

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 - s. 320 - basis of decisions of the commission and magistrates
Workers' Compensation and Rehabilitation Act 2003 - s. 550 - procedure for appeal and s. 558 - powers of appeal body

Q-COMP AND John Labaj (B/2011/6)

and

John Labaj AND Q-COMP (WC/2010/6)

DEPUTY PRESIDENT BLOOMFIELD

12 May 2011

DECISION

Background

- [1] This decision relates to an application (Matter No. B/2011/6) by the Review Unit, Q-COMP (Q-COMP) for an order pursuant to s. 320 of the *Industrial Relations Act 1999* (the IR Act) and/or s. 558 of the *Workers' Compensation and Rehabilitation Act 2003* (the Workers' Compensation Act) as follows:
- (a) the appeal lodged by Mr John Labaj on 20 January 2010 (WC/2010/6) against a decision of the Review Unit, Q-COMP dated 13 January 2010, be dismissed; and
 - (b) the decision of the Review Unit dated 13 January 2010 be affirmed; and
 - (c) the Respondent pay the Applicant's costs of and incidental to this application; and
 - (d) any further order the Commission considers appropriate.
- [2] To understand Q-COMP's application it is necessary to trace some of the history of Mr Labaj's dealings with both WorkCover Queensland (WorkCover) and Q-COMP, as follows:
- *5 June 2008* - Mr Labaj is assaulted during the course of his employment and sustains an injury to his left elbow and shoulder. He lodges an Application for Workers' Compensation which is accepted by WorkCover.
 - *11 November 2008* - WorkCover terminates the claim pursuant to ss. 144A and 144B of the Workers' Compensation Act.
 - *9 January 2009* - Mr Labaj lodges an application for review with Q-COMP.
 - *18 March 2009* - Q-COMP confirms WorkCover's decision to cease workers' compensation payments.
 - *26 March 2009* - Mr Labaj lodges an appeal with the Queensland Industrial Relations Commission (the Commission) (Matter No. WC/2009/24) against Q-COMP's decision.
 - *14 September 2009* - the appeal is compromised and Commissioner Asbury issues a Consent Order reinstating Mr Labaj's entitlement to compensation from 6 October 2008.
 - *28 September 2009* - WorkCover directs Mr Labaj to attend an appointment with an External Medical Officer on 29 October 2009.
 - *12 October 2009* - WorkCover informs Mr Labaj that it is making workers' compensation payments to him covering the dates 7 October 2008 until 14 September 2009 in accordance with the Order issued by Commissioner Asbury. He is informed that because there are no current medical reports or medical certificates no additional workers' compensation payments will be made until he is reviewed by an External Medical Officer.
 - *13 October 2009* - Mr Labaj requests Q-COMP to review WorkCover's decision of the preceding day.

- *30 October 2009* - WorkCover issues Mr Labaj with a Notice of Assessment of Permanent Impairment under s. 185 of the Workers' Compensation Act. He is informed that the External Medical Officer he saw on 29 October 2009 assessed him as having a Work-Related Impairment (WRI) of nine percent (9%). Mr Labaj is also informed that in accordance with the Workers' Compensation Act, WorkCover must stop paying his weekly compensation benefits and medical expenses when the earlier of the following happens:
 - he notifies WorkCover of his decision about the offer of lump sum compensation; or
 - 20 business days after he receives the Notice of Assessment containing the offer.
- *30 October 2009* - Q-COMP informs Mr Labaj that WorkCover's decision of 12 October 2009 not to continue workers' compensation payments until his medical condition is clarified is not a reviewable decision under s. 540 of the Workers' Compensation Act.
- *6 November 2009* - WorkCover informs Mr Labaj that, after review, it has decided to pay weekly workers' compensation payments from 15 September 2009 until 3 November 2009. It also informs him that as a result of his decision to disagree with the WRI assessment of the External Medical Officer he will be referred to the Medical Assessment Tribunal for further assessment by a panel of orthopaedic surgeons.
- *9 November 2009* - Mr Labaj lodges an appeal with the Commission (Matter No. WC/2009/94) against Q-COMP's decision of 30 October 2009.
- *9 November 2009* - Mr Labaj lodges a further Application for Workers' Compensation with WorkCover in respect of his left shoulder injury. The nature of the injury and the part of the body said to be injured is described as "*left rotator cuff: left elbow: left frozen shoulder*".
- *17 December 2009* - WorkCover rejects Mr Labaj's application of 9 November 2009 on the basis the injury has already been assessed for permanent impairment.
- *21 December 2009* - Mr Labaj requests Q-COMP to review WorkCover's decision to reject his claim of 9 November 2009.
- *13 January 2010* - Q-COMP informs Mr Labaj that WorkCover's decision of 17 December 2009 is not a reviewable decision under s. 540 of the Workers' Compensation Act and declines to undertake a review as requested.
- *20 January 2010* - Mr Labaj lodges an appeal with the Commission (Matter No. WC/2010/6) against Q-COMP's decision of 13 January 2010.
- *22 February 2010* - another Member of the Commission conducts a conference between the parties pursuant to s. 552A of the Workers' Compensation Act in relation to Matter No. WC/2010/6.
- *26 May 2010* - Mr Labaj's Solicitors lodge a common law damages claim in relation to the injuries he sustained on 5 June 2008 (the claim is not lodged with WorkCover until 3 June 2010). The claim lists his various injuries, including a "left frozen shoulder" injury as an unassessed (separate) injury.
- *9 June 2010* - the Commission as presently constituted conducts a directions hearing. At this hearing Mr Labaj informs Q-COMP that his 9 November 2009 Application for Workers' Compensation is in respect of a separate injury, namely "left frozen shoulder", which is said to have arisen out of the 5 June 2008 incident. He explains that his appeal is in relation to both WorkCover's and Q-COMP's refusal to assess this claim. He also explains that he is to visit a medical specialist on 16 August 2010 in relation to this injury, after which he will have additional information to support his appeal. Q-COMP informs Mr Labaj and the Commission that WorkCover has three months in which to determine Mr Labaj's damages claim (see 26 May 2010) in relation to his unassessed injury and that any decision WorkCover may make in relation to that claim might then be the subject of review. It is agreed that the matter be adjourned until 15 September 2010 to allow Mr Labaj to see the medical specialist and to give WorkCover time to consider the 26 May 2010 claim.
- *9 June 2010* - Mr Labaj withdraws his appeal in Matter No. WC/2009/94, originally lodged on 9 November 2009.
- *15 September 2010* - the Commission as presently constituted conducts a second directions hearing. Mr Labaj advises that he did not attend the medical appointment in August because it was cancelled by his (then) Solicitors. He also states that his (then) Solicitors included the unassessed left frozen shoulder

injury in his common law damages claim of 26 May 2010 contrary to his intentions. He states he is considering amending the common law damages claim or maybe withdrawing it all together. Mr Labaj also states that because his shoulder injury was never treated (through WorkCover) he is in constant pain. He also states that at his own initiative (apparently in or around October 2009) he went to see another specialist, Dr Robinson, who told him that while he might originally have had a rotator cuff injury he now had a frozen shoulder "*which is a totally different complaint or injury or condition to a rotator cuff injury ...*". He also said Dr Robinson told him that the frozen shoulder was as a result of the trauma he suffered on 5 June 2008. That was why he lodged the second Application for Workers' Compensation on 9 November 2009.

Q-COMP informs Mr Labaj and the Commission that its Counsel (Mr McLeod) has conferenced with Mr Labaj's specialist who advised that the claimed "frozen shoulder" injury is not a separate injury but symptomatology of the previously accepted rotator cuff injury. On this basis Q-COMP will continue to defend its decision of 13 January 2010 because WorkCover's decision of 17 December 2009 is not a reviewable decision. Notwithstanding these positions, the parties agree to participate in a further s. 552A conference before another Member of the Commission.

- 8 October 2010 - a further s. 552A conference is conducted before another Member of the Commission.
- 2 December 2010 - WorkCover informs Mr Labaj that it has accepted his Claim for Damages for his unassessed left frozen shoulder injury in his Notice of Claim for Damages of 26 May 2010 (lodged with WorkCover on 3 June 2010) and that his claim will be progressed in accordance with Chapter 5 of the Workers' Compensation Act. WorkCover's decision is made pursuant to s. 245(3) of the Workers' Compensation Act.
- 13 December 2010 - the Commission as presently constituted conducts a third directions hearing. Q-COMP informs the Commission that WorkCover has now accepted Mr Labaj's common law damages claim relating to his left frozen shoulder and questions the utility of further proceedings in Matter No. WC/2010/6. In response, Mr Labaj generally indicates that he did not understand "*where the new injury stands*" as a result of WorkCover's decision - including the medical opinion upon which it was based. He also said that he did not understand why he had been assessed for permanent impairment when his medical specialist had told him that his condition was not stable and that he did not have a permanent impairment. In addition, Mr Labaj complained that he was still in pain and that he had not received any medical treatment, which he should have been afforded, before he was sent for assessment for permanent impairment.

Towards the end of proceedings Q-COMP foreshadowed that it would lodge an application to have Mr Labaj's appeal (WC/2010/6) dismissed because what he had sought to achieve through his second Application for Workers' Compensation on 9 November 2009 had now been achieved, on 2 December 2010, by way of WorkCover's acceptance of his claim in relation to his left frozen shoulder.

- 16 March 2011 - Q-COMP lodges the present application (Matter No. B/2011/6) to dismiss Mr Labaj's appeal (Matter No. WC/2010/6) lodged on 20 January 2010.

Relevant Legislation

[3] The Workers' Compensation Act relevantly provides:

"Chapter 5 Access to damages

Part 2 Entitlement conditions

Division 1 Limitations on persons entitled to seek damages

237 General limitation on persons entitled to seek damages

- (1) The following are the only persons entitled to seek damages for an injury sustained by a worker -
- (a) the worker, if the worker -
 - (i) has received a notice of assessment from the insurer for the injury; or
 - (ii) has not received a notice of assessment for the injury, but -
 - (A) has received a notice of assessment for any injury resulting from the same event (the *assessed injury*); and
 - (B) for the assessed injury, the worker has a WRI of 20% or more or, under section 239, the worker has elected to seek damages;

...

Division 3 Claimant who has received notice of assessment

Subdivision 3 Claimant mentioned in s 237(1)(a)(ii)

244 Application of subdiv 3

This subdivision applies to a claimant who is a person mentioned in section 237(1)(a)(ii).

245 Claimant with more than 1 injury from an event

- (1) The claimant can not have, and the insurer can not decide to have, the injury assessed under chapter 3, part 10 to decide if the injury has resulted in a degree of permanent impairment.
- (2) The insurer can not decide that the claimant's notice of claim does not comply with section 275 only because the claimant has not received a notice of assessment for the injury.
- (3) However, the claimant may seek damages for the injury only if the insurer decides that the claimant -
 - (a) was a worker when the injury was sustained; and
 - (b) has sustained an injury."

Arguments

- [4] When Q-COMP's application to dismiss (Matter No. B/2011/6) came on for hearing on 9 May 2011, Mr McLeod, who appeared for that organisation, highlighted most of the elements of the above chronology and stressed the futility of proceeding with Mr Labaj's appeal (Matter No. WC/2010/6) on the basis that what he had sought in his second Application for Workers' Compensation, which led to his appeal, had since been achieved through WorkCover's acceptance of his Claim for Damages.
- [5] In response, Mr Labaj argued that WorkCover's decision to issue him with a Notice of Assessment of Permanent Impairment on 30 October 2009 was invalid because s. 185(2) of the Workers' Compensation Act stated that WorkCover could only give such notice after the worker's degree of permanent impairment from **all** the injuries sustained in a single event had been assessed. He said the Notice of Assessment had been issued before WorkCover assessed his second Application for Workers' Compensation.
- [6] Mr Labaj also repeated his previous complaints to the effect that he was still in pain and that he had not received any medical treatment for the injuries he received in the incident on 5 June 2008, most particularly for the left frozen shoulder. He said he was looking to have his Application for Workers' Compensation of 9 November 2009 assessed by WorkCover (in the apparent belief that acceptance of that claim would provide him with an entitlement to additional workers' compensation and/or medical treatment) notwithstanding that WorkCover had accepted his Claim for Damages.

Conclusions

- [7] Mr Labaj's comments about s. 185(2) of the Workers' Compensation Act are not valid for several reasons. Firstly, at the time WorkCover issued its Notice of Assessment of Permanent Impairment he had only lodged one workers' compensation claim and the Notice of Assessment was in relation to that claim. Secondly, WorkCover's letter of 2 December 2010 notified Mr Labaj it had accepted his unassessed injury as an "injury" within the meaning s. 32 of the Workers' Compensation Act, pursuant to s. 245(3) of that Act. In turn, that latter section references s. 237(1)(a)(ii), which relates to the circumstance where an injured worker has received a Notice of Assessment for a particular injury arising from one event but has not received a Notice of Assessment for another injury arising from the same event.
- [8] Consequently, because Mr Labaj's common law damages claim for his left frozen shoulder has been accepted as an "injury", within the meaning of the Workers' Compensation Act, it will now be up to the common law courts to determine the amount of damages to which he might be entitled. Undoubtedly, the actual nature of the injury to his left shoulder, as well as the degree of permanent impairment, will be the subject of consideration in proceedings arising out of his Claim for Damages. Equally, the other matters which Mr Labaj complains about - such as his continuing pain and the condition of his shoulder because of (alleged) lack of access to medical treatment - will be relevant in the ultimate determination of damages.
- [9] In any event, it seems to me that whatever Mr Labaj was hoping to achieve when he lodged his second Application for Workers' Compensation on 9 November 2009 has been well and truly overtaken by subsequent events, namely:
 - the decision of the Medical Assessment Tribunal (in early 2010) to assess him as having a WRI of 11%; and
 - his decision of 26 May 2009 to lodge a Claim for Damages which included the unassessed injury of "left frozen shoulder"; and
 - WorkCover's decision of 2 December 2010 to accept his claim in relation to the left frozen shoulder as an "injury" within the meaning of s. 32 of the Workers' Compensation Act and to deal with this claim in accordance with Chapter 5 - Damages, of that Act.

- [10] Given all of these developments, including the fact that both Mr Labaj's first and second Applications for Workers' Compensation have now, in effect, moved to the stage where they are being dealt with under Chapter 5 - Damages, of the Workers' Compensation Act, it would be a futile exercise to hear Mr Labaj's appeal (Matter No. WC/2010/6). It is far too late in the day to try to unscramble, or reverse, those events which have occurred since he originally lodged his appeal on 20 January 2010. To put it somewhat bluntly, his appeal (Matter No. WC/2010/6) has become irrelevant.
- [11] In the circumstances, I have decided, pursuant to s. 558 of the Workers' Compensation Act, to dismiss Mr Labaj's appeal (Matter No. WC/2010/6) against the decision of Q-COMP dated 13 January 2010 and to confirm that decision. I also order that Mr Labaj is to pay Q-COMP's costs of, and incidental to, Matter No. B/2011/6.
- [12] The Commission so determines and orders.

A.L. BLOOMFIELD, Deputy President.

Hearing Details:

2010 9 June (*Directions Hearing*)
 15 September (*Directions Hearing*)
 13 December (*Directions Hearing*)
 2011 9 May (*Hearing*)

Appearances:

Mr S. McLeod (Counsel) directly instructed by Q-COMP.
 Mr J. Labaj appearing on his own behalf.
 Released: 12 May 2011