CITATION:	*Denese Woods v Northern Territory of Australia* [2023] NTWHC 08
PARTIES:	Denese WOODS v NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	WORK HEALTH
FILE NO(s):	2022-02801-LC
DELIVERED ON:	02 November 2023
DELIVERED AT:	Darwin
HEARING DATE(s):	18 July 2023
DECISION OF:	Acting Judge Murphy

CATCHWORDS:

Workers' Compensation – Permanent Impairment – validity of the Authority's referral of a medical practitioner's assessment of a worker's level of permanent impairment to a panel of medical practitioners - Work Health Court's jurisdiction to determine the validity of the Authority's referral permanent impairment assessment to a panel of medical practitioners - Assessment of worker's level of permanent impairment undertaken by a panel under s 72 of the *Return to Work Act 1986* (NT) – Whether the s 72(4) prohibition on review of the panel's assessment of the level of permanent impairment applies to a medical practitioner's later assessment of a Worker's level of permanent impairment - Whether a Worker after having received permanent impairment compensation under the Act may recover additional compensation for an increased level of permanent impairment should a workers level of permanent impairment deteriorate - Whether permanent impairment caused by separate compensable injuries can be combined.

REPRESENTATION:

Counsel:

Worker:	Mr McConnell SC
Employer:	Mr Roper SC

Solicitors:

Worker:	Halfpennys
Employer:	Minter Ellison

Decision category classification:	A
Decision ID number:	[2023] NTWHC 08
Number of paragraphs:	62

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

No. 202202801LC

BETWEEN:

Denese WOODS

Worker

AND:

NORTHERN TERRITORY OF AUSTRALIA

Employer

REASONS FOR DECISION

(Delivered 2 November 2023)

ACTING JUDGE MURPHY

FACTUAL BACKGROUND

1. The Worker is and was at all material times employed by the Employer as a schoolteacher and was therefore a "worker"[1] as defined in the *Return to Work Act 1986* (NT) ("**the Act**"). [2]

2. On 21 February 2017, the Worker, whilst teaching at Katherine Highschool,[3] sustained a mental injury during the course of her employment with the Employer (the **"First Injury"**).[4]

3. On 28 February 2017, the Worker made a claim for workers' compensation for the First Injury. The claim related to the Worker's perception of threatened violence and risk to her safety from students at Katherine Highschool.[5]

4. On 21 March 2017, the Employer accepted liability for the First Injury[6] and benefits were paid.[7]

5. The Worker returned to full time pre-injury duties with the Employer in or about March 2017.[8]

[1] *Return to Work Act 1986* (NT), section 3B.
[2] Statement of agreed facts (**SOAF**), filed 02.05.2023, at [1].
[3] Worker's written submissions, filed 21.06.2023, at [13].
[4] SOAF at [2].
[5] Court Book (**CB**) at pp 12 - 21 (Worker's compensation claim form).
[6] Ibid, at pp 28 – 30 (Letter from TIO to Worker).
[7] SOAF at [3]. Worker's written submissions, filed 21.06.2023, at [13].
[8] SOAF, at [4].

6. On 22 June 2020, the Worker, whilst teaching at Palmerston College, sustained a further mental injury during the course of her employment with the Employer ("the **Second Injury**").[9]

7. On 12 March 2020, the Worker made a claim for workers' compensation for the Second Injury.[10] The claim related to the Worker's perception of threatened violence and risk to her safety from students at Palmerston College and additional perceptions of bullying and lack of peer support.[11]

8. Liability for the Second Injury was initially disputed by the Employer.[12]

9. The Worker commenced proceedings in the Work Health Court with regards the Second Injury (file 2020-2567-C).[13]

10. On 24 August 2020, the Worker served a permanent impairment assessment report upon the Employer. The assessment report was authored by psychiatrist, Dr Ash Takyar, it was dated 14 August 2020 ("**Dr Takyar's First Report**") and assessed the Worker's permanent impairment as being a whole person impairment (**WPI**) with regards the:[14]

    a. First Injury of 11%; and

    b. Second Injury of 11%.

11. On 24 September 2020, the Employer referred Dr Takyar's First Report to the Authority for a panel assessment.[15]

12. On 14 October 2020, by letter to the Employer, the Authority confirmed that the assessment of the Worker's WPI contained in Dr Takyar's First Report was properly conducted and in accordance with the approved guides, and that said assessment would be referred to a panel for reassessment of the Worker's WPI.[16]

13. A panel was then convened by the Authority. The Panel consisted of Dr B Jansen, Dr N Verman and Dr J Spear. On 5 February 2021, the Panel published its report ("**Panel Report**") and issued it to the parties. The Panel Report contained the Panel's assessment which confirmed that the Worker's WPI with regards the:[17]

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[9] ibid at [5]. NOTE: whilst the statement of agreed facts identify the date of injury as being 22.06.2020, the workers compensation claim form indicates that the Worker's knowledge of the injury occurred on 12.02.2020 (see p33 CB). Further, the Worker submitted the workers compensation claim form on 12.03.2020 (CB at p 35) and was countersigned by the Principal of Palmerston College some two days prior on 10.03.2020 (CB at p 37).
[10] Worker's written submissions, filed 21.06.2023, at [14]. CB at pp 31 - 41 (Workers compensation claim form).
[11] Worker's written submissions, filed 21.06.2023, at [14]. CB at pp 31 - 41 (Workers compensation claim form). SOAF at [5].
[12] SOAF at [6].
[13] CB at 3 - 6 (Statement of claim, file 2022-02801-LC, filed 19.01.2023, at [9]).
[14] SOAF at [7]. NOTE: Dr Takyar's first report was received by the Employer through Minter Ellison on 28.08.2020 (CB100- 101 - letter from Minter Ellison to NT WorkSafe).
[15] SOAF at [8]. CB at pp 100 - 101 (letter from Minter Ellison to NT WorkSafe).
[16] CB at p 102 (letter NT WorkSafe to Minter Ellison).
[17] SOAF at [9]. CB pp 77 - 89 (Panel Report).

a. First Injury was 5%; and

b. Second Injury was 12%.

14. On 1 March 2021, the Employer wrote to the Worker confirming that payment with regards the Panel's assessment of 5% WPI for the First Injury would be paid but denied liability with regards the Panel's assessment of 12% WPI for the Second Injury.[18]

15. On 7 April 2021, the Employer paid the Worker in respect of the 5% WPI for the First Injury.[19]

16. On 10 December 2021, the Employer accepted liability for the worker's Second Injury.[20]

17. On 13 December 2021, the Work Health Court proceedings (file no. 2020-2567-C) with regards the Second Injury were resolved by way of a consent order.[21]

18. Dr Takyar provided a further report dated 3 May 2022 ("**Dr Takyar's Second Report**") in which he assessed the Worker's WPI with regards the:[22]

a. First Injury was (by way inference) 9%; and

b. Second Injury was 13%.

19. On 15 June 2022, the Employer, without admission, paid the Worker in respect of the 13% WPI for the Second Injury.[23]

The Worker's contentions

20. The Worker contends that:

a. Compensation for permanent impairment under the Act is founded upon permanent impairment not injury.[24]

b. It is irrelevant that the extent of the permanent impairment suffered by the Worker was caused by two separate injuries because both injuries occurred in the course of the Worker's employment with the same Employer. Consequently, the Employer is

[18] CB at p 103 (letter Minter Ellison to Halfpenny's). SOAF at [11].
[19] SOAF at [10]. NOTE: Notwithstanding the assessment of 5% the Worker's WPI, pursuant to section 71(3) of the Act, the compensation payable to the Worker is reduced to 2%. Consequently the compensation paid to the Worker by the Employer was 2% of the Worker's WPI with regards the First Injury ($7,078.66).
[20] SOAF at [12].
[21] CB at pp 3- 6 (Statement of claim, file 2022-02801-LC, filed 19.01.2023, at [15]). CB at p 53A (Consent Order).
[22] SOAF at [13].
[23] SOAF at [14]. NOTE: Notwithstanding the assessment of 13% of the Worker's WPI, pursuant to section 71(3) of the Act, the compensation payable to the Worker is reduced to 8%. Consequently the compensation paid to the Worker by the Employer was 8% of the Worker's WPI with regards the Second Injury ($28,208.12).
[24] Worker's written outline of submissions, 21.06.2023, at [4] to [9].

solely liable to compensate the Worker and questions of contribution or exclusion of non-compensable causes do not arise.[25]

c. The separate assessment of the Worker's WPI with regards the First Injury and Second Injury by the Panel and Dr Takyar constitutes an incorrect application of paragraphs 1.6.3 and 11.10 of the *NT WorkSafe Guidelines for the Evaluation of Permanent Impairment* (the **Guidelines**) as deductions of pre-existing impairment levels are limited to pre-existing non-compensable impairments.[26]

d. The correct methodology for assessing the Worker's WPI with regards the First Injury and Second Injury in this case was to assess the Workers WPI as a single WPI (in this case 22%) then deducting any previous payment made to the Worker by the Employer for compensable impairments.[27]

e. There is nothing in the Act which indicates that an assessment of permanent impairment can only occur once. Consequently, there is nothing preventing a worker applying for an assessment of permanent impairment entitling him or her to compensation at any time, including additional compensation for an increased level of permanent impairment should that occur.[28]

f. The First Injury and the Second Injury constitute a single permanent impairment to the Worker of 22% WPI, and as a consequence the Worker is entitled to workers compensation for permanent impairment of 22% WPI.[29]

g. Alternatively, if the Panel Report assessment of 5% WPI is valid with regards the First Injury, the Worker is entitled to permanent impairment compensation of 17% WPI.[30]

The Employer's contentions

21. The Employer contends that:

a. An injury becomes compensable under the Act by court order or by an employer accepting liability for that injury. A Worker's right to an assessment of permanent impairment under Part 5, Division 3 Subdivision C of the Act is predicated upon that impairment being caused by a compensable injury. [31]

b. An assessment of a Worker's permanent impairment is limited to an impairment that was caused by the compensable injury.[32] In this case there were two separate compensable injuries, namely the First Injury and the Second Injury. To treat the two separate injuries as giving rise to one compensable lump sum permanent impairment assessment is contrary the proper operation of the Act. [33]

[25] Ibid at [27].
[26] Ibid at [36] to [47].
[27] Ibid at [48] and [49].
[28] ibid at [10] to [11].
[29] Worker's written outline of submissions, 21.06.2023, at [33], [48] [53] and [64].
[30] Ibid at [55] and [65].
[31] Employer's written submissions, 10.07.2023, at [8] and [9].
[32] Ibid at [14].
[33] Ibid at [51].

c. The Guidelines require that any pre-existing impairments be deducted from a WPI assessment pertaining to an injury, regardless of whether those pre-existing impairments have been identified as non-compensable.[34]

d. Pursuant to section 72(4) of the Act, the Panel's assessment of the Worker's 5% WPI with regards the First Injury and 12% WPI with regards the Second injury is not subject to review or any further assessment. Consequently, Dr Takyar's Second Report is not permissible and of no effect.[35]

e. Alternatively, if Dr Takyar's Second Report is of any effect, said effect is limited to the 13% WPI attributed to the Second Injury in Dr Takyar's Second Report.[36]

ANALYSIS

22. The pleadings and submissions filed by the parties in this matter raise the following questions:

a. Was the Authority's referral of Dr Takyar's First Report to the Panel for re-assessment valid with regards the WPI assessment of the First Injury and the Second Injury?

b. Is the Worker able to make a further claim for permanent impairment compensation following the Panel's assessment WPI with regards the First Injury and the Second Injury?

c. Can the Worker's WPI for the First Injury and Second Injury be combined thereby entitling her to permanent impairment compensation of 22% WPI?

23. To answer those questions, it is necessary to consider the Act's permanent impairment compensation scheme. That scheme is contained in Part 5 Division 3 Subdivision C of the Act. The provisions contained in Part 5 Division 3 Subdivision C of the Act and the definitions of "injury" and "impairment" under the Act are the same as those that were in force under the *Workers Rehabilitation Compensation Act* when those provisions and definitions were judicially considered by Magistrate Dr Lowndes (as he then was) of the Work Health Court in the matter of *Taylor v Pointon.*[37] Given that those provisions remain unchanged in the current legislation, I adopt His Honour's explanation of that scheme: [38]

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".

[34] Ibid at [15] to [21].
[35] CB at pp 7 to 11 (Notice of defence filed 07.02.2023 at [17.a] to [17.f]).
[36] CB at pp 7 to 11 (Notice of defence filed 07.02.2023 at [17.g]). Employer's written submissions, 10.07.2023, [31] to [32] and at [46].
[37] *Taylor Enterprises v Pointon & Work Health Authority* [2009] NTMC 029.
[38] Ibid at [11] to [17].

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.*

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: 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, whether temporary or permanent – being caused by an injury as defined in s 3 of the Act. 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.*

Was the Authority's referral of Dr Takyar's First Report to the Panel for re-assessment valid with regards the WPI assessment of the First Injury and the Second Injury?

24. In my opinion it is within the jurisdiction of the Work Health Court[39] to determine the validity of the Authority's referral of Dr Takyar's First Report to the Panel as that issue is incidental to and arises out of the Worker's claim for compensation.

25. In the present case, the Authority referred Dr Takyar's First Report to the Panel on or about 14 October 2020. That report contained a WPI assessment for both the First Injury and Second Injury. At that time the Employer had accepted liability for the First Injury but not the Second Injury. Furthermore, the Court had not determined liability for the Second Injury *vis a vis* the Employer. Consequently, at the time of the referral, the First Injury was an injury as defined in the Act and was therefore compensable under the Act but the Second Injury was not.[40]

26. That being the case, the Authority's referral of Dr Takyar's First Report to the Panel, at least so far as the Second Injury is concerned was invalid. This is so as the referral process under section 72 of the Act (as is relevant to this question) states:

> ***72 Assessment of permanent impairment***
>
> *(2)* …
>
> *(3) Where a person is aggrieved by the assessment of the level of permanent impairment by a medical practitioner, the person may, within 28 days after being notified of the assessment, apply to the Authority for a reassessment of that level.*
>
> *(3A) Subject to subsection (3B), the Authority must, as soon as practicable after receiving an application, refer the application to a panel of 3 medical practitioners to reassess the level of permanent impairment.*
>
> *(3B) The Authority is not required to refer an application to a panel unless satisfied that <u>the assessment was properly conducted and</u> is in accordance with the guides mentioned in the definition of permanent impairment in section 70.*
>
> *(3C)* …

27. To validly refer Dr Takyar's WPI assessment with regards the Second Injury to the Panel, the Authority must be satisfied that (1) the assessment was properly conducted **<u>and</u>** (2) the assessment was in accordance with the guides. This is so as section 72(3)(A) is subject to section 72(3)(B). Furthermore, if this were not so then the words *"… the assessment was properly conducted and…"* as appear in section 72(3B) would have no work to do.[41] In this case Dr Takyar's WPI assessment for the Second Injury was not properly conducted because liability for the Second Injury had not been accepted by the Employer or determined by the Court. Consequently, the Authority's referral to the Panel of Dr Takyar's WPI assessment with regards the Second Injury was invalid.

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[39] *Work Health Administration Act* 2011 (NT), section 14. *Return to Work Act* 1986 (NT), section 104.

[40] *Taylor Enterprises v Pointon & Work Health Authority* [2009] NTMC 029 at [17], [18], [21], [26] and [45]; *Sunbuild Pty Ltd v Austin & Anor* [2020] 42 NTLR 105 at [43].

[41] *Statutory Interpretation in Australia*, 8th Edition, LexisNexis Butterworths 2014, DC Pearce & RS Geddes, at 2.26 under "*All words have Meaning and Effect*".

28. Should I be mistaken as to my analysis of sections 72(3)(A) and section 27(3)(B), then I still find that the Authority's referral to the Panel of Dr Takyar's WPI assessment with regards the Second Injury was invalid, as that assessment did not comply with the Act's permanent impairment compensation scheme[42] in that liability for the Second Injury had not been accepted by the Employer or determined by the Court at the time the referral was made.[43]

29. Having found that the Authority's referral to the Panel with regards the Second Injury was invalid, I rule that the referral with regards the Second Injury is a nullity. As the Panel's WPI assessment with regards the Second Injury was a nullity, it follows that the Employer had no obligation to pay compensation to the Worker with regards the Panel's WPI assessment of the Second Injury. I further rule that the Authority's referral to the Panel with regards the WPI assessment of the First Injury was valid and that as a consequence the Employer was obliged to pay compensation to the Worker with regards the Panel's WPI assessment of the First Injury.

30. During the course of this proceeding, I identified that correspondence between the Authority and the Panel as to the referral of Dr Takyar's First Report had not been tendered and invited the parties to tender that documentation. Both parties elected not to do so.[44]

31. I note that neither party raised invalidity of the Authority's referral of Dr Takyar's First Report with regards his WPI assessment for the First Injury as an issue in this proceeding. I also note that the Authority wrote to Employer on 14 October 2020 regarding the referral of Dr Takyar's First Report to the Panel indicating that it would ask the Panel to provide separate WPI assessments with regards both claims,[45] and that the Panel gave separate WPI assessments with regards the First Injury and Second Injury.[46] That being the case, I am satisfied the Authority's invalid referral of Dr Takyar's WPI assessment with regards the Second Injury did not invalidate the Authority's referral of Dr Takyar's WPI assessment with regards the First Injury. It follows therefore, that the Employer, upon receipt of the Panel Report, was required to pay compensation to the Worker[47] in accordance with the Panel's WPI assessment for the First Injury but not the Second Injury.

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[42] See paragraph 23 (above).

[43] The same finding and reasoning for it was made by Dr Lowndes in *Taylor Enterprises v Pointon & Work Health Authority* [2009] NTMC 029 at [46].

[44] The Worker by of supplementary submissions filed 18.09.2023. The Employer by not having filed supplementary submissions or documents.

[45] CB at p 102 (letter NT WorkSafe to Minter Ellison). "*… As this matter relates to two separate incidents and two separate claims, the panel will be asked to provide separate whole person impairment assessments in relation to the separate claim conditions…*"

[46] CB at pp 77 to 89 – see in particular pp 85 to 87.

[47] *Return to Work Act 1986* (NT), section 71(4B).

Is the Worker able to make a further claim for permanent impairment compensation following the Panel's assessment of WPI with regards the First Injury and the Second Injury?

32. In *Pengilly v Northern Territory of Australia* (1999) NTMC 026, Chief Magistrate Bradley (as he then was) held that an assessment of permanent impairment establishes the level of permanent impairment caused to a worker by an injury at a certain point in time. That after that point in time a Worker whose level of permanent impairment worsens is able to make a further application for permanent impairment under the equivalent provisions Part 5 Division 3 Subdivision C of the Act.[48]

33. The facts in *Pengilly* are materially different to the present case. In *Pengilly*, the medical practitioner's initial permanent impairment assessment of 43% WPI, was accepted and paid by the Employer in 1997. In 2001 a further permanent impairment assessment for the same injury was conducted by a medical practitioner which assessed the worker's permanent impairment as 60% WPI. The facts in the present case involve an assessment of the Worker's level of permanent impairment by the Panel (at least so far as the First Injury is concerned), thus triggering section 72(4) of the Act which prohibits the review of the Panel's permanent impairment assessment.

34. Given that over a year has transpired between the Panel's assessment and Dr Takyar's assessment of the Worker's level of permanent impairment with regards the First Injury, and the fact that the assessment pertains to the Worker's level of permanent impairment on the date of the assessment, it is arguable that Dr Takyar's assessment of 3 May 2022 does not constitute a review of the Panel's assessment of 5 February 2021. However for the reasons that follow I make no ruling either way.

The Second Injury

35. As previously stated, the Authority's referral to the Panel of Dr Takyar's initial permanent impairment assessment with regards the Second Injury was a nullity. Consequently, the Panel's assessment of WPI with regards the Second Injury is of no effect or consequence. That being the case, the Worker's later claim with regards permanent impairment for the Second Injury by way of Dr Takyar's Second Report does not constitute a further claim and is not impacted by section 72(4) of the Act.

The First Injury

36. On 5 February 2021, the Panel assessed the Worker's permanent impairment with regards the First Injury as 5% WPI. Dr Takyar's Second Report dated 03 May 2022 (over a year later) opined that the Worker, at the time of the assessment, suffered a permanent impairment of 22% WPI, and that 13% of the worker's WPI was attributable to the Second Injury. At best therefore one may infer through simple arithmetic that the permanent impairment attributable to the First Injury, was 9% WPI.

37. It is arguable but ultimately irrelevant whether that indirect assessment of the First Injury constitutes an assessment for the purpose of sections 71 and 72(2) of the Act or breaches section 72(4) of the Act. This is so because pursuant to section 71(3) of the Act, a Worker who

[48] *Pengilly v Northern Territory of Australia* (1999) NTMC 026 at [49] to [53].

suffers a permanent incapacity of between 5% and 10% WPI for a compensable injury is entitled to permanent impairment compensation of 2% WPI. Consequently, regardless of which assessment is applicable to the Worker in this case, the Worker's entitlement to permanent impairment compensation for the First Injury remains the same, namely 2% WPI.

38. That being the case, any further claim with regards permanent impairment compensation for the First Injury based upon Dr Takyar's Second Report serves no real purpose and is therefore frivolous. Indeed, in monetary terms the difference permanent impairment compensation of 2% WPI paid in 2021 ($7,078.66) and 2023 ($7,114.85) is $36.19. Consequently, pursuant to section 16 of the *Work Health Administration Act*, I decline to deal with this aspect of the proceeding and make no ruling as to whether the Worker is statute barred[49] from making a further claim for permanent impairment with regards the First Injury.

Can the Worker's WPI for the First Injury and Second Injury be combined thereby entitling her to permanent impairment compensation of 22% WPI?

39. The Worker asserts that she is entitled to permanent impairment compensation of 22% WPI and relies upon Dr Takyar's Second Report to establish that entitlement. Dr Takyar's Second Report confirms that the Second Injury is a new injury as opposed a continuation of the First Injury.[50] It identifies that the Worker, at the time of the assessment, suffered permanent impairment of 22% WPI, and that 13% of the worker's WPI was attributable to the Second Injury. Whilst that assessment makes no direct reference to the WPI attributable to the First Injury, simple arithmetic makes it plain that according to Dr Takyar's Second Report, the permanent impairment compensation attributable to the First Injury, at the time of that assessment, was 9% WPI.

40. The Worker submits that permanent impairment compensation is founded upon "permanent impairment" as opposed to "injury" as defined in the Act. That is to say that because she has suffered a total of 22% WPI caused by two separate injuries she is entitled to permanent impairment compensation of 22% WPI, notwithstanding that the permanent impairment was caused by two separate injuries.

41. The Employer submits that the Worker's entitlement to permanent impairment compensation is founded upon the permanent impairment caused by an "injury" as defined in the Act. That is to say that the Worker is entitled to permanent impairment compensation caused by the First Injury and the Second Injury but said compensation is to be paid separately.

42. If the Worker is correct then she is entitled to permanent impairment compensation of 22% WPI. If the Employer is correct then due to section 71(3) of the Act the Worker is entitled to permanent impairment compensation of 2% WPI for the First Injury and permanent impairment compensation of 8% WPI for the Second Injury.

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[49] *Return to Work Act* 1986 (NT), section 72(4)(b).

[50] CB at p 91 – Dr Takyar's Second Report, dated 03.05.2022, see first dot point under "REFERRAL INFORMATION". See also p 94 of CB (p 5 of Dr Takyar's Second Report) under "OPINION" wherein he confirms, *"I understand that the two injuries have now been separated out."*

43. In *Taylor v Pointon*[51] His Honour Dr Lowndes held; and I agree; that:

    a. A worker's entitlement to compensation for permanent impairment depends upon the impairment being caused by an injury as defined in the Act.[52]

    b. It is the court's role to determine whether the impairment was caused by an injury as defined in the Act.[53]

    c. It is the medical practitioner's role in the first instance and a panel of medical practitioner's role in the reassessment stage to determine the extent of the worker's impairment.[54]

44. It is common ground as between the parties that both the First Injury and the Second Injury were, at the time of Dr Takyar's Second Report, compensable injures and were each therefore an "injury" as defined in section 3 of the Act. It is also common ground as between the parties that both the First Injury and the Second Injury had caused permanent impairment to the Worker. So much is clear from the statement of agreed facts, the Employer's pleadings and submissions and the Worker's pleadings, submissions and letter of instructions to Dr Takyar with regards Dr Takyar's Second Report. That being the case, and having reviewed Dr Takyar's First Report, the Panel Report and Dr Takyar's Second Report, and the documents referred to therein as have been included in the Court Book, I find:

    a. The First Injury and the Second Injury are each an "injury" as defined in section 3A of the Act;

    b. The First Injury and the Second Injury each caused permanent impairment to the Worker;

    c. The Panel determined the level of permanent impairment caused to the Worker by the First Injury was 5% WPI as at 05 February 2020. Dr Takyar determined the level of permanent impairment caused to the Worker by the First Injury and the Second Injury as at 3 May 2022 was 9% (by inference) and 13% by the First Injury and the Second Injury respectively.

45. It is also common ground as between the parties that the Panel and Dr Takyar had assessed the degree of permanent impairment caused by the First injury and the Second Injury, so much is clear from the statement of agreed facts tendered in this proceeding, the Panel Report and Dr Takyar's Second Report. What is in issue is whether the level of permanent impairment caused by the First Injury and the Second Injury can be combined. To resolve that issue it is necessary to consider the "guides" referred to in section 70 of the Act. This is so as section 70 requires that the permanent impairment is assessed in accordance with the guides:

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[51] *Taylor Enterprises v Pointon & Work Health Authority* [2009] NTMC 029.
[52] Ibid at [17], [18], [21] and [26].
[53] Ibid at [21], [22].
[54] Ibid at [20].

70 Definition

In this Subdivision ***permanent impairment*** *means an impairment or impairments assessed, in accordance with the guides approved and published by the Authority, as being an impairment, or combination of impairments, of not less than 5% of the whole person.*

(My emphasis)

46. The guides referred to in section 70 of the Act are the *NT WorkSafe Guidelines for the Evaluation of Permanent Impairment* (the **Guidelines**). The Guidelines contain various provisions dealing with multiple impairments, deductions for pre-existing conditions or injuries, and deductions for pre-existing impairments. Relevantly the Guidelines state:

PART 2 – PRINCIPLES OF ASSESSMENT

1.6 The following is a basic summary of some key principles of permanent impairment assessments:

…

1.6.3 In calculating the final level of impairment, the assessor needs to clarify the degree of impairment that results from the compensable injury/condition. Any deductions for pre-existing injuries/conditions are to be clearly identified in the report and calculated. If, in an unusual situation, a related injury/condition has not previously been identified, an assessor should record the nature of any previously unidentified injury/condition in their report and specify the causal connection to the relevant compensable injury or medical condition.

(My emphasis)

Multiple impairments

1.17 Impairments arising from the same injury are to be assessed together. Impairments that result from more than one injury arising out of the same incident are to be assessed together to calculate the degree of permanent impairment of the claimant.

1.18 The Combined Values Chart (pp 604-606, AMA5) is used to derive a % WPI that arises from multiple impairments. An explanation of its use is found on pp 9-10 of the AMA5. When combining more than two impairments, the Assessor should commence with the highest impairment and combine with the next highest and so on.

1.19 DELETED (See Appendix 2)

1.20 In the case of a complex injury, where different medical assessors are required to assess different body systems, a 'lead assessor' may be nominated to coordinate and calculate the final degree of permanent impairment as a percentage of whole person impairment (%WPI) resulting from the individual assessments.

(My emphasis)

47. In the present case there were two Injuries, namely the First Injury and the Second Injury. Furthermore, each injury involved separate incidents occurring years apart from each other.[55] That being the case, pursuant to paragraphs 1.6.3 and 1.17 of the Guidelines, the level of permanent impairment caused by those two separate injuries should not have been assessed together to calculate the Worker's degree of permanent impairment. Dr Takyar, in providing

[55] The First Injury arose from an incident occurring on 21.02.2017 and the Second Injury arose from an incident occurring on 22.06.2020. See paragraphs [2] and [6] above.

separate assessments as to the level of permanent impairment caused by each Injury was acting in accordance with paragraphs 1.6.3 and 1.17 of the Guidelines.

> ***Deductions for pre-existing condition or injuries***
>
> *1.27 The degree of permanent impairment resulting from pre-existing impairments should not be included in the final calculation of permanent impairment if those impairments are not related to the compensable injury. The assessor needs to take account of all available evidence to calculate the degree of permanent impairment that pre-existed the injury.*
>
> *1.28 In assessing the degree of permanent impairment resulting from the compensable injury/condition, the assessor is to indicate the degree of impairment due to any previous injury, pre-existing condition or abnormality. This proportion is known as "the deductible proportion" and should be deducted from the degree of permanent impairment determined by the assessor.*
>
> (My emphasis)
>
> ***Pre-existing impairment***
>
> *11.10 To measure the impairment caused by a work-related injury or incident, the psychiatrist must measure the proportion of WPI due to a pre-existing condition. Pre-existing impairment is calculated using the same method for calculating current impairment level .The assessing psychiatrist uses all available information to rate the injured worker's preinjury level of functioning in each of the areas of function. The percentage impairment is calculated using the aggregate score and median class score using the conversion table below. The injured worker's current level of impairment is then assessed, and the pre-existing impairment level (%) is then subtracted from their current level to obtain the percentage of permanent impairment directly attributable to the work-related injury. If the percentage of pre-existing impairment cannot be assessed, the deduction is 1/10th of the assessed WPI.*
>
> (My emphasis)

48. In the present case there were two Injuries, namely the First Injury and the Second Injury. The First Injury is a pre-existing Injury to the Second Injury. Under paragraphs 1.28, 11.10 and 1.6.3 of the Guidelines, when assessing the degree of permanent impairment applicable to the Second Injury (a compensable injury at the time of Dr Takyar's Second Report and the "relevant "compensable injury"[56] with regards his permanent impairment assessment of the Second Injury) Dr Takyar was required to, and did, identify and then deduct the degree of impairment caused by the First Injury.

49. The separate permanent impairment assessment caused by the First Injury conducted by the Panel and separate permanent impairment assessments caused by the First Injury and the Second Injury conducted by Dr Takyar in Dr Takyar's Second Report were assessments conducted in accordance with the Guidelines. Consequently, I rule that the Worker's entitlement to permanent impairment compensation under the Act is as follows:

    a. The level of permanent impairment caused to the Worker by the First injury is either 5% WPI as assessed by the Panel or 7% WPI as assessed in Dr Takyar's Second Report.

[56] See paragraph 1.6.3 of the Guidelines as underlined above.

In either case, pursuant to section 71(3) of the Act the Worker's entitlement to permanent impairment compensation for the First Injury is 2% WPI.

b. The level of permanent impairment caused to the Worker by the Second injury is 13% WPI as assessed by Dr Takyar in Dr Takyar's Second Report. Pursuant to section 71(3) the Worker's entitlement to permanent impairment compensation for the Second Injury is 8% WPI.

c. In accordance with the methodology for assessing the degree of permanent impairment caused by an injury under the Guidelines, the permanent impairment caused to the Worker by the First Injury and the Second Injury cannot be combined.

50. As to the Worker's contention regarding the relevance of being employed by the same employer at the time of suffering both injuries; neither the Act nor the Guidelines refer to or distinguish between injuries incurred whilst being employed by different employers. Instead the Act and the Guidelines refer to a permanent impairment caused by an injury[57] and allow for deductions to be made as a part of that assessment for a previous injury, pre-existing impairment, condition or abnormality,[58] regardless of whether the previous injury, pre-existing impairment, condition or abnormality had occurred whilst the worker was employed by a different employer. Had the Legislature intended to limit those deductions to situations where a previous injury, pre-existing impairment, condition or abnormality had occurred whilst in the employ of a different employer then it would have done so, given the absence of any express limitation in the Act to that effect, and the express requirement to assess permanent impairment in accordance with the guides in section 70 of the Act, I conclude that no such limitation exists.

51. As to the Worker's contention that the separate assessment of the Worker's WPI with regards the First Injury and Second Injury by the Panel and Dr Takyar constituted an incorrect application of paragraphs 1.6.3 and 11.10 of the Guidelines. The basis of that contention is that those deductions should have been restricted to pre-existing non compensable impairments. I reject that contention. I do so on the basis that the Guidelines pertain to the assessment of permanent impairment caused by that single compensable injury (referred to as the "relevant compensable injury" in paragraph 1.6.3 of the Guidelines). Consequently, I conclude that all impairments that were not caused by the "relevant compensable injury" are to be deducted when determining the level of permanent impairment that was caused by that compensable injury.

52. Should my finding that the Worker's entitlement to permanent impairment compensation for the First Injury and the Second Injury cannot be combined, then sections 72(3) and 71(4)(a) of the Act would have that effect in any case. This is so, as Dr Takyar's Second Report assessed the Worker's permanent impairment with regards First Injury and Second Injury as 9% WPI (by inference) and 13% WPI respectively.

53. Both the Worker and the Employer had 28 days from receipt of Dr Takyar's Second Report to apply to the Authority for a reassessment of the extent of the Worker's permanent

[57] Note: The Guidelines refer to the injury for which permanent impairment is being addressed as a "work-related injury" at paragraph 11.10, and "compensable injury" at paragraphs 1.6.3, 1.27 and 1.28.
[58] *NT WorkSafe Guidelines for the Evaluation of Permanent Impairment*, at paragraph 1.28.

impairment[59] with regards the First and Second Injury but neither party did. Consequently, absent an extension of time[60] to apply to the Authority for reassessment, the assessment of the Worker's permanent impairment attributable to the First Injury and Second Injury particularised in Dr Takyar's Second Report is no longer subject to challenge or reassessment.

The Employer's liability to pay compensation to the worker with regards the First Injury

54. Given my decision at paragraph 38 (above), not to make a determination as to whether Dr Takyar's Second Report constitutes a reassessment of the degree of permanent impairment with regards the First Injury or if said reassessment is statute barred, I make the following determination as to the Employer's liability to pay compensation with regards the First Injury.

55. The Employer's liability to pay the Worker for WPI with regards the First Injury did not arise until (1) the Employer had accepted liability for the First Injury – which occurred on 21 March 2017, (2) the Employer had received a WPI assessment for the First Injury from a medical practitioner - which occurred on 24 August 2020, (3) the assessment was referred by the Authority to the Panel – which occurred on 24 September 2020 and (4) the Employer received the Panel's reassessment of the Worker's WPI with regards the First Injury which occurred sometime after 05 February 2021.

56. The Panel Report provided a WPI assessment for the First Injury of 5%. On 7 April 2021, the Employer paid compensation to the Worker with regards the 5% WPI for the First Injury, thereby acquitting its liability under the Act with regards the First Injury.

The Employer's liability to pay compensation to the worker with regards the Second Injury

57. The Employer's liability to pay the Worker for WPI with regards the Second Injury did not arise until (1) the Employer had accepted liability for the Second Injury – which occurred on 10 December 2021; and (2) the Employer had received a WPI assessment for the second injury from a medical practitioner - which occurred sometime after 03 May 2022 when the Employer received Dr Takyar's Second Report.

58. Dr Takyar's Second Report provided a WPI assessment for the First Injury of 9% (by inference) and the Second Injury of 13%. On 15 June 2022 the Employer, pursuant to section 71(4)(a) of the Act paid compensation to the Worker with regards the 13% WPI for the Second Injury, thereby acquitting its liability under the Act with regards the Second Injury.

CONCLUSION

59. The Authority's referral of Dr Takyar's assessment of permanent impairment with regards the Second Injury was invalid and therefore a nullity, thus rendering the Panel's reassessment of the permanent impairment with regards the Second Injury of no effect or consequence.

60. Consistent with the Act and the Guidelines, the degree of permanent impairment caused by the First Injury and the Second Injury were assessed separately, thus entitling the Worker to permanent impairment compensation of 5% WPI for the First Injury and 13% WPI for the

[59] *Return to Work Act* 1986 (NT), sections 72(3).
[60] *Work Health Court Rules* 1999 (NT), rule 2.03.

Second Injury, which pursuant to section 72(3) of the Act, were reduced to 2% WPI and 8% WPI respectively.

61. Consistent with its obligations under the Act, the Employer had paid permanent impairment compensation to the Worker with regards the First Injury and Second Injury, prior to commencement of this proceeding.

62. I will hear the parties as to costs.