QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*Adcock v Workers' Compensation Regulator* [2017] QIRC 086
PARTIES:	**Adcock, Malcolm** (Appellant) **v** **Workers' Compensation Regulator** (Respondent)
CASE NO:	WC/2016/236
PROCEEDING:	Appeal against a decision of the Workers' Compensation Regulator
DELIVERED ON:	22 September 2017
HEARING DATES:	11 August 2017
HEARD AT:	Brisbane
MEMBER:	Industrial Commissioner Thompson
ORDERS:	**1. The appeal is upheld.** **2. The decision of the Regulator of 23 November 2016 to confirm the decision of WorkCover to reject the application for compensation is set aside with the claim being one for acceptance.** **3. The Regulator is to pay the appellant's costs of and incidental to the appeal to be agreed or failing agreement to be the subject of a further application to the Commission.**
CATCHWORDS:	WORKERS' COMPENSATION - APPEAL AGAINST DECISION - Decision of Workers' Compensation Regulator - Appellant bears onus of proof - Standard of proof - Balance of probabilities - Witness evidence - Appellant was a "worker" - Appellant sustained a personal injury - Personal injury arose out of or in the course of employment - Employment was a significant contributing factor to the injury - Decision of the Regulator is set aside - Claim is one for acceptance - Appeal is upheld - Regulator is to pay appellant's costs of and incidental to this appeal.
CASES:	*Workers' Compensation and Rehabilitation Act 2003* s 11, s 32, s 275, s 550
APPEARANCES:	Mr A. Wright of WK Lawyers for the Appellant. Mr G. Rhead, Counsel directly instructed by the Workers' Compensation Regulator, the Respondent.

Decision

[1] A notice of appeal was lodged with the Industrial Registrar on 12 December 2016 by Malcolm Adcock (Adcock) pursuant to s 550 of the *Workers' Compensation and*

Rehabilitation Act 2003 (the Act) against a decision of the Workers' Compensation Regulator (the Regulator) dated 23 November 2016.

[2] The Regulator's decision was to confirm the decision of WorkCover which was to reject Adcock's application for compensation in accordance with s 32 of the Act.

Relevant Legislation

[3] The Legislation pertinent to this appeal is:

> "**32 Meaning of *injury***
>
> An ***injury*** is personal injury arising out of, or in the course of, employment if -
>
> (a) for an injury other than a psychiatric or psychological disorder - the employment is a significant contributing factor to the injury."

Nature of Appeal

[4] The appeal to the Commission is by way of a hearing *de novo* in which the onus of proof falls upon the Appellant.

Standard of Proof

[5] The standard of proof upon which an appeal of this nature must be determined is that of "on the balance of probabilities".

Evidence

[6] In the course of the proceedings, evidence was provided by three witnesses.

[7] The Commission, in deciding to *précis* the evidence of the witnesses, and submissions, notes that all the material has, for the purposes of this decision, been considered in its entirety.

Witness Lists

[8] The witnesses for the Appellant were:

- Adcock; and
- Dr Kar Loong Ng (Dr Ng).

[9] The witness for the Regulator was Jason Romano (Romano).

Appellant

Adcock

[10] Adcock commenced employment with KJM Contractors Pty Ltd (KJM) on 8 October 2008 as a casual employee converting to full-time employment on 29 October 2013. The role was that of a cook/chef in remote camps with the arrangement being that he would "Fly-In-Fly-Out" (FIFO) on the basis of two weeks on, two weeks off. The duties of his position included:

- preparation of breakfasts, meals and desserts;
- stock ordering, planning and preparation (smaller camps);
- directing staff (at times);
- dealing with issues around equipment purchases and repairs;
- staff training; and
- on occasions repair broken machinery.

[11] Initially the work undertaken was at locations in South Australia however overtime the employment took him to a range of camps in Queensland. In June 2015 he was advised by KJM management that the business was going "bad" and that all full-time employees were to revert to casual employment and "if we did not like it we could leave".

[12] On 27 July 2015 he was contacted by Romano from KJM and told that the site he was on would no longer require catering services which left him without work until 24 August 2015 when he commenced employment (after contacting Romano) at Camp 12 outside of Roma in Queensland. At around 1.00 am on 25 August 2015 whilst getting some product in the form of a box of bacon and frozen cake mix he misjudged the step which led to his left foot rolling and he fell down which caused immediate pain up his left ankle and to his back. He informed the chef Nathan Whitfield (Whitfield) of what had occurred and whilst in a lot of pain continued to work as breakfast had to be done by 5.00 am.

[13] As it was a new job and he was worried about not having a job as he needed the money he continued to work until 31 August 2015 despite the pain. In that time he mentioned the incident to the camp manager Sean Cornwell (Cornwell) and another employee Maggie Henschel (Henschel). At the end of August 2015 he returned to Adelaide for two weeks of rest, returning to work on 14 September 2015.

[14] He continued to undertake his duties although in considerable discomfort and at some time following his return to work he spoke to another employee Shandelle Simpson (Simpson) who suggested they should do an incident report however that did not happen. On 28 September 2015 he was due to have another two weeks off and somewhere around that time he contacted Romano to inform him he needed

some extra time off for family reasons but was really taking time off because his ankle was too sore to stand on.

[15] Adcock consulted his general practitioner on 1 October 2015 and was sent for an x-ray after which the doctor informed him he had a left foot strain and should rest the ankle, ice it and keep it strapped. With no improvement he then had seven visits to a physiotherapist before being referred by WorkCover South Australia for an independent medical examination sometime after Christmas 2015.

[16] A report was received on 13 March 2016 from Dr Ng which diagnosed ligament damage with the recommendation of an ultrasound for the ankle and foot. On 17 March 2016 an ultrasound was performed and the general practitioner upon review of the results advised him to rest as much as possible with the likelihood it could take up to 12 months to get better. He continued to remain unfit for duties and forwarded medical certificates to his employer subsequently being informed that they had not received them. On 30 June 2016 he received a letter of termination.

[17] A claim for compensation was originally made in South Australia but it was later found that Queensland was the correct jurisdiction and the South Australian application was the subject of a discontinuance notice.

[18] Under cross-examination Adcock had no recall of Romano seeking to contact him and leaving messages on six occasions but it may have occurred once or twice [Transcript p. 1-9]. In or around August 2015 he had time off due to no availability of work and did not accept that Romano had offered him causal work at that time [Transcript p. 1-10]. Adcock was adamant that on 25 August 2015 he had fallen off the step as he came out of the freezer and did not trip over in the freezer [Transcript p. 1-10]. On the information provided in his WorkCover claim form had had stated "slipped coming out of freezer carrying meat" and whilst it did not suggest he had fallen down a step according to Adcock it was "six of one and half a dozen of the other" whether he slipped or fell [Transcript p. 1-12]. The reason he had not followed up and provided an incident report after the injury the evidence was because there was a culture where Cornwell did not "give a hoot" and the "culture of the thing" was to "suck it up" [Transcript p. 1-15].

[19] On having to tell Romano he needed time off for family reasons when he was in fact injured he did not accept he had lied but it was "a fine line" [Transcript p. 1-15]. The reason he had not sought from his general practitioner a WorkCover medical certificate on 1 October 2015 was in the past the boss had said "We'll pay for your - your doctors and medical. Just don't go through WorkCover" [Transcript p. 1-16]. On 26 October 2015 he was issued with a WorkCover medical certificate as he intended to make a WorkCover claim [Transcript p. 1-16]. Adcock in the visit to Dr Ng provided detail around the accident but did not recall saying the step was 14 inches high [Transcript p. 1-17]. The general practitioners clinical notes of 1 October 2015 contained the following reference:

> "Not sure that he has a job. Has left foot pain which came on with work about five weeks ago. On his feet for 13 hours a day. Pain on standing up".

Adcock had no understanding why there was mention of him not having a job because that was not the case [Transcript p. 1-19]. The clinical notes were different to his recollection of the visit [Transcript p. 1-20]. On the notation that he had slipped rather than fell the evidence was:

> "…I'm pretty sure - I've said all along I came out of the freezer, slipped on the step and went to the ground". [Transcript p. 1-20].

The reference in the WorkCover medical certificate (dated 26 October 2015) to be able to carry-out light duties was not relevant as there were no light duties for a cook or a chef [Transcript p. 1-21]. The WorkCover medical certificates were sent to Romano by post to a Gawler, South Australian post box [Transcript p. 1-22]. There were a number of WorkCover medical certificates issued from 30 November 2015 through until May 2016 which enabled him to return to work with restrictions [Transcript p. 1-23]. Romano made contact with Adcock on 3 March 2016 and offered him a couple of weeks on light duties in the kitchen which he refused because his ankle was "stuffed" [Transcript p. 1-25].

[20] In re-examination Adcock described the size of the box in which the bacon was kept as "18, 20 inches wide and would be about eight inches deep" and around 20 kilograms in weight. The cake mix was in plastic containers with the measurements around "14 inches long by nine inches by two inches". As to why he gave information to Romano about not being available due to family reasons he had done so because he (Romano) was a person "who hunts hounds and runs with the foxes" and he did not trust him.

Dr Ng

[21] Dr Ng an occupational physician had prepared two reports (dated 24 February 2016 and 18 April 2016) in relation to Adcock. At the time of authoring the reports he had not had the opportunity to review the ultrasound in respect of Adcock's left ankle but had subsequently done so and it was his conclusion that the ultrasound showed an old strain to the lateral on the outside ligaments of the ankle and given it was taken in March 2016 seven months after the reported date of injury was consistent with the mechanism of injury reported by Adcock, which was a rolled ankle. Any degenerative changes present were in a separate area of the ankle compared to the injury.

[22] In the report of 24 February 2016 Dr Ng confirmed Adcock had presented unaccompanied and that of the material provided he had assumed that it was true and correct in all aspects.

[23] Dr Ng's diagnosis was that of "a lateral ankle ligament sprain, most likely a partial tear to the calcaneal fibular ligament". There was also a probable strain to the cuboid metatarsal joints on the fourth and fifth toes.

[24] The injury was consistent with the reported mechanism of injury and consistent with Adcock's presentation. There were no non-organic symptoms with no pre-existing degenerative condition and was a work-related injury.

[25] A supplementary report (dated 18 April 2016) confirmed the earlier diagnosis and provided the following opinion with regards to his current capacity for work:

> "At present I consider he can work for four hours, five days a week with the restrictions of avoiding prolonged standing, avoiding uneven surfaces and to be given the ability to sit when required. If the results of further investigation are provided, I would be able to provide a more accurate opinion on his capacity."

[26] Under cross-examination Dr Ng confirmed that after conducting tests on Adcock the more significant finding was a positive talar tilt that meant the outside ligaments were stretching and unstable in a sense [Transcript p. 1-35]. Adcock at the time he examined him had the capacity to perform modified duties [Transcript p. 1-36]. The injury was "most definitely consistent with the description of the incident in August 2015" [Transcript p. 1-37]. In this case the only way Adcock could have hurt his ankle was as he described [Transcript p. 1-38].

Regulator

Romano

[27] Romano in 2015/2016 was employed at KJM as the head of human resources and at the time he had dealings with Adcock in the area of industrial relations and workcover type matters. In 2015 the business started to make mass redundancies as the oil and gas sectors were not in a good way and it became necessary to shed staff. There were limited positions available and in the case of Adcock he had transferred from full-time to casual employment although he had tried to keep him gainfully employed. On 13 October 2015 he spoke to Adcock about returning back to Camp 12 in Queensland but he said that he could not return due to family reasons, something to do with his daughter and that was the last they had heard of him at Camp 12.

[28] Some seven or eight weeks after the discussion with Adcock the return to work coordinator received the first lot of medical certificates stating that he did not injure himself on a particular day and in January 2016 the return to work coordinator, the head chef and himself constructed a return to work plan in line with his capacity to return to work. Adcock was contacted about a position in March 2016 in Adelaide but he declined as his foot was "still stuffed". No medical certificates were received after that date with KJM eventually ending his employment. Adcock filed for unfair dismissal at which time a number of medical certificates appeared.

[29] In March 2016 he had made a number of unanswered calls to Adcock leaving at least one message.

[30] Under cross-examination Romano gave evidence that in August 2015 the business was desperate to get as many South Australian based employees to work in the process kitchen [Transcript p. 1-43]. In the period between the beginning of 2015 until December 2016 it was a tumultuous time for the business as far as making redundancies, losing contracts and closing up camps [Transcript p. 1-43]. The relationship between Adcock and himself was fine and they got along really well [Transcript p. 1-43]. The decision to terminate the employment had been made due to the lack of contracts and no medical certificates forthcoming [Transcript p. 1-44].

Submissions

Regulator

[31] The case for the Regulator was that there is some doubt as to the circumstances surrounding the cause of the injury as described by Adcock with the Commission required to be satisfied on the balance of probabilities it occurred as claimed.

[32] There were a number of versions provided by Adcock who on 1 October 2015 at the first visit with the general practitioner does not mention the cause of injury and on 26 October 2015 he informs the general practitioner that the injury was as a result of an incident in the workplace. In November 2015 he informs the WorkCover officer that he slipped on a floor wet from defrosted ice whilst wearing steel capped rubber sole boots. He then in the WorkCover claim informs that he advised Simpson of the incident and when it was found she was not working that day he said it must have been reported to Cornwell.

[33] The history given by Adcock was described as misleading and the various variations relied upon by Adcock would cause the Commission some concerns as to whether he has satisfied on the balance of probabilities the injury occurred as claimed. The general practitioner in correspondence tendered in the proceedings could not recall if Adcock had advised him of the detail on how he had hurt his foot and it was only when it became a WorkCover claim was further details provided. Also to be examined was Adcock's behaviour in relation to his return to work and in particular making himself unavailable for work and not producing medical certificates when asked to do so.

[34] The Commission ought not be satisfied that the claim was one for acceptance on the basis of the doubts expressed by the Regulator.

Appellant

[35] The appellant relied upon the content of the Statement of Facts and Contentions lodged with Industrial Registrar on 21 February 2017 which went to:

- the nature of the appeal;
- background;
  - employment status;
  - sustained injury to his left food on 25 August 2015;
  - details of the incident, misjudged step out of the freezer, fell on deck, felt immediate pain;
  - continued to work;
  - mentioned injury to the manager;
  - conversations with other staff about the incident;
  - attendance upon medical practitioners;
- contentions;
  - suffered injury stepping out of the freezer;
  - misjudged step;
  - injury arose out of or in the course of employment;
  - employment was a significant contributing factor to the injury; and
  - sustained an injury with the meaning of s 32 of the Act.

[36] The critical evidence of Adcock was provided in a forthright, honest and articulate manner which was consistent with his character as an honest, down-to-earth and upstanding individual who made no attempt to exaggerate the incident that happened at work.

[37] The medical evidence established that the injury suffered was consistent with Adcock having rolled his ankle, with Dr Ng unwavering in respect of work being the cause of the injury. In the case of the general practitioner's clinical notes it was simply that he had not taken detailed notes on 1 October 2015.

[38] On the issue of the references to Simpson and Cornwell on the WorkCover claim form it was a minor issue without any intention to mislead and whilst technically incorrect was not founded on deceit. Adcock in the exchange with the WorkCover officer is said to have said he slipped on ice and slipped as opposed to tripped with the difference between tripped and falling being "six in one, half a dozen in the other".

[39] The injury pursuant to s 32 of the Act arose out of or in the course of employment with work clearly being a significant contributing factor to the injury. The claim is one for acceptance.

Conclusion

[40] The status of Adcock as a "worker" in accordance with s 11 of the Act was not the subject of contest in the proceeding.

Did he sustain a personal injury?

[41] The evidence of Adcock is that at around 1.00 am on 25 August 2015 he tripped whilst carrying a 20 kilogram box of bacon and two containers of frozen cake mix causing an injury to his left ankle. He further evidenced that for a period he self-managed the injury before attending upon his general practitioner on 1 October 2015. The clinical notes tendered in the proceedings contained the following reference:

> "…has left foot pain which came on with work about 5 weeks ago".

He visited the same general practitioner on 26 October 2015 where the clinical notes recorded:

> "…on 25 August 2015 at 1am came out of freezer carrying 20kg box of bacon and slipped and went down to the floor. Injured his left foot and lower back. Could not stand up straight due to sharp pain. He worked on for the next week and his back has come good but his left foot has continued to be painful. Had 2 weeks of work and went back, but standing on his feet was difficult due to pain. Getting pain in top of left foot and outside of ankle and instep esp when walking fast and standing for prolonged [time]…"

[42] Adcock was referred for an x-ray and a WorkCover medical certificate was issued.

[43] The general practitioner in correspondence (dated 30 July 2017) forwarded to Adcock's legal representative stated the following:

> "Thank you for your letter dated 9 July 2017 requesting a report on Mr Adcock's left foot injury. I am a general practitioner and have been treating Mr Adcock for over 11 years.
>
> 1. I first saw Mr Adcock for his left foot injury on the 1 October 2015.
>
> 2. I cannot recall whether Mr Adcock told me the detail of how he injured his left foot when he was seen on 1 October 2015 other than reporting that it occurred at work.

3. Mr Adcock may have advised me of the mechanism of injury on 1 October 2015 but I may not have recorded it or may not have asked for more detail because it was not the subject of a workcover claim at the time. Because of the issues which sometimes arise with workcover claims, more details history and recording of events around the injury are usually required and this is reflected in my notes taken on 26 October 2015 when Mr Adcock requested that a workcover certificate be issued.

4. When Mr Adcock first saw me he was suffering from left foot pain for approximately 5 weeks.

5. I have consistently diagnosed and documented Mr Adcock's injury as a left foot sprain but other doctors have apparently referred to it as a left foot/ankle sprain/strain."

[44] Dr Ng examined Adcock on 24 February 2016 some six months after the date of injury relied upon by Adcock. In a report dated the same day he made the following diagnosis in respect of Adcock's injury:

> "…a lateral ankle ligament sprain, most likely a partial tear to the calcaneal fibular ligament".

[45] On the medical evidence provided in the course of the proceeding I am satisfied that for the purposes of s 32 of the Act there was a personal injury sustained by Adcock.

Did the personal injury arise out of or in the course of Adcock's employment?

[46] The Commission was presented with limited evidence in respect of the incident said to have been causative of Adcock's injury, being only the evidence of the appellant himself. That evidence was not in the course of cross-examination disturbed in any way that gave cause to question the honesty of the account provided although not substantiated by any corroborative evidence.

[47] In consideration of the circumstances of the business at the time of the incident it was the evidence of Romano who appeared as a witness for the Regulator that in 2015 the business had commenced implementation of mass redundancies due to downturns in the sectors where they plied their trade and Adcock himself had been reduced from the status of full-time to casual employee. From the beginning of 2015 according to Romano the business was going through a "tumultuous" time and Adcock held the view that his interests would at the time be best served by not pursuing a WorkCover claim for fear of losing his employment altogether.

[48] The Commission in considering this aspect of the legislation is bound to determine a view based upon the evidence and material before the proceedings and in the absence of evidence from persons said to have been present and engaged by Adcock at or around the time of the incident I accept the evidence of Adcock with regards to the incident of 25 August 2015 and therefore its role in the workplace injury.

Was Adcock's employment a significant contributing factor to the injury?

[49] On acceptance of Adcock's evidence in terms of the incident whereby he slipped and fell whilst carrying a 20 kilogram box of bacon and frozen cake mix on

25 August 2015 it follows that the work undertaken at the time was in conjunction with the role in which he was employed.

[50] Further of assistance to the case prosecuted by Adcock was the evidence of Dr Ng that the reported mechanism of injury was consistent with Adcock's presentation.

[51] The injury suffered by Adcock on 25 August 2015 in my view arose in circumstances where his employment was a significant contributing factor to the injury.

Findings

[52] On consideration of the evidence, material and submissions before the proceeding based upon the requisite standard of proof I find that pursuant to s 32 of the Act Adcock suffered a personal injury in the form of a "lateral ankle ligament sprain, most likely a partial tear to the calcaneal fibular ligament". The personal injury arose out of or in the course of employment with the employment being the significant contributing factor to the injury.

[53] The decision of the Regulator of 23 November 2016 to confirm the decision of WorkCover to reject the application for compensation is set aside with the claim being one for acceptance.

[54] The appeal is upheld.

Costs

[55] The Regulator is to pay the appellant's costs of and incidental to the appeal to be agreed or failing agreement to be the subject of a further application to the Commission.

[56] I so order.