

Workers Rehabilitation & Compensation Tribunal

Case Commentary • March 2021

Coad v Tasmania [2021] TASFC 2
(17 February 2021)

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This is the first Full Court decision in Tasmania dealing with the assessment and combination of whole person impairment (**WPI**) under the *Workers Rehabilitation and Compensation Act 1988 (Act)*.

Prior to this decision, workers were not entitled to compensation for WPI:

- for physical impairment if the WPI was less than 5%; and
- for psychiatric impairment if the WPI was less than 10%.

Further, previously workers, it was thought, could only combine physical and psychiatric WPIs if the threshold for each impairment was met i.e., combined WPI had to be at least 15%, assuming section 72 was satisfied.

The Full Court does not disturb the law in relation to the respective threshold for physical impairment and psychiatric impairment.

However, the Full Court has now determined that once the threshold for either impairment has been met, the WPI can be combined.

For instance, in this case, the worker could combine a 5% WPI for physical impairment with 6% WPI for psychiatric impairment.

1 Background

- 1.1 The worker was born on 30 November 1981.
- 1.2 The Worker was employed by the State of Tasmania, working within the Department of Police and Emergency Management, as a Police Officer. The Worker commenced his employment with the State of Tasmania on 17 October 2005.
- 1.3 On 28 January 2007, he was performing his duties as a Police Officer at the Tasman Regatta at White Beach in Tasmania.
- 1.4 In the course of his duties, the worker was speaking to a group of males, when he was suddenly hit from behind with what was discovered later to be an unopened glass bottle.
- 1.5 As a result of being struck in the head, the worker felt a sensation in his spine and fell head-first to the ground landing on his left shoulder and left side of his face.
- 1.6 As a result of being assaulted in the course of his employment, the worker suffered

injuries. He made a claim for compensation in respect of those injuries under the Act. That claim was accepted by the employer.

2 The WPI Issue

- 2.1 On 5 October 2017, the worker sought a determination of WPI entitlements and asserted he had 11% WPI. This percentage was based on an opinion of occupational physician Dr Peter Sharman and psychiatrist Dr Michael Evenhuis.
- 2.2 The whole person impairment for the cervical spine was agreed at 5% in accordance with the assessment of Dr Sharman, and the Workers Rehabilitation and Compensation Tribunal (**Tribunal**) found accordingly.
- 2.3 Dr Evenhuis assessed permanent psychiatric impairment at 6% WPI, and psychiatrist Dr Phillip Reid's assessment was 5% WPI.
- 2.4 The Tribunal preferred Dr Evenhuis' assessment of 6%. No objections were made against this finding.
- 2.5 The Tribunal, however, did not allow a combination of the two WPIs (i.e. 5% physical and 6% psychiatric). One reason was that the psychiatric impairment had not reached the 10% threshold in section 71.
- 2.6 The worker appealed that decision to the Supreme Court.
- 2.7 The appeal was referred directly to the Full Court for determination.

3 The Determination

- 3.1 There were three judges on the Full Court Bench. Justice Wood and Justice Geason allowed the appeal. Justice Martin's opinion was that the appeal should be dismissed.
- 3.2 Given the 2-1 split, the Full Court allowed the appeal.
- 3.3 There are four important learning points.
- 3.4 First, the 5% threshold for permanent impairment cannot be met by combining psychiatric and physical impairments.
- 3.5 Second, if different physical impairments result from an injury, even if one or more of those impairments, individually, does not meet the threshold of 5%, those individual physical impairments can be combined to meet the 5% threshold.
- 3.6 Third, once the 5% threshold is met, any psychiatric impairment can be combined (assuming section 72 is satisfied).
- 3.7 Finally, different WPIs are not simply added arithmetically but must be *combined* in accordance with the AMA Guides. Accredited medical practitioners would know how to do this otherwise we suggest you seek legal advice on how the combined values table operates.
- 3.8 Although the following does not appear to have been discussed in the Tribunal when the section 71 referral was being determined or in the Full Court, we believe the WorkCover Tasmania Guidelines for the Assessment of Permanent Impairment (**Guidelines**) support the determination.
- 3.9 On page 52 of the Guidelines, there are several examples of how psychiatric impairment can arise. Example 3 says (summarised):

A worker suffers a needle stick injury. The injury is trivial but there are concerns about the effect of blood exposure. The worker develops severe anxiety disorder including

*panic attacks and secondary agoraphobia. The worker is later cleared of any blood borne disease, but by that time the presence of recurrent panic attacks and secondary agoraphobia have become autonomous, difficult to remedy even with treatment. The important issue in this case is whether the psychiatric disorder can be linked to the traumatic event itself or whether it is more properly linked to the physical injury. **If linked to the event and not the physical injury, any impairment would be included in the overall impairment assessment** (emphasis in bold).*

- 3.10 As you will see, the Guidelines which were published on 1 October 2011 had already indicated that any psychiatric impairment would be included in overall WPI where it was linked to the event. The Guidelines do not say only psychiatric impairment of 10% or more would be included in the overall assessment.

4 The Fork

- 4.1 The Full Court described section 71 as a fork in the road. The two paths are permanent impairment that is not psychiatric impairment and psychiatric impairment.
- 4.2 There is a hurdle which must be overcome for each path. Once the hurdle (i.e., threshold) is overcome, then it can be combined with another impairment – assuming section 72 allows it.
- 4.3 In our view, this is the best way to understand how section 71 will operate from now on.

5 Practical Implications of the Decision

- 5.1 We list a few scenarios and outline the likely result in each scenario.
- 5.2 If a worker suffers a physical and psychiatric impairment arising from the same injurious event (in other words a primary not secondary psychiatric impairment) and is assessed to have 4% physical impairment and 1% psychiatric impairment, the worker would not be entitled to lump sum compensation.
- 5.3 If a worker suffers a physical and psychiatric impairment arising from the same injurious event and is assessed to have 1% physical impairment and 4% psychiatric impairment, the worker would not be entitled to lump sum compensation.
- 5.4 If a worker suffers a physical and psychiatric impairment arising from the same injurious event and is assessed to have 5% physical impairment and 1% psychiatric impairment, the worker would be entitled to lump sum compensation.
- 5.5 If a worker suffers a physical and psychiatric impairment arising from the same injurious event and is assessed to have 1% physical impairment and 10% psychiatric impairment, the worker would be entitled to lump sum compensation.
- 5.6 The above illustrate the Full Court's ruling that at least one of the two thresholds set in section 71 must be met before they can be combined.
- 5.7 As you will see, section 72 is critical and has its own set of requirements. These require careful legal interpretation.
- 5.8 While the Full Court did not deal with the operation of section 72, there can be several legal issues arising in its application. As such, please do not hesitate to contact us if you require assistance in section 71 referrals or WPI matters generally.

If you have any queries or would like further information, please contact:

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