

Comcare v Lilley [2013] FCAFC 121 (1 November 2013)

Key Issues

- The criteria for 5% and 10% whole person impairment at Table 9.7 of the *Guide to the Assessment of the Degree of Permanent Impairment* (2nd Ed) are not invalid
- Given the purpose and context governing the use of the *Guide*, the Court found that it does not demand an interpretation with high levels of certainty or precision

Background

Mr Lilley commenced work as a firefighter in 1988. He reported developing pain in his legs after performing strenuous exercise and in 2005 was diagnosed with bilateral compartment syndrome which was probably caused by his work with the fire brigade. Mr Lilley made a claim for compensation for this condition, which was accepted.

In 2009, Mr Lilley made a claim for compensation for permanent impairment pursuant to section 24 of the SRC Act. Comcare's rejection of the claim was affirmed by reviewable decision, and Mr Lilley sought review at the Administrative Appeals Tribunal.

The Tribunal found that Mr Lilley's compartment syndrome did not meet the 10% threshold for compensation set out in section 24.

On appeal, the Federal Court found parts of Table 9.7 to be invalid because some of the criteria failed to fix an objective standard by which an assessment could be conducted, and therefore created uncertainty. Specifically, the trial judge found that there was no specificity in respect of the number of stairs required or the characteristics of a ramp appropriate for use in an assessment.

The Law

Section 14 of the SRC Act provides for the general liability of Comcare to pay compensation.

Section 24 imposes a liability on Comcare to pay lump sum compensation in circumstances where an injury results in permanent impairment. "Impairment" is defined in section 4 to mean "the loss, the loss of use, or the damage or malfunction, of any bodily system or function or part of such system function. "Permanent" is defined to mean "likely to continue indefinitely". This liability does not arise where the degree of permanent impairment is less than 10% (s24(7)).

The degree of a worker's permanent impairment is to be expressed as a percentage, to be determined with reference to the approved Guide (s24(5)). The applicable Guide in this instance is *Guide to the Assessment of the Degree of Permanent Impairment* (2nd Ed).

The Full Federal Court Decision

The Full Federal Court agreed with Comcare's submissions that the *Guide* should be construed in a common sense manner, taking into account that the overall objective of the SRC Act and the Guide is to determine the extent to which an employee is impaired when compared to a normal healthy person.

The Court found that the criteria for 5% and 10% whole person impairment at Table 9.7 of the *Guide*

were not invalid. The Court commented that, in some circumstances, the purpose of a piece of legislation may compel an approach to construction which may in other circumstances seem imprecise. The Court commented that uncertainty would only invalidate in situations where it is clear from the text, context and purpose of a statute that a high level of certainty or precision is required. Given the purpose and context governing the use of the *Guide*, the Court found that it need not be interpreted in such a way.

The Court found that “unable” as it is used in the *Guide* should be taken to mean “*an act or series of acts which in existing circumstances this person could do if he directed his mind to nothing else, but which, having regard to other circumstances, he could not reasonably be expected to do*” (*Leeder v Mayor of Ballarat East* [1908] VLR 214).

In respect of the trial judge’s comments about the ramp and the stairs, the Court pointed out that the purpose of the assessable activities provided at Table 9.7 of the *Guide* was to assess a person’s ability to go about the activities of daily living. Once that point was the focus, the Court concluded that it was clear that the precise kind of stairs or the precise length or gradient of a ramp need not be specified, and to do so would be counterproductive because the person is being assessed about his capacity to negotiate these types of obstacles in everyday life.

Lessons Learnt

The Full Federal Court confirmed the validity of the criteria in Table 9.7, which will impact permanent impairment assessment. While acknowledging that the *Guide* was drafted in a somewhat imprecise way, the Court has confirmed that this is not detrimental to its operation or useability.

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