

You be the Judge: does the Worker or Tribunal decide on the type of permanent impairment to be assessed?

Comcare v Farrell [2016] FCAFC 115

Key Points

- The Full Court of the Federal Court was asked to decide if it was open to the Tribunal to make findings in respect of the assessment of permanent impairment using the *Guide* in relation to only one injury, when the claim before it was for multiple injuries.

Background

Ms Farrell worked at the Australian Bureau of Statistics. As part of her role, she was required to perform a lot of repetitive typing and mouse clicking at a computer, as a result of which she developed pains. She sought compensation for right golfer's elbow, left and right tennis elbow, and synovitis and tenosynovitis in her left and right hands and wrists, and claimed these injuries had resulted in permanent impairment.

Comcare accepted liability for the injuries under section 14 of the SRC Act, but denied liability to pay compensation for permanent impairment and non-economic loss under sections 24 and 27 of the SRC Act. Ms Farrell sought review of this decision in the AAT.

Tribunal Decision

At first instance, the Tribunal found that only Ms Farrell's wrist injuries gave rise to a permanent impairment, accepting the evidence of Ms Farrell's medico-legal Rheumatologist. It found that Ms Farrell's wrist impairment was less than 10%, using Tables 9.9.1a and 9.9.1b of Comcare's *Guide to the Assessment of the Degree of Permanent Impairment* (Ed. 2.1) (**the Guide**), Tables relating exclusively to injuries of the wrist. The Tribunal therefore affirmed Comcare's decision to deny compensation.

Federal Court Decision

Ms Farrell appealed to the Federal Court on the ground that the Tribunal failed to make any finding of whether or not her impairment was permanent, and failed to determine her degree of permanent impairment in accordance with the *Guide*.

The Federal Court held that it was the duty of the Tribunal to determine whether Ms Farrell's injuries, as claimed, resulted in a permanent impairment, and that an assessment of impairment in both arms (including elbow and hand injuries) using Tables in the *Guide* pertaining to wrist injuries was, in fact, not really an assessment at all. It reasoned that the Tribunal had not made any finding in respect of permanent impairment and upheld Ms Farrell's appeal.

Comcare appealed this decision to the Full Court of the Federal Court.



Conclusion

In rejecting the approach taken by the Federal Court, the Full Court drew a careful distinction between the permanent impairment as first claimed (being impairment of both arms) and the permanent impairment actually found by the Tribunal (arising only from Ms Farrell's wrist injury).

The Full Court determined that the crucial question was whether it was open to the Tribunal to decide, having reasoned that only Ms Farrell's wrist injury gave rise to a permanent impairment, that the permanent impairment could be assessed under a Table in the *Guide* dealing only with wrist injuries.

It was held that the central error made by the Federal Court was that it “*gave to the claim*” (that is, the claim first lodged by Ms Farrell) the function of defining the relevant permanent impairment. The Full Court first viewed the SRC Act in the context of the powers it was created to afford to claims managers and the Tribunal. It then honed in on section 24 of the SRC Act specifically, finding that the section clearly intends that the decision as to whether an injured worker has suffered a permanent impairment is a question, first and foremost, for the decision maker, whether that be the Tribunal or a claims manager. The Federal Court, it was held, did not recognise that the Tribunal had accepted Ms Farrell's evidence that she only suffered a permanent impairment resulting from one injury, being tenosynovitis affecting her right wrist.


Applying *Broadhurst v Comcare* [2010] FCA 1034, the Full Court acknowledged that the *Guide* did not afford the Tribunal the power to alter the operation of section 24. What the Tribunal could do, however, was identify a particular permanent impairment, and then assess the degree of that impairment using the *Guide*.

The Full Court held that it was within the Tribunal's fact finding power to conclude, on the basis of Ms Farrell's evidence, that her impairment was able to be assessed under the Tables in the *Guide* dealing with the range of movement of the wrist, and to then perform the assessment. The Court held that to reach any other conclusion would interfere with the Tribunal's functions.

On this basis, Comcare's appeal was allowed, and the original Tribunal decision was upheld.

Lessons Learnt

The case confirms that the job of the Tribunal is to stand in the shoes of the original decision maker. In the case of a permanent impairment claim, this requires the Tribunal to make decisions about which of the claimed impairments constitute permanent impairments under the SRC Act having regard to the evidence, and to then undertake an assessment of those impairments in accordance with the *Guide*.





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