

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Jewsbury v Workers' Compensation Regulator*
[2019] QIRC 083

PARTIES: **Jewsbury, Dennis**
(Appellant)

v

Workers' Compensation Regulator
(Respondent)

CASE NO: WC/2018/141

PROCEEDING: Appeal against decision of Workers'
Compensation Regulator

DELIVERED ON: 3 June 2019

HEARING DATES: 17 May 2019

MEMBER: Merrell DP

HEARD AT: Brisbane

ORDERS: **1. The decision of the Workers'
Compensation Regulator is confirmed.**

CATCHWORDS: WORKERS' COMPENSATION - APPEAL
AGAINST DECISION OF WORKERS'
COMPENSATION REGULATOR- Industrial
Deafness - Whether worker entitled to be
reimbursed for cost of hearing aid after
acceptance of lump sum compensation.

LEGISLATION: *Acts Interpretation Act 1954, s 14A*

*Workers' Compensation and Rehabilitation Act
2003, s 9, s 119, s 125, s 144A, s 144B, s 190,
s 211, s 220 and s 221*

CASES: *Church v Workers' Compensation Regulator*
[2015] ICQ 031

Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28;(1998) 194 CLR 335

Rossmuller AND Q-COMP (C/2009/36) – Decision <http://www.qirc.qld.gov.au>

APPEARANCES:

Mr A. Wright of WK Lawyers for the appellant.

Mr C.J. Clark of Counsel, directly instructed by the respondent.

Reasons for Decision

Introduction

- [1] Mr Dennis Jewsbury suffered the injury of industrial deafness in the course of his employment as a seaman. In October 2015, WorkCover Queensland accepted liability for that injury under the *Workers' Compensation and Rehabilitation Act 2003* (the Act).
- [2] On 20 January 2016, WorkCover, pursuant to s 185 of the Act, issued Mr Jewsbury with a Notice of Assessment for a permanent impairment of 7%. On 21 January 2016, Mr Jewsbury accepted an offer of lump sum compensation made by WorkCover.
- [3] On 20 September 2017, solicitors on behalf Mr Jewsbury wrote to WorkCover seeking payment in respect of the costs incurred by him for hearing aids. There is no dispute that Mr Jewsbury required the use of hearing aids. On 11 May 2018, WorkCover rejected that claim pursuant to s 9 and s 190 of the Act.
- [4] Mr Jewsbury sought a review of that decision with the Workers' Compensation Regulator. Mr Jewsbury was unsuccessful in that review and now appeals to the Commission.
- [5] An appeal of this type, pursuant to ch 13, pt 3 of the Act, is a hearing *de novo*.¹ The onus is on Mr Jewsbury to prove that he has the entitlement, under the Act, that he claims.²
- [6] The issue is whether Mr Jewsbury, given that he accepted the offer of lump sum compensation made by WorkCover, is subsequently entitled to be reimbursed for the costs of his hearing aids.
- [7] The answer to that question depends on the construction of ch 3 of the Act.
- [8] In my view, Mr Jewsbury is not entitled to be reimbursed for the costs of his hearing aids.
- [9] My reasons follow.

¹ *Church v Workers' Compensation Regulator* [2015] ICQ 031, [27] (Martin J, President).

² *Rossmuller AND Q-COMP (C/2009/36) – Decision* <http://www.qirc.qld.gov.au>, [2] (Hall P).

The relevant provisions of the Act

[10] Section 9 of the Act provides:

Meaning of *compensation*

Compensation is compensation under this Act, that is, amounts for a worker's injury payable under chapters 3, 4 and 4A by an insurer to a worker, a dependant of a deceased worker or anyone else, and includes compensation paid or payable under a former Act.

[11] Chapter 3 of the Act deals with weekly compensation paid under the Act. Chapter 4 of the Act deals with injury management and the provision of medical treatment, hospitalisation and rehabilitation for injured workers. Chapter 4A of the Act deals with workers who sustained serious personal injuries.

[12] Chapter 3, pt 3 concerns compensation entitlements for particular workers. Division 3 of that part deals with workers with industrial deafness. Part 3 contains s 125 which relevantly provides:

125 Entitlements for industrial deafness

- (1) The worker is entitled to compensation for the industrial deafness under part 10 and sections 211(1)(a) and 219(1)³ and not under any other provision.

[13] Part 10 of ch 3 deals with entitlement to compensation for permanent impairment. Section 190 of the Act is contained in that part and provides:

190 No further compensation after fixed time

- (1) This section applies to a worker who has been given a notice of assessment.
- (2) The worker is not entitled to further compensation for the injury after the first of the following happens -
- (a) the worker notifies the insurer of the worker's decision about the offer within the decision period;
 - (b) 20 business days have passed since the worker received the offer.
- (3) This section does not limit the worker's entitlement to payment of -
- (a) lump sum compensation, if any, under part 3, division 5; or
 - (b) lump sum compensation under section 188(4) or 189(5); or
 - (c) additional compensation, if any, under division 4; or
 - (d) compensation under chapter 4A.

[14] Chapter 4, pt 2 of the Act deals with an insurer's liability for medical treatment, hospitalisation and expenses for injured workers. That part contains s 211 which provides:

³ Section 219(1) of the Act has no relevance to Mr Jewsbury's appeal.

211 Extent of liability for medical treatment

- (1) The insurer must pay the following costs for medical treatment for an injury, whether provided at 1 time or at different times -
 - (a) for medical treatment by a registered person - the cost that the insurer accepts as reasonable, having regard to the relevant table of costs;
 - (b) for nursing, medicines, medical or surgical supplies, curative apparatus, crutches or other assistive devices given to the worker otherwise than as an in-patient at a hospital - the cost that the insurer accepts as reasonable.
- (2) The insurer's liability for the cost of medical treatment by a registered chiropractor or a registered osteopath extends only to the cost of treatment involving the manipulation, mobilisation and management of the neuromusculoskeletal system of the human body.

[15] The phrase "medical treatment" is exhaustively defined in sch 6 to the Act. That definition provides:

medical treatment means -

- (a) treatment by a doctor, dentist, physiotherapist, occupational therapist, psychologist, chiropractor, osteopath, podiatrist or speech pathologist; or
- (b) assessment for industrial deafness by an audiologist; or
- (c) the provision of diagnostic procedures or skiagrams; or
- (d) the provision of nursing, medicines, medical or surgical supplies, curative apparatus, crutches or other assistive devices.

[16] The phrase "registered person" is also defined in sch 6 to mean "...a registered person of a description mentioned in the definition of *medical treatment*."

[17] Chapter 3, pt 8A sets out when an entitlement to weekly compensation stops and when the payment of medical treatment, hospitalisation and expenses stop. Section 144A and s 144B are found within that part. Those sections provide:

144A When weekly payments of compensation stop

- (1) The entitlement of a worker to weekly payments of compensation under part 9 stops when the first of the following happens -
 - (a) the incapacity because of the work related injury stops;
 - (b) the worker has received weekly payments for the incapacity for 5 years;
 - (c) compensation under this part reaches the maximum amount under part 6.
- (2) If subsection (1)(b) or (c) applies, the worker's entitlement to further compensation for the injury stops.
- (3) Subsection (2) does not apply to the worker's entitlement to compensation under chapter 4A.
- (4) This section does not limit another provision of this Act that stops weekly payments.

144B When payment of medical treatment, hospitalisation and expenses stops

The entitlement of a worker to the payment of medical treatment, hospitalisation and expenses under chapter 4 for an injury stops when -

- (a) the entitlement of the worker to weekly payments of compensation under part 9 stops; and
- (b) medical treatment by a registered person is no longer required for the management of the injury because the injury is not likely to improve with further medical treatment or hospitalisation.

[18] Section 220 of the Act is contained in ch 4, pt 3 of the Act and provides:

220 Insurer's responsibility for worker's rehabilitation

- (1) An insurer must take the steps it considers practicable to secure the rehabilitation and early return to suitable duties of workers who have an entitlement to compensation.
- (2) Without limiting subsection (1), an insurer must refer a worker who has lodged a notice of claim to an accredited return to work program of the insurer, unless the insurer is satisfied that, as a result of the injury, the worker will not be able to participate in the program.
- (3) An insurer must take the steps it considers practicable to coordinate the development and maintenance of a rehabilitation and return to work plan in consultation with the injured worker, the worker's employer and treating registered persons.
- (4) In this section -

accredited return to work program, of an insurer, means a return to work program managed by the insurer that is accredited by the Regulator.

Examples of return to work programs -

vocational assessments, reskilling or retraining, job placement, host employment

Mr Jewsbury's argument

[19] Mr Wright, who appeared for Mr Jewsbury, submitted that Mr Jewsbury was entitled to be reimbursed for the costs of his hearing aids.

[20] In written submissions, Mr Wright argued:

- the object of the Act is to rehabilitate and, where necessary, restore workers back into the Queensland community;
- when drafting s 190 of the Act, it was never the intention of the Queensland Parliament "...to permanently deprive Queensland workers of medical compensation or rehabilitation such that it would affect the object of the Act or by interfering with s 220 of the Act.";
- the hearing aids are necessary for Mr Jewsbury's rehabilitation;

- an entitlement to lump sum compensation under s 190 of the Act "...should not constitute a redemption of the entire statutory claim, nor should it be classified in a similar way to the worker accepting damages under common law.";
- section 9 and s 10 of the Act separately define "compensation" and "damages" and s 119 of the Act,⁴ therefore, cannot be relied upon to say there has been an agreement by Mr Jewsbury not to seek reimbursement for the cost of his hearing aids on the basis Mr Jewsbury did not pursue a common law claim;
- section 144B of the Act, which deals with when medical treatment, hospitalisation and expenses stop, is not limited by s 190 as is the case with weekly compensation payments by virtue of s 144A(4) of the Act and, as such, the Queensland Parliament "...did not intend for medical entitlements to stop once s 190 of the Act was enlivened.";
- the absence of the equivalent of s 144A(4) in s 144B has the effect that medical expenses continue after s 190 is enlivened; and
- for these reasons, and notwithstanding Mr Jewsbury's acceptance of the offer of lump sum compensation and that s 190 of the Act was enlivened, Mr Jewsbury was still entitled to the medical expenses of being reimbursed for his hearing aids.

[21] In his oral argument, Mr Wright further submitted that:

- section 190 of the Act only has the effect of redeeming weekly payments of compensation, but not medical expenses and the costs of rehabilitation; and
- there is a conflict in the Act between the effect of s 144B and of s 190 which arises because s 144B of the Act does not limit any other provision of the Act that stops the payment of medical treatment, hospitalisation and expenses to a worker; and that conflict must be resolved by s 144B prevailing over s 190 because of the

⁴ Section 119 of the Act is in ch 4 of the Act and provides:

119 Entitlement to compensation ends if damages claim is finalised

(1) This section applies if, for an injury, there is -

- (a) an entitlement to compensation; and
- (b) an entitlement to recover damages against an employer or another person.

(2) An entitlement to compensation ends when settlement for damages is agreed or judgment for damages is given.

(3) However, an entitlement to compensation under chapter 4A for an injury ends only if -

- (a) the damages include treatment, care and support damages; and
- (b) the worker accepts the treatment, care and support damages within the acceptance period.

(4) To remove any doubt, it is declared that the ending, under subsection (3), of an entitlement to compensation under chapter 4A for an injury also stops any entitlement to compensation under chapter 4 for the injury.

(5) In this section -

accept, for treatment, care and support damages, see section 232U.

acceptance period, for treatment, care and support damages, see section 232U.

damages includes damages under a legal liability existing independently of this Act, whether or not within the meaning of section 10.

object of the Act in putting the injured worker back into the same or similar position the worker was in prior to the injury; or, in the alternative

- rehabilitation should not be seen as a medical expense due to the insurer's responsibility for workers' rehabilitation pursuant to s 220(1) of the Act and, therefore, it was the intention of the Queensland Parliament that the insurer provide injured workers with industrial deafness, like Mr Jewsbury, with hearing aid devices to be able to fully function in everyday life.

The Regulator's argument

[22] Mr Clark, who appeared for the Regulator, submitted that Mr Jewsbury had no entitlement under the Act to be reimbursed for the costs of his hearing aids.

[23] In written submissions, Mr Clark argued:

- the supply of a hearing device, such as a hearing aid, is a "curative apparatus" or "other assistance device" within the meaning of s 211(1)(b) of the Act;
- because s 211 of the Act falls within ch 4 of the Act, the supply of such a device falls specifically within the definition of "compensation" in s 9 of the Act; and
- because, on 21 January 2016, Mr Jewsbury accepted the offer of a payment of lump sum compensation, then s 190(2)(a) of the Act applies to deny him "further compensation" such as the supply of the hearing device.

[24] In his written submissions in reply, Mr Clark argued:

- while the rehabilitation of injured workers is an object of the Act, s 5(4) of the Act provides that the workers' compensation scheme under the Act should "maintain a balance" between "appropriate benefits" and "reasonable cost levels for employers";
- Mr Jewsbury's assertion, that it was never the intention of the Queensland Parliament to "permanently deprive" workers of benefits or to interfere with the insurer's responsibility for a worker's rehabilitation referred to in s 220 of the Act, is wrong because s 190(3) of the Act, which provides s 190 does not limit a worker's entitlement to specific forms of compensation, meant that the Queensland Parliament did direct specific attention to the issue of depriving workers of certain benefits under the Act;
- the reliance on s 144B of the Act is without basis because the weekly payments of compensation under ch 3, pt 9, as referred to in s 144B(a), is not permanent impairment lump sum compensation as provided for in ch 3, pt 10 of the Act; and
- both s 144A and s 144B of the Act have clearly defined scopes of application, which in no way limit the operation of s 190 by limiting the extent of the entitlements under the Act once an offer of permanent impairment compensation has been made and accepted.

[25] In his oral submissions, Mr Clark:

- submitted that s 144A and s 144B of the Act had nothing to do with the circumstances which enliven ch 3, pt 10 of the Act and those sections could not cut down the operation of s 190(2) of the Act;
- referred to s 125(1) of the Act and submitted that while the drafting of that section may have been clearer, its effect was that a worker who is entitled to compensation for industrial deafness was only entitled, relevantly, to compensation under ch 3, pt 10 and s 211(1)(a) of the Act and, arguably, s 211(1)(a) of the Act did not include curative apparatus or assistive devices although the definition of "medical treatment" in sch 6 to the Act may be broad enough to cover such apparatus and devices; and
- submitted that the entitlement to payment of compensation for industrial deafness is not one of the entitlements, referred to in s 190(3), that is not limited by the operation of s 190 of the Act.

[26] In reply, Mr Wright submitted that:

- section 211(1)(a) of the Act was broad enough to cover the items referred to in s 211(1)(b) of the Act and s 211(1)(b) provides an exhaustive list that s 211(1)(a) presents; and
- when regard is had to the types of exceptions referred to in s 190(3) of the Act, the effect of s 190(2) of the Act does not extend to restricting the rehabilitation, by way of the provision of medical devices, for an injured worker.

Is Mr Jewsbury entitled to be reimbursed for the costs of his hearing aids under the Act?

[27] In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.⁵

[28] Relevantly to this appeal, it is a principle of statutory construction that a legislative instrument must be construed on the *prima facie* basis that its provisions are intended to give effect to harmonious goals; and where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve the result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions.⁶

⁵ *Acts Interpretation Act 1954*, s 14A(1).

⁶ *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 335, [70] (McHugh, Gummow, Kirby and Hayne JJ).

The interpretation of ch 3 that will best give effect to its purpose and language

- [29] By section 125(1) of the Act, Mr Jewsbury, who sustained the injury of industrial deafness, was entitled to compensation under, relevantly, ch 3, pt 10 and s 211(1)(a) of the Act.
- [30] On a plain reading of s 125(1) of the Act, s 211(1)(b) has no application to a worker entitled to compensation for industrial deafness. That section has no application to Mr Jewsbury.
- [31] Chapter 3, pt 10 of the Act provides for the payment of lump sum compensation when a worker is assessed as having a degree of permanent impairment. Mr Jewsbury was assessed as having a permanent impairment of 7%. He then accepted an offer of payment of lump sum compensation, for that impairment, under ch 3, pt 10.
- [32] Mr Jewsbury, about 20 months later, then claimed payment for the cost incurred by him for hearing aids.
- [33] Section 211(1)(a) of the Act provides that the insurer must pay the reasonable cost of medical treatment by a registered person. I assume, for the purposes of this appeal, that Mr Jewsbury's hearing aids are provided to him by a registered person. On that basis, having regard to the definition of "medical treatment" in sch 6 of the Act, he would be receiving medical treatment - the provision of a curative apparatus or other assistive device by a registered person - within the meaning of s 211(1)(a) of the Act.
- [34] However, payment for such medical treatment is compensation within the meaning of s 9 of the Act. This is because it is an amount payable under ch 4 of the Act. Therefore, payment for such medical treatment is "compensation" within the meaning of s 190(2) of the Act.
- [35] Mr Jewsbury, on 21 January 2016, notified WorkCover of his decision to accept the offer of payment of lump sum compensation made to him under the Act. On that acceptance, s 190(2) of the Act was enlivened.
- [36] The effect of s 190(2) is that Mr Jewsbury is not entitled to receive payment for the cost of the medical treatment by way of the provision of the hearing aids. This is because such a payment would amount to "further compensation" within the meaning of s 190(2)(a) of the Act. It would be compensation, within the meaning of the Act, paid after the date that Mr Jewsbury accepted the offer of lump sum compensation.
- [37] The purpose of s 190(2) of the Act is to remove, from a worker, an entitlement to further compensation under the Act upon acceptance of an offer of payment of lump sum compensation. That was the effect of s 190(2) of the Act in Mr Jewsbury's circumstances.
- [38] There are exceptions. By s 190(3) of the Act, a worker, even after accepting an offer of payment of lump sum compensation under the Act, is entitled to further specified forms of compensation⁷. However, the payment of the cost of medical treatment, by way of

⁷ Those forms of compensation are:

(a) lump sum compensation to workers with pneumoconiosis - ch 3, pt 3, div 5 of the Act;

the provision, by a registered person, of a curative apparatus or other assistive device such as a hearing aid for industrial deafness, is not such a form of further compensation specified in s 190(3) of the Act.

- [39] This construction of ch 3 of the Act is one that will best give effect to the purpose and language of ch 3 of the Act.
- [40] Furthermore, s 144A and s 144B do not assist Mr Jewsbury.
- [41] Section 144A specifies when weekly payments of compensation, made under ch 3, pt 9 of the Act, stop. Similarly, s 144B of the Act specifies when payments of medical treatment, hospitalisation and expenses, made under ch 4 of the Act, stop.
- [42] True, s 144B of the Act does not contain an equivalent provision to s 144A(4) of the Act. However, to give effect to the harmonious goal of ch 3 of the Act, once s 190(2) of the Act is enlivened, which is a later provision in ch 3 than s 144A and s 144B and which specifically deals with injured workers who are assessed as having a degree of permanent impairment, it operates so that a worker who accepts an offer of payment of lump sum compensation is not entitled to further compensation for the injury, save for the entitlement to compensation as specifically described in s 190(3) of the Act.
- [43] Section 144B of the Act can exist harmoniously with s 190(2) of the Act. This is because s 144B can apply to injured workers who do not have a degree of permanent impairment.

Conclusion

- [44] Mr Jewsbury was assessed as having a permanent impairment of 7%. An offer of payment of lump sum compensation was made to him under the Act. Mr Jewsbury accepted that offer.
- [45] In those circumstances, s 190(2)(a) of the Act was enlivened.
- [46] Following on from his acceptance of the offer, Mr Jewsbury is not entitled to further compensation under the Act. This includes the cost of medical treatment by way of the provision, by a registered person, of a curative apparatus or other assistive device such as a hearing aid.
- [47] The decision of the Workers' Compensation Regulator is confirmed.

-
- (b) lump sum compensation for injuries assessed as having a DPI of 20% or more under s 188(4) of the Act or for injuries assessed as having a DPI of less than 20% under s 189(5) of the Act;
- (c) additional lump sum compensation for workers with a DPI of 30% or more, or for workers who require gratuitous care, or for workers who sustained particularly injuries on or after 15 October 2013 and before 31 January 2015 - ch 3, pt 9, div 4 of the Act; and
- (d) workers who sustained serious personal injuries - ch 4A of the Act.