PARTIES:	WENDY PENGILLY
	v
	NORTHERN TERRITORY OF AUSTRALIA (No 2)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	No 8 of 2003 (20119869)
DELIVERED:	22 August 2003
HEARING DATES:	1 August 2003
JUDGMENT OF:	MILDREN J

CATCHWORDS:

Appeal – Work Health – permanent impairment – second application for compensation – method of calculation - interest

Statutes:

Work Health Act ss 70, 71, 97(2A),109, 116
Work Health Regulations r 9(1)

Cases:

Wendy Pengilly v Northern Territory of Australia (1999) NTMC 026 at para 54, referred to
Woodruffe v The Northern Territory of Australia (2000) 10 NTLR 52 at para 28, applied

Text:

American Medical Association – Guides to the Evaluation of Permanent Impairment (4th Edition)
Luntz, Assessment of Damages For Personal Injury and Death, 4th Edition para 7.4.3

REPRESENTATION:

Counsel:

Appellant:	Mr J Waters QC
Respondent:	Mr P Barr

Solicitors:

Appellant:	C Scicluna
Respondent:	Povey Stirk

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Pengilly v Northern Territory of Australia (No 2) [2003] NTSC 91
No 8 of 2003

BETWEEN:

WENDY PENGILLY
Applicant

AND:

NORTHERN TERRITORY OF AUSTRALIA (No 2)
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 22 August 2003)

[1] This is an appeal from the Work Health Court pursuant to s 116 of the Work Health Act.

[2] Some of the previous history of this litigation is set out in my judgment delivered 1 December 1999 [1999] NTSC 131. The appellant worker was employed by the respondent as a cleaner. In 1993, she sustained an injury to her right arm in the course of her employment. Following surgery for the injury, she contracted dermatitis. Liability for compensation under the Act for the injury and the dermatitis was accepted by the employer.

[3] In 1996, the appellant sought payment of compensation for permanent impairment under subdivision C of Part V Division 3 of the Act. "Impairment" is defined by s 3(1) of the Act to mean "a temporary or permanent bodily or mental abnormality or loss caused by an injury." Section 70 of the Act defines "permanent impairment" to mean "an impairment or impairments assessed, in accordance with the prescribed guides, as being an impairment, or combination of impairments, of not less than five percent of the whole person." Regulation 9(1) of the Work Health Regulations provides:

> For the purposes of the definition of "permanent impairment" in section 70 of the Act, the American Medical Association Guides to the Evaluation of Permanent Impairment (4th Edition) are the prescribed guides.

[4] In 1997, the parties agreed that the appellant would be entitled to a payment pursuant to s 71 of the Act. The amount agreed upon was $60,685.04, which represented 43% of the assessed percentage of 208 times average weekly earnings calculated at the time of payment.

[5] Section 71 of the Act provided, at the relevant time:

> **71. COMPENSATION FOR PERMANENT IMPAIRMENT**
>
> (1) In addition to any other compensation payable under this Part, a worker who suffers permanent impairment assessed at a percentage of the whole person equal to not less than 15% shall, subject to subsection (2), be paid compensation equal to that assessed percentage of 208 times average weekly earnings at the time the payment is made.

(2) In addition to any other compensation payable under this Part, a worker who suffers permanent impairment assessed at not less than 85% of the whole person shall be paid compensation of 208 times average weekly earnings at the time the payment is made.

(3) In addition to any other compensation payable under this Part, where a worker suffers permanent impairment assessed at a percentage of the whole person equal to less than 15%, the worker shall be paid compensation equal to the percentage specified in column 2 of the Table to this section of the relevant assessed percentage of permanent impairment specified opposite in column 1 of 208 times average weekly earnings at the time the payment is made.

TABLE

Column 1 Degree of permanent impairment	Column 2 Percentage of compensation payable
not less than 5% but less than 10%	2
10%	3
11%	4
12%	6
13%	8
14%	12

[1] The figure of 43% was arrived at as follows. It was agreed that the appellant's impairment of the whole person resulting from her dermatological condition was 24%, and that her impairment to the whole person resulting from her carpal tunnel syndrome was 25%. According to the Combined Values Chart in the prescribed guides, this combination of impairments resulted in a permanent impairment equal to 43% of the whole person.

[2] The amount of $60,655.04 was paid by the respondent to the appellant. Subsequently, the appellant sought to reopen the claim. This request was denied and, eventually, the issues between the parties were resolved by the Work Health Court which rejected the appellant's claim on the merits. An appeal to this Court in 1999 was dismissed. However, the Work Health Court held in 1999 that the making of the agreement in respect of permanent impairment did not prevent further application being made for payments if the permanent impairment, as assessed under the prescribed guides, is significantly increased or a new impairment arises: see *Wendy Pengilly v Northern Territory of Australia* (1999) NTMC 026 at para 54. Mr Bradley CM said in the same paragraph:

> The arbiter of a second determination would determine permanent impairment afresh in accordance with the Guide and additional compensation paid after deducting that percentage which was initially assessed and paid to the employee.

[3] Subsequently, in late 2001, the appellant's dermatitis deteriorated whilst her carpal tunnel syndrome resolved. A medical panel certified, in relation to her dermatitis condition, that she had a 60% permanent impairment of the whole person. Following that certification, a dispute arose between the parties as to how her new entitlement was to be calculated. The matter came before Ms Deland DCM who decided, on 12 February 2003, that the appellant was entitled to 60% - 43% = 17% of the relevant average weekly earnings at the time of payment. The appellant has appealed that decision to this Court. There is no issue about whether or not a second claim can be

made. The issue is, accepting that a second claim can be made, how is it to be calculated?

[4] The appellant's first submission was that the appellant was entitled to be paid 60% of the relevant average weekly earnings. The parties are agreed that this would amount to $102,036.00. Alternatively, the appellant submitted that she was entitled to $41,351.44 as follows:

$102,036.00 (ie. $170,060.00 x 60%) - $60,684.56 = $41,351.44

[5] The respondent submits that the learned Deputy Chief Magistrate was correct and that the appellant is entitled only to 17% of $170,060.00 = $28,910.00. (The figure of $170,060.00 is 208 times average weekly earnings at the present time.)

[6] I think it is clear that the appellant cannot recover $102,036.00 without in some way accounting for the fact that she has already been compensated. Any payment made in the past by the respondent to the appellant must amount to a *pro tanto* discharge of the respondent's liability, unless there is a presumption of advancement operating to negate that conclusion, or there is evidence of a gift or other consideration given. Otherwise, the respondent would be entitled to recover from the appellant the amount already paid, on the basis of a total failure of consideration. There is no presumption of advancement and no evidence of a gift or other consideration given. The amount was paid in respect of her entitlement under s 71 of the Act and,

therefore, must be brought into account. I therefore reject the first of the appellant's submissions.

[7] The appellant advanced two alternative arguments: one argument is that only the assessed loss for the dermatitis should be considered; the other is that the appellant is entitled to $41,351.44. The respondent rejects both of these arguments.

[8] There are no decisions of this Court on the point. The problem must, therefore, be dealt with by resort to first principles. The first of the appellant's alternative arguments is that, whilst the worker's increased loss for the dermatitis must be compensated for, the recovery of the carpal tunnel syndrome cannot be brought into account. I think this overlooks the plain language of s 71(1) of the Act. Whatever may have been the components of her loss in 1997, the percentage permanent impairment of the whole person was 43% - it is now 60%; the plain language of s 71(1) entitles her to $170,000.00 x 60%, less whatever sums she must bring into account by way of prepayment.

[9] This leaves just two alternatives: that the appellant is entitled to $41,351.44; or, that the respondent and the learned Deputy Chief Magistrate are correct, and the amount of her entitlement is $28,910.00. At common law, the quantum of a loss is calculated by a reference to the value of the loss at the time of the loss, and courts now have a statutory power to award interest to the time of payment to compensate the plaintiff for the loss of the

use of the money. In economic theory, interest is the price of money. It has three aspects: (1) compensation for the loss of the immediate use of the money to persuade the lender to lend; (2) an allowance for the risk of non-repayment; (3) an allowance for inflationary expectations: see Luntz, *Assessment of Damages For Personal Injury and Death*, 4th Edition, para 7.4.3. Because s 71 requires the assessment to be made by reference to the time of payment, the respondent submits that any loss caused by delay in finalising the payment, or loss of use of money loss, is compensated for. This is one explanation for the requirement in s 71 that the loss is to be calculated as at the time of payment. If this is the correct explanation, as the respondent contends, an intention on the part of the legislature not to compensate the appellant twice for her loss should be inferred, and, in order to achieve that intention, s 71 should be read so as to entitle her to now receive the difference between the percentage losses.

[10] However, it is not always the case that a loss has stablised to such a degree that a percentage of permanent loss of the whole person can be calculated immediately. The loss may be very severe initially, but recover gradually until it becomes sufficiently stable for an assessment to be made. Or, the impairment may gradually worsen, as happened in the case of the appellant's dermatitis. The concept of a "permanent impairment" under the prescribed guides is one "considered unlikely to change substantially by more that 3% in the next year with or without medical treatment." But the words

"unlikely to change", whatever be their precise meaning, recognise that change is still a possibility – as happened in this case. In the case of a condition which has stabilised immediately, any delay in payment may be seen as compensation for the loss of the use of the money, but the same does not apply to conditions which have gradually got worse or gradually got better.

[11] In the case of a gradually worsening condition, if there is only one payment made and the payment is calculated at the date of payment, there is a level of over-compensation inherent in the calculation if the explanation is that the date of payment was chosen to compensate for the loss of the use of the money. The opposite consideration is open when the condition gradually gets better.

[12] Furthermore, where there is unreasonable delay in the acceptance of a claim for, or the payment of, compensation, the Court may award interest under s 109 of the Act. In the case of a claim or payment due under s 71, the Court would have power to award interest calculated from the date that the claim ought to have been accepted, or the payment made. In addition, a worker who has an entitlement to compensation under s 71 which has not been paid, may, under s 97(2A), apply to the Registrar for a certificate of the amount payable under s 71. If that certificate is filed in the Local Court, the Clerk of the Local Court shall enter judgment for the amount of the compensation owing. Local Court judgments also bear interest until

payment is made. These provisions tend to suggest that "the date of payment" in s 71 does not literally mean the actual day of payment, but the day payment is agreed to be made, or ought to have been made. The fact that interest can be awarded on top of the payment due under s 71 is a strong indicator that the date of payment method of calculation was not intended to compensate for the loss of the use of the money.

[13] These factors tend to suggest that the date of payment method of calculation was chosen for the practical reason that, until there is sufficient stabilisation in the injury, the amount of compensation cannot be accurately calculated. There is, therefore, no sufficient reason to depart from the ordinary language of s 71(1) and arrive at the amount of the present loss by reference to the difference between the loss of impairments at the relevant times, as the respondent's contention would require. In addition, this being remedial legislation, a construction giving the worker the most complete remedy consistent with the language employed, and to which the words are fairly open, must be given to s 71: see *Woodruffe v The Northern Territory of Australia* (2000) 10 NTLR 52 at para 28.

[14] I would, therefore, allow the appeal. At the request of the parties, I direct that the parties bring in minutes of order, and grant liberty to the parties to speak to the minutes. I will hear the parties as to costs.