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Article

WORKERS COMPENSATION & SELF INSURANCE

Evaluating the Cause(s) of Impairments Comes Down to "Common Sense"

By Patrick Walsh

The Full Court of the Supreme Court of South Australia "doubles-down" on its reasons in Preedy but fails to articulate a straightforward test for determining the "cause" or "causes" of an impairment under the Return to Work Act ('the Act') and doesn't address the meaning of "assessed together or combined" in section 28(8)(c) of the Act.

In a somewhat frustrating decision in *Return to Work Corporation of South Australia v Summerfield* [2021] SASCFC 17[1], the Full Court of the Supreme Court of South Australia has elected not to meaningfully clarify the uncertainty that exists with respect to how section 22 of the Act permits impairments to be combined for the purpose of determining an injured worker's whole person impairment.

In November 2019, I wrote an article summarising the state of the law on these issues - 'Impairment Assessments and Section 22 of the Return to Work Act 2014 (SA)'[2].

Since that time, there has been a range of other decisions in the Tribunal concerning different scenarios for combination. Two decisions that have considered the meaning of "same cause" in section 22(8)(c) of the Act are *Donovan v SA Ambulance Service* [2020] SAET 161[3] and *Northcott v Return to Work Corporation of South Australia and Australian Red Cross Blood Service* [2020] SAET 233[4].

1 http://www.austlii.edu.au/cgi-bin/sign.cgi/au/cases/sa/SASCFC/2021/17

2 https://www.dwfoxtucker.com.au/2019/11/impairment-assessments-and-section-22-of-the-return-to-work-act-2014-sa/

3 http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/sa/SAET/2020/161.html

4 http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/sa/SAET/2020/233.html

Donovan v SA Ambulance Service

In *Donovan*, the injured worker had sustained injuries to her cervical spine in two separate compensable incidents. The first occurred in the course of the worker's employment with a deemed date of injury in 2016. As a consequence of this injury, the worker underwent a cervical spinal fusion.

In 2017 the worker was involved in a high-speed collision while on her way to receive medical treatment for her existing work injury. As a consequence, she sustained a further injury to her cervical spine.

At trial, Counsel for the worker contended that both cervical spine injuries arose from the same cause – namely the original work injury.

His Honour Deputy President Judge Rossi ultimately found that the high-speed collision constituted a break in the chain of causation such that the impairments could not be combined. In the alternative, His Honour found that the high-speed collision was a separate causal event such that the impairments could not be said to arise from the **same cause**.

Significantly, His Honour gave effect to the words "the same" in his reasoning by stating that if any external

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event independent of the chain of causation from the initial injury also causes an increase in the level of impairment, then the further impairment cannot be said to arise from the **same cause**. He noted that this is a significant departure from the common law approach to causation in which a material contribution will suffice to establish causation where there may be multiple contributing causes.

Northcott v Return to Work Corporation of South Australia and Australian Red Cross Blood Service

In *Northcott*, the injured worker had sustained a number of different injuries during the course of her employment. These injuries were gradual onset injuries and shared a common first date of incapacity within the meaning of the Act.

At issue was whether injuries that had arisen from the conditions of employment over time could be said to arise from the same cause within the meaning of section 22(8)(c) of the Act.

The decision of Auxiliary Judge Clayton went on Appeal to the Full Bench of the South Australian Employment Tribunal on this point.

The Full Bench ultimately held that a finding that multiple injuries have given rise to a single incapacity would not necessarily mean that the relevant impairments will arise from the same cause and upheld the decision at first instance by Clayton J.

In rejecting the worker's arguments, their Honours noted:

"Although there is a superficial connection in that both injuries share the same general description of the mechanism for suffering the injury, when one delves further it becomes apparent that they are significant differences. The injuries occurred at different times and in different circumstances, one being repetitive use of the hand, the other being standing for extended periods on a hard surface. ***When evaluated from that degree of particularity, it becomes clear that a permanent impairment resulting from the earlier activity cannot be said to have arisen out of the same cause as a permanent impairment resulting from the later activity.****"*

Which brings us to the decision in *Summerfield* …

In paragraph 20 and 21 of his reasons, Justice Stanley states:

"Equally, there is no warrant for construing "cause" in s 22(8)(c) narrowly to mean a single cause. There is nothing in the reasoning in para [54] of Preedy which supports such a construction. The use in s 22(8)(c) of the definite article must be understood in its context. The subject of s 22(8)(c) is "impairments" plural. Impairments which are not from the same injury but are from the same cause are to be assessed together or combined to determine the degree of impairment. This construction is supported by the terms of s 22(7)(b) which implies that impairment resulting from medical or surgical treatment of a back injury is to be treated as being from the same cause as the work injury. ***The causal test permits an impairment from a consequential injury to be combined with an impairment from another injury where, as a matter of common sense, the impairments are so connected that the trier of fact is satisfied that the impairments are from the "same cause"****.*

The appellant's submission that the example in para [55] invokes the common law test of causation is neither accurate nor helpful in construing s 22(8)(c). To characterise the test of causation in s 22(8)(c) as a common law test is inaccurate and does not assist in construing its meaning. Section 22(8)(c) posits a statutory test of "cause". It is to be construed in accordance with its text, context and purpose. ***It is an evaluative test. That evaluative test is to be applied adopting a common sense approach that recognises that more than one event might have been the "cause" of the impairment****."*

His Honour's reasons appear to be directed at the particular circumstances of *Summerfield*. The circumstances, in brief, were that the worker sustained a left hip injury and then developed a lower back injury as a sequel injury to the hip injury.

His Honour's proposition that determining whether impairments arise from the "same cause" requires a common-sense approach is particularly interesting in light of the comments made in the joint decision of French CJ, Bell, Gageler, Keane, and Nettle JJ in *Comcare v Martin* (2016) 258 CLR 467 at [42]:

> *"Causation in a legal context is always purposive (19). The application of a causal term in a statutory provision is always to be determined by reference to the statutory text construed and applied in its statutory context in a manner which best effects its*

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statutory purpose (20). ***It has been said more than once in this Court that it is doubtful whether there is any "common sense" approach to causation which can provide a useful, still less universal, legal norm (21)****. Nevertheless, the majority in the Full Court construed the phrase "as a result of" in s 5A(1) as importing a "common sense" notion of causation. That construction, with respect, did not adequately interrogate the statutory text, context, and purpose*." [emphasis added]

So where to now?

The failure of the Full Court of the Supreme Court of South Australia to address the meaning of "assessed together of combined" within section 22(8)(c) of the Act suggests that this will be an issue that needs to be taken further.

I also understand that RTWSA intends to seek leave to appeal to the High Court. Traditionally the High Court has been reluctant to grant leave to appeal when the question at issue involves the interpretation of state-based workers compensation legislation. However, the High Court may be inclined to grant leave given, amongst other things, the Court's comments on the use of a "common sense" approach to causal terms in statutory provisions in *Comcare v Martin*.

Ultimately if the High Court does grant leave and finds that the words "assessed together" mean something different to "combined", then this will change the purpose of section 22(8)(c) from that contended by His Honour Justice Stanley in his reasons in ***Preedy*** and ***Summerfield*** (that section 22(8)(c) is directed at the issue of combination of impairments) to an administrative provision directed at supporting the objective of ensuring a worker only has one assessment in respect of each work injury.

In the meantime, Compensating Authorities determining claims made pursuant to section 22 will need to try and use "common sense" to evaluate whether the claimed impairment arises from the same cause.

In doing this, I consider that His Honour Judge Rossi's reasoning in ***Donovan*** (and in the later decision of ***Zaidi v RTWSA*** [2020] SAET 207) offers helpful guidance. First, analyse the chain of causation from the original work injury through to each claimed impairment. If you consider that any of the impairments have a separate and external cause separate from the cause(s) of the original work injury, then they have not arisen from the same cause within the meaning of the Act.

However, the suggested approach still leaves open the question as to whether medication-induced impairments can be considered as arising from the same cause and, therefore, combined. Construing section 22(8)(c) harmoniously with section 7(6) of the Act would suggest that medication-induced impairments ought only to be combined when the pharmacological regime used to treat the work injury was reasonable and/or appropriate. This is likely to be a contentious issue, for instance, in circumstances where impairment to the digestive system is a consequence of the prescription of opioid medication long term as a treatment for chronic pain. Opioid medication is contra-indicated for long term pain relief, and its use is supposed to be regulated

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