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WORKERS COMPENSATION & SELF INSURANCE

Impairment Assessments and Section 22 of the *Return to Work Act 2014* (SA)

Batten down the hatches!

By Patrick Walsh

One wonders whether (the then Honourable John Rau – Deputy Premier) could have appreciated the sense of irony that his statement *"One of the key features of the new scheme is the distinction between seriously injured workers and non-seriously injured workers … Having a distinct boundary here is essential for the scheme to be able to support those workers who need it most"* would accrue as we navigate our way through the workers compensation landscape that has changed considerably since the commencement of the *Return to Work Act 2014* (SA) ('**the Act**').

As we approach Christmas, His Honour Deputy President Judge Calligeros has "launched" the most recent decision concerning the impairment assessment of Mr Wayne Preedy in *Preedy v Return to Work Corporation of South Australia* [2019] SAET 228. Having had the opportunity to consider His Honour's decision, it seems as good a time as any to review the Impairment Assessment landscape before we sail into the festive season.

Background

Mr Preedy first sustained a left shoulder injury in the course of his employment in August 2012. As part of his rehabilitation for this injury, he underwent treatment with a physiotherapist. Unfortunately for Mr Preedy (and his physiotherapist) he was suffering from a multiple myeloma (a rare form of cancer of the bone marrow, which significantly weakened his C5 vertebrae); which was completely unknown to both of them at the time. While receiving treatment for his left shoulder injury on 16 April 2013, Mr Preedy sustained a fracture of the C5 vertebrae in his neck.

By determination dated 13 January 2016, Mr Preedy's level of whole person impairment was determined at 27% as a consequence of the injury to the C5 vertebrae.

The resulting disputes concerned whether Mr Preedy's cervical neck impairment ought to be combined with his previously determined 11% whole person impairment assessment in respect of his left shoulder; which would have had the outcome of Mr Preedy being a *seriously injured worker* for the purposes of the Act.

It is not clear from any of the decisions whether any consideration was given to utilising the discretion afforded to Return to Work SA pursuant to section 34(2) of Schedule 9 of the Act to determine that Mr Preedy was a seriously injured worker; notwithstanding the 13 January 2016 determination.

Supreme Court decision

Ultimately the issue as to whether Mr Preedy's impairments ought to be combined went before the Full Court of the Supreme Court of South Australia, which rendered its decision in *Return to Work Corporation of South Australia v Preedy* (2018) 131 SASR 86.

Importantly, the court held that:

- The issue of whether Mr Preedy was entitled to have his cervical spine and shoulder impairments assessed together or combined depends on

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whether the impairments were from the same injury or cause within the meaning of section 22(8)(c) of the Act;

- Per Stanley J – Mr Preedy's assessment for the purpose of determining any entitlement pursuant to section 58 of the Act is to be undertaken in accordance with section 22 of the Act; and
- Per Stanley J – The Full Bench of the South Australian Employment Tribunal erred in concluding that for the purposes of making an assessment under section 22 of the Act, multiple impairments from the same injury or cause, are to be assessed together or combined, but in connection with an assessment of non-economic loss under section 58, they are only combined if they arise from the same trauma.

In my opinion, and something that is highlighted in His Honour Deputy President Judge Calligeros' most recent decision (at paragraph 50), the fact that His Honour Justice Stanley did not go on to consider the meaning of the words "***are to be assessed together or combined to determine the degree of impairment of the worker (using any principle set out in the Impairment Assessment Guidelines)***" [emphasis added] is of particular significance.

Unfortunately, His Honour Justice Stanley's reasons have generally been applied by the Tribunal to mean that it is sufficient for an injured worker to simply establish that their impairments have arisen from the same injury or cause in order for the impairments to be combined. This approach creates the issue that no meaning is accorded to Parliament's use of the coordinating conjunction "or" and the reference to impairments being combined using the principles set out in the Impairment Assessment Guidelines.

Recent decisions of the Tribunal in *Zelenko v Return Work SA* [2018] SAET 48, *Shane Summerfield v Return to Work SA (McCormack Freightlines Pty Ltd)* [2019] SAET 106, and of course His Honour Deputy President Judge Calligeros' most recent decision in ***Preedy***, articulate the current approach being adopted by the Tribunal.

Zelenko v Return to Work SA

The appeal to the Full Bench of the Tribunal in this instance concerned Mr Zelenko's application to be treated as a seriously injured worker on an interim basis pursuant to section 21(3). At Trial, Mr Zelenko contended that he had impairments to his left shoulder, left lower limb, right lower limb, and digestive system; and that these impairments were to be combined.

Ultimately the Full Bench was not able to make a finding as to the Mr Zelenko's likely whole person impairment, but their Honours did consider the application of section 22(8)(c) of the Act and stated at paragraph 48:

> "*The effect of this is that in connection with an assessment of whole person impairment for lump sum compensation under the RTW Act, Marrone no longer applies and multiple impairments are combined if either of the tests prescribed by s 22(8)(c) or s 58(6) are met. In other words, if a worker suffers multiple impairments from the same injury or cause the impairments are to be assessed together and combined. And, if a worker suffers 2 or more work injuries arising from the same trauma, they too are to be assessed* **together and** *combined." [Emphasis added]*

Interestingly, their Honours substituted the coordinating conjunction "or" for "and" in this summary of Section 22(8)(c), but refrained from providing any reasons on this point.

Summerfield v Return to Work SA

Mr Summerfield sustained a fractured left femur as a consequence of a fall at work. This necessitated a total left hip replacement.

At a later stage Mr Summerfield developed a lumbar spine injury and sought to have the resulting impairment combined with his left hip impairment.

Deputy President Magistrate Cole considered himself bound by the approach taken by the Full Bench in *Zelenko*, in particular their reasons at paragraph 48.

Cole DPM went on to find that the example provided by His Honour Justice Stanley (at paragraph 55 of his reasons in Preedy) of a worker who sustains an injury to the contralateral limb was analogous to the situation before him in *Summerfield* and Mr Summerfield's impairments arose from the same cause and were to be combined.

Preedy v Return to Work SA

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The issues before His Honour Deputy President Judge Calligeros were:

1. Did Mr Preedy's impairments arise from the same trauma? and
2. Did Mr Preedy's impairments arise from the same injury or cause?

Although His Honour considered himself bound by previous decisions of the Tribunal regarding the application of section 22(8)(c) of the Act, he makes an important observation at paragraph 50 of his reasons:

"*The expression "same injury or cause" was construed by the Full Court in Preedy. The expression "assessed together or combined" in s 22(8)(c) was not the subject of detailed consideration. The way in which the two expressions interrelate is therefore not completely clear.*"

On the home stretch

His Honour Deputy President Judge Calligeros refers to some 9 decisions of the Tribunal concerning the constructions of section 22(8)(c) of the Act.

I understand there is currently something in the order of 8 decisions under appeal to the Full Bench of the Tribunal concerning the issue of combination of impairments.

It seems likely that the Full Court of the Supreme Court will have the opportunity to clarify the construction of section 22(8)(c) of the Act well before any further appeal in ***Preedy,*** could be heard.

Some clarity regarding the meaning of the expression "***assessed together or combined***" is urgently required to resolve the uncertainty created by the current state of the law.

For what it's worth, my personal view is that a plain reading of the Act would suggest that:

1. Section 22 is the dominant and leading section with respect to arranging and conducting impairment assessments.
2. The intention of section 22(8)(c) is to reduce the number of assessments to the greatest possible extent.
3. To that end, any impairments that arise from the same injury or cause are to be dealt with in the same assessment.
4. If permitted by the principles set out in the Impairment Guidelines, the impairments to be combined to arrive at an aggregated whole person impairment.
5. If the principles set out in the Impairment Guidelines do not permit the impairments to be combined, then they are assessed together in the same assessment, but they are not combined into an aggregated whole person impairment.

Such an approach, in my view, has the benefit of resolving any apparent conflict between section 22 and sections 56 and 58 of the Act and would allow the Tribunal to apply the well understood principles of combination as set out in ***Marrone v Employers Mutual Limited as agent for WorkCover Corporation of South Australia*** [2013] SASCFC 67 and ***Return to Work Corporation of South Australia v Mitchell*** [2019] SASCFC.

If the Supreme Court does not take up the next opportunity to rein in the current rush to combine impairments, it is likely that the high amount of disputation we are experiencing in relation to impairment assessments will not abate.

Even if an injured worker is not likely to reach the 30% whole person impairment threshold, the significant sums of money available to (particularly young) workers in respect of section 56 and section 58 lump sums makes it very difficult to find some sort of "middle ground" and resolve disputes by way of a negotiated settlement.

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