Permanent Impairment Assessments & Deductions

In the past, one of the contentious issues in the assessment of permanent impairment has been whether there has been a failure to take into account any pre-existing non work related conditions.

When the *Return to Work Act* 2014 (RTW Act) was introduced along with Impairment Assessments Guidelines, the assessors were directed pursuant to sections 22(8)(b) and (g) of the RTW Act to take into account the following:

- Impairments from unrelated injuries or causes are to be disregarded in making an assessment (cf section 22(8)(b)), and
- Any portion of any impairment that is due to a previous injury (whether or not a work injury or whether because of a pre-existing condition) that caused the worker to suffer an impairment before the relevant work injury is to be deducted for the purposes of an assessment, subject to any provision to the contrary made by the Impairment Assessment Guidelines (cf section 22(8)(g)).

Unfortunately, this direction was not strictly applied. Often, assessors have not been able to take any pre-existing condition into account as they were not made aware of any pre-existing condition. On occasion the condition was not even known by the injured worker. The classic example of this was an osteo-arthritic condition (OA) that was asymptomatic.

One of the major cases relating to this issue in the last two years was the case of *Paschalis v Return to Work SA* [2021] SASCFC 44.

In that case, the Court of Appeal of the Supreme Court noted that the RTW Act only intended to compensate work injuries and impairments caused by work injuries.

The case concerned the application of sections 22(8)(b) and (g) of the RTW Act with Justices Livesey and Bleby referring to the reasons of Forrest J in *Alcoa Holdings Limited v Lothian & Ors* [2011] VSC 245, where Forrest J observed:

"...demonstrated that the statutory command to the medical panel was to evaluate only the impairment related to the compensable injury and to put to one side any impairment produced by unrelated injuries or causes. If the evidence established the existence of a pre-existing impairment from an unrelated injury or cause, the medical panel was obliged to ensure that its estimate of the impairment disregarded any pre-existing impairment or any subsequent impairment flowing from the unrelated injury or cause."

Their Honours noted that the reasoning of Forrest J in Alcoa had been referred to by the Full Bench of the SAET in Department of Health and Ageing v Neilsen [2017]SAET 136, with Livesey and Bleby JJ noting:

"...In essence, in each of Millane, Vegco, Alcoa and Neilson, it was held that where a pre-existing injury or cause leading to impairment is identified as affecting any assessment of a work injury impairment, the assessment must recognise the impairment flowing from that pre-existing injury or cause, evaluate it, and deduct it from the work injury assessment.".

While the case of Neilsen concerned the application of section 43A(9)(b) of the repealed, Worker's Rehabilitation and Compensation Act 1986 (the repealed Act), it was noted that the purpose of the deduction was to ensure that lump sum compensation for non-economic loss is payable only in respect of the degree of permanent impairment suffered as a result of a compensable injury and nothing else. The assessment of the degree of permanent impairment must not include any permanent impairment suffered as a result of an unrelated injury or cause. This informs how the expression "are to be disregarded" is to be construed.

It was acknowledged that this process is not without difficulty and relies on a correct medical history being provided and, if possible, obtained from the relevant medical provider. Nevertheless, the Court of Appeal noted that:

"The method of deduction is laid down in chapter 1.24 of the Guidelines. It requires the Assessor to assess the permanent impairment to the affected part of the body by applying the methodology in the Guidelines, then deducting the permanent impairment percentage attributable to the previous or unrelated injury or cause. Only if there is no impairment from the previous unrelated injury or cause will there be nothing to deduct. This is to be "appropriately documented" in the assessment report.

Chapter 1.29 of the Guidelines requires that a pre-existing injury be addressed by "objective evidence to support the assessment of impairment caused by that injury (e.g. clinical evidence, medical records and reports, the worker's history, etc)". Chapter 1.29 provides that the impairment rating of the pre-existing injury be determined by applying the methodology in the Guidelines. However, assessment of the impairment rating of the appellant's pre-existing injury necessarily proceeds with some modifications. That is because the assessment of the current impairment involves a single clinical assessment made on the date of the assessment, which necessarily includes a proportion of permanent impairment resulting from any previous injury. Two "stand-alone" assessments are not required. By the date of assessment, the worker will typically be presenting with impairments from both the relevant injury and the pre-existing injury, and the assessor's task of disentangling, so as to identify the extent of impairment from the work-related injury will sometimes be difficult if not compromised. Nonetheless the statutory command remains clear: the impairment from the previous injury must be excluded from the WPI assessment, and therefore deducted.

Chapter 1.29, by referring to the calculation of the impairment rating for the pre-existing injury using the methodology and the Guidelines, is not to be interpreted as if it was a statutory provision, however it does, as with AMA-5, form an integral part of the scheme. Respectfully, we would adopt what was said in HJ Heinz Company Ltd v Kotzman by Kyrou J as applicable to the Act, the Guidelines and AMA-5 (referred to below as "the Guides") (51 HJ Heinz Co Ltd v Kotzman [2009] VSC 311 ,[24]-[24]):

"The interpretation of the guides is a question of law. The determination of the level of impairment is a question of fact."

In summary, the Court of Appeal was left with no doubt the assessor needed to adopt an approach where an estimate of the degree of impairment that the unrelated injury or cause contributed to the overall Whole Person Impairment (WPI), relying upon the assessor's expertise and whatever objective evidence remains available. The Court also pointed out that the RTW Act did not mandate that any assessment of the unrelated injury or cause be subject to a strict assessment under the Guidelines in the same way as the relevant work injury must be assessed.

The recent case of Nicholson v Return to Work Corporation of South Australian [2023]SAET 64 now illustrates how the above principles are to be applied.

The matter was the subject of an application for review before His Honour Auxiliary Judge Clayton. At the time he was required to consider the impact of a non work-related condition, being osteo arthritis, on a Permanent Impairment Assessment (PIA).

In reasons handed down on 25 February 2022, a Full Bench determined that there had been an error in the decision at first instance as the Judge had found that Mr Nicholson's pre-existing osteoarthritis needed to be symptomatic to warrant deduction in connection with the assessment of his WPI. The matter was remitted back to Judge Clayton for further consideration.

The salient facts of the case are that the worker had sustained a right knee injury on 19 February 2016.

The worker had in fact complained of painful knees for the twelve months prior to the injury. X-rays taken at the time showed the presence of the OA. Further x-rays taken in February 2016 showed that the cartilage interval or joint space in the medial compartment of the left knee was 4mm, which would not give rise to an impairment rating under the IAG. At that time it was said that both knees were asymptomatic.

Knee replacement surgery was performed on the worker's right knee on 14 October 2016.

During December 2016, whilst working at home and talking to his boss on the telephone, the worker went outside to obtain better reception, and in accordance with his usual practice, stood on a particular rock. As he did so his left knee gave way and became painful and swollen. Thereafter his left knee had been significantly symptomatic.

A claim in respect of the left knee injury was initially rejected but was eventually accepted.

On 24 April 2017 an x-ray of the left knee showed that the cartilage interval or joint space in the medial compartment of the left knee had reduced to less than 1mm in the period from February 2016 to April 2017. That is, there had been a reduction of 3mm in the medial compartment joint space in a 14-month period.

The worker had total left knee replacement surgery on 1 May 2017. He was assessed at overall impairment of 20% WPI from the condition of each knee with an additional 1% WPI due to scarring.

Judge Clayton found that the impairments from the right knee injury and the left knee injury were from the same cause and should be combined.

The parties agreed that a deduction of 8% WPI should be made from the overall assessment of 20% WPI of the right knee, with the result that the impairment to the right knee was 12% WPI.

In relation to the left knee, both Dr Meegan and Dr Bastian agreed that the reduction in joint space in the medial compartment of the left knee from 4mm in February 2016 to less than 1mm in 2017 was a substantial progression of joint space loss in a relatively short period of time.

Both Dr Meegan and Dr Bastian agreed that compensatory weight bearing and use of the left knee to protect the right knee and the effects of the fall in December 2016 had contributed to that loss of joint space.

In essence, the respondent also contended that the progression of osteoarthritis also contributed to that loss of joint space, while the worker contended there was no impairment to the left knee prior to the onset of the left knee injury and therefore, there should be no deduction. It was submitted that it was the compensatory weight-bearing and the fall interacting with the osteoarthritis, or acting upon that osteoarthritis, which caused it to progress in a way that contributed to the loss of joint space. It was not the pre-existing osteoarthritis operating independently from those factors.

However, the medical evidence was to the contrary. Dr Meegan attributed one third of the loss of joint space to each of the progression of osteoarthritis, the effects of the fall and the compensatory use of the left knee to protect the right knee weight-bearing. Dr Meegan was prepared to concede that the impairment could be due to any three of the above, and it was difficult to be determined which of the three it was, but in the end, he reasoned that it should be apportioned one third to each of those causes. He accepted that this was an educated guess. Dr Bastian disagreed with the one third attribution to the progression of osteoarthritis but attributed one quarter of the loss of joint space to that cause. He attributed the remaining three quarters to the combination of the compensatory weight-bearing and use of the left leg, as well as the fall, on the basis that the significant progression coincided with those events.

In the final analysis, Judge Clayton accepted the submission that there has been some progression of the OA independent of the other two causes and preferred the opinion of Dr Meegan as to what should be deducted. The effect of this finding was to allow for a 3% WPI deduction that was attributable to the progression of the OA, and that is the deductable rating that should be applied to the left knee which was assessed at 20% WPI.

On our understanding, the impact was to reduce the assessment of permanent impairment due to the OA as follows:

- The right knee reduced from 20% WPI to 12%WPI
- The left knee reduced from 20% WPI to 17%WPI

While there was a further 1% WPI for the scarring to both knees, after the application of the AMA5 Combined Value Chart, the potential for the compensating authority to reduce its liability for a section 58 claim for lump sum compensation alone resulted in a saving of $109,362.00 (being the difference between a 28% total WPI and a 37% total WPI), as well as to avoid a serious injury claim.

The above emphasises the need to ensure all relevant medical information is obtained preferably as soon as the claim for any injury is submitted so that there is total awareness of the medical history relating to any pre injury condition. Additionally, there is a need to monitor any changes to the injury and any consequential injury that may arise.

The legal issues involved in such matters is complex and due attention must be paid to all aspect of the claim. Legal advice on such matters should be sought before any concessions are made.