

SUPREME COURT OF SOUTH AUSTRALIA

(Appeals to a Single Judge: Permission to Appeal in Private)

RETURN TO WORK CORPORATION OF SOUTH AUSTRALIA v MITCHELL

[2017] SASC 172

Judgment of The Honourable Chief Justice Kourakis

23 November 2017

WORKERS' COMPENSATION - ENTITLEMENT TO COMPENSATION - CAUSAL RELATION BETWEEN INJURY AND INCAPACITY OR DEATH - INCAPACITY OR DEATH DUE TO TWO CAUSES - GENERAL PRINCIPLES

Application for permission to appeal. The Full Bench upheld a decision of a Deputy President that digestive, urinary and reproductive system injuries caused by medication prescribed to and taken by the respondent to treat a serious back injury arose from the same trauma that caused the back injury. That finding has the effect that the back disabilities and the reactions to the medication may be treated as one disability for the purpose of s 43(6) of the Workers Rehabilitation and Compensation Act 1986 (SA).

Held per Kourakis CJ, granting permission to appeal:

1. There is some tension in the authorities' treatment of subsequent injuries arising out of medical treatment.
2. The contention of the Return to Work Corporation of South Australia is arguable.

South Australian Employment Tribunal Act 2014 (SA) s 68; Workers Rehabilitation and Compensation Act 1986 (SA) s 43, referred to.

Martin v Return to WorkSA [2016] SAET 95, discussed.

On Appeal from SOUTH AUSTRALIAN EMPLOYMENT TRIBUNAL (PRESIDENT JUSTICE MCCUSKER, DEPUTY PRESIDENT DOLPHIN AND DEPUTY PRESIDENT LIESCHKE) [2017] SAET 81

Applicant: RETURN TO WORK CORPORATION OF SOUTH AUSTRALIA Counsel: MR G COPPOLA - Solicitor: MINTER ELLISON

Respondent: STEPHEN JOHN MITCHELL Counsel: MR J WARREN - Solicitor: PALIOS, MEEGAN & NICHOLSON

Hearing Date/s:

File No/s: SCCIV-17-978

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**RETURN TO WORK CORPORATION OF SOUTH AUSTRALIA v
MITCHELL
[2017] SASC 172**

Appeals to a Single Judge

1 **KOURAKIS CJ:** This is an application for permission brought pursuant s 68(1) of the *South Australian Employment Tribunal Act 2014* (SA). The Return to Work Corporation of South Australia (RTWSA) seeks permission to appeal against a decision of the Full Bench of the South Australian Employment Tribunal (the Employment Tribunal). The Employment Tribunal upheld the decision of a Deputy President of the Tribunal that digestive, urinary and reproductive system injuries (the adverse reactions) caused by powerful medication which the respondent, Mr Mitchell, took to treat the symptoms of a serious back injury arose from the same trauma that caused the back injury.

2 That finding has the effect, pursuant to s 43(6) of the *Workers Rehabilitation and Compensation Act 1986* (SA) (the WRC Act), that the back disabilities and the adverse reactions may be treated as one disability for the purpose of determining the whole person impairment of Mr Mitchell. A higher whole person impairment assessment will entitle a worker to greater compensation.

3 In *Marrone v EML*¹ (Marrone) this Court held that for compensable disabilities to be combined pursuant to s 43(6) of the WRC Act it is not sufficient that the compensable disability share a common cause or causes; to be combined the disabilities must arise out of the same event or same series of events. For that reason this Court held in *Marrone* that an overuse disability of the left arm did not arise out of, and could not be combined with, a right arm disability for which the worker compensated by making greater use of his left arm. I will refer to the holding in *Marrone* as the same causal events principle.

4 In *Martin v Return To WorkSA*² (Martin) the Full Bench of the Employment Tribunal held that a disability caused by surgical treatment arose out of the same trauma that caused the disability for which the surgery was required. That holding is not directly challenged by the applicant. However it may be observed that the trial Judge in *Martin* accepted that surgical treatment which merely affected the symptomology, and therefore impairment, arose out of the same trauma which caused the original injury, but denied that an independent impairment, like consequential scarring, did. Even though surgery is plainly a distinct event which occurs after the traumatic injury it treats, the Full Bench in *Martin* went further than the trial Judge and held that all consequences of surgery arise out of the original trauma unless the surgery is so negligently undertaken that it breaks any causal claim linking back to the original trauma. I will refer to

¹ (2013) 116 SAR 501.

² [2016] SAET 95.

the holding in Martin as the consequential medical treatment exception to the same causal events principle.

5 In this case the Employment Tribunal extended the consequential medical treatment exception from surgery to prescribed medication. The applicant challenges the extension of the consequential treatment to prescribed medication in cases, like this, in which medication taken to treat the injury caused by the original trauma has adverse physiological symptoms.

6 There is some tension between the consequential medical treatment exception and the same causal events principle. Indeed in a case in which the immobilisation of a limb, by a medically prescribed cast or splint, or by the giving of medical advice, leads to an adverse injury of the opposite limb the consequential medical treatment exception would abrogate the same causal event principle. If the consequential medical treatment exception holds true, the result in a case like Marrone may be different depending on whether medical advice to rest the injured limb is given.

7 The contention of RTWSA is arguable.

8 Section 58(6) of the *Return to Work Act 2014* (SA) (the RTWA) is in similar terms to s 43(6) of the WRC Act. The combination of impairments may dramatically affect both the entitlement to ongoing weekly payments and the lump sum award for non-economic loss.³ The issue is of general importance.

9 I would grant permission to appeal

³ Permission to appeal the decision of the Employment Tribunal in the *Return to Work Corporation v Preddy* which concerns the proper construction of s 22(8) of the RTWA and s 58(6) of the RTWA which affects the assessment of the whole of person impairment for the purpose weekly payments of compensation has been granted.