As to the matter of costs. With a view to minimising expense I reserve the question of costs. If [the parties] wish to make submissions on the questions of costs, and, necessarily any application would come from Mr Sheridan, they can contact my Associate and my Associate will set a time frame.

It is not appropriate to treat the costs as in some way costs in the cause because there are some peculiar rules about costs in this particular jurisdiction.".

I have taken the unusual course of publishing a decision rather than a report on decision because what was said from the Bench provided no context for the remarks reproduced above and because I wished to make clear that the issue whether a failure to list an application for an adjournment constitutes a "decision" has yet to be argued.

Dated 13 December 2002.

D.R. HALL, President.

Appearances:
Mr M. Byrne QC and Mr S. Habermann, directly instructed by Division of Workplace Health and Safety, for the appellant.
Mr J. Sheridan, instructed by Bottoms English Solicitors, for the respondent.

Released: 13 December 2002

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INDUSTRIAL COURT OF QUEENSLAND

WorkCover Queensland Act 1996 – s. 509 – appeal against decision of industrial magistrate

WorkCover Queensland AND Curragh Queensland Mining Pty Ltd (No. C89 of 2002)

PRESIDENT HALL

16 December 2002

DECISION

On 22 December 2000 WorkCover Queensland accepted a claim for compensation by James Frederick Joseph Burgess. The decision of WorkCover Queensland to accept the claim was confirmed by the Statutory Review Unit by a decision of 23 May 2001. Curragh Queensland Mining Pty Ltd, the employer, appealed to the Industrial Magistrate's Court against the decision of the Statutory Review Unit. By a decision delivered orally on 30 August 2002 and reduced to writing and published on 30 September 2002, the Industrial Magistrate allowed the appeal. WorkCover Queensland now challenges the Industrial Magistrate's decision.

There is a preliminary point. The appeal is four days out of time. The respondent consents to an extension of time under s. 346(2) of the *Industrial Relations Act 1999*. The explanation for the delay is to be found in the delay between the delivery of the oral decision and the preparation of the written decision. There is no prejudice. On the date of hearing (11 December 2002) I granted the necessary extension of time.

By 25 October 2000 Mr Burgess had been employed by the respondent for approximately sixteen and a-half years. He had originally been employed as a purchasing clerk. During the period of 1987 to early 2000 he occupied the superior position of purchasing officer. In or about May 2000 he took up a more senior position still, *viz* the position of contracts officer. The change in position I should stress was entirely voluntary and at the end of the initial period of appointment (three months) Mr Burgess voluntarily chose to continue in the position. Sometime after taking up the position as contracts officer Mr Burgess, who on any view of the evidence was an entirely conscientious man, became concerned that the contracts department was in a "mess" and as he became more anxious began to undertake a heavier and heavier workload. His evidence before the Industrial Magistrate was that he thought he was making some headway prior to June 2000 when there was a change in ownership of the respondent. With the change in ownership his workload increased further. The Industrial Magistrate records:

"His evidence is that he became very tense, confused, short of breath and suffered headaches and that these symptoms got worse. He states that on the 25th October 2000 whilst at work his mind switched off. He burst into tears and broke down and after medical examination was put off work."; and

"It is not in dispute in the evidence that the worker was generally putting in 12 to 16 hour workdays, including the time spent at home of a night.".

The Industrial Magistrate found that by 25 October 2000 Mr Burgess was suffering from a psychological disorder and further found:

"I find this psychological disorder arose out of – in the course of the worker's employment with the appellant and that his work, the employment, was a significant contributing factor to the psychological disorder.".

However, the Industrial Magistrate also found that the psychological disorder was withdrawn from the definition of injury at s. 34 by s. 34(5) which provides:

"**34(5)** Despite subsection (1) and (3), '**Injury**' does not include a psychiatric or psychological disorder arising out of, or in the course of, any of the following circumstances –

(a) reasonable management action taken in a reasonable way by the employer in connection with the worker's employment;

(b) the worker's expectation or perception of reasonable management action being taken against the worker;

(c) action by WorkCover or a self-insurer in connection with the worker's application for compensation.".

The Industrial Magistrate found that the respondent's actions in appointing Mr Burgess to the position of contracts officer and in expanding the role of that office constituted reasonable management action. The Industrial Magistrate also found that management took that action in a "reasonable way". Those findings are not challenged on the appeal. The contention that is advanced is that the actions taken by management did not cause Mr Burgess to decompensate. On the evidence of the psychiatrist called by the appellant, Dr Oelrichs, that proposition would seem to be correct. Dr Oelrichs' evidence was that it was not the changes which brought about the decompensation but Mr Burgess' reaction to his inability to cope which developed in consequence of the change. (Dr Shrapnel, the treating doctor, I should add, thought that the development of the anxiety which became depression could be traced back to the anxiety experienced by (the conscientious) Mr Burgess confronting a new role, i.e. to the change). The obstacle to success on the appeal is not the facts but the law. Section 34(5) does not withdraw from the definition of injury psychological disorders caused by reasonable

management action taken in a reasonable way. It withdraws from the definition of injury psychological disorders arising out of reasonable management action taken in a reasonable way. It was settled by the decision in *Avis v. WorkCover Queensland* (2000) 165 QGIG 788 that the test posited by the words "arising out of" is wider than that posited by the words "caused by" and that a psychological disorder following in the wake of reasonable management action, including turbulence in the workplace flowing from reasonably taken changes, is withdrawn from the definition of injury by the phrase "arising out of" at s. 34(5). The relevant passage is:

"It was His Worship's use of the 'causal link' which has been the subject of the attack on the appeal. The submission is that s. 34(4)(a) will attach only where the management action in itself triggers the psychiatric or psychological disorder. The contention is that in this case the taking and implementation of the management action did not trigger the illness. It is contended that in the wake of the management decision and its implementation a set of circumstances arose in which the appellant could not do his job with a consequential loss of confidence and a feeling of inadequacy, helplessness and ineffectiveness. Reliance is placed on the decision of Davies AJA in *Manly Pacific International Hotel v Doyle* [1999] NSW CA 465 upon a provision on a similar subject matter in the *Workers' Compensation Act 1987* (NSW). I am unable to accept the submission. The New South Wales provision related to circumstances in which an injury was 'caused by' reasonable action (of defined type). Section 34(4)(a) of the *WorkCover Queensland Act 1996* is directed at an illness which 'arises out of' reasonable management action taken in a reasonable way. I adhere to the view which I expressed in *Lackey v WorkCover Queensland* (2000) 165 QGIG 22 at 22 (admittedly on another limb of s. 34) that the test posited by the words 'arising out of' is wider than that posited by the words 'caused by' and that the phrase 'arising out of' whilst involving some causal or consequential relationship between the employment and the injury, does not require that direct or proximate relationship would be necessary if the phrase used were 'caused by'. See also *State Government Insurance Commission v Stephens Brothers Pty Ltd* (1984) 154 CLR 552 at 555 and 559, and *Dickinson v The Motor Vehicle Insurance Trust* (1987) 163 CLR 500 at 505. There is in any event the further difficulty that while Davies AJA drew the distinction for which the appellant contends, Fitzgerald JA (with whom Mason P agreed) rejected the distinction." (at 788).

The decision in *Avis v. WorkCover Queensland,* ibid, is but two years old. There is no contrary line of authority. No submission has been made that the decision was given *per incuriam*. No submission is made that some important principle was not adverted to or that subsequent developments in other jurisdictions justify reconsideration of the decision. Compare generally *Queensland v. The Commonwealth* (1977) 139 CLR 585 at 599-600 per Gibbs J. I am not prepared to reverse the decision.

Some attack is made upon what, it must be conceded, is an infelicitous use of language by the Industrial Magistrate. The final paragraphs of His Worship's decision were as follows:

"I respectfully borrow and adapt the words of his Honour Davies AJA in the last two sentences of paragraph 29 of the reasoning in Manly Pacific International Hotel v. Doyle 1999, New South Wales Court of Appeal 465 and find:

'The worker's breakdown resulted wholly from the incidents of the worker's temporary contracts officer, not from the employer's actions. The worker suffered a psychological response, not to those actions, but to the work he was assigned at his own request to do.'

The evidence before me does not negate the exculpatory provision of section 34(5) and in the circumstances I am not available to conclude that the psychological disorder suffered by the worker was an injury within the meaning of section 34(1) of the Act.".

It is contended that having made the finding at the first of the two paragraphs, *viz* that the decompensation did not result from the employer's actions, the Industrial Magistrate could not make the finding at the second paragraph that the exculpatory provisions of s. 34(5) had not been excluded. With respect, that is to misread His Worship's decision taken as a whole. Paragraph 29 of the decision in *Manly Pacific International Hotel v. Doyle*, now reported (1999) 19 NSW CCR 181, was the very paragraph relied upon by the unsuccessful appellant in *Avis v. WorkCover Queensland,* op. cit. His Worship was attempting to make the point that the proposition contended for was the very proposition rejected as an accurate statement of Queensland law in *Avis v. WorkCover Queensland,* op. cit. His Worship was entirely correct. Indeed, the passage really reinforces that both before the Industrial Magistrate and on the appeal the argument has been the very argument rejected in *Avis v. WorkCover Queensland,* op. cit.

In fairness to His Worship I should record that there is no substance in the criticism that it is the effect of the decision that, because every worker will at some point in his/her history have (quite reasonably) been appointed by the employer, every Queensland worker who suffers a psychiatric or psychological injury is withdrawn from the protection of the *WorkCover Queensland Act 1996.* Slight though the causal nexus required by "arising out of" may be, greater connection than that is required. The analogous situation will be one in which a conscientious worker becomes anxious upon appointment, almost immediately has difficulty with workload and shortly thereafter is confronted with the changes to his/her position which increase workload further.

The respondent seeks costs. In my view there is power to award costs. It is vested by s. 510A of the *WorkCover Queensland Act 1996.* Admittedly, the provision is unhappily drafted. It provides:

"Costs of appeal to Industrial Court

(1) On an appeal, the Industrial Court may order a party to pay costs incurred by another party only if satisfied that the party made the application vexatiously or without reasonable cause.".

The problem arises out of the use of two nouns, *viz* "appeal" and "application". There can be no "application" before this Court which is not an "appeal". Confusion of the two nouns is not unknown, compare *Golden Video Pty Ltd v. Chief Executive, Department of Employment, Training and Industrial Relations* (2000) 164 QGIG 298 and *Seair Trading Co Pty Ltd and Erica Lewin, Denise Thompson and Robyn Evans* (2000) 165 QGIG 789. By s. 509(2) any appeal from the Industrial Magistrates' Court must be lodged as required under the *Industrial Relations (Tribunals) Rules 2000.* Pursuant to r. 7 the appeal must be commenced by application. I consider it plain that s. 510A vests power to allow a successful respondent his/her costs where the appellant "made the application vexatiously or without reasonable cause".

The appellant is of course entitled to revisit earlier decisions of this Court. However, for the reasons developed in concluding that the decision in *Avis v. WorkCover Queensland* should not be reversed, it seems to me that it is unreasonable to do so in this case. The appellant did no more than put the submissions which had been put against it when the appellant was the successful party in *Avis v. WorkCover Queensland,* op. cit.

I dismiss the appeal. I order that the appellant pay the respondent's costs of and incidental to the appeal assessed as they would be assessed if this had been a matter in the Supreme Court of Queensland.

Dated 16 December 2002.

D.R. HALL, President.

Appearances:
Mr P. Major, directly instructed, for the appellant.
Mr A.A.J. Horneman-Wren, instructed by Minter Ellison Lawyers, for the respondent.

Released: 16 December 2002