SUPREME COURT OF QUEENSLAND

CITATION:	*Workers' Compensation Regulator v Pryszlak* [2018] QCA 157
PARTIES:	**WORKERS' COMPENSATION REGULATOR (appellant)** **v** **JOHN WALTER PRYSZLAK** (respondent)
FILE NO/S:	Appeal No 13525 of 2017 SC No 273 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Rockhampton – [2017] QSC 286
DELIVERED ON:	6 July 2018
DELIVERED AT:	Brisbane
HEARING DATE:	28 May 2018
JUDGES:	Sofronoff P and Fraser and Philippides JJA
ORDER:	**Appeal dismissed.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – JURISDICTIONAL MATTERS – where the respondent claimed to have injured his thumb at work – where the respondent's application for compensation under the *Workers' Compensation and Rehabilitation Act* 2003 was rejected – where an application for a review of such a rejection must be made within three months of receipt of notice of the rejection – where the respondent applied for review out of time – where an extension of time to file an application for review can be granted if "special circumstances" exist justifying the grant of an extension – where the respondent's application for an extension of time was refused – where the respondent successfully sought judicial review of the refusal of an extension of time – where the respondent was, inter alia, denied procedural fairness through the failure of the original decision-maker to show him a letter from his employer maligning his character and casting doubt on whether he had been injured at all – whether the respondent's application raised circumstances that were capable of being regarded as special, such as to warrant the granting of an extension of time under s 542 of the *Workers' Compensation and Rehabilitation Act* 2003 ADMINISTRATIVE LAW – JUDICIAL REVIEW –

GROUNDS OF REVIEW – JURISDICTIONAL MATTERS – where information was provided in support of the respondent's application for an extension of time within which to review the decision of the original decision-maker that was not available to the original decision maker – where, on judicial review, it was found that the appellant failed to consider the merits of the respondent's claim – whether the failure of the appellant to consider the merits of the respondent's claim involved a failure to consider relevant matter which thereby vitiated the appellant's decision

Workers' Compensation and Rehabilitation Act 2003 (Qld), s 5, s 542, s 545

COUNSEL: P J Dunning QC SG, with C Hartigan, for the appellant
R D Green for the respondent

SOLICITORS: Crown Law for the appellant
Grant & Simpson Lawyers for the respondent

[1] **SOFRONOFF P:** The respondent claimed to have injured his thumb at work. He made an application for compensation under the *Workers' Compensation and Rehabilitation Act* 2003 on 16 July 2015. His application was rejected. The Act provides for a right of review of such a rejection, however the application for review must be made within three months of receipt of notice of the rejection. The respondent applied for review well after the three month period had expired. An extension of time to file an application for review can be granted but only if "special circumstances" exist. The respondent sought an extension of time from the Regulator but the decision maker concluded that there were no "special circumstances" and refused to grant an extension. The respondent made an application for judicial review of that decision and McMeekin J set aside the decision and remitted the application to the decision maker for consideration according to law.

[2] This appeal is concerned with meaning of the expression "special circumstances" in s 542(3) of the Act.

[3] Section 108(1) provides that compensation is payable for an injury sustained by a worker.

[4] Pursuant to s 131(1) an application for compensation must be made within six months after the right to compensation arises. The application must be made in an approved form and must be accompanied by a certificate from the treating doctor.[1] The respondent's application conformed to these requirements although he made his claim verbally by telephone on 16 July 2015 and, it seems, the form had been completed by a WorkCover staff member on his behalf.

[5] The date of the occurrence of the injury was stated to be "8 May 2015" at "12:00 AM".

[6] This was not accurate but that is not the respondent's fault because, as appears from WorkCover's contemporaneous notes of conversations with the respondent, on 20 July a representative of WorkCover spoke to the respondent who said he was:

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1 *Workers' Compensation and Rehabilitation Act* 2003 s 132.

> "unsure when it happened, pain accumulated, then started loosing (sic) strength in the hand. Dr's initially thought carpal tunnel, Dr's did xray, found wire in joint near thumb.
>
> Worker does a lot of refabrications of mine parts, lots of wire brushing, does not have one at home or do this time (sic) of thing other than at work, so must have come from (sic)
>
> Worker had been unable to identify when may have had this
>
> …
>
> no identifiable event as to when wire brush has ended up inside hand"

[7] The significance of 8 May as a date appears to have emanated from this:

> "…has not advised [employer] of claim, advised about 8th of May when got first medical certificate, worker to send through …"

[8] In short, the respondent never offered 8 May as the date on which he was injured. It was a date that was entered into a form by a member of WorkCover's staff as a *pro forma*.

[9] In fact, the respondent had begun feeling pain in his hand from early April. As appears from a letter from one of the respondent's treating doctors, Dr Mashaei, who practises in Ayr, the respondent had consulted him about "pain in right wrist on base of right wrist" during the last week of April. It was he who furnished the respondent with a certificate stating that he was unable to work from 20 to 22 April. On 22 April Dr Mashaei wrote to a surgeon at the Townsville Hospital asking him to manage the respondent's case. He said that the respondent appeared to have a foreign body lodged in his hand. He had been feeling pain for the previous three weeks. On 28 April Dr Mashaei was able to report to Townsville Hospital that an X-Ray carried out on 21 April had indeed found a foreign body in that location which was, apparently, responsible for his symptoms. It seems that surgery was scheduled for 7 May but actually carried out on 15 May, when a piece of wire was removed from the respondent's hand. On 7 May a nurse had recorded the result of the X-Ray and that the respondent had complained of pain having been suffered by him for "3/53", meaning, I take it, for the last three weeks.

[10] On 23 July a representative of WorkCover spoke to the respondent's employer's representative, Mr Nucifora. He was unable to "confirm how [the respondent] sustained wire in his hand [and was] unable to confirm this".

[11] Mr Nucifora expressed some doubts about the respondent's bona fides:

> "Employer has concerns with this claim, thinks Worker is just trying to get what he can"

[12] On 24 July, Mr Nucifora wrote a letter to WorkCover expanding upon his doubts. By then he had been sent a copy of the respondent's claim form. He wrote:

> "As per the claim details from John Pryszlak stating that the event occurred on the 8th May 2015. I don't believe this is correct as he has not been at work since 17th April 2015…

> Prior to Monday 20th April 2015 John Pryzlak approached me and advised that he had a sore thumb and asked what he should do. I told him that I was not a doctor and he should go and see one…
>
> On Monday 20th April 2015 he rang in sick stating that he had a sore thumb and he was going to the doctors. He then came into work and handed in a medical certificate covering two working days. He told me that he got a bit of wire stuck in the underside of his thumb, I'm no doctor but when I had a look there was no visible infection or entry point."

[13] In fact, the piece of wire had been seen on an X-Ray examination, had actually been removed on 15 May and had been preserved in a jar for inspection by the doctor who removed it from his body

[14] Mr Nucifora went on:

> "This is not the first time John Pryszlak has tried to claim an injury happened at work… Over the years that John Pryszlak has worked here I have endured many undesirable incidents and have given him many written warnings usually relating to alcohol induced illnesses and abusive phone calls and messages at all hours of the day and night."

[15] On 28 July the respondent called WorkCover to find out how his claim was progressing and was told that "we are just needing the medical information that the authority will allow us to obtain". This was, evidently, a reference to an authority that had been given by the respondent to allow WorkCover to obtain his medical history from treating doctors.

[16] The respondent had been treated initially in Ayr, as the medical records show, and then at Townsville Hospital where the operation was undertaken. According to Mr Nucifora, after leaving his employment, the respondent moved to Rockhampton. His general practitioner in Rockhampton was Dr Donohue and the respondent had first consulted him in June.

[17] On 30 July WorkCover asked Dr M Donohue, whom it believed to be the respondent's relevant treating doctor, to furnish relevant medical information. He responded on 3 August (in barely legible handwriting) that he had found a "foreign object in R hand" and, in answer to a question about how the injury was sustained, wrote "foreign body in hand occurred at work".

[18] The respondent actively prosecuted his claim, calling WorkCover two or three times to check its progress. On 25 August he was told that information had been received from his employer but he was not told what that information was.

[19] On 27 August WorkCover tried unsuccessfully to phone the respondent to tell him that his claim had been rejected. WorkCover then rang Mr Nucifora and told him. Later that day, the respondent phoned WorkCover and was told that his claim had been rejected and that a letter would confirm that decision.

[20] The letter dated 27 August 2015 said, relevantly:

> "In reaching the decision, I have reviewed all the information gathered on the application. In summary, the following information is noted:
>
> WorkCover Queensland received a medical certificate Dr Michael Donohue dated 20 July 2015 on 20 July 2015. Dr Michael Donohue diagnosed you with foreign body right hand, ulna nerve entrapment right hand. Dr Michael Donohue advised you first saw him on 22 June 2015. Dr Michael Donohue was unable to confirm when you had sustained the foreign body to your right hand. You had advised Dr Michael Donohue your date of injury was 8 May 2015.
>
> A statement was obtained from you in relation to your claim on 20 July 2015. You advised you had sustained foreign body in your right hand. You said your doctor initially thought it was carpal tunnel but then had found some wire near your joint near your right thumb. You could not confirm when you received this foreign body injury or how you sustained the foreign body in your hand. You advised you never reported anything to your employer. You advised you first saw a doctor on 8 May 2015.
>
> Your employer provided a statement in relation to your claim on 22 July 2015. Your employer advised they were not able to confirm when or how you sustained foreign body in your right hand. They were aware the date of injury stated on your medical certificate was on the 8 May 2015. They advised WorkCover Queensland you had not been at work since 17 April 2015 and were aware you had now moved.
>
> Dr Michael Donohue advised you have been diagnosed with foreign body right hand and ulna nerve entrapment right hand. Dr Michael Donohue advise you had sustained your foreign body at work and advised the ulna nerve entrapment right hand was caused over a period of time from work.
>
> WorkCover Queensland is unable to confirm how you sustained your foreign body in your right hand. You were not able to confirm how this injury occurred or when it occurred. We also confirm your employer were unable to confirm how or when you had sustained the injury as well. With respect to your ulna nerve entrapment right hand injury we also confirm you have not supplied any specific information on how you have sustained this injury."

[21] There are several problems with the reasons given for that rejection.

[22] First, it appears from the third paragraph quoted above that one of the facts taken into account by the decision maker was that the respondent had "never reported anything to your employer". This was not true. Mr Nucifora had in fact told WorkCover that the respondent had reported his painful hand to him. He would hardly have been asking Mr Nucifora for medical advice; it should have been plain that there was a question whether what the respondent was doing was reporting a workplace injury to his employer.

[23] Second, it appears from the fourth paragraph quoted above that another fact taken into account in rejecting the claim was that the decision maker wrongly thought that the injury had happened on 5 May. That incorrect fact, induced by WorkCover itself it seems, had been communicated to Mr Nucifora. His true statement to WorkCover that the respondent had ceased working for him about two weeks before 5 May would then have cast real doubt about the respondent's bona fides. Unfortunately, the basis for that doubt was an entirely false one.

[24] Third, in the second paragraph quoted above, the decision maker refers to the fact that the respondent had first consulted Dr Donohue on 22 June. He is the only doctor referred to and that fact is probably true. It appears that the decision maker had the impression that the injury was first reported to a doctor on that date. That too was incorrect because the respondent had been under the care of doctors in Ayr for his condition from April to June.

[25] These matters arose naturally from the limited information that WorkCover had obtained, some of it wrong from the start and some of it wrong because the decision maker did not inform the respondent what Mr Nucifora had said about him.

[26] The respondent was described by his solicitor, when writing to WorkCover, as "an unsophisticated individual, … a poor but honest historian and has below average reading and writing skills". A single sentence at the tail end of the letter of rejection advised the respondent, "You have a right to apply for a review of this decision". It did not tell him how he might do that. It informed him that he only had three months within which to apply for a review.

[27] Fortunately for the respondent, he found a solicitor who was able to take on his case and to make an application for an extension of time under s 542 of the Act. That solicitor, Mr Stephen Smith, gathered together the respondent's medical records from Ayr and from Townsville and made formal application as soon as he was able to WorkCover for an extension of time to apply for a review of the rejection of the claim. He enclosed the records he then had, which included the respondent's medical records from his Ayr doctors, records from the Townsville Hospital where the operation had been performed as well as photos of the piece of wire that had been extracted from the respondent's hand. He promised to deliver additional records when he received them. He included a short statement by the respondent and a written submission in support of the application that he himself had prepared.

[28] The respondent's statement said, relevantly:

> "**Ulna Nerve Entrapment – Right Hand**
>
> 1. I have for many years undertaken repetitive tasks at work involving the use of my arms and hands. In particular I am right-hand dominant and have been required to hold smaller items of equipment in fixed positions for extended periods of time to clean those items with grinders and/or wire brush wheels fixed to finishers.
>
> 2. Dr Alaa Alghamry by letter dated 22 January 2016 opined that the ulna nerve injury was consistent with my history of work and that it has developed over a period of time to the point where it became very symptomatic at or about the same time that I sustained a penetration injury to my right hand in April 2015.

3. Dr Alghamry and my general practitioner Dr Michael Donohue have suggested that the symptoms associated with my ulna nerve injury will improve with the passage of time but I still suffer from the symptoms, including in particular numbness affecting my right ring and small fingers and these symptoms do not seem to me to be improving with time.

Penetration Injury to Right Hand

1. I sustained a penetration injury to my right hand from a small piece of wire that had dislodged from a wire brush wheel at work within a period of three weeks up until Friday 17 April 2015 when I reported this injury to my supervisor at work. I am unable to state with certainty the exact date on which I sustained the penetration injury.

2. I attended on my general practitioner at the Ayr Medical Group on Monday 20 April 2015 who referred me for an x-ray that showed the presence of a small piece of wire in my right hand and this small piece of wire was subsequently surgically removed at the Townsville Hospital on 15 May 2015.

3. I had not at any time prior to the 17 April 2015 been involved in any activities outside of work that could possibly have resulted in a small piece of wire penetrating my right hand and lodging near the base of my thumb.

4. Since the 17 April 2015 and notwithstanding the surgery that was undertaken at the Townsville Hospital on 15 May 2015, I have continued to suffer from pain and discomfort and associated weakness in my right hand and this in particular prevents me from exercising any effective grip strength.

5. My lack of grip strength in my dominant right hand has since 17 April 2015 prevented me from undertaking any employment."

[29] The respondent's medical file from his Ayr treating doctors confirmed his statement as did the other medical records from Townsville. These showed, as I have said, that he began to suffer pain in early April – while still working for his employer – and that he consulted a doctor about his hand in late April. An X-Ray quickly revealed the foreign object in his hand and an operation was performed to remove it. There were plausible reasons given for thinking that the injury must have been sustained at work and there were none to think otherwise.

[30] In his written submission Mr Smith summarised the course of events from the onset of symptoms in early April 2015, the respondent's attempts to report the matter to his employer, the discovery of the wire embedded in his hand, its extraction and the reasons why it is likely that the injury happened at work.

[31] He then turned to explaining the reasons for the respondent's delay. He said that his client was ignorant of his entitlements and only lodged a claim when his doctor at Ayr told him that he could do so. When he failed in that claim he did not appreciate that he had a right of review. He was not highly literate and was not a man whose experience made him likely to appreciate how the formal system for workers'

compensation worked. It was only when he set about consulting a solicitor about a claim for damages that he obtained proper advice, ultimately from Mr Smith.

[32] Mr Smith summarised the special circumstances that would justify the grant of an extension of time to seek a review of the decision rejecting his claim as follows:

> "2.3 Special circumstances do exist to support the Worker's application for an extension of time to apply for his review and these special circumstances include the following:-
>
> 2.3.1 The Worker did not appreciate at the time when he provided the WorkCover authority at the request of the WorkCover Claims Representative on 24 July 2015 that the authority would only be utilised to obtain the records of Yeppoon Medical Practice.
>
> 2.3.2 The Worker did not appreciate that the decision to reject his WorkCover claim was made without reference to the records of the Ayr Medical Group and the Townsville Hospital.
>
> 2.3.3 In relation to the penetration injury the Worker did not appreciate that he should have provided additional information and clarification confirming the fact that the injury could only have realistically occurred during the course of his employment, notwithstanding his acknowledgement that he was unable to explain the exact circumstances or identify the exact date on which he sustained the penetration injury.
>
> 2.3.4 The Worker is an unsophisticated individual who has provided an honest and open account of the circumstances in which he sustained his accident-related injuries but he is not familiar with WorkCover claims and did not seek any professional advice or assistance within the three month review period.
>
> 2.3.5 There will be no prejudice suffered to the Employer or WorkCover Queensland if the time for application for the review is extended until the date on which the review application is received."

[33] The Regulator, by its delegate, responded on 3 March 2017 and pointed out that it was necessary for the Regulator to be satisfied that special circumstances existed before the application for a review could be considered out of time. The email stated:

> "Therefore, to determine whether your application for review can proceed, we must consider:
>
> - the reason for the delay in lodging the application for review and details of steps taken prior to lodgement of the application
> - any special circumstances that may exist to allow the application for review to proceed

> - any submissions relating to the merits of your application.
>
> To assist us in determining these matters, I request that you provide the following information in writing:
>
> - when you received the WorkCover Queensland decision
> - the reason or cause for the delay
> - details of any steps undertaken to progress your client's application prior to lodgement of the application
> - any other reason why you contend that the application for review should proceed."

[34] The Regulator's request for "any submissions relating to the merits of your application" is curious because on this appeal the Regulator now submits that the merits are irrelevant. That submission should be rejected for the reasons I give below.

[35] Further, the separation of the requests for information about "the reason for the delay" and the "merits of your application" from the request for "any special circumstances" suggests some confusion in the mind of the delegate about whether the three subjects were distinct from each other.

[36] Mr Smith replied promptly on 8 March. He repeated that his client had felt that he had no choice but to accept the rejection of his claim and did not understand that he had an entitlement to seek a review until he instructed a solicitor to make a claim for damages. He pointed out that there would be no prejudice to WorkCover by reason of the delay but that, on the other hand, his client would suffer prejudice and that the injury was well documented, as indeed it was.

[37] By letter dated 22 March 2017 the Regulator's delegate communicated her decision to refuse the request for an extension of time.

[38] Relevantly, she said:

> "In considering whether or not special circumstances exist to grant an extension, the Office of Industrial Relations will consider the reasons for the delay, including any steps taken to progress the review and the basis for those steps, the length of the delay in applying for review and the merits of the review.
>
> Relevant to my decision is that:
>
> - Your clients' application for compensation was **rejected** by **WorkCover** on **27 August 2015.**
> - You confirm your client received the written reasons for decision from **WorkCover shortly after 27 August 2015.** The reasons for decision state:
>
>> You have the right to apply for a review of this decision. For more information on the review process, please contact the Workers' Compensation Regulator on 1300 739 021.

> Please note that any application for review must be made within three months of receiving this letter.
>
> - You advised that Mr John Pryszlak felt he had no option but to accept the WorkCover decision and did not seek any professional advice about the decision or his claim.
> - You mentioned that Mr Pryszlak had made no steps to progress his application prior to 6 December 2016 and did not understand the implications of the decision and the subsequent review rights.
> - You advised that Mr Pryszlak did not realise WorkCover would not get any medical records from Ayr Medical practice or Townsville Hospital or that he needed to provide better information about the nature and cause of his injury.
>
> Mr Pryszlak acknowledges he received the letter from WorkCover rejecting his claim and acknowledges that the letter contained information about the review rights and that an application for review would have to be lodged within 3 months of receipt of the letter.
>
> Whilst I acknowledge Mr Pryszlak did not understand the implications of the WorkCover decision it is clear in the WorkCover file that the legislative timeframe to review the decision was advised to him both in writing and verbally on the 27 August 2015 by WorkCover.
>
> The medical records you have provided do not demonstrate that your client was suffering a medical incapacity which prevented him from lodging an application for review, nor has it been established that there are special circumstances which would warrant an extension of the timeframe to apply for review.
>
> **Summary**
>
> You have advised that Mr Pryszlak made no steps to progress his application for review within the three month timeframe. I am not satisfied that you have provided any evidence which details how your client attempted to comply with or utilise the legislative timeframe. In addition, the evidence supplied does not support either special circumstances or a medical incapacity preventing your client from attempting to comply with the timeframe.
>
> The review has been lodged approximately 15 months beyond the legislative timeframe to apply and granted you have listed your special circumstances warranting this delay, I do not consider it appropriate to waive the legislative timeframe to lodge your review application."

[39] The expression "special circumstances" conditions the exercise of discretions conferred by the Act in seven instances.

[40] Section 71(2)(a) provides that, notwithstanding that an applicant for a licence as a self-insurer who is a single employer has failed to satisfy one of the statutory pre-conditions for such a licence, the Regulator may issue a licence if satisfied that "special circumstances justify" its issue. Expressly without limiting the generality of that expression, s 71(3) specifies examples of special circumstances that may justify the issue of a licence.

[41] Section 72 makes the same provision for an applicant for a licence who is a group employer.

[42] Section 131(4) requires an insurer to waive the time requirement for lodging an application for compensation if satisfied that "special circumstances of a medical nature, decided by a medical tribunal" exist. Otherwise, s 131(5) confers a general discretion upon the insurer to waive the time limitation if satisfied that the failure to lodge the application in time was due to mistake, absence from the State or "a reasonable cause".

[43] Section 214 provides for an increase in the payment for medical treatment above that which the insurer accepts normally as reasonable. An applicant must specify the "special circumstances and the reasons the cost should be increased" and the insurer may approve the increase if the insurer "accepts that the increase is justified".

[44] Section 421(4) provides that the examination of a witness in a proceeding under that provision is to be carried out in public unless the court before which the examination is being held considers that it is desirable to hold the examination in private "because of special reasons".

[45] Section 522 requires that applications for a warrant under s 521, which requires such applications to be made by sworn application, may be made electronically or verbally by phone, radio or videoconferencing if the authorised person reasonably considers it necessary because of urgent circumstances or "other special circumstances" which include the authorised person's remote location.

[46] Section 542, with which this appeal is concerned, is the last of these instances.

[47] It can be seen that occasions for the exercise a discretion, to which the existence of "special circumstances" may be relevant, vary from the conduct of court proceedings to a consideration of late applications for compensation or for review of decisions. In only one of these instances, namely in s 131(4), is the scope of the expression expressly limited. In that case, a specialist medical tribunal will decide whether "special circumstances of a medical nature" exist.

[48] In all other instances, including s 542, the scope of the expression is not expressly confined and, accordingly, whether any circumstance that arises for consideration is "special" or not will depend entirely upon the purpose for which the discretion is to be exercised.

[49] Section 5 of the Act describes the scheme of the Act in terms which s 4 states are the main objects of the Act. Section 5(2) provides that some of the "main provisions of the scheme" are those that provide for compensation.

[50] Section 5(4) states that it is intended that the scheme should "ensure that injured workers are treated fairly by insurers". The term "fairly" will mean different things

in different contexts but, in the context of an administrative decision maker who is obliged to perform a statutory duty to consider an application, s 5(4) connotes that the decision will be made fairly according to law. Like any provision for an extension of time, the purpose of s 542 is to strike a balance between an applicant's entitlement and the benefits of finality. The power to extend time exists to prevent injustice in a particular case that might be caused by the enforcement of a general time limit. It is an instance of the general policy of the law to ensure that mandatory statutory provisions are not applied blindly so as to cause injustice in an individual case.

[51] Consequently, the meaning of "special circumstances" will be informed by its purpose but also by other provisions that depend upon it. In the case of s 542 the large factor will always be the explanation for the failure to make the application within time. However, the merits of the claim for compensation are also obviously relevant for if a claim has little merit there can hardly be any likely injustice in refusing an extension of time. On the other hand, while an application for an extension of time is not the occasion for a merits review, if an evidently meritorious claim exists, then that will bear upon the question whether other relevant circumstances taken together with the merits would constitute special circumstances. It is not possible nor desirable, by some word formula, to do that which the legislature has declined to do in s 542, but which it did in s 131, namely to define the scope of the expression.

[52] In this case the respondent's application did raise circumstances that were capable of being regarded as special.

[53] Prominent among these is that he was denied procedural fairness by not being shown his employer's letter, a letter which not only maligned his character but which also cast unjustified doubt about whether he had been injured at all. As appears from paragraph [12] of this judgment, Mr Nucifora was led to believe the injury was sustained on a date that was incorrect. The history given by the respondent, confirmed in all respects by the medical records, is consistent with his having suffered a real injury and that it was sustained at work on a date in early April.

[54] The failure to give the respondent an opportunity to respond to Mr Nucifora's allegations worked a real injustice in this case because it resulted in the decision maker failing to appreciate what she would have appreciated if she had given the respondent that opportunity. She would have been informed that both Mr Nucifora's theory that the injury never happened and his assertion that the injury had not been reported were incorrect. She would have been informed that she did not have the relevant medical records that the respondent had authorised WorkCover to obtain. Those are matters that, it is evident, were material to the decision whether there were special circumstances.

[55] The truth of the matter was apparent from Mr Smith's submissions and the material that he had assembled and had given to the Regulator. A consideration of the evidence that he submitted showed that it is more probable than not that the respondent had suffered an injury, that he had sustained this injury at work, that Mr Nucifora's deductions to the contrary were misconceived, that the respondent had reported his injury to his superiors and that any assertion to the contrary was not correct. The fact of the injury had actually been established beyond any doubt, to the point that

the wire lodged in his hand, which Mr Nucifora told WorkCover he doubted was even there, could be inspected in a photograph. None of this had been considered by the decision maker because of WorkCover's failure to afford the respondent procedural fairness.

[56] A failure to afford procedural fairness means that the decision sought to be reviewed is not a decision at all. That the decision maker, whose decision is the subject of the application for an extension of time, has not actually performed the statutory duty imposed upon her is, undoubtedly, a special circumstance within the meaning of s 542 because one of the objects of the Act is that workers should be treated fairly. That would be so even if s 545(1A)(c) was not in the Act. However ss 545(1) and (1A) depend upon s 542 and affect its meaning. They provide:

> "(1) The Regulator must, within 25 business days after receiving the application, review the decision and decide (the *review decision*) to—
>
> (a) confirm the decision; or
>
> (b) vary the decision; or
>
> (c) set aside the decision and substitute another decision; or
>
> (d) set aside the decision and return the matter to the decision-maker with the directions the Regulator considers appropriate.
>
> (1A) The Regulator may act under subsection (1)(d) only if the Regulator—
>
> (a) has considered information that was not available to, or known by, the decision-maker when the decision-maker made its decision; or
>
> (b) believes on reasonable grounds that the decision-maker did not have satisfactory evidence or information to make its decision; or
>
> (c) believes on reasonable grounds that the decision maker has not observed natural justice in making its decision."

[57] Section 545(1A)(c) assumes that a breach of the rules of natural justice, at least a breach that had an operative effect as in this case, would justify a decision on review to set aside the original decision refusing an extension of time.

[58] The finding of the Regulator's delegate that no special circumstances existed failed to take into account that some of the errors that led to the decision had been induced by the decision maker's own failure to afford natural justice. This failure conflicts with one of the primary objects of the Act, which is to treat workers who come within its terms fairly.

[59] There are other problems with the decision to refuse an extension of time.

[60] Mr Smith furnished the Regulator's delegate with voluminous and unimpeachable information about the circumstances of the occurrence of the injury and the fact of the injury. As s 545(1A)(a) and (b) make plain, information might be furnished to the Regulator upon a review that is relevant to the decision under review but which

was not available to, or not known by, the decision maker. That information might well demonstrate the special circumstances required. It may or may not matter that the information was available to the applicant but not given to the decision maker. In a case in which the applicant for compensation did not know, but believed, that the decision maker had all the relevant information and not just a two sentence opinion from the most recent treating doctor, the early availability of the information should not matter. That information, now provided, was highly material to the review because it bore upon the injustice of the operation of the time limit but the reasons for the decision under consideration in this appeal show no sign that any of that material was considered.

[61] As McMeekin J said, the decision maker failed to consider the merits of the claim. The injury suffered by the worker lies at the centre of any application for compensation or for an extension of time to make such a claim. As s 5 of the Act makes plain, one of the purposes of the Act is to give compensation to injured workers. While the entitlement of an employer to the finality ensured by time limits is a relevant factor, it is also a factor that a worker has in fact been injured and has not had the claim fairly understood or considered or, as in this case, ever considered as a matter of law. The Regulator correctly recognises the relevance of merit because a specific inquiry was made about that subject in this case and the Regulator's published guidelines, given to Mr Smith, also say so. That approach is correct and the submissions to the contrary made on the Regulator's behalf in this appeal are incorrect. I respectfully agree with McMeekin J that the failure to consider the merits of the respondent's claim involved a failure to consider a relevant matter and also vitiated the decision.

[62] There is also the fact that the delegate of the Regulator found that the respondent had not demonstrated that he was suffering from a medical incapacity that prevented him from lodging his application for review on time. No doubt such incapacity, if it existed, would have been a relevant consideration to consider. But in a case in which the applicant's case did not involve such a factor, its non-existence is an irrelevant consideration.

[63] For these reasons I would dismiss the appeal.

[64] **FRASER JA:** I agree with the reasons for judgment of Sofronoff P and the order proposed by his Honour.

[65] **PHILIPPIDES JA:** I agree with the reasons of Sofronoff P and with the order proposed by his Honour.