SUPREME COURT OF QUEENSLAND

CITATION:	*Capuano v Q-Comp* [2004] QSC 333
PARTIES:	**SHARON CAPUANO** (applicant) v **Q-COMP** (respondent)
FILE NO/S:	BS6311 of 2004
DIVISION:	Trial Division
PROCEEDING:	Application for statutory order of review
DELIVERED ON:	23 September 2004
DELIVERED AT:	Brisbane
HEARING DATE:	10 September 2004
JUDGE:	Philippides J
ORDER:	**The decision of the respondent of 1 June 2004 to return the WorkCover file to WorkCover for further determination be set aside**
CATCHWORDS:	ADMINISTRATIVE LAW – APPEALS FROM ADMINISTRATIVE AUTHORITIES – where decision made by the respondent to set aside the decision of WorkCover Queensland rejecting an application for compensation and to return the WorkCover file to it for further determination – whether s 545 of the Act authorised the respondent's decision to return the WorkCover file to WorkCover for its further consideration – whether the respondent failed to exercise its jurisdiction under s 545 to substitute its own decision to allow or reject the application for compensation for that of WorkCover *Workers' Compensation and Rehabilitation Act* 2003 (Qld), s 32, s 108, s 132, s 134, s 539, s 540, s 541, s 543, s 544, s 545, s 546, s 558, s 561, s 562, s 570
COUNSEL:	D C Rangiah for the applicant M D Hinson SC for the respondent
SOLICITORS:	Maurice Blackburn Cashman Lawyers for the applicant Crown Solicitor for the respondent

PHILIPPIDES J:

The application for statutory review

[1] The applicant, Sharon Capuano, sought a review before the respondent, Q-Comp, of a decision by WorkCover Queensland ("WorkCover") to reject her claim for compensation under the *Workers' Compensation and Rehabilitation Act* 2003 ("the Act"), on the basis that no "personal injury" had been sustained. The respondent's decision on review, made under s 545(1)(c) of the Act, was to set aside the WorkCover decision and to return the applicant's file to WorkCover Queensland for further determination.

[2] The application now before the Court is for statutory review of the decision of the respondent to return the file to WorkCover for further determination. The grounds of review are twofold. Firstly, it is contended that s 545(1)(c) of the Act did not authorise the decision to remit the matter to WorkCover. Secondly it is argued that the respondent, in so doing, failed to exercise its jurisdiction, because having set aside the decision of WorkCover to reject the application for compensation, s 545(1)(c) of the Act required that the respondent substitute its own decision for that decision.

Background Facts

[3] Section 108 of the Act provides for compensation to be payable for an injury sustained by a worker. The applicant made an application for compensation pursuant to s 132 of the Act to WorkCover, the relevant insurer, on 30 September 2003, the application describing the injury suffered as "anxiety, stress, emotionally distraught and sleep deprivation". Section 134(1) of the Act provides that a claimant's application for compensation must be allowed or rejected in the first instance by the insurer. It therefore required WorkCover to make a decision about the application for compensation in terms of either allowing or rejecting the application. On 4 February 2004, WorkCover made a decision to reject the application, stating as its grounds for so doing, that the applicant had not sustained an "injury" within the meaning of that expression in s 32 of the Act, in that no "personal injury" had been sustained. As a result it was not considered necessary to determine other issues raised by s 32, for example, whether or not employment was a significant contributing factor (s 32(1)), nor the exclusionary provisions of s 32(5) of the Act.

[4] On 6 May 2004, the applicant applied pursuant to s 541 of the Act to the respondent for review of WorkCover's decision to reject the applicant's claim, the ground of review being that the decision that no personal injury had been suffered was not sustainable. By letter dated 1 June 2004, the respondent advised the applicant of its decision made under s 545(1)(c) of the Act to set aside the decision made by WorkCover stating as follows:

> "I refer to your application to review lodged on 6 May 2004 in relation to the rejection of the … claim for workers' compensation. ... I wish to advise that my decision is to set aside the decision by WorkCover. Therefore my decision is that Ms Capuano is suffering from a personal injury.

> WorkCover denied Ms Capuano's application on the basis that she had not sustained a personal injury as defined in section 32 of the Act. WorkCover has not made any findings in relation to the remaining provisions of section 32 in establishing whether work is a significant contributing factor and if the exclusionary provisions of section 32(5) apply. I have made no findings in relation to these provisions and the basis of my review is to determine whether Ms Capuano has suffered a personal injury.
> …
> WorkCover made the determination to deny Ms Capuno's application for Compensation on the basis that Ms Capuano did not satisfy section 32 in having sustained a personal injury. As WorkCover determined Ms Capuano did not sustain a personal injury WorkCover was not obliged to make a determination as to whether work had been a significant contributing factor or whether the exclusionary provisions of section 32(5) applied.
> …
> In the circumstances, I accept that on the balance of probabilities that Ms Capuano has suffered a personal injury as defined in section 32 of the Act.
>
> As stated above WorkCover has not made a determination on all of the provisions of section 32 and I now return the file to WorkCover to determine if work is a significant contributing factor to Ms Capuano's injury and if the exclusionary provisions of section 32(5) apply."

[5] It can be seen that, by the letter of 1 June 2004, the respondent made:

(a) a decision to set aside the decision of WorkCover;
(b) a decision that the applicant is suffering a personal injury;
(c) a decision to return the file to WorkCover for it to determine if work was a significant contributing factor to Ms Capuano's injury and if the exclusionary provisions of s 32(5) apply, which were matters on which it had made no determination.

It is the last of these decisions that is the subject of the application for statutory review.

[6] On 10 June 2004, the applicant's solicitors wrote to the respondent requesting that it substitute its own decision to accept or reject the application, rather than refer the matter back to WorkCover. By letter dated 9 July 2004, the respondent refused to take that course, stating:

> "As the Review Unit is not considered to be the primary decision-maker the matter was referred to the insurer to make a new decision by considering all of the provisions of s 32 of the Act. The insurer appears to have collected evidence in this regard and should now turn their mind to it."

The review and appeal provisions of the Act

[7] It is convenient to refer to the provisions dealing with the process of review contained in Part 2 of Chapter 13 of the Act and the appeal process contained in Part 3 of Chapter 13. Section 539 of the Act specifies that the object of Part 2 "is to provide a non-adversarial system of prompt resolution of disputes". Part 2 provides

for a review by "the Authority" of a WorkCover decision or of a failure by WorkCover to make a decision. The Authority is the respondent, Q-Comp.

[8] Section 540 of the Act enumerates the types of "decisions" by WorkCover to which Part 2 applies and the circumstances in which Part 2 applies to "a failure to make a decision". Relevantly, the process of review by the respondent under Part 2 applies to a decision by WorkCover to allow or reject an application for compensation under Chapter 3 (s 540(1)(a)(viii)). It was not in dispute that the decision by WorkCover of 4 February 2004 was "a decision to reject an application for compensation under Chapter 3" for the purposes of s 540(1)(a)(viii).

[9] Section 543 of the Act allows for the applicant to appear or be represented on a review before the Authority "with a view to achieving a resolution of the matter" and permits the applicant to "make representations to the Authority".

[10] Section 544(1) of the Act empowers the Authority on a review to require the decision-maker to give the Authority all relevant information and documents in relation to the application that is in the decision-maker's possession and any information asked for by the Authority. The Authority may also require the decision-maker to provide the Authority with any further information the Authority needs to decide the matter.

[11] Section 545 of the Act specifies the obligations and powers of the Authority on a review:

> "**Review of decision or failure to make a decision**
>
> (1) The Authority must, within 35 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.
>
> (2) If an application is about the failure to make a decision, the Authority may –
>
> (a) make the decision (also a **"review decision"**) after considering the information before it; or
> (b) return the matter to the decision-maker with the direction the Authority considers appropriate.
>
> ….
>
> (5) If the Authority acts under subsection (1)(b) or (c) or (2)(a), the decision is taken for this Act, other than this part, to be the decision of the decision-maker."

[12] An appeal lies to an industrial magistrate in respect of a review decision concerning, inter alia, a s 540(1)(a)(viii) matter (see s 546(1) of the Act) and in respect of the failure by the Authority to make a decision (s 546(2) of the Act). The powers of the industrial magistrate are set out in s 558 of the Act which provides:

> "(1) In deciding an appeal, the industrial magistrate may –

(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 respondent with the directions the magistrate considers appropriate.

(2) If the magistrate acts under subsection (1)(b) or (c), the decision is taken for this Act, other than this part, to be the decision of the insurer."

[13] An appeal also lies, pursuant to s 561 of the Act from the decision of the industrial magistrate, to the Industrial Court, whose powers are specified in s 562, which provides:

"(1) In deciding an appeal, the Industrial Court may –

(a) confirm the decision; or
(b) vary the decision; or
(c) set aside the decision and substitute another decision.

(2) If the court acts under subsection (1)(b) or (c), the decision is taken for this Act, other than this part, to be the decision of the insurer."

The applicant's submissions

[14] The applicant submitted that the respondent erred in law in two respects. Firstly, it was contended that the respondent's decision to return the file to WorkCover for it to determine the additional issues of whether work was a significant contributing factor to the applicant's injury and whether the exclusionary provisions of s 32(5) of the Act applied was not authorised by the Act. The applicant contended that s 545(1) of the Act, which was the relevant source of the respondent's power, given that the review was of "a decision", did not confer on the respondent the power, upon setting aside the WorkCover decision, to return the matter to the decision-maker for further consideration. In this regard, the applicant argued that s 545(1) should be contrasted with s 545(2) of the Act, which dealt with an application to review a failure by WorkCover to make a decision and which expressly provides for such a course in s 545(2)(b) of the Act.

[15] Secondly, it was argued that the respondent failed to exercise its jurisdiction or statutory function under s 545(1) of the Act by failing to make the decision under review for itself. In support of that submission the applicant argued that the relevant "decision" which the respondent was required to review was the WorkCover decision to reject the application for compensation, not the more limited decision as to whether a personal injury had been sustained, which formed the basis for the decision to reject the application. It was submitted that the respondent's function on a review was analogous to that of a merits based review tribunal and was not restricted to deciding whether the original decision-maker had erred in the manner in which it reached its decision, but extended to making a determination

itself as to the decision under review.[1] The applicant argued that the respondent failed to appreciate that it was required to stand in the shoes of the decision-maker, which was said to be implicit in s 545(5) of the Act. The applicant pointed to provisions such as s 543 and s 544(1) of the Act as supporting the proposition that the Authority was required to make the decision under review for itself, since they pointed to the Authority not being bound to consider only the material before the primary decision-maker.

The respondent's submissions

[16] On behalf of the respondent it was submitted that the power to "substitute another decision" upon setting aside the WorkCover decision was not confined to making a decision to allow or reject the application but extended to cover the combination of decisions made by the respondent in the present case. Indeed, it was contended that s 545(1)(c) did not authorise the respondent to go beyond the extent of the exercise by WorkCover of its decision-making power. The respondent's function it was submitted was not to be a primary decision-maker of applications for compensation; such applications were to be allowed or rejected "in the first instance" by the insurer. Section 545(1)(c), it was argued, was to be construed as meaning that if a decision were set aside, a substitute decision was to be made "to the extent that WorkCover had made a decision on the application".

[17] It was submitted that as no decision had been made by WorkCover as to whether, if personal injury had been sustained, it arose in the circumstances described by s 32(1) or s 32(5), there was no decision about those matters which could have been confirmed, varied or set aside by the respondent under s 545(1). It was thus argued that, in the present case, since the decision was made on a particular basis, which basis was alleged to be wrong in the grounds of review, and which the respondent decided was wrong, the respondent was, under s 545(1)(c):

> (a) authorised to set aside the decision to reject the application for compensation, (based on an erroneous conclusion that no personal injury was sustained);
> (b) authorised to substitute a decision (which stated the correct conclusion that personal injury was sustained);
> (c) not authorised to consider and decide for itself matters which WorkCover had not considered and decided (the s 32(1) and s 32(5) matters).

[18] The respondent submitted that no difficulty arose from the fact that there is no express power to return a matter in s 545(1) of the Act. It was said that such a power was implied in s 545(1)(c). A further submission was made that, where a decision was made to set aside a WorkCover decision to reject an application, that application remained undecided and WorkCover was required to make a fresh decision. The respondent's "decision" to return the file to WorkCover was thus merely a procedural direction giving effect to that legal position.

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[1] In this regard reference was made to *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 589; *Fletcher v FCT* (1988) 19 FCR 442 at 453; *The Hospital Benefit Fund of Western Australia Inc v Minister for Health, Housing and Community Services* (1992) 39 FCR 325 at 234; *Singh v Migration Review Tribunal* [2004] FCA 1079 at [18].

Was the respondent empowered under s 545(1) of the Act to return the file to WorkCover for further consideration?

[19] I am unable to accept the respondent's submissions concerning the ambit of its powers under that section of the Act. I consider that s 545(1)(c) of the Act does not empower the respondent to take the course it did in returning the file to WorkCover for further consideration. There are a number of matters which militate against the interpretation of s 343(1)(c) of the Act contended for by the respondent.

[20] Firstly, the respondent's powers of review under s 545(1) arise where there has been "a decision" by WorkCover falling within s 540 of the Act. In the present case, the relevant "decision" is that described in s 540(1)(a)(viii) as a decision to reject an application for compensation. It is that "decision" which is the subject of review and that "decision" which may be confirmed, varied or set aside and in respect of which another decision is to be substituted. The flaw in the respondent's argument is that while it is accepted that the "decision" to be reviewed under s 545(1) in the present case is the decision to allow or reject an application, it is argued that "the substitute decision" to be made, upon the setting aside of the WorkCover decision, is not confined to that decision. Rather it is said that the words "substitute another decision" extend to include simply a decision, as was the case here, which merely concerns the basis of the ultimate WorkCover decision under review. Such an approach results in the word "decision" having different meanings and is contrary to well established principles of statutory interpretation. It is clear that the words "substitute another decision" are to be interpreted so that the substituted decision concerns the same decision as that under review - in this case, the decision under s 540(1)(a)(viii) of the Act to reject the application for compensation.

[21] There is another difficulty with the interpretation of s 545(1)(c) urged by the respondent. It is that there is simply no basis arising from the terms of s 545 itself or any other provisions of the Act for the proposition that s 545(1)(c) is to be construed as meaning that where a WorkCover decision is set aside, the ambit of the Authority's substitute decision is limited by the extent and nature of the issues determined by WorkCover in reaching its decision. There is nothing in the Act which precludes the respondent in this case from determining issues that had not been determined by WorkCover in order to make its substitute decision to allow or reject an application. Indeed, the provisions of s 545 of the Act are against such an approach: s 545(2)(a) envisages that the respondent may make its own decision (that is, a decision on the merits) where WorkCover has failed to make a decision at all. In those circumstances, it is difficult to see why the respondent does not have a similar power to decide the matter on the merits under s 545(1)(c), where WorkCover has made a decision to accept or reject an application, but has done so on a limited basis.

[22] The construction of s 545(1)(c) urged by the applicant, that the Authority is required to make the decision under review for itself once it sets aside the WorkCover decision, is supported by provisions such as s 544(1) which permits the respondent to seek further information, s 543 which permits the applicant a very broad right of appearance and s 545(5) which provides for the respondent's decision under s 545(1)(c) to be taken for the purposes of the Act to be the decision of WorkCover. Those provisions also show that there can be no practical impediment to the respondent conducting a full merits review of the decision set aside. Indeed, in the present case, the entire WorkCover file was provided to the respondent in

accordance with s 544 and the respondent's counsel conceded that there was no practical difficulty preventing the respondent from reaching its own decision to allow or reject the application. The interpretation contended for by the applicant also more accords with the stated objects of that part of the Act concerning the review process of ensuring a "prompt resolution of disputes".

[23] There is a further matter which runs against the construction urged by the respondent. That concerns the respondent's contention that the power of the respondent under s 545(1)(c) to return a matter to the primary decision-maker is implied in that section. The authorities indicate that the power to remit or return a matter is not readily to be inferred and that if such a power is intended to be conferred, one would ordinarily expect the power to be given in express terms.[2] That is even more so the case here, where the power to return a matter to a decision-maker for consideration is expressly conferred elsewhere in the legislation in s 545(2), s 558 and s 561 of the Act (see also s 570). In this regard, s 545(2) of the Act, which expressly confers on the Authority a power to return a matter to WorkCover for its consideration where WorkCover has failed to make a decision, is of particular relevance. The failure to similarly provide an express power in s 545(1) must be seen as deliberate.

[24] In the circumstances, I find that the respondent had no power under s 545(1)(c) of the Act to make a decision returning the file to WorkCover for determination of the specified issues. I order that the decision of the respondent of 1 June 2004 to return the file to WorkCover for further determination be set aside.

[25] I shall hear submissions as to costs.

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[2] See *R v Judge Dodds* [1990] 2 Qd R 80 and the authorities referred to therein.