SUPREME COURT OF QUEENSLAND

CITATION:	*Deng v Q-Comp* [2011] QSC 191
PARTIES:	**AQUEEN TENG DENG** (applicant) **v** **Q-COMP** (respondent)
FILE NO/S:	4258 of 2011
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 June 2011
DELIVERED AT:	Brisbane
HEARING DATE:	17 June 2011
JUDGE:	Ann Lyons J
ORDER:	**1. Pursuant to s 12 of the *Judicial Review Act* 1991 (Qld) the application for a statutory order of review filed 19 May 2011 is dismissed**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION – QUEENSLAND – where the respondent, Q-Comp, applies pursuant to s 12 of the *Judicial Review Act* 1991 (Qld) to dismiss the applicant's application for a statutory order of review – where the applicant alleges he was injured at work and made an application for compensation against his employer – where the self insurer rejected the application – where the applicant sought a review of that decision pursuant to s 542 of the *Workers Compensation and Rehabilitation Act* 2003 (Qld) approximately two and a half years outside the time limit – where Q-Comp declined to conduct a review – where the applicant appealed to the Industrial Magistrate – where Q-Comp's decision was set aside and directions made – where Q-Comp appealed that decision in the Industrial Court – where the decision to set aside the decision of Q-Comp was upheld – where the matter was remitted back to Q-Comp – where Q-Comp refused the application – where the applicant then brought an application in the Supreme Court for a statutory order of review – whether the application to this Court should be dismissed – whether adequate provision is made by a law under which the applicant is entitled to seek a review. *Industrial Relations Act* 1999, s 265(1)(d)

Judicial Review Act 1991 (Qld), s 12, s 542
Workers' Compensation and Rehabilitation Act 2003 (Qld), s 548, s 549

Nelson v Q-Comp [2004] QSC 167
Stubberfield v Webster [1996] 2 Qd R 211
Turner v Valuers' Registration Committee of Queensland [2001] 2 Qd R 100

COUNSEL: K F Boulton for the applicant/respondent
RN Traves SC with P B O'Neill for the respondent/applicant

SOLICITORS: Hunter Solicitors Pty Ltd for the applicant/respondent
Q-Comp for the respondent/applicant

[1] On 19 May 2011 the applicant Aqueen Teng Deng (Mr Deng) made an application to this Court for a statutory order of review. That application was to review an undated decision of the respondent Q-Comp which was received on 28 April 2011. Pursuant to that decision Q-Comp declined to review a decision by the self insurer, Australian Meat Holdings Pty Ltd (AMH), to dismiss the applicant's application for statutory workers' compensation benefits dated 31 January 2007.

[2] The basis of that application is that there had been a breach of natural justice in relation to the making of that decision. In particular it was alleged that Q-Comp failed to give Mr Deng a reasonable opportunity to present evidence and be heard. It was also alleged that the decision maker had rejected the relevance of the fact that AMH had denied natural justice to Mr Deng on the basis that, after he became aware that his account was disputed by two other employees, he failed to take any steps to investigate his review rights. It is argued that by so finding the decision maker erred in law. It is also alleged that the decision involved a number of other errors of law including an allegation that the decision maker erred by confining his consideration to the circumstances, extent and explanation of the non compliance and by so doing improperly restricted the scope of the discretion he was exercising. It is also alleged that the decision was based on a number of factual errors.

[3] On 8 June 2011 Q-Comp filed an application pursuant to s 12 of the *Judicial Review Act* 1991 (Qld) (the JR Act) that the application by Mr Deng for a statutory order of review be dismissed. In particular, the respondent seeks an order pursuant to s 12(b) of the JR Act that the application for review be dismissed as adequate provision is made by the Queensland Industrial Relations Commission and the Queensland Industrial Court to review the decision made by the respondent's review unit.

Background

[4] Mr Deng commenced employment with AMH on or about 21 November 2005. He was employed as a slicer at the Beef City Feed Lot. Mr Deng lodged an application for compensation dated 31 January 2007 in relation to a "L5 right side disc prolapse". The application noted that the injury was alleged to have occurred on 18 December 2006. The application for compensation stated that the injury occurred in the boning room and indicated that as Mr Deng was pulling meat across the belt he felt pain in his back.

[5] Pursuant to reasons for decision dated 15 March 2007 the self insurer AMH rejected that application in the following terms:

> "With regard to whether or not the "event" occurred as stated, you have given a statement describing an event. There are no witnesses to the alleged event, you did not report the incident, and you were away from the workplace on holidays for 22 December 06 until the 2 January 2007. According to the evidence AMH were not aware you had sustained an alleged workplace injury until the 31 January 2007. Therefore, even if it could be considered that you have a personal injury, it is not considered that any personal injury has arisen out of, or in the course of, employment or that employment has been a significant contributing factor to any such personal injury.
> ...
> If you are aggrieved by any part of this decision, you may have the right to have it reviewed by Q-COMP'S Review Unit or in some cases, you may be able to appeal to an industrial magistrate. Strict time limits apply to lodging review applications and appeals. "

[6] Section 542 of the *Workers' Compensation and Rehabilitation Act* 2003 (WCR Act) provides that an application for a review of that decision had to be made within three months of the receipt of the decision. Mr Deng lodged an application for review under cover of correspondence from his solicitors on 6 November 2009 some two and a half years after the decision was made to reject his application. The application argued that there had been a breach of the rules of natural justice as the applicant had not been given an opportunity to respond to statements which the decision maker relied on in making the decision to reject the application. The application also stated that the applicant was Sudanese, had financial difficulties, did not understand the workers compensation regime and that the letter of 15 March 2007 did not adequately notify Mr Deng of his right to have the decision reviewed.

[7] In a letter dated 18 November 2009 Q-Comp advised that it had declined to conduct a review as the review application was made out of time. The letter provided:

> "... I do not consider that special circumstances exist to determine that your client has substantially complied with the timeframe for lodging the application provided by section 542 of the *Workers Compensation and Rehabilitation Act* 2003. This is because the delay is significant; the application is almost three years out of time. Your client understood that his worker's compensation claim had been rejected and even though he had a poor command of English his housemate explained that it was possible to have the decision reviewed. Your client took no steps to find out about the review process. Being advised by a Doctor in 2008 to wait a year for surgery justifies waiting for surgery; it does not provide a reason to delay applying for a review. Therefore we are unable to proceed with a review."

[8] Mr Deng then lodged an appeal to the Industrial Magistrate at Southport on 24 November 2009. The hearing of that appeal occurred on 31 May 2010.

[9] On 9 September 2010 the Industrial Magistrate's judgment was delivered. His Honour held that substantial compliance was no longer the sole justification for not insisting on the three month time limit and that there were "a number of factors

which Q-Comp should have taken into account and not simply arbitrarily dismiss the application for review in the manner they did." It was further held:

> "[27] Q-Comp should not have determined Mr Aqueen Teng Deng's application was out of time without at least investigating all matters associated with his compensation application, including potentially relevant issues which arose subsequent to the self-insurer's original determination. There is a discretionary power vested in Q-Comp to review claims when requested to do so by an application brought pursuant to section 541 of the Act and that discretionary power cannot be exercised other than in a manner which has full regard to the principles enunciated in the cases referred to in this judgment Therefore, for the reasons stated above, the Court concludes that Q-Comp was not acting in accordance with its obligations under the Act when it declined to proceed with a review of Mr Aqueen Teng Deng's case. The Court declares with respect that the Q-Comp review officer's decision to reject the application for review was not correct in law."

[10] The decision also noted that there had been a breach of natural justice in relation to the original decision and that Q-Comp should have afforded Mr Deng the opportunity to explain whether the accident did or did not occur on 18 December 2006 and to put forward his version of events.

[11] The Industrial Magistrate set aside Q-Comp's decision to decline to review Mr Deng's application. The Court directed that pursuant to s 558(1)(d) the matter was remitted to Q-Comp with directions that Q-Comp conduct a review of the self insurer's decision and to:

(a) Look at all facts and circumstances relating to his workers compensation claim
(b) Receive and consider any additional information
(c) Make a determination as provided by s 545 of the Act as to whether Mr Deng should or should not be classed as a person entitled to receive workers compensation

[12] That decision was then appealed by Q-Comp to the Industrial Court.

[13] President Hall delivered judgment on that appeal on 8 February 2011. The President held:

> "[10] In my view it is tolerably clear that 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. I can understand that the apparent strength of an applicant's underlying case for waiving or excusing the non compliance is not irrelevant to that assessment. To excuse non compliance to review an Application for Review which is doomed to failure would be wrong. An Application for Review raising issues of moment (if one puts aside the factual uncertainties) requires serious consideration. However, the serious consideration is of the issue whether a non compliant Application for Review should be acted upon. The critical matters will be the circumstances, extent and explanation for the non compliance. The underlying merit of the Application for Compensation cannot provide the 'special

> circumstance' to justify pressing on, notwithstanding the non-compliance in seeking a review. Section 542 must be read as a whole. A potential application for a review seeking an extension of time prior to the expiry of the three months pursuant to the express terms of s 542(3) must show that 'special circumstances' exist to warrant the extension. It would be wrong to rely on construction of the Act to grant a hearing on broader grounds to an applicant who has failed to comply with the three month time limit at s 542(1). There is the additional consideration that the approach taken at first instance, potentially burdens Q-Comp with determining whether a review which would succeed, should not be conducted for non compliance. To find such a legislative outcome in the absence of express words is a step too far. The 'special circumstance' referred to in the authorities pertains to the non compliance in respect of which waiver or excusal is sought; not to whether the fruits if victory should be snatched from the applicant's grasp.
>
> [11] In my view, although the Application for Review should be remitted to Q-Comp to consider whether there are 'special circumstances' to warrant excusal for the failure to comply with the statutory time limit, the accompanying Directions imposed by the Industrial Magistrate should be set aside. Alternative Directions should not be imposed. Fundamentally the discretion lies with Q-Comp. The discretion lies neither with the Industrial Magistrate nor with this Court, and the exercise of the discretion is in its infancy."

[14] The President therefore confirmed the Order of the Industrial Magistrate setting aside Q-Comp's decision and remitting to Q-Comp the question of whether the Application for Review should be dealt with notwithstanding that the Application failed to comply with s 542(1) of the WCR Act. The directions however were set aside.

[15] The matter was accordingly remitted to Q-Comp to reconsider the application for review.

[16] On 21 April 2011 Q-Comp's review unit provided reasons for decision which confirmed that Q-Comp had considered Mr Deng's submissions in relation to 'special circumstances' but was not satisfied that Mr Deng had established special circumstances to allow the out of time application for review to proceed. The decision stated:

> "Having considered all of these matters, I note that the evidence shows that whilst Mr Deng may have had difficulties with the English language, after receipt of the Insurer's decision, it was read to him by Mr Pioth and the reasons for rejection of his application were explained. Accordingly, there is no evidence to show that Mr Deng was in any way confused about the decision or that he had rights to seek a review of the decision.
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> Mr Deng was aware of his rights to seek a review of the decision, but was of the belief that any such application would have to be pursued through a solicitor, who would require an upfront payment. There is no evidence to show upon what basis Mr Deng had formed this

> opinion and accordingly, there is no evidence to show that this was a reasonably held belief.
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> In addition to these advices, Mr Deng was given advice by his physiotherapist and Dr Akladious, in April 2007, that he should take steps to review the decision.
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> Despite being counselled that he should take these steps by at least three different people, Mr Deng chose not to take any steps to pursue his rights. Significantly, Mr Deng did not make any enquiries, other than his discussions with Mr Pioth, to ascertain what might be entailed with taking steps to review the Insurer's decision. Accordingly the evidence shows that Mr Deng was aware of his entitlement to apply for a review of the Insurer's decision, however he made a conscious decision not to take further steps to review his rights.
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> ...
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> In so far as the other matters are raised in Mr Deng's application for review:
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> - Whilst Mr Deng apparently was not given an opportunity to respond to the statements from Mr Truscott and Ms Wurth, he was aware of the conflicting statements when the decision was read to him by Mr Pioth. Even though he became aware of the conflict at that stage, Mr Deng did not take any steps to investigate his review rights. Accordingly I am not satisfied that the failure to give Mr Deng an opportunity to respond to those statements assists him in proving special circumstances.
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> ....
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> Therefore, I have determined that Mr Deng did not substantially comply with the three-month timeframe. I have also determined that special circumstances do not exist to allow the application for review to proceed."

[17] As a result of that refusal, Mr Deng filed the present application for a statutory order of review.

[18] Mr Deng has also lodged an appeal to the Queensland Industrial Relations Commission pursuant to the right of appeal provided by s 549 of the WCR Act.

Legislation

[19] The Industrial Relations Commission was established by s 255 of the *Industrial Relations Act* 1999 (Qld) (the IR Act). It has the jurisdiction conferred by s 265 including that conferred by s 265(1)(d): "All appeals properly made to it under this or another Act". The jurisdiction to hear Mr Deng's appeal is a consequence of ss 548 and 549 of the WCR Act and s 265(1)(d) of the IR Act.

[20] The current appeal to the Industrial Relations Commission is listed for a mention before Deputy President Swan on 30 June 2011.

The review structure established by the WCR Act.

[21] Section 538 of the WCR Act provides an internal review by the insurer where an application for compensation is refused.

"**538 Internal review by insurer**

(1) Before an insurer makes a decision to reject an application for compensation or to terminate compensation, the insurer must undertake an internal review of the proposed decision.

(2) The review must be made by a person who is in a more senior position than the person who proposes to make the decision."

[22] Section 539 provides for a review of an insurer's decision by Q-Comp.

"**539 Object of pt 2**

The object of this part is to provide a non-adversarial system for prompt resolution of disputes."

[23] Section 542 provides:

"**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 Authority to allow further time to apply for review.

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

(4) If the notice did not state the reasons for the decision or the failure to make a decision—

(a) the applicant must ask the decision-maker for the reasons within 20 business days after receiving the notice; and

(b) the decision-maker must give written reasons within 5 business days after the applicant asks for the reasons; and

(c) the application for review must be made within 3 months after the applicant receives the reasons, regardless of whether the reasons addressed the matters prescribed under a regulation.

(5) The application for review—

(a) must be made in the approved form and given to the Authority; and

(b) must state the grounds on which the applicant seeks review; and

(c) may be accompanied by any relevant document the applicant wants considered in the review.

(6) The Authority must, within 10 business days after receiving the application, give the applicant and the decision-maker written notice that the application has been received."

[24] Section 544 provides that Q-Comp, in carrying out a review, may request documents and information from the insurer.

"**544 Decision-maker must give information to Authority**

(1) The Authority may, by written notice, require the decision-maker to give the Authority—

(a) within 5 business days after receiving the notice—

(i) all relevant information and documents in relation to the application that is in the decision-maker's possession; or

(ii) the information asked for by the Authority; or

(iii) if the Authority believes on reasonable grounds that the reasons given by the decision-maker for the decision-maker's decision have not addressed the matters prescribed under a regulation for section 540(4)—reasons for the decision that address those matters; or (b) within the period stated in the notice, any further information the Authority needs to decide the matter.

(2) The decision-maker must comply with the notice.

(3) The decision-maker must pay the cost of obtaining the further information."

[25] Section 545 obliges Q-Comp to carry out a review within the time provided by the section. One of the options open to Q-Comp in carrying out a review is to return the matter to the insurer if the insurer has not observed natural justice in making its decision.

"**545 Review of decision or failure to make a decision**

(1) The Authority 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 Authority considers appropriate.

(1A) The Authority may act under subsection (1)(d) only if the Authority—

(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.

(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 directions the Authority considers appropriate.

(3) The decision-maker to whom the directions are given must comply with the directions.

(4) The Authority may extend the time in subsection (1)—

(a) with the applicant's consent, to allow the applicant a right of appearance or to make representations under section 543; or

(b) with the applicant's consent, to obtain information under section 544; or

(c) if the applicant applies to the Authority in writing for time to give the Authority further information.

(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."

Mr Deng's application

[26] It is not in dispute that the application by Mr Deng was out of time. An out of time application however is not void.

[27] It is argued by Counsel for Mr Deng that if there has been substantial compliance with s 542 of the WCR Act then pursuant to the decision in *Q-Comp v Baulch*[1] Q-Comp would in the usual circumstances exercise a discretion to carry out a review on the merits but if there had not been substantial compliance, then special circumstances will have to be established before Q-Comp is required to carry out a review on the merits.

[28] Accordingly Counsel for Mr Deng submits that the Court should proceed to determine his application for a statutory order for review because there are a number of public interest factors which need to be determined. In particular it is argued that:

(i) Firstly, there is the public interest in having Q-Comp properly carry out the functions entrusted to it under the WCR Act, s 545;

(ii) Secondly, it is contrary to the public interest to have Q-Comp's statutory functions transferred to the Industrial Relations Commission. It is noted that one of the powers given to the Industrial Relations Commission hearing an appeal from a decision of Q-Comp is to return the matter to Q-Comp for determination in accordance with the law (s558 (1) (d));

(iii) Thirdly, if Q-Comp has erred in failing properly to exercise its statutory functions, there is a public interest in obliging Q-Comp to reconsider the matter so that such errors will be avoided in the future.

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1 (2004) 175 QGIG 978.

[29] It is further submitted that it is in the public interest that Q-Comp monitor self insurers to ensure compliance with the WCR Act. It is argued that in the present case the self insurer, AMH, was guilty of a gross breach of procedural fairness by determining the applicant's application for compensation on the basis of disputed factual evidence without giving notice to the applicant. It is submitted that the legal effect of the self insurer's decision is that the applicant's application for compensation has still not been dealt with in accordance with the law.

[30] Accordingly it is argued that the failure of the self insurer to carry out its functions under the WCR Act is a matter of public importance and a matter of importance to Q-Comp which has the statutory function of monitoring the compliance and performance of self insurers with the Act.

[31] It is also submitted that one of the purposes of review by Q-Comp is to limit the need for adversarial litigation in the Industrial Relations Commission with the attendant costs and inconvenience of such an appeal. The furtherance of this purpose requires Q-Comp to properly review and decide the matter before it according to law. It is argued that this must include compliance with the requirements of procedural fairness by, inter alia, inviting the applicant, in appropriate circumstances, to submit information and to make submissions.

[32] Counsel also argues that his costs to date for the review by Q-Comp in relation to his appeal to the Industrial Magistrates Court, Q-Comp's appeal to the Industrial Magistrates Court and then Q-Comp's appeal to the Industrial Court amounts to $82,000. He argues that there is a very limited power in the Industrial Relations Commission or the Industrial Court to award costs on an appeal and that even if he was successful in his application he would be unlikely to recover substantial costs of his appeal to the Industrial Relations Commission or of any subsequent appeal to the Industrial Court. It is argued that the application for a statutory order for review is a much more cost effective procedure because the costs of interviewing witnesses and taking statements would not need to be incurred again.

[33] Mr Deng's Counsel also argues that the matter has not advanced at all and that the current process took over 15 months from 5 November 2009 to 8 February 2011. The Industrial Magistrate exercised the discretion given him by s 558(1)(d) to remit the matter to Q-Comp for determination according to law. It is argued that if Q-Comp's application to dismiss the application for review is successful, Mr Deng will incur substantial costs on the appeals without advancing his matter further.

[34] Furthermore, when the matter was before the Industrial Court, President Hall expressed the view that the existence or otherwise of special circumstances when dealing with out of time applications should be determined by Q-Comp. President Hall stated:

> "In my view, although the application for Review should be remitted to Q-Comp to consider whether there are "special circumstances" to warrant the excusal of the failure to comply with the statutory time limit, the accompanying directions imposed by the Industrial Magistrate should be set aside. Alternative directions should not be imposed. Fundamentally the discretion lies with Q-Comp. The discretion lies neither with the Industrial Magistrate nor with this Court, and the exercise of the discretion is in its infancy."

[35] Counsel for Mr Deng therefore submits that there is a high likelihood if he is successful on an appeal from Q-Comp's decision that the matter will in fact be returned to Q-Comp for further determination. Counsel argues that Q-Comp has now failed for a second time to properly determine the matter in accordance with the law. In this regard, Mr Deng argues that it is in the interests of justice that the matter be determined in this Court.

[36] In particular, reliance is placed on the decision in *Nelson v Q-Comp*[2] where the applicant had filed an application for a statutory order of review pursuant to the JR Act. Q-Comp had then filed an application seeking an order that the application be dismissed under s 48(1) of the JR Act.

[37] The applicant in *Nelson* had relied on a breach of the rules of natural justice, in particular, that there had been a breach of natural justice when Q-Comp had proceeded to make a decision on 27 April 2004 before Mr Nelson had obtained a report from a Dr Robinson, whose report had been foreshadowed to Q-Comp prior to the making of the decision. Q-Comp had not informed the applicant or his solicitors that it intended to make a decision before the report was obtained. In that decision Justice Mullins discussed the public interest submissions as follows:

> "[29] The primary submission made by Mr Rangiah of counsel on behalf of the applicant was that procedural fairness required the applicant to be given sufficient time to gather evidence and provide submissions. As part of that submission, the applicant relied on the course of communications between his solicitor and the respondent that preceded the decision and submitted that the conduct of the respondent in failing to notify the applicant's solicitor that it proposed to proceed to make the decision after 26 April 2004 meant that the applicant lacked the opportunity to put further evidence or to make oral or written submissions before the decision was made.
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> [30] It was submitted that there were a number of public interest factors that supported the application for statutory order of review being permitted to proceed, rather than the applicant being forced to pursue his appeal to the Industrial Magistrates Court. These were described as the public interest in having a statutory decision maker properly carry out the functions entrusted to it by the Legislature; the public interest in not having the Industrial Magistrates Court burdened by reason of the failure of the respondent to carry out its function properly; and the public interest in determining whether the respondent did in fact err, so that any such error could be avoided in the future.
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> [31] It was submitted that if the appeal to the Industrial Magistrate proceeded, the Industrial Magistrate would determine the question that was decided by the respondent rather than determining whether the respondent was required to give procedural fairness to the applicant and the content of that obligation. It was submitted that if any error on the part of the respondent in relation to procedural fairness was not corrected, it was likely to occur again."

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2 [2004] QSC 167.

[38] Mullins J concluded:

> "[45] The respondent is an administrative decision maker and its processes are quite different to that of the next stage of review provided for under the *WQA* which is the appeal to the Industrial Magistrates Court. There is a distinct public interest in ensuring that the decision making entrusted to the respondent fulfils its object. In the circumstances in which the respondent made the decision in this matter, weight should be given to the public interest in ascertaining whether the respondent did err in failing to provide procedural fairness to the applicant before making the decision. The appeal to the Industrial Magistrates Court would not be able to consider that matter.
>
> [46] I am not persuaded that the respondent has made out any of the grounds under s 48(1) for obtaining summary dismissal of the application for statutory order of review. The failure of the respondent to notify the applicant's solicitor of the intention to proceed to make the decision, without waiting for the applicant's further medico-legal report, in the light of the communications which preceded the making of the decision, together with the public interest in ensuring that any such procedural error on the part of the respondent be identified, justify allowing the application for statutory order of review to proceed. That public interest aspect allows the approach taken in *Turner v Valuers' Registration Committee of Queensland* to be distinguished. I also do not consider that it is appropriate at this stage to exercise the jurisdiction under s 12 of the *JRA* to dismiss the application for statutory order of review, because the applicant has also filed a notice of appeal in the Industrial Magistrates Court. These matters which I have identified also are sufficient at this stage to conclude that the interests of justice does not require the application for statutory order of review to be dismissed pursuant to s 13 of the *JRA*."

[39] Accordingly, her Honour considered that a number of public interest factors were important in deciding that she should determine the application for judicial review and sought to distinguish the earlier decision of *Turner v Valuers' Registration Committee of Queensland*[3]. In *Turner* Holmes J held that the right of appeal conferred by s 61(1)(c) of the *Valuer' Registration Act* 1992 involved a full appeal on the merits in the course of which the District Court was empowered to examine the disciplinary committee's decision in its entirety and accordingly within the meaning of s 12 of the JR Act adequate provision had already been made for the review of the decision by another court. Holmes J had followed the approach of Thomas J in *Stubberfield v Webster*[4] where it was held that "as a general rule judicial review should not be seen as a substitute for the appellate process in the civil courts."

[40] Counsel for Mr Deng argues that those cases are distinguishable as no reliance was placed on the aspect of public interest in those cases.

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3 [2001] 2 Qd R 100.

4 [1996] 2 Qd R 211 at 217.

Should the application under the JR Act be dismissed pursuant to s 12?

[41] Section 12 of the JR Act provides:

> **"12 When application for statutory order of review may be dismissed**
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> Despite section 10, but without limiting section 48, the court may dismiss an application under section 20 to 22 or 43 that was made to the court in relation to a reviewable matter because—
>
> (a) the applicant has sought a review of the matter by the court or another court, otherwise than under this Act; or
>
> (b) adequate provision is made by a law, other than this Act, under which the applicant is entitled to seek a review of the matter by the court or another court."

[42] Essentially the question for this Court is whether adequate provision is made by a law under which Mr Deng is entitled to seek a review of the matter. Counsel for Mr Deng essentially argues that adequate provision is not made and that there is a public interest in the matter being determined in this Court as follows:[5]

> "The point though is that the Industrial Relations Commission has got that discretion under the Act to send the matter back to Q-Comp without deciding it, so that the de novo hearing before the Industrial Relations Commission, your Honour, does not need to consider at all, or to make any comment on Q-Comp's decision. Q-Comp's decision is essentially irrelevant to the Industrial Relations Commission decision because the Industrial Relations Commission decision is based on - solely on the evidence before that body. And the Industrial Relations Commissioner does not have to make any findings about the Q-Comp decision, or make any comments about the adequacy of that decision, or point out any errors in that decision.
>
> To that extent the Industrial Relations Commission decision is a far less satisfactory course in the sense that it does not give Q-Comp - it does not apply to Q-Comp to comply with its obligations under the Act and it gives Q-Comp no assistance in the way in which its decision failed to meet the requirements of the Act.
>
> Now, your Honour, a decision in this Court, on the other hand, will scrutinise the Q-Comp decision and it will address the adequacy of that decision and it will point out any deficiencies in that decision. In that way this Court brings to Q-Comp's attention and becomes an authority for future matters about how to conduct - or how to decide the preliminary point in an out of time application. In that way Q-Comp is assisted in meeting its obligations under the Act and in future matters it has the guidance of this Court in how to carry out this type of decision making.
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> So, your Honour, in my submission although the appeal process might result in this preliminary point being determined, it doesn't have to. So the appeal process might be as good as this process, but

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5 Transcript of hearing 17 June 2011, p 21 l 63 to p 22 l 35.

> it may not be as good as this process, and in fact, one occasion it hasn't been as good, because we went back to Q-Comp and in fact Q-Comp made what we submit is a further defective decision, which we're now here to argue about."

[43] I consider however that there is *adequate* provision in the WCR Act and the IR Act under which Mr Deng is entitled to seek a review of the decision and that Mr Deng has in fact availed himself of those rights and has lodged an appeal to the Industrial Relations Commission. In my view the requirements of both s 12 (a) and (b) of the JR Act have been satisfied.

[44] I note Counsel for Mr Deng's arguments as to why he considers it preferable that the matter be determined in this Court. It is clear however that the test laid down in s 12 of the JR Act is simply whether the applicant has in fact sought a review elsewhere and whether there is an *adequate* review process already in place. It is clearly not a question of whether the issues are more appropriately determined in this Court or whether this Court can provide a more cost effective or timely outcome.

[45] It is significant in my view that the WCR Act and the IR Act there is a comprehensive scheme of reviews and appeals and Mr Deng's case is an example of how that regime in fact operates in practice. He has successfully availed himself of his review rights to date and his current appeal is listed for a mention next week in the Industrial Relations Commission. The IR Act also provides at s 320 that the Commission is not bound by technicalities, legal forms or rules of evidence and may inform itself on a matter it considers appropriate in the exercise of its jurisdiction. Section 267 specifically provides that the original and appellate jurisdiction conferred on the Commission by an Act is "exclusive of the jurisdiction of the Supreme Court or another court of Tribunal unless otherwise prescribed under this Act".

[46] The comprehensive scheme includes an appeal to the Industrial Court pursuant to s 561 of the WCR Act which provides:

> **"561 Appeal to industrial court**
>
> (1) A party aggrieved by the industrial magistrate's or the industrial commission's decision may appeal to the industrial court.
>
> (2) The *Industrial Relations Act 1999* applies to the appeal.
>
> (3) The appeal is by way of rehearing on the evidence and proceedings before the industrial magistrate or the industrial commission, unless the court orders additional evidence be heard.
>
> (4) The court's decision is final."

[47] Section 561(4) explicitly states that the decision of the Industrial Court is 'final' although there can be an appeal on the basis of jurisdictional error. In my view therefore there is a clear legislative intention that all such appeals and reviews be carried out within the regime which has been specifically established for that purpose. Accordingly not only is there a comprehensive review process under the WCR Act and the IR Act which Mr Deng has availed himself of but significantly the hearing before the Commission is in fact a hearing de novo.

[48] Counsel for Mr Deng argues however that the Commission has the power to send the matter back to Q-Comp for a determination and that such an outcome would be

unsatisfactory given the history of this matter. Whilst I accept that the matter might be remitted to Q-Comp, it is by no means certain that that would in fact be the outcome. The Commission may indeed substitute its decision for Q-Comp's decision or vary Q-Comp's decision. Whilst it is possible that a hearing in this Court may be more timely, if evidence needs to be called as has been foreshadowed by Counsel for Q-Comp, the matter may well go on the Civil List rather than be dealt with in the Applications List.

[49] Furthermore even if the judicial review application is successful the matter will still have to go back to Q-Comp in any event. I am not satisfied therefore that there will necessarily be a more timely determination if the matter proceeds by way of judicial review. It was also clear in *Nelson* that if the matter was not determined before her Honour it was likely that a 3 day hearing would follow in the Industrial Magistrates Court involving the calling of medical witnesses. That is not the position here. I am not satisfied that in the circumstances of this case there is a greater efficiency in having the matter determined in this Court.

[50] The next issue I must consider is whether there are substantial public interest reasons why the application for judicial review should proceed to a determination on the merits. Having considered the material currently before me I am not satisfied that significant public interest issues arise in this case. In *Nelson* one of the issues before her Honour was a question of the construction of the scheme established under the *WorkCover Queensland* Act 1996 (WQA). Senior Counsel for Q-Comp in that case had in fact submitted that as a matter of construction of the scheme under part 2 of chapter 9 of WQA "there was no breach of the rules of natural justice in the making of the decision by the respondent without waiting for the further medical evidence (or submissions) foreshadowed by the appellant's solicitors". It was submitted to her Honour that if the error in relation to "procedural fairness was not corrected, it was likely to occur again." It is clear that it was on that "public interest aspect" that Mullins J considered that the approach in *Turner* could be distinguished.

[51] It would seem to me that there is not that particular public interest aspect in the present case. I cannot discern in the public interest arguments put forward by Counsel for Mr Deng a particular systemic failure. In *Nelson* there was a very clear systemic failure as it was clear Q-Comp considered that a review officer could determine a matter using the medical evidence on the file whilst actually knowing that further medical evidence was forthcoming. Furthermore in the present case one of the public interest arguments is a submission that it is contrary to the public interest to have Q-Comp's statutory functions transferred to the Industrial Relations Commission. The difficulty with that argument is that such a consequence is indeed clearly provided for in the WCR Act. An appeal to the Commission in the current circumstances is the clear intent of the legislation. That is the statutory scheme.

[52] Ultimately I consider that there is a comprehensive and appropriate review process laid down in the WCR Act and the IR Act. As Holmes J held in *Turner* "I conclude that there is adequate provision for review of the matter by another court." In particular I agree with the remarks of Thomas J in *Stubberfield v Webster*[6] that with respect to judicial review applications "it is therefore important that it be clearly

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6 [1996] 2 Qd R 211 at 217.

understood that this remedy is not regarded as a substitute of the appellate system within the ordinary judicial process".

[53] Whilst Counsel for Q-Comp has raised the question of whether there is an abuse of process to have an application on foot in this Court whilst at the same time lodging an appeal in the Industrial Relations Commission I accept that because of the time limits involved the appeal to the Commission had to be made before this application could be heard and that s 11 of the JR Act is relevant and would allow for dismissal of the 'other review'. The issue however was not fully argued before me and I do not consider it necessary to decide that question given the order I propose.

[54] The application for a statutory order of review by Mr Deng is therefore dismissed.