at play. On assessing his evidence, I am of the view that Dr Campbell was struggling to justify his opinion that her employment significantly contributed to her condition.

Dr Van der Westhuizen, Orthopaedic Surgeon

[35] Dr Van der Westhuizen was Ms Hart's treating Orthopaedic Surgeon. He saw her when she was hospitalised in July and as a private patient in his rooms in November. When he examined Ms Hart in July her main complaints were dizzy spells and loss of balance but also facial tingling on left hand side. In a letter to Dr Whittle on 13 November 2015, Dr Van der Westhuizen provided various test results, including an MRI which showed some degenerative changes in her cervical spine and central canal as well as foraminal narrowing at C5/6/7 with no myelopathy of the spinal cord. He also noted that she had C1/C2 signs of significant arthritis.

[36] In a letter to the Regulator dated 13 April 2016, Dr Van der Westhuizen advised that he did not diagnose an exacerbation of a pre-existing cervical condition but that blood tests indicated a possible inflammatory arthritic condition.

[37] His opinion given in oral evidence was that Ms Hart has dual pathology. While she has a pre-existing degenerative cervical spondylosis, she also has an inflammatory condition superimposed. The results of blood tests that he had ordered both in July

and November showed she was probably suffering from an inflammatory condition and those results were confirmed by a Technetium bone scan. The scan showed some increased activity in the facet joints at C5/C6 and he considered that confirmed his diagnosis of an inflammatory condition affecting her cervical spine.

[38] Under close cross-examination, Dr Van der Westhuizen maintained this opinion. He agreed that if Ms Hart had overused her spine that may have contributed to her condition, however, he was not in a position to make that judgment. When pressed on the connection between work and Ms Hart's injury he was prepared to acknowledge that it was possible, even likely, that her pre-existing condition had been aggravated by the sub-optimal ergonomics of her work station and the 12 hour shift. However, it was impossible for him to have a clear opinion on whether the condition had been aggravated given the presence of the ongoing inflammatory condition.

[39] The Appellant was critical of Dr Van der Westhuizen for not addressing the question arising on this appeal as to whether employment was a significant contributing factor to the injury. That criticism is not accepted for two reasons. Firstly, Dr Van der Westhuizen was Ms Hart's treating doctor and was primarily concerned about diagnosing and treating her condition. He did not diagnose an exacerbation of pre-existing cervical spondylosis as the results of the blood tests showed a possible inflammatory arthritic condition. It was therefore unnecessary for him to consider whether any exacerbation arose out of repetitive movements in her job as Gate House Attendant.

[40] The second reason for rejecting the criticism is that it is the role of the Commission, and not an expert witness, to say whether the employment was a significant contributing factor to the injury.[2] The role of the expert witness is to "illuminate, to the extent of their knowledge and expertise, the cause (or causes) of the appellant's … condition."[3]

Dr Coroneos, Consultant Neurosurgeon

[41] Ms Hart was referred to Dr Coroneos by LGW for an independent examination and report. She was seen on 14 July 2015. Dr Coroneos also provided another report to LGW dated 30 September 2015 and reports to the Regulator dated 14 and 16 March 2016 as well as 6 May 2016.

[42] Dr Coroneos recorded in his report dated 23 July 2015 that Ms Hart told him of the gradual history of symptoms including intermittent lower back pain since 2004, pins and needles on the left side of the head, left face and left posterior hand, fragmentation of vision over a number of years, dizziness and vertigo which has been present for two years and increasing in recent times. She also reported a sensation of tinnitus or blockage of the left ear for about one week, neck pain and headaches as well as lower back pain. Although Ms Hart completed a form to show that she had an accident or event on 14 June 2015, she did not inform him of any such accident or event. However, he accepted that the alleged events occurred as described in the application for workers' compensation.

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[2] *Davidson v Blackwood* [2014] ICQ 008, [17].
[3] Ibid.

[43] Dr Coroneos was strongly challenged under cross-examination over not asking Ms Hart about the work event on 14 June during the consultation when he knew from information supplied that this was the date being relied on. Dr Coroneos defended his approach, advising that his practice was to ask some basic questions such as age, occupational and medical history and then ask the client to explain the history of when and how the symptoms started. He did not concede any omission or failure on his part by not asking directly about 14 June. He believed it significant that Ms Hart did not herself identify any mechanism of injury when she had been referred by LGW for the examination.

[44] In his first report, Dr Coroneos noted that the imaging performed on 16 June 2016 showed cervical spondylosis. He remarked that there were no soft tissue abnormalities. He said that he could not find a neurosurgical injury or that she had sustained an aggravation to a neurosurgical injury. He could not determine a brain or spinal injury having occurred due to the method of work from 3.30 p.m. to 5.30 p.m. on 14 June. His diagnosis was cervical spondylosis and the headaches and numbness was probably due to migraine.

[45] In his second report Dr Coroneos made clear that the cervical spondylosis was a pre-existing condition.

[46] Dr Coroneos did not accept that Ms Hart had sustained any aggravation to a pre-existing condition or that a prolonged occupational session at the gatehouse would result in an aggravation. However, it became clear during his evidence that Dr Coroneos distinguished between an aggravation and an exacerbation. He relied on American Medical Association guides to explain that an aggravation occurred where the patient's condition is permanently increased by the injury or event such that there is evidence of a structural injury having occurred whereas exacerbation is a temporary increase in symptomatology due to a pre-existing condition caused by an incident or event with the patient returning to their pre-injury status.

[47] The Act does not distinguish between an aggravation and an exacerbation. As Hall P found in *Heald v Q-COMP,*[4] and confirmed in *JBS Australia Pty Ltd AND Q-COMP,*[5] there are two types of aggravation to a degenerative condition. The first type is that which Dr Coroneos described as an aggravation and the second type is that which he referred to as an exacerbation. Dr Coroneos did not consider in his examination and report, and was not asked during his oral evidence, whether Ms Hart may have aggravated her pre-existing condition in the second sense of the meaning of aggravation.

[48] Dr Coroneos also viewed certain parts of the footage of Ms Hart working at the end of her shift on 14, 19 and 22 June 2015. In relation to the end of shift on 14 June, Dr Coroneos said he saw "a lady moving normally with no evidence that suggests any restriction or 'neck problem'." He also said, in relation to the segments of the three days of footage he watched, that there was "no requirement for any excessive spinal movement" and "[t]he pattern of movement … reveal (sic) normal movement in respect of the spine and trunk".

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[4] *Heald v Q-COMP* (2004) 177 QGIG 769, 771.

[5] *JBS Australia Pty Ltd AND Q-COMP (C/2012/35) - Decision <http://www.qirc.qld.gov.au>*

[49] Although Dr Coroneos accepted Ms Hart may have experienced some neck discomfort caused by her work activities in the setting of cervical spondylosis he was consistent in his evidence that work did not contribute to any injury. Watching the video footage of her on the day of the alleged injury and after her return to work confirmed this opinion. Dr Coroneos rejected the proposition put in cross-examination that the ergonomic design of the workplace and the work practice contributed to any cervical injury.

[50] The Appellant submitted that the reports of Dr Coroneos and his evidence offend against his obligations as an expert witness and in this regard referred the Commission to the decision of the New South Wales Court of Appeal in *Makita (Australia) Pty Ltd v Sprowles*[6] where the duties and responsibilities of expert witnesses in civil cases were set out in the principal judgment of Heydon JA, with whom Priestley and Powell JJA agreed. In his decision, Heydon JA cited with approval the list of duties and responsibilities from the decision of Cresswell J in *National Justice Compania Naviera SA v Prudential Assurance Co Ltd ("The Ikarin Reefer").*[7] Although it is unnecessary to set those out in full here, it is important to note that one of those duties and responsibilities was that "an expert witness should provide independent assistance to the Court by way of objective, unbiased opinion in relation to matters within his expertise."

[51] I am unable to find that Dr Coroneos was a biased witness in the sense that he preferred the Regulator's case to that of the Appellant. However, Dr Coroneos was a difficult witness, which, in my view, stemmed from his absolute belief in the correctness of his opinion and his unwillingness to seriously consider alternative opinions. In addition, Dr Coroneos became quite argumentative and unresponsive to certain questions. Of particular relevance were those concerning neck pain, and whether he considered there was a difference between neck pain and neck stiffness.

[52] Given that Ms Hart's case is about the second type of aggravation, or as considered by Dr Coroneos, an exacerbation, and this is a matter to which he apparently did not turn his mind, his evidence about any injury sustained by Ms Hart is of little assistance in the determination of this appeal. Further, in light of his unresponsive answers to the issues concerning Ms Hart's neck pain, the Commission is unable to place much weight on the opinion of Dr Coroneos.

[53] Despite my concerns and the criticism by the Appellant that Dr Coroneos did not specifically ask her about any work event, the Commission cannot disregard Dr Coroneos's evidence that Ms Hart did not report to him any work event on 14 June as leading to her neck pain that night. Although Dr Cunneen described her as a difficult historian, it is surprising that she omitted to describe the onset of neck stiffness and neck pain on 14 June when, according to her evidence, her neck pain that evening was unlike anything she had previously experienced and she had identified this date as the date of injury on the relevant form prior to her examination with Dr Coroneos.

Conclusion

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[6] *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305, 79.

[7] *National Justice Compania Naviera SA v Prudential Assurance Co Ltd ("The Ikarin Reefer")* [1993] 2 Lloyd's Rep 68, 81-2.

[54] The consensus of the medical opinion is that before 14 June 2015 Ms Hart had cervical spondylosis, a pre-existing degenerative condition. However, no consensus exists on the condition that is the subject of this appeal.

[55] The Commission has been hampered in the determination of this appeal by the absence of the records or oral evidence from the General Practitioner, Dr Whittle. That would have provided contemporaneous information about the history of the symptoms experienced by Ms Hart, assisted in understanding her condition and may have confirmed, or otherwise, her evidence.

[56] Of the four specialists who provided evidence in the proceedings, Dr Cunneen was the only one to have made a diagnosis. As the Regulator noted in its submissions, no two of the four specialists arrived at the same diagnosis and three of them did not come to a definitive diagnosis. While Dr Cunneen's expertise in the field of occupational medicine is acknowledged, it is of concern that three specialists, whose expertise lies in spinal conditions, were unable to provide a clear diagnosis of Ms Hart's condition. Even Dr Campbell, whose opinion the Appellant relied on, agreed that his diagnosis was in general terms and the case was "grey". The inability of three of the specialists in the field to provide a clear diagnosis highlights the difficulty in determining whether Ms Hart's condition satisfies the elements of s 32 of the Act.

[57] Despite the experts' difficulty in reaching a diagnosis, their evidence may assist in determining the cause of Ms Hart's condition.[8]

[58] The evidence of Dr Cunneen was that Ms Hart aggravated her cervical spondylosis as a result of the poor ergonomic design of the gatehouse, the system of work together with performing the 12 hour shift for the first time on 14 June. When considered in isolation from the pre-existence of neck symptoms and the chronology of the development of the other symptoms, his opinion lends weight to a finding that her pre-existing condition was aggravated by her employment.

[59] However, as later explained, I do not consider her neck symptoms can be considered in isolation. In addition, Dr Cunneen's opinion was diminished by the factual errors in his oral evidence: that her work hours increased over the preceding three months, that she had other work events prior to 14 June and that her condition had improved by February 2016.

[60] Dr Campbell attributed the cause of her condition to her work, although after viewing the video footage, he considered that her movements were not overly arduous and were on the bottom end of the spectrum of activities that were likely to cause a neck injury. I was unconvinced by his evidence for the reasons set out earlier.

[61] Dr Coroneos was clear that work was not the cause of the injury. He had not viewed any neck restriction on 14 June during the period Ms Hart said that she developed neck stiffness. However, his failure to consider exacerbation as an aggravation under the Act does not assist in the resolution of this appeal.

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[8] *Davidson v Blackwood* [2014] ICQ 008, [17].

[62] Dr Van der Westhuizen was prepared to acknowledge that work could, and was even likely to, have aggravated her cervical spondylosis but the presence of an inflammatory condition made it difficult for him to have a clear opinion on whether her pre-existing condition had been aggravated.

[63] Although the claim for a "neck sprain" is the focus of this appeal, it is not possible to exclude from consideration that the claimed injury occurred in the context of Ms Hart experiencing neck pain specifically in the week before 14 June as well as other symptoms, including neck symptoms, for at least two months before that date. In addition, she continued to experience neck and other symptoms after 14 June. As the chronology shows, her symptoms fluctuated in type and severity. The symptoms did not always fluctuate together.

[64] Ms Hart's neck stiffness commenced on 17 April. At that time she also experienced a range of other symptoms. She agreed under cross-examination that the symptoms she experienced at that time have continued but, whereas they were short-lasting before 14 June, after that they became constant.

[65] She first experienced neck pain on the left side of her neck while picking strawberries at home on 8 June, nearly a week before her first 12 hour shift. At that time Ms Hart had not been rostered for work for three days. Neck pain persisted over the following week. The presence of neck pain over this period and during periods that she was not at work suggests Ms Hart's cervical spondylosis may have become symptomatic at this time and, if so, this did not arise out of or in the course of her employment nor was employment a significant contributing factor to the onset of symptoms.

[66] Ms Hart experienced neck stiffness at work on 14 June. However, Dr Coroneos did not observe any neck restriction during the period that Ms Hart claimed the condition developed.

[67] It was not until Ms Hart arrived home from work that she felt neck pain. She described the neck pain as "incredible" and unlike the pain she felt on 8 June. Her evidence about whether she had neck stiffness or neck pain is inconsistent. Ms Hart emailed her supervisor to advise that she would not be able to work a 12 hour shift again because it impacted on her back injury but did not mention her neck. Her evidence explaining this omission was:

> "I had a stiff neck. I didn't have pain in the neck. I had a very stiff neck. I didn't know why I had a stiff neck, and I didn't think of - it was relevant to tell Jenny that I had a stiff neck."[9]

[68] Further, her evidence about whether her neck pain continued on her return to work on 17 June is inconsistent. At some points of her evidence she said the neck pain continued while at others she had some discomfort.

[69] I have considered Ms Hart's evidence that her symptoms became constant after 14 June. However, her own evidence, confirmed by Dr Coroneos after viewing the video footage, is that she was able to work without restriction on her return to work at the gatehouse on 19 June. I appreciate she was taking pain medication but her ability to

[9] T 1-21, ll 4-6.

work freely doing the same work that she claims caused her condition indicates that her symptoms, especially the neck pain, were not impeding her performing her duties in the gatehouse on her return to work there.

[70] Ms van Iren said Ms Hart's reported symptoms in her neck and her reported incapacity seemed to escalate quite quickly over the four days from 19 June. However, Ms Hart did not work on one and possibly two of those days.

[71] Ms Hart's evidence is that her neck pain progressively worsened over time. She agreed under cross-examination that her symptoms increased between the examinations performed by Dr Coroneos and Dr Campbell, that is, over the seven month period between July 2015 and February 2016. For most of that period Ms Hart did not work either in her previous employment or at all. Ms van Iren confirmed that Ms Hart's neck symptoms and incapacity worsened the longer she was away from the workplace.

[72] That Ms Hart's symptoms worsened, not settled, over time after ceasing work at the gatehouse confirms my view that something other than her cervical spondylosis was in play and could have significantly contributed to her condition. Only Dr Van der Westhuizen was able to provide an explanation for Ms Hart's worsening symptoms: that Ms Hart had dual pathology of pre-existing cervical spondylosis plus an inflammatory condition. He reached that conclusion on the basis of the results of the pathology tests he ordered in July and November and the bone scan. I prefer his evidence on the basis that it best explains Ms Hart's condition and accords with the evidence of Ms Hart in relation to the development and continuation of her neck symptoms.

[73] In the absence of evidence from a rheumatologist there is insufficient information before the Commission about the nature of the inflammatory condition, its effects and more importantly, its contribution to Ms Hart's condition. It complicates any determination of the cause of the condition.

[74] In my view the evidence of Dr Van der Westhuizen, which I have accepted, shows that the cause and nature of Ms Hart's condition is complicated by her dual pathology. The lack of clarity around her condition leads to the conclusion that she has been unable to establish on the balance of probabilities that her condition satisfies the elements of s 32 of the Act and must be dismissed.

Orders

1. The appeal is dismissed.
2. The decision of the Regulator is confirmed.
3. The Appellant is to pay the costs of and incidental to the appeal. Failing agreement, the Respondent is granted liberty to apply.