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Employment, Workplace Relations & Safety

Return to Work SA's Summer of Discontent May Soon Be Over

South Australia Government announces Bill to address the issues caused by the authorities in *Preedy* and *Summerfield*

By Patrick Walsh

Equilibrium is a state in which opposing forces or influences are balanced. At the heart of any workers compensation scheme is a list of compromises made by both workers and employers in respect of rights and remedies that exist in the Common Law to achieve a balance that, amongst other things:

- reduces the risks to all parties;
- enlarges the coverage for people injured in the workplace beyond those who are injured as a consequence of negligence; and
- creates a more stable and sustainable means of compensating persons who are injured in the workplace.

This concept is enshrined in section 3(2)(c) of the *Return to Work Act 2014* (SA) ('**the Act**'), which states that one of the objectives of the Act is to "*provide a reasonable balance between the interests of workers and the interest of employers*".

Lump sum compensation

Under the repealed *Workers Rehabilitation and Compensation Act 1986* (SA) ('**WRC Act**'), workers lost the right to sue their employer and seek damages for non-economic loss but gained the right to be paid a lump sum calculated by reference to a percentage impairment. Since amendments were made to the WRC Act in 2008, this became known as an assessment for whole person impairment.

In circumstances where a worker sustained multiple injuries (and/or impairments) from the one workplace incident, these were to be combined to arrive at an aggregated figure. The test for this was articulated in the Supreme Court of South Australia – Full Court decision of *Marrone v Employers Mutual Limited as an Agent for Workcover Corporation of South Australia [2013] SASFC 67*; which stated in paragraph 28:

> *"…any two impairments do not arise out of the same series [and therefore cannot be combined] unless all of the events in the series have operated as a cause of both impairments."*

In line with the notion of compromise – during the negotiation that occurred between the (then) Labor State Government, the unions, and business representatives over the *Return to Work Bill 2014* (SA) before it was introduced into the Parliament – workers lost the general entitlement to weekly payments to the age of 65 years (subject to certain legislative criteria) and instead received:

1. an entitlement of up to 2 years of weekly payments; and

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2. entitlement to an economic loss lump sum payment, in addition to the non-economic loss lump sum payment (both calculated by reference to the whole person impairment figure expressed as a percentage).

In addition to this, any worker assessed as having a whole person impairment of 30% or greater would be deemed to be a "seriously injured worker" and in lieu of the economic loss lump sum, would retain the entitlement to weekly payments until the Federally legislated retirement age.

What is important to note is that the most significant driver to repealing the WRC Act and creating a new scheme was to create a sustainable and affordable scheme for employers who were (at that time) paying the highest premiums in Australia. In this regard, it was widely stated that the objective was to bring the average premium rate for South Australian employers below 2% of workforce remuneration. It can be safely assumed that in agreeing to introduce a lump sum payment for economic loss and the category of 'seriously injured worker', the Government engaged in extensive modelling as to:

1. the cost of entitlements to lump sums for **both** economic and non-economic loss; and

2. the likely number of workers who would ultimately be classed as seriously injured workers.

This modelling must have been done on historical data and therefore based on the test for causation set out by the Supreme Court in Marrone, which is why the decisions of the Supreme Court of South Australia to significantly expand the test for combination of impairments in *Return to Work Corporation of South Australia v Preedy (2018) 131 SASR 86* and *Return to Work Corporation of South Australia v Summerfield [2021] SASCFC 17* has had such a significant impact on the bottom line for Return to Work SA and self-insurers.

Developments in impairment assessment caselaw under the Return to Work Act

It is relatively uncontroversial to note that a very significant amount of the litigation in the South Australia Employment Tribunal ('**the Tribunal**') at present relates to the assessment of whole person impairment. As the Full Bench of the Tribunal noted in the opening of its reasons in *Zaidi v Return to Work Corporation of South Australia* [2022] SAET 48 *"This is yet another appeal that concerns the issue of combination in connection with assessment of whole person impairment (WPI) under the Return to Work Act 2014 (the current Act)*".

In my view, the principal reasons for the amount of disputation concerning impairment assessments are:

1. the very significant benefit of achieving an assessment of 30% or greater, resulting in a worker being designated as a seriously injured worker;

2. the lack of flexibility inherent in a regime that allows for only one assessment. When errors do occur with an assessment, or there is an issue of causation associated with impairments included in the assessment, the resulting disputes are difficult to resolve with a negotiated settlement; and

3. **the Supreme Court of South Australia – Full Court authorities in *Preedy* and *Summerfield* have created an entirely new and more generous test for combination of impairments.**

I have previously argued (in articles here and here) that section 22(8)(c) of the Act is not directed toward the issue of combination of impairments, but rather how the assessment process is to be conducted. Read this way, section 22(8)(c) of the Act is intended to reduce the number of assessments a worker is able to have in respect of a particular incident in the workplace that causes a work injury/ies.

Notwithstanding this, the interpretation applied to section 22(8)(c) by the Tribunal and the Supreme Court of South Australia has had the effect of:

1. significantly increasing the number of workers that have reasonable prospects of reaching 30% whole person impairment; and

2. substantially increasing the sums being paid to injured workers pursuant to sections 56 and 58 of the Act. In this regard, it is important to note that the sums available pursuant to section 56 (economic loss) increase significantly for assessments greater than 18% whole person impairment.

In large part, this is because the combination test in *Preedy* and *Summerfield* has been applied in such

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a way that impairments (or injuries) that arise much later after the initiating incident(s) are combined with the original impairment (injury). Common examples are workers claiming that an injury to their knee or hip has then caused an injury to the contralateral joint, or workers who use opioid pain medications claiming digestive and dental injuries.

The impact that the decisions of Preedy and Summerfield have had on Return to Work SA's bottom line (and then onto employer premiums) has been noted in several of Return to Work SA's actuarial reports. In its 2020-21 Annual Report, Return to Work SA noted that "*the Scheme Actuary has applied a probability weighted approach to determining a $584m liability impact to be applied to this year's accounts. If the High Court appeal is unsuccessful, the adverse impact on the outstanding claims liability will likely be in* ***excess of $1billion***"

The proposed amendments to the Return to Work Act

The *Return to Work (Permanent Impairment Assessment) Amendment Bill 2022* ('**the Bill**') appears designed to reinstate the combination test set out in Marrone as the test for combination of impairments under the Act. It does this by:

1. amending section 22(8)(c) such that it specifies all injuries arising from the same trauma are to be assessed together **and** combined using the principles set out in the Impairment Assessment Guidelines; and

2. ensuring that sections 22(8)(c), 56(5), and 58(6)(a) are all consistent.

On the face of it, this should have the effect of bringing the number of workers who are deemed to be seriously injured more in line with the modelling originally performed by the State Government and Return to Work SA prior to the commencement of the Act and, importantly, avoiding a situation in which average employer premiums in South Australia increase over 2% of workforce remuneration.

I would also argue that these amendments are unlikely to result in an increase in litigation as they do not create any new test for combining impairments.

As one of my colleagues has already pointed out, however, there will need to be some consideration as to how the one assessment rule is to apply with these amendments. At first blush, it seems likely that any "consequential" injuries that arise from the primary injury will lead to an entitlement for a further assessment, which would be an erosion of the "one assessment" principle.

In this context, it is somewhat concerning that there have been reports in the media about various unions calling for more significant changes in the Act. When legislation is not working as intended by the Parliament, it is entirely appropriate for the Government to introduce amendments to ensure that the Act operates as originally intended.

I consider that introducing further changes to the legislation that materially change the manner in which the scheme operates carries a very significant risk of not only eroding the extent to which the Bill will improve the viability of the scheme but would also result in further litigation as parties seek to test the new boundaries and seek out judicial interpretation of any such amendments.

If, as expected, the Bill is brought on for debate within the next fortnight, let's hope that the Government stands its ground and resists the temptation to engage in horse-trading on this important amendment to protect the viability of the scheme.

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