



To Combine or not Combine (WPI Assessments)

Introduction

On 21 July 2017, the Full Bench of the South Australian Employment Tribunal, comprising President Judge McCusker, Deputy President Judge, Gilchrist and Deputy President Judge Ardlie handed down its landmark decision allowing the appeal in the matter of *Preedy*ⁱ.

The Full Bench was asked to determine whether two separate impairment assessments should be combined. This required the Full Bench to also determine whether:

- *Martin's*ⁱⁱ case applied;
- Mr Preedy had complied with *Regulation 5(4)*
- the Compensating Authority was estopped by conduct from contesting the claim;
- the Compensating Authority was barred from raising an argument for the first time on appeal

The determination of this important case required the Full Bench to consider the role and functions of sections 22 and 58 of the RTW Act.

The Full Bench was unanimous in its decision.

Background Facts

Mr Preedy suffered a compensable left shoulder injury in August 2012 and was awarded an 11%

WPI which was determined and paid under the WRC Act.

Prior to the introduction of the RTW Act, Mr Preedy, during the course of physiotherapy treatment for the compensable shoulder injury, sustained a C5 fracture which was accepted. Mr Preedy was assessed under section 43 of the WRC Act prior to 30 June 2015 as suffering with a 27% WPI however the compensating authority did not make that determination prior to the commencement of the RTW Act.

Mr Preedy subsequently requested a section 58 assessment under the RTW Act for the C5 fracture and made an application pursuant to regulation 5(4) of the *Transitional Arrangement Regulations*.

An assessment of permanent impairment took place and Mr Preedy was determined to be suffering with a 27% WPI of the C5 vertebrae.

Mr Preedy argued that the 11% WPI should be combined with the 27% WPI. This was important to Mr Preedy because, if the assessments were combined, he would be treated as a seriously injured worker.

The Compensating Authority refused to combine the WPI's.

The Decision

The Transitional provisions prevent a worker from being awarded a lump sum for permanent impairment if the worker's entitlement had already been determined under section 43 of the WRC Act for the same injury or any other injury arising from the same trauma.

Regulation 5(4) allowed a worker to effectively get around this Transitional provision - but only if an application was made before 1 July 2016.

On appeal, the Compensating Authority initially argued that the proper application had not been made by Mr Preedy. This argument was not raised at trial. The appeal was adjourned for submissions on this issue and, when the appeal resumed, Mr Preedy's solicitors provided an Affidavit which was not contested and which identified that a Regulation 5(4) application had been made. Accordingly, Mr Preedy argued that, because the Compensating Authority had gone on to arrange the section 58 assessment, it ought to be estopped from now arguing that a proper Regulation 5(4) application had not been made.

The Full Bench found that the application under Regulation 5(4) had in fact been made.

Furthermore, the Full Bench said that the Compensating Authority was estopped from advancing a new argument on Appeal which had not been raised at trial.

Accordingly, the question was whether the impairments should be combined.

Mr Preedy argued that the impairments should be combined based on *Martin's case*.

With respect to *Martin's case*, the Compensating Authority argued that the Full Bench's remarks about medical treatment were 'obiter' and therefore not binding. The Full Bench in Preedy's case noted that, if the remarks were 'obiter', then this case provided an opportunity to clarify that the scope of the decision in *Martin's case* included impairments from treatment for a work injury such physiotherapy treatment.

Accordingly, the Full Bench concluded that the impairment arising from the neck injury should be combined with the impairment arising from the shoulder injury because they arose from the same trauma.

The Full Bench also carefully examined the operation of sections 22 and 58 of the RTW Act.

It concluded that section 58 is "*focussed solely on the circumstances in which a lump sum payment for non-economic loss is payable and how such payment is quantified*".

The Full Bench found that the trial Judge, Deputy President Calligeros, erred when he concluded at first instance that *[i]t is the function of s58(6) to determine whether or not multiple injuries may be treated together as one injury and combined. For combination to occur, the multiple injuries in question must arise from the same trauma.*

With respect to section 22(8) of the Act, the Full Bench found that Deputy President Calligeros erred when he held that the function of this section was *... to detail the principles by which PIAs are made and to assist with the mechanical aspects of making,*

ordering, and if appropriate, combining assessments. Indeed, the Full Bench found that Deputy President Calligeros erred when he reached his decision at first instance by viewing section 22 as subordinate to section 58.

Conclusion

Importantly, the Full Bench construed the meaning of both sections 22 and 58 as follows:

For the purposes of making the assessment under s22, 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 s58, they are only combined if they arise from the same trauma.

Mr Preedy's impairment to the left shoulder and neck are to be treated as one because the two impairments arose from the same trauma. The result is a combined WPI at 35% and Mr Preedy is a seriously injured worker

The decision of the Full Bench means that impairments arising from medical treatment for a work injury (such as surgery or physiotherapy treatment) should be combined with the impairment arising from the original work injury.

Appeal

We understand the Compensating Authority is taking advice as to whether this matter ought to be appealed to the Full Court of the Supreme Court. We will keep you informed as to developments.ⁱⁱⁱ

Endnotes

ⁱ *Preedy v Return to Work SA* [2017] SAET 71

ⁱⁱ *Martin v Return to Work SA* (Gallagher Bassett Services Pty Ltd) [2016] SAET 95

ⁱⁱⁱ *Acknowledgements*

Mr Preedy is represented by Bradbrook Lawyers. Mr Stuart Cole appeared at trial. On Appeal Mr Preedy was represented by Mr Michael Roder SC who was greatly assisted by Mr Kevin Gilchrist from Gilchrist Connell. Mr Preedy would like to thank his legal team.

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