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SECTION 43 – DISFIGUREMENT AND MULTIPLE DISABILITIES

The following recent decisions provide assistance to case managers in determining scarring, disfigurement and multiple claim assessments.

Disfigurement

Disfigurement is assessable pursuant to Section 43 of the Act. The Third Schedule provides that a worker is entitled to a percentage of the prescribed sum (not exceeding 70%) proportionate to the extent, severity and likely duration of the disfigurement. The Tribunal has previously confirmed that a worker is entitled to Section 43 compensation for disfigurement if they suffer an alteration in their appearance in a way, which is negative or displeasing to the observer.

Pohl v Monroe Australia Pty Ltd [2002] SAWCT 73

Here, the worker sustained scarring following surgical treatment of her compensable disability. The scarring was located around two centimetres above and parallel with the left and right collar bones. The scars were each approximately eight centimetres in length, and were described by the Tribunal as particularly unpleasant as the worker had developed keloid of both scars. The scarring was visible and particularly noticeable if the worker wore open

necked clothing. The Tribunal assessed 5% for **each** scar.

Amodeo v WorkCover (Monadelphous Engineering Associates Pty Ltd) [2002] SAWCT 38

Here, the worker argued that he was entitled to an assessment for disfigurement resulting from:

- Post surgical scarring;
- The altered appearance of the skin on his hand;
- The fact that he held his hand, wrist, arm and elbow in a fixed position;
- His altered posture;
- The fact that he was required to permanently wear an observable splint on right wrist and lower forearm.

The Corporation admitted that the first four complaints were capable of being taken in to account in an assessment for disfigurement but argued that the wearing of a splint – being an external removable aid – could not constitute an assessable disfigurement.

The Tribunal found that the splint *could* be indirectly relevant to an assessment for disfigurement as it might hide or shield some other disfigurement. That is, in assessing the severity of a scar, the fact that the scar is not visible to an observer because it is hidden by a permanent splint or other device might affect the assessment of the severity of the scar.

In calculating the worker's entitlement, the Tribunal noted that the postoperative scarring consisted of four small incision points near the wrist line. Only one of these was visible and that was "of such insignificance that it (did) not warrant assessment at all". There was also a patch of discolouration of the worker's skin around 4 centimetres in diameter at the outer

aspect of his thumb extending to his wrist. In addition the worker complained of thickening and discolouration of the right hand and thickening of the right wrist relative to his left. He also complained that his right hand would sweat profusely causing a moist or glistening appearance and that as a result of his right wrist condition, he had developed a different body posture and positioning of his right arm – the fingers of his right hand were clenched and the worker held his right arm slightly flexed and resting on the right hip. When standing his body leant slightly to the left and forward with a slight droop in the left shoulder.

As outlined above, the Tribunal found that the postoperative scarring did not warrant any assessment at all. It expressed some reservation as to whether the sweating of the right hand was a sufficiently negative change in the worker's appearance but ultimately took it into account. The Tribunal also found that the changes in the worker's body posture and right arm would be marginally displeasing to the observer, and that the issue of discolouration and thickening of the worker's hand and wrist were of minimal significance.

The Tribunal assessed disfigurement at 4%, taking into account all of the above – compare this outcome with the first case of Pohl.

NOTE: Amodeo has been appealed to the Full Tribunal, which has reserved its decision. We will provide an update in the next issue of "Covered".

Multiple Disabilities

Stevanja v WorkCover (Gerard Industries) [2001] SAWCT 94

Here, the worker sustained a compensable disability to the right and left shoulders. In addition, she alleged a compensable disability of the right lower arm.

The worker sought Section 43 compensation based upon permanent disabilities of:

- The right arm at or above the elbow (resulting from the right shoulder injury);

- The left arm at or above the elbow (resulting from the left shoulder injury); and
- The right arm below the elbow (resulting from the alleged compensable disability to the right lower arm).

Crucial to this decision was the question:

Could a permanent disability to the shoulder be assessed as a loss of function of the arm at or above the elbow?

The Tribunal referred to an earlier decision – Mitchell v WorkCover (TW Ingham and Sons Pty Ltd) JD 60/98 which had held that sometimes a particular disability can be fairly categorised in more than one way and in such cases, the worker can choose how the disability is assessed.

As to the right shoulder injury, the evidence established that the worker had also suffered a permanent restriction of the use of her arm as a whole. Therefore the worker was entitled to have this loss assessed as loss of function of the arm.

However, it did not necessarily follow that in every case a loss of shoulder function could be assessed as loss of function of the arm. In relation to the worker's left shoulder injury, the prime area of loss of function was the shoulder and the other functions of the arm were not particularly affected. Accordingly, this loss was appropriately assessed as a loss of function of the shoulder.

This difference is of significance, given that a loss of function of the shoulder amounts to 50% of the prescribed sum, whereas a loss of function of the arm at or above the elbow amounts to 90% of the prescribed sum.

In cases such as these, it will be necessary to look at the medical reports carefully to determine the extent and nature of any loss of function resulting from the compensable disability.

Was the worker entitled to a separate assessment for loss of function of the lower arm resulting from her lower arm disability?

The Tribunal held that the worker had not sustained a compensable disability of the right lower arm. However, in any event, the Tribunal noted that the worker would not have been entitled to an assessment of loss of function of the arm below the elbow in addition to the abovementioned assessment of loss of function of the left arm at or above the elbow. Rather, any permanent disability of the lower arm must be incorporated in the assessment of loss of function of the upper arm.

COVERED CASES

BONELLO v ONE STEEL MANUFACTURING PTY LTD

[2002] SAWCT 60

Work Place Re-Structuring - What Constitutes Adequate Consultation?

Here, the Tribunal held that a worker had suffered anxiety and depression as a consequence of restructuring within the worker's work place and that his condition was compensable. Implicit in this was the finding that the employer had not acted reasonably.

The employer had determined that it needed to restructure by allocating work differently. Despite meeting with staff to determine their preferences as to work allocation, the employer allocated to the worker a position, which he had specifically sought to avoid. The worker expressed his concerns to management who attempted to placate him, but were not prepared to change their decision. The worker became unwell and resigned soon after.

The Tribunal found, in effect, that the employer's actions were not taken in a reasonable manner. Deputy President Gilchrist acknowledged the employer's right to implement changes in the work place but found that modern employers had an obligation not only to consult with but also to

involve their staff and unions in the planning of such changes.

In this case, although the employer had taken heed of the preferences of some members of staff, this was not sufficient. The employer should have:

- Conducted an extensive consultation with staff and their union;
- Included the staff and the union in the decision making process;
- Outlined its intentions in relation to the proposed change; and
- Counselling staff and explained the reason for its decision;

prior to implementing the changes in the allocation of work.

The Tribunal did not find that the decision itself – to allocate the worker to a particular position – was unreasonable but rather that process was flawed.

It also held that the worker's resignation was not a breach of mutuality as he had resigned because he felt unable to undertake the duties the employer was requiring him to perform.

This decision highlights the necessity for employers to ensure that their practices and processes concerning termination, work place change and redundancy are in accordance with current industrial standards.

STATE OF SOUTH AUSTRALIA (DEPARTMENT OF EDUCATION CHILDRENS SERVICES) v THE ESTATE OF BARBARA MASON

[2002] SAWCT 114
Full Tribunal

Claims for Injury Resulting From A Journey between Work and Home

A worker injured on a journey between work and home is not entitled to compensation unless there is a "real and substantial

connection between the *employment* and the *accident* which caused which the injury” – Section 30(5)(b). However, an injury sustained on a journey undertaken *in the course of* carrying out work duties is compensable.

In some circumstances, the journey between work and home can constitute a journey undertaken *in the course of employment*. Accordingly *journey* claims may require investigation into the duties and nature of the worker’s employment.

Here, the worker drove a school bus in a remote rural location. Her contract of employment required her to drive her own motor vehicle to the bus terminus in the mornings where she collected the school bus and drove to the school. The worker kept a second car at the school, and, when arriving there at the end of the morning run, would use that motor vehicle to return home. Then at the end of the school day, the worker drove back to the school, collected the school bus, drove the school bus to the terminus and then used her second car to drive home!!

This unusual situation had arisen, as the worker was not allowed to drive the school bus home. She was paid an allowance for around 50% of the necessary use of her private vehicle.

The worker sustained her injury in a motor vehicle accident whilst driving from the terminus to her home in her second car. The claim was rejected on the basis that it was a journey between work and home and there was no “real and substantial connection” between the employment and the accident.

At first instance, the Tribunal held that this matter was “close to the border” between injuries which fell within the Act and those that didn’t. Ultimately, it was held that the worker’s injury was compensable, as it arose from a journey undertaken in the course of carrying out duties of employment, as, the journey from the terminus to the worker’s home was reasonably incidental to the worker’s duties of employment.

The Full Tribunal held that the Deputy President at first instance had made no error in law. Accordingly, the exempt employer’s appeal was dismissed.

TID BITS

JENKINS v WORKCOVER (SKILLED ENGINEERING PTY LTD)

[2002] SAWCT 94

The worker’s claim for income maintenance was accepted and payments commenced. The employer then lodged a Notice of Dispute after which the claim was then rejected upon reconsideration. Income maintenance payments therefore ceased. The worker then lodged a Notice of Dissatisfaction and applied to the Tribunal for an Order that payments continue.

The Tribunal confirmed that as a result of the reconsideration, the specific decision in dispute was the varied decision rejecting the worker’s claim. Accordingly the worker was not entitled to weekly payments during the ongoing dispute.

BEGOVICH v WORKCOVER (ITRIX PTY LTD)

[2002] SAWCT 115

Some decision makers elect to determine claims by way of a series of consecutive closed period acceptances (usually reflecting a period certified in the Prescribed Medical Certificate).

Here, the claims agent determined on 31 July 2000 to accept the worker’s claim for a closed period of incapacity up to 15 August 2000 only. A subsequent determination rejected the worker’s claim for income maintenance payments beyond 15 August 2000. The worker argued that the determination of 31 July 2000 was invalid, and constituted an attempt to avoid the effect of Section 36 of the Act. Deputy President Thompson held that the compensating authority was entitled to make such determination.

The Full Tribunal dismissed the worker's appeal, finding that the Deputy President had made no error of law.

NOTE. In our view, the acceptance of the claim for consecutive closed periods of incapacity should not continue indefinitely. If there is evidence that the compensable disability is permanent, it is appropriate to accept the claim on an ongoing basis, rather than by way of consecutive closed period acceptances. The Tribunal may form a different view than that expressed in Begovich where closed period acceptances go on for too long.

WALKER v SOWINSKI

**[2002] SAWCT 88
Full Tribunal Decision**

Return to Work – Section 36(1)(c)

The Full Tribunal unanimously held that a partially incapacitated worker who had returned to paid employment earning less than his notional weekly earnings had “not returned to work” for the purposes of Section 36(1)(c). For the purposes of that Section, a “return to work” means a *return to work as a settled or established wage earner, earning equal to or above notional weekly earnings.*

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