

# the front page

a seasonal bulletin for self insurers  
workers compensation + OH&S + workplace relations

**Mountain Pine Furniture Pty Ltd v. Taylor:** Steven Notarianni

**"Yes" Optus:** Sean Millard

**After the Optus Case:** Madelaine August

**Owner Drivers/Contractors—A special - special interest sector:** Bruce Butler

**MOUNTAIN PINE FURNITURE PTY LTD v.  
TAYLOR**  
Steven Notarianni - Senior Associate

The Victorian Court of Appeal has now delivered its decision in regard to the appeal in the matter of Mountain Pine Furniture Pty Ltd v Taylor & Ors [2007] VSCA 146 (6 July 2007).

The Court of Appeal has decided that, in its view, Justice Bongiorno was correct in his decision, and that it is "*inherently improbable that the clause 3.3 direction was an oversight*". The Court of Appeal has concluded that the nature of spinal injuries is such that the direction at clause 3.3 was intended to override the approach to impairment assessment observed elsewhere in the Guides. The Court concluded that a spinal injury is such that there is no known technique of restoring a damaged spine to "*a state of perfect integrity*" and that the spinal injury once incurred will forever remain regardless of what may be done by way of treatment to alleviate the suffering it causes.

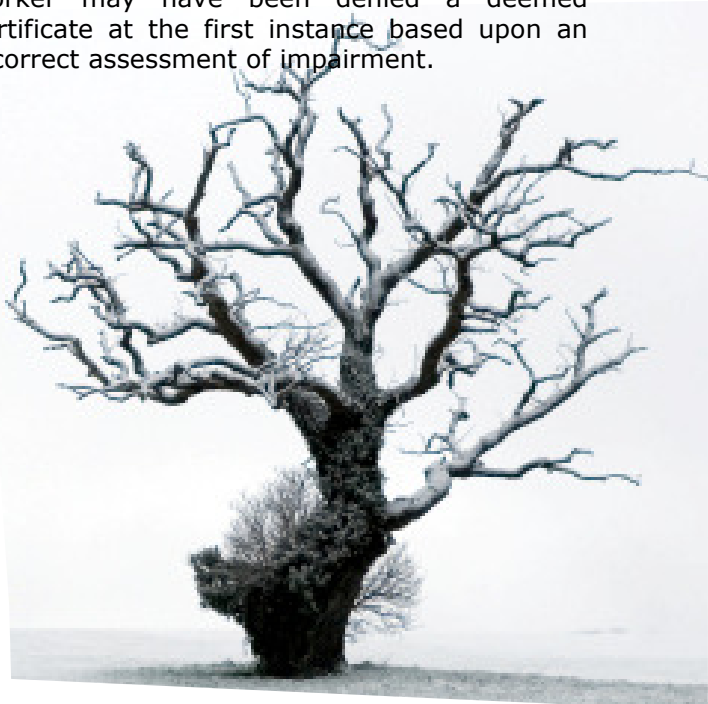
His Honour Justice Nettle in his reasons, also dealt briefly with the example outlined in the Guides where a worker has a lower extremity weakness subsequent to surgery for a spinal injury. In accordance with the meaning given by the Court to clause 3.3, this lower extremity weakness would not be relevant to the determination of permanent impairment as it has arisen as a result of surgery. It would, however, in His Honour's view be compensable pursuant to section 83(1)(d) of the Accident Compensation Act 1985 ("*the Act*"), as it would constitute a further injury arising while the worker was at a place for medical or surgical treatment. The Court was not called on to determine this issue in this matter and His Honour's comments were solely based upon the facts and relevant legislation.

The VWA's appeal was therefore dismissed by the Court of Appeal and Justice Bongiorno's original decision therefore stands.

## Practical Implications of the Decision

This decision of the Court of Appeal has the potential to impact upon employers and self insurers in various respects. Section 98C/E claims involving workers who have had surgery and have been assessed in accordance with Chapter 3 of the Guides should be reviewed. There is the potential now for workers to seek review of claims where successful surgery has been taken account of in determining the degree of permanent impairment of an injury that has been assessed in accordance with Chapter 3. Additionally, in matters where an assessment is yet to be performed, it should be made clear to assessors that the effects of surgery **are not** to be taken into account when performing their assessment pursuant to Chapter 3 of the Guides.

In respect to a serious injury application under section 134AB of the Act, it is conceivable that a worker may have been denied a deemed certificate at the first instance based upon an incorrect assessment of impairment.



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Whilst it would be considered unusual for a worker with a relatively high impairment assessment not to subsequently obtain a certificate from the court based upon the narrative definition of '*serious injury*', it cannot be ruled out entirely. In reality, it is very unlikely that such a situation would arise, however, it is important to remain aware of the possibility that a worker may attempt to revisit an application that did not succeed due to such circumstances.

The final issue is in regards to how the effects of unsuccessful surgery are to be treated. In the example looked at by His Honour Justice Nettle, a worker who suffers from weakness of the lower extremity as a consequence of spinal surgery is precluded from being considered in the assessment of impairment. However, the worker will very likely have recourse to compensation by way of section 83(1)(d) of the Act, as the new injury will have arisen as a result of the worker attending at a place for receiving medical, surgical or hospital advice, attention or treatment.

The Court was not called on to conclusively determine this issue, it does however, remain open, and the Court of Appeal may well be called upon to decide the issue in future. However, in accordance with the comments of Justice Nettle and the operation of section 83(1)(d), it is probable that any new injury that arises as a result of surgery is able to be compensated under the Act despite it being precluded from consideration in the determination of permanent impairment of the original injury.

### **"YES" OPTUS** **Sean Millard - Special Counsel**

Worker's compensation and Occupational Health and Safety have been the responsibility of State and Territory Governments for many years. However, High Court decisions over the last 12 months dealing with the constitutional underpinnings of the WorkChoices system and Comcare workers' compensation scheme, has created momentum towards a national scheme for the regulation of workers compensation, workplace safety, employment and industrial relations in Australia.

In 2004, Optus was granted a licence to become a self insurer under the Comcare scheme. The licence was granted as Optus was able to show that it carried on business in competition with Telstra which was a Commonwealth authority. The Victorian Government challenged the issue of that licence on the basis that the constitutional insurance power precluded the Commonwealth from doing so.

The High Court, in confirming the grant of the licence as valid, has given the option to companies which compete with Commonwealth authorities, to choose to operate under Comcare, or to continue to use a State scheme.

The dissenting judges noted that this will have serious implications for workers while reducing obligations on employers. For example, in the Victorian WorkCover scheme, damages for economic loss are '*capped*' for serious injury at \$1,006,760 and \$438,000 for non-economic loss.

One benefit for those that transfer to Comcare as self insurers, is that they will be subject to one set of workers' compensation and occupational health and safety rules. This will reduce the difficulties with having to deal with the intricacies and differences in the different State systems. Furthermore, businesses may save on premiums. Optus, on becoming a self insurer, anticipated a pre-tax savings of \$186,000 per month.

Further, self insurers under Comcare are only covered by the current Commonwealth Occupational Health and Safety scheme which places a greater emphasis on proactive measures in encouraging employers to maintain safe work places and practise. This contrasts to the ever increasingly more prescriptive/penalty driven State systems. In other words, on current legislation, employers involved in the Comcare system are much less likely to be prosecuted for breaches, than those who are subject to a State system.

One issue that remains is whether the Commonwealth Occupational Health & Safety Scheme is able to cover contractors and this may be an issue that permits a continuing state impact. Developments are occurring on this issue and we will keep you informed on this important aspect.

**AFTER THE *OPTUS CASE*: THE NEW CHALLENGE TO THE FEDERAL SELF INSURANCE SCHEME UNDER COMCARE**  
**Madelaine August - Articled Clerk**

**Cowie v SRCC : The John Holland Backlash**

In September, a new Federal Court challenge to the self insurance scheme under Comcare will begin. Unlike the earlier unsuccessful High Court litigation, *Attorney-General (Vic) v Andrews* [2007] HCA 9 (the '*Optus Case*'), which relied on constitutional arguments to undermine the scheme, the new challenge is administrative in nature (see above).

The claim has arisen from the decision of the Safety, Rehabilitation and Compensation Commission (SRCC) to grant John Holland Pty Ltd a licence to self insure under sections 103 and 104 of the Federal *Safety, Rehabilitation and Compensation Act 1988* ("the SRC Act"), in December 2006. Jason Cowie, a building worker employed by the construction company in New South Wales, supported by the construction division of the CFMEU, has lodged an application for judicial review of this decision in the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

In Mr Cowie's application, it is claimed that the SRCC did not satisfy itself that it was appropriate to grant John Holland Pty Ltd a license to self insure under Comcare, as it failed to seek the views of, amongst others, the worker. It is further claimed that SRCC did not satisfy itself, by assessing or comparing the benefits of Comcare and the relevant State worker's compensation scheme, whether or not the interests of the employees, including the worker, would be adversely affected. The SRCC, it is alleged, has thus failed to take into account a relevant consideration and made an error in law.

The application to set aside the decision of the SRCC was lodged on 2 July 2007 and is currently listed before Jacobson J for a First Directions hearing on Thursday, 6 September 2007.

**A Fight on Multiple Fronts**

This is not the only dispute to have arisen from

John Holland's decision to opt out of State worker's compensation schemes and into Comcare. John Holland Pty Ltd is one of three companies in the John Holland group, including John Holland Group Pty Ltd and John Holland Rail Pty Ltd, which have been caught in the escalating campaign, led by the union movement, against the expansion of Comcare to private companies.

John Holland has initiated two legal actions in response to documents produced and distributed by the unions warning employees of the impact of Comcare. In the ACT, John Holland is seeking a declaration that the CFMEU and NSW secretary Andrew Ferguson breached section 53B of the Trade Practices Act, which prohibits conduct likely to mislead prospective employees about their conditions. Other offences alleged include breaches to occupational health and safety laws, as well as torts including nuisance, invasion of privacy and defamation after the phone number of a senior John Holland employee was distributed. The company is also suing the AMWU for similar reasons in Victoria. Nevertheless, critics of Comcare have not been discouraged from making an example of John Holland, with safety standards on the Queensland Ports Authority Expansion being the most recent target of Brendan O'Connor, Labor's shadow parliamentary secretary for industrial relations. John Holland is facing a fight in multiple States on multiple fronts.

Watch this space for progress reports as the matters progress through the system.

**OWNER DRIVERS/CONTRACTORS**  
**A SPECIAL - SPECIAL INTEREST SECTOR**  
**Bruce Butler - Partner**

Both the Victorian and Commonwealth Governments have introduced legislation providing for additional regulation of Owner Drivers/Contractors. The stated intention was to provide specific legislation that treats this sector as small businesses rather than "*quasi employees*". Accordingly, in Victoria, the *Owner Drivers and Forestry Contractors Act* was introduced, being operative from 1 December 2006. In addition, the *Commonwealth Independent Contractors Act* is operative from 1 March 2007 but for the time being it does not apply to Owner Drivers in Victoria

leaving the Victorian Act to regulate the Owner Driver sector.

The Victorian *Owner Drivers and Forestry Contractors Act* introduces a totally new scheme of regulating Owner Driver contracts. Such Regulations include prescribing the minimum requirements for Owner Driver contracts, which must be in writing. This Act also sets a general dispute resolution regime with Contractors having the right to refer disputes to the Small Business Commissioner and in certain cases to the Victorian Civil and Administrative Tribunal (VCAT). Specifically, VCAT is able to determine "unlawful termination" and also has an extensive range of remedies including varying, voiding and inserting contractual terms into contracts in order to avoid injustices.

While the stated intention was to treat Owner Drivers/Contractors as small businesses, the *Victorian Accident Compensation Act* has not been amended in respect to the deeming provisions for Owner Drivers/Contractors (Sections 8 and 9). We are therefore left with broad and far reaching deeming provisions which provide compensation coverage for a vast number of Owner Drivers/Contractors. In this regard, Victoria may be considered as the State having the worker's compensation system with the broadest potential range of coverage for workers and deemed workers pursuant to the *Accident Compensation Act*.

However, whilst Victoria may have the broadest range of coverage for Owner Drivers/Contractors there has also recently been introduced a "Public Ruling" issued by the Victorian WorkCover Authority

in respect to the determination of remuneration payable to Contractors and accordingly, the remuneration that should be disclosed for the purposes of calculating premiums. This Ruling provides guidelines that are voluntary and are for the purposes of calculating premiums and do not alter the deeming provisions under Sections 8 and 9 of the *Accident Compensation Act*.

This is confirmed within the *Premium Public Ruling Owner Drivers*, which states as follows:

*"This ruling cannot override the law and cannot reduce the rights of a deemed worker or a hirer..."*

We are therefore left with a situation of increased regulation for contracting with Owner Drivers/Contractors, on the basis that they are small businesses but on the other hand such Owner Drivers/Contractors may still be covered for compensation pursuant to the deeming provisions under the *Accident Compensation Act*. The *Premium Public Ruling Owner Drivers* whilst potentially being beneficial in respect to the calculation of premiums nevertheless does not alter the coverage for Owner Drivers/Contractors provided for under the *Accident Compensation Act*.

Arguably, Owner Drivers/Contractors now get the best of both worlds, as they have a special regulatory framework for determining their contracts on the basis that they are small businesses but they still get the potential benefits of being deemed workers, for the purposes of coverage under the *Accident Compensation Act*.

## something for the back page

**date for the diary — Seminar — Victorian County Court — Thursday 25 October 2007 — 3:30 pm**

Mock Serious Injury Trial: a first hand look at the use of evidence at hearing: evidence in chief and cross examination of our Plaintiff introduced at the Autumn Seminar, to be followed with a discussion of evidence at common law proceedings (numbers will be limited). Drinks to follow at 5:00 pm.

- Psychological workers compensation claims have doubled since 1996/1997. Stress now amounts for 6% of successful workers compensation claims and 59% of these claims are from women [ACCS, Compendium of Workers Compensation Statistics for 2004/2005].