INDUSTRIAL COURT OF QUEENSLAND

CITATION:	*Green v Workers' Compensation Regulator* [2019] ICQ 3
PARTIES:	**NORMAN GREEN** (appellant) **v** **WORKERS' COMPENSATION REGULATOR** (respondent)
FILE NO:	C/2018/2
PROCEEDING:	Appeal
DELIVERED ON:	3 May 2019
HEARING DATE:	22 May 2018
MEMBER:	Martin J, President
ORDER:	**The appeal is dismissed.**
CATCHWORDS:	WORKERS' COMPENSATION – PROCEEDINGS TO OBTAIN COMPENSATION – PRELIMINARY REQUIREMENTS – CLAIMS FOR COMPENSATION – FAILURE TO MAKE CLAIM WITHIN TIME – where the appellant was diagnosed with asbestos related pleural plaques and, five years later, asbestosis – where the appellant applied to the insurer for compensation for each illness – where the application was outside the statutory time limit – where the insurer declined to waive the time limit, that decision was supported by the Respondent and not disturbed on appeal by the Commission – whether the Commissioner erred in not finding that the insurer should have been satisfied that the applicant's failure to lodge the application was due to a reasonable cause – whether, being so satisfied, the insurer should have waived the time limit *Workers' Compensation and Rehabilitation Act* 2003, s 131
CASES:	*Black v City of South Melbourne* [1963] VR 34, cited *Butt v John W Eaton Ltd* (1920) 29 CLR 126, cited *Commonwealth of Australia v Connors* (1989) 86 ALR 247, cited *Murray v Workers' Compensation Regulator* [2016] QIRC 81, cited *NF v State of Queensland* [2005] QCA 110, cited *Perdis v Nominal Defendant* [2004] 2 Qd R 64, cited

Re Lee and Repatriation Commission (1986) 11 ALD 56, cited

Re van Gelder and Commonwealth of Australia (1985) 7 ALN N374, cited

APPEARANCES: G Diehm QC and S Noble instructed by Slater & Gordon Lawyers for the appellant
S McLeod instructed by the respondent

[1] Norman Green commenced his working life at the age of 13 in 1945. He worked in a variety of jobs until he retired in 1996. For the purposes of this appeal, the relevant work was over two brief periods in 1948 and 1949 when he was subjected to substantial exposure to asbestos, asbestos dust, debris and fibres.

[2] In April 2004, Mr Green was diagnosed with asbestos related pleural plaques. Five years later, in July 2009, he was diagnosed with asbestosis.

[3] He lodged an application for compensation, for each illness, on 22 October 2015 with the insurer WorkCover Queensland. The application was outside the time limit provided for in the *Workers' Compensation and Rehabilitation Act* 2003 – by just under 11 years for the pleural plaques claim and over five years for the asbestosis claim.

[4] The time limit for lodging such an application is set out in s 131 of the WCR Act. Section 131(1) provides:

> "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."

[5] The six month time limit may be waived by an insurer under s 131(5):

> "An insurer may waive sub-section (1) ... for a particular application if the insurer is satisfied that a claimant's failure to lodge the application was due to -
>
> (a) mistake; or
>
> (b) the claimant's absence from the State; or
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> (c) a reasonable cause."

[6] In this case, the insurer declined to waive the time limit, that decision was supported by the Regulator and not disturbed on appeal by the Queensland Industrial Relations Commission.

[7] The broad issue which arises in this appeal is whether the Commissioner erred in not finding that the insurer should have been satisfied that the claimant's failure to lodge the application was due to a reasonable cause and, being so satisfied, whether the insurer should have waived the time limit.

The process under s 131

[8] It was not in contention that a decision to waive the time limit under s 131(5) is a two-step process:

(a) it must be determined whether the failure to lodge within time was due to one of the stated grounds and, if so

(b) whether the discretion should be exercised in the applicant's favour.

[9] The basis for the applicant's case was that a reasonable cause existed to explain the failure to lodge within time. A "reasonable cause" is a cause which a reasonable person would regard as sufficient – a cause which is consistent with a reasonable standard of conduct. See *Perdis v Nominal Defendant.*[1]

[10] It was put this way in *Black v City of South Melbourne*[2] where the Full Court of the Supreme Court of Victoria considered the meaning to be given to "reasonable cause" as it appeared in s 34(4) of the *Limitations of Actions Act* 1958 (Vic). The Full Court said:

> "The inquiry here appears to be of a much wider kind justifying a more liberal attitude. The expression 'reasonable cause' appears to us to mean some act or omission which operated to prevent the giving of notice, and which was an act or omission which was in the circumstances reasonable."

[11] An example of a "reasonable cause" can be found in *Perdis v Nominal Defendant.* The Court of Appeal held that "a reasonable excuse for the delay" had been given within the meaning of s 37(3) of the *Motor Accident Insurance Act* 1994 where the excuse was that the claimant had retained and given adequate instructions to a solicitor, in sufficient time before the expiry of the time limit, to enable him or her to prepare and send a notice of claim, but through the solicitor's negligence this was not done on time. It so held because in doing so, such a claimant had done what a reasonable person might have been expected to do, namely, leave the matter then in the hands of an apparently competent solicitor.

[12] Whether a "reasonable cause" exists for the purposes of s 131(5) will always depend on the facts of the particular case and will require consideration of the knowledge of the applicant at the relevant time and the actions taken or not taken within the six month time limit.

The decision in the Commission

[13] The Commissioner found that the applicant was a person of limited education who had spent his working life in manual labouring occupations and who had always relied heavily upon his wife to take care of what were described as "administrative type issues". In other words, Mrs Green was responsible for the paperwork for all parts of her husband's life. He was, the Commissioner found, properly described as an unsophisticated person. On the other hand, Mrs Green had been a legal support officer in the psychiatric unit at the Nepean Hospital in New South Wales. As part of those duties, she was required to deal with magistrates with respect to the discharge of patients from the hospital's psychiatric unit. She was also a qualified Justice of the Peace.

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[1] [2004] 2 Qd R 64, applying *Quinlivan v Portland Harbour Trust* [1963] VR 25.
[2] [1963] VR 34 at 38.

[14] In May 2010 Mrs Green lodged a claim on behalf of the applicant with the Workers' Compensation Dust Diseases Board of New South Wales. That claim was rejected by the Board in September 2010. The applicant said that, at the time the application was lodged, he did not think he had an entitlement to lodge a claim for compensation because he had stopped working. The claim was lodged without him having obtained any advice and no legal advice was sought after he was advised his claim had been rejected. The DDB had not contacted him beyond the rejection letter and he was not told at any stage he could bring a claim in Queensland.

[15] The letter from the Dust Diseases Board contained the following statements:

> "However, it would appear from your employment history that your asbestosis exposure seems insufficient to enable attribution. Therefore, it is the Authority's opinion that this condition is not related to your dust exposure."
>
> "Furthermore, it would appear from your work history that you never had any asbestos exposure whilst a worker under the Act in New South Wales."

[16] No further steps were taken by the applicant until Mrs Green obtained some information about the option of lodging a claim with WorkCover. That led to her lodging the current application the subject of this appeal.

[17] The extent of the applicant's knowledge about compensation was referred to in his statement where he said:

> "All I know of asbestos related compensation payments I read and heard in the news when Bernie Banton was fighting to get compensation. I did not have any knowledge besides that. I did not really understand who he was fighting and how."

[18] In cross-examination on this topic he said:

> "Well, only because we watched Bernie on TV. He was – he had his oxygen mask on and everything. And I thought he was there to help people out who ever worked for – in asbestos."

[19] After relating that piece of evidence in his reasons, the Commissioner went on to say:

> "[96] It is a matter of public record that Banton gained a degree of public exposure throughout Australia as a campaigner around asbestos-related conditions/illnesses and often appeared on television with an oxygen tank by his side. It is also on the public record that Banton died on 27 November 2007.
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> [97] The level of importance that can be attached to Banton's death on 27 November 2007 is that Green's knowledge about his activities in respect of asbestos related conditions was obtained well before the diagnosis of asbestosis in 2009 and it was reasonable to expect that in respect of the 2009 appeal he was aware that compensation for conditions such as that diagnosed was in the mix."

[20] The reference to the date of Mr Banton's death is the subject of one of the grounds of appeal which I deal with below.

[21] In reaching his conclusion, the Commissioner said:

> "[104] In consideration of the reasonableness of Christine Green's conduct I am drawn to the observations of Keane JA in *NF v State of Queensland:*[3]
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> > 'The person is expected then to take steps to see whether there is a worthwhile right of action, and the question is whether he or she could reasonably be expected to take a certain step, which if taken, would reveal the decisive fact. The reasonableness of the step is assessed by asking whether a person who was or should have been investigating the prospects of a successful action, should have taken that step.'
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> [105] This is exactly what Christine Green had done in respect of her conduct in 2010 and 2015 leaving little doubt of her capacity to instigate applications for compensation albeit in the circumstances significantly outside the statutory time limitations. Christine Green had the capacity to make the applications within the time periods contained in s 131 of the Act."

[22] The statement of principle is correct but, it should be noted, was not an observation by Keane JA. Rather it was an extract, quoted by Keane JA, from the decision under appeal in that case.

The grounds of appeal

Ground 1 The Commissioner erred in failing to confine the consideration of "reasonable cause" to each of the six month periods for each of the diagnoses.

[23] The appellant argued that the reference by the Commissioner to certain actions taken by Mrs Green demonstrated that irrelevant material had been taken into account. The paragraphs complained of are:

> "[81] In May 2010 (a date beyond the end of the six month limit of s 131 of the Act) the appellant lodged a claim with the DDB in NSW that was subsequently rejected in September 2010.
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> [82] The evidence is uncontested that Christine Green was the instigator of that claim firstly through sourcing information from her son's mother-in-law and then the completion of the application form requiring only her husband to add his signature prior to the lodgement of the claim.
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> ...
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> [85] In August 2015 it was again Christine Green who obtained information about the option of lodging another claim, this time with WorkCover in Queensland and it was Christine Green who arranged legal representation to process that application."

[24] The recitation of the evidence is nothing more than part of the general narrative underlying the entire case. It was part of the appellant's evidence and it was recognised by the Commissioner as being outside the six-month time limit.

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[3] [2005] QCA 110 at [20].

[25] The appellant also argued that the Commissioner failed to consider, discretely, the two six-month time periods and the facts and circumstances applying within them. That is, with respect, not an accurate depiction of the Commissioner's reasons. While he did not set out in a separate part of his reasons an examination of each six-month period, he did refer to the evidence which was called with respect to what had occurred at those times. Apart from the two diagnoses which the appellant received, there was little which did occur in those six-month periods. The material which was relevant was not with respect to any actions which were taken but rather the nature and extent of symptoms that the appellant was experiencing at those times.

[26] The Commissioner did refer to the submissions made on behalf of the appellant, including the following:

(a) that he was in 2004 and 2009 (the relevant six-month periods) dependent upon his wife as his carer to attend medical appointments with him and to receive medical documentation,

(b) at the relevant times, he had been retired from all employment,

(c) at the relevant times, he was living in New South Wales, and

(d) the first diagnosis was made as a result of him suffering a chest infection – he was not suffering any significant symptoms within the six-month period.

[27] The Commissioner also referred to the appellant's evidence that he did not, at any relevant time, know that he could claim compensation for asbestos disease.

[28] These were all matters which were relevant and which were recorded by the Commissioner.

Ground 2 The Commissioner erred in failing to consider the nature and extent of the appellant's symptoms within each of the six month periods for each of the diagnoses.

[29] In support of this ground, the appellant argued that if the failure to claim compensation is occasioned by a reasonable belief (within the relevant time period) that the injury is not serious, or the effect of the injury in the future is, reasonably, underestimated (within the relevant time period), then that can constitute a "reasonable cause" for failing to lodge an application within the time period. Three authorities are cited in support of that contention. One of them – *Butt v John W Eaton Ltd*[4] – is a decision of the High Court which is not authority for the appellant's proposition. It relates only to whether or not there was evidence to support the finding of the District Court judge – not whether the judge was correct in his application of the law to the facts of that case.

[30] Section 131 is a standard form of provision in workers' compensation legislation. There are cognate provisions in United Kingdom legislation and they were considered in a series of decisions which were accurately summarised in *Re Lee and Repatriation Commission*:[5]

> "There is a distinct change in modern times from the way in which failure to give timely notice was treated in former times. Six English cases will illustrate two diverging older views.

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[4] (1920) 29 CLR 126.
[5] (1986) 11 ALD 56 at 70.

> *Shotts Iron Co v Fordyce* [1930] AC 503, *Hillman v London and Brighton and South Coast Railway* [1920] 1 KB 284 and *King v Port of London Authority* [1920] AC 3, all took a relatively liberal approach. They considered that reasonable cause (a permissible concept for extending time for notice of injury) existed where a worker honestly believed that there was nothing seriously wrong with him as the result of his accident and therefore did not make a claim in time. Similarly, where a workman encouraged by his employer continued to work after an accident believing that he would be looked after, the worker could rely upon that circumstance as reasonable cause for bringing a late claim.
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> The other type of approach was typified in *Lingley v Thomas Firth and Sons* [1921] 1 KB 655, *Webster v Cohen and Brothers* [1913] WCR 268 and *Roles v Pascall and Sons* [1911] 1 KB 982. They deal with the situation where the worker might say to himself 'I am sanguine about my recovery. I do not think I will want to make a claim. I will, therefore, not give notice of my accident'. The English courts in these cases took the view that the workers would be neglecting the interests of their employers and in such circumstances reasonable cause was found not to exist."

[31] What was described as the more modern approach was discussed in *Re van Gelder and Commonwealth of Australia*[6] where this was said:

> "I consider that in the present context the preferable approach is that of Rainbow J in *Garratt v Tooheys Ltd* [1949] WCR 80. He examined the meaning of 'reasonable cause' and concluded that 'cause' meant the grounds which lead to the worker to omit to give the notice or to claim compensation. The mixture of facts, circumstances and motive which constitutes the explanation of the omission, he considered must be reasonable considered from the viewpoint of the worker, not in the sense that he considered his omission reasonable, but rather in the sense that the cause of the omission is reasonable in the light of all the circumstances in which the worker found himself.
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> In other words the test to be applied is subjective and not objective. One should look through the eyes of the applicant and decide whether, in the circumstances, viewed from his perspective, he was acting reasonably or otherwise. One of the circumstances which his Honour found to constitute reasonable cause was where the worker had failed to associate the incapacity with the injury until a later date. So also *McComas v Goldsbrough Mort & Co Ltd* [1948] WCR 58."

[32] That decision was given before the Full Court of the Federal Court gave its decision in *Commonwealth of Australia v Connors.*[7] It concerned the cognate Commonwealth legislation. In that case, the respondent had, in 1970, a severe heart attack at work. He was absent from work for two months on full pay. When he returned to work he was retrenched on the grounds of invalidity. In October 1985 he sought compensation based on his heart attack and made a formal claim in February 1986. In the Administrative Appeals Tribunal it was found that:

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[6] (1985) 7 ALN N374 at N378.
[7] (1989) 86 ALR 247.

"There appear to be several factors which explain the failure of the applicant to cause an adequate notice to be given to the appropriate person as soon as practicable after his attack:

(1) The fact that he was not suffering any loss at work because of it.

(2) The fact that he knew that those in authority over him were as aware as he was of the fact of the heart attack and his inability, on medical advice, to return to work for two months.

(3) His ignorance of any right to claim compensation at that stage or later and accordingly his failure to consider or seek advice as to the adequacy of the notice which his employer had however clearly received in the sense that he had full knowledge of the heart attack."

[33] The majority (Northrop and Ryan JJ) held that those facts were not sufficient to constitute "reasonable cause" under the relevant legislation. They said:[8]

"In our opinion, those facts are not sufficient to constitute other 'reasonable cause' under s 16 of the 1930 Act. The notice of accident had to be given as soon as practicable after 6 November 1970. On any view, if the respondent had known of the existence and extent of his rights under the 1930 Act, he could have given notice of the accident at any time after he returned to work in January 1971 and likewise could have made his claim within six months of 6 November 1970. In order to come within the provisos to s 16(1), it is necessary that the want of giving notice and the want of making the claim 'was occasioned by mistake ... or other reasonable cause' (emphasis added). The findings of fact do no more than support a conclusion that he was ignorant, that is, that he did not know of his right to make a claim for compensation. Of course it followed from that conclusion that he was ignorant also of the requirements of giving notice and of making a claim within the times prescribed in s 16(1). The failure to give the notice and the failure to make the claim, on these findings, was occasioned by ignorance. Ignorance, in the sense we have used it as signifying failure to advert to the existence of the right cannot of itself constitute 'reasonable cause' under the 1930 Act.

As was said by the Court in *Black's* case (at 38), when considering 'reasonable cause': 'The inquiry here appears to be of a much wider kind justifying a more liberal attitude. The expression 'reasonable cause' appears to us to mean some act or omission which operated to prevent the giving of notice, and which was an act or omission which was in the circumstances reasonable. In *Quinlivan v. Portland Harbour Trust* [1963] VR 25 at 28, Sholl J, used these words: 'The sub-section means to refer to a cause which a reasonable man would regard as sufficient, a cause consistent with a reasonable standard of conduct, the kind of thing which might be expected to delay the giving of notice by a reasonable man.'

Applying that test, it is clear on the findings made that **the only reason for the failure to give the notice and to make a claim was ignorance of the law. That does not constitute 'reasonable cause'**." (emphasis added)

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[8] At 251-252.

[34] The appellant submitted that the uncontested evidence about the appellant's symptoms within each of the relevant periods was that they were slight. The appellant argued that he had not yet acquired much understanding about the development of his asbestos-related conditions into the future. As such, he did not fully appreciate the seriousness of his condition within the relevant periods and had no reason at those times to try to overcome his lack of understanding about his rights in respect of compensation. It was accepted that neither the appellant nor Mrs Green were aware of a right to make an enquiry.

[35] There was evidence, though, from the appellant that he had suffered from side-effects from the disease for many years.

[36] The argument for the appellant appears to be that, because he was not aware of the full extent of the injury and the effect that it could have on him, he failed to claim for compensation because he did not regard the injury as being serious. But, that overlooks the fact that he gave no consideration to making a claim because he did not know that it was possible to make a claim. There is a considerable difference between being aware of one's rights and deciding not to pursue them because of a mistaken belief about the seriousness of an illness and not being aware at all that it was possible to make a claim.

Ground 3 The Commissioner erred in finding that because of the appellant's reliance upon Mrs Green, "reasonable cause" was not shown as a matter of fact; and further erred in law by not considering whether the appellant's reliance as such was unreasonable.

[37] The evidence available supports a finding that Mrs Green had the capacity to make the applications within the time periods set out under s 131. This is not a case in which an injured person has sought the assistance of a lawyer and the lawyer has not acted sufficiently promptly. On the evidence, it is open to conclude that Mrs Green did not make an application on behalf of her husband at least because she was not aware that that was able to be done.

[38] It was argued that the Commissioner erred in not applying the principles which he had discussed in *Murray v Workers' Compensation Regulator.*[9] That case is distinguishable from this because in *Murray* the worker had engaged a firm of solicitors in sufficient time to make an application. It was not an error to, as the appellant put it, fail to consider whether the appellant's reliance on his wife was unreasonable. Mr Green had not relied upon his wife to look after his interests and make an application because neither he nor his wife knew, at the relevant times, that it was possible to make such an application.

Ground 4 The Commissioner erred in finding that in respect of the asbestosis diagnosis the appellant was aware that compensation was "in the mix" when such a finding was unsupported by any evidence and was contradicted by uncontested evidence.

Ground 5 The Commissioner erred by a denial of procedural fairness in that he relied on his own research with respect to the matters pertaining to "Bernie Banton" and which were not raised with the parties.

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[9] [2016] QIRC 81.

[39] The appellant complains that the Commissioner did his own research, namely determining the date of Bernie Banton's death. By itself, such a fact would not be of great consequence in proceedings of this general nature. But, in this matter, the Commissioner was able to fix Mr Green's evidence about what he knew about compensation at a particular time by reference to Mr Banton's death.

[40] Although the Commission is not bound by the rules of evidence, and not constrained by the doctrine of judicial notice, it is bound by the rules of procedural fairness. Where the Commission does embark on a fact-finding exercise without the knowledge of the parties, then the parties should be given an opportunity to comment upon whatever fact has been uncovered by the Commission and make submissions with respect to its relevance and what inferences, if any, can be drawn by a combination of that fact and the other evidence.

[41] The Commission has, like other industrial tribunals, always proceeded on the basis that the members of the Commission are entitled to rely upon the expertise which they have developed. That is particularly apparent when the Commission deals with matters which may be broadly described as industrial matters. The capacity to rely upon expertise and acquired knowledge is at a much lower level when dealing with workers' compensation matters.

[42] In this case, the Commissioner erred by not alerting the parties to the fact that he was going to take into account the date of Mr Banton's death with respect to the time when Mr Green became aware of compensation rights. That error also affects the finding complained of in Ground 5 but for the reasons I give later is not determinative of this appeal.

Ground 6 The Commissioner erred by not finding in each instance that there was "reasonable cause" within each of the six month periods and not going on to exercise the discretion in favour of the appellant.

[43] This ground relies upon findings which are favourable to the appellant in the early grounds. I do not accept that, apart from the grounds relating to the date of Mr Banton's death, the substantive grounds of appeal have been made out.

[44] With respect to the first diagnosis in 2004, the appellant made a conscious decision to do nothing. He was ignorant of the right to seek compensation and such ignorance cannot constitute a "reasonable cause". With respect to the second diagnosis in 2009, he knew of some capacity to seek compensation because an application was made to the Dust Diseases Board. That application, though, was made outside the six-month time period.

[45] The error which I have found to have been established does not provide a ground for allowing the appeal. The other matters upon which the Commissioner was entitled to rely in rejecting the application have not been disturbed.

[46] The appeal is dismissed.