CITATION:	*North Australian Helicopters v Matthew Ray Gane* [2021] NTLC007
PARTIES:	NORTH AUSTRALIAN HELICOPTERS V MATTHEW RAY GANE
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	WORK HEALTH
CLAIM NO:	2020-00535-LC
DELIVERED ON:	24 February 2021
DELIVERED AT:	DARWIN
HEARING DATE:	4 March 2020
DECISION OF:	Judge John Neill

CATCHWORDS:

Approach to assessing and reassessing percentage permanent impairment of the whole person in accordance with Subdivision C of Division 3 of Part 5 of the Return To Work Act.

Return To Work Act sections 70, 71, 72 and 72A

Clayton v Top End Wholesale Distributors (unreported 22 March 1996) per Magistrate Trigg of the Work Health Court

Taylor Enterprises v Pointon & Work Health Authority [2009] NTMC 29

Taal Johanssen v Buslink Vivo Pty Ltd [2018] NTLC 23

NT of A v Wendy Pengilly [2004] NTCA 4

REPRESENTATION:

Counsel:

Worker:	Ben O'Loughlin
Employer:	Peggy Cheong

Solicitors:

Worker:	Piper Ellis Lawyers
Employer:	Hunt & Hunt Lawyers

Judgment category classification:	B
Judgment ID number:	007
Number of paragraphs:	53

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

No. 2020-00535-LC

BETWEEN

MATTHEW RAY GANE

WORKER

AND

NORTH AUSTRALIAN HELICOPTERS

EMPLOYER

REASONS FOR DECISION

(Delivered 24 February 2021)

JUDGE JOHN NEILL

INTRODUCTION

1. This proceeding was commenced by North Australian Helicopters ("the Employer") as a vehicle in which to seek a ruling as to the correct way to approach an assessment and/or a reassessment of the percentage permanent impairment of the whole person when more than one type of injury is involved.

2. Matthew Ray Gane (“the Worker”) suffered injuries ("the injuries") in a helicopter crash on 12 November 2015 which occurred in the course of his employment with the Employer. He made a claim pursuant to the *Return To Work Act* ("the Act") in respect of the injuries and the Employer accepted that claim.

3. The injuries included physical damage to the Worker's brain, a right brachial plexus injury and orthopaedic injuries including a right pelvic fracture. The physical injury to the Worker's brain resulted in long-term neuropsychological/cognitive impairments.

THE ASSESSMENT BACKGROUND

4. The Employer arranged to have the Worker assessed by consultant neurologist and rehabilitation physician Dr L J du Plessis who provided a report dated 7 November 2018. In that report Dr du Plessis did not make any assessment of the Worker's percentage permanent impairment of the whole person arising from his

orthopaedic injuries and he did not make any assessment of the Worker's percentage permanent impairment of the whole person arising from his neuropsychological/cognitive injuries. Dr du Plessis specifically left those two areas of injury suffered by the Worker to be assessed by the appropriate specialists.

5. Dr du Plessis in his report of 7 November 2018 did make an assessment of the Worker's percentage permanent impairment of the whole person arising from his neurophysical injuries. He found a 9% permanent impairment of the whole person solely in respect of the neurophysical injuries sustained by the Worker.

6. The Employer subsequently arranged to have the Worker assessed by consultant orthopaedic surgeon Associate Professor Peter Steadman in respect of his orthopaedic injuries. Professor Steadman provided a report dated 7 June 2019. He found the Worker had a 0% permanent impairment of the whole person in respect of the orthopaedic injuries suffered in the helicopter crash.

7. The solicitors for the Employer served the report of Professor Steadman on the solicitors for the Worker on 22 June 2019. On 19 July 2019 the solicitors for the Worker wrote to NT WorkSafe advising the Worker was aggrieved by Professor Steadman's assessment and that he sought a reassessment. That request for a reassessment was made within 28 days of service of the report, as required by subsection 72(3) of the Act.

8. By letter dated 24 July 2019 NT WorkSafe advised the solicitors for the Worker that it would organise a reassessment panel of three medical practitioners in respect of Professor Steadman's assessment of the orthopaedic injuries.

9. In the meantime, the Employer had provided Dr du Plessis with Professor Steadman's report dated 7 June 2019, and also with a report dated 27 June 2019 by consultant clinical neuropsychologist Mr Martin Jackson. Dr du Plessis provided his second report, this time dated 17 July 2019. In his second report Doctor du Plessis noted that Professor Steadman had arrived at a 0% permanent impairment of the whole person as a consequence of orthopaedic injuries. He noted that Mr Jackson had arrived at a 5% figure for the Worker's impairment related to mental status and a 5% figure for emotional and behavioural disorders. Doctor du Plessis formed the view that these two figures should be taken as one overall figure of 5% for the Worker's percentage permanent impairment of the whole person arising from his neuropsychological/cognitive injuries. Dr du Plessis then took Professor Steadman's 0% figure, and Mr Jackson's figures reduced to 5%, he then arrived at a new figure for the Worker's neurophysical injuries, and he merged all three to arrive at a new whole person impairment figure of 13%.

10. The solicitors for the Employer served the second report of Dr du Plessis dated 17 July 2019 on the solicitors for the Worker, on 31 July 2019. On 26 August 2019, within 28 days of service of this second report, the solicitors for the Worker applied to NT WorkSafe asking it to find that the assessment by Dr du Plessis in his report of 17 July 2019 was not properly conducted in accordance with the prescribed Guides, which is a function granted to NT WorkSafe pursuant to subsection 72(3B) of the Act. The solicitors for the Worker in the alternative asked NT WorkSafe to organise a panel reassessment of Dr du Plessis' figure of 13%.

11. On 5 September 2019 NT WorkSafe advised that it was not satisfied that the 13% assessment by Dr du Plessis in his second report had been properly conducted in accordance with the Guides. In addition, it advised that the earlier request for a panel reassessment of the 0% figure of Professor Steadman would proceed.

12. The solicitors for the Employer then corresponded with the solicitors for the Worker and with NT WorkSafe and all parties agreed to a delay of any reassessment panel for the orthopaedic assessment while the solicitors for the Employer obtained a further report from Dr du Plessis. As part of this process, the solicitors for the Employer obtained a supplementary report from consultant clinical neuropsychologist Mr Martin Jackson, dated 9 October 2019, and then a "clarification report" from Mr Jackson, dated 8 November 2019. In those reports Mr Jackson stated his view that the correct application of the NT WorkSafe Guidelines would result in a 10% whole person impairment in respect of the Worker's neuropsychological/cognitive injuries, not the 5% as previously interpreted by Dr du Plessis.

13. Dr du Plessis then provided a third report to the solicitors for the Employer, this one dated 17 December 2019. In this report he considered the second and third reports of Mr Jackson and accepted Mr Jackson's conclusion of a 10% whole person impairment in respect of the Worker's neuropsychological/cognitive injuries. Dr du Plessis went on to provide a combined percentage permanent impairment of the whole person in respect of the Worker's neurophysical injuries and his neuropsychological/cognitive injuries, of 18%. This third report of Dr du Plessis was served on the solicitors for the Worker on 20 December 2019.

14. By letter dated 23 December 2019 the solicitors for the Worker wrote to the solicitors for the Employer advising that the Worker accepted the figure of 18% for those two impairments and that he would now proceed with his request for a panel reassessment of Professor Steadman's 0% assessment of the orthopaedic injuries. The parties agreed however that the panel reassessment would not proceed while they explored "global settlement options". The Employer paid the lump sum appropriate to an 18% assessment to the solicitors for the Worker on 27 February 2020.

15. It appears that no global settlement was achieved because on 30 January 2020 the solicitors for the Worker requested NT WorkSafe to proceed with organising the orthopaedic reassessment panel. NT WorkSafe advised by letter dated 7 February 2020 that it was making the appropriate arrangements for the orthopaedic reassessment.

16. On 17 February 2020 the solicitors for the Employer commenced this proceeding by filing an initiating Application together with an interlocutory application and supporting affidavit. The Employer sought a stay of the reassessment panel for the orthopaedic reassessment. It sought a ruling that any reassessment had to be of the entire combined whole person impairment and not of one component only of that whole person impairment, and it sought a consequential direction that NT WorkSafe arrange a reassessment panel to reassess the entirety of the Worker's whole person impairment.

17. NT WorkSafe was made aware of this proceeding and the Orders sought and it agreed to take no action to appoint a reassessment panel in respect of the orthopaedic assessment until the outcome of the proceeding.

18. On 27 March 2020 the solicitors for the Employer filed an amended interlocutory application in substitution for the original interlocutory application. The Employer now seeks the following:

> "*A declaration that the whole person impairment assessment provided by Dr du Plessis in his report dated 17 December 2019 is a combined whole person impairment assessment for the respondent worker that included the whole person impairment assessments for the respondent worker provided by Mr Martin Jackson and Associate Professor Peter Steadman"*.

19. Accordingly, this is the only question now before the Court arising out of this history.

JURISDICTION

20. The question of compensation for permanent impairment is largely determined by extra-curial administrative procedures laid down in Subdivision C of Division 3 of Part 5 of the Act – that is, in sections 70 to 72A of the Act. However, there is authority which establishes that the Work Health Court has jurisdiction to hear and determine disputes concerning permanent impairment assessments under the Act. An early authority to this effect is to be found in *Clayton v Top End Wholesale*

Distributors ("*Clayton*") (unreported 22 March 1996) where Magistrate Daynor Trigg (as he then was) observed:

> "*It is clear that there may be other issues in dispute between the parties other than the level of permanent impairment under section 71. These disputes can cover such matters as:*
>
> *"whether the permanent impairment relates to an 'injury' under the Act;*
>
> *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 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 section 94(1)(a)* (since repealed and re-enacted in section 14 of the *Work Health Administration Act*) *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) where the justice of the case required".*

21. In *Taylor Enterprises (NT) v Pointon & Work Health Authority* [2009] NTMC 29 Magistrate Dr John Lowndes (as he then was) in paragraph 25. specifically concurred with the observations of Magistrate Trigg in *Clayton* set out above. In paragraph 43. Dr Lowndes went on specifically to rule "*… 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 sections 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".*

22. Accordingly I am satisfied and I rule that the Work Health Court does have jurisdiction to consider the Employer's amended interlocutory application dated 27 March 2020 which seeks an interpretation of the process provided for in sections 71 and 72 of the Act.

23. It is clear from the history I have set out above that my Decision in this matter will be of interest to NT WorkSafe/the Authority and may affect the way in which it might proceed in respect of the Worker. For this reason, it might be asked why was NT WorkSafe not made a party to this proceeding? I have previously ruled in *Taal Johannsen v Buslink Vivo Pty Ltd* [2018] NTLC 23 at paragraph 43. that the Work Health Court does not have jurisdiction either to entertain an initiating

Application against the Work Health Authority/NT WorkSafe or to join it as a party to existing proceedings, where the issue comes under Part 5 of the Act, which includes sections 70 to 72A inclusive of the Act.

ANALYSIS

24. At the time the Employer filed its initiating Application in this proceeding it also filed an Index of Documents. That Index of Documents attached the 3 reports of Dr du Plessis identified above, the report of Associate Professor Steadman dated 27 May 2019 and two reports of neuropsychologist Martin Jackson, being those dated 27 June 2019 and 8 November 2019. No other documents or correspondence were included in the Index of Documents.

25. At the same time, the Employer filed the affidavit of Kate Elizabeth Frost promised 17 February 2020 in support of its interlocutory application dated 17 February 2020. That affidavit and its 18 annexures neither refer to nor identify any service of the first report of Dr du Plessis dated 7 November 2018 on the solicitors for the Worker or on the Worker personally.

26. The Employer filed a further affidavit in the proceeding, this time promised by Ms Peggy Cheong on 18 March 2020. That affidavit and its three annexures neither refer to nor identify any service of the first report of Dr du Plessis dated 7 November 2018 on the solicitors for the Worker or on the Worker personally.

27. The Worker filed an affidavit in the proceeding promised by Alanna Mariah Florence Grimster on 27 March 2020. That affidavit and its 18 annexures neither refer to nor identify any service of the first report of Dr du Plessis dated 7 November 2018 on the solicitors for the Worker or on the Worker personally.

28. Solicitors for the Employer filed written submissions dated 18 March 2020 signed by Ms Peggy Cheong of Hunt & Hunt. Nowhere in those submissions is it identified when or even if the first report of Dr du Plessis dated 7 November 2018 was served on the solicitors for the Worker or on the Worker personally. I note that report is identified in a chronology of events provided by Ms Cheong in the submissions but without any mention of its being served on the Worker. This is in contrast with later items in that chronology which refer specifically to service of other reports on the solicitors for the Worker.

29. Solicitors for the Worker filed written submissions dated 27 March 2020 settled by Mr Ben O'Loughlin of counsel. Nowhere in those submissions is it identified when or even if the first report of Dr du Plessis dated 7 November 2018 was served on the solicitors for the Worker or on the Worker personally.

30. On the evidence before me I am unable to find that the first report of Dr du Plessis being dated 7 November 2018 was served on the solicitors for the Worker or on the Worker personally at any time prior to 20 December 2019 when the solicitors

for the Employer served the third report of Dr du Plessis dated 17 December 2019 on the solicitors for the Worker. Accordingly, I find that the first report of Dr du Plessis dated 7 November 2018 plays no part in the processes established by sections 70 to 72A of the Act as they have applied in this matter.

31. This means and I find on the evidence before me that the first assessment by a medical practitioner of the Worker's level of permanent impairment for the purposes of section 71 of the Act which was served on the Worker or on his solicitors was the report of orthopaedic surgeon Associate Professor Peter Steadman dated 7 June 2019. This was served on 22 June 2019.

32. I am satisfied and I find that this was an assessment limited to the Worker's orthopaedic injuries.

33. I am satisfied and I find that the solicitors for the Worker applied to NT WorkSafe on 19 July 2019 for a reassessment of Associate Professor Steadman's assessment, within 28 days in accordance with subsection 72(3) of the Act.

34. I am satisfied and I find that NT WorkSafe proceeded on the basis that it was satisfied that the assessment by Associate Professor Steadman was properly conducted in accordance with the Guides and so it proceeded to take steps to set up a reassessment panel.

35. I am satisfied and I find that the Employer proceeded to obtain the second report dated 17 July 2019 from Dr du Plessis which purported to be a whole person impairment assessment dealing with the Worker's orthopaedic injuries, his neurophysical injuries and his neuropsychological/cognitive injuries. I find that this report was served on the solicitors for the Worker on 31 July 2019. I find that those solicitors within 28 days of that service applied to NT Work Safe for a determination that the assessment was not properly conducted in accordance with the Guides. I find that on 5 September 2019 NT WorkSafe advised the solicitors for the Worker of its determination that the assessment of Dr du Plessis in his report dated 17 July 2019 was not properly conducted in accordance with the Guides.

36. Because subsection 72(3) of the Act allows a worker 28 days from the date of service of a report in which to apply for assessment, the employer may not within those 28 days take any further step with respect to that report for the purposes of Subdivision C of Division 3 of Part 5 of the Act. The employer must await the worker's election within those 28 days to seek a reassessment and/or to challenge whether the report was properly conducted in accordance with the prescribed Guides.

37. In this case, the Employer within a period including those 28 days provided a copy of the orthopaedic assessment report of Associate Professor Steadman to Dr du Plessis, with the request that he take it into account in arriving at a new global figure for the Worker's percentage permanent impairment of the whole person in respect of his neurophysical, neuropsychological/cognitive and orthopaedic injuries. I find that this step, with respect to the orthopaedic assessment, was premature.

38. For the reasons I have identified in paragraphs 35 and 37 above, I am satisfied and I find that the assessment set out in the report dated 17 July 2019 of Dr du Plessis plays no part in the processes established by section 70 to 72A of the Act as they have applied in this matter.

39. I am satisfied and I find that after 5 September 2019 the representatives of the Employer and of the Worker liaised with each other and with NT WorkSafe and agreed to delay convening the panel which was to provide a reassessment of percentage permanent impairment arising from the orthopaedic injuries. This was done to allow a further assessment to be conducted by Dr du Plessis.

40. I find that Dr du Plessis provided a third report which was dated 17 December 2019 and served on the solicitors for the Worker on 20 December 2019. This report found a whole person impairment of 18% in respect of the Worker's neurophysical injuries and his neuropschological/cognitive injuries.

41. I find that the solicitors for the Worker accepted the 18% whole person impairment figure set out in the report of Doctor du Plessis dated 17 December 2019, but on the basis that the panel reassessment for the Worker's orthopaedic injuries remained outstanding – see the email dated 23 December 2019 from Alanna Grimster to Jaimie-Lee Tinning being annexure A G–11 to the affidavit of Ms Grimster promised 27 March 2020. I find that the Employer paid the appropriate lump sum on the basis of this 18% assessment to the solicitors for the Worker on 27 February 2020.

42. In the Employer's submissions dated 18 March 2020 Ms Peggy Cheong submits in subparagraphs 2(b) and (c) that because Dr du Plessis had previously been provided with the report of Associate Professor Steadman and the reports of Mr Martin Jackson and he had previously been asked to take them into account, this meant that his third report dated 17 December 2019 in fact took all these reports into account. She submits Dr du Plessis in his third report was purporting to provide a combined whole person impairment assessment for the Worker, and that he did in fact take into account the whole person impairment assessment provided by Associate Professor Steadman.

43. I accept that Dr du Plessis in his report of 17 December 2019 did take all of the reports of Mr Martin Jackson into account. I do not accept that Doctor du Plessis took the assessment of consultant orthopaedic surgeon Associate Professor

Steadman into account. This is because of my finding in paragraph 38 above. It is also because Dr du Plessis specifically states at point 5 on page 4 of his report dated 17 December 2019 as follows: "*Thus, my assessment of the whole person impairment, excluding the orthopaedic injuries which I do not have a rating for, would be…"*. Doctor du Plessis concludes at the foot of page 4 of that report as follows: *"… The combined whole person impairment would now be… 18%. To this, must be added his degree of orthopaedic impairment"*.

44. I find that the whole person impairment of 18% set out in the report of Dr du Plessis dated 17 December 2019 specifically did not take into account the 0% percentage permanent impairment for orthopaedic injuries found by Associate Professor Steadman in his earlier report. I find that Dr du Plessis did not take into account any assessment of the Worker's orthopaedic impairment when arriving at his 18% figure. I find Dr du Plessis in his report dated 17 December 2019 specifically contemplated that a further assessment of the Worker's percentage permanent impairment for orthopaedic injuries was to be ascertained and then added to Doctor du Plessis' 18% assessment.

45. I find that the report of Dr du Plessis dated 17 December 2019 is a report assessing the level of the Worker's permanent impairment for the purposes of section 71 of the Act. However, I find that this report did not, and indeed could not, deal with an assessment of the Worker's percentage permanent impairment of the whole person arising from his orthopaedic injuries. This is because the report of Associate Professor Steadman dealing with that issue had already been served by the Employer on the Worker, it had already been accepted by NT WorkSafe as having been properly conducted in accordance with the Guides, and it was already the subject of an application by the Worker within time for a reassessment panel, which application NT WorkSafe had already accepted.

46. I have earlier in these Reasons found that Dr du Plessis' previous two reports do not form part of the processes established by sections 70 to 72A of the Act in this case. I find that for the purposes of those sections of the Act, Dr du Plessis' third report dated 17 December 2019 stands alone and is to be considered independently of his previous two reports.

47. I find that the Worker did not within 28 days or at all seek a reassessment of the 18% figure arrived at by Dr du Plessis in his report dated 17 December 2019. Accordingly, that assessment figure for the two categories of injuries to which it applies is no longer subject to challenge or reassessment.

CONCLUSION

48. On the basis of my findings there is no longer any reason to delay establishing a medical panel to reassess the 0% permanent impairment figure arrived at by Associate Professor Steadman in his report dated 7 June 2019 in respect of the Worker's orthopaedic injuries. NT WorkSafe is free to make the appropriate arrangements for this to take place.

49. Once that medical panel will have arrived at its reassessment figure in respect of the Worker's orthopaedic injuries, and if that reassessment figure be greater than 0%, then the medical panel can be asked in accordance with the Guides to merge its reassessment figure with the 18% figure arrived at by Doctor du Plessis in his report dated 17 December 2019. This will result in a global figure for the Worker's overall percentage permanent impairment of the whole person arising from the injuries. The Worker would in that case be entitled to be paid in accordance with that global figure calculated in 2021, less the amount he was paid on 27 February 2020 – see *NT of A v Pengilly* [2004] NTCA 4.

50. The Employer has been wholly unsuccessful in this proceeding. The Worker is entitled to his costs.

ORDERS

51. The Employer's amended interlocutory application dated 27 March 2020 is dismissed.

52. The proceeding is dismissed.

53. The Employer pay the Worker's costs of and incidental to the proceeding including his costs of and incidental to the Employer's original interlocutory application and its amended interlocutory application, to be taxed in default of agreement at 100% of the Supreme Court scale, certified fit for senior/junior counsel.

Dated this 24th day of February 2021

JOHN NEILL
WORK HEALTH COURT JUDGE