Pengilly v Northern Territory of Australia [1999] NTSC 131

PARTIES:	**WENDY PENGILLY**
	and
	NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	THE SUPREME COURT OF THE NORTHERN TERRITORY OF AUSTRALIA
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	47 of 1999
DELIVERED:	1 December 1999
HEARING DATES:	18 October 1999
JUDGMENT OF:	Mildren J

CATCHWORDS:

Appeal - civil - worker's compensation - meaning of permanent impairment

Appeal - civil - worker's compensation - appeals restricted to questions of law - Work Health Court not bound by rules of evidence.

Appeal - civil - worker's compensation - incorrect assessment process - requisite figure is to be expressed as a percentage of the whole body - terms "level" are not acceptable - "classes" must be identified, followed by a specific percentage assessment being either class 1 or a whole number ending in 0 or 5.

Appeal - civil - worker's compensation - term "fluctuating symptomology" is consistent with an assessment of "permanent impairment".

Appeal - civil - worker's compensation - "permanent" injury as defined in glossary is not "permanent" in ordinary sense of the word - what glossary meaning requires.

Texts

1. American Medical Association Guides to the Evaluation of Permanent Impairment, 4th Ed.

Legislation

1. *Work Health Act*; s116; s3(1); s70; s71; s187(2).
2. *Work Health Regulations*; r.9(1)

Cases

1. *R v Turner* (1975) 1 QB 834, referred.
2. *Browne v Dunn* (1894) 6 R.67, mentioned
3. *Zadko and Zadko v Hilton International Adelaide and Crossbrook Pty Ltd (In Liq)* (unreported, [1996] SASC 5478, applied.

REPRESENTATION:

Counsel:

Appellant:	J Waters, QC
Respondent:	P Barr

Solicitors:

Appellant:	Caroline Scicluna & Associates
Respondent:	Povey Stirk

Judgment category classification:	A
Judgment ID Number	Mil99207
Number of pages:	13

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Pengilly v Northern Territory of Australia [1999] NTSC 131

No. 47 of 1999

BETWEEN:

WENDY PENGILLY
Applicant

AND:

NORTHERN TERRITORY OF AUSTRALIA
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 1 December 1999)

Mildren J

[1] This is an appeal from the Work Health Court pursuant to s116 of the *Work Health Act.*

[2] The appellant worker was employed as a cleaner by the respondent. In 1993 she sustained an injury to her right arm in the course of her employment. Following surgery, the worker contracted dermatitis. Liability for compensation under the Act for the injury and the dermatitis was accepted by the employer. In December 1993, an attempted return to work program was commenced. This proved to be unsuccessful. The worker ceased work in July 1994, and has not worked since.

[3] In 1996, the worker's solicitors raised the question of a payment of compensation for permanent impairment under Subdivision C of Part V Division 3 of the Act, commonly referred to as "lump sum" compensation – a misleading description as the entitlement is not paid by way of redemption of weekly compensation, but as compensation for permanent impairment additional to that otherwise payable under the Act . "Impairment" is defined by s3(1) of the Act to mean "a temporary or permanent bodily or mental abnormality or loss caused by an injury", and "permanent impairment" is defined by s70 of the Act 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".

[4] Following an exchange of correspondence between the solicitors for the appellant and the respondent's insurer, a negotiated settlement of this claim was reached, based on an assessment of the physiological impairment assessed by a Dr Butcher, and a dermatological assessment of impairment by a Dr Simmons, which resulted in a payment of $60,685:04 to the appellant. The dermatological assessment arrived at by Dr Simmons was one of 10-24 percent of the whole person, 24 percent being adopted by the parties for the purposes of calculating the settlement figure.

[5] Subsequent to the settlement and payment by the employer of the settlement sum, the worker's solicitors received a medical report from the employer which indicated that there was a possibility of a larger degree of impairment

for the dermatological injury than that which had been relied upon for the purposes of the settlement. The worker's solicitors wrote to the insurer seeking a reassessment of the lump sum settlement, but this request was denied, and the worker brought an application in the Work Health Court seeking to have the matter of her entitlement under s71 of the Act resolved by the Court. A number of issues were raised in the Work Health Court by the employer which, if successful, were designed to prevent the Court from determining the issues on the merits. It is not necessary to mention them all, but they included, as may be expected, a claim by the employer that the matter having been settled and payment made could not now be reopened. The learned Chief Magistrate disposed of these defences in favour of the appellant. The respondent employer does not seek to challenge the learned Chief Magistrate's decision on any of these issues. His Worship then considered the appellant's claim on the merits. His Worship was not satisfied that the worker was entitled to more than had already been paid to her, and held that the application must fail. The worker appeals this part of his Worship's decision to this Court. Appeals are restricted to questions of law.

[6] The principal reason given by the learned Chief Magistrate for refusing the application was that he was not satisfied that on the evidence before him there was sufficient material to show that the process of assessment adopted by the medical expert called by the appellant, Dr Simmons, was in

accordance with the prescribed guides. Regulation 9(1) of the *Work Health Regulations* provides:

> For the purpose of the definition of "permanent impairment" in section 7 of the Act, the American Medical Association Guides to the Evaluation of Permanent Impairment (4th Edition) are the prescribed guides.

The learned Chief Magistrate, in his written reasons, referred to the prescribed guides as thus defined, and to the evidence of Dr Simmons, and pointed to a number of matters that showed that the guides had not been followed in certain respects, as the reasons for arriving at this decision.

[7] Further, his Worship found that even if the processes adopted by Dr Simmons were adequate for him to give an opinion in accordance with the prescribed guides, he could not be satisfied on the evidence that the permanent impairment properly assessed was any greater than that which had previously been agreed between the parties.

[8] Mr Waters QC, counsel for the appellant, submitted that the conclusions of the learned Chief Magistrate were in error because his Worship wrongly interpreted the meaning of "permanent impairment" as defined by s70 of the Act. He submitted that the definition required proof only of an "impairment" which need not be permanent in the ordinary sense of that word. The argument based on s70 is that the words "impairment or impairments" as found in the section must take their meaning from the definition of "impairment" in s3(1), which defines "impairment" to mean "a temporary or

permanent bodily or mental abnormality or loss caused by an injury". Mr Barr, for the respondent, submitted that it was not possible, if the prescribed guides were properly employed, to arrive at any assessment in accordance with the guides if the condition was temporary. He referred to the glossary, p315, which provides:

> *Permanent impairment* is impairment that has become static or well stablized with or without medical treatment and is not likely to remit despite medical treatment.
>
> A permanent impairment is considered to be unlikely to change substantially and by more than three percent in the next year with or without medical treatment. If an impairment is not *permanent* it is inappropriate to characterize it as such and evaluate it according to *Guides* criteria.

[9] Further, Mr Barr referred to the *Criteria for Evaluating the Permanent Impairment of the Skin* in chapter 13 of the prescribed guides (pps 13/281-289). The heading uses the word "permanent", and when read with the glossary, and the lack of any criteria in the guides for assessing an impairment which is not permanent in the sense used in the glossary, it was submitted that the definition of "permanent impairment" required an assessment of only those impairments which were permanent in the sense used in the glossary. He submitted that a condition could be "permanent" in this sense even if the signs and symptoms of the condition were intermittently present only, as impairment figures were available (up to 54 percent of the whole person) in such a case: see Table 2, p13/280.

[10] Mr Barr submitted that the effect of reg.9(1) was to incorporate into the regulations the whole of the text of the 4th Edition of the *American Medical Association Guides to the Evaluation of Permanent Impairment.*

[11] I accept Mr Barr's analysis, which is the same conclusion arrived at by the learned Chief Magistrate. I note that s187(2) of the *Work Health Act* specifically provides that:

> The Regulations may incorporate or adopt by reference to the provisions of any document, standard, rule, specification or method formulated, issued, prescribed or published by any authority or body whether –
>
> (a) wholly or partly, or as amended by the Regulations;
>
> (b) as formulated, issued, prescribed or published at the time the Regulations are made or at any time before then; or
>
> (c) as amended after the making of the Regulations...".

It has not been shown that his Worship applied the wrong text. This ground of appeal must be rejected.

[12] The next point raised by Mr Waters QC is that the evidence presented by the appellant worker at the hearing was that Dr Simmons assessed the impairment in accordance with the prescribed guides at 50-55 percent of the whole body; that this assessment was not challenged by counsel for the respondent, and that therefore the appellant was not required to prove the process by which, and the factors considered by, Dr Simmons in arriving at his assessment. Therefore, it was submitted, there being no other evidence

on the topic, the learned Chief Magistrate erred in law in not accepting the evidence and acting upon it.

[13] There are a number of reasons why it was submitted that this submission must be rejected. First, no evidence was led from Dr Simmons that he had arrived at an assessment of the worker's impairment in accordance with the relevant guidelines, and what that assessment was in percentage terms. The evidence led consisted of Dr Simmons' report (Exhibit A6) and his oral evidence. As to the former, it merely stated:

> I would assess (the worker's) level of impairment based on the consultation of 21st September 1998 as Level 3, possibly Level 4.

[14] Read in isolation, this information was totally inadequate because (1) the Act requires *a figure expressed as a percentage of the whole body* in order to calculate the amount of the benefit, not an assessment of the "level" of impairment: see s71; and (2) according to the prescribed guides, the terms "level 3" or "level 4" are no-where to be found. If what was meant was "class 3" or "class 4" the prescribed guide provides a range of percentage impairments between the various classes. For example "class 3" has an impairment range of between 25-54 percent. However, it is clear that the guides require, once the appropriate class has been identified, the practitioner to make a specific percentage assessment, which should be a whole number ending in 0 or 5, except for class 1 estimates, for which smaller increments may be occasionally justified: see pps 13/278-280, and the examples given at pps 13/281 ff.

[15] However, the report Exhibit A6 has to be read in the context of other reports written by Dr Simmons and tendered as Exhibits A3 and A4, from which it can be seen that Dr Simmons' classification of the worker's previous level of impairment was based on the *American Medical Association Guides* (4th Edn)", (I note he previously used the term "class" rather than "level") and that he was purporting then to make an assessment of the appellant's permanent impairment. From this it can be deduced that Dr Simmons' report, Exhibit A6, was intended to be read as an assessment of permanent disability by reference to the prescribed guides. Further, it can be also deduced (given the reference to "possibly Level 4") in Exhibit P6, that Dr Simmons was prepared to assess the appellant's permanent disability as at least at the top of the range for the classification class 2, i.e. 54 percent. This was elaborated upon by Dr Simmons' oral evidence when he said that the classification (or level) by reference to those guidelines "approaches 50-55 percent of impairment of the whole person", and later he said, "Well, as I understand it going from class 3 to class 4 is about 50 percent". In other words, his assessment could be taken to mean (if a figure ending in 0 or 5 had to be chosen) at least 50 percent.

[16] However, the difficulty with the evidence is that Dr Simmons was then asked *if that level of impairment was permanent*, to which he responded:

> It's very hard to say with (inaudible) whether it's going to be permanent or not. It's a dynamic condition so as I stated when I first saw her, the hands were in a reasonably good condition. Subsequently they deteriorated but who's to say that it's going to continue in this way? It may get better. I don't know. I can't say

> that it's going to be permanent or not. I suspect however that it will be.

[17] Later, Dr Simmons explained that the appellant's symptoms fluctuated, and he was asked in cross-examination whether this meant her *impairment* may vary. The answer to this question was, that this depended on a number of factors, and that it was possible, but highly unlikely, that her condition would clear itself permanently. At this stage, it is relevant to note that the prescribed guides, table 2, pp 13/280, recognise that, in a class 3 impairment "the signs and symptoms of skin disorder are present *or intermittently present*". Consequently, fluctuating symptomology is consistent with an assessment of "permanent impairment" as defined in the glossary. Dr Simmons did not answer the cross-examiner's real question, which was whether, given that the symptoms fluctuated, did this mean that the *classification* would vary?

[18] Next, Dr Simmons was asked by the learned Chief Magistrate:

> Is there a mean and average permanent level that you would be able to indicate?...Yes,...I would have thought somebody who had a chronic relapsing and remitting hand eczema who has access to reasonable treatment and is reasonably (inaudible) in treating that disorder, the class I would rate the person to be in the class somewhere between class 2 and class 3.
>
> Is that an assessment?...That's a guess...
>
> How does that translate to percentages?...Between 22 percent and 24 percent.

[19] Later he was asked to clarify this further and the following passage ensued between Mr Waters QC and Dr Simmons:

> Have you any way of evaluating from the history that you were given on the occasion that you saw her or from your treatment, whether she comfortably settles into that mean or whether there is a progression which would put her out of the considerations of the mean?...I will, this is quite difficult. As you probably realise that I've only seen her on two occasions or thereabouts. I would have thought that she would probably fit into that average which I suggested was 10% or something, something of that nature. Given correct treatment, given her compliance.
>
> Doctor, I just want to be clear that when you say that 10%, what do you mean?...I would put her – if she were – I think I was asked what was her mean plant (sic) of impairment be with a chronic hand eczema is that correct?
>
> Yes, I think that's right, Doctor?...Yeah, and I would think that most patients including this particular patient would be able to settle into a class 2 somewhere between class 1 and class 2 impairment in the order of about 10% on a permanent basis. But there are a lot of facts to consider.

[20] This evidence was certainly very confusing. It is clear that an injury may be "permanent" in the sense defined in the glossary without being "permanent" in the ordinary sense of the word, because the definition in the glossary requires only that the condition is static and not likely to remit, or unlikely to change substantially and by more than three percent in the next year. Further, table 2 on p. 13/280 recognises that the signs and symptoms may be intermittent. Consequently, much of the evidence from Dr Simmons relating to permanence and fluctuation of the signs and symptoms has to be read in that light. The most difficult part of the evidence is that which relates to a "mean average permanent level". Strictly speaking, if an evaluation is

properly made according to the guidelines, there ought not be a mean or average level at all. The evaluation should have acknowledged the fluctuating nature of the symptoms, and arrived at the appropriate figure bearing that in mind, (assuming that the condition was "permanent" in the relevant sense). The fact that Dr Simmons acknowledged an average and that this worker fitted somewhere between a class 1 and class 2 impairment, does nothing to inspire confidence in his opinion.

[21] The learned Chief Magistrate observed (as one of the reasons for rejecting Dr Simmons' opinion):

> Dr Simmons in his evidence indicated that the level of incapacity varied from time to time and he agreed that there was no fault in his earlier diagnosis of 10-20 percent in April 1996, 10-24 percent in December 1996, or indeed in the assessment of Dr Stevenson (which was not made available to the court) at some other point in time. He said words to the effect "you can only asses it as what you see at the time". There are therefore serious doubts in my mind as to whether he made the adjustments appropriate for an intermittent condition that are required by the AMA Guide. I note that such an assessment could probably not have been made by him in any event because the necessary history had on, his own admission, not been taken.

[22] I consider that the learned Chief Magistrate was entitled to reject Dr Simmons' assessment of an impairment at the level of 50 percent of the whole body, given this evidence. The learned Magistrate was not bound to accept his evidence on this topic, even though no other expert evidence was called. The learned Chief Magistrate had sufficient reason to reject this evidence. This was a question of fact for him to determine.

[23] It was submitted that error lay in the fact that the learned Magistrate went beyond that part of the *American Medical Association Guidelines* which had been tendered by the parties, and did not give counsel for the appellant an opportunity to make submissions on the extra material relied upon, in arriving at the decision to reject Dr Simmons' evidence.

[24] So far as the admissibility of the guidelines is concerned, the guidelines were not formally tendered as an exhibit, but handed up by Mr Waters QC without objection during submissions. Whilst all that was provided was chapter 13, chapter 13 itself provides that "Before using the information in this chapter, the reader should study chapters 1 and 2 and the glossary...".

[25] Strictly speaking, the regulations and the guidelines are not admissible unless tendered in evidence; however, s110A(3) of the *Work Health Act* provides that the Work Health Court is not bound by any rules of evidence and may inform itself on any matter in such manner as it thinks fit. That disposes of any argument based upon admissibility. Further, the fact that counsel for the worker relied on chapter 13 in support of the worker's case, was in effect an invitation, given the matters referred to in para [24] above, to consider chapters 1, 2 and the glossary, which the learned Magistrate did, and in part relied upon, for rejecting the worker's expert. I do not consider that there was any breach of the requirements of natural justice in the course the learned Chief Magistrate adopted. If counsel refers to a particular part of a document which is properly before the Court, the Court must be able to refer to other parts of the same document if those parts throw light on the

part relied upon by counsel. So much would be anticipated, or at least ought to have been anticipated, by any experienced counsel. The worker's counsel knew, or must have known at the hearing that Dr Simmons' evidence was contested. It is true that there was no cross-examination based on the considerations which appealed to the learned Chief Magistrate, but the onus was on the worker to lead in examination in chief the relevant material which Dr Simmons relied upon for forming the basis of his opinion: see *R v Turner* (1975) 1 QB 834 at 840. There can be no complaint that the rule in *Brown v Dunn* (1894) 6 The Reports 67, was not complied with. Dr Simmons' evidence was left in a state of confusion, and the worker's counsel had every opportunity to remedy that by leading Dr Simmons through the relevant considerations and in particular, by referring him to those parts of the guidelines which he needed to have considered. It must have been very obvious that there were discrepancies which the worker's counsel needed to address, and indeed this he attempted to do during addresses by reference to the guidelines themselves. If, on a proper reading of them, the guidelines gave no support to the worker's contention, the worker cannot be heard to complain: cf. *Zadko and Zadko v Hilton International Adelaide and Crossbrook Pty Ltd* (*In Liq)* (unreported, [1996] SASC 5478 at paras 56-58).

[26] In my opinion, none of the grounds of appeal have been made out. The appeal is therefore dismissed with costs.
