



Australian Government
Comcare

Jurisdictional Policy Advice No. 2010/02 *Safety, Rehabilitation and Compensation Act 1988*

High Court decision in *Fellowes v MRCC*— implications for determining permanent impairment

Purpose

1. This advice is being issued to explain the implications of the decision made by the High Court of Australia in the case of *Fellowes v Military Rehabilitation & Compensation Commission* [2009] HCA 39 (*Fellowes*). Guidance is included for determining authorities to follow when they determine liability for an injury which results in permanent impairment. The relevant part of the *Safety, Rehabilitation and Compensation Act 1988* (the Act) is Part II, Division 4.
2. In particular, this advice informs and reminds determining authorities that:
 - the word 'impairment' appearing in sections 24, 25 and 28 of the Act bears the meaning given by the definition in subsection 4(1) of the Act. It is defined in terms of the effect on body parts, bodily systems or functions, not 'whole person impairment' as described in Comcare's approved¹ *Guide to the Assessment of the Degree of Impairment* (Guide).
 - when they are applying the Guide to assess the degree of permanent impairment resulting from a compensable injury, they need to isolate the permanent impairment resulting from that particular injury and assess only that impairment.
3. Determining authorities are advised to:
 - apply the above practice to all permanent impairment claims they determine on and from 23 September 2009. This is the date that the High Court handed down its decision. Determinations made before that date remain valid. However, if a request for reconsideration of a determination made before 23 September 2009 is received, it would be reasonable for the determining authority to apply the new practice.

¹ Section 28 of the Act requires Comcare to prepare and issue a *Guide to the Assessment of Degree of Permanent Impairment*. This Guide sets out methods of assessment of permanent impairment and non-economic loss. It is binding on determining authorities and the Administrative Appeals Tribunal.

Background

Ms Robyn Fellowes enlisted in the Australian Army in November 1986. In 1986 she suffered a work-related injury to her left knee, and in 1987 she suffered a work-related injury to her right knee. Ms Fellowes claimed compensation for her injuries under the SRC Act (via the Military Rehabilitation and Compensation Commission [MRCC]). The MRCC determined that Ms Fellowes suffered a degree of permanent impairment assessed at 10% as a result of the injury to her left knee and paid her compensation in respect of the permanent impairment. However, although Ms Fellowes suffered a degree of permanent impairment assessed at 10% resulting from the right knee injury, the MRCC determined that under the SRC Act and the Guide it was not liable to pay compensation for that permanent impairment because it had already compensated Ms Fellowes for a degree of permanent impairment assessed at 10%.²

4. The majority³ of the High Court decided that the degree of permanent impairment that Ms Fellowes suffered from a subsequent injury to her right knee should be assessed independently of the compensation she had already received for a permanent impairment to her left knee. The High Court took this approach despite both of the permanent impairments resulting from both of the injuries being assessed under the Limb Function—Lower Limb Table 9.5 in Part 2 of the Guide.
5. In making its decision, the High Court relied on and reinforced the judgment in *Comcare v Canute (2006) HCA 47 (Canute)*. The judgment made in this case decided that under subsection 24(5) of the Act there should be a separate assessment of the degree of permanent impairment resulting from each separate injury suffered by an employee. This includes sequela injuries (injuries which arise from, occur subsequent to, or are caused by the initial injury or associated treatment).
6. Ms Fellowes sustained two separate work related injuries that led to two separate losses of the use of, or damage to, two distinct parts of her body (left and right knees). The High Court decided that Ms Fellowes was entitled to permanent impairment compensation for her right knee injury as it met the criterion for 10 per cent degree of impairment under Table 9.5 (Part 2) of the Guide: ‘can rise to standing position and walk but has difficulty with grades and steps’⁴. This was irrespective of the permanent impairment assessment already awarded in relation to her left knee injury, which met the same 10 per cent criterion under the same Table in the Guide.

² High Court of Australia Media Release.

³ The majority judgement was delivered by Hayne, Heydon, Crennan and Bell JJ. Keifel J did not agree with their reasons.

⁴ Table 9.5 description of level of impairment in Part 2 (page 205) of the Guide.

7. Prior to this decision by the High Court, determining authorities had considered that subsequent injuries to a lower limb, or limbs, which did not result in an increase to the degree of permanent impairment to the 'lower limb function' under Table 9.5 in Part 2 of the Guide or to the 'lower extremity' under Table 9.7 in Part 1 of the Guide could not be compensated. This approach was consistent with the Full Federal Court decision in *Comcare v Van Grinsven (Van Grinsven)*. However, in the case of *Fellowes*, the High Court overruled the decision made in *Van Grinsven* on the basis it was incompatible with *Canute* and therefore wrongly decided.

Note:

- Part 2 of the Guide deals with the assessment of defence-related claims for permanent impairment made under the Act by members of the Defence Force in relation to injuries sustained due to service rendered before 1 July 2004. The Military Rehabilitation and Compensation Commission (MRCC) is the determining authority under the Act.
- Part 1 of the Guide deals with the assessment of permanent impairment claims made under the Act by employees of premium paying agencies, the ACT Government and licensees⁵. Comcare is the determining authority under the Act for premium paying agencies and the ACT Government. Licensees or their claims agent are the determining authority for employers who have been granted a licence under the Act.

Discussion

8. Part 1 of Comcare's Guide is based on the American Medical Association *Guides to the Evaluation of Permanent Impairment* fifth edition (AMA 5). Part 2 of Comcare's Guide is based on the American Medical Association *Guides to the Evaluation of Permanent Impairment* second edition (AMA 2). The AMA Guides' method of assessment applies a 'whole person impairment' concept. This means that:
 - most tables provide impairment ratings expressed as a percentage of 'whole person impairment'
 - a combined values chart enables the assessor to account for the effects of multiple impairments, with a summary value that can not exceed 100 per cent of the whole person.⁶
9. The stated policy intent⁷ of permanent impairment compensation under section 24 of the Act was to apply a 'whole person' approach to the assessment.

⁵ Employers who have been granted a licence to self-insure under the Act.

⁶ AMA5, page 9 (para 1.3 and 1.4).

⁷ In the Second Reading Speech introducing the Bill for the 1988 Act, the Minister said:

'Under the existing Act (1971), lump sum payments are made on the basis of a table of maims, with the level of payment being determined having regard to the loss, or loss of the efficient use, of various parts of the body. That approach has been abandoned and the level of payments in future will be determined using a 'whole person' approach. . .'

10. The decision made by the High Court in *Canute*⁸ cast doubt on whether the 'whole person' approach taken by the Guide was supported by the actual wording of the Act. The Act provides the authority for and boundaries of the Guide. The High Court held that the terms of subsection 24(5) required attention to the assessment of the degree of permanent impairment resulting from an injury. Therefore, each separate injury suffered by an employee (including sequela injuries) that results in a permanent impairment should be assessed independently.
11. The effect of the *Canute* decision is that a sequela injury, that satisfies the definition of injury in section 5A of the Act, is treated separately and therefore the person is able to claim for any separate permanent impairment that results from the injury.
12. In the *Fellowes* decision, the High Court reiterated and expanded on the finding in *Canute*. They made it clear that where an employee has two injuries resulting in separate impairments to separate body parts, that are assessable under the same Table in the Guide, the impairments must be assessed separately. They stated that the Guide does not require a single rating to be given where two injuries yield the same degree of impairment to two separate parts of the body. The *Fellowes* decision restated that the 'whole person' concept described in the Guide could not be applied in the event that each of a person's compensable injuries results in impairment.
13. Further to this, 'impairment' bears the meaning given by the definition in subsection 4(1) of the Act. Therefore, 'impairment' must be identified by the effect of the injury on the employee's loss, the loss of the use, or the damage or malfunction of any part of their body, bodily system or function.
14. The following policy advice applies to all claims involving assessment of a degree of permanent impairment.

Policy guidelines

15. The *Fellowes* decision applies to all permanent impairment determinations dated on or after 23 September 2009. This was the date the High Court handed down its decision. The important date is the date the determination is issued, not when the permanent impairment claim was made. Decisions on claims issued since 23 September 2009 should be consistent with the terms of this advice.

Determining authorities should take the following steps when deciding whether an employee is entitled to compensation for a permanent impairment that results from a compensable injury.

8 The Court said:

"...it is important to remember that recourse to the criteria and methodologies set out in the Guide is only necessary once the key statutory criterion of the occurrence of 'an injury' (which resulted in permanent impairment) has been fulfilled. The Guide is to be approached through the prism of each 'injury'..."

"...the Act assumes that more than one injury may occur. Therefore it is not correct to say that s24(5) imports a 'whole person' approach to the determination of the degree of permanent impairment. That ignores the centrality of 'an injury' to the scheme upon which the Comcare' liability to compensate depends."

16. **Step 1—Ensure the following initial threshold requirements are satisfied**

i) Liability for an injury is accepted

Claims for permanent impairment under section 24 or section 25 of the Act can only be determined where, in accordance with section 14 of the Act, liability has been accepted for an injury which includes a disease, or an aggravation of either.

If liability for the claimed injury has not been accepted under section 14 of the SRC Act then the determining authority should:

- make a determination under that section or assist the employee to submit a claim so that a determination can be made
- consider whether the injury is described differently to any previously accepted claim that the employee has, or whether it is essentially the same injury.⁹

ii) The injury meets the definitions of 'impairment' and 'permanent'

Claims for permanent impairment must:

- result from the particular compensable injury. Any impairment that results from a different injury or non-compensable condition must be isolated (if possible)¹⁰
- meet the meanings of:
 - o impairment—the loss, the loss of use, or the damage or malfunction of:
 - any part of the body
 - any bodily system or function
 - any part of a bodily system or function.
 - o permanent—likely to continue indefinitely.

These definitions of 'impairment' and 'permanent' can be found in subsection 4(1) of the Act. Subsection 24(2) lists the factors that a determining authority must have regard to in determining whether an impairment has become permanent. The factors are:

- the duration of the impairment
- the likelihood of improvement in the employee's condition
- whether the employee has undertaken all reasonable rehabilitative treatment for the impairment
- any other relevant matters.

If a claim does not comply with the Act's interpretation of 'impairment' and 'permanent', it can not be accepted. A claimed permanent impairment can also not be accepted if it does not result from the particular compensable injury.

If a permanent impairment does result from a compensable injury, proceed to Step 2.

⁹ See *Abrahams v Comcare* (2006) 93 ALD 147.

¹⁰ See subsections 24(1) and 24(5) of the SRC Act in the Full Federal Court decision in *Comcare v Amorebieta* [1996] FCA 1438 and Federal Court decisions in *Martin v Australian Postal Corporation* [1999] FCA 655 and *Jordan v Australian Postal Corporation* [2007] FCA 2028.

17. Step 2—Assess the degree of permanent impairment

The degree of an employee's permanent impairment must be assessed using Comcare's Guide.

Separate injuries resulting in separate impairments

If an employee suffers two or more compensable injuries that result in any permanent impairment or impairments, the determining authority must make separate assessments of the degree of permanent impairment resulting from each of the compensable injuries. This is irrespective of whether the same table and criteria in the Guide apply to impairments resulting from the different injuries, as in *Fellowes*.

Liability to pay compensation will only arise if the degree of permanent impairment resulting from each compensable injury achieves the required 10 per cent threshold. The only exception to this is hearing loss, or the loss of a finger, toe, or the sense of taste or smell as mentioned in subsections 24(7A) and 24(8).

Consistent with *Canute* and *Fellowes*, 'above percentage threshold' impairments resulting from separate injuries are added. Any instructions in the Guide to combine or disregard rather than add these values must now be ignored.

Multiple impairments resulting from one injury

If an employee suffers one compensable injury that results in multiple permanent impairments to different parts of their body, bodily systems or functions, irrelevant of whether those assessed impairments are above or below the percentage threshold, they must be combined. Combine them using the instructions in the Guide and its Combined Values Chart in Appendix 1. The injured employee would be eligible to receive compensation if the combined degree of their permanent impairment value is at least 10 per cent.

18. Step 3—Consider any pre-existing permanent impairment

If an employee's relevant body part or system was already affected by a permanent impairment (from any condition), and it can be assessed using the Guide, it should be isolated from the compensable injury.¹¹

This means that the degree of permanent impairment arising from the compensable injury in question has to be adjusted to take into account any pre-existing permanent impairment. It should be noted that this approach is not inconsistent with *Fellowes*. In *Fellowes*, when Ms. Fellowes suffered a compensable injury to her right knee, her right knee was not affected by any pre-existing permanent impairment.

11 See subsections 24(1) and 24(5) of the Act in the Full Federal Court decision in *Comcare v Amorebieta* [1996] FCA 1438 and Federal Court decisions in *Martin v Australian Postal Corporation* [1999] FCA 655 and *Jordan v Australian Postal Corporation* [2007] FCA 2028.

19. **Step 4—Consider non-economic loss (NEL)**

An injured employee is entitled to receive a separate payment under section 27 of the Act for each accepted injury that results in permanent impairment compensation under section 24 of the Act.

Section 27 of the Act provides where there is liability to pay compensation for a permanent impairment, additional compensation for NEL is payable. NEL deals with the effects of the impairment on the employee's life or lifestyle. Lifestyle effects are a measure of an individual's mobility, enjoyment of, and participation in:

- social relationships
- recreation
- leisure activities.

Where an employee has already received NEL compensation the determining authority will need medical evidence to be satisfied that the employee is not being compensated twice for the same effects on their lifestyle (part B of the NEL formula).

Where an interim payment for permanent impairment has been determined under section 25 of the Act, NEL compensation is not payable until the final permanent impairment compensation is determined.

Applying *Fellowes* to permanent impairment claims that have been determined

Reconsideration of own motion

20. A determining authority has power under subsection 62(2) of the Act to reconsider decisions on its own motion. However, there is no requirement to do so for decisions issued before 23 September 2009. Decisions made before this date are valid, as section 24 was applied in accordance with the judicial interpretation current at that time.

Requests for reconsideration

21. The determining authority or Administrative Appeals Tribunal (AAT) must apply the Act as interpreted by the High Court in *Fellowes* if either of the following situations occur:
- a determining authority receives a request for reconsideration of a decision issued before 23 September 2009
 - a reconsideration decision becomes the subject of an application for review by the AAT.

Out of time requests for reconsideration

22. 'Out of time' requests for reconsideration are those made more than 30 days after the notice is given that a determination for permanent impairment liability is issued. If an 'out of time' request for reconsideration is made, it is at the determining authority's discretion to extend the time.

It is reasonable for determining authorities to extend the time if the original determination relied on *Van Grinsven*. It is also reasonable to extend the time if the request for reconsideration involves an assessment of the degree of permanent impairment where the principles in *Fellows* apply. If a determining authority does not extend the time in these circumstances, it could result in the employee making an application to the AAT for a review of the decision¹².

23. Alternatively, determining authorities can conduct a new assessment of the degree of permanent impairment. Determining authorities are not, however, able to reconsider decisions or undertake new assessments on decisions that have been made by the AAT or the Federal Court.

Recalculating permanent impairment entitlement and interest

24. If the determining authority accepts an 'out of time' request for reconsideration it may determine that the employee is entitled to further permanent impairment compensation. In this case, the statutory rate at the time of the reconsideration determination will apply for the purposes of calculating the amount of further compensation payable. The rate that applied when the original determination was made does not apply.
25. No interest is payable in respect of reconsideration or AAT review under subsection 26(4).

Policy review

26. Comcare is conducting a policy review of the Act and the Guide to ensure it delivers fair and equitable compensation for permanent impairment and non-economic loss.

More information

27. For more information about this advice email Comcare's SRC Policy Section at SRC.Policy@comcare.gov.au or call 1300 366 979.

General Manager
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¹² Employees are able to make an application to the AAT under section 64 of the Act.