CITATION:	*Woods v Northern Territory of Australia* [2024] NTSC 35
PARTIES:	WOODS, Denese v NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	2023-04076-SC
DELIVERED:	26 April 2024
HEARING DATE:	22 April 2024
JUDGMENT OF:	Riley AJ

CATCHWORDS:

WORKERS COMPENSATION - Work Health Law - Work Health Court - Appeal from Work Health Court - Whole person Impairment (WPI) - Whole person impairment assessment – Permanent impairment compensation – impairment - injury- impairment v injury - compensable injury - non-compensable injury - deductible proportion - question of construction - error of construction - Whether two injuries give rise to the one impairment for the purpose of a whole person impairment assessment - Whether an error has been made in construing the *Return to Work Act* and NT WorkSafe Guidelines for the Evaluation of Permanent Impairment leading to the determination that the appellant had received her full entitlement – appeal dismissed.

Return to Work Act 1986 (NT), s 2, s 3, s 70, s 71(1), s 71(2), s 71(3), s 71(4), s 72*; NT WorkSafe Guidelines for the Evaluation of Permanent Impairment* (August 2018), 1.6.1, 1.6.2, 1.6.3, 1.27, 1.28, 11.10
Interpretation Act 1978 (NT) s 20
Harris v Northern Territory of Australia [2023] NTSC 39- considered
Rallen Australia Pty Ltd v Sweetpea Petroleum Pty Ltd [2023] NTSC 36- considered; *Alcan v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27 considered; *SZATL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 considered; *Taylor Enterprises (NT) Pty Ltd v Pointon* [2009] NTMC 029 applied; *Denese Woods v Northern Territory of Australia* [2023] NTWHC 08

REPRESENTATION

Counsel:

Appellant:	D McConnel SC
Respondent:	W Roper SC

Solicitors:

Appellant:	Halfpennys Lawyers
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Judgment category classification:	B
Judgment ID Number:	Ril2403
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Woods v Northern Territory of Australia [2024] NTSC 35
No. 2023-04076-SC

BETWEEN:

DENESE WOODS
Appellant

AND:

NORTHERN TERRITORY OF AUSTRALIA
Respondent

CORAM: RILEY AJ

REASONS FOR JUDGMENT

(Delivered 26 April 2024)

[1] This is an appeal under the *Return to Work Act 1986* (the Act) from a decision of the Work Health Court. The appellant claims that the trial Judge erred in wrongly construing s 72 of the Act and the Northern Territory Guidelines for the Evaluation of Permanent Impairment under that Act (the Guidelines) with the result that his Honour found that the respondent had acquitted its liability under the Act in relation to the appellant's entitlement to compensation for whole person impairment (WPI).

Background

[2] The appellant worked as a school teacher with the Northern Territory Department of Education at two schools. She was a "worker" as defined in the Act. It was claimed that in the course of her employment the appellant was exposed to traumatic and violent interactions with students which substantially contributed to her sustaining psychological injuries.

[3] The first such injury occurred when she worked as a teacher at the Katherine High School. It was agreed that on 21 February 2017 the appellant sustained a "mental injury" during the course of her employment (the first injury). She received benefits payable under the Act until returning to full-time duties in about March 2017. Thereafter the appellant sustained a further "mental injury" in the course of her employment whilst working at the Palmerston College on 22 June 2020 (the second injury). Liability for the second injury was initially disputed.

[4] The parties agree that on 24 August 2020 the appellant served upon the respondent a permanent impairment assessment report by a psychiatrist, Dr Takyar, which assessed the appellant's WPI (a) referable to the first injury at 11% and (b) referable to the second injury at 11% (Dr Takyar's first report).

[5] On request and pursuant to the legislation, this report was referred to the Work Health Authority under the Act for a panel assessment. On 5 February 2021 the Panel Report was issued to the parties and this assessed the

appellant's WPI (a) referable to the first injury at 5% and (b) referable to the second injury at 12%. At the time of the Panel Report, liability for the second injury had not been accepted by the respondent for the purposes of the Act and, consistent with the discussion below at [30] and [31], should not have been dealt with in Dr Takyar's first report or have been the subject of a referral to a panel. These observations do not apply to the first injury because liability in relation to that injury had been accepted by the respondent.

[6] On 1 March 2021 the respondent wrote to the appellant confirming that payment in relation to the first injury would be made but denied liability in relation to the assessment by the panel of 12% for the second injury. On 7 April 2021 the respondent paid $7,078.66 to the appellant in respect of the 5% WPI assessment referable to the first injury.

[7] On 10 December 2021 the respondent accepted liability for the appellant's second injury and, on 13 December 2021, the appellant's Work Health Court proceedings in relation to that injury were resolved by way of a consent order.

[8] A further report dated 3 May 2022 was obtained from Dr Takyar (Dr Takyar's second report) in which he assessed the appellant's WPI (a) referable to the first injury at 9% and (b) referable to the second injury at 13%.

[9] On 15 June 2022, without admission, the respondent paid the appellant $28,208.12 in respect of the 13% WPI assessment referable to the second injury.

[10] The issue before the Work Health Court, from which this appeal proceeds, was identified by the parties to be the nature of the first injury and the second injury and whether for WPI assessment purposes the first injury and the second injury gave rise to the one impairment.

[11] The learned Judge in the Work Health Court provided detailed written reasons for concluding that the respondent had paid permanent impairment compensation to the appellant in relation to both the first injury and the second injury prior to the commencement of these proceedings and therefore had acquitted its liability under the Act in relation to the appellant's entitlement to compensation for WPI.

The nature of the appeal

[12] In the present case the appellant identified three independent grounds of appeal. The first was expressed to be the "primary ground" being that his Honour erred in construing the Act and Guidelines which led to a determination that the appellant had received her full entitlement to compensation under the Act. Grounds 2 and 3 were abandoned during the course of the hearing.

[13] Section 116 of the *Return to Work Act* provides that a party may appeal against a decision or determination by the Work Health Court on a question

of law. Such an appeal is of a limited nature and the subject matter of the appeal is the question or questions of law raised in the proceedings. In relation to this issue, I have had regard to the very helpful observations of Blokland J in *Harris v Northern Territory of Australia*[1] and of Barr J in *Rallen Australia Pty Ltd v Sweetpea Petroleum Pty Ltd*.[2]

[14] As the High Court has observed, the task of statutory construction must begin with a consideration of the text itself. The language which has been employed in the legislation is "the surest guide to legislative intention" which may, in turn, require a consideration of the "general purpose and policy of a provision, in particular the mischief it is seeking to remedy".[3]

[15] The legislative regime involves the Act and a statutory instrument being the Guidelines. Section 20 of the *Interpretation Act* [4] provides that "words, expressions and provisions in a statutory instrument have the same interpretation, application and effect as they have in the Act under which the instrument is made, granted or issued".

Ground 1– error of construction – the legislative regime

[16] The appellant submitted that the Guidelines require a finding that, in the circumstances of this case, there was a single impairment arising from separate injury incidents with, it was submitted, the necessary legal

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1 [2023] NTSC 39 [18]-[45].
2 [2023] NTSC 36 [4]-[11].
3 *Alcan v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27 at [47]. See also *SZATL v Minister for Immigration and Border Protection* (2017)262 CLR 362 at [14] and [43].
4 *Interpretation Act NT 1978*.

consequence that the appellant is entitled to compensation for WPI at 22% from which must be deducted the monetary value of the previous WPI compensation payment.

[17] In order to consider this ground it is necessary to look at the legislative regime in so far as it is relevant to the questions in issue. The objects of the Act relevant for present purposes are expressed to include providing effective compensation for injured workers and ensuring that the compensation of such workers is fair and affordable and also that adequate and just compensation be provided.[5]

[18] Section 3 of the Act defines "impairment" to include "a temporary or permanent … mental abnormality or loss caused by an injury." Section 70 then defines "permanent impairment" to mean:

> An impairment or impairments assessed, in accordance with the guides approved and published by the Authority, as being an impairment, or combination of impairments, of not less than 5% of the whole person.

[19] The reference to the "guides approved and published by the Authority" is to the document approved and published by the Authority and entitled NT Worksafe: Guidelines for the evaluation of permanent impairment.

[20] Section 71(1) of the Act provides for compensation for permanent impairment in the following terms:

> In addition to any other compensation payable under this Part, a worker who suffers permanent impairment assessed at a percentage of the

5 *Return to Work Act* s 2.

> 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.

[21] Subsections 71(2) and (3) then provide for circumstances where permanent impairment is assessed at not less than 85% of the whole person and those who suffer permanent impairment assessed at a percentage of the whole person equal to less than 15%. Subsection (2) is not relevant for present purposes. Subsection (3) is in the following terms:

> 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 1of 208 times average weekly earnings at the time the payment is made.

[22] Section 72 of the Act goes on to provide that the level of permanent impairment for the purposes of s 71 shall be assessed in the first instance by a medical practitioner. Where a person is aggrieved by the assessment of the medical practitioner the person may, within 28 days after being notified of the assessment, apply to the Work Health Authority for a reassessment of that level. The Authority must then refer the application to a panel of three medical practitioners to reassess the level of permanent impairment. The Authority is not required to refer an application to a panel unless satisfied that the assessment is properly conducted and is in accordance with the Guidelines. The assessment made by the panel is taken to be the level of permanent impairment suffered by the worker and is not subject to review.

[23] Pursuant to s 71(4) of the Act, compensation is to be paid to the worker as follows: (a) if no application is made for reassessment, not later than 14 days after the end of the 28 day period allowed for that application; or (b) if an application is made for a reassessment, not later than 28 days after the applicant is notified of the reassessment.

[24] In circumstances where impairment arises from a compensable injury and there may be a pre-existing condition or injury, assessors are required to take that into account. Paragraph 1.6.1 of the Guidelines provides that the assessment of permanent impairment involves the clinical assessment of the claimant as they present on the day of the assessment and take into account the claimant's relevant medical history in order to determine:

- whether the condition has reached Maximum Medical Improvement;
- whether the claimant's compensable injury/condition has resulted in an impairment;
- whether the resultant impairment is permanent;
- the degree of permanent impairment that results from the injury; and
- the proportion of permanent impairment due to any previous injury, pre-existing condition or abnormality, if any, in accordance with diagnostic and other objective criteria as outlined in the Guidelines.

[25] Paragraph 1.6.2 then provides:

> Assessors are required to exercise their clinical judgement in determining a diagnosis when assessing permanent impairment and when making deductions for pre-existing injuries/conditions.

[26] Paragraph 1.6.3 goes on:

> In calculating the final level of impairment, the assessor needs to clarify the degree of impairment that results from the compensable injury/condition. Any deductions for pre-existing injuries/conditions are to be clearly identified in the report and calculated.

[27] Paragraphs 1.27 and 1.28 deal with the issue of deductions for pre-existing conditions or injuries. Paragraph 1.27 is as follows:

> The degree of permanent impairment resulting from pre-existing impairments should not be included in the final calculation of permanent impairment if those impairments are not related to the compensable injury. The assessor needs to take account of all available evidence to calculate the degree of permanent impairment that pre-existed the injury.

[28] Paragraph 1.28 is in the following terms:

> In assessing the degree of permanent impairment resulting from the compensable injury/condition, the assessor is to indicate the degree of impairment due to any previous injury, pre-existing condition or abnormality. This proportion is known as "the deductible proportion" and should be deducted from the degree of permanent impairment determined by the assessor.

[29] Also relevant for present purposes is paragraph 11.10 which relates particularly to psychiatric and psychological disorders and provides:

> To measure the impairment caused by a work-related injury or incident, the psychiatrist must measure the proportion of WPI due to a pre-existing condition. Pre-existing impairment is calculated using the same method for calculating current impairment level. The assessing psychiatrist uses all available information to rate the injured worker's pre-injury level of functioning in each of the areas of function. The percentage impairment is calculated using the aggregate score and median class score using the conversion table below. The injured worker's current level of impairment is then assessed, and the pre-existing impairment level (%) is then subtracted from their current level to obtain the percentage of permanent impairment directly attributable to the work-related injury. If the percentage of pre-existing impairment cannot be assessed, the deduction is 1/10th of the assessed WPI.

[30] As was identified in *Taylor Enterprises (NT) Pty Ltd v Pointon*,[6] it can be seen that whilst proof of a compensable injury is a matter for the Court, the question of compensation for permanent impairment is largely determined by extra-curial administrative procedures and the operation of the statute. In that case it was observed that s 72 of the Act is predicated upon the assumption that liability for the injury has been accepted or found by the Court. As both parties accept it followed that:[7]

> … if an employer denies that the injury in question is compensable, and the Court has not yet determined that that injury is compensable, there is no statutory or legal basis for the commencement of the process established by s 72; any attempt to set in train the statutory process under such circumstances would be premature and not in compliance with the statutory scheme.

[31] Once liability has been established by determination of the Court or where the employer has accepted liability, an entitlement to compensation exists and the amount payable will be calculated in accordance with the requirements of s 71 by reference to the level of permanent impairment and that, in turn, will be assessed according to the requirements of the Act and the Guidelines.

[32] In the present case, the appellant submitted that the first assessment, by both Dr Takyar and the panel, should not have been undertaken because of the disputed claim in relation to the second injury. In light of the subsequent assessments it is unnecessary to deal with that issue for present purposes.

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6 [2009] NTMC 029 at [24].
7 Ibid at [27].

[33] As to the later assessment by Dr Takyar, it was submitted that it reflected a conclusion that the impairment suffered by the appellant was one impairment arising from two injuries rather than separate impairments arising from each injury. The appellant says the trial Judge fell into error by determining that the appellant had two impairments which, then, were to be assessed separately.

[34] The appellant argued that the Work Health Court Judge misconstrued the Guidelines in concluding that: "the level of permanent impairment caused by (the appellant's) two separate injuries should not have been assessed together to calculate (the appellant's) degree of permanent impairment".[8]

[35] In dealing with this issue his Honour said:[9]

> In the present case there were two injuries, namely the first injury and the second injury. Furthermore, each injury involves separate incidents occurring years apart from each other. That being the case, pursuant to paragraphs 1.6.3 and 1.17 of the Guidelines, the level of permanent impairment caused by those two separate injuries should not have been assessed together to calculate the worker's degree of permanent impairment. Dr Takyar, in providing separate assessments as to the level of permanent impairment caused by each injury was acting in accordance with paragraph 1.6.3 and 1.17 of the Guidelines.

[36] The referral to Dr Takyar at this later time was appropriate under the legislative regime as liability was no longer in issue for either injury.

[37] The respondent contended that the parties treated the impairment arising out of the second injury as a fresh impairment. In the letter of instruction from

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8 Reasons of the Work Health Court at AB 137.
9 AB 137 [47].

the appellant's solicitors to Dr Takyar it was noted that the parties acknowledged that on 22 June 2020, or thereabouts, the appellant suffered a "fresh (new) injury not a continuation of Ms Woods 2017 injury" and the "whole person impairment, if any, as a result of the now accepted June 2020 injury is to be determined afresh". Dr Takyar was then asked to assess the appellant's "permanent impairment for the 2020 injury". This is consistent with the order of the Work Health Court[10] of 13 December 2021 that the appellant suffered an injury on or about 22 June 2020 and the injury is an adjustment disorder. These matters were noted in the second report of Dr Takyar.

[38] However, and notwithstanding those observations, in that report Dr Takyar stated that he "diagnosed an adjustment disorder with mixed anxiety and depression (chronic) per DSM-V from both the 2017 and 2020 incidents. I apportioned half of the impairment to the circumstances of Katherine High School and half to those at Palmerston." He said that he determined "half of her 22% impairment being related to the second injury." In proceeding in this way Dr Takyar was responding to the issues posed in the letter of instruction. He went on to conclude that the appellant "presents with severe depressive and anxiety symptoms and the adjustment disorder diagnosis has been reconsidered and a more apt major depressive disorder and generalised anxiety disorder has been diagnosed."

10 AB 63

[39] It is apparent that Dr Takyar was treating the condition of the appellant as requiring assessment of the appellant's total impairment with the source of that impairment being from two separate injuries with levels of causation being allocated in the manner he described. The total impairment was 22% arising from a combination of the two compensable injuries. Having been asked to again apportion the contribution of each incident or injury to that total, it was the view of Dr Takyar that 60% of the 22% was attributable to the second injury providing a WPI in relation to that injury of 13%.[11]

[40] In so concluding, Dr Takyar was proceeding in accordance with the requirements of the Guidelines and, in particular, the Guidelines relating to the existence of a pre-existing condition or injury and how that should be addressed.

[41] In accordance with paragraph 1.6.1, Dr Takyar was called upon to assess the degree of permanent impairment which resulted from the second injury and also to assess the proportion of permanent impairment due to the previous injury (the first injury).

[42] Consistent with paragraph 1.6.2, Dr Takyar was required to exercise his clinical judgment in determining a diagnosis when assessing permanent impairment and when making deductions for pre-existing injuries.

[43] In calculating the final level of impairment, pursuant to paragraph 1.6.3, Dr Takyar was required to clarify the degree of impairment resulting from

11 AB 105.

the compensable injury (the second injury) and clearly identify any deductions for pre-existing injuries (the first injury).

[44] Paragraph 1.27 then required that the degree of permanent impairment resulting from pre-existing impairments (in this case from the first injury), if those impairments are not related to the compensable injury (the second injury), should not be included in the final calculation of permanent impairment. In this case the pre-existing impairment related to the first injury alone and was not in any relevant sense for the compensation regime related to the second injury which occurred some years later. The paragraph goes on to provide that the assessor must take into account all available evidence to calculate the degree of permanent impairment that pre-existed the compensable injury.

[45] Paragraph 1.28 of the Guidelines required that Dr Takyar should determine the degree of permanent impairment suffered by the appellant, which he did at 22%. He was then required to indicate the degree of impairment due to the previous injury (the first injury), which he did at 9%. This is the "deductible proportion" referred to in the paragraph. Thereafter, the "deductible proportion" was required to be deducted from the degree of permanent impairment determined by Dr Takyar to give the degree of permanent impairment resulting from the compensable injury. This resulted in the total impairment attributable to the second injury of 13%.

[46] A similar process of reasoning is required by paragraph 11.10 which is found under the heading “Psychiatric and psychological disorders”.

[47] The appellant submitted that the Guidelines do not expressly refer to a single impairment caused by a multiplicity of injuries or incidents. It was suggested that an ambiguity arises. However, to the contrary, the process described above demonstrates how an impairment which occurred in the circumstances of this case, and whether it may be classified medically as a single impairment or otherwise, is handled for the purposes of determining compensation. In my opinion, the process followed in this case was in accordance with the requirements of the Act and of the Guidelines.

[48] In relation to the relevant provisions, it matters not if there was one relevant employer or more than one. As the Work Health Court Judge noted, neither the Act nor the Guidelines refer to, or distinguish between, injuries incurred whilst employed by different employers. Rather, they refer to permanent impairment caused by an injury and allow for deductions for previous injuries or conditions to ensure double compensation does not occur. The total impairment caused by the separate injuries, whether during employment with one employer or more than one employer, was 22% WPI. If a different employer was liable in respect of the second injury, from the employer liable for the first injury, that employer is required to contribute the amount of compensation calculated in accordance with the total impairment less the “deductible proportion” in relation to the first injury. In

the present case those figures would be the same as contained in Dr Takyar's second report.

[49] The appellant submitted that the Act and the Guidelines do not provide for circumstances where there is one impairment arising out of two or more injuries. It was submitted that the reference to pre-existing injuries/conditions and "any previous injury, pre-existing condition or abnormality", in the above-mentioned paragraphs from the Guidelines should be read as referring only to non-compensable injuries or conditions. On the face of the provisions that is not so. There is nothing in the Guidelines which suggests that pre-existing conditions need be first identified as non-compensable before the requisite deduction is made. An interpretation of the relevant paragraphs to that effect would involve a departure from the plain language of the provisions by reading words into the paragraphs. I do not accept that it is either necessary or appropriate to do so.

[50] An injury for the purposes of the Act is defined in s 3A(1)(b) to include "the aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease". In this case the first injury suffered by the appellant gave rise to a right to compensation assessed in accordance with the Act and Guidelines. That, in the circumstances, involved an assessment of the level of permanent impairment resulting from that injury leading to an entitlement pursuant to s 71 of the Act. Thereafter, the second injury, whether it be a fresh injury or an aggravation, acceleration, exacerbation,

recurrence or deterioration of the first injury, also gave rise to a right to compensation assessed in accordance with the Act and Guidelines and to a separate entitlement for permanent impairment pursuant to the terms of s 71 of the Act. In order to avoid the appellant receiving double compensation, the Guidelines provide for necessary deductions in paragraphs 1.63, 1.27 and 1.28 and, in the case of psychiatric and psychological disorders, in paragraph 11.10.

[51] Whether one impairment or more than one impairment arose out of two or more incidents considered in a medical sense, the legislative provisions applicable for the purposes of calculating compensation require that the matter proceed in accordance with the Act and Guidelines. That is what occurred in the present case.

[52] It can be seen from the above analysis that, in my opinion, the Act and the Guidelines do provide for the circumstances of this matter. Further, it is apparent that Dr Takyar proceeded in accordance with each of the requirements. There was no challenge to his calculations. There was no referral to a panel. In the circumstances I see no error in the procedure adopted and payment was made in accordance with the terms of the Act.

[53] The appeal is dismissed. If required I will hear the parties as to any consequential orders.

[54] In my opinion, this case throws up an apparent anomaly in the legislative regime which I draw to the attention of the Authority. The appellant suffered

permanent impairment of 22% WPI arising out of injuries suffered in the course of her employment. Had the appellant suffered that level of impairment arising out of one injury in the course of her employment her compensation would have been significantly greater than is the case where she has the same level of permanent impairment caused by two injuries occurring some years apart as described in this case.
