QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*Plant v Workers' Compensation Regulator* [2022] QIRC 169
PARTIES:	**Plant, Darren Colin** (Appellant) v **Workers' Compensation Regulator** (Respondent)
CASE NO.:	WC/2021/45
PROCEEDING:	Appeal against decision of Workers' Compensation Regulator
DELIVERED ON:	20 May 2022
HEARING DATE:	1 – 2 March 2022
MEMBER:	McLennan IC
HEARD AT:	Brisbane
ORDERS:	**1. The appeal is allowed.** **2. The decision of the Workers' Compensation Regulator be set aside.** **3. That the Appellant be paid benefits as a worker with a terminal condition pursuant to ch 3, pt 3, div 4 of the *Workers' Compensation and Rehabilitation Act 2003* (Qld).** **4. The Respondent is to pay the Appellant's costs of the Hearing, to be agreed or, failing agreement, to be subject to a further application to the Commission.**
CATCHWORDS:	WORKERS' COMPENSATION – ENTITLEMENT TO COMPENSATION – entitlements of worker with terminal condition –

meaning of terminal condition – whether appellant suffered a terminal condition pursuant to s 39A of the *Workers' Compensation and Rehabilitation Act 2003* – where appellant suffered from two conditions expected to reduce his life expectancy – interpretation of s 39A of the *Workers' Compensation and Rehabilitation Act 2003* – appellant entitled to compensation

LEGISLATION AND OTHER INSTRUMENTS:

Acts Interpretation Act 1954 (Qld) s 14B

Workers' Compensation and Rehabilitation Act 2003 (Qld) s 5, s 39A, s 128A, s 128B, s 234, s 545, s 558

Workers' Compensation and Rehabilitation and Other Legislation Amendment Act 2019 (Qld) s 36, s 732

Workers' Compensation and Rehabilitation Regulation 2014 (Qld) s 132

Workers' Compensation and Rehabilitation and Other Acts Amendment Bill 2005 (Qld)

Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2019 (Qld)

CASES:

Blanch v Workers' Compensation Regulator [2021] QIRC 408

Certain Lloyd's Underwriters v Cross [2012] HCA 56

Coley v Nominal Defendant [2003] QCA 181

Federal Commissioner of Taxation v Consolidated Media Holdings Limited (2012) 250 CLR 503

Minister for Immigration v Li (2013) 249 CLR 332

Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28

Qantas Airways Limited v Q-Comp (2006) 181 QGIG 301

R v Anderson: ex parte IPEC-Air Pty Ltd [1965] HCA 27

Schipp & Anor v The Star Entertainment Qld Limited [2019] ICQ 009

SZTAL v Minister for Immigration and Border Protection; SZTGM v Minister for Immigration and Border Protection [2017] HCA 34

Tamas v Victorian Civil and Administrative Tribunal [2003] VSCA 113

Workers' Compensation Regulator v Queensland Nurses and Midwives' Union of Employees (No 2) [2021] ICQ 13

APPEARANCES: Mr M Grant-Taylor QC and Ms K M Riedel of counsel, instructed by Shine Lawyers for the Appellant.

Mr S A McLeod QC, directly instructed by the Respondent.

Reasons for Decision

Introduction

[1] Mr Darren Plant ('the Appellant') is a 47-year-old gentleman who previously worked as a spray painter.[1]

[2] The Appellant has been diagnosed as suffering from occupational asthma and chronic obstructive pulmonary disease ('COPD').[2]

[3] On 13 February 2020, the Appellant lodged an application for terminal benefits pursuant to s 128B of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) ('the WCR Act').[3] On 28 August 2020, WorkCover Queensland ('WorkCover') rejected that application.[4]

[4] On 27 November 2020, the Appellant sought a review of WorkCover's decision from the Workers' Compensation Regulator ('the Respondent'). On 11 March 2021, the Respondent decided to confirm the earlier decision of WorkCover to reject the Appellant's request for terminal latent onset lump sum compensation in accordance with s 39A of the WCR Act.

[1] Appellant's Submissions, 29 March 2022, 1 [1]; Appellant's Statement of Facts and Contentions, 21 June 2021; Respondent's Further Amended Statement of Facts and Contentions, 7 February 2022; T 1-6, L 28.
[2] Exhibit 3, 1, 4, 42, 50, 61, 65, 69, 75, 81.
[3] Appellant's Submissions, 29 March 2022, 1 [4].
[4] Ibid.

[5] On 9 April 2021, the Appellant appealed against the Respondent's decision to the Queensland Industrial Relations Commission ('the Commission').

Background

[6] The Respondent does not dispute the evidence given by the Appellant at the Hearing[5] and so the following background is not in dispute.

[7] The Appellant has worked as a spray painter since he was approximately 15 years old, with the exception of a period of self-employment in the early 2000s.[6]

[8] During his career, the Appellant regularly used paints that contained isocyanates.[7]

[9] The Appellant has been engaged by a number of different employers which have implemented varying standards of workplace safety and equipment.[8]

[10] The Appellant was variously provided with either a paper mask, a P2 or single filter mask, or no mask at all.[9] It was not until later in his working life that the Appellant was provided with a four phase positive pressure mask to wear while spray painting.[10]

[11] The Appellant typically applied the paint with a spray gun which used compressed air to atomise the paint into fine, tiny droplets which were released into the air.[11]

[12] The Appellant gave evidence that the extraction fans were largely ineffective and the painters would be covered by the overspray.[12]

[13] The Appellant would work long hours (sometimes up to 10 hours per day) and even after the Appellant moved into a managerial role, he was still exposed to paint that contained isocyanates.[13]

[14] When questioned about his smoking habits during the Hearing, the Appellant indicated he had stopped smoking in early 2020 but resumed smoking a cigarette after a meal in around March 2021 and smoked once every second day and in social settings.[14]

Matters not in dispute

[15] The following matters are not in dispute:

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[5] Respondent's Submissions, 14 April 2022, 1 [4].
[6] T 1-27, L 42-43.
[7] T 1-12, L 30-37; T 1-13, L 35-37; T 1-14, L 19-24; T 1-16, L 5-6; T 1-18, L 25-27; T 1-19, L 1; T 1-19, L 16-21; T 1-20; L 41-45.
[8] Appellant's Submissions, 29 March 2022, 2 [8].
[9] T 1-7, L 18-25; T 1-8, L 40-45; T 1-11, L 15-16; T 1-15, L 33.
[10] T 1-19, L 34-38.
[11] T 1-8, L 19-20.
[12] T 1-26, L 11-15; Exhibit 1.
[13] T 1-12, L 42-43; T 1-19, L 18-21; T 1-21, L 20-25.
[14] T 1-31, L 18-21, 23-28, 33-46; T 1-32, L 5-10.

- the Appellant has been diagnosed as suffering from occupational asthma, with isocyanate exposure identified as the causal factor;

- the Appellant has been exposed to isocyanates in the course of his employment as a spray painter;

- the occupational asthma suffered by the Appellant is an injury within the meaning of s 32 of the WCR Act;

- occupational asthma is an insidious disease; and

- occupational asthma is a latent onset injury within the meaning of sch 6 of the WCR Act.[15]

[16] Further, the parties agree that because the Appellant was diagnosed with the subject condition after 31 January 2015 - pursuant to s 732(1) of the WCR Act, s 39A as amended on 30 October 2019 applies.[16]

Questions to be decided

[17] This appeal is conducted by way of a hearing *de novo* in which the Appellant bears the onus of proof.[17]

[18] Section 128B of the WCR Act provides for the "Entitlements of worker with terminal condition." Subsection (1) provides, "The worker is entitled to compensation for the latent onset injury calculated only under this division."

[19] The relevant section is outlined as follows:

> **39A Meaning of *terminal condition***
>
> (1) A terminal condition, of a worker, is a condition certified by a doctor as being a condition that is expected to terminate the worker's life.
>
> (2) A condition is a terminal condition only if the insurer accepts the doctor's diagnosis of the terminal nature of the condition.

[20] The questions to be decided in the determination of the appeal are:

- whether the Appellant's latent onset injury (i.e., isocyanate induced asthma) is a terminal condition certified by a doctor as being a condition that is expected to terminate the Appellant's life in accordance with s 39A(1) of the WCR Act; and

- if so, whether or not it is appropriate to accept the medical diagnosis of the terminal nature of the condition in accordance with s 39A(2) of the WCR Act.

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[15] Appellant's Statement of Facts and Contentions, 21 June 2021; Respondent's Further Amended Statement of Facts and Contentions, 7 February 2022.
[16] Respondent's Submissions, 14 April 2022, 7 [21]-[22].
[17] *Qantas Airways Limited v Q-Comp* (2006) 181 QGIG 301.

Medical Evidence

[21] The opinions of three thoracic physicians are before the Commission, namely Dr Ian Brown, Dr Robert Edwards and Dr Chris Zappala. The reports of each physician were tendered and admitted in full by the parties. Each physician gave evidence at the Hearing with the exception of Dr Zappala who the parties ultimately agreed not to call.

[22] The Respondent did not call its own expert witnesses and although the Respondent cross examined Dr Brown and Dr Edwards, the expertise of those physicians were not challenged.

[23] I have decided not to approach this Decision by summarising the totality of the medical evidence but will instead refer to the key aspects of the opinions relevant to the determination of this Appeal.

[24] Dr Edwards opined the following:

- "Mr Plant does have moderate chronic obstructive pulmonary disease (COPD) secondary to cigarette smoking. This was his baseline condition but he has also developed occupational asthma which has aggravated the COPD";[18]
- the Appellant suffers from chronic occupational asthma consequent upon his exposure to isocyanates, which were a component of the spray paint with which he worked;[19]
- the Appellant's life is expected to be terminated by "severe chronic air way obstruction which has been produced by – which has contributed to significantly by chronic asthma";[20]
- the Appellant is at risk, without any preventative treatment, of having a very severe exacerbation of asthma and suffering from a respiratory arrest and dying;[21]
- the Appellant's life expectancy has been reduced by approximately ten years, two of which are due to his severe chronic asthma with the balance due to chronic airway obstruction;[22]
- the Appellant's occupational asthma contributed significantly to the reduction of his life expectancy;[23]

[18] Exhibit 3, 62.
[19] Ibid 54; T 2-6, L1-5.
[20] T 2-5, L 43 – 45.
[21] Exhibit 3, 61.
[22] Ibid 56; T 2-7, L 1-10.
[23] Ibid 62.

- the Appellant smoking one cigarette every second day and also smoking more than one cigarette on social occasions would not contribute to any significant deterioration in the Appellant's lung function;[24]

- "the main reduction in life expectancy is due to COPD with a smaller contributing factor from his asthma";[25]

- "I consider that his life expectancy has been reduced by an extra two years because the asthma superimposed upon COPD. The asthma will also make the COPD much worse";

- "When patients have a combination of COPD and asthma, their prognosis is worse than if they have either condition alone";[26] and

- "I consider that Mr Plant's prognosis is also worse because of the inadequately controlled occupational asthma".[27]

[25] Dr Brown opined the following:

- "it's his lung disease and the airways obstruction component of his lung disease" that will terminate the Appellant's life;[28]

- the Appellant's "chronic airways obstruction with occupational asthma alone, is sufficient to cause progressive impairment in lung function and respiratory failure such that he could die as a consequence of that disease alone";[29]

- even if the Appellant did not have a smoking history, his occupational asthma effect could be severe enough to cause his death in its own right;[30]

- there would likely be a significant impact on the Appellant's life expectancy by virtue of developing progressive respiratory failure with poor gas exchange and increasing complications affecting cardiac status;[31]

- "given the severity of his airways obstruction at present I think it is highly likely that his life expectancy will be reduced by at least ten years";[32]

- the Appellant's life expectancy was reduced by at least ten years, with some four to five years as a consequence of the occupational asthmatic component alone;[33]

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[24] T 2-6, L 33-39.
[25] Exhibit 3, 56; T 2-6, L 46-47; T 2-7, L 10.
[26] Ibid 62.
[27] Ibid.
[28] T 2-9, L 15-17; Exhibit 3, 73.
[29] Exhibit 3, 82.
[30] T 2-11, L 41-46; Exhibit 3, 82.
[31] T 2-4, L 21-22; Exhibit 3, 70.
[32] Exhibit 3, 68.
[33] Ibid 82.

- Dr Edwards' opinion regarding the reduction in the Appellant's life expectancy was a conservative estimate – the asthmatic component was at least the equal of the Appellant's smoking related COPD in causing his overall airways obstruction and affecting his life expectancy;[34]

- the effects of COPD and occupational asthma are so closely intertwined with symptoms and pathological features that one could not separate which one was contributing at the time;[35]

- following the complex lung function test dated 14 October 2019, Dr Brown consequently assessed the Appellant with a 40% whole person impairment of which a 20% impairment was attributable to the Appellant's COPD and 20% was attributable to the isocyanate induced chronic asthmatic component;[36]

- the Appellant had shown a significant reversible component in lung function at times consistent with a significant asthmatic component which suggested that it was a significant factor and deserved equal weighting in the impairment rating with COPD;[37]

- the Appellant's occupational asthma was relatively equal to his cigarette related COPD in contributing to his cause of death because the Appellant's emphysema and COPD could also be attributed partly to his occupational exposure to fumes;[38]

- "I think the combination of his asthma-induced chronic air ways obstruction and his COPD, make it more likely that he will die of his chronic air ways disease one way or the other";[39]

- in his report of 10 August 2021:

> It is certainly possible that he [the Appellant] could die from his occupational asthma component and I would place this probability somewhere in the range of 10% to 25%. Because of the significant impact on his lung function with his occupational asthmatic component alone, I do believe that this would be sufficient to reduce life expectancy by some four to five years even without the presence of emphysema. The clinical scenarios however are unpredictable in this circumstance and highly influenced by variables such as the frequency and severity of respiratory infections.[40]

- although a difficult assessment to make, 50% of the Appellant's chronic airways obstruction in the lung function measurements is attributable to smoking related

[34] T 2-10, L 34-39; Exhibit 3, 70, 74.
[35] T 2-11, L 34-39.
[36] Exhibit 3, 66.
[37] Ibid.
[38] T 2-10, L 16-20.
[39] Ibid L 2-7.
[40] Exhibit 3, 82.

lung disease of COPD with the remaining 50% related to chronic occupational asthma;[41] and

- although the prospect of the Appellant dying from the effects of his occupational asthma alone was quantified between 10-25%, "even if he didn't have a smoking history, his occupational asthma effect would have been severe enough to cause his death in its own right."[42]

[26] Dr Zappala opined the following:

- the Appellant has significant airway disease best characterised as chronic obstructive airway disease and asthma overlap[43] caused by smoking and occupational exposures;[44]

- decline in the Appellant's lung function was associated with reduced survival of many years;[45] and

- "it is possible that Mr Plant may still have reduced life expectancy by several years despite this positive intervention, or be relatively normal – but this will depend entirely on his ability to manage risk and the degree to which lung function improves."[46]

Consideration

[27] I will now consider whether the Appellant's condition satisfies the meaning of 'terminal condition' pursuant to s 39A of the WCR Act.

Section 39A(1)

[28] Section 39A(1) defines a 'terminal condition' as a condition certified by a doctor as one that is expected to terminate the worker's life.

Key opinions

[29] As outlined above, Dr Edwards expects that Mr Plant's life will be terminated by "Severe chronic air way obstructions, which has been produced by – which has contributed to significantly by chronic asthma."[47] Specifically, Dr Edwards opines that "eight years of

[41] Ibid 66.
[42] T 2-11, L 41-46.
[43] Exhibit 3, 4.
[44] Ibid 2.
[45] Ibid 6.
[46] Ibid.
[47] T 2-5, L 43-45.

reduced life expectancy is due to chronic airway obstruction and two years is due to his severe chronic asthma."[48]

[30] Dr Brown expects that "his lung disease and the airways obstruction component of his lung disease" will terminate the Appellant's life.[49] That is caused, in turn, by "Occupational exposure to isocyanate fumes and to cigarette smoke."[50] Further, Dr Brown opines that even in the absence of a smoking history, "his occupational asthma effect would have been severe enough to cause his death in its own right."[51] Dr Brown considered Dr Edwards' views to be conservative and instead opined "that the asthmatic component is, at least, the equal of his smoking related COPD in causing his overall air ways obstruction and, thus, affecting his life expectancy."[52]

[31] I do not consider Dr Zappala's evidence to be as relevant to that of Dr Edwards and Dr Brown in the determination of the questions to be decided. This perspective appears to be shared by the parties, as there was no objection to the Appellant's determination not to call Dr Zappala as a witness in this Hearing.

Submissions

[32] The Respondent contends that the medical evidence does not support a conclusion that occupational asthma is a condition which is expected to terminate the Appellant's life.[53] Rather, the Respondent submits that, on a proper construction of the sub-section, the condition for which compensation is sought must be **the** condition that will terminate the Appellant's life.[54] Instead, the Respondent referred to COPD as being the "dominant condition" contributing to "the expectancy and the reduction of the expectancy".[55]

[33] In response to this argument, the Appellant turns to statutory interpretation.[56] The Appellant refers to the Respondent's argument that because the non-work related terminal condition is the dominant condition, the Appellant does not suffer from a 'terminal condition' under s 39A(1) of the WCR Act. The Appellant submits that argument ignores the legislature's use of the indefinite article, 'a' throughout s 39A(1).[57]

[34] The Appellant continued (emphasis added):

> Use of the indefinite article was a deliberate choice and the fact that it was maintained throughout the subsection is of significance. For example, the legislature did not draft the section to say 'a terminal condition, of a worker, is a condition certified by a doctor as being <u>the</u> condition that is expected to terminate the worker's life.' Indeed, given the speculative nature of the subject matter of the section (it is not possible to know if a particular condition has terminated a worker's life until

[48] Exhibit 3, 56.
[49] T 2-9, L 15-17.
[50] Ibid L 19-20.
[51] T 2-11, L 44-46.
[52] T 2-10, L 36-49.
[53] Respondent's Further Amended Statement of Facts and Contentions, 7 February 2022, [25a]a).
[54] Respondent's Submissions, 14 April 2022, 8 [27].
[55] T 1-5, L 44-46.
[56] Appellant's Submissions, 29 March 2022, 7 [41].
[57] Ibid 8 [42]-[43].

> that event has come to pass) it is submitted that the draft person's choice of the indefinite article was a careful one which aligns with the purpose of the section and the act.[58]

[35] The Appellant referred to comments of Callaway JA in *Tamas v Victorian Civil and Administrative Tribunal* where his Honour considered the use of the word 'the' and said it is "a natural and correct usage of English to employ the definite article when one is referring to a person or thing already identified expressly or by implication".[59] The Appellant submits that in that matter, the Court determined that the use of the word 'the' rather than 'a' was quite deliberate usage by the draftsperson indicating intention to specify a very particular subject matter.[60]

[36] The Respondent submits that the evidence of the physicians do not attribute the Appellant's occupational asthma as a condition which is solely expected to terminate his life.[61] On that basis, the Respondent contends the Commission cannot be satisfied that the Appellant's work-related condition will be the cause of death in and of itself.[62]

[37] Further, the Respondent submits that the reference to 'a' condition in s 39A(1) of the WCR Act is simply a reference to the need to define a "terminal condition" as "a condition" and that condition "is expected to terminate the worker's life."[63]

[38] Ultimately, the Respondent concludes that on the state of the expert evidence, the Appellant's condition of occupational asthma has not been certified by a doctor as being a condition that is expected to terminate his life.

[39] In reply, the Appellant referred to the decision of *Coley v Nominal Defendant*, within which McMurdo P (with whom Jerrard JA agreed) said:

> The words 'a result of' (my emphasis) themselves support the March v Stramare concept of causation. Had the legislature intended to further restrict the meaning, it could have used phrases such as 'the immediate result of', 'the most proximate result of' or 'the sole result of'. Such a conclusion is consistent with the objects of the Act; the Second Reading Speech and the subsequent amendments to s 5 of the Act; nor is there anything in the Act or in the decided cases to suggest to the contrary.[64]

[40] In application of her Honour's observations to this Appeal, the Appellant submitted that the legislature may have included the phrases "the immediate condition", "the most

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[58] Ibid [44].
[59] [2003] VSCA 113, [8].
[60] Ibid [50]-[51].
[61] Respondent's Submissions, 14 April 2022, 8 [28].
[62] Ibid 9 [28].
[63] Ibid [29].
[64] [2003] QCA 181, [19].

proximate condition" or "the sole condition" to further restrict the meaning. However it did not do so.[65]

Statutory construction

[41] In *Blanch v Workers' Compensation Regulator,*[66] Power IC outlined relevant principles of statutory construction:

> [33] The modern approach to statutory construction as outlined by the High Court in *SZTAL v Minister for Immigration and Border Protection; SZTGM v Minister for Immigration and Border Protection*[67] is as follows:
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> > The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.[68]
> >
> > [footnotes omitted]
>
> [34] In *Project Blue Sky Inc v Australian Broadcasting Authority*,[69] the High Court found that it was a court's duty 'to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have'.[70] The purpose of legislation must be derived from what the legislation says, and not from any assumption about the desired or desirable reach or operation of relevant provision.[71]
>
> [35] General principles of statutory interpretation have been outlined in a number of authorities. The High Court said in *Federal Commissioner of Taxation v Consolidated Media Holdings Limited*:[72]
>
> > "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text". So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is there examination an end in itself.[73]
> >
> > [footnotes omitted]
>
> [36] As outlined by Deputy President Merrell in *Schipp & Anor v The Star Entertainment Qld Limited*,[74] the following:
>
> > A consideration of the context of statutory text includes the legislative history and extrinsic materials. The context should be considered at the first instance not at some later stage and context includes things such as the existing state of the law and the mischief the statute intended to remedy. Therefore it is permissible to have regard to extrinsic materials in order to identify the context and purpose of a

[65] Appellant's Submissions in Reply, 19 April 2022, 2 [7]-[8].
[66] [2021] QIRC 408.
[67] [2017] HCA 34.
[68] Ibid [14] (Kiefel CJ, Nettle and Gordon JJ).
[69] [1998] HCA 28.
[70] Ibid [78] (Mchugh, Gummow, Kirby and Hayne JJ).
[71] *Certain Lloyd's Underwriters v Cross* [2012] HCA 56 [26] (French CJ and Hayne J).
[72] (2012) 250 CLR 503.
[73] Ibid [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).
[74] [2019] ICQ 009.

> statutory provision, including the identification of any mischief to which the legislative amendment was directed.[75]
>
> [footnotes omitted]

Legislative history of s 39A

[37] In order to consider the context and purpose of a statutory provision, including the identification of any mischief to which the legislative amendment was directed, I will examine the legislative history of the section.

[38] As considered in *R v Lavender*,[76] it is permissible when determining the meaning of a continuing provision to refer to its legislative history.

[39] Chapter 3, Part 3, Division 4 of the WCR Act was initially introduced to the WCR Act pursuant to the *Workers' Compensation and Rehabilitation Act and Other Acts Amendment Act 2005* (Qld) ('the WCR Amendment Act 2005'). The Explanatory Note to the Workers' Compensation and Rehabilitation and Other Acts Amendment Bill 2005 (Qld) provide that*:*

> The proposed Bill will achieve its objectives for the workers' compensation scheme primarily by: …
>
> - providing greater certainty on the payment of workers' compensation for latent onset injuries and aligning the calculation of these benefits with the method used by the Courts;[77]
>
> …

[40] Section 732 of the WCR Amendment Act 2019 provides that 'terminal conditions' under s 36 of the WCR Act arising after 31 January 2015 are defined as 'a condition certified by a doctor as being a condition that is expected to terminate the worker's life'.

[41] The meaning of 'terminal condition' was previously provided for under s 234, however, was reallocated and renumbered as s 39A as a result of schedule 3, s 14 of the WCR Amendment Act 2005. Section 234 of the WCR Act, prior to the section being reallocated and renumbered, provided the following:

> **234 Meaning of *terminal condition***
>
> (1) A terminal condition, of a worker, is a condition certified by a doctor as being a condition that is expected to terminate the worker's life within 2 years after the terminal nature of the condition is diagnosed.
>
> (2) A condition is a terminal condition only if the insurer accepts the doctor's diagnosis of the terminal nature of the condition

[42] The amendment to section 39A(1) of the WCR Act, introduced pursuant to the WCR Amendment Act 2019, was as follows:

> A terminal condition, of a worker, is a condition certified by a doctor as being a condition that is expected to terminate the workers life ~~within two years after the terminal nature of the condition is diagnosed.~~

[43] Section 39A(2) remained unchanged.

Extrinsic materials

[44] As permitted in matters where an interpretation may lead to a result that is unreasonable, I will consider extrinsic material pursuant to s 14B of the *Acts Interpretation Act 1954* (Qld).

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[75] Ibid [25].
[76] [2005] HCA 37.
[77] Explanatory Note, Workers' Compensation and Rehabilitation and Other Acts Amendment Bill 2005 (Qld) 2-3.

[45] Section 14B of the *Acts Interpretation Act 1954* (Qld) provides:

> **14B Use of extrinsic material in interpretation**
>
> (1) Subject to subsection (2), in the interpretation of a provision of an Act, consideration may be given to extrinsic material capable of assisting in the interpretation—
> (a) if the provision is ambiguous or obscure—to provide an interpretation of it; or
> (b) if the ordinary meaning of the provision leads to a result that is manifestly absurd or is unreasonable—to provide an interpretation that avoids such a result; or
> (c) in any other case—to confirm the interpretation conveyed by the ordinary meaning of the provision.
>
> (2) In determining whether consideration should be given to extrinsic material, and in determining the weight to be given to extrinsic material, regard is to be had to—
> (a) the desirability of a provision being interpreted as having its ordinary meaning; and
> (b) the undesirability of prolonging proceedings without compensating advantage; and
> (c) other relevant matters.
>
> (3) In this section—
> ***extrinsic material*** means relevant material not forming part of the Act concerned, including, for example—
> (a) material set out in an official copy of the Act; and
> (b) a report of a royal commission, law reform commission, commission or committee of inquiry, or a similar body, that was laid before the Legislative Assembly before the provision concerned was enacted; and
> (c) a report of a committee of the Legislative Assembly that was made to the Legislative Assembly before the provision was enacted; and
> (d) a treaty or other international agreement that is mentioned in the Act; and
> (e) an explanatory note or memorandum relating to the Bill that contained the provision, or any other relevant document, that was laid before, or given to the members of, the Legislative Assembly by the member bringing in the Bill before the provision was enacted; and
> (f) the speech made to the Legislative Assembly by the member when introducing the Bill; and
> Note—
> See section 53 in relation to Bills introduced before the commencement of that section.
> (g) material in an official record of proceedings in the Legislative Assembly; and
> (h) a document that is declared by an Act to be a relevant document for the purposes of this section.
>
> ***ordinary meaning*** means the ordinary meaning conveyed by a provision having regard to its context in the Act and to the purpose of the Act.

[46] The overarching purpose of the WCR Act, as provided at s 5 of the WCR Act, is to maintain a balance between providing fair and appropriate benefits to injured workers, dependents, and other persons, and ensuring reasonable cost levels for employers.

[47] As outlined above, s 39A was amended by the WCR Amendment Act 2019. The Explanatory Note to the Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2019 (Qld) ('the WCR Amendment Bill 2019') provide the following reference to the amendment resulting in the current s 39A:

> *(d) Life expectancy to qualify for terminal condition lump sum*
>
> A worker with a terminal condition has an entitlement to the latent onset terminal lump sum compensation of up to $743,041 under the WCR Act. The WCR Act currently defines a terminal condition as a condition that is expected to terminate the workers life within two (2) years after the terminal nature of the condition is diagnosed (section 39A). However, some workers are diagnosed with a terminal work-related condition with a life expectancy greater than 2 years (for example 3 or 5 years) which means they are excluded from accessing this payment. The Bill amends the WCR Act to extend entitlement to the latent onset terminal entitlements by removing the reference to two years and

> replacing it with an assessment that the insurer is satisfied that the worker has a latent onset condition that is terminal.[78]

[48] The Explanatory Note states that the amendment is intended to 'extend entitlement to the latent onset terminal entitlements by removing the reference to two years'. This statement confirms that the intention was to extend, not restrict, the entitlement. The Explanatory Note continues that the reference to two years is to be removed and replaced 'with an assessment that the insurer is satisfied that the worker has a latent onset condition that is terminal'. This appears to be erroneous in that, whilst the reference to two years was removed, it was not 'replaced' with an assessment that the insurer is satisfied that the worker has a latent onset condition that is terminal. Section 234(2) of the WCR Act, prior to the relevant amendment, already contained the requirement that the condition only be considered terminal if the insurer accepts the doctor's diagnosis. The section remains exactly the same, with the only amendment being the removal of the reference to two years under s 39A(1).

[49] The rationale for the amendment would seem to be that the time period of two years was operating to exclude some workers from accessing compensation despite suffering from a terminal condition, and hence the removal of the reference to a time limit.

…

Finding

[42] The Macquarie Dictionary defines "expected" as "seen as likely to happen; assumed" and the past tense of "expect" which is defined as "to look forward to; regard as likely to happen; anticipate the occurrence or the coming of" and "to support or surmise".[79]

[43] I turn firstly to consider the context and purpose of s 39A(1) of the WCR Act.

[44] In my view, the plain and ordinary meaning of s 39A(1) is that a worker has a 'terminal condition' if that worker has *a* condition that is expected to terminate the worker's life, as certified by a doctor. The provision does not contemplate the interference of other conditions that an individual may have nor does it contemplate the likelihood of external factors that may also be reasonably expected to terminate someone's life. Rather, the provision is focused on whether a particular condition is expected to terminate that worker's life.

[45] The parties disagree with the interpretation of s 39A(1) with respect to the word 'a'. As a result, I have concluded there is ambiguity in that provision which leads me to consider extrinsic material below.

[46] This is a matter where the Appellant has unfortunately been diagnosed with two conditions that in and of themselves will reduce the Appellant's life expectancy and each of which would end his life – either separately or together . The purpose of the WCR Act is to maintain a balance between providing fair and appropriate benefits to injured workers and ensuring reasonable cost levels for employers. It is not in dispute that the Appellant's employment has caused a condition that will reduce his life expectancy by somewhere between two to five years based on the medical evidence. In light of the purpose of the legislation, it would be unfair and unreasonable if the Applicant did not receive compensation just because he has a concurrent condition that has too reduced his

[78] Explanatory Note, Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2019 (Qld) 9.
[79] Macquarie Dictionary Online.

life expectancy. That is particularly so where the medical evidence suggests that it is his occupational asthma that has exacerbated the COPD.

[47] The mischief that the WCR Act intends to remedy appears to be the circumstances in which employment has caused an injury that will affect the length of someone's life. Put another way, to cause the worker's death. To ensure that remedy, in my view, the legislature intended for s 39A to compensate a worker in circumstances where a work-related condition is expected to terminate the worker's life and that meaning is to encompass circumstances where that condition has reduced the Appellant's life expectancy such that it is likely the Appellant's life will terminate sooner than if the Appellant did not suffer from that condition. Any interpretation to the contrary would be unreasonable.

[48] The WCR Amendment Bill 2019 relevantly stipulates that, "The Bill amends the WCR Act to extend entitlement to the latent onset terminal entitlements by removing the reference to two years and replacing it with an assessment that the insurer is satisfied that the worker has a latent onset condition that is terminal."

[49] I agree with Industrial Commissioner Power's conclusion that the Explanatory Notes confirm that the intention of the recent amendments was to extend, not restrict, the entitlement. Regrettably, the previous time period of two years operated to exclude some workers from accessing compensation despite suffering from a terminal condition. In my view, so too does the Respondent's interpretation and argument that by virtue of having a competing 'dominant' condition, the Appellant should be denied from accessing compensation despite suffering from a work-related condition that has similarly reduced his life expectancy.

[50] I believe the adoption of such interpretation would result in an outcome for terminally ill workers that is unreasonable.

[51] The WCR Amendment Bill 2019 supports the Appellant's contention that the focus is on the latent onset condition, rather than other conditions or external factors. The medical evidence in this case suggests that although nobody can know whether the Appellant will die from other conditions prior to the occupational asthma ending his life, it is nonetheless the medical evidence of Dr Brown that if nothing else prior, the occupational asthma will terminate his life in its own right.

[52] Although the opinions of Dr Edward and Dr Brown differ with respect to the contribution of occupational asthma to the Appellant's life expectancy, the key conclusion from both is that the Appellant's occupational asthma will contribute to his cause of death. Further, the medical evidence suggests that the Appellant's occupational asthma has aggravated the COPD and as a result, the Appellant's prognosis is much worse than if he had either condition alone.

[53] I summarise the following:

- Dr Brown opined that the Appellant's occupational asthma effect is severe enough to cause his death in its own right;

- Dr Edwards and Dr Brown agreed that the occupational asthma has contributed significantly to the reduction in the Appellant's life expectancy – their opinions differed slightly with respect to estimate of years; and

- both Dr Edwards and Dr Brown agreed that the occupational asthma has exacerbated the COPD, rendering the prognosis worse.

[54] In light of the above, I find the following:

- it can be reasonably inferred that Dr Edwards and Dr Brown would not have attributed occupational asthma to a reduction in life expectancy if they did not expect that it was a condition that would terminate the Appellant's life;

- although the evidence suggests the physicians expect it is most likely COPD is the condition that will terminate the Appellant's life, that does not detract from the evidence suggesting an expectation that occupational asthma is a concurrent condition that is too expected to terminate the Appellant's life;

- the medical evidence provided by the physicians supports the expectation that occupational asthma will reduce the Appellant's life expectancy in its own right whilst also reducing life expectancy by exacerbating the COPD;

- the opinions of Dr Edwards and Dr Brown constitute certification for the purpose of s 39A(1) of the WCR Act. If there was an issue with that, Mr Plant should have been told; and

- I am satisfied that the evidence supports a conclusion that the Appellant's latent onset injury is a terminal condition for the purposes of s 39A(1) of the WCR Act.

[55] I find that the Appellant has proved to the required standard that s 39A(1) of the WCR Act has been met. In that case, I will proceed to consider the second limb.

Section 39A(2)

[56] The Respondent has submitted that even if the Commission were to accept that the Appellant satisfies s 39A(1) of the WCR Act, it is not a matter warranting acceptance "of the doctor's diagnosis of the terminal nature of the condition" under s 39A(2).[80]

[57] Although the Respondent did not accept the medical evidence satisfied s 39A(1) of the WCR Act, there was no challenge to this medical evidence or the qualifications of either doctor to provide the prognosis. It seems that the Respondent is of the view that s 39A(2)

[80] Respondent's Submissions, 14 April 2022, 9 [32].

provides the Insurer with a discretion to not accept 'the doctor's diagnosis of the terminal nature of the condition' on the basis of other considerations.

[58] The consequence of the decision to not accept the doctors' diagnosis is that the Appellant is determined not to have a 'terminal condition' for the purposes of ss 128A and 128B of the WCR Act and so is not entitled to compensation for the latent onset injury calculated under chp 3, pt 3, div 4 of the WCR Act.

[59] The Appellant submits that the reason the Respondent has disputed the entitlement to the benefit is because it again refers back to its arguments that there is a co-existing 'dominant' condition more likely to end the Appellant's life. This turns on the Respondent's advance of the arguments that the latent onset injury must be the 'main' and/or 'dominant' condition.[81]

[60] In circumstances where I have found the Appellant meets s 39A(1) of the WCR Act, the construction of s 39A(2) permits an insurer to not accept 'the doctor's diagnosis of the terminal nature of the condition'.

[61] Consequently, I must look to the construction of s 39A(2) of the WCR Act, reproduced below:

> (2) A condition is a terminal condition only if the insurer accepts the doctor's diagnosis of the terminal nature of the condition.

[62] The Insurer concluded the following:

> It is clear that, at its highest, there is a hypothetical prospect Mr Plant's life expectancy has been shortened by reason of the totality of his respiratory disease. However, no doctor expresses the opinion that they expect Mr Plant's occupational asthma to terminate his life.
>
> …
>
> There remains a prospect that Mr Plant's life expectancy will not be shortened at all.
>
> If Mr Plant's life expectancy is to be shortened, it will not be as a direct consequence of the asthma, by way of an asthmatic attack.
>
> Further, it is evidenct, particularly from Dr Edwards' opinion, that the predominant contribution to future respiratory failure and shortening of life expectancy is not Mr Plant's occupational asthma, but rather his cigarette related emphysema.
>
> In the circumstances, there is inadequate evidence to establish that it is "expected", (meaning it is anticipated with a high degree of confidence and certainty), either that:
>
> (a) Mr Plant's life expectancy will in fact be shortened;
> (b) Mr Plant's life expectancy will be shortened as a result of his occupational asthma.
>
> …[82]

[81] Ibid 10 [32].
[82] Excerpt from WorkCover Queensland decision dated 28 August 2020, provided in Workers' Compensation Regulator decision dated 11 March 2021, 2.

[63] Section 39A(2) of the WCR Act does not permit the Insurer to insert an arbitrary criteria relating to there being a 'main' or 'dominant' terminal condition. I agree that seeks to construe words up into s 39A(2) that are not there.

[64] The Respondent has provided no evidence challenging the doctors' diagnosis that the Appellant's latent onset injury will cause a reduction in his life expectancy. The contention appears to be that the diagnosis of the 'terminal nature' of the condition is not accepted on other grounds including the existence and 'dominance' of the COPD.

[65] In *Blanch v Workers' Compensation Regulator,* Power IC stated:

> [30] In making the decision as to whether to accept 'the doctor's diagnosis of the terminal nature of the condition' pursuant to section 39A(2), the Insurer must act reasonably.[83] In circumstances where more persuasive evidence exists, the Insurer could determine to not accept the doctor's diagnosis. However, there is no evidence to the contrary in this matter. Both the Respondent and the Insurer have accepted the two doctors' diagnosis of the Appellant's condition.
>
> [31] I consider the Respondent's decision that s 39A(2) allows for the doctor's diagnoses to not be accepted on the basis of external considerations to lead to a result that is unreasonable. Such an interpretation is not only inconsistent with the plain meaning of s 39A(2), but may lead to an effective veto over terminal condition compensation based on arbitrary considerations by insurers that are not outlined in the legislation.
>
> [32] A consideration of the construction of s 39A is required to determine the correct interpretation of this section.[84]

[66] I have reproduced Industrial Commissioner Power's consideration of statutory construction at [41] above.

[67] The Appellant submits that once a worker's injury is terminal, as diagnosed by a doctor - and I have accepted the doctors' diagnosis in this regard - the worker has a terminal condition within the meaning of the WCR Act. There is no additional requirement that the Insurer or the Respondent considers it right or just that terminal condition benefits be payable to that worker.[85]

[68] In my view, the fact that the legislation does not reference 'the' condition nor how to assess in circumstances where a worker suffers from more than one condition that is expected to reduce his life expectancy, suggests the legislature did not consider it to be an appropriate consideration in determining the meaning of 'terminal condition'.

[69] To allow the Insurer to effectively insert an arbitrary consideration would be to usurp the role of the legislature in making a policy decision as to the appropriate constraints within which compensation may be paid for terminal conditions.

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[83] *Minister for Immigration v Li* (2013) 249 CLR 332, 364 [66] (Hayne, Kiefel and Bell JJ).
[84] [2021] QIRC 408, 10.
[85] *Blanch v Workers' Compensation Regulator* [2021] QIRC 408, 16 [61].

[70] Industrial Commissioner Power's considerations in *Blanch* are again somewhat relevant below:

> [65] As the decision maker, the Respondent is required to act reasonably and not capriciously or irrationally in coming to their conclusion. In circumstances in which there is medical evidence to the contrary which is more persuasive than that provided by an injured worker, it may be reasonable for an insurer to reject or not accept the doctor's diagnosis. In other circumstances, an insurer may determine not to accept the doctor's diagnosis if they do not accept that the doctor is suitably qualified to offer the opinion. In this matter, however, there is no dispute as to qualifications of the doctors nor was other evidence called challenging the reliability of the diagnosis.
>
> [66] The Respondent appears to have accepted the medical diagnoses of the terminal nature of the condition, however they have then imposed a policy judgement over it to determine that the worker should not receive the benefits in these particular circumstances. This was not a judgement for them to make.[86]

[71] The Insurer determined that the Appellant was not entitled to compensation partially on the grounds that "the predominant contribution to future respiratory failure and shortening of life expectancy is not Mr Plant's occupational asthma, but rather his cigarette smoking related emphysema."[87] In my view, this conclusion minimises the Appellant's condition, with the report of both physicians outlining that the occupational asthma has contributed to a decrease in the Appellant's life expectancy.

[72] I have decided to follow Industrial Commissioner Power's decision in *Blanch* in accepting that the Appellant meets the test under s 39A of the WCR Act as I find the principles in this matter to be broadly analogous to those described in the extracts of the *Blanch* decision above.

[73] While Dr Edwards opined that Mr Plant is expected to live for another 22 years, the medical experts agree that the two terminal conditions are difficult to separate, with the combination of the two separate but twinned conditions resulting in a prognosis worse than either condition alone.

[74] A consideration of the extrinsic materials confirm the meaning of s 39A(2) that provides that a condition is only a 'terminal condition' if the insurer accepts a doctor's diagnosis of the terminal nature of the condition. Insurers, therefore, have the option to not accept a doctor's diagnosis if they disagree with the terminal nature of the condition. The other grounds upon which the Insurer decided not to accept the doctor's diagnosis in this matter, including the Appellant's 'dominant condition' are simply not relevant to the decision required under this section. To interpret subsection (2) as allowing insurers to not accept the diagnosis on the basis of arbitrary considerations may also lead to inconsistent criteria being applied between insurers, contrary to the stated objective of providing greater certainty. Allowing insurers the prerogative to reject any claim on grounds not mentioned in the section is entirely inconsistent with the context and purpose of s 39A. To interpret the section in such a way is inconsistent with the purpose of maintaining a balance

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[86] [2021] QIRC 408, 17.

[87] Excerpt from WorkCover Queensland decision dated 28 August 2020, provided in Workers' Compensation Regulator decision dated 11 March 2021, 3.

between providing compensation to workers and ensuring reasonable costs for employers. It is also inconsistent with the beneficial character of the legislation.[88]

Costs

[75] In light of my conclusions above, an order will be made in favour of the Appellant to allow the appeal and set aside the Respondent's decision. I will now consider the issue of costs.

[76] In *Workers' Compensation Regulator v Queensland Nurses and Midwives' Union of Employees (No 2)*,[89] Davis J considered the issue of costs in a Workers' Compensation Appeal and relevantly stated the following (citations removed):

> [16] The power to award costs under s 558 of the WCR Act is not limited like the power to award costs given by s 545 of the IR Act. It therefore follows that costs ought ordinarily follow the event. While costs would normally follow the event of the appeals to the QIRC, there is a discretion to make some other costs order. In *Davidson v Blackwood*, the point is made that in the absence of any reasons to make any other costs order, costs follow the event. That does not remove the discretion to make some other order and does not extinguish the necessity to give reasons why any costs order was made…
>
> …
>
> [24] Section 558 provides as follows:
>
> "**558 Powers of appeal body**
>
> (1) In deciding an appeal, the appeal body may—
>
> (a) confirm the decision; or
>
> (b) vary the decision; or
>
> (c) set aside the decision and substitute another decision; or
>
> (d) set aside the decision and return the matter to the respondent with the directions the appeal body considers appropriate.
>
> (2) If the appeal body acts under subsection (1)(b) or (c), the decision is taken for this Act, other than this part, to be the decision of the insurer.
>
> (3) Costs of the hearing are in the appeal body's discretion, except to the extent provided under a regulation." (emphasis added)
>
> [25] By s 558(3), what is "in the appeal body's discretion" (here the QIRC) are the "costs of the hearing". The "costs of the hearing" may be quite a different thing to the "costs of the appeal".
>
> [26] The power to award costs is not a common law power. It is one granted by statute. Consequently, if the QIRC does not have a power vested by statute to award costs of the appeal beyond the costs of the hearing, then it cannot do so.

[88] *Blanch v Workers' Compensation Regulator* [2021] QIRC 408, 18 [70].
[89] [2021] ICQ 13.

…

[28] However, the QIRC's only power to award costs in this case probably comes from the WCR Act, not restricted by s 545 of the IR Act. In determining the proper construction of s 558(3), and in particular the meaning of the term "costs of the hearing", regard must be had to the context and purpose of the section having regard to the statute as a whole.

[29] In my view, the legislature has clearly deliberately limited the costs which can be recovered on an appeal to the QIRC. It has drawn a clear distinction between different parts of the appeal process. While the legislation envisages that the appeal process may involve a conference, no power to award costs associated with a conference is given. The costs are limited to the "costs of the hearing".

[30] The law of costs recognises "costs of action" and "costs of trial". In my view, they equate to "costs of appeal" and "costs of hearing" respectively. The distinction is explained by Professor Dal Pont in his work Law of Costs in these terms:

> "1.19 An order for 'costs of the action' includes not only costs of the trial but also those of interlocutory proceedings and their preparation (such as costs relating to interrogatories, notices to produce and admit and preparation of counsel's brief). These represent the costs to which the successful party in the action is entitled on taxation or assessment, in the absence of an order to the contrary. The 'costs of the trial' cover only the costs incurred in the conduct of the trial itself, not any interlocutory matters preceding the trial. In any case, as an action ends with judgment, each of these orders excludes costs incurred after final judgment. Costs of executing the judgment are therefore not costs of the action (or of the trial) but are payable of the execution."

[31] I accept that distinction. I consider that the term "costs of the hearing" in s 558(3) is equivalent to "costs of trial" recognised by the law of costs and explained by Professor Dal Pont.

[32] Consequently, when the QIRC is exercising a discretion under s 558(3) of the WCR Act, the order which should be made is not "costs of the appeal" but "costs of the hearing" and costs assessors should assess the "costs of the hearing" as they would "costs of trial" as explained by Professor Dal Pont.

[77] Section 132(1) of the *Workers' Compensation and Rehabilitation Regulation 2014* (Qld) provides that "A decision to award costs of a proceeding heard by an industrial magistrate or the industrial commission is at the discretion of the magistrate or commission."

[78] I accept that costs in Workers' Compensation Appeals ordinarily follow the event. Had the Respondent not defended this proceeding, the Appellant would not have incurred the expense which he did during the hearing of this matter. An award of costs in favour of the Appellant is reasonable and appropriate, not to punish the Respondent for defending the proceeding but rather out of fairness to the Appellant in ensuring appropriate indemnification. For those reasons, a costs order will be made in favour of the Appellant.

[79] For the reasoning outlined in *Workers' Compensation Regulator v Queensland Nurses and Midwives' Union of Employees (No 2),*[90] the Respondent will only be required to pay the "costs of the hearing" rather than the "costs of the appeal".

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[90] Ibid.

Order

[80] I order accordingly:

1. **The appeal is allowed.**

2. **The decision of the Workers' Compensation Regulator be set aside.**

3. **That the Appellant be paid benefits as a worker with a terminal condition pursuant to ch 3, pt 3, div 4 of the *Workers' Compensation and Rehabilitation Act 2003* (Qld).**

4. **The Respondent is to pay the Appellant's costs of the Hearing, to be agreed or, failing agreement, to be subject to a further application to the Commission.**