

SUPREME COURT OF SOUTH AUSTRALIA

(Civil: Application for Judicial Review)

GRAMAR PTY LTD T/A VALLEY VIEW NURSING HOME v WORKCOVER CORPORATION OF SOUTH AUSTRALIA

[2011] SASC 237

Judgment of The Honourable Justice Kelly

22 December 2011

**ADMINISTRATIVE LAW - ADMINISTRATIVE TRIBUNALS -
STATUTORY APPEALS FROM ADMINISTRATIVE AUTHORITIES TO
COURTS**

**ADMINISTRATIVE LAW - JUDICIAL REVIEW - GROUNDS OF
REVIEW - ERROR OF LAW**

**ADMINISTRATIVE LAW - JUDICIAL REVIEW - GROUNDS OF
REVIEW - DELEGATION OF POWER**

**ADMINISTRATIVE LAW - JUDICIAL REVIEW - GROUNDS OF
REVIEW - RELEVANT CONSIDERATIONS**

Application for judicial review - the defendant imposed penalty levy rates under the Workers Compensation and Rehabilitation Act 1986 (SA) on the plaintiff over two consecutive financial years - the WorkCover Levy Review Panel dismissed the plaintiff's application for review - the plaintiff sought to have the two original orders set aside on the grounds they were made ultra vires of the approved delegate's power - the plaintiff also sought in the alternative to have the decision of the Review Panel set aside - whether the approved delegate acted within power in respect of the original determinations - whether the original decisions were invalid or not - whether the original determinations made by the defendant could now be challenged - whether the Review Panel made an error of law - whether the Review Panel took relevant considerations into account

Held: the approved delegate did make decisions within power - the defendant's original decisions were valid - the Review Panel conducted a full merits review of the two original decisions and so original decisions cannot now be the subject of judicial review - the Review Panel correctly interpreted s 30(3)(e) of the Workers Rehabilitation and Compensation Act 1986 (SA) but failed to take all relevant considerations into account

**Plaintiff: GRAMAR PTY LTD T/A VALLEY VIEW NURSING HOME Counsel: MR S THOMAS -
Solicitor: SPARKE HELMORE**

**Defendant: WORKCOVER CORPORATION OF SOUTH AUSTRALIA Counsel: MR M WAIT -
Solicitor: CROWN SOLICITOR FOR THE STATE OF SOUTH AUSTRALIA**

Hearing Date/s: 26/07/2011

File No/s: SCCIV-10-925

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which may have affected its decision - the matter is to be returned to the Review Panel for further determination in light of all the relevant considerations.

Workers Rehabilitation and Compensation Act 1986 (SA) s 3, s 28A, s 30, s 64, s 66, s 67 and s 72; *WorkCover Corporation Act 1994* (SA) s 17; *The South Australian Government Gazette* No 6, 25 January 2006; No 48, 26 July 2007; No 75, 29 October 2009, referred to. *Gramar Pty Ltd t/as Valley View Nursing Home v WorkCover Corporation of South Australia* [2010] SAWLRP 2, discussed.

Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 209 CLR 597; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; *Seymour v Migration Agents Registration Authority* (2006) 234 ALR 350; *Garde-Wilson v Legal Services Board* [2007] VSC 225; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, considered.

**GRAMAR PTY LTD T/A VALLEY VIEW NURSING HOME v
WORKCOVER CORPORATION OF SOUTH AUSTRALIA
[2011] SASC 237**

CIVIL

KELLY J.

Introduction

1 This is an application for judicial review of three decisions made by
WorkCover Corporation of South Australia (“defendant”).

2 The applicant, Gramar Pty Ltd (“plaintiff”) seeks orders setting aside the
decision of 24 May 2007 by the defendant by which the defendant imposed a
penalty levy rate to be paid by the plaintiff in the financial year 1 July 2007 to 30
June 2008, and the decision of 23 May 2008 by the defendant by which the
defendant imposed a penalty levy rate to be paid by the plaintiff in the financial
year 1 July 2008 to 30 June 2009.

3 The plaintiff also seeks orders in the alternative that the decision of the
defendant’s Levy Review Panel (“the Review Panel”) on 8 February 2010 be set
aside. By that decision the Review Panel dismissed the plaintiff’s applications
for review of both the decisions made by the defendant on 24 May 2007 and
23 May 2008.

4 It is necessary to describe at the outset the factual and legal background
which gave rise to the challenged decisions.

5 The plaintiff operates a nursing home known as the Valley View
Residential Care Facility and Valley View Nursing Home. A number of nursing
staff are employed by the plaintiff. In two separate incidents on 6 December
2004 and 23 August 2005 two of those nursing staff suffered injuries at work.

6 In the incident on 23 August 2005 a worker employed by the plaintiff as a
carer was involved in an incident at work which led to an alleged injury to that
worker’s right elbow. The worker had tried to prevent a resident in the home
from slipping. The injury resulted in an alleged compensable disability under the
Workers Rehabilitation and Compensation Act 1986 (SA) (“the Act”).
Following the incident the worker commenced participation in an agreed
rehabilitation and return to work plan under the provisions of s 28A of the Act.
That plan required the worker to engage in modified duties in particular light
clerical duties, no patient contact, work limited to four hours a day and limited
use of her right arm. While performing these modified duties in participation of
the plan, on or before 4 November 2005, the worker developed a left shoulder
injury because she used her left arm for such duties. It was agreed in the
proceedings before me that the injury to the left shoulder was the primary cause
of the worker’s compensable disability under the Act and also the injury taken

into account by the defendant in making the original decisions relating to imposition of a penalty levy on the plaintiff.

The Scheme

7 The defendant's principal function under the Act is to administer the Act, which establishes a rehabilitation and compensation scheme ("the Scheme") funded by registered and self-insured employers. The Act provides for compensation for employment related disabilities and the rehabilitation of disabled workers and their return to work. The defendant is required to establish and maintain a compensation fund.¹

8 The principal source of income for that fund are the levies paid by employers as provided by part 5 of the Act. Section 66 of the Act concerns the imposition of levies, and all employers (other than self-insured employers as defined in the Act) are required to pay a levy that is calculated as a percentage of the aggregate remuneration paid by them. Employers must pay the percentage remuneration, fixed by the defendant, for the class of industry in which the employer operates.

9 It is necessary to set out in some detail the relevant provisions of the Act. Section 66 of the Act is headed "imposition of levies", and relevantly provides:

- (1) An employer (not being a self-insured employer) is liable to pay a levy to the Corporation under this section.
- (2) The levy is a percentage of the aggregate remuneration paid to the employer's workers in each class of industry in which the employer employs workers.
- (2a) The levy will, subject to this Act, be payable at first instance on the basis of an estimate of aggregate remuneration for a particular financial year in accordance with Division 6.
- (3) The Corporation may for the purposes of this section divide the industries carried on in the State into various classes.
- (4) The Corporation may determine any question as to the class of industry in which an employer employs workers.
- (5) In determining the class of industry in which an employer employs workers the following provisions will be applied—
 - (a) if the employer employs a worker in two or more classes of industry—
 - (i) the worker will, subject to any determination by the Corporation to the contrary, be treated as if solely employed in the class of industry in which he or she is predominantly employed; and

¹ *Workers Rehabilitation and Compensation Act 1986* (SA), s 64.

- (ii) if it is not possible to determine which is the predominant class, the worker will be treated as if solely employed in a class of industry determined by the Corporation; and
- (b) if the employer employs workers in different classes of industry at a particular workplace, all workers employed at the workplace will, if the Corporation so determines, be treated as engaged in the predominant class of industry; and
- (c) in determining what is the predominant class of industry, the Corporation will have regard to—
 - (i) the importance within the employer's total operations of each class of industry in which workers are employed; and
 - (ii) any other relevant factor.
- (6) The Corporation—
 - (a) must fix the percentages applicable to the various classes of industry by notice published in the Gazette; and
 - (b) may, by subsequent notice published in the Gazette, vary the percentages so fixed.

...

10 Section 67 relates to the adjustment of levies in relation to an individual employer. Section 67 empowers the defendant to grant a remission of the levy that would otherwise be payable by an employer or to impose on the employer a supplementary levy (commonly known as a penalty levy). In so doing, the defendant may have regard to all or any of the following matters:²

- (a) the adequacy or inadequacy of measures taken by the employer to reduce the incidence of work related traumas;
- (b) the incidence or costs of claims for compensable disabilities suffered by the employer's workers (disregarding claims of a class excluded from the ambit of this paragraph by regulation);
- (c) the rehabilitation facilities or services for disabled workers provided by the employer, or the absence or inadequacy of such facilities or services provided by the employer;
- (ca) the employer's practices and procedures in connection with the appointment and work of a rehabilitation and return to work co-ordinator under Part 3 (including with respect to compliance with any relevant guidelines published by the Corporation for the purposes of section 28D);
- (d) the employer's practices as to the retention, employment or re-employment of disabled workers (and, in particular, any failure on the employer's part to provide,

² *Workers Rehabilitation and Compensation Act 1986* (SA), s 67(1)(a)-(e).

in accordance with this Act, employment to a worker who has suffered a compensable disability in the employer's employment);

- (e) such other matters (whether similar or dissimilar to those referred to above) as the Corporation considers relevant.

11 If the defendant imposes a supplementary levy on an employer it may also require the employer to observe certain conditions stipulated by it in a written notice to the employer,³ and in the event the employer fails to comply with a condition the defendant may impose a further supplementary levy.⁴ For any "proper reason" the defendant may vary or revoke a condition imposed or revoke or reduce a supplementary levy imposed or a remission of levy granted.⁵ In respect of rehabilitation and return to work programs s 67 of the Act relevantly provides:

- (5) The Corporation may establish rehabilitation and return to work programs for disabled workers on terms under which an employer who participates in the program by providing employment for disabled workers and complying with the other conditions of the scheme is entitled to reduction of the levy that would otherwise be payable by the employer on a basis set out in the scheme.
- (6) The terms and conditions of a rehabilitation and return to work scheme established under subsection (5) must be promulgated by regulation.

12 Section 28A of the Act which also deals with rehabilitation and return to work programs relevantly provides:

- (1) The Corporation may establish a rehabilitation and return to work plan for a worker who is incapacitated for work by a compensable disability.
- (2) If a worker—
 - (a) is receiving compensation by way of income maintenance; and
 - (b) is (or is likely to be) incapacitated for work by a compensable disability for more than 13 weeks (but has some prospect of returning to work),

the Corporation must prepare a rehabilitation and return to work plan for the worker.

- (3) In preparing the plan, the Corporation—
 - (a) must consult with the worker and the employer out of whose employment the disability arose; and
 - (ab) must consult with the relevant rehabilitation and return to work co-ordinator under section 28D (if appointed); and
 - (b) should if practicable—

³ *Workers Rehabilitation and Compensation Act 1986* (SA), s 67(2).

⁴ *Workers Rehabilitation and Compensation Act 1986* (SA), s 67(3).

⁵ *Workers Rehabilitation and Compensation Act 1986* (SA), s 67(4).

- (i) review medical records relevant to the worker's condition; or
 - (ii) consult with any medical expert who is treating the worker for the compensable disability.
- (4) A rehabilitation and return to work plan may impose obligations on the worker and on the employer.
- (5) The Corporation must give the worker and the employer a copy of the rehabilitation and return to work plan.
- (6) The plan is binding on the worker and the employer.

13 In this case the relevant injury suffered by the worker occurred whilst performing modified duties pursuant to a plan established under the provisions of s 28A of the Act.

The Levy Adjustment Scheme

14 Since 1999 the defendant has published determinations in the South Australian Government Gazette to establish a consolidated remission and supplement scheme, known as the Levy Adjustment Scheme, for the purpose of exercising its powers under s 67(1) of the Act which I have set out above. In substance, the scheme adjusts an employer's base industry levy depending on, amongst other things, the employer's claims history. The two relevant determinations for the purposes of the proceedings in this case are those published in the Gazette on 25 January 2006 and 26 July 2007.⁶ Those determinations are referred to in the affidavit of Ms Karen Foundas of 28 June 2011. From Item 2.3 onwards the schedule sets out the various circumstances or "elements" in which an imposition of a supplement levy is allowed. Item 2.3 relevantly provides:

Element 1 is the grant of a remission or the imposition of a supplement on a particular employer determined having regard to:

- (a) the incidence or costs of claims for compensable disabilities suffered by a particular employer's workers (disregarding claims excluded from the ambit of Section 67(1)(b) of the WRCA by regulation); or
- (b) the performance or otherwise by the employer of measures determined by the Corporation to reduce the incidence or costs of those compensable disabilities,

...

15 In respect of delegations s 17 of the *WorkCover Corporation Act 1994* (SA) by instrument in writing provides that the defendant may delegate a function or power conferred on or vested in it. Section 17 relevantly provides:

⁶ *South Australian Government Gazette*, No 6, 25 January 2006 at 328; *South Australian Government Gazette*, No 48, 26 July 2007 at 3191.

- (1) The Corporation may, by instrument in writing, delegate a function or power conferred on or vested in the Corporation.
- (2) **A delegation—**
 - (a) **may be made—**
 - (i) to a member of the board; or
 - (ii) to a committee established by the Corporation or by or under an Act; or
 - (iii) **to a particular officer of the Corporation, or to any officer of the Corporation occupying (or acting in) a particular office or position; or**
 - (iv) to a public authority or public instrumentality; or
 - (v) to a private sector body in connection with a contract or arrangement that is an authorised contract or arrangement under section 14(4); and
 - (b) may be made subject to conditions and limitations specified in the instrument of delegation; and
 - (c) is revocable at will and does not derogate from the Corporation's power.
- (2a) If the terms of an instrument of delegation allow for subdelegation, the delegate may subdelegate the function or power in accordance with the instrument.
- (3) In legal proceedings an apparently genuine certificate, purporting to be signed by an officer of the Corporation, containing particulars of a delegation or subdelegation under this section will, in the absence of proof to the contrary, be accepted as proof of the particulars.

[emphasis added]

16 Relevantly, Item 6 provides for general and specific delegations of certain functions to certain officers of the defendant. The delegate for the purpose of the determination in this case was the Chief Executive Officer and the Chief Financial Officer who at that time was Mr I Rhodes. In her affidavit Ms Foundas deposes to the circumstances in which the decision to impose a supplementary levy on the plaintiff was made.

17 On 11 April 2001 the defendant's Board approved a formula according to which determinations under Element 1 referred to in the determinations should be made. This decision included that the performance index would be calculated according to a formula. In respect of the administration of Element 1 Ms Foundas deposed to the following:

I am aware that there are now approximately 50,000 employers in South Australia that are required to be registered under the WRCA. The issue of levy rate notices starts in May for the subsequent July/June levy period. An on other occasions, at the time of the two original decisions, as part of my role and functions, I instructed WorkCover's Information

Computer Technology Business Unit to run the rollover. That means utilising the computerised system to apply the formula approved by the Board together with other applicable policies and procedures established by WorkCover to produce the next financial year's levy rates. An automated system then generates letters to employers advising them of any applicable supplement or remission.

I am aware that since October 2004 Mr Ian Rhodes, in his capacity of Chief Financial Officer, oversaw the processes described in [the above paragraph] and gave his tacit approval to them. Mr Rhodes's employment with WorkCover ceased on 22 April 2011.

18 It appears from Ms Foundas' evidence that the original decisions to impose supplementary levies on the plaintiff were made in accordance with the policy adopted by the Board. As such the levy was calculated by an automated computer system operated by the defendant and overseen by the Chief Financial Officer as the relevant delegate. The original decisions concerning the fixing of a levy rate to be paid for the 2007 - 2008 and 2008 - 2009 years respectively were based on the plaintiff's claims history.

19 By operation of s 67(1)(b) and transitional provision 34, and the definition of "unrepresentative disability" in s 3(1) of the Act, claims generated from disabilities arising from certain "attendances" identified in s 30(3) of the Act should not be taken into account in determining a supplementary levy. The Review Panel determined that the worker's attendance at the workplace to perform modified duties under the provisions under the rehabilitation and return to work plan was not an "unrepresentative disability".

20 I turn now to the relevant sections of the Act in relation to unrepresentative disabilities. Unrepresentative disability is defined in s 3 of the Act as follows:

unrepresentative disability means a disability arising from an attendance mentioned in section 30(3) or a journey mentioned in section 30(5)(b);

21 Section 30 provides that a disability is compensable if it arises from employment. A disability "arises from employment" if:⁷

- (1) Subject to this Act, a disability is compensable if it arises from employment.
- (2) Subject to this section, a disability arises from employment if—
 - (a) in the case of a disability that is not a secondary disability or a disease—it arises out of or in the course of employment; or
 - (b) in the case of a disability that is a secondary disability or a disease—
 - (i) the disability arises out of employment; or
 - (ii) the disability arises in the course of employment and the employment contributed to the disability.

⁷ *Workers Rehabilitation and Compensation Act 1986* (SA), s 30(1)-(2).

A worker's employment includes:⁸

- (a) attendance at the worker's place of employment on a working day but before the day's work begins in order to prepare, or be ready, for work; and
- (b) attendance at the worker's place of employment during an authorised break from work; and
- (c) attendance at the worker's place of employment but after work ends for the day while the worker is preparing to leave, or in the process of leaving, the place; and
- (d) attendance at an educational institution under the terms of an apprenticeship or other legal obligation, or at the employer's request or with the employer's approval; and
- (e) **attendance at a place to receive a medical service, to obtain a medical report or certificate (or to be examined for the purpose), to participate in a rehabilitation program or for the purposes of a rehabilitation and return to work plan, or to apply for, or receive, compensation for a compensable disability.**

[emphasis added]

22 The residue of s 30 of the Act states:

- (4) However, a disability does not arise from employment if it arises out of, or in the course of, the worker's involvement in a social or sporting activity, except where the activity forms part of the worker's employment or is undertaken at the direction or request of the employer.
- (5) A disability that arises out of, or in the course of, a journey arises from employment only if—
 - (a) the journey is undertaken in the course of carrying out duties of employment; or
 - (b) the journey is between—
 - (i) the worker's place of residence and place of employment; or
 - (ii) the worker's place of residence or place of employment and—
 - (A) an educational institution the worker attends under the terms of an apprenticeship or other legal obligation, or at the employer's request or with the employer's approval; or
 - (B) a place the worker attends to receive a medical service, to obtain a medical report or certificate (or to be examined for that purpose), to participate in a rehabilitation program, or to apply for, or receive, compensation for a compensable disability,

⁸ *Workers Rehabilitation and Compensation Act 1986* (SA), s 30(3).

and there is a real and substantial connection between the employment and the accident out of which the disability arises.

- (6) However, the fact that a worker has an accident in the course of a journey to or from work does not in itself establish a sufficient connection between the accident and the employment for the purposes of subsection (5)(b).
- (7) The journey between places mentioned in subsection (5)(b) must be a journey by a reasonably direct route but may include an interruption or deviation if it is not, in the circumstances of the case, substantial, and does not materially increase the risk of injury to the worker.

23 Section 30(3)(e) is the relevant provision interpreted by the Review Panel not to include attendances at the workplace in participation of a rehabilitation and return to work program.

Issues for Decision

24 The questions which arise for determination on this application are:

- 1 Whether this Court should entertain the plaintiff's challenge to the two original decisions made by the defendant on 24 May 2007 and 23 May 2008.
- 2 If so, whether either or both of those decisions should be set aside on the grounds that they were invalidly made.
- 3 The plaintiff's alternative application that the decision of the Review Panel of 8 February 2010 be set aside is based on the submission that the Panel fell into error by concluding that the injury suffered by the first worker while attending at the workplace to perform modified duties under a rehabilitation and return to work plan is not "an unrepresentative disability".

25 The third question raises the issue of the relevant considerations which should be taken into account by the defendant when determining whether or not to impose a supplementary levy. This question also raises an issue about the interpretation of s 30(3)(e) of the Act.

The Two Original Decisions

26 It was not in dispute that the instruments of delegation under the relevant determinations did operate as delegations under the Act and that the proper officer holding the delegation was the Chief Financial Officer. Further, it was accepted that the relevant element of the Levy Adjustment Scheme is Element 1 exercisable by the Chief Financial Officer.

27 The plaintiff contended that the two original decisions were invalid by reason of the fact that they were not made in accordance with the delegation to the Chief Financial Officer. It was complained that the effective silent oversight

and approval by the Chief Financial Officer of an automated process in accordance with the policy of the Board adopted in 2003, made the original decision *ultra vires*. It was argued that the terms of the delegation ought to be construed so as to require personal participation by the delegate, that is the Chief Financial Officer, in the decision to impose supplementary levies and that as the decision was made partly by an automated computer generated process, the decision was not properly made by the approved delegate.

28 It was submitted that the right to impose a supplementary levy on an employer represents a serious impingement on the rights of the employer. Accordingly, it was argued any instrument of delegation must be construed narrowly subject to any contrary intention manifested in the relevant legislative provisions or the instrument itself. The plaintiff submitted that effectively the policy approved by the Board meant that decisions were made to impose supplementary levies without any input by the relevant delegate.

29 The plaintiff contends that the delegation under s 17 of the *WorkCover Corporation Act 1994* (SA) should be interpreted to require the personal participation by the delegate, in this case the Chief Financial Officer, in the decision to impose any supplementary penalty levy.

30 In my view, the plaintiff's argument is misconceived for the following reasons.

31 Section 67(1) of the Act empowers the defendant to impose supplementary levies on employers. The defendant has made a determination that its discretion should be exercised in accordance with the Levy Assessment Scheme as amended from time to time, and, that Element 1 determinations made under the Scheme are made in accordance with a formula approved by the Board in 2001.⁹

32 Although the delegate was in charge of overseeing the processes, the fact is that the decision was made by the defendant itself in accordance with its policy to apply the following calculation:

$$\text{Performance Index} = \frac{\text{Claims payments}}{\text{Remuneration}} \times \frac{\text{Rating factor}}{\text{Industry levy rate}}$$

33 This was the formula adopted and maintained for the purposes of the Levy Assessment Scheme in 2006 and 2007. Effectively therefore the rate was arrived at by the defendant in accordance with its policies, even though the precise calculation was performed by a computer, using the formula. In my view the defendant's contention that no specific delegation was therefore required is correct. This was a decision of the Board itself. Even if I am wrong about that and there was a specific delegation required in each instance, there was no dispute that the Chief Financial Officer was the general delegate for the purposes of a Levy Assessment Scheme and it was in that capacity that he oversaw the

⁹ See Affidavit of Karen Joan Foundas (dated 28 June 2011) at [11].

relevant processes by which the precise calculation for each financial year was arrived at.

34 For these reasons the plaintiff's submission that the original decisions were invalid must fail.

35 In any event I do not consider it now open to the plaintiff to challenge the earlier decisions in light of the fact that the plaintiff has already chosen to utilise the review processes mandated by s 72 of the Act. The nature of the review carried out by the Review Panel under s 72 is such that I consider that the plaintiff was entitled to, and did receive in this case, a review on the full merits of the matter. During that review the plaintiff had the opportunity to place before the Review Panel all or any complaint it had with regard to the assessment of the levy. In fact, the Review Panel sat for two days and received written submissions from the plaintiff. In these circumstances I do not consider it appropriate that the plaintiff should now challenge the two original decisions when they have effectively been supplanted by a full merits review and decision by the Review Panel.

36 The plaintiff submitted that this could not be so because the plaintiff only had jurisdiction to review a valid decision. It claimed that because the original decisions were invalid therefore the Review Panel decision must be invalid because there can be no review at law of a decision that does not exist.

37 The plaintiff relied on a number of authorities where courts have interpreted privative claims narrowly. However the plaintiff's submission does not take into account a line of authority which establishes that provisions in legislation conferring jurisdiction on decision making bodies should not be narrowly or technically construed.¹⁰ In this case, far from attempting to exclude jurisdiction to review, s 72 confers a review jurisdiction. Moreover, given the determination establishing the Review Panel and the principles on which the Panel is required to function, I consider that the review conducted by the Panel was a full merits review.¹¹ For this reason I consider that the plaintiff's challenge to the decision of the Review Panel based on jurisdictional validity cannot succeed.

38 The plaintiff made a further submission based on the wording of clause 3 in the determination establishing the Review Panel. That clause restricts the Panel from reviewing a decision of the defendant on a matter of law which goes to the validity of that decision. Clause 3 states *inter alia*:¹²

¹⁰ Aronson, M, Dyer, B and Groves, M, *Judicial Review of Administrative Action* (4th ed, 2009) at 716 and cases therein cited including in particular *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 and *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476. See also discussion of this topic in *Seymour v Migration Agents Registration Authority* (2006) 234 ALR 350 per Rares J and *Garde-Wilson v Legal Services Board* [2007] VSC 225 at [54]-[71].

¹¹ *The South Australian Government Gazette*, No 75, 29 October 2009, 4977-4978; clauses 3 and 8.

¹² *The South Australian Government Gazette*, No 75, 29 October 2009, 4977.

The function of the Panel shall be to perform the functions of the Board under section 72 of the Workers Rehabilitation and Compensation Act 1986 ('the Act') as delegate of the Board under that section in reviewing decisions of the Corporation pursuant to subsections 66 (4), 66 (5), 66 (6), 67(1), 67 (2), 67 (3), 67 (4), 69 (4) (b), 70 (1), 70 (2), 70 (3), 70 (4), 71 (1), 71 (2) of the Act and (subject to the succeeding clauses of this determination) the powers of the Board under section 72 of the Act (**other than the power to review a decision of the Corporation on a matter of law going to the validity of that decision**) are delegated to the Panel for that purpose.

[emphasis added]

39 On the face of the delegation in clause 3, the Review Panel is not restricted from reviews of decisions that might be invalid for some other reason, it merely prevents the Review Panel from deciding those reviews before it on such grounds. The restriction on the Review Panel referred to in clause 3 of the delegation only restricts the grounds of review to be pursued before the Review Panel and not the kind of decisions for review. As the Review Panel in this case did not review the original decisions in order to determine their validity, and in fact was not asked to do so by the plaintiff, the Review Panel did not purport to exercise a jurisdiction which it did not have.

40 In any event as I have noted earlier, even if the original decisions were invalid, I consider that the decision of the Review Panel has effectively cured any defect in the original decision, and that it is the decision of the Review Panel which is open to challenge now and not the earlier decisions. For these reasons the plaintiff's application to review the two earlier decisions must be refused. Even if it was open to the plaintiff to challenge the earlier decisions, for the reasons I have already given, I would decline to grant the relief sought.

41 I turn now then to the plaintiff's alternative application arising out of the Review Panel's interpretation of s 30 of the Act.

The Decision of the Review Panel

42 The Review Panel provided detailed reasons for its decision. The Panel's reasoning and conclusion that the worker had not suffered an unrepresentative disability within the meaning of s 30(3)(e) is to be found in [66]-[82]. The gravamen of the Review Panel's reasons are found in the following paragraphs:¹³

[73] We interpret the word "attendance" to refer to an attendance in relation to the consultative process for the preparation of the plan, or other steps preparatory for return to work, rather than the working at modified duties that is the product or consequence of the plan. There are two reasons for our conclusion.

[74] Firstly, the words "for the purposes of a ... plan" appear to us to refer to the preparatory stage rather than the carrying out stage of the arrangements. The essence of our reasoning is that the word "plan" carries that connotation. We also

¹³ *Gramar Pty Ltd t/as Valley View Nursing Home v WorkCover Corporation of South Australia* [2010] SAWLRP 2.

note in this context that the word "participate" is omitted from this part of the subsection, although we do not attach any great significance to this.

[75] Secondly, the whole purpose of the subsection is to list various activities that would not otherwise be within employment, but to provide that they are sufficiently connected to the compensation process or to the employment itself that, if a disability is suffered during those activities, it should be compensable. The carrying out of modified duties for the employer is clearly within employment without any need for the subsection. We therefore consider that the intention of the subsection is not to refer to the carrying out of modified duties under a plan.

[76] We note in this case that the worker was paid wages for the work performed. It is important in our view that, in this case, the worker was carrying out productive work for the usual employer. We leave for another day questions of whether work hardening might be attendance at a place for the purposes of a rehabilitation and return to work plan.

[77] We consider that the purpose of section 30(3)(e) in this context is to provide that, if a worker suffers a disability while engaged in the consultative process or preparatory stage, that disability should be compensable. Without the subsection, it would arguably not be compensable.

[78] We have noted the arguments of the applicant that there is no restriction expressed in relation to the word "place". But we have come to the conclusion that the meaning of the word "attendance" is limited by the context and apparent purpose of the subsection.

[79] In reaching this conclusion, we are conscious of the comments of DeBelle J in *Peet v WorkCover* to the effect that an activity can be within section 30(3)(e) even if it arises from employment.

[80] We also note that a rehabilitation and return to work plan may result in the worker performing duties that are essentially full duties with some monitoring or alternatively some very minor restriction, for a lengthy period of time. It would be a strange result if the fact that the duties were performed as a result of a formal plan, as distinct from an informal arrangement with the employer, made the significant difference that any disabilities suffered were unrepresentative.

[footnote omitted]

43 In light of that conclusion the Review Panel determined not to interfere with the original decisions of the defendant on the basis that these amounts had not been excluded.

Did the Review Panel fall into error?

44 The plaintiff submitted that the Review Panel made an error of law by determining that the injury suffered by the worker was not an "unrepresentative disability" within the meaning of s 3(1) of the Act.

45 By operation of s 67(1)(b) of the Act, transitional provision 34 and the definition in s 3(1) of the Act, claims generated from disabilities arising out of

certain attendances set out in s 30(3) of the Act are not to be taken into account in determining a supplementary levy.

46 The plaintiff submitted that s 30(3) of the Act provides for an extended range of activities which are incidental to employment and they are not intended to be limiting. It was asserted that the work being done by the worker was clearly representative of her normal duties. The plaintiff submitted that s 30(3)(e) of the Act was intended to apply to a worker who is carrying out alternative activities under a rehabilitation program or a rehabilitation and return to work plan that might not strictly fall within the contract of employment and that it is drafted sufficiently widely to apply to any situation where the worker was undertaking activities or functions that are part of a rehabilitation program or a rehabilitation and return to work plan at any place. Had this construction been applied it was argued then the worker's injury fell within the provisions of s 30(3)(e) of the Act and the Review Panel would have found the injury to be unrepresentative within the meaning of s 3 of the Act. Thus it should not have properly been taken into account by the defendant when determining whether a supplementary levy should be imposed on the plaintiff.

47 The provisions I have just referred to make it clear that unrepresentative disabilities are not to be taken into account in determining whether an employer is liable to pay a supplementary levy.

48 In this case the Review Panel determined that the first worker's attendance at the workplace to perform modified duties under the rehabilitation and return to work plan was not an unrepresentative disability.

49 Taking into account the evident policy of the Act it is my view that the Review Panel was correct to determine that the first worker's attendance at the workplace pursuant to the return to work plan was not an attendance at work under the provisions of s 30(3)(e) of the Act. Her attendance at work was under the provisions of s 30(1) of the Act.

50 The evident purpose of s 30(3) is to extend the concept of employment in s 30(1) of the Act to include certain attendances which might not ordinarily fall within the concept of employment, however the worker's attendance at the workplace for the purpose of the rehabilitation and return to work plan on modified duties is in my view more properly characterised as a return to work within the concept of s 30(1).

51 The provisions of s 30(3)(e) are not intended to include attendance at the workplace for the purpose of performing usual duties, albeit modified duties, pursuant to the contract of employment or pursuant to a return to work plan.

52 I accept the defendant's submission that there is a good reason to restrict the meaning of "attendance at a place" in s 30(3)(e) of the Act having regard to the policy behind the Act. The policy of the Act is that "unrepresentative

disabilities” are disabilities that have a sufficient connection with employment so as to warrant the payment of compensation to an employee, but which are not so closely connected with employment, or under the control of an employer, that an employer should be held liable for them.

53 It follows that the Review Panel was not in error in concluding that the first worker’s disability was an unrepresentative disability within the meaning of s 3(1) of the Act.

54 This however is not the end of the matter.

55 On the hearing of this application the plaintiff raised an alternative submission which arises out of the terms of the rehabilitation and return to work plan under s 28A of the Act.

56 Despite the somewhat equivocal evidence, the Review Panel made the finding neither party disputes, that:¹⁴

We find that the evidence indicates that the left shoulder injury occurred while performing modified duties in November 2005 because the worker used her left arm for all such duties.

57 The Review Panel went on to accept the argument of the defendant that the bulk of the worker’s disability related primarily to her left shoulder and further that the evidence established that the injury was compensable in that it occurred as a result of using the left arm excessively to compensate for the lack of use of the right arm that was initially injured. The Review Panel concluded:¹⁵

We consider that the various alleged injuries all appeared to be the result of work activities.

58 The Review Panel expressed that view notwithstanding the defendant’s failure to determine each of the various claims for the injuries meaning that the employer was unable to challenge any of the decisions in the Workers Compensation Tribunal. The Review Panel was of the view that any challenge could not have given rise to any reduction in the amount paid for claim.

59 With regard to the modified duties and the nature of the duties required to be performed the Review Panel said:¹⁶

During the relevant time, the worker was generally certified as fit for modified duties with the restriction of no lifting over 5 kg, no overhead work and no repetitive shoulder movement. Hours were limited for much of the time. These are very restrictive

¹⁴ *Gramar Pty Ltd t/as Valley View Nursing Home v WorkCover Corporation of South Australia* [2010] SAWLRP 2 at [22].

¹⁵ *Gramar Pty Ltd t/as Valley View Nursing Home v WorkCover Corporation of South Australia* [2010] SAWLRP 2 at [37].

¹⁶ *Gramar Pty Ltd t/as Valley View Nursing Home v WorkCover Corporation of South Australia* [2010] SAWLRP 2 at [45].

conditions. It would have been difficult to have found real job opportunities with such restrictions.

60 These observations were made in the context of evaluating the complaint that the claim process had been mismanaged. Nevertheless, it was accepted by both the Review Panel and the defendant that the cause of the work injury was overuse of the left shoulder which occurred as a result of compensating for the non-use of the right shoulder. The Review Panel did not address the issue, implicit in its findings, that the return to work plan under s 28A of the Act was foredoomed to fail. It was a specific requirement of the return to work plan that the worker amongst other things was to limit her use of the right arm. In these circumstances it is almost inevitable that the worker was going to suffer a further injury and she did.

61 It is evident from an examination of the whole of s 67 of the Act that there is a causal relationship between the conduct of the employer and either the imposition of a supplementary levy or the grant to the employer of a remission of a levy. The defendant has the discretion to in effect reward employers who do the right thing and penalise those employers who do not.

62 It is also apparent that the discretion given to the defendant in s 67 of the Act is a very wide one. By s 67(1)(e) the defendant is empowered, in addition to the other matters enumerated in sub-paragraphs (a)-(d) of that section, to have regard to such other matters as the defendant considers relevant. As I have previously commented by s 67(4) of the Act, the defendant is also empowered for any proper reason to revoke or reduce a supplementary levy imposed or a remission of a levy granted under the section.

63 A question which arises, in the circumstances in which the first worker suffered a further injury giving rise to a compensable disability, is whether the defendant was obliged to take into account the terms of the rehabilitation and return to work plan under s 28A of the Act.

64 The Review Panel does not appear to have addressed at all the fact that, on its own findings, the terms of the return to work plan were so restrictive that it was almost inevitable that the first worker would suffer an injury to the other shoulder. The employer was bound by the terms of the return to work plan. In a very real sense it was not a matter within the control of the employer. It seems to me that a question does arise in these particular circumstances whether it was reasonable or just to penalise the employer when, as happened here, the inevitable occurred and the employee suffered a further injury.

65 In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*,¹⁷ the Court said:

¹⁷ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 per Mason J.

The failure of a decision-maker to take into account a relevant consideration in the making of an administrative decision is one instance of an abuse of discretion entitling a party with sufficient standing to seek judicial review of ultra vires administrative action...

- (b) What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors — and in this context I use this expression to refer to the factors which the decision-maker is bound to consider — are not expressly stated, they must be determined by implication from the subject-matter, scope and purpose of the Act. In the context of judicial review on the ground of taking into account irrelevant considerations, this Court has held that, where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except in so far as there may be found in the subject-matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard: see *Reg v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd*, adopting the earlier formulations of Dixon J in *Swan Hill Corporation v Bradbury*, and *Water Conservation and Irrigation Commission (N.S.W.) v Browning*. By analogy, where the ground of review is that a relevant consideration has not been taken into account and the discretion is unconfined by the terms of the statute, the court will not find that the decision-maker is bound to take a particular matter into account unless an implication that he is bound to do so is to be found in the subject-matter, scope and purpose of the Act.
- (c) Not every consideration that a decision-maker is bound to take into account but fails to take into account will justify the court setting aside the impugned decision and ordering that the discretion be re-exercised according to law. A factor might be so insignificant that the failure to take it into account could not have materially affected the decision...

[footnotes omitted]

66 In the context of this case I accept that here the discretion given to the defendant was a wide one, however in my view the fact that the employee was injured in the course of a rehabilitation and return to work plan which on any sensible view of the matter was foredoomed to fail was a very relevant consideration and ought to have been taken into account by the Review Panel. There is no evidence that the Review Panel did take that particular factor into account. Given the policy considerations implicit in the factors set out in s 67 of the Act, it is my view that it is by no means inevitable that the Review Panel would have come to the same conclusion if it had taken into account that fact. In these circumstances I consider that the Review Panel was obliged to have regard to that matter. In my view the plaintiff has a justifiable grievance. It follows that the matter should be returned to the Review Panel for hearing and determination taking into account the fact that the first worker has suffered a further injury in circumstances which the employer was effectively powerless to prevent.

67

I make the following orders:

- 1 The decision of the Review Panel made on 8 February 2010 is set aside.
- 2 The plaintiff's application for review of the decisions made by the defendant on 24 May 2007 and 23 May 2008 is remitted to the Review Panel for hearing and determination in accordance with these reasons.