INDUSTRIAL COURT OF QUEENSLAND

CITATION:	*Kim v Workers' Compensation Regulator* [2019] ICQ 14
PARTIES:	**INSUNG KIM** (appellant) **v** **WORKERS' COMPENSATION REGULATOR** (respondent)
FILE NO:	C/2018/7
PROCEEDING:	Appeal
DELIVERED ON:	20 November 2019
HEARING DATE:	26 November 2018
MEMBER:	Martin J, President
ORDER:	**The appeal is dismissed.**
CATCHWORDS:	INDUSTRIAL LAW – QUEENSLAND – APPEALS – ADDITIONAL EVIDENCE – where the appellant seeks leave to adduce additional evidence in support of the appeal – where the evidence was obtained shortly after the hearing in the Queensland Industrial Relations Commission – where the appellant did not inform the Commission of the additional evidence or seek an adjournment – whether the additional evidence should be admitted on appeal – whether the evidence could not have been obtained with reasonable diligence for use at the Commission hearing INDUSTRIAL LAW – QUEENSLAND – OTHER MATTERS – STRIKE OUT APPLICATION – where the respondent made an application to strike out the appellant's application to appeal on the first day of the hearing in the Commission – where the respondent's application was granted – where the appellant argues that the type of injury considered by the Commission in granting the respondent's application was narrower than that contended for in the appellant's statement of facts and contentions – where the appellant also contends that the Commission erred in summarily determining the appeal without hearing further evidence which was to be adduced at trial – whether the Commission erred in exercising the discretion to strike out the application to appeal – whether it was in the public interest to strike out the application to appeal *Industrial Relations Act* 2016, s 531, s 541, s 545

	Workers' Compensation and Rehabilitation Act 2003, s 32
CASES:	*Carlton v Simon Blackwood (Workers' Compensation Regulator)* [2015] ICQ 029, followed *Church v Simon Blackwood (Workers' Compensation Regulator)* (2015) 252 IR 461; [2015] ICQ 031, cited *Council of the City of Greater Wollongong v Cowan* (1955) 93 CLR 435, cited *Gambaro v Workers' Compensation Regulator* [2017] ICQ 005, considered *House v The King* (1936) 55 CLR 499, cited *Kim, Insung v Workers' Compensation Regulator* [2018] QIRC 048, related *Local Government Association of Queensland Ltd v Queensland Services Industrial Union of Employees and Ors* [2017] ICQ 002, cited *Orr v Holmes & Anor* (1948) 76 CLR 632, cited *Prange v Brisbane City Council* [2012] ICQ 2, cited *Quaedvlieg & Ors v Boral Resources (Qld) Pty Ltd* (2005) 180 QGIG 1209, cited *Quinlan v Rothwell* [2002] 1 Qd R 647, cited *State of Queensland v Lockhart* [2014] ICQ 006, cited *Walz Construction Co Pty Ltd v de Jong and Simon Blackwood (Workers' Compensation Regulator)* [2015] ICQ 010, cited *Yousif v Workers' Compensation Regulator* [2017] ICQ 004, cited
APPEARANCES:	R Green instructed by Park & Co Lawyers for the appellant D Callaghan directly instructed by the respondent

Background

[1] Mr Kim (the appellant) is a South Korean national. He arrived in Australia in July 2015 on a working holiday visa and returned to South Korea on 28 June 2016 when that visa expired.

[2] While the appellant was in Australia he undertook numerous jobs of an unskilled nature. One such job was at the Kilcoy abattoir. The appellant claims to have suffered a fall while working there on 14 June 2016. He says that he slipped and fell on a set of stairs when carrying a tub of meat offcuts.

[3] On 24 August 2016 the appellant, through his solicitors, made a claim for compensation, pursuant to s 132 of the *Workers' Compensation and Rehabilitation Act* 2003 (WCR Act). The application referred to injuries including to the left elbow, buttock, shoulder and lower back. The claim was not part of the evidence before the Commission.

[4] Dr Charles Hur examined the appellant before he left Australia, on 22 June 2016. He provided a certificate attached to the claim which said that the appellant was suffering from soft tissue injuries to the left elbow and hip. That certificate was in evidence before the Commission. The claim was also said to have attached an MRI scan of the appellant taken on 11 July 2016, obtained once the appellant had returned to South Korea.

[5] The claim for the left elbow and left hip injury was accepted by WorkCover on the basis of Dr Hur's certificate and his application in respect of intervertebral disc herniation of the cervical and lumbar spine was rejected.

[6] Upon review, the Regulator upheld WorkCover's decision.

Proceedings before the Commission

[7] On 1 February 2017 the appellant filed an appeal in the Commission against the decision of the respondent.

[8] On 11 December 2017, the first day of the hearing, it was apparent that Dr Tae-Hun Lee, who had assessed the appellant in South Korea, would not appear before the Commission. Dr Lee's qualifications had not been accepted by the respondent and he was required for cross-examination.

[9] The appellant sought to rely on an MRI scan and accompanying radiological report obtained in South Korea, but, in Dr Lee's absence, the documents were not admitted.

[10] The respondent then made an oral application to dismiss the appeal and the Commission ordered that the parties make written submissions.

[11] On 16 April 2018 the Commission granted the respondent's application to dismiss the appeal pursuant to s 541 of the *Industrial Relations Act* 2016 (IR Act). That decision is the subject of this appeal.

Grounds of appeal

[12] There are many grounds of appeal:

1. The Commission erred in failing to appropriately consider the interests of persons immediately concerned with the appeal, pursuant to s 531(3) of the IR Act in relation to the particular merits of the case as required.

2. The Commission erred in summarily deciding the appeal without reference to the evidence of the witnesses who were available to give evidence in the context of all of the evidence to be led in the course of the appeal, contrary to s 531(2)(a) of the IR Act.

3. The Commission erred in ordering the appellant to pay the Regulator's costs of, and incidental to the Application for Dismissal made by the respondent and the substantive appeal contrary to s 545(2) of the IR Act in circumstances where no notice was given prior to the application being made on the first day set down for hearing of the appeal, with time permitted for submissions to be made, and when no evidence was in fact heard.

4. The Commission erred in failing to hear any evidence in relation to the matters to be addressed in the appeal.

5. The Commission erred in concluding that there was no public interest to be served by permitting the appeal to proceed when there was no hearing of the evidence.

6. The Commission erred in concluding that there was no evidence that would enable a finding consistent with the appeal articulated by the appellant.

7. The Commission erred in concluding that Dr Wallace could not assist the Commission in relation to the matters before it, without hearing evidence from him in the context of all the evidence to be led in the course of the appeal.

8. The Commission erred in concluding that the absence of evidence from Dr Tae-Hun Lee meant that the appellant could not lead evidence that would enable the Commission to make findings consistent with what was contended for by the appellant.

9. The Commission erred in concluding that the appeal was reliant upon the evidence of Dr Tae-Hun Lee to satisfy the requirements of the WCR Act entitling him to the findings sought on appeal.

10. The appellant obtained fresh evidence relating to the diagnosis of the appellant's condition which evidence is sought to be relied upon for the purposes of the appeal, and which evidence was not available at the time of the appeal though was obtained as a result of an attendance for MRI scans on 12 December 2017 and a subsequent attendance upon Dr Wallace on 13 December 2017. This evidence could not be obtained prior to the appellant's return to Australia. The appellant returned to Australia arriving at late evening on 9 December 2017 for the hearing of the appeal set for Monday 11 December 2017. The appellant remained within Korea from 29 June 2016 and the cost of returning to Australia until the hearing was prohibitive.

[13] The appellant has categorised the grounds of appeal into three groups and I will deal with them in that way:

1. The appellant has obtained fresh evidence that was not available at the time of the hearing, which would have brought about an entirely different result (ground 10);

2. The Commission erred in summarily determining the appeal without hearing or referring to any evidence (grounds 2, 3, 4, 6, 8 and 9); and

3. The Commission erred in concluding that there was no public interest to be served in permitting the appeal to proceed when there was no hearing of evidence (ground 5).

Ground 10 – The appellant has obtained fresh evidence that was not available at the time of the hearing, which would have brought about an entirely different result

[14] The appellant seeks leave to adduce additional evidence in support of the appeal. The evidence consists of radiological studies undertaken in Australia, together with a statement of Dr Malcolm Wallace made after a review of the appellant in person.

[15] Section 561 of the WCR Act governs the conditions of an appeal to this Court. Section 561(3) provides that "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."

[16] The appellant submits that the criteria relevant to the admission of additional evidence on appeal are set out in *Orr v Holmes & Anor*.[1] In that case, Latham CJ referred to two necessary pre-conditions for the admission of fresh evidence:

(a) first, that a new trial should not be granted on grounds of fresh evidence if by the exercise of reasonable diligence the fresh evidence could have been discovered in time to be used at the original trial; and

(b) secondly, it must be shown at least that the evidence to be admitted is of such importance as very probably to influence the decision.

[17] In *Council of the City of Greater Wollongong v Cowan*,[2] Dixon CJ said:

> "It must be reasonably clear that if the evidence had been available at the first trial and had been adduced, an opposite result would have been produced or, if it is not reasonably clear that it would have been produced, it must have been so highly likely as to make it unreasonable to suppose the contrary. Again, reasonable diligence must have been exercised to procure the evidence which the defeated party failed to adduce at the first trial."

[18] In *Carlton v Simon Blackwood (Workers' Compensation Regulator)*,[3] it was held that:

> "While this court is not bound by the decisions of other courts which have dealt with applications to call extra evidence, the principles which have been developed can assist in determining an application such as this. So much was recognised by Hall P in *MacDonald v Q-COMP*. In *Akins v National Australia Bank* the New South Wales Court of Appeal considered the relevant principles of an application to call fresh evidence. Although the rule that court considered only allowed fresh evidence on special grounds, the criteria which were applied assist in cases like this. The test that court administered had three conditions:

---

[1] (1948) 76 CLR 632 at 635.

[2] (1955) 93 CLR 435 at 444.

[3] [2015] ICQ 029 at [4].

(a) The evidence could not have been obtained with reasonable diligence for use at the trial;

(b) The evidence must be such that there is a high probability that there would be a different result; and

(c) The evidence must be credible."

[19] *Carlton* remains the definitive articulation of the criteria for admission of additional evidence on an appeal such as this.

[20] *Carlton* was referred to in *Local Government Association of Queensland Ltd v Queensland Services Industrial Union of Employees and Ors*,[4] and the following observations were made regarding "reasonable diligence":

> "[13] Notwithstanding the difference between s 348 of the IR Act and s 561 of the WCR Act, it is helpful to consider the approach taken in this jurisdiction to the exercise of the unfettered power in the WCR Act. For example, in *Regan v WorkCover Queensland*, Hall P stated:
>
> > 'I accept that the statutory power to hear 'additional evidence' is constrained only by the proper exercise of discretion and is not to be exercised only in those cases in which 'fresh evidence' would be received in a civil matter at common law, compare *Chalk v. WorkCover Queensland* (2002) 171 QGIG 327 at 328. However, I can see no reason why the accumulated wisdom of the common law should be ignored. **Having regard to the desirability of finality in litigation, the upset and cost of litigation after a trial is completed and the need to encourage litigants to prepare for trial in a proper way, I can see no justification for exercising the statutory discretion to let in additional evidence which might, by the exercise of reasonable diligence, have been discovered by the appellant prior to the trial.** The 'additional evidence' now relied upon is of that character.'
>
> …
>
> [15] Section 348 was considered by a Full Bench of the Commission in *Smith v Mackay Business Brokers Pty Ltd*, where the following was said:
>
> > 'Every litigant is entitled to procedural fairness. However, procedural fairness requires that a litigant be given "a reasonable opportunity to present his case" and not that the Tribunal ensure "that a party takes the best advantage of the opportunity to which he's entitled" *Sullivan v Department of Transport* (1978) 20 ALR 323 at 343 per Deane J, approved *Re Association of Architects of Australia; Ex Party Municipal*

[4] [2017] ICQ 002.

> *Officers' Association of Australia* (1989) 63 ALJR 298 at 305 per Gaudron J (with whom Dawson J agreed). **This was a case in which the applicant should have realised that the execution of the Employment Agreement was an issue**, compare *Re Building Workers Industrial Union of Australia; ex parte Gallagher* (1988) 62 ALJR 81 at 84 approved *Re Association of Architects of Australia; ex parte Municipal Officers' Association of Australia*, op. cit. at 305. **A litigant who loses the opportunity to have his case fully and fairly considered by his own folly or the neglect of his advisors has no remedy**, *Reg v Home Secretary, ex parte Al- Mehdawi* [1990] 1AC 877 at 898 per Lord Bridge of Harwich (with whom the other members of the House of Lords agreed) and *SBA Foods Pty Ltd v Victorian WorkCover Authority and Anor* [2001] VSC 276 (10 August 2001) at para 283 per Gillard J.
>
> In our view the application for leave to appeal should be dismissed both upon the ground that the proposed appeal has no prospect of success and upon the basis that it is not in the 'public interest' (section 342(3)) to permit a litigant to found an appeal upon the inadequacy of the case presented at first instance. For completeness, we note that **it would be unconscionable to exercise the discretion at s. 348(2) to allow 'additional evidence' which, by the exercise of a modicum of prudence and diligence, might have been made available and placed before the Commission at first instance**.' (emphasis added)"

[21] The appellant says that the evidence should be admitted because:

(a) the evidence is directly relevant to the matters critical to the decision to dismiss the appeal as considered by the Deputy President;

(b) on its face, the evidence would give rise to a different conclusion to that reached by the Deputy President; and

(c) such evidence was not available because of the financial difficulties experienced by the appellant associated with returning to Australia to obtain such evidence, the difficulties in securing the attendance of doctors to prove the Korean radiology, and the inability of Dr Wallace to undertake the review which on one view would have given him more information pertaining to the injury alleged by the appellant.

[22] The greatest difficulty faced by the appellant is satisfaction of the first criterion in *Carlton* – that the evidence could not have been obtained with reasonable diligence for use at the trial. The onus rests with the appellant to demonstrate that this is the case.

[23] In such circumstances, the following chronology is relevant:

(a) The appellant's statement of facts and contentions was filed on 13 April 2017.

(b) The respondent's statement of facts and contentions was filed on 21 July 2017.

(c) The appellant provided his list of witnesses, which included Dr Wallace and Dr Lee, on 11 August 2017.

(d) The parties were given notice on 13 September 2017 that the matter was set down for hearing on 11 and 12 December 2017.

(e) On 11 December 2017 hearing of the matter in the Commission commenced.

(f) On 12 December 2017 an MRI scan of the appellant was performed in Australia. On the same day the respondent filed submissions in support of the application to strike out.

(g) On 13 December 2017 Dr Wallace consulted with the appellant. Dr Wallace's statement based on this consultation is dated 18 December 2017.

(h) On 4 January 2018 the appellant filed submissions in response to the respondent's application to strike out.

[24] The respondent argues that if the appellant was not initially aware of the deficits in its expert evidence, then the respondent put them on notice in its statement of facts and contentions. The respondent further states that it advised the appellant that, in the usual course, medical evidence would not be tendered by consent and doctors were required for cross-examination. This was noted at paragraph [34] of the Commission decision:[5]

> "[34] The Regulator submits that matters which must be considered in the exercise of the Commission's discretion to grant this Application to Dismiss include the lack of real prospects of success, the purposes of the relevant legislation and matters of justice and fairness to each party. It further states
>
>> 'In consideration of fairness and justice to the parties, the Regulator set out clearly in its statements of Facts and Contentions in July 2017 the deficits in evidence which the appellant needed to address prior to the hearing. The Regulator advised the appellant that, in the usual course, medical evidence would not be tendered by consent and doctors were required for cross-examination.'"

[25] The fresh evidence which was the subject of this ground was obtained in Australia when the appellant returned for the Commission hearing. Even if it is accepted that the appellant had financial difficulties in funding a journey to Australia, it is difficult to see how the evidence was unobtainable in advance of the hearing when it was available at short notice at the time of, and shortly after, the dates when the hearing was scheduled to occur.

[5] *Kim, Insung v Workers' Compensation Regulator* [2018] QIRC 048.

[26] More perplexing is the fact that the MRI scan and Dr Wallace's examination were not raised at all before the Deputy President, including in the submissions filed 4 January 2018. At no time was there a request for an adjournment of the matter. In light of the reliance now sought to be placed on the evidence, the decision not to inform the Commission is baffling.

[27] Considering the foregoing, it cannot be said that the appellant has discharged his onus to demonstrate that the evidence could not have been obtained with reasonable diligence for use at the hearing. The other criteria from *Carlton* do not need to be considered.

[28] Accordingly, ground 10 fails.

Grounds 1-4 and 6-9 – The Commission erred in summarily determining the appeal without hearing or referring to any evidence

[29] As a preliminary point, there appears to have been some confusion as to what case may be made on an appeal from the Regulator's decision. A hearing before the Commission is a hearing *de novo*. The ambit of a Commission hearing is determined by the case which was before the Regulator.[6] However, the Regulator's actual decision is irrelevant. The parties start the case again and the appellant must make out their case anew – here, that meant establishing the existence of an injury for the purposes of s 32 of the Act. The appellant is incorrect to the extent that he suggests otherwise.

[30] In any event, both parties agreed that the critical document before the Commission was the appellant's statement of facts and contentions. It is therefore useful to recount what was said in *Yousif v Workers' Compensation Regulator*[7] regarding the role of such a document:

> "[11] In appeals brought to the Commission under the Act, it was once the standard practice for a direction to be given requiring the appellant to file and serve a Statement of Stressors. It is now the common practice for a direction to be given requiring the parties to file and serve Statements of Facts and Contentions. The legislative power to make such a direction is found in s 451(2)(a) of the *Industrial Relations Act* 2016 (IR Act). More detailed provisions are contained in r 41 of the *Industrial Relations (Tribunals) Rules* 2011. Rule 45 also provides that, among other things, the Commission may dismiss a proceeding if there is a failure to comply with a direction.
>
> [12] In *Blackwood v Adams*, I referred to Statements of Stressors as setting 'the boundaries of the application'. More recently, in *Carlton v Blackwood* I said:
>
>> 'An appellant's case has to be known before the hearing starts. The Commission cannot allow a case to "evolve" and place the respondent in the position of having to contend with the shifting sands of an undefined

---

[6] *Church v Simon Blackwood (Workers' Compensation Regulator)* (2015) 252 IR 461; [2015] ICQ 031 at [31] - [33].

[7] [2017] ICQ 004.

> argument. If an appellant wishes to advance a different case, then that should be done by seeking an amendment to the Statement of Stressors or the document identifying the facts and contentions. The Commission can then decide whether or not to allow such an amendment.'

[13] A Statement of Facts and Contentions is not attended with the same level of formality as pleadings in the traditional sense are. The Commission is relieved, by s 531 of the IR Act, of many of the strict rules which apply in the civil courts. But, the Commission is still in charge of its own procedure and may, consistently with the provisions of s 531, require parties to provide an outline of their respective cases. This is particularly important in appeals under the Act where the nature of injuries, their cause, and the times at which they were suffered are essential to the resolution of an appeal. It follows, then, that the Commission is entitled to rely on the Statement as a complete statement of a party's case and, if an admission is made, to rely on that admission.

[14] Section 531 requires that the Commission be:

> '… guided in its decisions by equity, good conscience and the substantial merits of the case having regard to the interests of—
>
> (a) the persons immediately concerned; and
>
> (b) the community as a whole.'

[15] It is consistent with the requirements of s 531 for a party in an appeal under the Act to set out its case by way of a Statement of Facts and Contentions. It alerts the other party to the case it will have to deal with and it identifies the issues which exist which, in turn, allow for a confinement of the matters in dispute. An appeal under the Act is not the time for a broad ranging inquiry into an unlimited number of complaints or grievances. The time and resources of the Commission are constrained and it is necessary for those constraints to be acknowledged in this way. Subject always to the Commission's power to allow appropriate amendments (so that s 531 may be observed) a party will be bound by its Statement of Facts and Contentions and may not lead evidence which is not relevant to the identified issues.

…

[28] The mere fact that there are references to earlier events in the Statement of Facts and Contentions does not incorporate them into the claim made by the appellant. That claim was clearly set out in the paragraphs excerpted above. The appellant argues that because the appeal to the Commission is a hearing *de novo* he cannot be confined to one issue. Such a hearing, though, must have boundaries and a party is not entitled to go beyond the

claim that has been articulated in the Statement of Facts and Contentions. As Dawson J said in *Harris v Caladine*:

> 'An order made by a Registrar is reviewable by way of a hearing de novo. That means that the court reviewing the order begins afresh and exercises for itself any discretion exercised below by the Registrar. The parties commence the application again, **subject to any restrictions in the rules upon the calling of evidence** or provisions relating to the use before the court of evidence called before the Registrar. **A hearing de novo involves the exercise of the original jurisdiction and 'the informant or complainant starts again and has to make out his case and call his witnesses.**' (emphasis added)

[29] The fact that an appellant 'starts again' does not mean that he or she does so unrestricted by any requirements as to the identification of the nature of the case. That identification was made in the Statement of Facts and Contentions and the appellant is bound by it."

[31] The appellant's statement of facts and contentions included the following relevant passages:

"12. According to the Reports from Dr Hur, General Practitioner and Dr Tae-hun Lee, Orthopaedic Surgeon and Dr Malcolm Wallace, Orthopaedic Surgeon, the Appellant has sustained injuries to lower back and neck/shoulder identified as intervertebral disc herniation to lumbar and cervical spine.

Issues

13. The Appellant sees the following issues as relevant in this Appeal:

a. Whether the review officer erred in failing to consider all the relevant information in reaching the review decision.

b. Whether the primary decision maker of WorkCover Queensland erred by taking in irrelevant information.

c. Whether the primary decision maker of WorkCover Queensland erred in failing to consider all relevant information to come to [the] decision.

d. Whether lumbar and cervical injuries were arising out of, or in the course of, employment.

e. Whether the causal or consequential (not needing to be direct or proximate) relationship exists between the workplace incident and the lumbar and cervical spinal injuries.

Contentions:

…

> 15. The Appellant contends that he sustained lumbar spine and cervical spinal injuries on 14 June 2016. The Appellant relies upon the medical opinions of Dr Tae-hun Lee and Dr Malcolm Wallace in this regard.
>
> 16. The Appellant contends that the injuries resulted from his fall while performing his duty of lifting and transferring trimming tubs and trays in Kilcoy on 14 June 2016.
>
> 17. The Appellant therefore contends that the injuries to his lumbar spine and cervical spine arose out of, or in the course of his employment, and that the employment is a significant contributing factor to the injury.
>
> Decision Sought
>
> …
>
> 19. That a declaration that the Appellant has sustained a physical injury within the meaning of section 32 of the *Act*, being an intervertebral disc herniation to lumbar and cervical spine."

[32] The matters raised in 13(a),(b) and (c) of the appellant's statement of facts and contentions are irrelevant to a hearing *de novo*.

[33] In the appellant's submission, the term "being" in the second line of paragraph 19 should be read as descriptive in the sense that, if one looks historically at the documents which precede the Commission hearing, the notion of disc herniation of the lumbar and cervical spine arose out of the way in which the respondent decided to talk about the incident and the injury, not the appellant. The appellant says that the Commission erroneously regarded the paragraph as prescriptive in the sense that it prescribed what the appellant had to prove in order to succeed on his appeal.

[34] The respondent says that the injury that the appellant put under consideration was intervertebral disc herniation and the issue that the Commission had to decide was whether there was any evidence before it that would allow it to find such an injury for the purposes of s 32 of the Act.

[35] In support of this, the respondent points to the statement of facts and contentions and the grounds of appeal to the Commission. The respondent says that the grounds of appeal specifically referred to the failure of the Regulator to give sufficient weight to an MRI performed in South Korea, which purported to show disc herniation.

[36] Notably, the appellant says that if one were to have regard to the issues before the Regulator in setting the parameters of the hearing of the appeal, there was no issue as to the existence of the condition of discal herniation, and it was only the causal relationship between that diagnosis and the work incident that was in issue. The respondent submits that this is incorrect.

[37] The respondent says that it was clear from the respondent's statement of facts and contentions that the claimed injury of cervical and lumbar disc herniations was in issue. That is,

the appellant was on notice that he needed to prove the existence of the personal injury claimed.

[38] The respondent's statement of facts and contentions relevantly states:

"4. In response to the allegations in paragraph 8 of the appellant's statement, the Regulator:

…

(g) says further that the CT scan showed no abnormality of bone, joint or disc or sign of soft tissue damage. There was no sign of significant disc protrusion or prolapse.

5. In response to the allegations in paragraph 12 of the appellant's statement, the Regulator:

(a) denies that Dr Hur has given a report stating that the appellant has sustained any injuries to his neck/shoulder or any intervertebral disc herniations because no such injuries were subject of the history, examination or CT scan findings when the appellant was seen by Dr Hur;

(b) agrees that the appellant has produced a document purportedly written by a Dr Tae-hun Lee;

(c) does not admit that Dr Lee is an orthopaedic surgeon nor that he concluded that the appellant had sustained injuries on 14 June 2014 in a work accident causing the alleged intervertebral disc herniation of the lumbar and cervical spines because neither of these matters are addressed in the two documents provided;

(d) denies that Dr Malcolm Wallace has made such a statement because he stated that if your client is continuing to suffer from ongoing lumbar spinal pain and upper limb and shoulder injuries, these would be consistent and the work related injury is likely to have been the single and on balance of probabilities, the only causative factor and has made no mention of intervertebral disc herniation to the lumbar and cervical spine; and

(e) says that Dr Wallace also stated that it would be necessary to interview the appellant, take a history and conduct a physical examination to provide an opinion.

Issues

6. In response to the allegations in paragraph 13 of the appellant's statement, the Regulator:

(a) Says that the appellant has the onus of proof to establish the elements of section 32 of the *Workers Compensation and Rehabilitation Act* 2003 (Qld);

(b) agrees that the issue is as set out in subparagraph 13 d. but says that employment must also be a significant contributing factor to the alleged injuries; and

(c) says further that the appellant has not provided sufficient evidence to satisfy his onus of proof that the alleged cervical and lumbar disc herniations were caused by the fall at work on 14 June 2016."

[39] The appellant's statement of facts and contentions evidence that the appellant contended before the Commission that he sustained lumbar spine and cervical spinal injuries, which were said to be substantiated by medical reports identifying such injuries "as intervertebral disc herniation to lumbar and cervical spine." It is incorrect to suggest that the appellant's appeal was constrained by the way in which the respondent decided to describe the incident and the injury. The appellant couched the terms of his appeal in the limited sense of cervical and lumbar disc herniations.

[40] The Commission considered the appeal in the terms advanced by the appellant. It follows that the Commission did not direct its attention to the wrong issue, or injury, in dispute.

[41] At paragraph [20] of the Commission decision, the following appears:

> "The Regulator submits that there is no medical evidence before the Commission that the Appellant has intervertebral disc protrusion in the lumbar spine, and therefore the Appellant cannot discharge his onus of proof on the primary issue of injury or that such an injury was connected with his employment."

[42] On this point the Deputy President held:

> "[35] The Appellant in its Statement of Facts and Contentions relies upon the diagnosis of Dr Tae-hun Lee and the qualified opinion of Dr Wallace to support his claim of injury. In an Affidavit provided to the Commission on 11 December 2017, Ms Jungwon (Leena) Lee, Solicitor for the Appellant advised that Dr Tae-hun Lee (who resides in South Korea) had refused to give evidence in this matter. Dr Tae-hun Lee claimed to have been unable to provide a Korean Workers' Compensation Medical Certificate 'because the incident had occurred in Australia and it is out of their standard procedures'.
>
> [36] Counsel for the Regulator also queried Dr Tae-hun Lee's qualification as all that had been provided was what appeared to be a web page reference to his qualifications. That, coupled with the fact that Dr Tae-hun Lee was not going to give evidence and therefore unable to be cross-examined by the Regulator, defeated the prospect of any material which might be attributed to him and tendered by the Appellant of any relevance to the Appellant's claim.
>
> [37] Notwithstanding that Dr Wallace may have made commentary on the Appellant's situation, at no time had the Appellant consulted with Dr Wallace. Dr Wallace had stated that it would be necessary to interview the Appellant, take a history from him and conduct a physical examination to

provide an opinion. This did not occur and that matter can be taken no further.

[38] The Regulator's claim that there is no reliable medical [evidence] at all to support the Appellant's claim is correct as it relates to Dr Wallace and to Dr Tae-hun Lee."

[43] The appellant says that error emerges from the conclusion at paragraph [37] that Dr Wallace would not have been able to "carry the day" for the appellant. The appellant says that, in addition to his report, Dr Wallace could have described from a general perspective the symptoms associated with herniation of the lumbar spine and the cervical spine. That would then give rise to an ability on the part of the Commission to compare what Dr Wallace said about symptomatology with what the appellant said were the symptoms he experienced, what was recorded about the appellant's circumstances, and CCTV footage of the appellant's fall.

[44] This accords with what was said in the Commission. In the opening by counsel for the appellant before the Commission it was said that the only evidence that Dr Wallace was going to provide in the hearing was "his opinion about the consistency of the event that was described to him and the type of injuries one might expect to occur in the circumstances."

[45] In reply, the respondent says that Dr Wallace did not speak about an intervertebral disc injury, he did not have an MRI scan, and there was no evidence that such an injury had occurred which could have been put before the Commission at the time of the hearing.

[46] At the time when the strike out application was made, the Deputy President had admitted into evidence, among other things, a report by Dr Wallace and letter of instructions, Dr Hur's clinical record and Workers' Compensation certificate, a CitiScan radiology report, and a file note of Mr Matthew Marten, a chiropractor who assessed the appellant on the day of the incident. It is not correct to submit, as the appellant did, that "[t]here was no evidence before the Commission at all."

[47] The appellant's case, at its highest, would not have included any direct evidence that supported the contention that the appellant had suffered herniation of the lumbar and cervical spine. At best, the appellant was asking the Commission to infer from circumstantial evidence that that specific injury had occurred. It would have been clear in the circumstances whether an injury could be substantiated to the requisite standard of proof, given the evidence which had already been admitted and what remained to be led. A full hearing was unnecessary.

[48] This disposes of grounds 2, 4, 6, 7, 8 and 9.

Ground 1 – The Commission erred in failing to appropriately consider the interests of persons immediately concerned with the appeal

[49] Section 531(3) of the IR Act provides:

"Also, the commission or Industrial Magistrates Court is to be guided in its decisions by equity, good conscience and the substantial merits of the case having regard to the interests of—

(a) the persons immediately concerned; and

(b) the community as a whole."

[50] There is nothing to suggest that the Commission's decision failed to accord with s 531(3). Simply asserting non-compliance with the section cannot operate as a bar to a strike out application.

[51] This ground fails.

Ground 3 – The Commission erred in ordering the appellant to pay the Regulator's costs of, and incidental to the Application for Dismissal and the substantive appeal

[52] The Deputy President's treatment of costs is brief. It appears in the following sequence of paragraphs:

> "[39] It is clear that further proceedings before the Commission are not desirable in the public interest.
>
> [40] The Regulator's Application to Dismiss is granted. It follows that the substantive Appeal (filed by the Appellant on 1 February 2017) is dismissed.
>
> [41] The Appellant is to pay the Regulator's costs of, and incidental to this Application and substantive Appeal."

[53] The general power to award costs is governed by s 545 of the IR Act. That section provides:

> "545 General power to award costs
>
> (1) A person must bear the person's own costs in relation to a proceeding before the court or commission.
>
> (2) However, the court or commission may, on application by a party to the proceeding, order—
>
> (a) a party to the proceeding to pay costs incurred by another party if the court or commission is satisfied—
>
> (i) the party made the application or responded to the application vexatiously or without reasonable cause; or
>
> (ii) it would have been reasonably apparent to the party that the application or response to the application had no reasonable prospect of success; …"

[54] The respondent submitted that an appeal without merit is an abuse of process and should not be allowed to remain on foot.[8] That submission was in respect of the application to strike out generally, but it is equally pertinent to the question of costs.

[8] Citing *Gambaro v Workers' Compensation Regulator* [2017] ICQ 005 at [49].

[55] The principles governing an order for costs were considered by Deputy President O'Connor (as his Honour then was) in *Walz Construction Co Pty Ltd v de Jong and Simon Blackwood (Workers' Compensation Regulator)*:[9]

> "[16] In *Heidt v Chrysler Australia Ltd*, a case involving the Commonwealth statute, Northrop J wrote:
>
> > 'The policy of s. 197A of the Act is clear. It is designed to free parties from the risk of having to pay the costs of an opposing party. At the same time the section provides a protection to parties defending proceedings which have been instituted vexatiously or without reasonable cause. This protection is in the form of conferring a power in the court to order costs against a party who, in substance, institutes proceedings which in other jurisdictions may constitute an abuse of the process of a court.'
>
> [17] Similarly, in *Reddick v Ocean Spirit Cruises Pty Ltd*, Chief Commissioner Hall (as his Honour then was) viewed the adjective 'unreasonable' in s 225(1)(b) of the *Workplace Relations Act* 1997 as taking its colour from s 225(1)(a). His Honour went on to write:
>
> > 'It is insufficient to show inadvertence or even neglect. What must be shown is an abuse of process attracting opprobrium of the same magnitude as is attracted by launching an application frivolously or vexatiously or without reasonable cause.'
>
> [18] A similar approach was adopted by her Honour the Vice President in *Larorb Pty Ltd t/a Sunshine Office Supplies and Allan Thomas Ball*. There her Honour wrote:
>
> > 'Without reasonable cause in s 335(1)(a) of the Act should also take their colour from the word 'vexatiously' and bearing in mind the statements of Northrop J (*supra*) dealing with the Commonwealth Act, the phrase suggests conduct verging on an abuse of process.'"

[56] The appeal to the Commission could not succeed. The decision to award costs is a matter of discretion and no error has been demonstrated that would vitiate the exercise of that discretion.

[57] This ground fails.

Ground 5 – The Commission erred in concluding that there was no public interest to be served in permitting the appeal to proceed when there was no hearing of evidence

[58] The power to strike out an application to appeal is contained in s 541 of the IR Act:

---

[9] [2015] ICQ 010.

"The court or commission may, in an industrial cause do any of the following—

…

(b) dismiss the cause, or refrain from hearing, further hearing, or deciding the cause, if the court or commission considers—

(i) the cause is trivial; or

(ii) further proceedings by the court or commission are not necessary or desirable in the public interest;"

[59] It was not in dispute between the parties on appeal to this court that the Commission has the power to order a strike out in relation to a claim for workers' compensation.[10]

[60] The appellant contends that the evidence of Dr Wallace needed to be heard before a proper judgment as to its value or merit could be made. The appellant submits that without a proper understanding of the whole of the evidence of Dr Wallace, in the context of the lay evidence, the video footage and the clinical records, it could not be said that there was no public interest in permitting the appeal to proceed.

[61] The respondent says that Dr Wallace's proposed evidence-in-chief, as it was described by the appellant, would not have assisted the Commission in determining the primary issue as to the existence of alleged disc herniations. Similarly, the evidence of the only other doctor who was to provide evidence at the hearing, Dr Hur, would not have assisted the appellant since Dr Hur had completed a workers' compensation certificate for left elbow and hip soft tissue injuries only.

[62] The respondent also argues that since the Commission and the Regulator are funded directly or indirectly by the public, it is a matter of public interest that a two-day appeal not proceed when there is no realistic prospect of success.

[63] In the Commission, the respondent sought assistance from the summary judgment provisions in the *Uniform Civil procedure Rules* 1999 (UCPR) in identifying the matters to be considered when deciding whether a proceeding should be struck out or dismissed on a summary basis. However, the test provided by the UCPR that a plaintiff have "no real prospect of succeeding on all or a part of the plaintiff's claim and there is no need for a trial of the claim or the part of the claim" is distinct from the test that proceedings simply be "not necessary or desirable in the public interest".

[64] In *State of Queensland v Lockhart*,[11] Deputy President O'Connor summarised the meaning of "public interest" in relation to the exercise of discretion under s 331 of the *Industrial Relations Act* 1999 in the following terms:

"[21] In *O'Sullivan v Farrer*, Mason CJ, Brennan, Dawson and Gaudron JJ considered the expression 'in the public interest'. Their Honours wrote:

---

[10] Cf *Gambaro v Workers' Compensation Regulator* [2017] ICQ 005 at [6].

[11] [2014] ICQ 006.

> 'Indeed, the expression, 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, **confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable** … given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view.'

[22] In *GlaxoSmithKline Australia Pty Ltd v Makin*, the Full Bench of Fair Work Australia in considering what constitutes 'the public interest' wrote:

> 'Appeals have lain on the ground that it is in the public interest that leave should be granted in the predecessors to the Act for decades. It has not been considered useful or appropriate to define the concept in other than the most general terms and we do not intend to do so. **The expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made to be made by reference to undefined factual matters, confined only by the objects of the legislation in question.**
>
> Although the public interest might be attracted where a matter raises issues of importance and general application, or where there is a diversity of decisions at first instance so that guidance from an appellate court is required, or where the decision at first instance manifests an injustice, or the result is counter intuitive, or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters, it seems to us that none of those elements is present in this case.'

Conclusion

[23] The respondent has not demonstrated that the Commission erred in the exercise of its discretion to dismiss the application for extension of time and to strike out the application for reinstatement.

[24] As Martin P observed in *Burke v Simon Blackwood (Workers' Compensation Regulator)*, 'The burden upon a person seeking to upset the exercise of such a discretion is described in the well-known decision of the High Court in *House v The King*'." (emphasis added)

[65] Similarly, in *Prange v Brisbane City Council*,[12] Hall P held at [3] that:

"The power to dismiss proceedings pursuant to s. 331 of the Act, on the ground that further proceedings are not necessary or desirable in the public interest, is a discretionary power. The discretion is not vested in this Court. The discretion is

[12] [2012] ICQ 2.

vested in the Commission. Only in limited circumstances may this Court intervene. In *House v The King* at 504 to 506, Dixon, Evatt and McTiernan JJ explained:

> 'The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.'"

[66] In the earlier case of *Quaedvlieg & Ors v Boral Resources (Qld) Pty Ltd*[13] Hall P, in dealing with an application to strike out for want of prosecution, referred with approval to the reasoning of Thomas JA in *Quinlan v Rothwell*[14] as follows:

> "There is now a consciousness of the need for some level of efficiency in the use of the courts as a public resource. That, of course, must not displace the need for reasonable access to the courts and the provision of justice according to law in each matter, but it highlights the fact that the former *laissez faire* attitude by courts towards the leisurely conduct of actions at the will of the parties has ended. At the same time the rules of court are not an end in themselves. They do not exist for the discipline of practitioners or clients, or for the protection of courts from inefficient litigants, but rather as a means of ensuring that issues will be defined in an orderly way and that parties have the opportunity of full preparation of their case before the trial commences. The rules also afford defendants the means of bringing to an end actions in which the other party will not abide by the rules."[15]

[67] The Commission has a broad discretion to dispose of an application under s 541(b)(ii) of the IR Act. As outlined above, the contention that the Deputy President turned her mind to the wrong injury cannot succeed. In considering whether there was any medical evidence to

---

[13] (2005) 180 QGIG 1209.

[14] [2002] 1 Qd R 647.

[15] At 658, quoted in *Quaedvlieg & Ors v Boral Resources (Qld) Pty Ltd* (2005) 180 QGIG 1209 at 1210.

support the existence of such an injury, the Deputy President did not act beyond the object or provisions of the legislation.

[68] Ground 5 fails.

Were there issues of credit?

[69] In his written submissions, the appellant advanced an argument that the accuracy of the medical or health service provider records were disputed by the appellant since he does not speak English and denied having input into them. The appellant says that this gives rise to “credit issues” which required a hearing of the evidence.

[70] This argument was not raised before the Commission either at the hearing or in written submissions. It does not appear in the grounds of appeal.

[71] The appellant’s matter was struck out because he could not provide evidence to substantiate the claim that he had suffered disc herniations. Issues affecting the weight to be afforded to certain medical evidence would not have improved his position, since the evidentiary burden was his to discharge.

[72] This ground fails.

Conclusion

[73] The appeal is dismissed.