CITATION:	*Taylor Enterprises v Pointon & Work Health Authority* [2009] NTMC 029
PARTIES:	TAYLOR ENTERPRISES (NT) PTY LTD v ALAN POINTON & WORK HEALTH AUTHORITY
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	Darwin
FILE NO(s):	20823563 & 20916760
DELIVERED ON:	10 July 2009
DELIVERED AT:	Darwin
HEARING DATE(s):	22 May and 10 June 2009
JUDGMENT OF:	Dr John Allan Lowndes

CATCHWORDS:

WORKERS COMPENSATION – stay of administrative proceedings in relation to assessment of permanent impairment – declaratory orders in relation to administrative proceedings for assessment of permanent impairment

Workers Rehabilitation and Compensation Act (NT) ss 3, 71, 72, 94, 104
Clayton v Top End Wholesale Distributors (unreported 22 March 1996) considered
Pengilley v Northern Territory of Australia (1999) NTMC 026 considered
McMillan v Territory Insurance Office (1988) 57 NTR 24 applied
Maddalozzo v Maddick (1992) 84 NTR 27 applied

REPRESENTATION:

Counsel:

Applicant:	Judith Kelly
First Respondent:	Pipina Lazarus
Second Respondent:	Greg MacDonald

Solicitors:

Applicant:	Hunt & Hunt
First Respondent:	Ward Keller
Second Respondent:	Solicitor for the Northern Territory

Judgment category classification:	A
Judgment ID number:	[2009] NTMC 029
Number of paragraphs:	49

IN THE WORK HEALTH COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

Nos. 20823563 & 20916760

BETWEEN:

TAYLOR ENTERPRISES (NT) PTY LTD
Plaintiff

AND:

ALAN POINTON
1st Respondent

AND

WORK HEALTH AUTHORITY
2nd Respondent

REASONS FOR DECISION

(Delivered 10 July 2009)

Dr John Allan Lowndes SM:

THE NATURE OF THE PROCEEDINGS

1. By way of an interlocutory application filed on 2 April 2009 the employer sought the following orders:[1]

    1. Until further order NT Work Safe be stayed from proceeding with a re-assessment of the worker's permanent impairment assessment from Dr Walton under ss 71 and 72 of the *Workers Rehabilitation and Compensation Act*;

    2. The worker to pay the employer's costs of and incidental to the application.

[1] This application was refiled on 21 April 2009 returnable on 22 May 2009.

2. In support of the application the employer relied upon the affidavit of Peggy Cheong sworn 3 April 2009. In support of the application filed on 21 April 2009 the employer relied upon two further affidavits of Peggy Cheong sworn on 21 April 2009.

3. In response to the application the worker relied upon the following:

    1. The affidavit of the worker sworn 8 June 2009 and

    2. The affidavit of Pipina Lazarus (the worker's solicitor) sworn on 9 June 2009.

4. At the suggestion of the Court, on 21 April 2009 the employer filed a substantive application seeking a ruling pursuant to s 104 of the *Workers Rehabilitation and Compensation Act* to the effect that proceedings commenced under s 72 of the Act were invalid.[2] The Court suggested that such an application be filed because it had some concerns about the ability of the Court to stay the administrative process embarked upon under ss 71 and 72 of the Act.

THE FACTUAL BACKGROUND

5. The circumstances leading up to the employer's application are as follows.

6. By way of letter dated 17 February 2009 the worker's solicitors wrote to the employer's solicitors enclosing a copy of a report from Dr Walton which contained a purported assessment of permanent impairment. That correspondence represented the first notification by the worker to the employer of a claim for compensation for permanent impairment.

7. By way of letter dated 24 February 2009 the employer disputed that the report was an assessment of permanent impairment, but sought to preserve its position by seeking a permanent impairment re-assessment in accordance with s 72(3) of the *Workers Rehabilitation and Compensation Act.*

[2] See the employer's application filed on 21 April 2009.

8. Against the background of what is essentially a dispute between the worker and the employer as to whether the report was an assessment of the level of permanent impairment caused by the injury for the purposes of s 72 of the Act, the Work Health Authority declined to advise the employer that Dr Walton's report did not amount to an assessment for the purposes of s 72 or to suspend or cease the process prescribed by the section.

9. In support of the interlocutory application the employer submitted that it was appropriate for the Work Health Court to make an order effectively staying the proceedings under s 72 of the Act until the substantive dispute as to the alleged psychiatric injury has been determined by the Court. The employer submitted that this could be achieved by restraining the Work Health Authority from acting on the employer's request until the matter has been determined.[3]

THE RELEVANT LEGISLATIVE PROVISIONS AND THE STATUTORY SCHEME

10. As the employer's interlocutory application is predicated upon a particular view of the *Workers Rehabilitation and Compensation Act* insofar as it relates to compensation for permanent impairment, it is necessary to examine the relevant legislative provisions with a view to divining the statutory scheme.

11. Section 71 of the Act provides for compensation for permanent impairment.

12. Subsections (1), (2) and (3) stipulate the percentage of compensation payable referable to the degree of permanent impairment.

13. For the purposes of the compensatory scheme, "permanent impairment" is defined in s 70 of the Act as meaning "an impairment or impairments assessed, in accordance with the prescribed guides, as being an impairment, or combination of impairments, of not less than 5% of the whole person".

[3] See [12] and [13] of the employer's written submissions.

14. "Impairment" is defined as "a temporary or permanent bodily or mental abnormality or loss caused by an injury": s 3. "Injury" is defined in s 3 as a physical or mental injury arising out of or in the course of a worker's employment, including a disease and the aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease.[4]

15. Section 72 of the Act provides the mechanism for the assessment of the degree of permanent impairment. The process is set in train by a medical practitioner assessing the level of permanent impairment: s 72(2). Section 72(3) provides that where a person is aggrieved by a medical practitioner's assessment, that person may, within 28 days after being notified of the assessment, apply to the Work Health Authority for a reassessment of that level of permanent impairment. Subject to one exception, the Authority must, as soon as practicable after receiving such application, refer the application to a panel of three medical practitioners to reassess the level of permanent impairment: Section 72(3A). The exception is that the Authority is not required to refer an application to a panel unless it is satisfied that the assessment was properly conducted in accordance with the guides prescribed for the purposes of the definition of "permanent impairment" in s 70: s 72(3B).

16. Section 71(4) (a) and (b) prescribes the time within which compensation payable under ss 71(1), (2) and (3) is to be paid. Compensation is to be paid to a worker within a period of 14 days after the end of the 28 day period allowed for an application for reassessment, or, if there has been an application for reassessment, within 28 days after the worker is notified of the reassessment.

17. It is clear that a worker's entitlement to compensation for permanent impairment depends upon the impairment – a bodily or mental abnormality,

[4] "Injury" does not include an injury or disease suffered by a worker as a result of reasonable disciplinary action taken against the worker or failure by the worker to obtain a promotion, transfer or benefit in connection with the worker's employment or as a result of reasonable administrative action taken in connection with the worker's employment: s 3.

whether temporary or permanent – being caused by an injury as defined in s 3 of the Act.[5] Once that entitlement exists, the amount of compensation payable to a worker is calculated in accordance with the formula set out in s 71 by reference to the level of permanent impairment, which must be assessed according to process specified by s 72.[6]

18. Given that a permanent impairment must have been caused by an injury in order to be compensable, whose responsibility is it to determine whether the impairment was "caused by an injury". Is that the sole function of the Work Health Court? Or is that a matter that can be determined by the Work Health Authority or by a medical practitioner in the first instance or by a panel of medical practitioners during the reassessment process?

19. There is nothing in s 72 which either explicitly or by implication empowers the Authority to make such a determination. Nor is there anything in the section that confers such a power upon a medical practitioner or panel of medical practitioners.

20. It is clear that the role of a medical practitioner in the first instance and a panel of medical practitioners at the reassessment stage is confined to an assessment of a worker's level of impairment – that is, an assessment of the level of mental or bodily abnormality or loss.

21. That medical practitioners have no role to play in determining whether a worker's impairment was "caused by an injury" is not only plain on the face of s 72, but is supported by the definition of "injury". In order for a permanent impairment to be compensable, that impairment must not only have been "caused by an injury", but there must have been an injury within the meaning of the Act.

[5] This conclusion accords with the submission made by the employer at [6] of its written submissions.
[6] See [6] of the employers' written submissions.

22. There can be no question that whether or not a worker has suffered an injury within the meaning of the Act is a matter to be determined by the Work Health Court. Whether or not a physical or mental injury arises out of or in the course of a worker's employment is an issue to be determined by the Court. Whether or not an injury is a disease or an aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease is again a matter for the Court. Similarly, whether or not an injury or disease suffered by a worker was a result of reasonable administrative or disciplinary action is a matter within the province of the Court.

23. As is apparent from the pleadings in these proceedings, whether the worker's alleged psychiatric injury is an injury within the meaning of the Act is a live issue, yet to be determined by the Court.[7]

24. Just as proof of a compensable injury is a matter for the Court, the question of compensation for permanent impairment is largely determined by extra – curial administrative procedures and the operation of the statute: ss 71 and 72. Notwithstanding that clear division of function, there is authority that indicates that in some instances the Work Health Court has jurisdiction to hear and determine disputes concerning permanent impairment assessments under the Act, including whether a permanent impairment relates to an injury under the Act.[8]

25. In *Clayton v Top End Wholesale Distributors* (unreported 22nd March 1996) Mr Trigg SM made the following observations, with which I concur:

> It is clear that there may be other issues in dispute between the parties other than the level of permanent impairment under s 71. These disputes can cover such matters as:
>
> - whether the permanent impairment relates to an "injury" under the Act;

[7] See [11] of the Statement of Claim and [11] of the Defence.
[8] See *Clayton v Top End Wholesale Distributors* per Trigg SM, which was cited with approval in *Pengilley v Northern Territory of Australia* (1999) NTMC 026 per Bradley CM at [23]. Significantly, in *Pengilley*, on appeal to the Supreme Court, neither the reasoning of Mr Trigg SM nor that of Mr Bradley CM was criticised.

- whether a person was notified of the assessment of the level of permanent impairment on a particular date;

- whether the permanent impairment has already been assessed (and no application to reassess has been made within the 28 days required) and therefore is not open to be further assessed or reassessed;

- whether the permanent impairment was obtained by fraud or other unlawful means.

> This list is not intended to be exhaustive, but simply an indication that the process is not necessarily always straightforward. Where disputes of this type occur, then in my view, the Work Health Court has power under s 94(1(a) to hear and determine these types of disputes. Further, it would seem to be open (in appropriate cases) for the Court to expand the 28 day requirement laid down in section 72(3) (section 94(2)) where the justice of the case required.

26. It follows that compensation payable under s 71 of the Act, and as a consequence of the administrative process established by s 72, is predicated upon the level of permanent having been caused by an injury which is compensable under the Act. The process under s 72 presupposes that the permanent impairment which is required to be assessed has been caused by a compensable injury, in respect of which the employer has accepted liability or the Court has made a determination. I agree with what Mr Trigg SM said in *Clayton v Top End Wholesale Distributors* (supra):

> Section 72 of the Act appears to be predicated on the assumption that liability for the "injury" (which has resulted in or materially contributed to the permanent impairment) has been accepted or found by the Court already. Accordingly, in my view, where the liability of the employer to pay compensation to the worker was either before the Court for determination, or had been properly disputed in accordance with the Act, it would be premature for any assessment of permanent impairment to be sought (by either side) until liability had been determined in accordance with the Act.

27. Accordingly, if an employer denies that the injury in question is compensable, and the Court has not yet determined that that injury is compensable, there is no statutory or legal basis for the commencement of the process established by s 72; any attempt to set in train the statutory process under such circumstances would be premature and not in compliance with the statutory scheme.

28. The worker argues that there is no need for the orders sought by the employer in its interlocutory application because of the operation of s 71(4) of the Act. The worker argues that by invoking the provisions of s 72(3) the employer has unnecessarily brought about the present interlocutory application. Further, the worker argues that in accordance with s 71(4)(a) no compensation of permanent impairment is payable under s 71 because the employer has not accepted liability in respect of the psychiatric injury (said to have caused the impairment), nor has the Court determined that the alleged injury is compensable. While that is the legal effect of s 71, the worker's arguments ignore the fact that it is the worker who has instigated the s 72 process, in derogation of the clear object or purpose of that process, and by so doing has embarked upon and set in train a flawed process, which is likely to create mischief.

29. The process established by s 72 is founded upon a simple assumption that the permanent impairment which is to be assessed was caused by a compensable injury. The process begins proceeds and ends on that assumption. Whether or not that assumed fact exists, once the process is embarked upon s 72 requires the parties and the Authority to act in accordance with the mandates of the section. There is nothing in the section or elsewhere in the Act that operates to terminate or suspend the statutory process, should the underlying assumption be incorrect. Furthermore, the Work Health Authority, not being a judicial body exercising judicial functions, has no power to make a determination as to the validity of any process commenced under ss 71 and 72 of the Act.

30. Therefore, the circumstances under which the administrative process was instigated in the present case has the potential to create mischief. If the employer were not to apply for a re-assessment within the prescribed time frame, then it would run the risk of being liable for the payment of compensation in accordance with s 71(4)(a). That subsection does not discriminate between processes under s 72 which are proper and those which

are flawed or misconceived. Furthermore, once the employer has applied for a re-assessment, the Authority is required as soon as practicable to refer the assessment to a panel of medical practitioners, even if the process is flawed.[9] That is reinforced by the terms of s 74 (3B). There is the potential for a panel of three medical practitioners to arrive at an assessment of permanent impairment which is fundamentally at odds with the intent of Subdivision C of Division 3 of Part 5 of the Act, and which gives rise to a compensation liability that not only offends the object of the compensatory scheme but also fundamental notions of justice.

31. As pointed out by counsel for the employer, the mischief might extend to the worker applying for a certificate from the Registrar of the Work Health Court under s 97(2A) of the Act and arranging for judgment to be entered under s 97(3) on the strength of the purported re-assessment.[10] Although the Court would undoubtedly have power to stay execution of any such judgment,[11] that such a situation could arise demonstrates the degree of mischief that a failure to follow the intent and spirit of the Act might engender.

ABUSE OF PROCESS AND STAY OF PROCEEDINGS

32. Pursuant to its interlocutory application the employer seeks orders which would effectively injunct the Work Health Authority from proceeding with the process prescribed by s 72 of the *Work Rehabilitation and Compensation*

[9] The phrase "as soon as practicable" is intended to impose upon the Work Health Authority a reasonably practical time limit for making the reference pursuant to s 72(3A) of the Act; and what is a reasonably practical time limit will vary according to the circumstances of the case: see *McMillan v Territory Insurance Office* (1988) 57 NTR 24 at 26-27; *Maddalozzo v Maddick* (1992) 84 NTR 27 at 36-37. Although all the surrounding circumstances would need to be taken into consideration in determining what was "as soon as practicable" I doubt that the fact that the initial assessment may not be an "assessment" as contemplated by the legislative scheme would be a relevant circumstance, such as to entitle the Work Health Authority to decline to refer the assessment under s 72(3A). By way of contrast, subsection (3B) relieves the Authority of the statutory obligation to refer an application under the circumstances set out in that provision. In my opinion, the circumstances of the present case fall outside the ambit of subsection (3B).

[10] See [14.5 c] of the employer's written submissions.

[11] See [14.5 c] of the employer's written submissions. Counsel for the employer also highlights other practical difficulties, such as reconciling a judgment by registration in relation to a permanent impairment assessment with a finding of the Court that the alleged injury is itself not compensable.

Act or alternatively stay the administrative process on the grounds of abuse of process.

33. In support of its application the employer made the following submission:

> The Work Health Court has no inherent jurisdiction, but it has implied jurisdiction to do all things necessary or convenient to be done to ensure the integrity of its processes and that its processes are not abused: see *Grassby v R* [1989] 87 ALR 618 at 628 per Dawson J. The worker's setting in motion the mechanism for a purported assessment of the level of "permanent impairment" due to the alleged psychiatric injury while the question of whether the psychiatric injury is an "impairment" at all (ie due to an "injury") is a live issue yet to be determined in the present proceeding (instituted by the worker in this Court) is just such an abuse of process/inroad on the integrity of the Court's proceeding.[12]

34. The power of courts which are a creature of statute – such as the Work Health Court – to stay proceedings to prevent an abuse of process is far from clear.

35. Such courts do not have an inherent jurisdiction, like superior courts such as the Supreme Court of the Northern Territory, to stay proceedings for an abuse of process. If the Work Health Court has such power it can only be derived by necessary implication from the jurisdiction and powers conferred upon the Court by the *Worker Rehabilitation and Compensation Act.*

36. Section 94(1) of the Act provides:

> The Court has the power to hear and determine –
>
> (a) claims for compensation under Part 5 and all matters and questions incidental to or arising out of such claims; and
>
> (b) all other matters required or permitted by this Act to be referred to the Court for determination,
>
> and such other powers as are conferred on it by or under this or any other Act.

37. Although it would seem that s 94(1) of the Act is couched in such broad terms as to confer upon the Court an implied power to stay proceedings in

[12] See [14.5 d] of the employer's written submissions.

order to prevent an abuse of process, whether or not that power extends to staying extra curial administrative proceedings pursuant to s 72 of the Act is doubtful. It is one thing for a court to control its own procedures. It is quite another matter for a court to reach beyond its statutory functions and control a non curial and purely administrative process – even if that process is related to the curial functions. It is important to keep in mind that the doctrine of abuse of process is concerned with a court preventing an abuse of *its procedures* and defeating any attempted thwarting of *its process*.

38. I accept that it could be argued that there has been an abuse of court process on the basis that by instigating the process under s 72 of the Act the worker has attempted to usurp the function of the Court, which is to determine whether or not there is a compensable injury. However, I am not convinced that that provides a sufficient basis for staying the proceedings – particularly when that argument was not advanced by either the employer or the Work Health Authority.

THE APPLICATION PURSUANT TO SECTION 104 OF THE ACT

39. Due to the doubt that surrounds the power of the Work Health Court to stay the proceedings that have been prematurely commenced under s 72 of the Act, I now turn to consider any relief the employer can be afforded by way of its application brought pursuant to s 104 of the *Workers Rehabilitation and Compensation Act*.

40. Section 104(1) of the Act provides:

> For the purposes of the Court exercising its powers under section 94(1)(a), a person may, subject to this Act, commence proceedings before the Court for the recovery of compensation under Part 5 or for an order or ruling in respect of a matter or question incidental to or arising out of a claim for compensation under that Part.

41. That section empowers the Court to make an order or ruling in respect of a matter or question incidental to or arising out of a claim under Part 5 of the Act.

42. As observed by Hugh Bradley CM in *Pengilley v Northern Territory of Australia* (1999) NTMC 026 at [28.3] "s 94 and s 104 specifically entitle a claim to be brought before the Court for compensation under Part V and thus for compensation for permanent impairment". It follows that the Court can, pursuant to those provisions, make orders or give rulings in respect of matters or questions incidental to or arising out of a claim under Part 5 of the Act, including a claim for compensation for permanent impairment.

43. In the present case the worker purported to make a claim for compensation for permanent impairment. A dispute subsequently arose between the parties – which also involved the Work Health Authority – as to whether the claim was in accordance with Subdivision C of Part 5 of the Act, which deals with compensation for permanent impairment. In my opinion, it is within the jurisdiction of the Work Health Court to give a ruling as to the validity of the process commenced by the worker pursuant to ss 71 and 72 of the Act. The validity of the administrative process set in train by the worker is a matter or question that is incidental to or arises out of the worker's claim for compensation.

44. In *Clayton v Top End Distributors* (supra) Mr Trigg SM held that the Work Health Court has power under s 94(1)(a) of the then *Work Health Act* [13] to hear and determine disputes concerning claims for compensation for permanent impairment. With respect I adopt that view, adding that the Court's power to resolve disputes such as the present dispute is reinforced by the facilitative powers vested in the Court by s 104(1) of the Act, in particular the power to make rulings.

45. The present dispute is also incidental to or arises out of the substantive claim for compensation. As noted earlier, in order to claim compensation for permanent impairment such impairment must have been caused by an "injury" within the meaning of the *Workers Rehabilitation and*

[13] Section 94(1)(a) of the *Work Health Rehabilitation and Compensation Act* is in identical terms.

Compensation Act. As the causative injury remains in dispute, the purported claim for compensation for permanent impairment is incidental to and arises out of the substantive claim for compensation. In that further regard the Court has by reason of ss 94(1)(a) and 104(1) power to give a ruling as to the validity of the process commenced by the worker pursuant to ss 71 and 72 of the Act.

RULING UNDER SECTION 104 OF THE ACT

46. I make the following rulings pursuant to s 104(1) of the Act:

- The assessment of the level of permanent impairment by Dr Walton was not an assessment for the purposes of s 72(2) of the Act because it did not conform to the legislative scheme in relation to compensation for permanent impairment. The assessment by the medical practitioner did not conform to that scheme because the injury said to have caused permanent impairment remains a live issue in the substantive proceedings, and is yet to be determined by the Work Health Court. The assessment is a nullity and of no effect.

- As a consequence of the invalidity of the assessment of the level of permanent impairment the employer was under no legal obligation to apply, pursuant to s 72(3), to the Work Health Authority for a reassessment of that level of impairment. The employer's application for reassessment is also a nullity and of no effect.

- As a consequence of the foregoing the Work Health Authority was not required to refer the employer's application to a panel of three medical practitioners to reassess the level of permanent impairment. Therefore the Authority is not required to proceed with the reference.

- The administrative process purportedly commenced pursuant to ss 71 and 72 of the Act is a nullity and of no effect.

47. I will hear the parties as to whether any further orders are necessary to dispose of the s 104 application.

48. Given the uncertainty surrounding the power of the Court to grant the stay sought in the employer's original application, I dismiss that application.

49. In due course I will hear the parties on the question of costs in relation to the employer's original application and its subsequent application brought pursuant to s 104 of the Act.

Dated this 10th day of July 2009

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Dr John Allan Lowndes
STIPENDIARY MAGISTRATE