QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*JBS Australia Pty Limited v Workers' Compensation Regulator* [2016] QIRC 138
PARTIES:	**JBS Australia Pty Limited** (Applicant) **v** **Workers' Compensation Regulator** (Respondent)
CASE NO:	WC/2016/176
PROCEEDING:	Application for stay
DELIVERED ON:	7 December 2016
HEARING DATES:	11 November 2016
HEARD AT:	Brisbane
MEMBER:	Industrial Commissioner Black
ORDERS:	**1. The application for stay is granted;** **2. The applicant to pay Mr Bacon the agreed sum no later than 14 December 2016;** **3. No order as to costs.**
CATCHWORDS:	WORKERS' COMPENSATION - APPEAL AGAINST DECISION – APPLICATION FOR STAY - Where the review unit of the WCR had set aside the decision of the self-insured employer - Where the employer appealed to the Commission against that decision - Where the employer asks that the WCR review decision be stayed pending the resolution of that appeal – Standing of a self-insurer to bring an application for stay in question.
CASES:	*Workers' Compensation and Rehabilitation Act 2003,* s 5, s 30, s 48, s 68, s71, s 75, s 83, s 109; *Industrial Relations Act 1999*, s347, s 274; *Industrial Relations (Tribunal) Rules 2011* s 134; *Toll North Pty Ltd AND Q-COMP & Anor* (B2013/32); *Qantas Airways Ltd AND Q-COMP* (2006) 181 QGIG 227; *Uwe Arthur Willi Hetmanska AND Q-COMP* 183 QGIG 917; *Brisbane City Council v Gillow and Simon Blackwood (Workers' Compensation Regulator)*

[2015] QIRC 124; *Alexander v. Cambridge Credit Corporation Ltd Ltd* (1985) 2 NSWLR 685

APPEARANCES: Mr GJ Cross, Counsel, instructed by JBS Australia Pty Limited, for the Appellant.
Mr PB O'Neill, Counsel, instructed by the Workers' Compensation Regulator, the Respondent.

Decision

Background

[1] JBS Australia Pty Limited, the Applicant in this matter, is a licensed self-insured employer under the *Workers' Compensation and Rehabilitation Act 2003* ("WCR Act").

[2] Mr Bacon lodged an application for compensation with the self-insurer on 29 January 2016. Mr Bacon claimed that he had injured his right foot at work on 14 December 2015. His application for compensation was rejected by the self-insurer on 12 April 2016. On 8 July 2016 Mr Bacon exercised his right to request a review of the self-insurer's decision by the Workers' Compensation Regulator's review unit.

[3] On 15 September 2016 the regulator set aside the decision to reject the Mr Bacon's application and concluded that the claim was one for acceptance. However on 23 September 2016, JBS elected to appeal the review unit's decision and on 30 September 2016, JBS filed an application asking that the review unit's decision be stayed pending the determination of its appeal.

[4] In his application for compensation dated 29 January 2016 Mr Bacon stated that his injury was sustained at his place of work on the "kill floor" and that the injury occurred because he slipped on fat as he was walking past a trim stand. In effect he said that the slip caused him to kick the trim stand with his right foot and injure his ankle.

[5] Mr Bacon reported an injury to the first aid officer at 11.50 pm on 14 December 2015. In completing a first aid injury report shortly thereafter Mr Bacon stated that he suffered an injury when his "right ankle became swollen over time". He said that the injury occurred at 10.30 pm on 14 December 2015. He said that at the time of injury he was on the kill floor. He said that he did not know what caused the injury.

[6] The first aid report which is marked attachment RM4 to an affidavit sworn by Ms Rebecca Munn on 11 October 2016 includes the following entry made by the first aid officer, Tony Pusaloa:

> "Peter has sustained major swelling to his R) ankle. At the time of the injury he was on the kill floor. Peter is unsure how the injury occurred. He reports that the swelling had gradually built up over time. Rested in FAC with an ice pack for the remainder of the night. Advised to see a G.P. for this issue as it may be a personal illness that he is unaware of. Foreman and HR are aware of the injury."

[7] After the incident on 14 December 2016, Mr Bacon completed his normal shifts on 15 and 16 December 2016. The plant closed on 17 December 2015 for approximately four weeks for the Christmas-New Year break. When the plant re-started on 22 January 2016, Mr Bacon again presented at the first aid room and reported similar symptoms to those reported on 14 December 2015. The records of the 22 January 2016 visit to the first aid room show that Mr Bacon said that the injury was caused when he slipped on a piece of fat. Mr Bacon subsequently worked on alternative duties until 27 January 2016 but has not worked since that date.

[8] In a statement prepared on 9 February 2016, at paragraphs 24 And 25, Mr Bacon said:

> "I recall slipping on a piece of fat that was lying on the floor near the stand and losing balance, causing my right foot to slip out from under me and hit the side of the stand with an amount of force. This action saved me falling on my back.
>
> At the time I thought little of the incident as I was taking knives back to an employee on the stand. I carry 4 knives at a time."

[9] Attachment RM14 to the affidavit sworn by Ms Rebecca Munn on 11 October 2016 includes advice from JBS's workers' compensation manager to the effect that Mr Bacon will require surgery before he recovers from his injury, and that following surgery Mr Bacon would be unable to work for approximately nine months. The cost of surgery was estimated at $17,669. It was estimated that the total cost of entitlements to be paid to Mr Bacon was $113,494.51.

Power to Grant Stay

[10] A determination about jurisdiction involves consideration of a number of provisions of both the *Industrial Relations Act 1999* ("IR Act") and the WCR Act, as well as certain provisions in the *Industrial Relations (Tribunal) Rules*. The relevant provisions are set out hereunder:

[11] Section 347 of the *Industrial Relations Act 1999* ("IR Act") provides:

> "**347 Stay of decision appealed against**
>
> On an appeal, the industrial tribunal may order that the decision being appealed be wholly or partly stayed pending—
>
> (a) the determination of the appeal; or
>
> (b) a further order of the industrial tribunal."

[12] However it is relevant to note that prior to amendments made to section 347 of the IR Act in 2011, the section was specifically limited to the grant of stays relating to appeals made under a particular part of the IR Act. Appeals to the Commission from WCR review unit decisions were not mentioned in that part of the IR Act. In 2011 the IR Act was amended by omitting the limiting provision viz section 347(1).

[13] Section 274 of the IR Act relevantly provides as follows:

"**274 General powers**

(1) The commission has the power to do all things necessary or convenient to be done for, or in connection with, the performance of its functions.

(2) Without limiting subsection (1), the commission in proceedings may—

(a) give directions about the hearing of a matter; or

(b) make a decision it considers appropriate, irrespective of the specific relief sought by a party; or

(c) make an order it considers appropriate. "

[14] Section 134 of the *Industrial Relations (Tribunals) Rules 2011* provides as follows:

"**134 Application for stay of decision under appeal or review**

(1) An application for a stay of a decision under appeal or review must—

(a) be in the approved form; and

(b) include—

(i) details of the interest of the applicant; and

(ii) any other facts and circumstances relevant to the exercise of the jurisdiction of the court, the commission or a magistrate.

Note—

See schedule 2 for the definition *stay of a decision under appeal or review*.

(2) An application for a stay of a decision under appeal or review must not form part of—

(a) an application for leave to appeal; or

(b) an application to appeal; or

(c) an application for a WHS review."

[15] Schedule 2 of the *Industrial Relations (Tribunals) Rules 2011* includes the following definition of "stay of a decision under appeal or review":

"***stay of a decision under appeal or review*** means any of the following—

(a) an order that a decision be stayed under section 347 of the Act;

(b) a stay of a decision under the *Coal Mining Safety and Health Act 1999*, section 239 or a stay of a directive or review decision under section 245 of that Act;

(c) a stay of a decision under the *Electrical Safety Act 2002*, section 171 or 174;

(d) a stay of a decision under the *Mining and Quarrying Safety and Health Act 1999*, section 219 or a stay of a directive or review decision under section 225 of that Act;

(e) a stay of a decision under the *Petroleum and Gas (Production and Safety) Act 2004*, section 826;

(f) an order that a decision be stayed under the *Further Education and Training Act 2014*, section 169;

(g) a stay of a decision under the *Work Health and Safety Act 2011*, section 229C."

[16] O'Connor DP determined in *Toll North Pty Ltd AND Q-COMP & Anor*[1] that the power to grant a stay arising from workers' compensation appeals resided in section 274 of the IR Act. In so concluding DP O'Connor found that reliance on section 347 of the IR Act was not available for a number of reasons:

(i) Nothing within the 2011 amendments to the IR Act lent support for a conclusion that section 347 of the Act was to apply to an appeal under the WCR Act and it was apparent from the Explanatory Memorandum that the intent of the amendment to section 347 was to overcome the effect of the decision of the Industrial Court of Queensland in *Hetmanska v Q-COMP;*[2]

(ii) The provisions of Division 1 of Chapter 3 of the WCR Act did not indicate that the provisions of the IR Act were to apply to an appeal to the Commission pursuant to section 550 of the WCR Act;

(iii) There were textual and contextual reasons for concluding that, on a proper interpretation of the word "decision" in section 347 of the IR Act, the term would not include a review decision under the WCR Act; and

(iv) The definition in schedule 2 of the Rules does not expressly deal with an appeal pursuant to section 550 of the WCR Act.

[17] In his decision, O'Connor DP noted that VP Linnane had arrived at a similar conclusion in *Qantas Airways Ltd AND Q-COMP*[3] where it was determined that section 347 of the IR Act did not provide a source of power for the grant of a stay application brought in respect to an appeal prosecuted under the WCR Act. It was

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[1] *Toll North Pty Ltd AND Q-COMP & Anor* (B2013/32).
[2] *Uwe Arthur Willi Hetmanska AND Q-COMP* 183 QGIG 917.
[3] *Qantas Airways Ltd AND Q-COMP* (2006) 181 QGIG 227.

her view that the power under section 347 to stay a decision under appeal was limited to appeals made under Part 9 of Chapter 8 of the Act.

[18] In her decision VP Linnane also declined to rely on section 274 as a power to base the grant of a stay. VP Linnane concluded that the general power in section 274 of the IR Act could not give the Commission a power to grant a stay where there is specific power in section 347 of the IR Act limited to granting of stays to particular appeals.

[19] The effect of the 2011 amendments to the IR Act however was to remove the limitation relied on by VP Linnane, and the express application of section 347 of the IR Act to appeals mentioned in a particular part of the IR Act no longer applies.

Standing to bring Application for Stay

[20] The applicant is both the employer of the injured worker and also a licensed self-insurer under the WCR Act. It was the respondent's submission that section 549(1) of the WCR Act was clear in not providing any standing to an insurer or self-insurer to appeal a decision of the review unit. It was further submitted that the only right of appeal given to an insurer is that provided by section 549(2) of the WCR Act, but that this right of appeal is limited to decisions specified in section 540(1)(a)(i) to (vi) of the WCR Act which do not include decisions to allow or reject an application for compensation. Section 549 of the WCR Act is set out below:

> "**549 Who may appeal**
>
> (1) A claimant, worker or employer aggrieved by the decision (the ***appellant***) may appeal to an appeal body against the decision of the Regulator or the insurer (the ***respondent***).
>
> (2) An insurer aggrieved by a decision of the Regulator to confirm, vary or set aside a decision of the insurer mentioned in section 540(1)(a)(i) to (vi) may appeal to an appeal body against the decision of the Regulator.
>
> (3) If the appellant is an employer—
> (a) the claimant or worker may, if the claimant or worker wishes, be a party to the appeal; and
> (b) an insurer may, if the insurer wishes, be a party to the appeal if the appeal is against a decision of the Regulator to confirm, vary or set aside a decision of the insurer mentioned in section 540(1)(a)(i) to (vi).
>
> (4) If the appellant is WorkCover, an employer may, if the employer wishes, be a party to the appeal. "

[21] Relevant to this matter, section 549(1) of the WCR Act confers appeal rights on "employers". The respondent's proposition is that the section does not in any express terms confer rights on employers who are also self-insurers. The proposition is then developed to the effect that if the section does not expressly include appeal rights for self-insurers and in circumstances where appeal rights for insurers are expressed in section 549(2), it follows as a matter of construction that appeal rights for insurers, including self-insurers are governed by section 549(2).

[22] There a two obstacles to this line of reasoning. The first is that there may not be any adequate basis upon which to differentiate between an employer at large on the one hand and an employer who is a licensed self-insurer on the other hand. The second difficulty is that while section 549(2) refers to "an insurer" being aggrieved by a decision of the regulator, and the definition of "insurer" states that the word includes "self-insurer", it is clear that section 549(2) has no role to play in defining or limiting the appeal rights of self-insurers. That section 549(2) has no application to self-insurers is disclosed by an examination of the provision itself, and also by reference to explanatory notes accompanying the bill that introduced amendments to section 549 of the WCR Act in 2004. What is disclosed is that the provisions of section 549(2), in their current form, have exclusive application to the general insurer, WorkCover.

[23] The inclusion of particular appeal rights for WorkCover resulted from amendments to the WCR Act made by the *Workers' Compensation and Rehabilitation and Other Acts Amendment Act 2004*. The explanatory notes accompanying the bill relevantly read as follows:

> **"Amendment of s 549 (Who may appeal)**
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> Clause 69 amends s 549 which sets out who may appeal to an industrial magistrate. The clause expands the coverage to include both appeal bodies, the Queensland Industrial Relations Commission and the Industrial Magistrate.
> The clause also provides WorkCover with a right to appeal decisions of the Authority on prescribed decisions relating to premium as WorkCover may be directly aggrieved by the Authority's decision. To ensure natural justice the clause gives both an employer and WorkCover the right to be joined as a party to an appeal relating to premium decisions."

[24] Consistent with the explanatory note, the terms of section 549(2) make clear that the section only has application to WorkCover. None of the decisions of WorkCover mentioned in section 540(1)(a)(i) to (vi), which are subject to review by the regulator and which ultimately give rise to appeal rights for WorkCover, involve requests for review made by self-insurers. Conversely all of the decisions mentioned in section 540(1)(a)(i) to (vi) involve the right of an employer, who is not a self-insurer, to ask the regulator to review a decision made by WorkCover. It is in these particular circumstances that section 549(2) confers on WorkCover a right to appeal the decision of the regulator's review unit. In no respect is section 549(2) prescribing appeal rights or obligations in respect to employer's who are self-insurers.

[25] Therefore section 549(2) cannot be relied on to support a proposition that the appeal rights for self-insurers are prescribed by section 549(2) and that it would be inconsistent with the correct construction of section 549 to conclude the appeal rights conferred on employers by section 549(1) can be construed to include appeal rights for self-insurers. It follows in my view that there is no jurisdictional impediment to an employer who is a self-insurer exercising a right of appeal prescribed by section 549(1). In this respect I accept the argument of the applicant that legal principles require that if section 549(1) of the WRC Act is to be read to exclude an employer who is a self-insurer, where no such current exclusion exists, the extinguishment of the right should be done in express terms.

[26] The other limb of the respondent's argument involves a proposition that, in some way or other, a finding of fact can be made about whether an applicant exercising an appeal right under section 549(1), is exercising that right as an "employer" or as a "self-insurer". This proposition is advanced despite the fact that in this matter the employer and the self-insurer are the one and the same entity, and despite the fact that there is nothing in the scheme of the Act that suggests or mandates that the activities or status of self-insurers are to be differentiated from the activities of employers who hold the self-insurers' license.

[27] There is no basis, in terms of the scheme of the act, for a finding to be made that in terms of the financial sustainability of the self-insurer, accountability for decision making associated with compliance with an employer's responsibility generally under the WCR Act, or in terms of compliance obligations associated with the obtaining or continuing to hold a self-insurer's licence, that the self-insurer holds any particular responsibility, other than functions and duties which are administrative in nature. The WCR Act is clear in mandating that the employer is accountable for, and responsible for, financial sustainability, governance, and compliance with the fundamental objectives of the WCR Act which are to provide compensation to injured workers. These obligations derive from both the general provisions of the WCR Act as well as the specific provisions relevant to the issuing of a self-insurers licence.

[28] In terms of the Objects of the WCR Act, clause 5(2)(d) provides that the main provisions of the workers compensation scheme established by the WCR Act include that an employer's obligations are to be "covered against liability for compensation and damages either under a WorkCover insurance policy or under a licence as a self-insurer".

[29] Section 30 of the WCR Act defines an "employer" as "a person who engages a worker to perform work". Section 109 of the WCR Act provides that if an employer is a self-insurer, the employer must pay the compensation.

[30] Section 48(3) of the WCR Act provides that the employer's liability to insure against workplace injuries "must be provided for either "under a licence as a self-insurer" or "under a WorkCover policy".

[31] Section 68(1) of the WCR Act provides that "self-insurance allows an employer, under a licence under this part, to provide their own accident insurance for their workers, instead of insuring with WorkCover".

[32] The conditions that must be satisfied before an employer secures a self-insurer licence are set out in sections 71 and 83 of the WCR Act. There is no condition suggesting or mandating the establishment by the employer of a separate entity to manage the self-insurers obligations under licence.

[33] Section 75 of the WCR Act provides that the regulator, in deciding whether an employer is fit and proper to hold a self-insurance licence, may consider the long term financial viability of the employer; whether the employer is to be able to meet its liabilities; and the adequacy of the employer's resources and systems for administering claims for compensation and managing rehabilitation of workers.

[34] There is nothing in the scheme of the WCR Act that suggests that a self-insurer should be considered a separate entity of the employer, nor is there anything disclosed in the scheme of the WCR Act that requires an employer who acquits his obligation to insure, and remain insured against injuries sustained by his workers under licence as a self-insurer, to establish a separate entity to manage, operate or control the activities associated with self-insurance.

[35] It was the respondent's submission that it was clear that the stay application was brought by the self-insurer rather than the employer "because the entire stay application focusses on the amounts that the self-Insurer will have to pay Mr Bacon as a consequence of the review decision".

[36] I don't think this is necessarily a correct representation of the application for stay. Unquestionably the *raison d'être* for the stay is the desire to avoid financial detriment in the event of a successful appeal and in circumstances were monies already paid to the worker cannot be recovered. But the employer and the self-insurer are the same entity and cost efficiencies effected through the operation of the workers compensation department are ultimately reflected in the employer's financial accounts.

[37] The respondent also submitted that it was clear, on a perusal of the affidavit of Ms Rebecca Munn, that it was the workers' compensation department of JBS that will be making the relevant payments to Mr Bacon. In her affidavit at paragraph 25, Ms Munn said that the decision of the regulator to overturn the self-insurer's decision meant that "JBS are now obligated to pay Mr Bacon for his past loss of income and past medical expenses". She also said that the Workers' Compensation Department of JBS had given her advice about Mr Bacon's potential workers' compensation entitlement. From my perspective, even if the respondent's construction on these parts of the affidavit were correct, nothing turns on the construction. Neither reference establishes that monies owing to Mr Bacon were to be characterised as monies owing by the workers' compensation department as distinct from JBS.

[38] In my view neither the provisions of the WCR Act nor the disclosed facts associated with the stay proceedings, support a view that the section of JBS's business that had responsibility for workers' compensation had anything other than an administrative responsibility in terms of the payment of compensation. On the available facts there is nothing to suggest that the activities of the workers' compensation department of JBS should be considered anything other than the section of the employer's business which has responsibility for managing workers' compensation claims and related matters. The self-insurer is not a separate entity from the employer. There is no determinative distinction to be drawn between the "employer" on the one hand, and the "self-insurer" on the other hand.

[39] In asserting that the applicant did not have standing to bring the application for stay, the respondent also relied on a decision of VP Linnane in *Brisbane City Council v Gillow and Simon Blackwood (Workers' Compensation Regulator)*("*Gillow*") .[4] The decision states at paragraph 33:

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[4] *Brisbane City Council v Gillow and Simon Blackwood (Workers' Compensation Regulator)* [2015] QIRC 124.

> "I agree with the submission made by the Regulator that a licensed insurer has no standing to bring an application for a right to be heard in an appeal against a review decision by a worker. In those circumstances these applications are also dismissed on the basis that they have been made on behalf of the self-insurer. Whilst I acknowledge that the Brisbane City Council has attempted, since the commencement of the hearing on 26 June 2015, to distance itself from both the Affidavit of Ms Whiting and its initial written submission, I am not satisfied that the applications were made by anybody other than the self-insurer."

[40] The proposition advanced by the respondent appeared to be that either the facts of the case supported a conclusion that the application was brought by the self-insurer, or in the alternative a jurisdictional finding was made in *Gillow* to the effect that employers who are self-insurers do not have a right to bring an appeal from an adverse decision of the regulator, and consequently do not have a right to bring an application for stay.

[41] The decision in *Gillow* is distinguished on the basis that the determination in *Gillow* was whether a licensed insurer has standing to bring an application for a right to be heard in an appeal by a worker from a review decision in circumstances where it has been confirmed that the employer has no such right. The fundamental question to be answered in this matter is not whether JBS has a right to appear in an appeal against a review decision brought by a worker, but whether JBS, either as an employer or a self- insurer, is entitled to appeal a review decision which determined that the worker's claim for compensation was one for acceptance. The law in its current form is quite different in its treatment of employer's rights associated with an appeal against a decision of the regulator which aggrieved the employer, as opposed to a right to appear and be heard in an appeal brought by an aggrieved worker.

Exercising a Discretion to Grant a Stay

[42] In *Alexander v Cambridge Credit Corporation Ltd* the Court of Appeal in New South Wales made an extensive examination of the matters relevant to the granting of a stay and enumerated a number of principles relevant to the consideration of an exercise of the discretion:

> "
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> - The onus is upon the applicant to demonstrate a proper basis for a stay which will be fair to all parties.
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> - The mere filing of an appeal does not demonstrate an appropriate case or discharge the onus.
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> - The court has a discretion involving the weighing of considerations such as balance of convenience and the competing rights of the parties.
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> - Where there is a risk that if a stay is granted, the assets of the applicant will be disposed of, the court may refuse a stay.

- Where there is a risk that the appeal will prove abortive if the appellant succeeds and a stay is not granted, courts will normally exercise their discretion in favour of granting a stay.

- The court will not generally speculate upon the appellant's prospect of success, but may make some preliminary assessment about whether the appellant has an arguable case, in order to exclude an appeal lodged without any real prospect of success simply to gain time.

- As a condition of a stay the court may require payment of the whole or part of the judgment sum or the provision of security."[5]

Appeal Prospects

[43] The approach is not to speculate upon the appellant's prospect of success, but to make a preliminary assessment about whether the appellant has an arguable case.

[44] The respondent did not concede that the appellant had an arguable case and rejected as premature and unfounded confident assertions made by the applicant about its prospects of success on appeal. At such an early stage of the process, and after a review on the papers, the respondent took the view that it would amount to significant speculation to embark on an enquiry about prospects of success of the appeal, particularly in in circumstances where the outcome of the appeal would most likely turn on Mr Bacon's credibility. It followed that the respondent took the view that the stay should not be granted on the basis that the appellant had an arguable case.

[45] The applicant submitted that the contemporaneous records demonstrated the presence of significant inconsistencies in Mr Bacon's reporting of injury. Reference was made to the relevant first aid notes and to the records of medical consultations on 22 December and 31 December 2016. It was the applicant's view that records of medical consultations disclosed that Mr Bacon's injury was not sustained on 14 December 2015 but at some earlier point, while there were significant inconsistencies over time in Mr Bacon's version about how his injury was sustained:

(i) While Mr Bacon described in specific terms how he injured his ankle on 22 January 2016, when he first reported an injury to his employer's first aid officer at 11.50pm on 14 December 2015, he said to the first aid officer that he was "unsure how the injury occurred";

(ii) Similarly, when Mr Bacon completed a record of injury statement shortly after reporting to the first aid office, he wrote that he "suffered an injury when my right ankle became swollen over time", and stated that he did not know what caused the injury;

[46] In the applicant's submission it beggared belief that Mr Bacon might slip and kick a stand at 10.30pm and yet only an hour or so later tell a first aid attendant that he did not know why his ankle was swollen, and indicate that the condition had built up

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[5] Judicial Commission of New South Wales, *Civil Trials Bench Book* (at CTBB 16) [9-0020], citing *Alexander v Cambridge Credit Corporation Ltd* (1985) 2 NSWLR 685, 694-5.

over time. Despite these apparent inconsistencies however it is in Mr Bacon's favour that:

(i) He has always stated that the injury occurred on the kill floor of his workplace; and

(ii) He reported the injury to the first aid office soon after he became aware that something was amiss.

[47] I am satisfied having regard to the material and submissions that there are significant matters to be tried on appeal and that on a preliminary assessment it would be difficult for me to conclude anything other than that the applicant has an arguable case to prosecute in the appeal proceedings.

Abortive Appeal

[48] *Alexander v Cambridge Credit Corporation Ltd*[6] is authority for the proposition that an application for stay would normally be granted where there is a risk that an appeal will prove abortive if the appellant fails to secure a stay. The prospect of an abortive appeal arises because the terms of section 566 of the WCR Act provide that if a determination is made by the industrial commission or the industrial court to the effect that a claim is not one for acceptance and the insurer has already made payments to an injured worker, "the person who received compensation is not required to refund the payment to the insurer".

[49] The effect of the relevant parts of Ms Munn's affidavit was that if JBS's appeal was ultimately determined in its favour, JBS will have been obligated to pay Mr Bacon benefits in the order of $113,494.51, which payment were not recoverable given the operation of section 566 of the WCR Act. It followed in the applicant's submission that JBS would suffer a "serious financial detriment" should it succeed in its appeal and yet fail to secure a stay of the review unit decision. In these circumstances, it was put that the conduct of the appeal would be seen as a fruitless exercise and was likely to be aborted.

[50] The respondent however challenged the accuracy of JBS's estimate of monies lost and doubted that the appeal should be considered futile if a stay were not granted. It was their submission that the applicant retained a substantial interest in prosecuting the appeal because of common law implications should the appeal fail. The respondent submitted that "this outcome of itself would justify the Applicant in continuing with the appeal".

[51] The estimate of financial detriment is unlikely in my view to be as high as $113,494. The wages cost up to the end of January 2017 will be of the order of $51,000. If surgery has not been accessed through the public system, it is estimated to cost the insurer $17,669 if the procedure is undertaken through the private system. JBS also calculated its exposure on the basis that, following surgery, Mr Bacon would require a recovery period in the order of nine months before he could resume work. However this estimate was challenged by Mr Bacon who said in his affidavit that he expected to resume work eight weeks after surgery.

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[6] *Alexander v Cambridge Credit Corporation Ltd* (1985) 2 NSWLR 685.

[52] If I proceed on the basis that delays in deciding the appeal and recovery time were likely to mean that Mr Bacon would not return to work prior to 30 June 2017, the wages component would be assessed at approximately $21,000. In these circumstances the total financial detriment would be assessed at $90,000. If surgery were completed in the public system, this cost would be avoided and hence it might be more equitable to assess the detriment as falling within a range of between $70,000 and $90,000.

[53] The significant financial detriment that may be suffered, the failure to recover if the appeal was successful, and the probability that the appeal would be aborted if the stay were not granted, are factors which contribute persuasively to a view that the Commission's discretion should be exercised in favour of granting a stay.

Balance of Convenience and Fairness to All

[54] The question to be answered is whether the balance of convenience favours the granting of a stay of the review unit's decision until the appeal is heard by the Commission.

[55] In his affidavit Mr Bacon said, in effect, that the lodgment of the employer appeal had delayed treatment for his ruptured tendon. Because of the rejection of his claim by the self-insurer he elected to place himself on a public waiting list for surgery. However he subsequently took himself off the list when the regulator over-ruled the self-insurer's decision and when, on his account, JBS informed him that he should access surgery through the private system. The subsequent decision by JBS to appeal the regulator's decision has led him to once again place himself on the public waiting list. He does not know when he will access surgery. It is clear in my view that Mr Bacon has been significantly inconvenienced by the delays occurring in the resolution of his workers' compensation claim. This is not to say however that the employer has done anything other than exercise its rights to appeal the review unit's decision and is motivated by anything other than a genuine belief that Mr Bacon's injury was not work related.

[56] Mr Bacon also stated in his affidavit that the delay in the resolution of his workers compensation application had caused significant financial hardship. His only source of income since January 2016 had been income protection insurance payments of $416.52 (net) per week. The consequence of this is that, over the 2016 calendar year, he has received less than half his normal income. I accept that Mr Bacon has suffered significant financial hardship arising from his inability to work because of injury, and because of delays in resolving his workers compensation claim.

[57] In order to mitigate Mr Bacon's hardship and improve its prospects in any balance of convenience adjudication, the applicant offered to pay Mr Bacon, within 14 days of its stay application being granted, a lump sum amount equal to what Mr Bacon would have earned on normal wages from the date of any entitlement to compensation to the end of January 2017. This payment, which was based on a net weekly wage of $961.72, amounted to $51,023.63. The payment was proposed to be made on an unconditional basis and would not be required to be paid back by Mr Bacon in the event that JBS was successful with its appeal.

[58] While the respondent acknowledged that the payment of wages offer made by the applicant would mitigate the extent of Mr Bacon's financial loss, the offer still left unresolved, wages payments that might otherwise be paid after 31 January 2017 and up to the date of determination of the JBS appeal. Further the employer's offer did not mitigate in any way the ongoing pain, suffering and inconvenience suffered by Mr Bacon as a result of his injury and as a result of the substantial delay in accessing the necessary medical treatment for his injury, including surgery. Therefore, in only addressing part of the balance of convenience considerations, the applicant's offer falls short of satisfying the balance of convenience test.

Conclusion

[59] I am satisfied that the applicant has an arguable case on appeal. I am also satisfied that the applicant will suffer a significant financial detriment in the event that it were to succeed with its appeal but fail to secure a stay of the review unit decision. I accept that without a stay, it could be anticipated that the employer would give serious consideration to aborting its appeal. In terms of a balance of convenience determination, the immediate payment of a lump sum by the employer would significantly assist Mr Bacon's financial circumstances, but does not bring an end to any pain, suffering or inconvenience caused by delays in medical treatment. It is unlikely however that he will access surgery for his injury before the end of January 2017, whether public or private systems are pursued.

[60] In circumstances where the appeal is to be heard at the end of January 2017 and a decision might be expected to issue at the end of March 2017, I have concluded that the balance of convenience considerations favour the grant of the stay application. The application is granted on the basis that the agreed sum should be paid to Mr Bacon by his employer no later than seven days from the date of this decision.

Orders

[61] In light of the above reasons, I make the following orders:

(i) That the decision of the regulator dated 15 September 2016 in the matter of Peter John Bacon be stayed until the appeal so initiated is disposed of or until the Commission otherwise orders;

(ii) That the employer pay to Mr Bacon an amount of $51,023.63 (net of tax) within seven days of the date of this decision; and

(iii) There be no order as to costs.