

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Wicks v Workers' Compensation Regulator*
[2021] QIRC 001

PARTIES: **Wicks, Helen**
(Appellant)

v

Workers' Compensation Regulator
(Respondent)

CASE NO.: WC/2020/4

PROCEEDING: Application in existing proceedings

DELIVERED ON: 4 January 2021

HEARING DATE: On the papers

MEMBER: Merrell DP

DATES OF WRITTEN SUBMISSIONS: Respondent's written submissions: 28 July 2020
Appellant's written submissions: 11 August 2020

ORDERS:

- 1. The Respondent's application in existing proceedings filed on 8 June 2020 is dismissed.**
- 2. The parties are to file written submissions of no more than 2 pages by 4.00 pm on 22 January 2021 in relation to costs.**

CATCHWORDS: WORKERS' COMPENSATION - ENTITLEMENT TO AND LIABILITY FOR COMPENSATION - worker made application for workers' compensation pursuant to the *Workers' Compensation and Rehabilitation Act 2003* for aggravation of a psychiatric/psychological injury - application for compensation made out of time - no express waiver of the time limit in WorkCover decision - WorkCover rejected application on the basis that the worker's injury arose out of or in the course of the worker's expectation or perception

of reasonable management action being taken against the worker - worker applied for review to the Workers' Compensation Regulator - Regulator confirmed the decision of WorkCover and made no reference to the worker's application for compensation being made out of time - worker appealed Regulator's decision to the Commission - application in existing proceedings by the Regulator to dismiss worker's appeal - whether Regulator can now raise the fact the worker's application for compensation was made out of time so as to dismiss the application for workers' compensation - Regulator's application in existing proceedings dismissed

LEGISLATION:

Workers' Compensation and Rehabilitation Act 2003, s 32, s 131, s 540, s 541, s 545, s 548, s 549 and s 558

CASES:

Church v (Simon Blackwood) Workers' Compensation Regulator [2015] ICQ 031; (2015) 252 IR 461

Kalokerinos v HIA Insurance Services Pty Ltd [2004] NSWCA 312

Kim v Workers' Compensation Regulator [2019] ICQ 14

Kostas v HIA Insurance Services Pty Ltd [2010] HCA 32; (2010) 241 CLR 390

Lowis v Workers' Compensation Regulator [2019] QSC 5

Wicks v Workers' Compensation Regulator [2018] QIRC 063

Workers' Compensation Regulator v Yates [2015] QIRC 174

APPEARANCES:

Ms H. Blattman of Counsel directly instructed by Ms K. Bednarek of the Workers' Compensation Regulator

Mr J. Shepley of Counsel directly instructed by Ms H. Wicks

Reasons for Decision

Introduction

- [1] Ms Helen Wicks was employed by Capilano Honey Ltd as a Graphic Designer. On 24 November 2015, Ms Wicks made an application for workers' compensation for a psychological injury sustained on or about 11 November 2015. WorkCover Queensland rejected that application and on 9 March 2017, the Workers' Compensation Regulator confirmed WorkCover's decision on review. An appeal to this Commission by Ms Wicks against the Regulator's 9 March 2017 review decision was dismissed.¹
- [2] On or about 15 March 2017, Ms Wicks lodged a further claim for workers' compensation for a psychological/psychiatric injury which she claimed was sustained during her employment with Capilano Honey Ltd ('Ms Wicks' further application'). The date of the injury was stated to be 11 November 2015 and was described as an '[a]ggravation of existing injury originally caused by Capilano (refer to previous claim S15XX278964 for more detail)'.²
- [3] It is not disputed by Ms Wicks that, having regard to s 131(1) of the *Workers' Compensation and Rehabilitation Act 2003* ('the Act'), she should have lodged her further application for compensation within 6 months of either 20 January 2016 or 13 February 2016.³
- [4] By written decision dated 27 June 2019, WorkCover rejected Ms Wicks' further application on the basis that it arose out of Ms Wick's expectation or perception of reasonable management action taken against her. In its reasons, WorkCover did not refer to s 131(1) of the Act and did not expressly reference waiving, pursuant to s 131(5) of the Act, the limitation period in s 131(1).
- [5] By decision dated 10 December 2019, the Regulator confirmed WorkCover's decision to reject Ms Wick's further application and, in doing so, did not refer to s 131(1) of the Act. By notice of appeal filed on 9 January 2020, Ms Wicks appealed the Regulator's 10 December 2019 decision to this Commission ('Ms Wick's appeal').
- [6] By application in existing proceedings filed on 8 June 2020, the Regulator applies for an order that Ms Wicks' appeal be dismissed on the basis that Ms Wicks' further application for compensation is not valid and enforceable pursuant to s 131(1) of the Act ('the Regulator's application'). The Regulator seeks an order that Ms Wicks' appeal be dismissed with costs.
- [7] In deciding whether or not to make the orders sought by the Regulator, there are two specific questions for my determination, namely:
- whether, having regard to the decision under appeal and the fact that Ms Wicks' appeal is a hearing *de novo*, the Regulator should now be permitted to raise the

¹ *Wicks v Workers' Compensation Regulator* [2018] QIRC 063, [177] (Industrial Commissioner Knight).

² The affidavit of Ms Kerstin Bednarek affirmed on 8 June 2020, exhibit KB-1.

³ The submissions of the Workers' Compensation Regulator filed on 28 July 2020 ('the Regulator's submissions'), paras. 16-17 and the submissions of Ms Helen Wicks filed on 11 August 2020 ('Ms Wicks' submissions'), para. 2.

limitation period contained in s 131(1) of the Act in relation to Ms Wicks' appeal;
and

- if so, whether the discretion pursuant to s 131(5) of the Act is enlivened and, if so, whether such discretion should be exercised in favour of Ms Wicks.

[8] The answer to the first question requires consideration of the decision of the Industrial Court of Queensland in *Church v (Simon Blackwood) Workers' Compensation Regulator ('Church')*.⁴

[9] For the reasons that follow, my decision is that the Regulator cannot now raise the limitation period contained in s 131(1) of the Act in relation to Ms Wicks' appeal.

Should the Regulator now be permitted to raise the limitation period contained in s 131(1) of the Act to defeat Ms Wicks' appeal?

The relevant provisions of the Act

[10] Section 131(1) of the Act provided that an application for compensation is valid and enforceable only if the application is lodged by the claimant within six months after the entitlement to compensation arises.

[11] Chapter 13 of the Act provides for reviews and appeals. Part 2 of that chapter provides for a review, by the Regulator, of certain decisions by WorkCover and a self-insurer.

[12] Relevantly, s 540 of the Act provides:

- (1) This part applies to the following-
 - (a) a decision by WorkCover-
 - ...
 - (vii) to waive or not to waive section 131(1) or (2); or
 - (viii) to allow or reject an application for compensation; or

[13] Section 541 of the Act provides that a claimant, worker or an employer aggrieved by a decision or the failure to make a decision may apply for review by the Regulator.

[14] Section 545(1) of the Act provides that the Regulator must, within 25 business days after receiving an application, review the decision (the review decision) and decide to:

- confirm the decision; or
- vary the decision; or
- set aside the decision and substitute another decision; or

⁴ [2015] ICQ 031; (2015) 252 IR 461 ('Church').

- set aside the decision and return the matter to the decision maker with directions the Regulator considers appropriate.

- [15] Section 545(5) of the Act relevantly provides that if the Regulator, upon review, varies the decision or sets aside the decision and substitutes a new decision, the (Regulator's) decision is taken for the Act, other than ch 13, pt 2, to be the decision of the decision maker.
- [16] Relevantly to the Regulator's application, the combined effect of s 548(1)(a) and s 549(1) of the Act provides for an appeal to the Commission by a claimant or worker aggrieved by a review decision of the Regulator, other than a review decision to return a matter to a decision maker under s 545 of the Act.
- [17] Section 558(1) of the Act deals with the powers of the Commission on appeal. The Commission may confirm the review decision, vary the decision, set aside the decision and substitute another decision, or set aside the decision and return the matter to the respondent with directions the Commission considers appropriate.

Church v Workers' Compensation Regulator

The facts in Church

- [18] In *Church*, the appellant worker made an application for compensation. WorkCover rejected the application on the basis that it was lodged outside the six-month limitation period contained in s 131(1) of the Act.⁵ Upon Mr Church's application for review, the Regulator set aside the WorkCover decision, waived the time limit in s 131 of the Act, decided the application was valid and enforceable, and returned the claim to WorkCover for further assessment.⁶ Having regard to s 545(1)(c) and s 545(5) of the Act, the Regulator's decision to waive the time limit was taken to be the decision of WorkCover.⁷
- [19] WorkCover then decided the claim by rejecting it on the basis that Mr Church had not sustained an injury within the meaning of s 32 of the Act. The Regulator, by a second review decision, affirmed the decision of WorkCover.⁸ Mr Church then appealed the second review decision of the Regulator to the Commission.⁹ The Commission, by way of a preliminary decision, accepted the Regulator's contention that because the application for compensation, as originally lodged by Mr Church, was outside the statutory time limit, the Commission had jurisdiction to determine whether s 131 had been complied with irrespective of the waiver of the time limit.¹⁰
- [20] Mr Church then appealed that decision of the Commission to the Industrial Court.

⁵ *Church* (n 4), [2].

⁶ *Ibid* [3].

⁷ *Ibid* [19].

⁸ *Ibid* [4].

⁹ *Ibid* [5].

¹⁰ *Ibid* [5] and [6].

The principles in Church

[21] An appeal to the Commission against a review decision of the Regulator is a hearing *de novo*.¹¹ This means that the parties are to start the 'case' again.¹²

[22] In referring to these principles, Martin J, President, in *Church* relevantly held that:

- the lodging of an appeal to the Commission does not open the gates for both parties to the appeal to request the Commission to determine any number of preliminary issues;
- the ambit of such a hearing is determined by the case which was before the Regulator; and
- it is also determined by any specific statutory provision which impinges upon the boundaries of the issue to be determined.¹³

[23] Furthermore, his Honour referred to s 545(1) of the Act and stated that the definition of 'the review decision' referred to in that section, namely, the decision of the Regulator to either confirm, vary or set aside the decision (and either substitute another decision or return the matter to the decision maker with directions the Regulator considered appropriate) provided the boundaries of the hearing before the Commission on appeal.¹⁴

[24] Put another way, the ambit of a Commission hearing is determined by the case that was before the Regulator, the parties start again and an appellant must make out their case anew.¹⁵

The decision in Church

[25] On the facts in *Church*, Martin J, President, held that:

- the review decision in that case was to affirm the decision of WorkCover that Mr Church had not sustained an injury within the meaning of the Act;¹⁶
- the provisions of the Act which dealt with appeals do not contemplate that another issue, removed in time and effect from the review decision, would be able to be considered;¹⁷ and
- the Commission did not, in the circumstances of that case, have the power to consider and then vary the decision of the Regulator to waive the time limit.¹⁸

¹¹ *Church* [27].

¹² *Ibid* [29] and [30].

¹³ *Ibid* [33].

¹⁴ *Ibid* [37] and [38].

¹⁵ *Kim v Workers' Compensation Regulator* [2019] ICQ 14, [29] (Martin J, President).

¹⁶ *Church* (n 4) [38].

¹⁷ *Ibid* [38].

¹⁸ *Ibid* [39].

The Regulator's submissions

[26] In summary, the Regulator submits that:

- Ms Wicks' application for compensation was and is not valid and enforceable because it was not made within the limitation period contained in s 131(1) of the Act;¹⁹ and
- *Church* is distinguishable because in that case:
 - there had been a previous decision to waive time, by the Regulator, standing in the shoes of WorkCover, following which the application was remitted to WorkCover for consideration on its merits;²⁰ and
 - there had been no appeal from the decision of the Regulator to waive time;²¹
- what is being considered *de novo* is a question of fact, namely, whether Ms Wicks' (further) application for workers' compensation was brought within time, and that such an issue was contemplated in *Church* at paragraph [34], as a matter which could be the subject of further evidence and argument;²²
- the application of s 131(1) of the Act is a specific statutory provision of the type contemplated in *Church* at paragraph [33] and the difference in *Church* was that s 131(1) had already been waived pursuant to s 131(5) of the Act, such that it had no further role to perform;²³ and
- because no consideration was given either by WorkCover or it to the question of whether the application was brought within time, let alone the exercise of a discretion to extend time, the matter remains a live issue appropriate for determination on a hearing *de novo*.²⁴

Ms Wicks' submissions

[27] In summary, Ms Wicks submits that:

- having regard to the principle in *Church*, namely, that by way of a hearing *de novo*, the issue that is to be determined by the parties, starting again, is the issue decided by the Regulator in the review decision;²⁵ and

¹⁹ The Regulator's submissions, para. 17.

²⁰ Ibid para. 19.

²¹ Ibid.

²² Ibid para. 20.

²³ Ibid.

²⁴ Ibid para. 21.

²⁵ Ms Wicks' submissions, paras. 4 to 32.

- in the present case, the subject of her appeal is the review decision by the Regulator to confirm the decision of WorkCover that her personal injury was not an injury within the meaning of s 32 of the Act.²⁶

My determination

- [28] The determination of the Regulator's application requires close scrutiny of its submissions concerning the decision in *Church*.

What is being considered de novo is a question of fact, namely, whether Ms Wicks' application for workers' compensation was brought within time, and that such an issue was contemplated in Church at paragraph [34], as a matter which could be the subject of further evidence and argument

- [29] The Regulator submits that the decision in *Church* contemplated that the question of whether or not an application for workers' compensation was brought within time was a matter which could be the subject of further evidence and argument. The passage from *Church* upon which this submission is based is that contained in paragraph [34].
- [30] However, paragraph [34] of *Church* should not be read in isolation. In the preceding paragraphs, Martin J, President, set out the relevant paragraphs from the decision of the Commission against which the appeal in that case was made. His Honour then set out why the reasoning in that decision did not accord with the role of the Commission in a hearing *de novo*. In this regard, his Honour held:

What was the issue to be decided?

- [31] In this case, the case or issue able to be taken on appeal to the Commission by Mr Church is the decision of the Regulator to affirm the decision of WorkCover. The decision of WorkCover which was affirmed by the Regulator was a decision that Mr Church had not sustained an injury within the meaning of 32 of the Act. It was not a decision that related to whether or not Mr Church had filed his application for compensation within time. By the time this part of Mr Church's case was considered by WorkCover, it had already, by virtue of the operation of s 545(5), "made" the decision to waive the time limit and it was not revisited.

- [32] In concluding her decision on this point, the Commissioner said:

'[30] ... I have formed the view the Commission is not prevented from examining and determining whether or not s 131 has been complied with on appeal where a question with respect to compliance is raised by one of the parties.

[31] In particular, a prior decision or even the absence of a decision during an applicant's interaction with either the Regulator or WorkCover in their assessment of a claim for workers' compensation with respect to the waiving or otherwise of the time limitation under s 131, does not in my view prevent the Commission from examining and determining whether s 131 has been complied with on appeal.

...

[33] Whilst it is clear on the authorities that it is not the Commission's role to go back and delve down into every aspect of the legislation, and in particular the numerous determinations that can arise during the administrative review stage, by lodging an Appeal

²⁶ Ibid para. 32.

the Appellant has, in effect, opened the gates for both itself and/or the Respondent to request the Commission to determine, having regard to its powers at s 558, any number of preliminary issues, including compliance with s 131 of the Act.

[34] In my view, Mr McLeod is correct in his assertions that there are no current authorities preventing the Commission from dealing with a particular matter relating to a claim, simply because it had previously been determined in favour of a claimant during the administrative review process.

[35] In a practical sense, if the Appellant's arguments were accepted, then the Regulator would be bound by findings in its previous review decisions related to a particular claim, to the extent that it could result in a situation where, for example, a determination that a claimant was a "worker" during the review process would have to be maintained even in circumstances where additional evidence might support a different finding from the Commission."

[33] That reasoning does not, with respect, accord with the role of the Commission in a hearing *de novo*. For the reasons I have set out above, the lodging of an appeal to the Commission does not "open the gates" for both parties to the appeal to request the Commission to determine "any number of preliminary issues". The ambit of such a hearing is determined by the case which was before the Regulator. It is also determined by any specific statutory provision which impinges upon the boundaries of the issue to be determined.

[34] The question which is raised in this case is quite distinct from the circumstances argued by Mr McLeod. It was submitted that preventing the Commission from considering the issue of the time limit under s 131 would have the effect of preventing the Regulator or a claimant from departing from a stance such as the acceptance by the Regulator that an injury was work-related. I accept that an insurer, a claimant and the Regulator might proceed on the basis that a certain set of facts exists. For example, it is not unusual for an insurer or the Regulator to accept that a claimant is a "worker" within the meaning of the Act or that it is accepted that an injury is work-related. Those are matters which can be the subject of further evidence in a hearing before the Commission. But those are questions of fact.

[31] In the present case and in *Church*, the review decisions the subject of appeals to the Commission involve the questions of whether the claimants have injuries within the meaning of s 32 of the Act. As in the second review decision in *Church*, the Regulator in the present case, in reviewing the 27 June 2019 WorkCover decision, proceeded on the basis that Ms Wicks' further application for workers' compensation was valid and enforceable.

[32] For these reasons, the issue raised by the Regulator about s 131 of the Act does not bring Ms Wicks' case into the category of case referred to by Martin J, President, in *Church*, namely, where questions of fact can be subject of evidence before the Commission on appeal. In my view, the category of case contemplated by his Honour specifically concerned cases where the issue before the Regulator was whether or not the person had a compensable injury under the Act.

[33] Further, in my view, his Honour was indicating that while it may be assumed by the Regulator in conducting a review under ch 13, pt 2 of the Act, that, for example, a person was a worker within the meaning of the Act, or that there was a causal connection between a worker's employment and a worker's injury, on a hearing *de novo* before the Commission, those matters of fact could be agitated and be the subject of evidence or further argument in determining whether the person had a compensable injury. Those matters, it seems to me, are the types of matters not removed in time and effect from the review decision, to which his Honour referred.

- [34] In the present case, the issue of the validity and enforceability of Ms Wicks' further application is removed in time and effect from the review decision the subject of Ms Wicks' present appeal.
- [35] The Regulator submitted that an application of the type presently made by it was made in *Workers' Compensation Regulator v Yates ('Yates')*²⁷ where an application was made by the Regulator to strike out particular stressors.²⁸ In my opinion, *Yates* does not assist the Regulator.
- [36] In that case, Ms Yates lodged a claim for compensation on 24 March 2014 which identified an injury occurring on 21 March 2014.²⁹ The application for compensation was rejected by WorkCover. The Regulator, by its review decision, upheld WorkCover's decision. Ms Yates then lodged an appeal against the review decision to the Commission.³⁰
- [37] In respect of the appeal before the Commission, Ms Yates filed a statement of stressors on 6 May 2015 which identified her being exposed to bullying and harassment in the workplace for the period of April 2012 until March 2014.³¹
- [38] The Regulator did not contend that Ms Yates' application for compensation itself was invalid. Rather, the Regulator challenged the stressors relied upon by Ms Yates concerning the period prior to an assessment of Ms Yates by Dr Ernest Finberg, General Practitioner, on 4 May 2012.³²
- [39] The basis of the challenge was that for an application for compensation to be valid and enforceable it must be lodged by the claimant within six months of an entitlement to compensation arising.³³ The Regulator sought to strike out all stressors relied upon by Ms Yates in the period prior to the assessment by Dr Finberg on 4 May 2012 as an application for workers' compensation had not been made within the six-month time period, nor had there been issues raised in terms of special circumstances that would allow for consideration of a waiver.³⁴
- [40] Industrial Commissioner Thompson held that:
- effectively on 4 May 2012, there was a diagnosis of an injury which would have enabled Ms Yates to lodge an application for workers' compensation,³⁵

²⁷ [2015] QIRC 174 (*'Yates'*).

²⁸ *Ibid* [2].

²⁹ *Ibid* [11].

³⁰ *Ibid* [11].

³¹ *Ibid* [12].

³² *Ibid* [13].

³³ *Ibid* [13].

³⁴ *Ibid* [14].

³⁵ *Ibid* [25].

- the injury diagnosed by Dr Finberg on 4 May 2012 was unable to be considered '... as such an application for compensation would now not be valid or enforceable';³⁶
- if such an injury is excluded, then the stressors said to have contributed to the diagnosed injury would meet a similar fate and that it would be an unrealistic and unsustainable situation if such stressors could form part of a claim for compensation lodged some 18 months beyond the finish of a prescribed time;³⁷ and
- three stressors referring to events in 'Approximately April 2012' and 'In or around April 2012' were to be removed from the statement of stressors filed by Ms Yates on 6 May 2015.³⁸

[41] On a fair reading of that decision, Ms Yates' injury, which was diagnosed on 4 May 2012, had not been the subject of any decision by WorkCover. It further seems that such an alleged injury was not the subject of any review decision by the Regulator nor was it a 'case' that was before the Regulator.

[42] The facts are different in Ms Wicks' case. In *Yates*, the stressors that were struck out of the statement of stressors concerned matters that had never been the subject of an application for workers' compensation and had never been the subject of a review decision of the Regulator. In Ms Wicks' case, there has been a decision by WorkCover, and a review decision by the Regulator, that the injury Ms Wicks said she has suffered, was not an injury within the meaning of the Act.

The application of s 131(1) of the Act is a specific statutory provision of the type contemplated in Church at paragraph [33] and the difference in Church was that s 131(1) had already been waived pursuant to s 131(5) of the Act, such that it had no further role to perform

[43] I cannot accept this submission.

[44] In *Church*, Martin J, President, held:

[37] Further, the appeal to the Commission is with respect to the "review decision". As set out above, a "review decision" is defined in s 545 in the following way:

"(1) The Regulator must, within 25 business days after receiving the application, review the decision and decide (the *review decision*) to-

- confirm the decision; or
- vary the decision; or
- set aside the decision and substitute another decision; or
- set aside the decision and return the matter to the decision-maker with the directions the Regulator considers appropriate."

[38] That definition provides the boundaries of the hearing before the Commission on appeal. The sections of the Act which deal with an appeal to the Commission apply to "review

³⁶ Ibid [26].

³⁷ *Yates* (n 27) [26].

³⁸ Ibid [29].

decisions". The review decision in this case was to affirm the decision of WorkCover that Mr Church had not sustained an injury within the meaning of the Act. The provisions of the Act which deal with appeals do not contemplate that another issue, removed in time and effect from the review decision, would be able to be considered.

- [45] In my opinion, Martin J, President, at paragraph [33] in *Church* was not referring to specific statutory provisions which were removed in time and effect from the review decision of the Regulator. The decision that Ms Wicks did not have an injury within the meaning of s 32 the Act was a decision to which ch 13, pt 2 of the Act applied.³⁹ The Regulator's subsequent review decision was that Ms Wicks did not have an injury within the meaning of s 32 of the Act. What is to be considered by way of a *de novo* hearing before this Commission is whether Ms Wicks had an injury within the meaning of s 32 of the Act.
- [46] In my view, whether or not WorkCover implicitly waived the time limit in s 131(1) of the Act is not the issue. What identifies the case before this Commission, by way of an appeal *de novo* against the review decision, is the review decision and not the WorkCover decision.
- [47] In any event, the Regulator's submissions about this point are not persuasive.
- [48] In *Lowis v Workers' Compensation Regulator*⁴⁰ (*Lowis*), Crow J found, on the facts of that case, that WorkCover had implicitly waived the time limit in s 131(1) of the Act.⁴¹ The Regulator submits that the present case is not like *Lowis* because in *Lowis* an application had been made in time but the applicant later changed his nomination as to the identity of his employer and WorkCover registered it as a 'new' claim although there was only one injury. The Regulator contends that because Ms Wicks' case concerns different injuries, arising on different dates and out of different circumstances, there is no basis for a similar finding.⁴²
- [49] I cannot accept that as a material point of distinction. The decision by WorkCover to waive the time limit was necessarily implicit, in WorkCover determining Ms Wicks' further application, by WorkCover deciding that Ms Wicks did not have an injury within the meaning of s 32 of the Act.
- [50] A decision of a tribunal, such that it may be challenged in respect to a matter of law in a statutory appeal, can include an implied decision.⁴³ In that context, implied decisions have been described as '... decisions which were necessary steps in the Tribunal's reasoning, whether or not made explicit by the Tribunal'⁴⁴ or decisions which are '... necessarily implicit in making the finding';⁴⁵ or decisions which involve '... a necessary step in the Tribunal reaching its conclusion.'⁴⁶

³⁹ *Workers' Compensation and Rehabilitation Act 2003* s 540(1)(a)(viii).

⁴⁰ [2019] QSC 5.

⁴¹ *Ibid* [19].

⁴² The Regulator's submissions, para. [22].

⁴³ *Kostas v HIA Insurance Services Pty Ltd* [2010] HCA 32; (2010) 241 CLR 390, [23] (French CJ) and [69] (Hayne, Heydon, Crennan and Kiefel JJ).

⁴⁴ *Ibid* [23] (French CJ).

⁴⁵ *Ibid* [69] (Hayne, Heydon, Crennan and Kiefel JJ).

⁴⁶ *Ibid* [78] (Hayne, Heydon, Crennan and Kiefel JJ).

[51] In the same context,⁴⁷ it has been held that where there must be a decision in order to dispose of a proceeding, a tribunal '... may decide on such an issue without overtly referring to it.'⁴⁸

[52] In my view, the description of an implied decision referred to above is apposite in respect of the decision made by the claims representative on behalf of WorkCover in the present matter. The WorkCover claims representative proceeded to make a decision that Ms Wicks did not have an injury within the meaning of s 32 of the Act. Having regard to the date upon which Ms Wicks' further application was lodged with WorkCover (15 March 2017) and the date of the alleged injury as recorded in that application (11 November 2015) or the date of the alleged injury as recorded in the accompanying workers' compensation medical certificate (11 January 2016), it was implicit, in that decision, that WorkCover waived the six-month time limitation. Put another way, the implied decision to waive the time limit was a necessary step in WorkCover determining Ms Wicks' further application and deciding whether or not Ms Wicks had an injury within the meaning of the Act. In the absence of any evidence to the contrary, it is open to conclude that there was such an implied decision.

Because no consideration was given either by WorkCover or the Regulator to the question of whether the application was brought within time, let alone the exercise of a discretion to extend time, the matter remains a live issue appropriate for determination on a hearing de novo

[53] For the same reasons given above, I cannot accept this submission.

[54] Ms Wicks sought a review of WorkCover's decision that she did not have a compensable injury. That was the issue of the review decision, or, put another way, the case before the Regulator in review. The Regulator confirmed WorkCover's decision. In Ms Wicks' case, the issue to be determined, by a hearing *de novo* before the Commission, is whether Ms Wicks has suffered an injury within the meaning of the Act.

[55] In these circumstances, there is no further role for s 131(1) of the Act to play in the appeal before the Commission.

Conclusion

[56] For the reasons given above, the Regulator's application is dismissed.

Orders

[57] I make the following Orders:

- 1. The Respondent's application in existing proceedings filed on 8 June 2020 is dismissed.**

⁴⁷ Namely, in a statutory appeal, whether there is a decision on a question with respect to a matter of law.

⁴⁸ *Kalokerinos v HIA Insurance Services Pty Ltd* [2004] NSWCA 312, [47] (Bryson JA with Santow JA at [1] agreeing).

- 2. The parties are to file written submissions of no more than 2 pages by 4.00 pm on 22 January 2021 in relation to costs.**