

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Stokes v Workers' Compensation Regulator*
[2021] QIRC 211

PARTIES: **Stokes, Cheryl Therese**
(Appellant)

v

Workers' Compensation Regulator
(Respondent)

CASE NO: WC/2019/93

PROCEEDING: Appeal against decision of Workers'
Compensation Regulator

DELIVERED ON: 14 June 2021

HEARING DATE: 21 & 22 July 2020

MEMBER: Industrial Commissioner Dwyer

HEARD AT: Brisbane

ORDER: **1. The appeal is allowed; and**

**2. The Respondent pay the Appellant's
cost of and incidental to the appeal.**

CATCHWORDS: WORKERS' COMPENSATION – APPEAL –
personal injury – aggravation of degenerative
lumbar spine – over a period of time claim –
competing medical expert opinion evidence –
reliability of medical expert – reliance on
epidemiological data

LEGISLATION: *Workers' Compensation and Rehabilitation*
Act 2003 (Qld) s 32

CASES: *Peebles v Work Cover Queensland* [2020]
QSC 106

APPEARANCES: Mr D.G.H Turnbull of counsel, instructed by
Ms S. Francis of Bounty Law for the appellant

Mr C.J Clark of counsel, instructed by Ms R
Moroney of the Workers' Compensation
Regulator

Reasons for Decision

Background to Appeal

- [1] This is an appeal against a decision of the Worker's Compensation Regulator ('the Regulator') dated 3 May 2019 ('the decision'). The appellant, Ms Cheryl Stokes, commenced employment with Coles Supermarkets Australia Pty Ltd ('Coles') in 2007 as a shelf filler at the Coles supermarket in Yeppoon.
- [2] On 17 January 2008, Ms Stokes sustained an injury to her lower back in the course of her employment. She made a claim for compensation in relation to this injury and the claim was accepted for medical expenses through until March 2008 ('the 2008 claim'). She was certified as fit to return to normal duties by March 2008 and her benefits ceased.
- [3] Ms Stokes contends that she continued to work as a shelf filler after the 2008 claim with persistent and increasing levels of lower back pain. She continued to routinely perform her duties which included unloading trolleys and placing boxes of stock onto high shelves. Ms Stokes contends that she pressed on with work despite her discomfort and treated her symptoms with varying methods including heat packs, massage and physiotherapy.
- [4] In or about December 2012, the system of work altered and Ms Stokes was no longer required to undertake the heavy lifting tasks.
- [5] By 2012, her lower back pain had reached a point where she had sought a specialist opinion. Initial opinion from her treating orthopaedic specialist at the time was to manage the condition with exercises and prescription medication. By 2014, with her symptoms continuing, the spectre of surgery emerged. Ms Stokes eventually underwent spinal surgery in March 2017.
- [6] In February 2017, Ms Stokes sought to re-open the 2008 claim. Her application for re-opening was rejected and Ms Stokes did not pursue an appeal of that decision.
- [7] In November 2017, subsequent to her surgery, Ms Stokes filed a Notice of Claim for Damages (NOC) seeking common law damages. The injury claimed in the NOC is for an 'Over Period of Time' injury sustained to Ms Stokes' lower back whilst working at

Coles as a shelf filler in the period from 17 January 2008 to 31 December 2012¹ ('the OPT period').

- [8] Ms Stokes' claim was investigated and the opinions of Dr Licina and Dr Low (both orthopaedic surgeons) were among the medical opinions considered. Dr Low opined that Ms Stokes had suffered an aggravation of her degenerative spine in January 2008 and that her work practices thereafter had served to continue that aggravation. In his view, her condition as at 2012 was an aggravation of underlying degeneration and was 50% attributable to the initial incident in 2008 and 50% attributable to the aggravations continuing over the period of time thereafter.
- [9] Dr Licina on the other hand considered that the state of Ms Stokes' lower back as at 2012 was entirely a product of a naturally occurring degenerative process and unrelated to her employment.
- [10] Preferring Dr Licina's opinion, Coles' self-insurer rejected Ms Stokes' NOC on 9 November 2018. Ms Stokes sought a review of this decision from the Regulator. The Regulator upheld the decision to reject the NOC on 3 May 2019. Ms Stokes filed her appeal against this decision on 28 May 2019.
- [11] The Regulator has conceded that, for the purposes of s 32 of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) ('the Act') Ms Stokes is a 'worker' within the meaning of the Act. The issues for determination are the remaining elements of s 32(1) of the Act, namely whether:
- Ms Stokes sustained a personal injury;
 - The personal injury arose out of, or in the course of, her employment with Coles; and
 - Her employment was a significant contributing factor to the employment.
- [12] The appellant bears the onus of proving the claim is one for acceptance. The standard of proof is the balance of probabilities.

Relevant facts

Work performed

- [13] The appellant worked for Coles Yeppoon from May 2007 as a night shelf filler. The role typically requires unpacking stock and placing it onto shelves of the supermarket.

¹ The system of work altered after 2012.

- [14] The facts asserted by Ms Stokes regarding the work she performed were not materially contradicted by the Regulator. In those circumstances I am prepared to accept the evidence given by Ms Stokes describing the duties she performed, and in particular, I accept her description of the repetitive lifting practices that she said she undertook throughout her shifts.
- [15] In addition to the evidence given at the hearing, a statement signed by Ms Stokes on 31 October 2017 was introduced into evidence during her cross examination.² The statement, insofar as it describes the duties performed by Ms Stokes, was generally consistent with her oral evidence at hearing. Ms Stokes was not challenged by the Regulator on those aspects of her statement. Given there is no controversy over these facts it is not necessary for me to list the duties in detail.
- [16] In summary, I accept that prior to the January 2008 injury Ms Stokes' duties included lifting, handling and manoeuvring heavy boxes of stock during the whole of the shift for a period of five to six hours per shift. A typical shift in the pre-January 2008 injury period would include loading a trolley with boxes in the storeroom, pushing the trolley into the public area, and replenishing shelves. The task of replenishing shelves included bending and lifting boxes of stock and, in particular, it routinely required Ms Stokes to stand on her toes to lift heavy boxes of stock onto upper shelves. Some of the boxes weighed between 12-15kgs.
- [17] Ms Stokes experienced the first onset of pain in her lower back in January 2008 while performing these tasks. After a period of approximately four weeks of light duties, Ms Stokes was certified fit to return to normal duties. Ms Stokes says that notwithstanding her clearance, her duties were modified after January 2008 to exclude the task of loading boxes onto the trolley in the storeroom however, the other tasks described above continued to be part of her routine duties until approximately December 2021.
- [18] Ms Stokes contends that the duties she performed, as described above, continued to cause pain in her lower back after her return to normal duties. She contends that she was never free of pain in her lower back after the injury in January 2008, and that her condition slowly worsened over the next three years. It is these contentions about ongoing pain that give rise to the factual controversy in this matter.

Ongoing pain in lower back

- [19] Ms Stokes maintains that her back pain never ceased after the incident in January 2008. She states that the modification of her duties did not eliminate many of the lifting tasks, and that these tasks produced pain in her lower back.³ The pain continued and worsened

² Exhibit 2.

³ Transcript dated 21 July 2020, page 32; Exhibit 2, paragraph 12-13.

over the next three to four years. It is this evidence that forms the factual basis of the OPT claim.

- [20] Medical records from general practitioners were in evidence. It was not controversial that, following her return to full duties in March 2008, Ms Stokes was not recorded as having sought medical attention for her lower back pain until July 2011.
- [21] Ms Stokes was extensively cross examined on her evidence about ongoing pain in her lower back from 2008 until 2012. She was questioned about various attendances throughout this period for other ailments and injuries. It was put to her that, while she regularly attended upon her doctors during this period, she never took the opportunity to report her on going back pain.
- [22] Ms Stokes responded in a frank and honest fashion. She asserted that she believed she had mentioned her pain on doctors visits, though her response also suggests she was not seeking treatment for it on these occasions and was in the mind-set of ‘putting up with the pain’.⁴
- [23] Her responses to (repeated) questions about why she did not report her ongoing back pain to her doctors between 2008 and 2011 also included that she was fearful that an ongoing back injury might lead to her losing her employment. A number of attendances on her doctors were highlighted e.g. when she injured her ankle, had a broken molar and facial cellulitis. Ms Stokes explained the absence of any report of back pain on these occasions and broadly explained this was because she was attending in relation to other painful conditions.⁵
- [24] Ms Stokes’ husband also gave evidence. He confirmed that throughout the period 2008-2012 Ms Stokes continued to suffer lower back pain. He confirmed she treated the symptoms with heat packs etc.
- [25] It was submitted by the Regulator that the absence of treatment or reporting of lower back problems in the period between 2008 and 2011 should lead me to conclude that Ms Stokes either did not have symptoms during this period, or if she did, they were not significant.
- [26] The Regulator drew attention to notes taken by treating physiotherapists prior to Ms Stokes’ attendance on her GP in July 2011. The submission suggests that the notes of the physiotherapist record pain or discomfort that is inconsistent with the evidence of ongoing constant lower back pain.

⁴ Transcript dated 21 July 2020, page 57, lines 35-45.

⁵ Transcript dated 21 July 2020, page 58, lines 10-15; page 60, lines 5-10.

- [27] While it is open to me on the evidence to conclude that the absence of reporting of back pain in any meaningful way contradicts Ms Stokes' testimony, such a finding would require me to find that Ms Stokes was not a reliable or credible witness. It would require a similar finding in respect of Mr Stokes.
- [28] I found Ms Stokes to be a consistently frank and honest witness. She answered all questions asked of her without hesitation, without embellishment, and to the best of her ability and memory given the time that has elapsed. Her testimony, while imperfect in many ways, impressed me as wholly authentic. I came to the same conclusions about Mr Stokes.
- [29] As to her explanations to the questions about not reporting her back pain, I found it to be entirely plausible that she would not report back pain while she is attending upon her doctor in relation to other more recent or immediate ailments e.g. an injury to her ankle.
- [30] While the notes of the physiotherapists she saw may not be entirely consistent with the pain she said she was experiencing, her description of the pain between 2008 and 2011 is understandably general. I have no doubt she had 'good days and bad' as was recorded in one physiotherapist note. A reference to 'good days' does not in any way undermine her general description of pain in my view. The fact that she was attending upon a physiotherapist seeking treatment for her ongoing back pain is of itself a compelling indicator that her condition was sufficiently painful that she had sought out treatment.
- [31] Further, Ms Stokes' lower back condition is not at all unusual in the common human experience. The common experience is that most people similarly afflicted learn to live with chronic discomfort, such that it is not reported each and every time they attend a doctor. This is especially so where they have been led to understand there is no further investigation or treatment that can resolve their chronic pain. People generally tend to adapt. Reporting of pain tends to be reserved for occasions when there has been an acute episode or marked increase of symptoms that is cause for concern i.e. exactly as it happened in Ms Stokes' case.
- [32] From my observations of her, Ms Stokes is a woman well stocked with stoicism. Her evidence was that she put up with the pain. I accept her explanation, and in doing so, I accept her evidence about ongoing pain between 2008 and 2012 and the circumstances under which she says she experienced it.

The expert medical evidence

Dr Low

- [33] Dr Low is an orthopaedic surgeon with more than 40 years of experience in medical practice. He is a general orthopaedic surgeon. His qualifications as an expert were not in issue. Dr Low provided two medico-legal reports in relations to Ms Stokes, dated 19 July

2017 and 28 November 2017. Dr Low also gave evidence at the hearing of this matter and broadly adopted the opinions contained in his reports.

- [34] In his reports, Dr Low apportions 50% of the cause of the condition of Ms Stokes' lower back to the injury which occurred on 17 January 2008 (which he regards as an aggravation of her degenerative condition), and 50% to ongoing aggravation arising from work practices during the OPT period. I note that Dr Low does not, at any point, opine that Ms Stokes' spinal degeneration was *caused* by her employment.
- [35] In simple terms, the view of Dr Low is that Ms Stokes had a naturally occurring degenerative condition in her lower spine. It was aggravated in January 2008, at which point the condition became symptomatic. Thereafter, as a consequence of work practices, Ms Stokes continued to aggravate her degenerative condition over a 3-4 year period.
- [36] During his evidence in chief, Dr Low expanded on his opinion by describing the injury the subject of the OPT claim as '...an ongoing degenerative process with some acceleration from physical activity'.⁶
- [37] Under cross examination Dr Low appeared to modify his opinion somewhat, in that he appeared to apportion 50% of the symptoms to the underlying degenerative condition, and 50% to the aggravations in the workplace i.e. the January 2008 incident and the ongoing aggravations during the OPT period.⁷ As an aside to this, I consider that whether the workplace practices between 2008 and 2012 contributed 50% or 25%, it would still be a significant contribution in my view.
- [38] Also, under cross examination Dr Low was asked to comment on the academic papers of Ms Michelle Battie that inform Dr Licina's opinion. He was familiar with the general tenor of these papers, but not the papers themselves. He was dismissive of them, saying:⁸
- ...there's 10000 different papers on this subject. I mean, they don't all agree...with each other.
- ...this is not proven science by any means.
- [39] On the whole, Dr Low preferred to rely on his forty years as an orthopaedic surgeon as support for his opinion as to the work-related contribution to Ms Stokes' injury.

Dr Licina

- [40] Dr Licina is an orthopaedic surgeon with 20 years of experience. He has a specialty within the specialty of orthopaedics in respect of spinal conditions. Dr Licina's specialist qualifications were not in dispute. Dr Licina examined Ms Stokes and provided an initial medico-legal report dated 6 April 2017.⁹
- [41] In that report Dr Licina opined that the condition affecting the appellant's lower back is constitutional degeneration of the L5-S1 disc. He concluded that she had aggravated this condition in the incident of January 2008, and that since that time she had "other non-

⁶ Transcript dated 22 July 2020, page 10, line 10-15.

⁷ Transcript dated 22 July 2020, page 17, line 15-25.

⁸ Transcript dated 22 July 2020, page 17, line 35-45 and page 18, line 1-16.

⁹ See Exhibit 5.

work-related exacerbations”. He regarded her condition at the time of examination as entirely constitutional.

- [42] The history set out in the report dated 6 April 2017 notably does not include any indication or consideration of further work activities and their impact on Ms Stokes’ condition.
- [43] Dr Licina provided a subsequent report on or about 31 August 2018.¹⁰ The focus of the subsequent report was essentially to comment on the opinion of Dr Low as set out in his reports. Dr Licina appears to understand Dr Low’s opinion and the reason for it but disagrees with Dr Low’s conclusions. It is Dr Licina’s view that Ms Stokes’ history of gradually worsening back pain is exclusively indicative of the natural progression of her degenerative spine.
- [44] In support of his view, Dr Licina includes in his report an extract from an article titled “*Lumbar Disc Degeneration: Epidemiology and Genetic Influences*” taken from ‘The Spine Journal’ dated December 2004 and authored by Ms Michelle Battie. The extract contained in Dr Licina’s report reads as follows:

Research conducted over the past decade has led to a dramatic shift in the understanding of disc degeneration and its aetiology. Previously, heavy physical loading was the main suspected risk factor for disc degeneration. However, results of exposure-discordant monozygotic and classic twin studies suggest physical loading specific to occupation and sport has a relatively minor role in disc degeneration, beyond that of upright postures and routine activities of daily living. Recent research indicates that heredity has a dominant role in disc degeneration, explaining 74% of the variance in adult populations studied to date.

- [45] Following this extract in his second report, Dr Licina opines:

I interpret this as stating that disc degeneration is pre-determined, and that external influences that resolve quickly are transient exacerbations rather than significant contributors to the future state of the disc.

...

I recognise that there is a report of ongoing pain thereafter, but I cannot attribute this episode as something that has caused a significant deviation to the state of her back from what it would have been had it not occurred.

- [46] Notably again, there is little to no evidence of any consideration by Dr Licina into the full details of the post-January 2008 work activities and the symptoms they produced at the time he expressed this view.
- [47] In respect of Dr Licina’s reliance on the epidemiological data in the reports, Dr Licina responded to a series of questions under cross examination as follows:¹¹

Mr Turnbull: But when you look at those – at that article – that one you are referring to in 2008, it is still left up in the air to a degree, is it not? ---Of Course.

...

¹⁰ Exhibit 5.

¹¹ Transcript dated 22 July 2020, page 44, line 10-25.

Mr Turnbull:...but if the science is not settled and what we had is an area of research which is still a work in progress? --- Yes

[48] During his evidence Dr Licina responded to questions I put to him as follows:¹²

COMMISSIONER: ...Can I ask you this, Dr Licina; in reference to the articles that you have provided with your evidence; these as I read them are articles that deal with **the causes, or the origins, of disc degeneration**; do I understand that correctly?---Yes.

And so, putting aside for the moment the causes of disc degeneration, it is not controversial is it that a degenerated disc is then liable to aggravate the condition, depending on certain physical activities, not in every case, but **it is not controversial that people will aggravate that degenerative process through physical activity of one form or another**?---Yes.

And the **aggravation usually presents in the form of pain**?---Correct.

So where we described before, and I think where you were talking about before, where we have Miss Stokes with an already pre-existing degenerative condition in her lumbar spine, routinely lifting boxes down from shelves and that producing pain; that pain is evidence of an aggravation of that degenerative process?---This is where I took into account the severity and duration of the pain and I would [indistinct] more an exacerbation rather than an aggravation considering that the pain lasted for four to six weeks and resolved to a point where she no longer required medical care and more time off work. This is why I place less emphasis on that and consider [indistinct] rather than [indistinct] carried any weight onwards in the next few years.

If I were then to accept, however, evidence from Ms Stokes that over the period from the beginning of 2008 and onwards over the course of the next three years or so she routinely experienced pain in her lower back arising from these activities; that would be consistent with your previous answer with respect to the pain being evidence of aggravation?---Correct

Okay. Anything arising out of that, Mr Clark or Mr Turnbull? Mr Clark first?

MR CLARK: Not for me, no.

(Emphasis added)

Consideration of medical evidence

[49] For the reasons that follow, I prefer the expert evidence of Dr Low.

[50] Firstly, the reports upon which Dr Licina relied upon in support of his conclusions were concerned with the *causes* of degeneration. To my understanding of the evidence (and the medical science) degenerative spinal disease is a naturally occurring process. It is also not controversial to my understanding of the evidence that such process has a genetic component.¹³ Nobody contended otherwise in this matter. In my view, the quite heavy reliance of Dr Licina on the reports of Ms Battie was misconceived in the context of a claim largely pointing to *aggravation* of the underlying condition.

[51] It is not controversial that the naturally occurring degenerative process is liable to aggravation through physical activity. Dr Low has only ever contended that the injury

¹² Transcript dated 22 July 2020, page 46, line 10-45.

¹³ See Transcript dated 22 July 2020 at page 21 for Dr Low's 'Dachshunds/Greyhound' analogy.

was an aggravation of the degenerative process, or rather two aggravations, namely the January 2008 incident, followed by the work practices over the following years.

- [52] Importantly, Dr Licina confirmed the features of aggravation in his answers to my questions that I have extracted above. Dr Licina confirmed that pain associated with performing certain activities or duties was consistent with aggravation of the underlying condition.
- [53] Dr Licina had little to no history as to the extent Ms Stokes suffered pain associated with work practices following the incident in January 2008. To the extent that he did, he referred to pain that ‘resolves quickly’ and described it as ‘transient’. On the evidence given by Ms Stokes, which I have accepted, the ongoing pain was anything but transient. It was constant and persistent.¹⁴
- [54] I am satisfied therefore that the evidence of both medical experts supports a finding that Ms Stokes suffered a work related aggravation of her pre-existing degenerative spinal condition as a result of work practices over a period of time between January 2008 and December 2012, and that her employment was a significant contributing factor within the meaning of s 32 of the Act.
- [55] Secondly, Dr Licina went to some lengths to demonstrate his reliance on the reports of Ms Battie by extracting a passage of her 2004 paper in his second report. The passage relied on (which is extracted above) talks only about the *causes* of degeneration and says nothing about matters of aggravation.
- [56] More importantly, the passage that Dr Licina extracted in his report is somewhat at odds with the conclusion set out in the 2004 paper of Ms Battie which read:

The consistent finding that L4-S1 lumbar discs are more degenerated than L1-L4 discs is a strong indicator that lifetime physical exposures have a role in disc pathogenesis, as “pure” aging genes, and all systemic factors would be expected to affect all discs similarly. Most of the environmental and behavioural factors suspected as risk factors for disc degeneration represent different forms of physical activity or loading and are often labelled by the environment where activities commonly occur. Yet the additional effects of specific loading exposures studied to date, whether work, sports, or leisure related, beyond those of the normal range of activities of daily living, **are unclear** or **appear to be** relatively minor. The modest effects of extreme physical loading conditions on disc degeneration have been striking in studies of grossly exposure-discordant monozygotic twins and elite weightlifters under extraordinary loading conditions. **It is certain, however, that both environmental and constitutional factors have some role in disc degeneration phenotypes and that their magnitude can vary. In other words, the genetically determined “natural progression of disc degeneration” is modified to some degree by behavioral and environmental factors.**

(Emphasis added)

- [57] The passage extracted by Dr Licina in his second report is taken from an introductory summary at the commencement of the paper by Ms Battie. The entire paper was tendered in these proceedings in a bundle that became Exhibit 5. Regrettably, neither Counsel attempted to lead evidence or cross examine Dr Licina on the *entire* paper of Ms Battie and in particular, its conclusions.

¹⁴ See Exhibit 2, paragraphs 12-13.

- [58] I have subsequently taken the opportunity in my deliberations to review the entire 2004 paper of Ms Battie contained in Exhibit 5. I have set out above the salient parts of the conclusions she recorded. The extract relied on by Dr Licina is not representative of the conclusions of Ms Battie. The conclusions of Ms Battie, as they plainly appear in the full body of her paper, are far from conclusive and leave ample scope to conclude that environmental factors (such as workplace activities) will contribute (to some degree) to the *progression* of spinal degeneration.
- [59] For completeness I note that Exhibit 5 also contained a further paper from Ms Battie published in The Spine Journal in 2009. While its conclusions adopt a similar theme to the 2004 paper i.e. that genetics is the principal determinative factor in degeneration of the spine, it concludes:
- ...the investigation of genetic influences on disc degeneration is still in its infancy.
- [60] The conclusion found in the 2009 paper of Ms Battie accords with Dr Low's comment that these theories are by no means settled science. I note further that Ms Battie regarded the science to be in its infancy in 2009. If that is so, then the science must have been embryonic at the time of her paper in 2004.
- [61] While I draw no conclusions as to the competence or independence of Dr Licina, I find it extraordinary that he would commit to writing a medico-legal report in which he justifies his opinion by reference to specific papers examining epidemiological studies, but then so thoroughly fail to accurately represent the conclusions of those papers. Being as fair as I can to Dr Licina, this oversight is (at best) evidence of poor attention to scientific detail which causes me to find his evidence entirely unreliable.
- [62] I hasten to add further that I am reluctant to be drawn into considering expert evidence that relies overly on epidemiological studies. As Dr Low reflected, such reports exist in their thousands, and they do not all agree with each other.
- [63] Finally, the question of factual causation in *this* matter is not a matter of statistical association based on analysis of relevant studies. It is whether, on the balance of probabilities, Ms Stokes has proved factual causation.¹⁵ In my view she has.

Conclusions

Worker

- [64] There is no dispute that Ms Stokes was a 'worker' within the meaning of the Act.

Personal injury

- [65] Section 32 defines injury as *inter alia* 'a personal injury'. Personal injury is further defined in s 32(3) in broad terms that include a disease or the aggravation of a disease.

¹⁵ *Peebles v Work Cover Queensland* [2020] QSC 106, [85].

[66] Both medical experts agreed that the pain experienced by Ms Stokes at work during the OPT was consistent with an aggravation of her degenerative disease. It follows that I conclude that Ms Stokes has sustained a personal injury within the meaning of the Act.

Arose out of, or in the course of employment

[67] Both medical experts concluded that the pain experienced by Ms Stokes during her employment was suggestive of an aggravation of her degenerative spine. Further, there was no evidence that Ms Stokes had her back pain activated in any significant way by activities other than her work practices. I therefore conclude that the aggravation of Ms Stokes' condition arose out of or in the course of her employment.

Whether employment was a significant contributing factor

[68] It was this element of the s 32 of the Act that was centrally in contest in this appeal. Dr Low was clear in his view that Ms Stokes' spinal degeneration was aggravated following the incident in 2008 and was further aggravated by the work practices over those years following that incident.

[69] For the reasons set out above I accept the evidence of Dr Low. It follows that I find that Ms Stokes's employment was a significant contributing factor.

Order

[70] I make the following order:

- 1. The appeal is allowed; and**
- 2. The Respondent is to pay the Appellant's costs of and incidental to the appeal.**