

# Alert

## WORKERS COMPENSATION & SELF INSURANCE

### Life After *Mitchell*

*Full Court of the Supreme Court of South Australia Publishes Decision in Return to Work Corporation of South Australia v Mitchell [2019] SASCFC 34*

By Patrick Walsh & Tiffany Walsh

The recent successful appeal in [Return to Work Corporation of South Australia v Mitchell \[2019\] SASCFC 34](#) (“**Mitchell**”) has provided some clarification as to how injuries are to be combined pursuant to Section 43(6) of the *Workers Rehabilitation and Compensation Act 1986* (SA) (“**the Repealed Act**”) and its successor provisions. Uncertainty remains, however, with respect to how the South Australian Employment Tribunal will apply the test set out in Section 22(8) of the *Return to Work Act 2014* (SA) (“**the RTW Act**”).

*Mitchell* was an appeal from a Supreme Court of South Australia decision with respect to the combination of compensable injuries pursuant to Section 43(6) of the *Workers Rehabilitation and Compensation Act 1986* (SA) (“**the Repealed Act**”). The worker had previously suffered a compensable lower back injury, and had undergone surgery for that injury. The worker then made claims for further impairments which had arisen as a result of the pain medication that he had taken following the surgery.

At first instance, in the South Australian Employment Tribunal, it was found that the impairments could all be combined as they arose from “*the same trauma*” in accordance with Section 43(6) of the Repealed Act. This decision was upheld by the Full Bench of the South Australian Employment Tribunal.

At issue in the appeal to the Full Court of the Supreme Court of South Australia, was:

*“whether the [worker] suffered a single compensable injury or two or more compensable injuries within the meaning of s 43(6) [of the Repealed Act]. If the answer is the former, then s 43(6) does not apply. If the*

*answer is the latter, there is further question of whether the respondent’s compensable injuries arose from the same trauma”.*

The Full Court of the Supreme Court of South Australia noted that the Full Bench of the South Australian Employment Tribunal had erred in citing a line of authority concerning the issue of compensability, which is to be distinguished from the interpretation of Section 43(6) of the Repealed Act. They noted further that the purpose of Section 43(6) is instead to “*decide whether for the purpose of assessing an entitlement to lump sum compensation, for non-economic loss, two or more compensable issues can be combined*”, referring to *Return to Work Corporation of South Australia v Preedy* [2018] SASCFC 55 (“**Preedy**”).

Justice Stanley went on to state that:

*“Rather, the question is whether, for the purposes of the application and operation of s 43(6), permanent impairment that results from surgical or medical treatment of a compensable injury is to be characterised as a separate and distinct compensable injury from the original compensable injury that was the subject of the medical or surgical treatment.”*

His Honour considered that “*the answer to that question is in the affirmative*”, which was consistent with the authority of *Marrone v Employers Mutual* [2013] SASCFC 76 (“**Marrone**”).

Following this reasoning, His Honour decided that:

*“... the impairments that arose as a complication of the [worker’s] ingestion of*

*continued overleaf...*

*opioid medication to relieve the symptoms of his lumbar spine injury following surgery arose not from the injury to his lumbar spine, but from his ingestion of opioid medication. While those impairments were causally related to his lumbar spine injury, the crucial and necessary event for the development of those impairments was the ingestion of opioid medication. As that event occurred subsequent to the events which resulted from the injury to his lumbar spine, it was not the case that those injuries arose from the same trauma as the lumbar spine injury. Accordingly, the condition for combination prescribed by s 43(6) was not made out.*

This decision has three main implications, being:

1. The Full Court of the Supreme Court of South Australia has reaffirmed that the leading authority with respect to combination of compensable injuries pursuant to the Repealed Act is *Marrone*;
2. Injuries caused by medications cannot be combined with other compensable injuries pursuant to the Repealed Act when assessing whole person impairment for lump sum payments, as they are not caused by the same series of events (ie, there has been a decision by the worker to take the medication); and
3. ***Preedy* remains the leading authority when combining injuries for assessing whole person impairment for lump sum payments under the *Return to Work Act 2014 (SA)* (“RTW Act”).**

*Preedy* differs from the decisions of *Mitchell* and *Marrone* in that it notes when combining injuries or impairments for the purpose of whole person impairment under the RTW Act, it is necessary to take a different approach when determining whole person impairment pursuant to Section 22 as opposed to Section 58.

When determining whole person impairment pursuant to Section 58 (in order to determine the entitlement to a lump sum payment for non-economic loss) the assessment is focused on multiple impairments from two (or more) work injuries that have arisen from the same trauma (or event).

When determining whole person impairment pursuant to Section 22 (in order to determine permanent impairment) the assessment is focused on multiple impairments that have arisen from the same injury or cause.

In his reasoning in *Preedy*, His Honour Justice Stanley noted that these two approaches are complementary, such that an injured worker now has two methods by which injuries can be aggregated for the purpose of determining whole person impairment.

If you would like more information in relation to combination of injuries for whole person impairment in situations such as these, please contact us for advice and assistance.



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