No/s	Title	Certified on and certificate issued	Cancelling
CA37/05	National Plastics & Rubber Pty Ltd – Certified Agreement 2005	22/02/05	CA500/01
CA64/05	Goodman Fielder Consumer Foods Transport Employees' – Certified Agreement 2004-2006	25/02/05	CA838/03
CA65/05	Coral Sea Resort – Certified Agreement 2004	25/02/05	
CA66/05	Burdekin Shire Council – Certified Agreement	25/02/05	CA403/03
CA67/05	Murilla Shire Council – Certified Agreement 2004	25/02/05	CA455/02
CA68/05	Balonne Shire Council – Certified Agreement (State) 2005	25/02/05	CA369/02
The following Agreements have been amended by the Commission:		Date amended	
CA320/02	Building Service Contractors' Association of Australia – Queensland Division – Certified Agreement 2002	09/02/05	
CA88/04	BHP Billiton Cannington Operations – Certified Agreement 2003	17/02/05	
The following Agreements have been terminated by the Commission:		Date terminated	
CA257/00	Tarong North Power Station Construction Project – Certified Agreement 2000	25/02/05	
CA178/01	Coral Sea Resort – Certified Agreement 2001	25/02/05	

G.D. SAVILL,
Industrial Registrar.

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INDUSTRIAL COURT OF QUEENSLAND

Industrial Relations Act 1999 – s. 341(1) – appeal against decision of industrial commission

Geoffrey Baldwin AND Department of Industrial Relations (No. C89 of 2004)

PRESIDENT HALL

1 March 2005

REPORT ON DECISION (as edited)

In giving a decision from the Bench on 17 February 2005, the President stated:

"With respect it seems to me that this is a clear-cut matter. Traditionally the Industrial Relations Commission in this State was charged with the responsibility of conciliating and arbitrating industrial disputes. In more recent times it has been armed with a number of judicial powers including the power to order that outstanding wages (in an extended sense) be paid.

Necessarily it had to be given power to deal with the situation in which a respondent did not appear. The rules were amended to deal with that matter in the same way in which that matter has traditionally been dealt with in the Supreme Court, the District Court and the Magistrates Court. The scheme is that if somebody does not appear, if there is evidence that that person has been made aware by proper service that the proceedings were on, and if on the face of the documents there is a *prima facie* case, there is a discretion vested in the Commission to make the order in the absence of the person.

There is of course a right of appeal from any decision of the Commission to this Court, but the appeal is only on the ground of error of law or excess or want of jurisdiction.

An error of discretion will only be an error of law in the circumstances described in *House* v *The King* (1936) 55 CLR 499. There would have to be an error of principle or clear unfairness. The materials before me do not indicate an error of principle, neither do they indicate that the member of the Commission who dealt with the matter was clearly wrong. On the face of it, the member of the Commission correctly applied rule 62. It may be that evidence could be led to show that by inadvertence – and inadvertence is always possible when somebody is not present – the Commission managed to get it wrong. But that would not be an error of law or an excess or want of jurisdiction.

It is not the case that the appellant is without remedy. The appellant does have a remedy. The remedy is by way of proceedings under rule 63. That rule requires the appellant to make a further application to the Commission to set aside the order made under section 62 and make other orders in lieu thereof. But that is not a matter to be pursued in this Court. This Court has no jurisdiction to deal with that particular matter.

The appeal is incompetent. It is dismissed. There being no appeal to protect, there is no basis for a stay. The matter of costs is to be dealt with by way of written submissions.".

Dated 1 March 2005.

By the Court,
[L.S.] G.D. SAVILL,
Industrial Registrar.

Released: 1 March 2005

Appearances:
Appellant in person.
Mr C. Murdoch of Counsel instructed by Crown Law for the Respondent.

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INDUSTRIAL COURT OF QUEENSLAND

Worker's Compensation and Rehabilitation Act 2003 – s. 561 – appeal against decision of industrial magistrate

Paul Andrew Delaney AND Q-COMP Review Unit (Case No. C90 of 2004)

PRESIDENT HALL

2 March 2005

DECISION

Mr Delaney was employed by Queensland Health within the Mental Health Services Unit of the Bundaberg Base Hospital as a Registered Psychiatric Nurse from 1995 until June 2002 when he suffered a myocardial infarction. Since then, he has been in receipt of sickness benefits and a disability pension. On 21 June 2002, he made an application for compensation to WorkCover in relation to injuries which he claimed to have suffered during the course of his employment since 12 February 2000, namely work related stress (an adjustment disorder). Mr Delaney did not seek to rely upon the myocardial infarction as an injury for the purposes of his application and has not relied upon it in the subsequent appeals.

That application was rejected on 1 October 2002. On 25 October 2002, the Appellant made an application for review of that decision. On 28 January 2003, the Review Unit of Q-COMP confirmed the decision to reject the application for compensation on the basis that the Appellant had not suffered an "injury" within the meaning of s. 34 of the *WorkCover Queensland Act 1996*. The reason given was that under s. 34(5) an "injury" did not include a psychiatric or psychological disorder arising out of, or in the course of, reasonable management action taken in a reasonable way by the employer in connection with a worker's employment, and that on the facts, Mr Delaney's disorder was properly so described.

Mr Delaney appealed against the decision of the Review Unit pursuant to s. 498 of the *WorkCover Queensland Act 1996*. By a decision of 16 September 2004, the Acting Industrial Magistrate who had heard the appeal determined it adversely to Mr Delaney. Mr Delaney now appeals to this Court. It is common ground that it is the effect of s. 603 of the *Worker's Compensation and Rehabilitation Act 2003* that the matter is to be dealt with under the *WorkCover Queensland Act 1996*.

By s. 509 the appeal is by way of rehearing. Counsel for the Appellant accepts the burden of demonstrating that the Acting Industrial Magistrate was wrong, compare *Garrett* v *WorkCover Queensland* (2000) 105 QGIG 217 but takes issue with the reliance in the response upon a passage in *Priddle* v *WorkCover Queensland* (1999) 162 QGIG 170 at 171, *viz.*:

> "The traditional approach has been for the Industrial Court to pay due deference to the view reached by an Industrial Magistrate where that view is reasonably open, even though the Court still retains a right to substitute its own view, ultimately, because of the approach indicated by the High Court in such cases as *Warren* v *Coombes* (1979) 142 CLR 531, compare *WorkCover Queensland* v *Ross Henry Alcorn* 156 QGIG 568 at 568 per de Jersey, President.".

Whilst I adhere to the view repressed in *Priddle* v *WorkCover Queensland*, *ibid*, I quite accept that where an Appellant succeeds on a submission that an Industrial Magistrate has misapprehended the facts (and such a submission is made on this appeal) the advantages of evaluating credibility and gauging the feel of a case (compare *Fox* v *Perey* (2003) 214 CLR 118 at 126 per Gleeson CJ, Gummow and Kirby JJ) are lost. And the same approach must be taken where the only issue is about the evaluation of undisputed facts or facts (originally disputed) treated as established by the findings of the Industrial Magistrate, compare *Warren* v *Coombes* (1979) 142 CLR 531 at 551 per Gibbs A-CJ, Jacobs and Murphy JJ.

Some issue is also raised about the content of the notion of reasonableness at s. 34(5) *WorkCover Queensland* v *Kehl* (2002) 170 QGIG 93 at 94 adopts the view that "reasonable" should be treated as meaning "reasonable in all the circumstances of the case". In reliance upon the decision of the trial judge (Walker J) in *Doyle* v *Manly Pacific International Hotel* [1998] NSWCA 44 at [106], counsel for the Appellant seeks if not to subsume "reasonableness" in "industrial fairness" to elevate "industrial fairness" a dominant consideration. The relevant passage in *Doyle* v *Manly International Hotel*, *ibid*, is:

> "In *Jackson's* case I endeavoured to come to terms with the difficult concept of reasonable in s11A (11). My conclusion was 'reasonable' means reasonable in all the circumstances of the case. Because the employer's actions are in an industrial law setting, the test I applied was whether a reasonable observer of all the circumstances of the case would find the employer's actions fair.".

[I accept that His Honour's view was not adversely commented on when the matter went on (an unsuccessful) appeal, see *Manly Pacific International Hotel* v *Doyle* [1999] NSWCA 465.]

Whilst I accept that because s. 34(5) operates upon occurrences in the course of an employment relationship and work related disorders of the mind, considerations of "fairness" will always be relevant, I can see no advantage in seeking to improve on the statutory test. Indeed, in cases in which an employer bears the burden of displaying fairness to multiple employees with divergent interests the improvement may well prove a distraction. None of those remarks I should add, are intended to detract in any way from the cardinal role to be played by "fairness" when (as here) management are dealing with a staff member known to management to have decompensated in the face of workplace pressure on an earlier occasion.

The Acting Industrial Magistrate found that the Appellant suffered from an adjustment disorder with mixed anxiety and depressed mood, which was a psychiatric or psychological disorder was an "injury" within the meaning of s. 34. No attack is made on that finding on the appeal. The Acting Industrial Magistrate also found that the Appellant's employment had been a significant contributing factor to that "injury". Once again, there is no challenge to that finding upon the appeal. His Honour went on to consider whether the "injury" was withdrawn from the definition of industry by s. 34(5). In my view His Honour was right to take that course. Given the history of the legislation, it would, be wrong to start at the other end, eliminate all work related causes which might be characterised as reasonable management action reasonably taken and inquire whether any remaining causes might be characterised as significant causes of the injury. This not being a case in which the "injury" was said to have been withdrawn from the definition by one event or one course of conduct the necessities of exposition forced the Acting Industrial Magistrate to tease out the transactions and series of events said to have brought about the injury and said to have been reasonable management action reasonably taken. I am content to adopt the Acting Industrial Magistrates description of the issues, *viz.*:

1. "The failure of the District Manager, Mr Leck to deal with the Appellant's application for worker's compensation in early 2000 in a timely manner.
2. The failure to notify the Appellant of what was happening or had happened with the grievance instituted by Ms Reedy against the Appellant in June 2000.
3. The lack of any consultation by management with the Appellant concerning the closure of the intensive care unit in early 2001.
4. Circumstances surrounding creditation process and the "declaration of an authorised mental health service" form, namely that he was bullied or harassed to complete the declaration form.
5. The letter of no confidence in the union delegates for Bundaberg Integrated Mental Health Services Sub-Branch the Queensland Nurses' Union of which the Appellant was a member, by member's of the Queensland Nurses' Union including Ms McDonnell.
6. The failure in Ms Judith McDonnell to deal with the issue raised by the Sub-Branch of the Queensland Nurses' Union and its letter dated 8 December 2001 concerning the non-election of the Workplace Health and Safety representative in accordance with the relevant legislation.

7. Delay in dealing with, failing to take the statement from Mr Delaney, and a lack of notification with respect to, the grievances lodged against Dr Jenkins and Ms McDonnell in November/December 2001.".

The Acting Industrial Magistrate had an obligation to disclose the reasons for the decision on the appeal. It is difficult to imagine how that might have been done without segmenting the events which occurred over a lengthy period of time. However, the events and courses of conduct marshalled up by the Acting Industrial Magistrate under the headings set forth above were not truly discreet. The closure of the intensive care unit in early 2001 referred to at heading (3) was the cause of on-going discord within the workplace. The Appellant, who was strongly opposed to the closure, was a vigorous participant in the dissention. Each of the matters at headings (3) to (7) were either aspects of the wrangling between the management and some of the staff about the closure, or products of that wrangling. The strongest example of the nexus between the events and courses of conduct is provided by the matters at headings (5) and (6) which became (part of) the subject matter of the grievances at (7).

There are the additional considerations that there was a temporal link between the matter headings (3) to (7) and that the personalities involved were relatively constant. The importance of all of that is that in reliance upon the decision in *Bowers* v *WorkCover Queensland* (2002) 170 QGIG 1 the Acting Industrial Magistrate dismissed the issues at headings (4), (6) and (7) as but blemishes. The critical point is that there were repetitive blemishes joined by subject matter, time and personality in a discordant workplace housing, to the knowledge of management, a worker who had decompensated once before in the face of workplace stress. In my view, the Appellant was entitled to a much more "global" evaluation of the actions in which the management team had engaged.

The matter does not end there.

In dealing with the matter at heading (2), *viz.* management's failure to notify the Appellant of what was happening or had happened with a grievance instituted by Ms Reedy against the Appellant in June 2000, the Acting Industrial Magistrate found that the failure of the District Manager to write to the Appellant advising him that the matter was closed was not reasonable management. However, His Honour found against the Appellant on the point because he concluded that the failure had no relationship or connection with the Appellant's injury i.e. the Acting Industrial Magistrate found that on the evidence the Appellant's injury was not attributable in any way to the incident. I accept the submission of counsel for the Appellant that the Acting Industrial Magistrate was quite mistaken as to the facts. There was but one specialist called, *viz.* Dr Robert Athey, a consultant psychiatrist. It is apparent from the Acting Industrial Magistrate's decision, that the conclusion that the way in which management dealt with Ms Reedy's grievance had no nexus with the Appellant's injury based upon the evidence of Dr Athey. It is quite plain that Dr Athey's evidence went entirely the other way. At one point in his report Dr Athey observes:

> "I was unable to obtain a history of pre-existing injury other than the similar episode in 2000 arising under similar circumstances and in my opinion it is basically the same illness.".

Dr Athey also observed:

> "He had a similar episode of a mixture of depression and anxiety under similar circumstances in 2000. The symptoms have never really resolved.".

And finally says:

> "I noted the experience to previous episode in 2000. To me this has been an ongoing episode of illness, commencing in 2000 and continuing on to the current situation.".

Understandably, counsel for the Respondent seeks to distinguish Dr Athey's remarks. It must be noticed that contemporaneously with the grievance of Ms Reedy, which ultimately did not proceed, the Appellant was suspended in relation to an incident concerning a patient. (I hasten to add that the Appellant was entirely exonerated.) The contention is that the decompensation in 2000 was caused not by Ms Reedy's grievance but by serious issues connected with the suspension. The difficulty is that the suspension and the receipt of the grievance were made known to the Appellant by the management team at or about the same time. The disorder of the mind, which was accepted by WorkCover as an "injury", existed after the exoneration. Importantly, Dr Athey in evidence seems to have nominated management's omission to keep the Appellant informed about the progress of the grievance as at least a part cause of the decompensation at that time. Granted that Dr Athey was relying upon his memory and (as psychiatrists almost inevitably do) was relying upon what he had been told by the Appellant, there seems to be no justification for going behind the medical evidence, compare *Mason* v *WorkCover Queensland* (2002) 170 QGIG 376 at 376. In any event the Acting Industrial Magistrate was not seeking to do so. The error was quite benign. At one point in his opinion Dr Athey observes, "The main precipitating factors appear to have been a dispute with the Acting Manager...". The Acting Industrial Magistrate took that to be an opinion that the "main factors" were the dispute between the Appellant and the Acting Manager (*viz.* Ms McDonnell).

With the benefit of the full argument, it seems to be tolerably clear that Dr Athey was making the point that there was a dormant unresolved condition going back to 2000, and that the transactions involving the Acting Manager prodded the condition back into life. Whilst entirely understandable, the error was an important one. On Dr Athey's evidence, the Appellant's complaint about Ms Reedy's grievance was that he had been ignored and treated as without value. That, in large part, was the Appellant's complaint about the matters at headings (3), (6) and (7).

The Acting Industrial Magistrate's decision is also tainted by misapprehension insofar as it deals with the matter at heading (3), *viz.* lack of consultation by the management with the Appellant concerning the closure of the intensive care unit. The Acting Industrial Magistrate found that the Appellant had admitted in cross-examination that there had been consultation involving himself and management about the closure of the intensive care unit. Perusal of the evidence shows that the passage identified concerned issues relating to closure of the department of emergency medicine for after hours or extended hours care. Counsel for the Respondent concedes so much. Whilst I accept counsel for the Respondent's further submission that there was much evidence of consultation with the staff about closure of the intensive care unit, I am unable to locate evidence that the Appellant was included within the consultation. All of that goes back to the Appellant's concern that he was being ignored and being treated as without value. Whilst I accept counsel's further submission that the Appellant was (implacably?) opposed to the closure of the intensive care unit, I am quite unable to go the further step of finding consultation with him would not have made a difference. Consultation may well not have made a difference to his opposition to closure of the unit, but may well have made a difference to his mental health.

The Industrial Magistrate found that the activity at heading (5) was not management action. That finding is not challenged on the appeal. What is put, and quite rightly, but, is that as the activity was not management action there can be no question of the activity removing the Appellant's "injury" from the definition at s. 34.

The Acting Industrial Magistrate dealt with the matters at heading (6) on the basis that what had occurred was but a blemish. The management team at the Bundaberg Base Hospital is not the first management team to have encountered difficulty about the election of a workplace health and safety representative under the *Workplace Health and Safety Act 1995* part 7, division 3 where there is but one nominee. If the matters at heading (6) had stood alone, the Acting Industrial Magistrate's description of them as a "blemish" would have been entirely open to His Honour. The problem is that the events did not stand alone. This was a case for a global assessment.

There were two aspects to the matters at (7), *viz.* delay in dealing with the grievances, accompanied by a failure to seek an extension of time and failure to give the Appellant a hearing. Even on a stand-alone evaluation, the conclusion that the errors were but a "blemish" was not reasonably open. The grievance procedure was neither casual nor consensual. It was established by the *Nurses (Queensland Public Hospitals) Award 1991*. There is no room for selective observance, compare Re: *Sky West Airlines Pty Ltd Pilots Agreement 1986* Print J8753, 1 August 1991, Moore DP, Watson DP and Commissioner MacDonald. To allow the process to drag on for twelve months without seeking an extension of time by consent was "industrially unfair" and (in all the circumstances) unreasonable in relation to the Appellant, notwithstanding that because of his myocardial infarction the Appellant left the workplace prior to completion of the process and endured part only of the agony of the delay. As to the failure to grant the Appellant an interview, the interview was expressly required by the terms of reference and by every consideration of natural justice. The Acting Industrial Magistrate's conclusion that because there had been "collusion" between the various signatories to the grievances no different outcome would have been reached if the Appellant had been interviewed, is contrary to all authority (see e.g. *Queensland Police Credit Union* v *Criminal Justice Commission* [2000] 1 QdR 626 at 634 to 635) in so far as it relates to the ultimate disposition of the grievances, and of doubtful relevance upon the question whether an employee with some (known) medical history who had already endured much imperfect management action was entitled to the courtesy of a hearing.

In all the circumstances I allow the appeal. I set aside the decision of the Acting Industrial Magistrate. I find that the Appellant did suffer an injury for the purposes of the *WorkCover Queensland Act 1996*. I reserve liberty to apply for any necessary formal orders.

Dated 2 March 2005.

D.R. HALL, President.

Released: 2 March 2005

Appearances:
Mr K. Watson instructed by Finemore Walters & Story, Solicitors, for the Appellent.
Mr P. Rashleigh directly instructed by Q-COMP the Respondent.

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INDUSTRIAL COURT OF QUEENSLAND

Industrial Relations Act 1999 – s. 341(1) – appeal against decision of industrial commission

Young Men's Christian Association of Bundaberg Inc AND Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees (No. C74 of 2004)

PRESIDENT HALL

2 March 2005

REPORT ON DECISION (as edited)

In giving his decision from the Bench on 14 December 2004, the President stated:

> "The Respondent is an applicant for reinstatement under s. 74 of the *Industrial Relations Act 1999* (the Act). As is required by the Act, the matter has been progressed through a conciliation procedure. The conciliation procedure has failed.
>
> The Commissioner hearing the matter issued a certificate pursuant to s. 75(3) to the effect that all reasonable attempts to settle the matter by conciliation had and were likely to be unsuccessful. The Commissioner went on to make comments about the merits of the application and about certain out-of-Court steps which might be taken to resolve it. This appeal relates to the observations within the certificate about the Commissioner's assessment of the merits of the application and about the future conduct of the matter. There is an issue as to the competency of the appeal.
>
> I am satisfied that it is the effect of Schedule 5 of the Act that the word "decision" is not restricted to decisions which finally determine the rights and obligations of the parties and may well embrace decisions of an interlocutory nature, e.g. on an application for adjournment. In particular, it seems to me that a decision to issue a certificate pursuant to s. 75(3) or a refusal to issue a certificate pursuant to s. 75(3) (which may include the case where the refusal is inferred from a failure to issue) are "decisions" within the meaning of Schedule 5 and are subject to appeal under s. 341 of the Act.
>
> Allowing an appeal against the content of the certificate is rather another matter. It cannot be a complaint that the certificate which has been issued deals with the merits and comments upon the merits of the application. That is because s. 75(3) paragraph (b) requires the Commission to do precisely that. Neither can it be a complaint that the certificate comments on the future conduct of the matter. Section 75(3) paragraph (c) permits the Commission to do precisely that.
>
> I accept all that was said by the Full Bench of the Australian Industrial Relations Commission in *Wright* v *Australian Customs Service* Print PR 926115, about the desirability of a Commissioner conducting a conciliation in a reinstatement case, bearing in mind that the whole of the evidence has not been heard and that witnesses have not been tested under cross-examination. There is great virtue in restraint in the expression of view about the merits of the relative cases. However, it seems to me that any such expressions of opinion are but by way of recommendations to the parties and by way of advice to the parties, and consistently with the decision in *QPSU* v *Department of Corrective Services* (2002) 170 QGIG 422 at 425 should be treated as less than a binding "decision" within the meaning of Schedule 5.
>
> The obligation referred to in *Wright, op.cit.*, seems to me but an imperfect obligation. Ultimately, if the matter goes to a trial, the matters will be fully litigated. Any unfairness which a Commissioner conducting the conciliation procedure has displayed in expressing an opinion about merits will be overborne: compare *Ebner* v *Official Trustee* (2000) 205 CLR 337 at paragraph 71. All will be cured.
>
> I understand the concern about the observations touching the future conduct of the matter. The final two sentences of the certificate assert:
>
> > 'It is likely that the applicant will succeed at trial but the matter will have to be determined by evidence. The parties should put "without prejudice save as to costs" offers in writing to invoke the "unreasonable act" provisions of s. 335 of the Act as to costs.'.
>
> The Appellant, with some justification, contends that in circumstance where it is asserted that the applicant for reinstatement is likely to be successful, that passage can mean only that the Appellant should put offers to settle the matter and is at risk of an adverse costs order if it fails to do so.
>
> I can understand a litigant being concerned by such a passage. It is not unusual in an era in which it is sought to reduce the cost and length of litigation to require parties to attempt to conciliate a solution. Neither is it unusual to require parties to seek a pre-trial assessment of the strength of the various cases. It is unusual for one person to perform both roles. Particularly is that so when the person performing the role is drawn from the group of persons who will conduct any trial when it takes place. It is entirely understandable that a litigant would seek to complain about a use of words which, howsoever well intended, can be read as an attempt to force the litigant into a settlement which it does not wish to reach. It is