



## Jurisdictional Policy Advice No. 2007/05

### *Safety, Rehabilitation and Compensation Act 1988*

#### **Implications of the High Court decision in *Canute v Comcare* on consequential injuries arising under the *Safety, Rehabilitation and Compensation Act 1988*.**

#### **Purpose**

This Jurisdictional Policy Advice has been developed in response to a High Court decision, [Canute v Comcare](#) [2006] HCA 47. The decision in this matter provided direction as to how a permanent impairment (PI) assessment should be calculated where a psychological sequela arose from an injury for which PI benefits under section 24 of the *Safety, Rehabilitation and Compensation Act 1988* (the Act) had already been paid. The implications of the decision go beyond psychological injury.

#### **Background**

Mr Canute received compensation under section 24 of the Act in respect of a 12% whole person impairment covering PI of his back and right leg resulting from L5/S1 spondylolisthesis. He submitted a subsequent claim for compensation under section 24 of the Act in respect of 'adjustment disorder with depression'. Comcare denied liability to pay compensation in respect of the subsequent claim on the basis that Mr Canute did not meet the required threshold of a 10% increase in the degree of impairment imposed by subsection 25(4) of the Act. Comcare calculated his degree of impairment for the subsequent condition at 9% using the combined values table 14(1) in the *Guide to the Degree of Permanent Impairment*. The matter was reviewed in AAT, then appealed in the Federal Court, the Full Bench of the Federal Court and the High Court.

The decision to deny liability in respect of Mr Canute's subsequent claim for compensation under section 24 was based on an interpretation of the Act to the effect that conditions arising as a consequence of an injury were not treated as a separate injury, but were taken into account in making an assessment of whole person impairment resulting from the primary injury.

The High Court rejected this approach:

...there is no foundation in the Act for any such distinction between "an injury" and a consequential or secondary injury. Neither of these qualifiers finds any expression in the Act. The Act speaks exclusively in terms of "an injury".

The Court continued:

The Act only adopts the "whole person impairment" approach with respect to permanent impairments resulting from each "injury". That "whole person" approach cannot properly be used to deny the applicability of s24 to something which corresponds to the legislative definition of an "injury". The statutory criterion of an "injury" is antecedent to the concept of "whole person" impairment, not the other way around.

### **The effect of this decision:**

Where a compensable injury gives rise to a subsequent injury (a sequela), that satisfies the definition of injury in section 4 of the Act, that subsequent injury is to be treated as a separate injury, with all the entitlements of a separate injury; this includes entitlement to a separate assessment for compensation under sections 24 and 27 of the SRC Act.

The decision in *Canute* also means that where an injury occurrence results in a number of injuries, each injury is assessed as a separate injury which individually must satisfy the required threshold of 10% degree of impairment. For example, in a motor vehicle accident where injuries are sustained to the left ankle, right wrist and left shoulder, each injury must now be assessed as a separate injury.

### **Discussion**

Past practice has been, as a general rule, to treat a sequela as a subsequent 'impairment' arising from the original 'injury' and to combine permanent impairment assessments (Appendix 1 of the PI Guide). It has also been past practice to combine multiple injuries from a single injury occurrence.

The significance of the *Canute* decision is that there is now a requirement on a case-by-case basis to assess, as a matter of fact, whether a sequela or a subsequent injury is actually an 'injury' which can be separately assessed for a PI benefit.

If it is a separate injury it may have to be assessed and accepted as such. Any impairment arising from that injury will usually be additional to the impairment arising from the original injury, meaning that the decision maker adds the assessments rather than combining them in accordance with appendix 1 of the PI Guide.

It will be a question of medical evidence as to whether a new injury has been sustained. Generally, new and distinct pathological changes should be evident, as distinct from increased symptoms or natural progression of an accepted condition.

### ***Exceptions***

A single 'injury' resulting in multiple impairments would be one exception. For example, impairments would be combined where a single spinal cord injury results in loss of function of lower extremities, loss of urinary and reproductive functions

Another exception may arise where impairments arising from 2 separate injuries are capable of being assessed under the same Table of the Guide. This issue is most likely to arise in relation to the Tables which express the level of impairment by reference to an overall functional capacity, rather than individually impaired body parts.

For instance, impairments arising from an injury to the left leg and a subsequent injury to the right leg would both be assessed under the 'lower extremity function' table of the PI Guide and a single rating covering both impairments would be given. Authority for this comes from [Comcare v Van Grinsven \[2002\] FCA 371 \(3 April 2002\)](#), a decision of the full Federal Court.

### ***Investigations***

When a claim is made, a separate assessment will be required in respect of each condition which satisfies the definition of 'injury'.

## *Examples*

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### **1. Multiple injuries arising at the same time as a result of one incident**

A claimant suffers multiple injuries as a result of a motor vehicle accident. The injuries suffered are to left ankle, right foot, right wrist and left shoulder.

Pre *Canute*, the decision maker would combine the resulting impairments because they arose from the same incident.

Post *Canute*, the decision maker cannot combine the impairments because they arose from separate injuries. Note that if none of the impairments reaches 10% in their own right, the impairment claim fails.

Note that each impairment may also attract a separate non-economic loss payment under section 27 of the SRC Act.

### **2. Injuries that manifest later as a result of a compensable injury (also known as sequelae)**

For example, a claimant suffers a back injury which 12 months later results in an adjustment disorder.

Pre *Canute*, the decision maker would combine the impairments, because they arose from the same incident.

Post *Canute*, the decision maker cannot combine the impairments, because they arose from separate 'injuries'. If neither of the impairments from the back injury and adjustment disorder reaches 10% on their own merits, the impairment claim fails.

The decision maker will need to be satisfied that the adjustment disorder is an injury as defined under section 4 of the Act.

Note that each impairment may also attract a separate non-economic loss payment under section 27 of the SRC Act.

### **3. An injury that results in multiple impairments**

An employee suffers an injury and as a result develops an infection, which affects a number of principal organ systems. The *Guide* requires that the WPI ratings from each system be combined using the Combined Values Chart (Paragraph 13.2).

Note that careful consideration must be given to medical evidence in distinguishing multiple impairments from multiple injuries.

## **Assessing non economic loss**

Following *Canute*, an employee will be entitled to claim for a separate set of entitlements in respect of each accepted injury. This includes non-economic loss (s27).

However, the determining authority will need to be satisfied, on the medical evidence, that an employee is being correctly compensated.

As an example, the determining authority will need to be satisfied that an employee is not being compensated twice for the same non economic loss (NEL). In some cases, this would be reasonably straight forward to decide, as the compensable injuries are likely to have distinctive characteristics and effects. In cases such as *Canute*, for instance, the effects of a back injury on NEL, as described in the claim form [here](#) are most likely to involve physical dimensions such as pain and mobility while an adjustment disorder is likely to have emotional dimensions such as reduced social functioning. However, this will be a matter for medical opinion and the decision maker should obtain suitable evidence to differentiate between the differing causes of the NEL.

## **Existing PI Decisions**

Whilst the determining authority may reconsider pre-*Canute* decisions on its own motion, there is no requirement that it do so simply due to the *Canute* decision. Previous decisions made under section 24 of the Act were made pursuant to what had been accepted to be the correct interpretation of section 24. Those decisions were valid at the time they were made and they remain so. For instance, in *Eggin v Brooms Head Bowling and Recreation Club* (1984) 5 NSLR 52, McHugh JA stated that a party to appeal proceedings ‘cannot seek to have a verdict, based on an accepted state of law, set aside on the ground that the law is later held to be different from what the parties accepted it to be.’

Further, determining authorities are unable apply reconsiderations decisions which result in a worse result for the employee where the initial decision was made under the provisions of the first edition of the PI Guide – which would account for the majority of pre-*Canute* decisions (see: 3. Application of the Guide – Page iv of the [PI Guide](#)).

Consequently, equity of outcomes would be best served if determining authorities refrained from conducting reconsiderations of own motions on pre-*Canute* decision where there was no other presenting change in circumstances.

It is possible that employees who have previously had PI claims calculated on the basis of combined impairments will request a reconsideration of that calculation, having regard to *Canute*.

If the request for reconsideration is made out of time, the determining authority will need to consider whether it is prepared to extend time. If the reason for the request is the decision in *Canute*, and the employee does not assert any other relevant change in circumstances, the determining authority may decide not to exercise its discretion to extend time for the request for reconsideration, eg, a case where an employee does not submit medical evidence which adds to the information which was before the primary decision maker or which contradicts the assessment of the degree of PI contained in the determination.

Should an employee submit additional evidence, eg a further deterioration, or evidence which contradicts an earlier assessment or which claims a subsequent impairment, the determining authority may reconsider its earlier decision. If it does so, the determining authority should advise the employee that it will take all available evidence into account and would also apply the principles of the *Canute* decision. However, determining authorities should note that they cannot decrease the PI percentage previously awarded if the assessment was under the first edition of the Guide (as noted above).

The principles contained in *Hunter Valley Developments Pty Limited; And: The Honourable Barry Cohen Minister For Home Affairs And Environment* No. G.426 of 1983 (1984) [3 FCR 344](#) may be useful for the decision maker.

### **Application**

The principles of this advice apply to all claims with a date of injury on and from the commencement of the SRC Act (1 December 1988).

For practical purposes, decision-makers should apply these principles to new PI claims received and to reconsiderations made in relation to PI payments on and from the date of this advice.

### **Further information**

Any issues relevant to this advice may be discussed with Comcare's SRC Policy Group, telephone 1300 366 979 or email [SRC.Policy@comcare.gov.au](mailto:SRC.Policy@comcare.gov.au)

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