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These slides were delivered during a presentation to the ASIEQ members where it was possible to elaborate on the context and content to the audience.

Questions or comments are welcome to John McDiarmid.

The Regulator will aim to provide a more formal guidance note on s.542 and the out of time issue later in the year

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Applications For Review Lodged Out of Time

1. Case law interpretation of s.542
2. Substantial compliance and/or special circumstances
3. Relevant case law summary
4. Regulator’s upcoming changes to AFRs lodged OOT
5. Principles / guidelines for approaching OOT applications

s.542 Applying for review

(1) An application for review must be made within 3 months after the person applying for review (the ***applicant***) receives written notice of the decision or the failure to make a decision and the reasons for the decision or failure, unless subsection (4) applies.

(2) For subsection (1), the applicant may, within the 3 months mentioned in the subsection, ask the Regulator to allow further time to apply for review.

(3) The Regulator may grant the extension if it is satisfied that special circumstances exist.

There is no express statutory provision in the Act giving WCR the power to consider and/or decide an AFR lodged outside the three month time limit.

The answer to this issue is in the culmination of a number of case authorities dealing with the issue of whether the time limits were “mandatory” or “directory”

Ultimately, the words were held to be directory – WCR has discretion to either accept or reject a non-compliant AFR lodged out of time.

The starting point in the case law is Q-COMP v Baulch (2004) 75 QGIG 978, where the President of the Industrial Court held:

- The equivalent provision of s.542 in the WorkCover Queensland Act 1996 (repealed) was directory and not mandatory.
- “it would be passing strange if compliance with s.491 was intended to be mandatory in circumstances in which there is no power to waive non-compliance”
- “The WorkCover Queensland Act 1996 was beneficial legislation. . . Every consideration of context and justice suggests that just as the limitation at s499(1) is read as directory so also should the limitation period at s.491 be read as directory”
- The limitation period serves a purpose – there must be compliance in substance
- It was the responsibility of the Statutory Review Unit to determine whether there had been **compliance in substance**.

This approach was criticised in a later case, Emerson v Coles Myer [2004] QSC 6 by Dutney J.

"I have great difficulty in accepting that a statutory provision authorising a review of a decision within a specified limited time, without a power to extend time being conferred, authorises an application outside the prescribe time"

The matter has now been settled by the decision of Lyon J of the Supreme Court of Queensland in Cloncurry Shire Council v Workers' Compensation Regulatory Authority and Anor [2006] QSC 362, Justice Lyons, A:

- Her Honour decided the primary question is whether the legislature intended that a failure to comply with the time limit prescribed by s.542(1) would invalidate an application for review, as opposed to whether the provision was mandatory or directory.
- Answered in the negative – her Honour was not satisfied that a decision taken by Q-COMP to review a decision of the self-insurer outside of the time period allowed for in the legislation was invalid.

Thus the issue of whether s.542 is mandatory or directory has been answered by both the Industrial Court of Queensland and Supreme Court of Queensland. **It is directory.**

Substantial Compliance

Initial case law had focused upon whether an applicant had demonstrated substantial compliance. Some guidance from QIRC and IC decision on the issue of substantial compliance is provided by the following decisions :

Australian Meat Holdings Pty Ltd v Q-COMP

President Hall explained the term substantial compliance as “the practical effect of what has been done substantially equates with the practical effect which s.542 seeks to achieve”.

The worker had manifested her intention to exercise the right to seek a review having taken positive steps within the limitation period notwithstanding the application having not been lodged on time due to the actions of the Union official who, at the time, had carriage of the worker’s claim for review.

Q-COMP v Baulch

Substantial compliance was evidenced by the worker having completed an AFR within time, notwithstanding it had not been received by Q-COMP until two days after the expiry of the three month period.

Special Circumstances

The issue of “Special Circumstance” was developed in Q-COMP AND Aqueen Teng Deng (2/2010/56), where President Hall noted:

“Substantial compliance is no longer the sole justification for not insisting upon the three month time limit. It is the effect of the decision of the Supreme Court in Cloncurry Shire Council v Workers’ Compensation Regulatory Authority . . . **that non-compliance with the time limit may be waived on the grounds of substantial compliance or other special circumstances**” (emphasis added).

“the threshold issue which arises when Q-COMP is confronted with an application for Review which is out of time is whether there is a proper basis for waiving or excusing the non-compliance”

“Whilst it must be conceded that “special circumstance” has not formed an element of the *ratio decidendi* of a decided case, and that the content of “special circumstances” is yet to be settled.”

Determining whether substantial compliance or special circumstances exist.

Q-COMP AND Aqueen Teng Deng (2/2010/56)

> "The critical matters will be the circumstances, extent and explanation for the non-compliance"

Carmody v WorkCover Queensland (1998) 157 QGIG 119

- De Jersey P outlined the following relevant considerations in a determination of whether to exercise the Commission's discretion to extend time to lodge an appeal was based upon:
  - extent of the delay
  - explanation for the delay
  - prejudice to the Respondent
  - prejudice to the Applicant
  - Enthusiasm for prosecuting the Appeal; and
  - Merits of the Appeal

Prejudice

Australia Meat Holdings Pty Ltd v Q-COMP [2007] QIC 21

The application for review was lodged approximately three months out of time.

"The prejudice suffered by the self-insurer is no more than that a dormant (and presumably finalised) claim is to be re-opened"

Mohammad Goburdhun AND Q-COMP (WC/2013/200) – OOT for QIRC Appeal

"Prejudice to the worker is obvious. The prejudice to the employer/insurer, given the determination of the substantive appeal would be done on its merits (based upon medical and factual information), the **prejudice would relate to where legislation has stipulated a time period within which to file an appeal, that readily allowing an appeal to proceed when it had been filed after such an inordinate delay from receipt of the review decision, would be to the detriment of the non-party to the appeal**." (emphasis added)

(Some Other) Case Law Considerations

Taylor v Q-COMP (2008) 188 QGIG 298

Commissioner Fisher stated:

"The starting point in any extension of time application is that the time limit prescribed by the legislation must be respected. Time limits represent the view of Parliament that justice requires disputes to be settled as quickly as possible; they provide certainty about prospects of litigation and ensure relevant evidence is not lost. . ."

Q-COMP And Aqueen Teng Deng

- Considerations of the substantive merits of a case are not irrelevant, but should not form part of the primary consideration.
- "I can understand that the apparent strength of an applicant's underlying case is not irrelevant to that assessment. To excuse non-compliance to review an Application for Review which is doomed to failure would be wrong."

Stuart Cooper AND Q-COMP (2/2012/5)

> "The key factors will be the length of the delay, explanation for the delay, the prejudice to the putative appellant if an extension is not granted, the prejudice to the putative respondent if an appeal is permitted after delay and (if capable of expeditious assessment) the prospect of an appeal being successful"

Hansen v Q-COMP (2/2010/16)(no.2)

> "The solicitors had copy of the file from the self-insurer from 8 January 2009. The Application for Review was dated 1 June 2009. . .The fault lay with his solicitors who were his agents. There were no special circumstances. All that has occurred is that the Appellant and his agents have made conscious decisions later regretted."

Gary Morris, Elizabeth Fenton and Rebecca Fenton AND Q-COMP (WC/2011/163)

The solicitor undertook a general review of his files and determined that he had not received a copy of the Review Decision. Upon investigation, a decision had actually been sent by email the solicitor's office on 16 March 2011.

The applicants were forwarded this copy of the review decision on the 6 May 2011 and the solicitor subsequently lodged an AFR on 17 May 2011. (42 days after the three month deadline).

"On the basis of Q-COMP's neutral position in respect of the application and of **concerns relating to "visiting the sins of the Applicant's representative upon the Applicant"** the Commission extends the time in which the appeal is made . . ." (emphasis added)

Jennifer Campbell AND Q-COMP (WC/2011/339)

Ms Campbell engaged Everingham Lawyers who demonstrated a high level of service, competence and had promptly acted upon all previous written correspondence. The employer a second claim decision only to Ms Campbell. Ms Campbell assumed her legal representatives had also received the information and were aware of it and took no action.

Commissioner Brown found that by sending the decision directly to the applicant only:

"I am in not [sic] doubt, given the level of activity and urgency shown by Everingham Lawyers on the matters in question, had Everingham Lawyers been included . . . in that correspondence, the review application would have been attended to by Evertingham Lawyers within the legislative timeframe"

"In all, I am satisfied the circumstances were 'special' with the meaning of s.542 of the act"

Principles and/or Guidelines for Substantial Compliance and Special Circumstances

It is useful to review relevant cases and distil ‘principles’ or ‘guidelines’, however any such set of ‘principles’ or ‘guidelines’ may not be treated as exhaustive as each case is treated on its merits.

The onus rests with the applicant to demonstrate that substantial compliance or special circumstances exist.

The approach is to consider whether the applicant has substantially complied with the three month timeframe and in the absence of substantial compliance, to consider whether there are other special circumstances

Common Reasons Provided For Late Lodgement

Incapacity To Lodge

- It is not sufficient for the applicant to state that they were not able to lodge an application for medical reasons – the applicant needs to supply medical evidence stating why they were not capable of, or competent to lodge an application for review within the three months.
- It will be difficult to establish special circumstances where the applicant displays little enthusiasm for exercising their right of review for a considerable period of time.

Ignorance/Not Aware/Did Not Receive Insurer Decision

- If the applicant states they did not receive the decision or it was a delayed receipt, the Regulator will attempt to find evidence within the claim file or applicants submissions to show any evidence of this. Without evidence to show the applicant **did** receive the decision, it can be difficult not to allow the application given the past case law.
- A bare assertion that an applicant is uneducated or unsophisticated and unaware of their review rights is not likely to be found to be special circumstances
- A bare assertion that English was a second language without evidence is unlikely to be viewed as a special circumstance in isolation

Ignorance/Not Aware/Did Not Receive Insurer Decision

- The Regulator does not consider an applicant's failure to consult a solicitor until the time to lodge a review application is about to expire as a special circumstance. We acknowledge that the applicant, by their actions, has placed their solicitor in a difficult position.
- Surprise at the rejection of a WorkCover claim does not constitute a special circumstance.

Seeking Further Information

- Delays to obtain appointments for doctors to examine or provide a report about an applicant that are speculative in nature (not from the treating doctors/specialists) are not sufficient grounds by themselves to constitute ‘special circumstances’

Legal Representatives

- The mere fact that a delay was caused by the actions or inactions of an applicant’s legal representative is not sufficient to establish special circumstances. Therefore, it is relevant to consider the length of any delay and the nature of the actions taken while the matter was in the solicitor’s hands.

New Information

- Where new medical (or other) information becomes available, the Regulator has an expectation that the individual will take immediate steps to begin or complete the process.

The Regulator's existing Approach to AFRs lodged OOT

Upon late lodgement of the AFR, the Registration Team will contact the applicant and seek reasons for the delay, issuing appropriate deadlines for information.

The applicants reasons for lodging OOT are carefully considered by the team, further information is sought when needed to substantiate applicant's claims.

The team are guided by relevant case law and actively consider QIRC/IC decisions in their decision making

OOT Committee Meeting if required

The team have focused on making this process as timely and efficient as possible. Historically this was a time-consuming exercise, with substantial extensions granted, additional delays without consequence and the end result was to significantly prolong the entire exercise.

A decision letter is sent to the applicant confirming either the review will proceed (and is now deemed to be a valid application) or a letter is sent explaining why the lodgement was deemed out of time.

The Regulator's Future Approach to AFRs lodged OOT

The exercise of discretion has always been held to be of the same importance as a 'normal' review decision. The process is now at a point where it can evolve to incorporate the same procedures associated with the review process (procedural fairness).

The updated process will see the OOT issue integrated into the existing review process. Therefore the Review Officer will invite submissions from both parties on the OOT issue and substantive matter(s), ensure procedural fairness is conducted for both components, allowing each party to receive the submissions that are relevant (and significant, credible, adverse) to the decision.

The process also recognises that the other party may have evidence which needs to be considered as part of the exercising of discretion.

Draft OOT and Review Process

Where an AFR is lodged out of time, a letter will be sent by the Registration Team to both parties confirming receipt of the AFR and noting that it is not yet considered a valid application, and that a Review Officer will be allocated the matter to consider the OOT and substantive matter(s).

Registration will seek submissions on the OOT issue from the applicant. Expectation of applicant to also provide submissions relating to the substantive matter with the AFR.

Review Officer will potentially release to other party and seek submissions on OOT and substantive matter **(together).**

A review decision will be issued covering both the OOT and substantive matters combined.

This is to avoid two decisions being issued (appeal complications) & (delays to review process).

As soon as the RO deems the application OOT, the decision will be prioritised and issued, attempting to minimise any additional work associated for both parties who may still be preparing their substantive submissions. **However, this is not meant to encourage a "backdoor" two stage process.**

Tight time-frames will apply to the request for the submissions on the OOT issue, in accordance with the Review Unit's desire for efficient and timely processing of Reviews.

Privacy Considerations

The Regulator may, on occasion, paraphrase the information to try and ensure some degree of confidentiality, provided that the other party is made aware of the substance of the information and is afforded an appropriate opportunity to respond.

The obligation to afford privacy does not trump the obligation to afford procedural fairness.

The decision of the High Court in Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs, unanimously held that procedural fairness required that the decision maker at least disclose the ‘substance’ of the allegation and provide an opportunity for the affected person to respond, even if ‘public interest’ considerations meant the actual author and exact content of the letter could not be disclosed.

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