

SECTION 22 – WHOLE PERSON IMPAIRMENT ASSESSMENTS

GETTING THE SECTION 22 PROCESS
RIGHT FROM THE GET-GO

FACILITATORS:

CHRISSY PSEVDOS
&
TRACEY KERRIGAN



WHAT WE WILL BE COVERING THIS AFTERNOON

- The lump sum entitlements and how to calculate them.
- The one assessment rule.
- The assessment principals.
- Stability / Maximum Medical Improvement (MMI)
- Combination.
- Deductions
 - pre-existing impairments
 - prior ss 56 and 58 payments.
- Section 56A.
- Case studies and a practical guide.

SECTION 56 OF THE RETURN TO WORK ACT 2014 (SA)

- Provides compensation for economic loss (future earning capacity) for physical injury claims only (not for psychiatric injuries or noise induced hearing loss (NIHL) claims) sustained after 1 July 2015.
- An assessment of whole person impairment (WPI) in accordance with s 22 of the RTW Act must be made.
- Does not apply to “seriously injured workers” (SIW) i.e. $>35\%$ (WPI).
- There is no entitlement to compensation unless the WPI is $\geq 5\%$.

SECTION 58 OF THE RETURN TO WORK ACT 2014 (SA)

- Provides compensation for non-economic loss for physical injuries.
- Applies to all workers, including SIWs.
- There is no entitlement to compensation unless the WPI is $\geq 5\%$ (s 58(2) of the RTW Act).
- Psychiatric injuries can be assessed for the purpose of determining whether or not an injured worker will be taken to be a SIW under the RTW Act.
- An assessment of whole person impairment (WPI) in accordance with s 22 of the RTW Act must be made:
 - must be in accordance with the Impairment Assessment Guidelines (IAGs);
 - Must be carried out by an accredited assessor.

MAXIMUM MEDICAL IMPROVEMENT (MMI)

- An assessment of permanent impairment must not be made until there is evidence that the injury has stabilised i.e. has reached MMI.
- Evidence of MMI must be obtained before the assessment is arranged: *Kaye v Return to Work SA* [2018] SAET 143.

ONE ASSESSMENT RULE

- The rule is somewhat dead:
 - The rule provided that only one assessment could be made for permanent impairment per claim, per date of injury.
 - Any injury/ies that developed subsequently would not be assessed together.
 - *Abraham* [2016] SAET 76 noted that you can challenge the assessment made but it is not “a free for all”.

ONE ASSESSMENT RULE

- But now:
 - if a worker has had an assessment and another impairment from the same injury or cause develops or manifests itself after that assessment, then: -
 - The other impairment can be assessed separately;
 - The impairment will not be combined with the impairments already assessed;

ONE ASSESSMENT RULE

- But now:
 - The impairment will be combined with any other impairment from the same injury or cause that also developed or manifested itself after the earlier assessment.
 - Surgery no longer constitutes a separate injury and is considered to be part of the original injury under section 7(6) of the RTW Act.

CALCULATION OF LUMP SUM COMPENSATION FOR ECONOMIC LOSS

- The PS is located in the schedule of sums (RTWSA publication) and based on the % impairment assessment.
- The AF is determined in schedule 6 of the RTW Act.
- The HWF is the number of hours worked by the worker at the date of injury, expressed as a percentage of full-time work (38 hours).
- The HWF should be consistent with the calculation of the average weekly earnings determined.

CALCULATION OF LUMP SUM COMPENSATION FOR ECONOMIC LOSS

- Section 56 entitlement calculation:
 - **Lump sum entitlement =**
 - Prescribed sum [PS] for the relevant calendar year of injury x age factor [AF] (age as of date of injury) x hours worked factor [HWF] (determined at the time of the injury)

CALCULATION OF LUMP SUM COMPENSATION FOR NON-ECONOMIC LOSS

- Section 58 entitlement calculation:
 - **Lump sum entitlement =**
 - Prescribed sum [PS] for the relevant calendar year of injury using the % assessment for impairment and the schedule of sums

COMBINATION – COMBINED VALUES CHART

- The Combined Values Chart, AMA 5, is used to combine multiple impairments.
 - Example:
- A worker makes a claim for left and right knee injuries sustained in the same incident.
- The worker is assessed as having the following impairments:
 - 25% WPI left knee;
 - 12% WPI right knee .
- What is the combined assessment? = 34% (not 37%).

COMBINATION

- Impairments from the same injury or cause are to be assessed together or combined to determine the degree of impairment [section 22(8)(c)].
- This section is to be applied in accordance with the principles set out by the Supreme Court in *Preedy, Summerfield*, and now also *English & Williams*

Preedy

- Mr Preedy suffered a left shoulder injury in the course of his employment. While receiving physiotherapy treatment for the shoulder injury, he suffered a neck injury.
- If the impairment from the left shoulder injury was combined with the impairment from the right shoulder injury, then Mr Preedy would be a seriously injured worker under the Act.
- It was decided that the left shoulder injury and the neck injury arose from the same cause.

Summerfield

- Mr Summerfield suffered a fracture to his left leg and left hip in a fall.
- Mr Summerfield had a hip replacement and developed a limp which caused back pain.
- Mr Summerfield later claimed for this lumbar injury and the claim was accepted.
- Return to Work SA determined that Mr Summerfield was entitled to lump sum compensation on the basis of:
 - 31% WPI for the left leg and left hip and 8% WPI for the lumbar spine.
 - The issue in dispute was whether the lumbar spine impairment was to be combined with the other impairments.
 - The Supreme Court found that the lumbar spine impairment arose from the same cause as the impairments to the left leg and hip.
 - Therefore, the outcome of the case was that the assessments were to be combined.

COMBINATION – GREY AREAS UNTIL RECENTLY

Following *Preedy & Summerfield* we were still attempting to separate some injuries namely,

- Impairments that arise from repetitive work activities over a period of time – *Williams*.
- Impairment from a fall due to the effects of medication taken for a work injury – *English*

Return to Work Corporation v English

The facts:

1. Mr English suffered a work injury to his neck in March 2019.
2. In May 2019, he suffered a further work injury when he fell and injured his right quadriceps. The fall occurred as a result of light-headedness caused by prescribed pain medication (Lyrica) Mr English was taking for his neck injury.
3. The Return to Work Corporation chose to not combine the impairments relating to his two injuries when determining his entitlements under s 22 of the RTW Act.
4. The Court of Appeal in this case found that both impairments were found to have arisen from the same injury (the initial neck injury), and from the same cause (the event that caused the initial neck injury or, indeed, the neck injury itself) and so are to be combined, despite the second impairment not being physiologically linked to the first impairment.

Return to Work Corporation v Williams

The facts:

1. Mr Williams worked as an electrician. From early 2015, he was required to do more physically demanding work, including having to climb up ladders and stairs frequently, and do more work in a crouched or kneeling position.
2. Over time, Mr Williams suffered increasing pain in both knees, undergoing surgery on both.
3. He made a claim for lump sum payments under s 58 of the RTW Act, but the RTW Corp chose to not combine his two knee injuries when determining his entitlements.
4. The Court of Appeal found that s22 wasn't just limited to subsequent injuries arising from the initial injury – but that it extends to the combination of impairments from multiple injuries that both arose from the same incident or event. In other words – both knee injuries were caused by the regular climbing and crouching that Mr Williams was required to perform between May and August 2015.

Williams & English

Why is this decision important?

- In assessing an injured worker seeking a lump sum payment, you will now be required to combine impairments from multiple injuries that are linked to the same incident or event, regardless of whether the injuries are physiologically linked to each other.
- More %assessments being combined increases the chances for injured workers to attain higher %assessments and therefore greater entitlements to lump sums.

DEDUCTIONS – UNRELATED OR PRE-EXISTING IMPAIRMENTS

- Two important principles of deductions set out in section 22(8) of the RTW Act:
 1. Impairments from unrelated injuries or causes are to be disregarded in making an assessment [s22 (8)(b)];
 2. Any portion of an impairment that is due to 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 IAGs.
- Different rules apply depending on whether or not the worker has had a prior payment of lump sum compensation.

DEDUCTIONS FOR PRIOR SECTION 58 PAYMENTS

- A deduction is made of the s58 lump sum payable if:
 1. A work injury consists of an aggravation, acceleration etc. of a prior work injury; and
 2. Compensation has previously been paid under s58 or s43 of the 'old Act'.
- The deduction is the amount of the prior lump sum.
- For that reason, a lump sum check is required.

Onody

- In 1996, Mr Onody was paid \$8,310.60 lump sum compensation for non-economic loss [pursuant to S43 of the 'old Act']. This was based on a 6% WPI.
- In 2015, Mr Onody claimed lump sum compensation under s58. He was assessed as having a 9% WPI.
- RTWSA argued that, for the purposes of determining the entitlement, the 6% WPI was to be deducted from the 9% WPI.
- This would mean the difference in 3% WPI - under the 5% threshold.
- The Supreme Court said that, because there was a prior payment, the dollar amount of the prior payment is deducted.
- Mr Onody's entitlement was therefore \$18,756 (9%) less \$8,310.60 (the prior payment).

DEDUCTIONS FOR PRIOR SECTION 56 PAYMENTS

- A worker has received a lump sum for economic loss and then suffers:
 1. An aggravation, acceleration of the injury;
 2. A new work injury.
- The worker then claims a second lump sum for economic loss.
- The second lump sum will be reduced by the amount of the first lump sum.
- The same principles apply for a third or subsequent entitlement

DEDUCTIONS FOR PRIOR SECTION 56 PAYMENTS

- What is a 'new work injury'?
 - Is it a new injury to the same body part?
 - Is it any subsequent injury even to a different body part?

Jackermis

- In 2016 Ms Jackermis injured her right shoulder at work.
- She was assessed as having a 17% WPI. She received a lump sum of \$76,000.
- In 2017 Ms Jackermis injured her left shoulder in a new incident at work.
- Ms Jackermis was assessed as having a 13% WPI in relation to the left shoulder. A 13% WPI translates to a section 56 lump sum of \$45,000.
- The Court had to determine whether Ms Jackermis was entitled to:
 - \$45,000 or
 - Nil [being \$45,000 less \$76,000 already paid for the right shoulder]?

Jackermis

- The Full Bench of the Tribunal found in favour of Ms Jackermis and awarded compensation of \$45,000.
- The Full Bench said that ‘a new work injury’ is a further work injury where a portion of the impairment is due to a previous injury.
- The Full Bench held that the left shoulder injury bore no relationship to the previous injury, no deduction was to be made.
- On appeal to the Supreme Court, the Supreme Court found that the phrase ‘a new work injury’ carries a wide connotation of any new injury.
- The Supreme Court therefore decided that Ms Jackermis’ entitlement for her left shoulder was nil.

ASSESSMENT PRINCIPALS

- The assessment principals are set out in section 22 of the RTW Act.
- Assessments are made in accordance with the IAGs.
- Accredited assessors use the AMA Guides to the Evaluation of Permanent Impairment, 5th edition (AMA Guides).
- You may need more than one assessor i.e., lead assessor and others.
- List of accredited assessors.
- Report must be compliant.

TIPS FOR MANAGING LUMP SUM CLAIMS

Dealing with claims where an injury **has not been** accepted:

- *Lohmann's* case suggests that:
 1. A request for a whole person impairment assessment is a claim for compensation.
 2. If an injury has not previously been claimed, the issue of compensability could be determined after the permanent impairment assessment.
 3. If an injury has previously been accepted, that does not stop you from revisiting compensability for the purposes of a lump sum claim.



TIPS FOR MANAGING LUMP SUM CLAIMS – GENERALLY

1. Gathering evidence before the assessment takes place.
2. Using IMEs as part of the permanent impairment claim process.
3. Do not just give workers the option of three assessors [see 17.3 of the IAGs].
4. Provide assessors with instructions about the relevant assessment principles that may apply [i.e., the assessment principles in relation to deductions].
5. Obtain lump sum checks.

TIPS FOR MANAGING LUMP SUM CLAIMS

6. Do not have unilateral communications with assessors.

7. Check for compliance issues.

8. Document the HWF at the start of the claim, when determining the average weekly earnings rate applicable.

ECONOMIC LOSS LUMP SUMS FOR SIW

- A seriously injured worker can elect to receive a payment for economic loss: s56A.
- Worker must receive professional advice, financial advice and medical advice.
- No entitlement applies for:
 - *Psychiatric impairment;*
 - *Noise induced hearing loss;*
 - *Workers with injuries pre-1 July 2015*
 - *Workers who have redeemed their entitlement to weekly payments*

ECONOMIC LOSS LUMP SUMS FOR SIW

- If a payment is received, no further entitlement to weekly payments or RRTW services.
- If the worker has an impairment of 50% WPI or greater and elects to receive an economic loss payment, the election is referred to the SAET for approval by a Presidential Member.
- **Lump Sum Entitlement = PS x AF x HWWF**
- Prescribed sum (PS) caps out at 34% i.e. 2023 is \$539,281.00

ECONOMIC LOSS LUMP SUMS FOR SIW

- Transitional provisions generally apply, for workers who were assessed as seriously injured on a final basis prior to 17 October 2022 (some exceptions).
- Calculation amendments:
 - the AF is to be based upon the worker's age at the date of election not the relevant date (so AF reduced);
 - the total payment under s56 cannot exceed the PS applicable for 29% WPI; and
 - the payment is to be deducted by weekly payments made to the worker on or after 17 October 2022 to the date of election (rather than any payments after 104 weeks).

A practical guide to permanent impairment assessments – brought to you by Tracey Kerrigan .

Case study – the facts:

- Claimant was 44 years at the date of injury.
- Claim Form refers to “whiplash to neck, stiff shoulders, both hips, right ankle and right knee, large haematoma to breast” - a variety of injuries that were the result of a rear end collision.

- In 2022 the unrepresented worker sought an assessment of her permanent impairment.
- The injuries to be assessed were neck, bilateral shoulders, right ankle, right knee and chest.
- The worker had suffered neck and shoulder problems in the past possibly as a result of other motor vehicle accidents.
 - what, if any deductions would need to be made by the PIA assessor when reviewing her?



Dr D'Onise was nominated as the assessor, what did he do?

- Dr D'Onise reviewed all of the documents provided and also noted the various earlier problems for which the worker had received treatment.
- He provided an assessment that the worker was in DRE Category 2 for the cervical spine giving her an automatic 5% WPI and noted some limitations on heavy activities and self-care and therefore gave her a 3% assessment for ADL's giving her a total of 8% WPI for the neck.
- In respect to the right and left shoulders, the assessment was based on range of motion methods which is the required method to adopt.
- For her right shoulder, he provided a 6% WPI and for the left shoulder a similar assessment.

Dr D'Onise was nominated as the assessor, what did he do?

- The assessment for the shoulders also appeared to include an ADL impairment so potentially overlapping with the neck ADL impairment.
- There was no impairment of the right knee or ankle.

Did Dr D'Onise make a deduction?

- Dr D'Onise's view was that the prior problems in 2012 for the shoulders were very mild and probably resolved.
- The basis of this assumption was not made clear.
- In respect to the neck, although there was reference to neck pain through 2016, the symptoms had ceased around 2017.
- He again presumed that her neck problems had resolved.

- He provided no deduction of any pre-existing impairment for either the neck or either shoulders.
- His combined values of all of the injuries sustained was 19% WPI with no deduction made.

What did Dr Cross say on peer review?

- Dr Cross made a number of criticisms of the report. He noted that the assessment of 3% for ADL's was not clearly explained.
- In terms of the pre-existing status, he noted the assumptions made about resolution of shoulder and neck problems were without any rationale.

What did Dr Cross say on peer review?

- He considered the presumption of resolution of a pre-existing condition was not entirely consistent with the Guides and there needed to be more information to justify that rationale.
- He also said it was unclear which ADL's of personal care was specifically impacted by the neck condition as compared to the shoulder and arm problems.
- Although not particularly critical of the failure to make any deduction the issue of the presumptions made that the previous problems had resolved was an implied criticism.
- Overall, he found that the report was not compliant.

Non-compliant report – what happens now?

- Case Law such as *Cordova-Canalves* indicates that the compensating authority cannot unilaterally communicate with the assessor.
- The only option was for the compensating authority to decline to rely upon the views expressed by Dr D'Onise and to issue a Nil determination in respect to the worker's lump sum entitlements.
- Had the worker been represented at that stage, it may have been possible to obtain consent to write back to Dr D'Onise and put Dr Cross' views to him.

During the dispute process:

- The parties were then able to put to Dr D'Onise the issues raised by Dr Cross in his opinion. As part of the dispute process, we wrote to Dr D'Onise asking him to consider Dr Cross's opinion and seeking comment on the following matters:
 - His rationale for presuming that the worker's shoulder and cervical spine symptoms had resolved and asking the medical basis for that;
 - Why a deduction for pre-existing impairments was not considered,
 - Which activities of daily living have impacted the cervical spine as compared to which ones have impacted the worker's right shoulder and left shoulders?; and
 - Do the peer review comments of Dr Cross alter his WPI assessments in any way.

What options are there in an attempt to Conciliate?

- Obtain more medical evidence - particularly the issue of deduction.
- Dr Champion was also asked to comment on the various medical information and whether or not Dr D'Onise's report was compliant.
- He gave a similar view to Dr Cross.
- The parties then agreed to do an indicative PIA with an assessor with which they were both happy.

What options are there in an attempt to Conciliate?

- That assessor put the worker in a higher DRE category -15% WPI rating as opposed to 5%.
- The basis of that is unclear and was not mentioned by other doctors.
- There was limitation in ADL's and he assessed 2% as opposed to 3% by Dr D'Onise.
- The assessor, however, did give a pre-existing impairment deduction of 7% for the neck based on the medical notes of prior problems. That 7% deduction reduced the worker's cervical spine assessment to 10%.

What options are there in an attempt to Conciliate?

- In terms of the right and left shoulders, those measurements were lower than those given by Dr D'Onise but again no deduction made for any prior impairment.
- The PIA assessor came up with an overall combined assessment of 18%, so a reduction of 1% overall as compared to the views of Dr D'Onise. Therefore, not a lot of progress has been made in terms of that issue.
- This shows the difficulties of different assessors looking at the same matter and coming up with different conclusions.

Where to from here?

- Try to Conciliate further on PIA assessment.
- Proceed to trial if that fails.
- It is then open for trial Judge to determine which assessment is correct or refer to an IMA.
- IMA may also raise issues in terms of reliability – *Staker*.
- The *Staker* case demonstrates the difficulties in these matters if the assessment is in fact challenged.

Credibility issues?

- You can attack the factual basis of the assessment and an example of that is the case of *Parry*.
 - Considerable evidence in medical notes that suggested the worker's condition had improved following the knee replacement and that he was not having the sort of difficulties that he asserted to the PIA assessor.
 - Crawley DPJ found the worker's evidence to be unreliable and that there was discrepancy between history to treating doctors and PIA assessor.

Surveillance:

- The issue of surveillance and the relevance to the PIA process is always a complicated one.
- In the case of *Matejic*, Lieschke DP was asked to refer the matter to an IMA and to provide the IMA assessor all of the surveillance taken by the compensating authority of the worker over four (4) years.
- The request fell on deaf ears.

Surveillance:

- After cross-examination of the worker Lieschke DP was not persuaded by the surveillance or that the assessment should be set aside.
- The issue of showing surveillance to the PIA assessor is very tricky and clearly if provided you are going to lose privilege over it.
 - if not provided you then have the worker providing a history which is not affected at all by any objective evidence.



QUESTIONS FROM THE FLOOR?

FOR MORE INFORMATION AND ADVICE:

CHRISSY – 0402 873 641

TRACEY – 0408 826 647

