Hand v Alcan Gove Pty Ltd [2008] NTSC 25

PARTIES:	HAND, JASON RICHARD
	v
	ALCAN GOVE PTY LTD (ACN: 000 453 663)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LA 9 of 2007 (20614894)
DELIVERED:	18 June 2008
HEARING DATES:	31 March and 1 April 2008
JUDGMENT OF:	MILDREN J

CATCHWORDS:
WORK HEALTH – Statutory Interpretation – injury arising out of and in the course of his employment – whether amending provision prospective or retrospective in effect – causal connection – compensation for permanent impairment – lump sum entitlements – whether injury in the course of treatment amounts to new injury – appeal dismissed

Statutes:
Safety, Rehabilitation and Compensation Act 1988 (Cth)
Work Health Act 1986, s 53(1)
Work Health Act, s 3(1), s 4, s 4(1), s 53, s 53(1), s 70, s 71, s 71(1), s 72(2), s 72(3), s 72(3A), s 72(4), s 80(1)
Work Health Amendment Act (No 2) 1991 Amendment Act, s 2, s 3, s 14(1)
Work Health Amendment Act (No 2) 1991, s 11, s 14
Work Health Regulations, Regulation 94
Workers Compensation Act 1949 (NT)

References:
American Medical Association Guides to the Evaluation of Permanent Impairment (4th Edition) June 1993, AMA, Chicago

Citations:
Followed:
Lindeman v Colvin (1946) 74 CLR 313

Referred to:
Canute v Comcare (2006) 226 CLR 535
Commonwealth v Oliver (1961) 107 CLR 353
D & W Livestock Transport v Smith (1994) 4 NTLR 169
D & W Livestock Transport v Smith (unreported, 9 September 1993)
Haider v J P Morgan Holdings Aust Ltd t/a J P Morgan Operations Ltd [2007] NSWCA 158
Hatzimanolis v ANI Corporation Ltd (1992) 173 CLR 473
Henderson v Commissioner for Railways (WA) (1937) 58 CLR 281
Herbert v K P Welding Construction Pty Ltd (unreported, 13 July 1995)
K P Welding Construction Pty Ltd v Herbert (1995) 102 NTR 20
Kavanagh v The Commonwealth (1959-1960) 103 CLR 547
Migge v Wormald Bros Industries Ltd [1972] 2 NSWLR 29
Nunan v Cockatoo Docks & Engineering Co Pty Ltd (1941) 41 SR (NSW) 119
Roncevich v Repatriation Commission (2005) 222 CLR 115
S v Crimes Compensation Tribunal [1998] 1 VR 83
Tracy Village Sports & Social Club v Walker (1992) 111 FLR 32
Weston v Great Boulder Gold Mines Ltd (1964) 112 CLR 30
Wilson v Lowery (1993) 4 NTLR 79

REPRESENTATION:

Counsel:

Appellant:	C McDonald QC
Respondent:	P Barr QC

Solicitors:

Appellant:	Ward Keller
Respondent:	Morgan Buckley Lawyers

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

Hand v Alcan Gove Pty Ltd [2008] NTSC 25
No. LA 7 of 2007 (20614894)

BETWEEN:

JASON RICHARD HAND
Appellant

AND:

ALCAN GOVE PTY LTD
(ACN: 000 453 663)
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 18 June 2008)

Introduction

[1] This is an appeal from the Work Health Court. The appeal raises questions concerning the construction to be given to various provisions of the Work Health Act (the Act) concerning compensation for permanent impairment and lump sum entitlements.

Factual Background

[2] The basic facts of this case are derived from the pleadings. On or about 30 April 1990 the appellant commenced employment with the employer as a utility serviceman within its maintenance department at Nhulunbuy. On or

about 8 August 1991, the appellant sustained an injury to his left knee joint. It is not pleaded how this injury occurred nor that the injury arose out of or in the course of his employment, but in any event the appellant made a claim for compensation under the Act which was accepted by the respondent.

[3] On 22 August 1991 as a consequence of the injury the appellant underwent a lateral meniscectomy to his left knee performed by an orthopaedic surgeon, Mr S Baddley, as a result of which the torn medial meniscus was removed.

[4] On 15 October 1991, s 11 of the Work Health Amendment Act (No 2) 1991 (the 1991 Amendment) came into force, which amended s 71 of the Act. The effect of the amendment was to lower the threshold for a permanent impairment entitlement from 15 per cent of the whole person to 5 per cent and of doubling the multiplier of average weekly earnings from 104 times average weekly earnings to 208 times average weekly earnings.

[5] On 8 April 1992, the Work Health Amendment Act (No 2) 1991 Amendment Act (the 1992 Amendment) was assented to. Section 2 of the 1992 Amendment deemed the 1992 Amendment to have come into force immediately before the commencement of the 1991 Amendment. Section 3 of the 1992 Amendment repealed s 14 of the 1991 Amendment and substituted, therefore, a new s 14 which provided, by subsection (1), that s 11 of the 1991 Amendment applied only to and in relation to an injury suffered by a worker after the commencement of the 1991 Amendment on 15 October 1991.

[6] As a consequence of the original injury, in January 1992 the appellant underwent a ligament reconstruction of the left knee with ligament staple fixation. As a further consequence of the original injury, on 2 September 1992 the appellant underwent further arthroscopy of the left knee with chondroplasty and removal of the staples from the previous reconstruction. On 13 February 1993, as a consequence of the original injury, the appellant underwent further surgery involving a left and anterior cruciate reconstruction in which the surgeon used a segment of the patella tendon to reconstruct the anterior cruciate ligament. Further procedures were conducted on the left knee in May 1995 and July 1995.

[7] In September 1995 an orthopaedic surgeon advised that as a consequence of the original injury the appellant had 15 per cent permanent impairment of the whole person. Shortly thereafter the respondent paid the appellant the sum of $9,901.32, purportedly being the amount of compensation for permanent impairment required by s 71(1) of the Act. This sum was calculated by taking 15 per cent of 104 (weeks) x $634.70 (average weekly earnings in 1995).

[8] In April 1997, May 2000 and August 2001 as a consequence of the original injury, the appellant underwent further surgery to the left knee in order to improve the appellant's function. The last of these procedures was a lower femoral osteotomy of the left knee involving extensive fixation by means of plates and screws. In July 2002 an orthopaedic surgeon, Dr Marshall, assessed the appellant as then suffering a 30 per cent permanent impairment

of the whole person as a consequence of the original injury. Subsequently the respondent paid the appellant compensation based on the formula 30 per cent of 104 (weeks) x $817.60 (the average weekly earning as at the time of payment).

[9] On 12 February 2004, as a consequence of the original injury, the appellant underwent a total left knee replacement. The respondent paid all of the appellant's medical, hospital, radiological, anaesthetists', surgical, rehabilitation and pharmaceutical expenses from 28 August 1991 to 12 February 2004 in accordance with its obligations under the Act.

The First Ground of Appeal

[10] In the Work Health Court the appellant submitted that he was entitled to further compensation based on an assessment of his permanent impairment at 30 per cent of the whole person, based on the formula 30 per cent of 208 (weeks) x $1,039.00 (being average weekly earnings in 2006) amounting to $64,833.60 or $42,177.72 after taking into account the payments already made under s 71. The basis of this claim is that each of the surgical procedures which the appellant has undergone since 1991 is, in itself, an injury and there must be compensated for in accordance with the 1991 Amendment as amended by the 1992 Amendment. The learned Magistrate rejected this submission holding that surgery as a consequence of the original injury in 1991 is not in itself an "injury" as defined by the Act and even if the surgery were to be treated as an "injury" as defined, it was so

causally connected with the original injury that it could not be regarded as a new and independent injury.

The Appellant's Contentions – Ground 1 of the Appeal

[11] The appellant submitted that each of the subsequent surgical interventions was a new injury. In support of that contention counsel for the appellant relied upon the decision of Angel J in *D & W Livestock Transport v Smith*[1]. In that case a worker suffered an injury arising out of or in the course of his employment in February 1985 resulting in broken ribs and a splenectomy. During the course of the splenectomy the worker became infected by Hepatitis C as the result of a blood transfusion. Initially the worker recovered from the treatment he received and was able to return to work in May 1985. He was paid compensation up to then under the Workers Compensation Act 1949 (NT) (the former Act). In 1986 he changed his employer. In 1996 it was discovered that he had contracted Hepatitis C as a result of the transfusion and he claimed compensation under the Work Health Act 1986 which had repealed and replaced the former Act. It was common ground that as at 1986 the worker could have brought his claim under the Work Health Act or under the former Act, but an amendment passed in 1991 before the further claim was made prevented claims being made under the Work Health Act where compensation had already been paid in respect of an injury under the former Act. The worker had lodged his claim in December 1991. The 1991 Amendment to the Work Health Act did

[1] *D & W Livestock Transport v Smith* (unreported, 9 September 1993)

not come into force until 1 January 1992. Angel J held that the 1991 Amendment was procedural only and operated retrospectively. However, his Honour held that the 1991 claim was a claim for a new injury which had not been compensated for and therefore it was able to proceed under the Act.

[12] On appeal, the Court of Appeal[2] dismissed the appeal, holding that the 1991 Amendment was not procedural and did not operate retrospectively. It was therefore not necessary to consider whether Angel J was correct in finding that the contraction of Hepatitis C was a new injury. However, Priestley J, with whom Gray AJ agreed, observed[3]:

> "It has been recognised for many years in workers compensation law that when a surgical procedure, such as the splenectomy in the present case, has been carried out to remedy or alleviate an injury compensable under the workers compensation legislation, the total condition resulting from the injury and the surgery is to be attributed to the original injury, so long as the operation was reasonably undertaken by the worker."

[13] It was submitted by Mr McDonald QC for the appellant that the observations of Priestley J went only to causation and that it did not follow that, even if the surgery is to be attributed causally to the original injury, it was not in itself a new injury.

[14] Mr McDonald QC also referred the Court to the decision of the High Court in *Canute v Comcare*[4]. The decision in that case turned upon the construction to be given to certain provisions of the Safety, Rehabilitation

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[2] *D & W Livestock Transport v Smith* (1994) 4 NTLR 169

[3] *D & W Livestock Transport v Smith* (1994) 4 NTLR 169 at 172

[4] *Canute v Comcare* (2006) 226 CLR 535

and Compensation Act 1988 (Cth). However it is to be noted that, in that case, it was found that there were two separate injuries arising out of, or in the course of, the employment of the injured worker. Thus the decision is not relevant to the question of whether or not each surgical procedure is to be treated as an injury. I will return to that decision later.

[15] Counsel for the respondent submitted that surgery is not in itself an injury, but rather is treatment for an injury. So far as the decision of Angel J in *D & W Livestock Transport v Smith*[5] is concerned, the contraction of Hepatitis C was, so it was submitted, a disease and therefore could be regarded as a separate injury. I will not enumerate all of counsel's submissions, but they proceeded upon the basis that if each time a worker has surgery subsequent upon an injury, this were to amount to a new injury, there would be considerable difficulties in identifying the level of compensation payable to the worker and would require a notice of each injury under s 80(1) of the Act.

Construction of the Act

[16] The starting point is s 53 which provided, at all relevant times:

> "Subject to this Part, if a Territory worker suffers an injury within or outside the Territory and that injury results in or materially contributes to his or her –
>
> (a) death;
>
> (b) impairment; or

[5] *D & W Livestock Transport v Smith* (unreported, 9 September 1993)

(c) incapacity,

there is payable by his or her employer to the worker or the worker's dependants, in accordance with this Part, such compensation as is prescribed."

[17] "Injury" is defined by s 3(1). At the time of the original injury, the definition read:

> ""injury" in relation to a worker, means a physical injury or mental injury arising before or after the commencement of the relevant provision of the Act out of or in the course of his employment and includes:
>
> (a) a disease; and
>
> (b) the aggravation, acceleration, recurrence or deterioration of a pre-existing injury or disease."

[18] In September 1991 the definition of "injury" was amended by the 1992 Amendment to read:

> ""injury" in relation to a worker, means a physical or mental injury arising before or after the commencement of the relevant provision of this Act out of or in the course of his employment and includes:
>
> (a) a disease; and
>
> (b) the aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease but does not include an injury or disease suffered by a worker as a result of reasonable disciplinary action taken against the worker or failure by the worker to obtain a promotion, transfer or benefit in connection with the worker's employment or as a result of reasonable administrative action taken in connection with the worker's employment."

[19] The words "arising out of or in the course of employment" are subject to the provisions set out in s 4. It is not necessary to set out those provisions in full. It is to be noted that s 4(1) begins, "without limiting the generality of the expression, an injury to a worker shall be taken to arise "out of or in the course of his or her employment if…" The remaining provisions either expand upon or exclude certain injuries or diseases from the concept. However, the general concept as established by longstanding authorities is that, broadly speaking, an injury arises out of the employment if there is a causal connection between the injury and the employment, whilst it arises out of the course of the employment if there is a temporal relationship between the employment and the injury in the sense that the injury must have occurred whilst the employee was doing that which he or she was reasonably required to do to further the employer's interests, or to use another expression, there must be a "sufficient connection" between the employment and the injury[6]. For a recent discussion of the relevant principles and authorities see *Haider v J P Morgan Holdings Aust Ltd t/a J P Morgan Operations Ltd*[7].

[20] In this case, apart from the original injury which may be inferred arose out of or in the course of the appellant's employment with the respondent in 1991 because the respondent accepted the original claim, there is no finding

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[6] See *Nunan v Cockatoo Docks & Engineering Co Pty Ltd* (1941) 41 SR (NSW) 119; *Henderson v Commissioner for Railways (WA)* (1937) 58 CLR 281 at 294; *Commonwealth v Oliver* (1961) 107 CLR 353; *Weston v Great Boulder Gold Mines Ltd* (1964) 112 CLR 30 at 38 per Windeyer J; *Kavanagh v The Commonwealth* (1959-1960) 103 CLR 547; *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473; *Roncevich v Repatriation Commission* (2005) 222 CLR 115

[7] *Haider v J P Morgan Holdings Aust Ltd t/a J P Morgan Operations Ltd* [2007] NSWCA 158

that any of the subsequent operations, even if they were separate "injuries", were injuries which arose out of or in the course of the appellant's employment with the respondent and nor was such a case pleaded. It is difficult to envisage a situation where an operation could be an injury which arose out of or in the course of the employment. Such a concept postulates that it was part of a worker's employment duties or otherwise sufficiently connected with the employment to undergo an operation. There is no evidence that the appellant remained in the employ of the respondent after his initial injury or that his work contributed to an aggravation or deterioration of that injury with reference to facts or events after 1991. In my opinion this is fatal to the appellant's argument. It might have been different if, for example, the appellant had suffered an exacerbation of his pre-existing 1991 injury whilst working for the respondent, which necessitated further medical intervention. Of course the appellant is entitled to compensation for any medical treatment, incapacity or disability which was a consequence of his original injury but, the difficulty with the argument that a deterioration of his pre-existing injury is, by itself, a new injury, is that it has not been shown that the deterioration arose out of or in the course of his employment with the respondent such as to enable a finding to be made that it constituted a separate injury.

[21] Further, there is no authority which supports the proposition that surgery following an injury is in itself a separate injury. I accept that a worker may suffer more than one injury as the result of a particular happening or event.

In *D & W Transport v Smith*[8], the worker clearly suffered two injuries, as Angel J found, one of which was a disease and the other of which was a physical injury. A similar conclusion was reached in *Canute v Comcare*[9], where the worker suffered both a physical injury and a mental injury. In both of those cases the two injuries were causally related to the original happening or event giving rise to the initial claim for compensation and there were findings that both injuries arose out of or in the course of his employment. Neither case is authority for the proposition contended for by the appellant that remedial surgical intervention is itself a separate injury.

[22] Nor is the fact that the appellant's injury deteriorated over time such that he had, eventually, a total knee replacement, is by itself a separate injury identifiable with the date of the operation. The relevant nexus required by the expression "arising out of or in the course of his or her employment" is the original 1991 injury, to which it is solely related. The position would obviously be otherwise if there had been evidence that continued employment after 1991 was related, in the relevant way, to the deterioration of the appellant's condition. In such a case the appellant may have had a separate new claim against his employer or his new employer, or employers, and it may be that a different insurer or insurers then became involved.

[23] Counsel for the appellant submitted that s 53(1) and s 71(1) are concerned with "impairments" not injuries. However, no compensation is payable

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[8] *D & W Livestock Transport v Smith* (unreported, 9 September 1993)

[9] *Canute v Comcare* (2006) 226 CLR 535

under s 71(1) unless the injury results in or materially contributes to his impairment. So far as the knee injury is concerned, the appellant sought to claim in the Work Health Court that, as a result of the 1991 injury, the appellant suffered a psychological injury or psychiatric injury which resulted in an impairment. The respondent denied this allegation. There are no findings by the learned Magistrate as to whether or not this contention was accepted or rejected. There is no appeal from that part of the Court's decision and it is not necessary to consider it further.

[24] The appellant also argued that the impairment which he now suffers from is different in kind from the impairment which originally arose from his knee injury. It was put that prior to the knee replacement surgery in 2004 the appellant had impairments arising from the deteriorated or deteriorating condition of his left knee; but following the knee replacement, he has an impairment or impairments consequent upon the physical limitations caused by the artificial joint and by the interaction between the non-living material of the replacement joint and the living material of the appellant's left leg above and below the artificial joint. There is also scarring of the left knee and hip as a direct consequence of the knee surgery and harvesting of a bone graft.

[25] "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".

[26] At the time of the original injury in 1991, s 70 of the Act defined "permanent impairment" to mean in sub-Division C of Part V of the Act to mean "an impairment or impairments assessed, in accordance with the prescribed guides, as being an impairment, or combinations of impairments, of not less than 15 per cent of the whole person". As noted previously, this was reduced to 5 per cent by the 1991 Amendment.

[27] I am unable to see how, even if the impairment the appellant now suffers from is different in kind from the impairment he suffered from before the knee replacement, this assists the appellant's arguments, because the 1991 Amendment applies only to and in relation to an "injury" suffered by a worker after the commencement of the 1991 Amendment. Clearly, whatever permanent impairment or impairments he now suffers relate to the injury he sustained before the commencement of the 1991 Amendment. However, I do not accept that the appellant's impairment is different in kind in any relevant sense. The impairment, however one looks at it, and ignoring any psychiatric injury, is a bodily abnormality or loss caused by the injury in 1991. There is no evidence of a novus actus interveniens[10]. The case as pleaded shows that the medical treatment was directed towards the original injury. As Dixon J said in *Lindeman v Colvin*[11]:

> "… if an injury resulting from accident arising out of and in the course of employment is aggravated by medical treatment or if the surgical procedures adopted to remedy or alleviate the injury caused

[10] *c.f. Migge v Wormald Bros Industries Ltd* [1972] 2 NSWLR 29

[11] *Lindeman v Colvin* (1946) 74 CLR 313 at 321

> secondary traumatic or pathological condition or death, the total condition is to be attributed to the accident, that is so long as the workman acted reasonably."

[28] In my opinion, the same reasoning applies, notwithstanding that there is no longer a requirement that there be injury by accident and that on the facts of this case the total condition must be attributed to the original injury in 1991.

[29] It follows that the learned Magistrate was correct and this ground must be rejected.

The Second Ground

[30] Counsel for the appellant abandoned this ground at the hearing.

The Third Ground

[31] At trial, the appellant relied upon as assessment of his permanent impairment contained in a report by a specialist occupational physician, Dr Colin G Mills, dated 18 December 2005. The learned Magistrate held that there was insufficient material to show that the assessment was in accordance with the prescribed guides and that the assessment was "unreliable" and had "little probative value" because the assessment, although stated by Dr Mills to be calculated using the prescribed guides, did not demonstrate the process of his reasoning and did not demonstrate that he had in fact properly applied the guides in arriving at his conclusion.

[32] Section 70 defines "permanent impairment" to mean an impairment or impairments assessed in accordance with the prescribed guides.

[33] The "prescribed guides" are, by Regulation 94 of the Work Health Regulations, the American Medical Association Guides to the Evaluation of Permanent Impairment[12].

[34] Section 72(2) of the Act provides that the level of permanent impairment for the purposes of s 71 shall be assessed in the first instance by a medical practitioner. There is no dispute that Dr Mills is a medical practitioner. Section 72(3) provides:

> "Where a person is aggrieved by the assessment of the level of permanent impairment by a medical practitioner, the person may, within 28 days after being notified of the assessment, apply to the Authority for a reassessment of that level."

[35] If the Authority decides to refer the application for reassessment, s 72(3A) requires the reassessment to be referred to a panel of three medical practitioners. A reassessment by the panel is by s 72(4) "taken to be the level of permanent impairment" and "is not subject to review". There is no similar provision in relation to an assessment by a medical practitioner which has not been made the subject of reassessment by a panel.

[36] In this case the respondent did not seek a reassessment under s 72(3A). No point is taken that this failure by the respondent precluded the Court from rejecting the assessment. I therefore approach this question on the assumption that it was open to the respondent to challenge the assessment before the Work Health Court.

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[12] *American Medical Association Guides to the Evaluation of Permanent Impairment* (4th Edition) June 1993, AMA, Chicago

[37] The argument for the respondent depends in part upon the Prescribed Guides itself. In Chapter 2, under the heading "Records and Report" the Guides state[13]:

> "The major objective of the *Guides* is to define the assessment and reporting of medical impairment so that physicians can collect, describe and analyze with a similar set of standards. Two physicians, following the methods of the *Guides* to evaluate the same patient, should report similar results and reach similar conclusions. Moreover, if the clinical findings are fully described, any knowledgeable observer may check the findings with the *Guides* criteria."

[38] At Chapter 2 p 2, the Guides state:

> "The strength of the medical support for an impairment estimate depends on completeness and reliability of the medical documentation. The scope of the documentation needed for a reliable report is indicated in the Report of Medical Evaluation (p 11)."

[39] The Report of Medical Evaluation[14] indicates that the physician should provide a Report of Medical Evaluation using a two page pro forma. Clearly Dr Mills' report did not follow the pro forma. Mr Barr QC conceded that this was not necessarily fatal, but submitted that the report failed to contain certain information which the pro forma suggested should be included. In particular, the report referred to "disabilities" rather than "impairments" and does not state whether or not the "disabilities" were "permanent impairments" as defined in the glossary. Further, the report separately assessed the disabilities for pain, scarring and right knee function without

[13] At Chapter 2, p 1

[14] At Chapter 2, p 11

providing an overall estimate using the Combined Values Chart. In this respect, the *Guide* states that this should be done[15]. So far as pain is concerned, the *Guide* states[16]:

> "In general, the impairment percents shown in the chapters that consider the various organ systems make allowance for the pain that may accompany the impairing conditions. Chronic pain, also called the chronic pain syndrome, is evaluated as described in the chapter on pain (p 303)."

[40] Although the report refers to Chapter 15[17], there is little material in the report to indicate the basis upon which Dr Mills made a separate assessment for pain and no finding in the report that the appellant suffered from chronic pain. It was submitted by Mr Barr QC that whether or not the report demonstrated that Dr Mills accurately used the Guides in order to arrive at his assessment is a question of fact for the learned Magistrate and, as such, is not open to be questioned on appeal. Mr McDonald QC for the appellant referred me to the decision of Kearney J in *K P Welding Construction Pty Ltd v Herbert*[18], not relevantly overruled by the decision of the Court of Appeal[19]. In that case the question was whether it was permissible to go behind a purported compliance with the PAYE taxation system to ascertain whether the actual relationship was one of master and servant for the purposes of the definition sections of the Act relating to "worker". His

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[15] Chapter 2, p 2

[16] At Chapter 2, p 9

[17] Which commences at p 303

[18] *K P Welding Construction Pty Ltd v Herbert* (1995) 102 NTR 20 at 39

[19] *Herbert v K P Welding Construction Pty Ltd* (unreported, 13 July 1995)

Honour there held that the words "in accordance with" must be read in context and that all that was required was whether PAYE tax deductions have been made in purported compliance with the Income Tax Assessment Act. Mr Barr QC submitted that a purported compliance with the Guides is not ipse dixit because the context of the expression "in accordance with" in s 70, s 71 and s 72 do not indicate that a purported compliance is sufficient. I agree with Mr Barr QC. Section 72(3) specifically provides for a mechanism to review or reassess an assessment by a medical practitioner. This demonstrates that an assessment by a medical practitioner is open to dispute and a purported compliance is not sufficient.

[41] I also agree with Mr Barr QC that whether or not the medical practitioner in fact made an assessment in accordance with the prescribed guides and the weight to be given to an opinion in a medical report is a question of fact for the learned Magistrate[20]. Mr Barr QC's concession that it is not essential for the medical practitioner to slavishly follow the pro forma is clearly correct. The pro forma is merely a useful guide which, if followed, if likely to result in a reliable assessment. However, relevant information suggested by the Guides' pro forma was not provided. It was open to the Court to give Dr Mills' report such weight as the Court thought fit.

[42] It follows that this ground of appeal is not made out.

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[20] See *Tracy Village Sports & Social Club v Walker* (1992) 111 FLR 32 at 37-38; *Wilson v Lowery* (1993) 4 NTLR 79 at 84-85 (Court of Appeal); *S v Crimes Compensation Tribunal* [1998] 1 VR 83

Ground 4

[43] This ground challenges a finding by the learned Magistrate that Dr Mills' report did not establish a causal nexus between the total knee replacement and any assessed level of incapacity. It is not necessary to consider this question in view of the conclusion I have reached in relation to ground 3.

Ground 5

[44] This ground raises a question which depends on the success of ground 3 and is not necessary to consider. However, there is a short answer to it. The appellant's contention was that the report provided separate assessments for impairments for pain and scarring and that the appellant had not previously been compensated for those impairments.

[45] In my opinion even if Dr Mills' assessments did carry weight, no additional impairment of the whole body had been established. It is not in dispute that if Dr Mills had applied an overall assessment using the Combined Values Sheet, he would have arrived at an assessment of impairment of 30 per cent of the whole person, which is precisely the same assessment of impairment arrived at by Dr Marshall in 2002 for which the appellant has already been compensated under s 71 of the Act.

Conclusion

[46] The appeal is dismissed with costs.
