Alert

WORKERS COMPENSATION & SELF INSURANCE

Assessor or Adjudicator?

By Patrick Walsh

Three recent decisions in the SAET have served to highlight the difficulty in remediating incorrect impairment assessments under the Return to Work 2014 (SA).

The Full Bench of the South Australian Employment Tribunal ('**the SAET**') in *Frkic v Return to Work Corporation of South Australia* has cited the decisions of Deputy President Judge Rossi (in *Palios v Return to Work Corporation of South Australia*) and Deputy President Judge Gilchrist in *Canales-Cordova v Return to Work Corporation of South Australia*) with approval. In doing so, the SAET has made it clear that the role of the Compensating Authority in ensuring that Impairment Assessments comply with the *Return to Work Act 2014* (SA) ('**the Act**') and the Impairment Assessment Guidelines is focused on the form of the assessments, and not the substance.

The logical implication of this decision is that we are likely to see an increased number of disputes regarding impairment assessments as the only mechanism by which the substance of an impairment assessor's opinion can be challenged is by seeking a review of the assessment in the SAET.

Broadly speaking, in each of these decisions one of the issues that arose was the admissibility of further reports drafted by an impairment assessor after the initial impairment assessment had been performed. In each case, an employee of Return to Work SA reviewed the assessments and formed the view that the substance of the assessments was not correct. Return to Work SA then sought further reports from the assessors to address the issues that had been identified. Relevantly, the SAET heard evidence in each of the cases that the assessor felt harassed and/or pressured to change their assessment.

The Full Bench in a joint decision in *Frkic* stated that:

> *"We agree with the reasons of Rossi DPJ in Palios and Gilchrist DPJ in Canales-Cordova that* ***unauthorised, inappropriate or unlawful actions by the respondent in the s22 process, can enliven the exercise of the discretion referred to in decisions such as Bunning v Cross****[47] and* ***may result in the exclusion of the subsequent reports****. In our view, it is plainly relevant if in circumstances such as addressed by Gilchrist DPJ in Canales-Cordova and, the circumstances of this matter, an assessor is not only being requested to alter the assessment of whole person impairment but is also being placed in a position where the regulated professional fee that the assessor is entitled to, will not be paid by the respondent until its invitation to provide an amended report is addressed."*

Relevantly, in his decision in *Canales-Cordova* His Honour Deputy President Judge Gilchrist stated that:

> *"It follows that an assessor undertaking an assessment under s 22 of the RTW Act* ***is acting very much in the***

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> ***nature of an independent adjudicator*** *who is making a decision that in the absence of special circumstances is binding on all relevant parties."*

It is clear that a motivating factor for the SAET is to try and preserve the perception that the impairment assessor is impartial. With respect, practical experience with the impairment assessment process set out in the Act is that it is not perceived as impartial and, given that the worker always chooses the assessor, is not much different from the process set out in the *Workers Rehabilitation and Compensation Act 1986* (SA); with the notable exception that the Compensating Authority does not have the right to request an assessment from an assessor of its own choice. In this regard, Return to Work SA, in its submission to the Parliamentary Review of the Act conducted in 2017/2018, noted that:

> *"In relation to Permanent Impairment Assessments and WPI, RTWSA has observed there is sometimes significant variation in WPI percentages allocated by different assessors for similar injuries depending upon which assessor is chosen (the worker can choose their assessor under the Impairment Assessment Guidelines [clause 17.3]). The bulk of assessments are done by a small group of assessors (1524 out of a total of 3443 assessments have been completed by 6 assessors since 1 July 2015). There is significant involvement from lawyers in the WPI process, including advising workers which assessor to select."*

It is interesting to note that Deputy President Judge Rossi (in his reasons in *Palios*) cites a passage from the authority of *Lord Arbinger v Ashton*:

> *"Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual that we constantly see persons, instead of considering themselves witnesses, rather consider themselves as the paid agents of the person who employs them."*

Applying this passage to the process set out in Section 22 of the Act, in which the worker is afforded a discretion (only fettered by the requirement that the assessor be accredited for the relevant impairment) to choose whomever he/she wishes, it is difficult to see how an impairment assessor could be properly regard as truly independent.

This raises the issue as to what, if any, remedy is available to a party to an impairment assessment who is of the view that the opinion of the assessor is not correct.

Sections 21(5), 56(1), and 58(1) of the Act make reference to a worker's assessment (and in the case of Section 21(5) the worker being assessed **or** determined as having a whole person impairment of 30% or more). Applying the reasons of Deputy President Judge Gilchrist in *Canales-Cordova* it is possible that the Compensating Authority is not afforded any discretion whatsoever in respect of making a determination of a worker's whole person impairment. As an example, an impairment assessor could refuse to make a deduction for a pre-existing impairment (as was the situation in *Frkic*) based on an incorrect understanding of the Impairment Assessment Guidelines. Despite there being an error with respect to the substance of the assessment, the Compensating Authority would have no choice but to file an Application for Review in the SAET in order to correct the assessment.

While, on the face of it, this may not seem unreasonable- there are at least two situations in which this could be problematic:

1. Section 29(1) of the *South Australian Employment Tribunal Act 2014* (SA) ('**the SAET Act**') states that an Application for Review does not operate to prevent the implementation or operation of the decision under review unless the relevant Act, or an order of the SAET, state otherwise. For this reason the Compensating Authority could be required to pay the worker lump sum pursuant to sections 56 and 58 of Act and then, in the event that the assessment is set-aside by the SAET at a later stage, seek repayment of those sums. This same reasoning would apply in the event that an assessment is made that the relevant worker's WPI is 30% or more and the Compensating Authority is required to continue weekly payments on the basis that the worker is a seriously injured worker. These sums of money are generally significantly large and a worker cannot be expected to hold that money "in trust" awaiting the outcome of the dispute.

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2. It is reasonably common that, when requesting an assessment, an injured worker will also request an assessment of impairments not previously the subject of a claim for weekly payments and/or medical and like expenses. Deputy President Judge Gilchrist's decision in *Lohmann v Return to Work SA* suggests that a Compensating Authority can be compelled to arrange an impairment assessment, notwithstanding that it has not yet accepted a "claim" for such impairments. This calls into question the status of an assessment of whole person impairment that includes impairments previously accepted for a species of compensation, and impairments that have not previously been accepted for a species of compensation.

As the SAET does not have the jurisdiction to review the impairment assessment process itself, it seems unlikely that there will be any decisions ruling on some of these issues anytime soon. In the meantime, the SAET has clearly stated that it will exclude any evidence that it considers is harmful to the impairment assessment process. When a Compensating Authority is provided with a report that it considers is not compliant with the form set out in the Impairment Assessment Guidelines, or is not correct in respect of the substance of the assessment, I suggest that it consider doing the following:

1. Advise the worker, and/or the worker's representative, that it considers the impairment assessment is not correct and the basis for that view. Seek the worker's consent to request a supplementary report from the assessor.
2. If the worker's consent is obtained, request a supplementary report from the assessor to clarify the issues identified. It is worth noting that one of the issues considered by the Tribunal is whether the assessor is to be paid for a supplementary report/assessment. Consideration ought to be given to whether this is appropriate having regard to the particular circumstances of the assessment.
3. If an supplementary report cannot be obtained by consent, and a correct assessment provided, Part 3 of the SAET Act and Part 6 of the Act require a decision to be made. In the absence of case law to the contrary, it seems that the Compensating Authority is still required to make a decision as to the worker's entitlements pursuant to Sections 41, 58, and/or 56 of the Act before the jurisdiction of the Tribunal can be enlivened by an Application for Review. A Compensating Authority therefore ought to either:
   a. Accept the worker's claims, pursuant to those sections, and issue a determination in accordance with the impairment assessor's assessment; or
   b. Reject the worker's claims, pursuant to those sections, on the bases that the assessment is not correct and/or the claimed impairments do not meet the causation test set out in Section 7 of the Act.

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