MAGISTRATES COURT OF QUEENSLAND

CITATION:	
PARTIES:	Kevin John HANSEN (APPELLANT) V Q-Comp and Swift Australia Pty Ltd (RESPONDENT)
FILE NO:	MAG-00135631/09(4)
PROCEEDING:	
ORIGINATING COURT:	Yeppoon
DELIVERED ON:	12 March 2010
DELIVERED AT:	Yeppoon
HEARING DATE:	26 February 2010
MAGISTRATE:	A HENNESSY
ORDER:	Appeal dismissed for failure to comply with s.542 of the *Workers Compensation and Rehabilitation Act 2003*

1. The Application before me is to determine the issue of whether or not the Appellant's Application for Review dated 1st June 2009, seeking to review a decision by Australia Meat Holdings Pty Ltd (now Swift Australia Pty Ltd) dated the 11th of December 2006 pursuant to Section 542 of the *Workers Compensation and Rehabilitation Act 2003* (the Act) was correctly rejected as being "out of time" by Q-Comp as stated in their letter to the Appellant's solicitors on the 11th of June 2009. The Appeal proper is not being determined on its merits in this application.

2. Q-Comp rejected the application for review on the basis that it was lodged outside the 3 months statutory time limit imposed by the Act and because sufficient reasons were not provided to warrant the Application for Review proceeding. Further, Q-Comp advised that they were not satisfied that the Applicant had demonstrated substantial compliance with the legislation or that there was some other good reason as to why the 3 month time limit should not be enforced.

3. Section 542 of the Act provides (in short compass) that an application for review must be made within 3 months of the Applicant receiving written notice of the decision. The Applicant may ask the Authority to allow further time for the Application to Review to be lodged and the Authority may grant the extension if it is satisfied that special circumstances exist. Those special circumstances are not detailed in the Section or elsewhere in the Act.

4. Section 542 has been interpreted or commented on in a number of Supreme Court decisions. The first of those is *Emerson v Coles Myer Limited* [2004] QSC 161 where Justice Dutney made obiter comment in

relation to an almost identical provision in Section 491 of the *Workcover Queensland Act (1996)* at paragraph 26:

> "Since I am considering the operation of the time limit in s 491(1) of the Act, I should comment on one further submission made on behalf the applicant. I was referred to a decision of the Industrial Court in *Q-Comp and Diane Baulch* (No C97 of 2003, Hall P, 27 February 2004). The decision appears to conclude that the time limit for an application to review in s 491(1) is merely directory and the failure to comply strictly will not invalidate the application for review if there has been substantial compliance. Since the only right to review a rejection decision on the merits which an applicant has is the right granted to the applicant by the statute itself, it follows that if that right is limited by the imposition of a time constraint, the failure of an applicant to bring herself within that time constraint must be fatal. That is because she could not bring herself within the scope of the statutory right. It is not necessary to consider the issue further in this matter because of my conclusions regarding other issues raised. Nonetheless, I have great difficulty in accepting that a statutory provision authorising a review of a decision within a specific limited time, without a power to extend time being conferred, authorises an application outside the prescribed time."

5. Section 542 was considered in the judgment of Justice A Lyons in *Cloncurry Shire Council v Worker's Compensation Regulatory Authority and Anor* [2006] QSC 362. In Her Honour's judgment she stated at paragraph 24:

> "Whilst it is clear that the timely resolution of disputes is the object of this section it must be remembered that the Act has as its main aim the establishment of a workers' compensation scheme whose aim is to provide benefits for workers who sustain injuries in their employment as well as their dependants and to encourage improved health and safety performance by employers. The Act is clearly what is commonly described as "beneficial legislation" and s 108 of the *WCRA* gives an entitlement to compensation when it provides "compensation is payable under this Act for injuries sustained by a worker.""

6. Her Honour stated that the starting point for a correct interpretation of the section was the High Court's decision in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355. Justice Lyons stated –

> "This decision makes it clear that what is required is for the Court to ascertain the intention of Parliament."

7. Justice Lyons further stated in the *Cloncurry* decision (at paragraphs 27 and 28)-

> "I agree with the submissions of the first and second respondent that s 542 of the *WCRA* should be interpreted to give effect to a beneficial purpose particularly when there is no inherent conflict between the object of prompt resolution of disputes and the object which recognises the right to seek a review of a decision refusing compensation. In terms of an examination of a hierarchy of provisions, to use the language of the High Court, it is clear that the major aim of the *WCRA* is to provide benefits for workers who sustain an injury in their employment and provisions which relate to timeliness are clearly provisions which are lower in the hierarchy to provisions which give rights to compensation.
>
> I am not satisfied that non-compliance with the method of applying for a review was intended by the legislature to affect the ambit of the power such that non-compliance is fatal to the existence of the power."

8. Her Honour then found that Q-Comp did have the power to extend the period within which an Application for Review must be made and Reviews conducted in relation to out of time applications were not invalid.

9. The decision of Justice Lyons in the *Cloncurry* case was referred to in the later matter before President Hall of *AMH v Q-Comp* [2007] QIC in which President Hall held that on its proper construction, Section 542 (1)

is not intended to extinguish the right to review when the Applicant fails to meet the time limit of 3 months. President Hall made reference to the matter of *Baulch* which held that there needed to be substantial compliance with the legislation for the consideration of a review made out of time to be dealt with. In the matter of *Baulch,* the Applicant had completed her application within time but it had not been received by Q-Comp until 2 days following the expiration of the 3 month time limit in the Act.

10. In the matter of *AMH,* President Hall was considering an Application which was lodged more then 6 months after the decision which the worker sought to review. President Hall stated (on page 7) –

> "However, the applicant had manifested her intention to exercise the right to seek a review and had taken positive steps within the limitation period to do so. In the event, she was "let down" by union officials who had the carriage of her claim for a review. The merit of the worker's claim has not been put in issue. There is no suggestion that the delay has embarrassed the conduct of any review. The prejudice suffered by the self-insurer is no more than that a dormant (and presumably finalised) claim is to be re-opened. "

President Hall held that there had been substantial compliance with the requirements of the Act in that case.

11. I have been urged by the Appellant to have reference to the case law relating to extensions of time under the *Motor Accident Insurance Act 1994* in determining the position here. I do not consider that this course would benefit my consideration in relation to this matter and I am confident that the decisions of the Supreme Court and President Hall are sufficient to detail the law in relation to the interpretation of Section 542.

12. The Appellant argues that he is a man of limited education who at the time of receiving the Determination on the 11th of December 2006 had no knowledge of the provisions of the Act or the time limits which applied to the request for a review of the Determination. There was no indication in the letter of the 11th of December 2006 as to the existence of a time limit or the period of it. There was also no suggestion in the letter that the Appellant may wish to seek independent legal advice in relation to his rights. Section 92(5) of the Act requires the insurer to perform its functions and exercise its powers reasonably. The Appellant argues that in order to do so, insurer should have made reference to the time limit applicable to the application for review or least the existence of a time limit in the determination of 11th December 2006. The Appellant further argues that special circumstances exist as the insurer failed to discharge that responsibility properly and the failure is both relevant and significant because it could have been remedied very simply by the inclusion of that information in the determination and the insurer stood to benefit from the Appellant's ignorance of his rights arising from their failure to supply that information.

13. In his affidavit, the Appellant gave reasons for the delay in the lodging of the Application to Review. They included his limited education, the fact that he was unsure of his legal rights, the fact that he did not think he would be able to make an application or afford a solicitor to do so and the fact that he was not aware of his rights until he was referred to obtain legal advice after consulting a solicitor for family law issues in February 2008.

14. The Appellant gave evidence that in about February 2008 he consulted a solicitor in Yeppoon in relation to family law issues. Upon being asked by that solicitor why he was sitting tenderly in the chair and was informed of the Appellant's back injury, the solicitor referred Mr Hansen to obtain further more specific legal advice in relation to his rights concerning his

injury. Mr Hansen further stated in evidence that he, shortly after that consultation, made contact with Mr O'Donnell, the solicitor to whom he had been referred. Mr Hansen gave evidence that he complied with all of the requests of the solicitors to provide information required for them to pursue his rights in relation to review of the determination. He spoke to Mr O'Donnell in detail on the 18th of November 2008. The Application for Review was then prepared on the 27th of May 2009 by Mr Hansen's solicitors.

15. Mr Hansen gave evidence that he has difficulty reading but stated that when he received the determination it was read to him and he understood it. He gave evidence that he had noticed from the determination that an error had been made in relation to the date on which he first consulted his general practitioner in relation to the back injury. The allegation by Mr Hansen was that he had hurt his back at work on the 5th of October 2006 but had not informed his employer of this until the 9th of October 2006. Reliance on a later statement made by him to investigators for the employer caused AMH to found the determination on an attendance at his general practitioner on the 9th of October 2006. However the medical records which were presented to the Court during the hearing of this application confirm that a consultation was made in relation to the back injury prior to the 9th of October 2006. This matter has not been raised by Mr Hansen with Q-Comp prior to the matter currently before the Court.

16. Reference was made in the determination to a phone number for Q-Comp which could be called if an appeal was to be lodged in relation to the determination. Mr Hansen gave evidence that he at no time had called that telephone number.

17. In the matter before me, the Respondents argue that there has not been a substantial compliance on the part of the Appellant with the provisions

of the Act. The original decision was dated the 11th of December 2006 and Mr Hansen had been provided with a copy of that decision within a few days of that date. An application for review was lodged on the 27th of May 2009. The Respondents argue that there had not been substantial compliance with the provisions of the Act within the 3 month period provided for in Section 542, and therefore the Court has no discretion to overturn Q-Comp's decision in those circumstances.

18. The issue of factual errors in the Determination has not really been argued before me. As those matters relate to the merits of the matter and not the issue of the extension of time, I do not propose to make particular findings in relation to that point.

19. It is clear from the evidence that Mr Hansen, upon receipt of the determination refusing him compensation for the back injury which he alleges was incurred at his workplace on the 5th of October 2006, did not take advantage of the phone number in the letter, to challenge the determination. He is a man of limited education and I also accept was not aware of his legal rights in relation to any appeal against the Determination at the time. He became aware that he may have some recourse of address when he consulted the Yeppoon solicitor in February 2008. He then made contact on an unspecified date with solicitors who currently act for him in relation to this matter and received advice from them. He had a detailed conversation with his solicitor in late 2008 but the Application for Review of the Determination was not made until the 27th of May 2009. The delay between late 2008 and May 2009 does not appear to have been of the Appellant's doing.

20. There has been a delay of two and a half years in this matter in relation to the application for a review of the determination in a situation where the Act provides for a 3 month time period in which such application should be made. The Authority can be requested to extend the period of

time for the making of the application but in this case refused to do so for lack of grounds. I do consider that I am bound by the decisions of the Industrial Court in *Baulch,* and *AMH* v. *Q-Comp*. I am satisfied that the Appellant would need to show substantial compliance with the provisions of the legislation within the 3 months or a reasonable period of time after that in order to rely on an extension of time for the consideration of the application to review. Even after the Appellant became aware that he may have some rights in relation to the determination in February 2008 when he consulted his family law solicitor, a further 15 months elapsed before the Application was made. Eight months of that time is an unexplained delay between the consultation with the family law solicitor and the conversation with Mr O'Donnell in November 2008. If the application had been made shortly after the raising of the right with the Appellant to apply to review the determination then the situation may have been different. However, given the particular facts of this matter and the substantial delay which has occurred, despite the apparent bona fides of the Appellant, I do not find sufficient cause to overturn Q-Comp's decision to refuse to consider the application for review of the determination as I am satisfied that there has not been substantial compliance with the provisions of the Act within the time limit or any reasonable time. & therefore there are no special circumstances.

21. If the Insurer had made reference in the Determination notification to the existence of a time limit and the right to seek legal advice, after hearing the evidence in this matter, I am not sure that Mr Hansen would have acted differently. If that indication had been made in the letter in December 2006 however, this argument could never have been mounted.

22. The appeal is dismissed. As the Application to Review is out of time and was correctly rejected by Q-Comp, I do not need to address the merits of the Appeal proper.

23. In relation to the issue of costs of the application, whilst I have sympathy for Mr Hansen, I have not been persuaded that I should divert from the usual path of the costs following the result and I order costs of the application in favour of the First and Second Respondent. on scale.

AHennessy.

A M Hennessy

Magistrate