

SUPREME COURT OF SOUTH AUSTRALIA
(Full Court)

**WORKCOVER CORPORATION OF SOUTH AUSTRALIA v
DAVEY; DAVEY v WORKCOVER CORPORATION OF
SOUTH AUSTRALIA**

[2011] SASCFC 66

Judgment of The Full Court

(The Honourable Justice Duggan, The Honourable Justice Gray and The Honourable Justice Sulan)

20 July 2011

**ADMINISTRATIVE LAW - JUDICIAL REVIEW - GROUNDS OF
REVIEW - PROCEDURAL FAIRNESS - EXCLUSION OF PROCEDURAL
FAIRNESS - PARTICULAR CASES**

WORKERS' COMPENSATION - MISCELLANEOUS MATTERS

Appeal from a decision of the Full Bench of the Workers Compensation Tribunal (SA) - WorkCover pursuant to section 35B of the Workers Rehabilitation and Compensation Act 1986 (SA) assessed the worker and determined that he had a current work capacity - WorkCover did not give the worker notice that it proposed to conduct an assessment pursuant to section 35B and did not invite the worker to make submissions - in response to the worker lodging a notice of dispute, WorkCover reconsidered and confirmed the section 35B determination - the dispute was referred to conciliation and conciliation was unsuccessful - the dispute was referred to a presidential member of the Workers Compensation Tribunal for judicial determination and then referred to the Full Bench of the Workers Compensation Tribunal - whether the Workers Rehabilitation and Compensation Act provides the Workers Compensation Tribunal with jurisdiction to make orders with respect to matters of judicial review or complaint concerning a want of procedural fairness - whether the Workers Rehabilitation and Compensation Act provides the worker with the right to be accorded procedural fairness at the time of the assessment pursuant to section 35B.

Held: Appeal allowed - the Workers Compensation Tribunal is not charged with making decisions on collateral issues concerning procedural fairness - the Workers Compensation

On Appeal from WORKERS COMPENSATION TRIBUNAL (HIS HONOUR DEPUTY PRESIDENT JUDGE HANNON, HER HONOUR DEPUTY PRESIDENT JUDGE FARRELL AND DEPUTY PRESIDENT MCCOUAIG) 2032/2010N; 1 MARCH 2011

Appellant/Defendant: WORKCOVER CORPORATION OF SOUTH AUSTRALIA Counsel: MR T STANLEY QC WITH MR B DOYLE AND MR S MCDONALD - Solicitor: MINTER ELLISON LAWYERS

Respondent/Plaintiff: MALCOLM LLOYD DAVEY Counsel: MR D HOOKE SC WITH MR A ROSSI - Solicitor: MOODY ROSSI AND CO

Hearing Date/s: 06/04/2011, 07/06/2011

File No/s: SCCIV-11-208, SCCIV-11-496

A

Tribunal acted without jurisdiction - the right to procedural fairness did not arise in regard to the making of the determination pursuant to section 35B - the separate proceedings seeking judicial review dismissed.

Workers Rehabilitation and Compensation Act 1986 (SA) s 2, s 3, s 35, s 35A, s 35B, s 35C, s 36, s 37, s 38, s 79, s 85, s 86, s 86A, s 89A, s 90, s 90A, s 90B, s 91, s 91A, s 92D, s 94A, s 94B and s 94C; WorkCover Corporation Act 1994 (SA) s 4, referred to.

Annetts v McCann (1990) 170 CLR 596; Davey v WorkCover Corporation (Construction Industry Training Board) [2011] SAWCT 1; Rundle v WorkCover Corporation / Vero Workers Compensation (SA) Ltd (P & O Transport Australia (SA) Pty Ltd) [2006] SAWCT 12; Re Minister for Immigration and Multicultural Affairs; Ex parte Miah (2001) 206 CLR 57; Brettingham-Moore v St Leonards Municipality (1969) 121 CLR 509; Twist v Randwick Municipal Council (1976) 136 CLR 106; R v Marks; Ex parte Australian Building Construction Employees Builders Labourers' Federation (1981) 147 CLR 471, considered.

**WORKCOVER CORPORATION OF SOUTH AUSTRALIA v DAVEY;
DAVEY v WORKCOVER CORPORATION OF SOUTH AUSTRALIA
[2011] SASCF 66**

Full Court: Duggan, Gray and Sulan JJ

1 **DUGGAN J:** In my view the Workers Compensation Tribunal did not have jurisdiction to determine whether WorkCover Corporation afforded procedural fairness to the respondent worker.

2 I am also of the view that, on a proper construction of the relevant provisions of the *Workers Rehabilitation and Compensation Act 1986* (SA), Parliament has determined that the requirements of procedural fairness to be observed in carrying out these provisions are those which are prescribed with particularity in the legislation and that they are to operate to the exclusion of the common law principles of natural justice.

3 I agree with the reasons prepared by Justice Gray and the orders which he proposes.

GRAY J:

4 This is an appeal from a decision of the Full Bench of the Workers Compensation Tribunal (SA).

5 There are two principal issues arising on the appeal for consideration by this Court. First, whether the *Workers Rehabilitation and Compensation Act 1986* (SA) provides the Tribunal with jurisdiction to make orders with respect to matters of judicial review or complaints concerning a want of procedural fairness. Second, whether the Act provides the worker with the right to be accorded procedural fairness at the time of a specific administrative process known as a section 35B determination – that is, a determination by a delegate of WorkCover Corporation which results in the cessation of weekly payments.

Background

6 A consideration of the issues arising on the appeal requires an understanding of the circumstances surrounding the claim for workers compensation.

7 Malcolm Lloyd Davey, the worker and respondent, sustained injury in the course of his employment in November 2006. The injury sustained was a

condition of anxiety and depression. By a consent order dated 14 March 2008, the worker's claim was accepted by WorkCover Corporation.¹

8 Section 38 of the *Workers Rehabilitation and Compensation Act* deals with review of the weekly payments made to a worker who has suffered a compensable disability.² On 24 November 2008, WorkCover completed a section 38 review. At this time, the worker was determined to be partially deemed totally incapacitated for work.³ His weekly payments remained unchanged.

9 The worker asserted that a further review pursuant to section 38 of the *Workers Rehabilitation and Compensation Act* was required to be carried out in November 2009. WorkCover did not carry out this review. The worker continued to receive weekly payments.

10 On 3 May 2010, WorkCover pursuant to section 35B of the Act assessed the worker and determined that he had a current work capacity and, as a consequence, advised that weekly payments would stop in accordance with sections 35B(1) and 36(1)(i) of the Act. This determination is referred to in these reasons as the section 35B determination. Pursuant to the provisions of the statute, the worker was entitled to receive weekly payments for a further 13 weeks following the receipt of the notice of determination.⁴

11 WorkCover did not give the worker any notice that it proposed to conduct an assessment under section 35B of the Act and did not invite the worker to make any submission in that regard.

12 "Current work capacity" and "no current work capacity" are defined in section 3 of the Act.⁵ Each definition refers to suitable employment which is also

¹ WorkCover Corporation is a corporation established by statute: *WorkCover Corporation Act 1994* (SA) section 4. WorkCover Corporation generally acts through delegates. For the purposes of these reasons, at times whether acting through a delegate or not, the term "WorkCover" is used.

² 38—Review of weekly payments

(1) Subject to subsection (2), the Corporation may on its own initiative and shall if requested by a worker or an employer review the amount of the weekly payments made to a worker who has suffered a compensable disability.

(1a) If a period of incapacity continues for more than one year, the Corporation must conduct a review under this section in the second year of incapacity and in each subsequent year of the incapacity.

...

³ The phrase "partially deemed totally incapacitated for work" is not the subject of a statutory definition. Counsel for WorkCover accepted that this was the equivalent of an assessment that a worker has no current work capacity.

⁴ *Workers Rehabilitation and Compensation Act 1986* (SA) section 35B(6).

⁵ "**current work capacity**, in relation to a worker, means a present inability arising from a compensable disability such that the worker is not able to return to his or her employment at the time of the occurrence of the disability but is able to return to work in suitable employment;"

"**no current work capacity**, in relation to a worker, means a present inability arising from a compensable disability such that a worker is not able to return to work, either in his or her employment at the time of the occurrence of the disability or in suitable employment;"

defined in section 3. What is suitable employment is to be determined by having regard to the factors set out in the definition. Those factors include information personal to a worker including age, education, skills and work experience. It might be expected that the worker would be the best source of that information.⁶

13 In the within proceeding, the section 35B determination set out a statement of the reasons for the decision and identified the documents on which WorkCover relied in making the determination. The statement advised that the decision was reached on the basis of a review of the worker's claim file and a consideration of information contained in documents which were then individually described. Copies of the documents were enclosed with the notice. The documents included the claim for compensation, medical certificates, medical and vocational rehabilitation reports and other material relating to the worker's employment profile and job seeking record. The determination asserted that the worker was vocationally suited and medically fit to undertake work as a senior or general accountant and that the documentary information demonstrated that, although the worker was not able to return to his pre-injury work with his pre-injury employer, he had a capacity to return to work as an accountant with an alternative employer.

14 On 7 May 2010, the worker lodged a notice of dispute in response to the section 35B determination. In the notice the worker asserted that he had been denied procedural fairness, asserted that he had no current work capacity and that it was probable that he would continue indefinitely to have no work capacity. In particular, the notice of dispute alleged:⁷

The determination is defective as the compensating authority has denied the worker procedural fairness by failing to provide the worker with the opportunity to make submissions before making a determination under section 35B of the Act.

Having regard to all relevant circumstances the applicant has no current work capacity and is likely to continue indefinitely to have no current work capacity.

⁶ The terms of the definition of "suitable employment" in section 3 in full are as follows:
 "suitable employment, in relation to a worker, means employment in work for which the worker is currently suited, whether or not the work is available, having regard to the following:

- (a) the nature of the worker's incapacity and previous employment;
- (b) the worker's age, education, skills and work experience;
- (c) the worker's place of residence;
- (d) medical information relating to the worker that is reasonably available, including in any medical certificate or report;
- (e) if any rehabilitation programs are being provided to or for the worker;
- (f) the worker's rehabilitation and return to work plan, if any;"

⁷ 90—Notice of dispute

- (1) A person with a direct interest in a reviewable decision (the applicant) may lodge a notice of dispute with the Registrar.
- (2) A notice of dispute must be in writing and in the form prescribed by regulation.
- (3) A person has a direct interest in a reviewable decision if the person—
 - (a) is directly affected by the decision; or
 - (b) is the employer from whose employment the compensable disability arose or is alleged to have arisen.

15 On 12 May 2010, a delegate of WorkCover reconsidered and confirmed the section 35B determination.⁸ Notice of the confirmation was given to the worker, that notice included the following:⁹

REASONS WHY DECISION CONFIRMED

Employers Mutual Limited has reconsidered the decision in dispute based on the information supplied with the Notice of Dispute and previous information on the claim relevant to the disputed decision.

All information has been reviewed, and where appropriate clarified with the relevant parties. However, the decision is correct in fact and law, and in absence of any conclusive new evidence being provided to consider at reconsideration, this further review does not provide grounds for Employers Mutual Limited to change the original decision.

The decision in dispute is therefore confirmed.

Pursuant to section 91A of the Act, the Registrar referred the dispute for conciliation. This was unsuccessful. As a consequence, the dispute was referred to a presidential member of the Tribunal for judicial determination.¹⁰

16 On 23 August 2010, the dispute was referred to a Full Bench of the Workers Compensation Tribunal pursuant to section 94A(2) of the Act.¹¹ Before the Full Bench, the parties agreed that the issues to be resolved were as follows:¹²

When undertaking an assessment and prior to making a decision under s 35B of the Act, is a compensating authority required to afford a worker procedural fairness?

If there is such a requirement, does a failure to afford a worker procedural fairness render a subsequent determination by reference to the s 35B assessment void or voidable?

Is there an interrelationship between s 38 and an assessment under s 35B? If so, how does a failure to comply with s 38(1a) in the year prior to an assessment pursuant to s 35B affect the assessment and any decision purportedly made under s 35B in consequence of that assessment?

The dispute concerning the worker's capacity for work was not included.

⁸ Pursuant to section 91 of the *Workers Rehabilitation and Compensation Act 1986* (SA).

⁹ Pursuant to section 91 of the *Workers Rehabilitation and Compensation Act 1986* (SA).

¹⁰ 92D—Reference of dispute into Tribunal

If conciliation proceedings do not result in an agreed settlement of the dispute, the conciliator presiding at the conciliation proceedings must refer the dispute into the Tribunal for judicial determination.

¹¹ 94A—Constitution of Tribunal

(1) For the purpose of making a judicial determination of a disputed claim, the Tribunal will be constituted of a single presidential member.

(2) However, if the President decides that a particular dispute should be referred directly to a Full Bench of the Tribunal, the dispute will be heard and determined by a Full Bench of the Tribunal.

¹² These issues are as extracted from the reasons of Deputy President Judge Hannon in *Davey v WorkCover Corporation (Construction Industry Training Board)* [2011] SAWCT 1, [3].

17 In the course of his reasons, Deputy President Judge Hannon considered the nature of the statutory power conferred on WorkCover to discontinue a worker's income maintenance payments and concluded that that power was a power to destroy, defeat or prejudice a worker's interests or legitimate expectations.¹³ Deputy President Judge Hannon placed reliance on the following passage from *Annetts v McCann*, where the High Court observed:¹⁴

It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intentment: *Commissioner of Police v. Tanos*; *Twist v. Randwick Municipal Council*; *Heatley v. Tasmanian Racing and Gaming Commission*; *J. v. Lieschke*; *Haoucher v. Minister for Immigration and Ethnic Affairs*. In *Tanos*, Dixon C.J. and Webb J. said that an intention on the part of the legislature to exclude the rules of natural justice was not to be assumed nor spelled out from "indirect references, uncertain inferences or equivocal considerations". Nor is such an intention to be inferred from the presence in the statute of rights which are commensurate with some of the rules of natural justice: *Baba v. Parole Board of New South Wales*. In *Kioa v. West*, Mason J. said that the law in relation to administrative decisions "has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention." In *Haoucher*, Deane J. said that the law seemed to him "to be moving towards a conceptually more satisfying position where common law requirements of procedural fairness will, in the absence of a clear contrary legislative intent, be recognised as applying generally to governmental executive decision-making".

[Footnotes omitted. Emphasis added.]

18 Deputy President Judge Hannon then concluded:¹⁵

The compensating authority is required to afford a worker procedural fairness when undertaking an assessment and prior to making a decision under s 35B of the Act. What must be done to discharge that obligation will vary depending upon the circumstances. If before that time the compensating authority has given a worker an opportunity to make representation on the level of incapacity as and when required by s 38 of the Act, and if the s 35B assessment is conducted having proper regard to relevant historical and contemporaneous material, including any material supplied by the worker on the most recent s 38 review, then it may not be necessary that the worker be given specific notice of the impending s 35B assessment or the opportunity to make representation with respect to it. However, the fact that a timely s 38 review process has taken place will not necessarily be determinative of the issue. Each case must be considered in light of its own facts.

In the present case, the s 35B assessment was conducted in the context of a failure by the compensating authority to give the worker the opportunity of making representation on a s 38 review which should have preceded the s 35B assessment. This resulted in a breach

¹³ *Davey v WorkCover Corporation (Construction Industry Training Board)* [2011] SAWCT 1, [46].

¹⁴ *Annetts v McCann* (1990) 170 CLR 596, 598 as cited in *Davey v WorkCover Corporation (Construction Industry Training Board)* [2011] SAWCT 1, [12].

¹⁵ *Davey v WorkCover Corporation (Construction Industry Training Board)* [2011] SAWCT 1, [92]-[95].

of the compensating authority's obligation to afford the worker procedural fairness with respect to the s 35B assessment. I would find that this breach renders the subsequent determination voidable.

As is evident from the above conclusion, there is an interrelationship between the review procedure under s 38 and the assessment process under s 35B, such that a failure to comply with s 38(1a) in the year prior to an assessment pursuant to s 35B, may of itself render such an assessment voidable on account of a denial of procedural fairness.

In the circumstances I would conclude that the disputed determination is voidable, and that the parties should be given the opportunity to address us further on whether as a result the determination of 3 May 2010 should be set aside as invalid.

19 Deputy President Judge Farrell agreed with the reasons and decisions of
Deputy President Judge Hannon.

20 Deputy President McCouaig concluded:¹⁶

I would answer the agreed issues for determination thus:

A compensating authority is required to afford a worker procedural fairness when undertaking an assessment and prior to making a decision under s 35B of the Act.

A failure to afford a worker procedural fairness in the circumstances contemplated does not render a subsequent determination based on an assessment under s 35B void, but rather irregular and susceptible to an application for it to be set aside on the grounds of irregularity.

In the circumstances of this case, there is an interrelationship between s 38 and an assessment done under s 35B, such that a failure to comply with s 38(1a) in the year prior to an assessment under s 35B may lead to the conclusion that the worker has been denied procedural fairness.

The Scheme of the Act

21 The determination of the questions raised in this appeal calls for a
consideration of the operation of the provisions of the *Workers Rehabilitation
and Compensation Act* relating to workers compensation and dispute resolution.

22 The scheme requires WorkCover to determine claims pursuant to the terms
of the statute. WorkCover has the power to determine a worker's entitlement to
compensation, including the reduction or discontinuance of an entitlement to
compensation. WorkCover is to provide written notice of its determinations. In
response, the worker has a right to lodge a notice of dispute pursuant to Part 6A
of the Act. WorkCover must then assign a suitable person, who did not conduct
the disputed decision, to conduct a review.¹⁷ If the dispute remains unresolved, it

¹⁶ *Davey v WorkCover Corporation (Construction Industry Training Board)* [2011] SAWCT 1, [123].

¹⁷ *Workers Rehabilitation and Compensation Act 1986* (SA) section 91(1)(a).

is to be referred to conciliation¹⁸ and then, if conciliation is unsuccessful, the conciliator must refer it into the Tribunal for judicial determination.¹⁹

23 Section 35(1) of the Act provides that a worker who suffers a compensable disability that results in incapacity for work is entitled to weekly payments. Section 35A provides entitlement to weekly payment for persons who are incapacitated for work. Section 35A provides for three entitlement periods. A worker with no current work capacity receives payments equal to the worker's notional weekly earnings in the first entitlement period, payments equal to 90% of the worker's notional weekly earnings in the second entitlement period and payments equal to 80% of the worker's notional weekly earnings in the third entitlement period. Workers who have a current work capacity receive, in the first entitlement period, payments equal to the difference between the worker's notional weekly earnings and the worker's designated weekly earnings. These payments reduce to 90% and 80% of that amount in the second and third entitlement periods respectively.

24 At the end of the third entitlement period, a worker's weekly payments will cease unless the worker has been assessed by WorkCover as having no current work capacity and is likely to continue to have no current work capacity.²⁰ However, this is subject to other provisions in the Act.

25 Pursuant to section 35C, a worker may make an application to WorkCover seeking a determination that the worker's weekly payments do not cease at the end of the third entitlement period.²¹ The worker can only make this application if the worker is in employment but is likely to indefinitely be, due to the worker's compensable disability, incapable of undertaking further additional work which would allow the worker to increase his or her current weekly earnings.²²

26 A worker may also continue to receive weekly payments after the expiration of the third entitlement period pursuant to section 35B(4). That subsection provides that a worker who had no current work capacity and was receiving weekly payments at the end of the third entitlement period, can continue to receive those payments unless and until WorkCover assesses whether the worker falls within the category of a worker who may be considered as having no current work capacity and as likely to continue indefinitely to have no current work capacity. Once an assessment is made, WorkCover must provide the worker with 13 weeks notice before payments can cease.²³ It is appropriate to set out the terms of section 35B in full:

¹⁸ *Workers Rehabilitation and Compensation Act 1986* (SA) section 91A.

¹⁹ *Workers Rehabilitation and Compensation Act 1986* (SA) section 92D.

²⁰ *Workers Rehabilitation and Compensation Act 1986* (SA) section 35B(1).

²¹ *Workers Rehabilitation and Compensation Act 1986* (SA) section 35C.

²² *Workers Rehabilitation and Compensation Act 1986* (SA) section 35C.

²³ *Workers Rehabilitation and Compensation Act 1986* (SA) section 35B(6).

- (1) Subject to section 35C (and to the other provisions of this Act), a worker's entitlement to weekly payments under this Division ceases at the end of the third entitlement period under section 35A (unless brought to an end before this time) unless the worker is assessed by the Corporation as—
 - (a) having no current work capacity; and
 - (b) likely to continue indefinitely to have no current work capacity.
- (2) If a worker qualifies under an assessment under subsection (1), the worker is entitled to weekly payments while incapacitated for work in respect of a particular disability equal to 80% of the worker's notional weekly earnings as though the third entitlement period were continuing.
- (3) A review of the assessment of a worker under this section may be conducted by the Corporation at any time and must be conducted as often as may be reasonably necessary, being at least once in every 2 years.
- (4) In connection with the operation of subsection (1), a worker who, immediately before the end of a third entitlement period, is in receipt of weekly payments under paragraph (a) of section 35A(3) is entitled to continue to receive weekly payments at the rate prescribed by that paragraph unless or until the Corporation has assessed whether the worker falls within the category of a worker who may be considered as—
 - (a) having no current work capacity; and
 - (b) likely to continue indefinitely to have no current work capacity.
- (5) An assessment under subsection (4) may be made before or after the end of the third entitlement period.
- (6) Despite section 35A, the Corporation must not discontinue weekly payments to a worker who is subject to the operation of subsection (4) until it has given the worker at least 13 weeks notice in writing of the proposed discontinuance (and the requirements of section 36 will not apply with respect to this notice).
- (7) A notice under subsection (6) must not be given unless or until the assessment envisaged by subsection (4) has been undertaken.
- (8) Subsections (4), (5), (6) and (7) do not apply if the Corporation discontinues the worker's weekly payments under section 36 or suspends such payments under another provision of this Act.
- (9) The Corporation may, on the basis of a review under subsection (3), discontinue weekly payments under this section if satisfied that the worker has a current work capacity.

27

Section 36 provides for the discontinuance or reduction of weekly payments in other circumstances. In order to discontinue weekly payments, one of the conditions in section 36(1) must be fulfilled.²⁴ Similarly, in order to reduce

²⁴ Section 36(1) of the *Workers Rehabilitation and Compensation Act 1986* (SA) is in the following terms:

weekly payments, one of the conditions in section 36(2) must be fulfilled.²⁵ For both discontinuance and reduction of weekly payments, WorkCover is required to provide notice of its intention in writing to the worker.²⁶ In certain circumstances there is a specified time period within which notice must be given and before the decision can take effect.²⁷ Such circumstances include when a

(1) Subject to this Act, weekly payments to a worker who has suffered a compensable disability must not be discontinued unless—

- (a) the worker consents to the discontinuance of weekly payments; or
- (b) the Corporation is satisfied, on the basis of a certificate of a recognised medical expert, that the worker has ceased to be incapacitated for work by the compensable disability; or
- (c) the worker has returned to work; or
- (d) the worker has obtained work as an employee, or as a self-employed contractor, that is providing remuneration equal to or above the worker's notional weekly earnings; or
- (e) the worker is dismissed from employment for serious and wilful misconduct; or
- (f) the worker breaches the obligation of mutuality; or
- (g) the worker is, without the Corporation's consent—
 - (i) resident outside the State; or
 - (ii) absent from the State for more than two months in any continuous period of 12 months; or
- (h) the worker's entitlement to weekly payments ceases because of the passage of time; or
 - (i) the worker's entitlement to weekly payments ceases because of the occurrence of some other event or the making of some other decision or determination that, under another provision of this Act, brings the entitlement to weekly payments to an end or the discontinuance of weekly payments is otherwise authorised or required under another provision of this Act.

²⁵ Section 36(2) of the *Workers Rehabilitation and Compensation Act 1986* (SA) is in the following terms:

(2) Subject to this Act, weekly payments to a worker who has suffered a compensable disability shall not be reduced unless—

- (a) the worker consents to the reduction of weekly payments; or
- (b) the Corporation is satisfied, on the basis of a certificate of a recognised medical expert, that there has been a reduction in the extent the worker is incapacitated for work by the compensable disability; or
- (ba) the reduction is necessary to correct an arithmetical or clerical error; or
- (bb) where the weekly payments include a component for overtime—the Corporation is satisfied that if the worker had continued in the work in which he or she was last employed before becoming incapacitated, he or she would not have continued to work overtime or the pattern of overtime would have changed so that the amount of overtime would have diminished; or
- (c) the worker has recommenced work as an employee or as a self employed contractor, or the worker has had an increase in remuneration as an employee or a self employed contractor; or
- (d) the worker's entitlement to weekly payments reduces because of the passage of time; or
- (e) the worker's entitlement to weekly payments reduces because of the occurrence of some other event or the making of some other decision or determination that, under another provision of this Act, is expressed to result in a reduction to an entitlement to weekly payments or the reduction of weekly payments is otherwise authorised or required under another provision of this Act.

²⁶ *Workers Rehabilitation and Compensation Act 1986* (SA) section 36(3). Section 36(3) is in the following terms:

(3) Where the Corporation decides to discontinue or reduce weekly payments in pursuance of this section, the Corporation must give notice in writing to the worker containing such information as the regulations may require as to the reasons for the Corporation's decision and informing the worker of the worker's right to have the decision reviewed.

²⁷ See *Workers Rehabilitation and Compensation Act 1986* (SA) section 36(3a). That subsection provides:

(3a) The notice must be given at least the prescribed number of days before the decision is to take effect in any of the following cases:

- (a) where a decision to discontinue weekly payments is made, without the consent of the worker, on the ground that—

decision has been made to discontinue weekly payments following a review by WorkCover pursuant to section 35B(3) or section 35C(5)(a)²⁸ or when a decision has been made pursuant to section 38 of the Act to discontinue or reduce weekly payments.²⁹

28 A decision to reduce or discontinue weekly payments can be made under section 38. It is to be noted that sections 37 and 38 require notice to be given to a worker that Workcover is considering making a decision, whereas under sections 35B and 36, there is no such express requirement.

29 Against the above background, the worker contended in this Court that the critical question to be determined was whether the terms of the statute display a legislative intention to exclude the rules of natural justice and, in particular, to exclude a right to be heard in relation to a decision made under section 35B.

The Jurisdiction of the Tribunal

30 WorkCover submitted that the nature and limits of the Tribunal's jurisdiction are to be ascertained by reference to the provisions creating it and conferring it power. It was said that the relevant provision which conferred jurisdiction on the Tribunal was section 92D. WorkCover submitted that section 92D, in combination with sections 94A and 94C, implicitly confer jurisdiction on the Tribunal to hear and judicially determine disputes referred to it. The dispute which is considered by the Tribunal is, subject to any variation resulting from

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- (i) the Corporation is satisfied that the worker has ceased to be incapacitated for work by the compensable disability (although the worker has not returned to work); or
 - (ii) the worker has failed to submit to an examination by a recognised medical expert or to provide a medical certificate as required by the Corporation; or
 - (iii) the worker has been dismissed from employment for serious and wilful misconduct; or
 - (iv) the worker has breached the obligation of mutuality; or
 - (b) where a decision to reduce weekly payments is made, without the consent of the worker, on the ground that—
 - (i) the Corporation is satisfied that there has been a reduction in the extent the worker is incapacitated for work by the compensable disability; or
 - (ii) the Corporation is satisfied, in the case of a worker whose weekly payments include a component for overtime, that the worker would not have continued to work overtime or the pattern of overtime would have changed so that the amount of overtime would have diminished; or
 - (ba) where a decision to reduce weekly payments is made on account of the end of the first entitlement period or the second entitlement period under section 35A; or
 - (bb) where a decision to discontinue weekly payments is made on account of the end of the third entitlement period under section 35A; or
 - (bc) where a decision to discontinue weekly payments is made on account of—
 - (i) a review by the Corporation under section 35B(3); or
 - (ii) a decision of the Corporation under section 35C(5)(a); or
 - (c) where a decision to discontinue or reduce weekly payments is made under section 38, and in any other case the notice must be given as soon as practicable after the decision is made (but not necessarily before it takes effect).

²⁸ *Workers Rehabilitation and Compensation Act 1986* (SA) section 36(3a)(bc).

²⁹ *Workers Rehabilitation and Compensation Act 1986* (SA) section 36(3a)(c).

reconsideration, the same as the dispute that was the subject of reconsideration. It was contended that as the Tribunal exercises the decision making power afresh, its power is coextensive with that of WorkCover to determine the claim and to reconsider it. It was also contended that the multistage process of reconsideration, conciliation and judicial determination provided for by Part 6A of the Act supports the conclusion that the Tribunal's function is restricted to determining the dispute on the merits.

31 WorkCover submitted that regardless of whether one of the grounds relied upon by the worker to dispute the decision was a want of procedural fairness, the substantive merits of the dispute in the present proceeding concern the discontinuance of the defendant's weekly payments, not the failure to afford the worker a hearing before making the section 35B determination.

32 WorkCover further submitted that the Tribunal erred in concluding that any non-compliance with the rules of procedural fairness rendered WorkCover's decision "voidable"³⁰ by the Tribunal or "irregular and susceptible to an application for it to be set aside [by the Tribunal] on the grounds of irregularity".³¹ It was said that by accepting that the decision of WorkCover was voidable and should be set aside by reason of the procedure adopted by WorkCover, the Full Bench of the Tribunal denied itself the capacity to consider the substantial merits of the dispute. It was also said that the Tribunal has no jurisdiction to set aside a determination by WorkCover on the ground that the procedural prerequisites to making the determination had not been complied with. It was pointed out that the Tribunal does not have an inherent jurisdiction or a declaratory power analogous to the supervisory jurisdiction of the Supreme Court.

33 The worker contended that it is not section 92D of the Act which confers jurisdiction on the Tribunal. Instead, it was said that the true source and definition of the Tribunal's jurisdiction is found in sections 79, 89A and 90.³²

³⁰ *Davey v WorkCover Corporation (Construction Industry Training Board)* [2011] SAWCT 1, [89], [93], [95].

³¹ *Davey v WorkCover Corporation (Construction Industry Training Board)* [2011] SAWCT 1, [118], [123(b)].

³² Section 90 is extracted later in these reasons. Sections 79 and 89A provide as follows:

79—Jurisdiction

The Tribunal has the jurisdiction conferred by statute.

89A—Reviewable decisions

(1) The following decisions are reviewable—

(a) a decision on a claim for compensation including—

(i) a decision redetermining a claim¹; or

(ii) a decision on a claim by the Tribunal, made in the exercise of the Tribunal's special jurisdiction to expedite decisions on claims²;

(b) a decision about the nature of rehabilitation services provided, or to be provided, for a worker³;

(c) a decision to vary, suspend or discontinue weekly payments;

(d) a decision on an application by an employer to have weekly payments payable to a worker employed by, or formerly employed by, the employer reviewed;

The worker submitted that the Tribunal's jurisdiction was invoked pursuant to sections 89A and 90(1) of the Act when the worker, who was a person with a direct interest in a reviewable decision, lodged a notice of dispute with the Registrar of the Tribunal. It was said that once the jurisdiction of the Tribunal is invoked, if the reconsideration and conciliation processes do not resolve the dispute, the matter is referred under section 92D for judicial determination.

34 To determine whether the Tribunal exceeded its jurisdiction, the worker contended that first, the nature, scope and content of the reviewable decision before the Tribunal must be determined, and secondly, the substantial merits of the parties' positions must be identified. The worker provided the Court with a number of considerations which, in his submission, lead to the conclusion that the question of procedural fairness is a relevant consideration for the Tribunal determining the dispute before it.

35 The worker went on to argue, in direct contradiction to the submissions of WorkCover, that the jurisdiction of the Tribunal and the function of WorkCover in determining claims for compensation are not coextensive. Further, the worker rejected WorkCover's contention that the Tribunal has no jurisdiction to set aside a determination on the ground of non-compliance with procedural prerequisites. It was said that the Tribunal is a specialist Tribunal established by the *Workers Rehabilitation and Compensation Act* to deal with matters arising under the Act and to determine disputes concerning rights and privileges conferred by the Act. In the absence of some special reason for intervention, it was argued that the procedures laid down by the Act should be allowed to take their course and should not be displaced by the making of declaratory orders by the Supreme Court concerning the respective rights of the parties under the statute.

36 Ultimately, the worker submitted that the real question raised by WorkCover is whether, in the exercise of jurisdiction conferred by the Act, the Tribunal erred in law by misconstruing section 35B and taking into account an irrelevant consideration; that is, the lack of procedural fairness afforded by WorkCover. It was said that no true question of jurisdiction arises.

37 Section 79 of the Act establishes that the Tribunal's jurisdiction is conferred by statute. Section 89A specifies the decisions that are reviewable. Sections 90, 90A and 90B address the way in which a dispute is brought before the Tribunal. A notice of dispute is to be lodged within a specified time and must be given to the Registrar of the Tribunal. Section 91 addresses the responsibilities of

(e) a decision to disallow or reduce a charge for a medical service (unless the decision merely brings the charge into conformity with a rate of charge prescribed by regulation).

(2) However, a decision is not reviewable if declared not to be reviewable by or under this Act.

Notes—

1 See section 53(7) & (7a).

2 See section 97B(3)(b).

3 Section 28B also provides for the review of a rehabilitation and return to work plan.

WorkCover to address the notice of dispute through a process of reconsideration. Section 91A sets up a process of conciliation and, if that process does not resolve the dispute, section 92D provides for reference of the dispute to the Tribunal for judicial determination. I consider that the collective effect of these provisions set out the jurisdiction of the Tribunal and in particular, how it is enlivened. Section 94A addresses the constitution of the Tribunal and allows for a direct reference of a dispute to a Full Bench of the Tribunal.

38 The Tribunal proceeded on the basis that a want of procedural fairness rendered the decision in this case voidable. The Tribunal did not take the view that the initial decision was void *ab initio* of no effect and as such, that no decision at all had been made under section 35B; in other words, nothing had occurred that affected the worker's ongoing entitlements. In this respect, I agree with the reasoning of the members of the Tribunal. As a consequence, the Tribunal's decision involved a process of judicial review and a determination that the worker be denied procedural fairness, leading in the Tribunal's view to the conclusion that the decision of WorkCover was voidable and, in the particular circumstances, should be set aside. In my view, the Tribunal proceeded to determine a collateral issue which was beyond its jurisdiction.

39 There is nothing in the *Workers Rehabilitation and Compensation Act* that provides the Tribunal with any jurisdiction to grant judicial review or make declarations or other orders with respect to matters of judicial review or complaint concerning a want of procedural fairness. Further, the earlier referred to terms of section 85 militate against such a conclusion. Section 85 is titled "Principles of equity and good conscience" and provides:

The Tribunal must act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms.

40 Division 6 of Part 6A of the Act addresses the topic of judicial determination of disputes. The sections within that division provide:

94A—Constitution of Tribunal

- (1) For the purpose of making a judicial determination of a disputed claim, the Tribunal will be constituted of a single presidential member.
- (2) However, if the President decides that a particular dispute should be referred directly to a Full Bench of the Tribunal, the dispute will be heard and determined by a Full Bench of the Tribunal.

94B—Pre-hearing conference

- (1) Before the Tribunal proceeds with the hearing of the disputed claim, a pre-hearing conference of the parties must be held in accordance with the rules.
- (2) However, a presidential member of the Tribunal may dispense with a pre-hearing conference if there is proper reason for doing so.

94C—Determination of dispute

- (1) In proceedings under this Division, the Tribunal must decide the dispute without regard to decisions taken in earlier proceedings.
- (2) However, if the amount of lump sum compensation is disputed by a worker and the amount the Tribunal proposes to award is less than, or the same as, or less than 10% above, the amount offered in conciliation proceedings, the worker is not entitled to costs of the proceedings under this Division.

The Tribunal is to make a judicial determination of a disputed claim. It is to do so without regard to decisions taken in earlier proceedings and, to repeat the terms of section 85, it is to do so acting according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms. The Tribunal is not charged with making decisions on collateral issues concerning procedural fairness. The Tribunal acted without jurisdiction.

41 As noted above, both parties consented to the Tribunal acting in this way and positively encouraged it to do so. Jurisdiction, however, cannot be conferred by consent.

42 There are two further matters on this topic which should be briefly addressed. The first is the decision of *Rundle v WorkCover Corporation / Vero Workers Compensation (SA) Ltd (P & O Transport Australia (SA) Pty Ltd)*.³³ In *Rundle*, there had been a procedural irregularity in the decision making process and the Full Bench considered the issue whether that irregularity caused the decision to be void or voidable. President Judge Jennings, Deputy President Judge Gilchrist and Deputy President McCouaig concluded “that Parliament intended a defective notice to affect rights unless and until set aside by the Tribunal”.³⁴ Their Honours continued.³⁵

...notwithstanding the so-called mandatory nature of the procedural requirements of s 36, a failure to comply with those requirements will not necessarily, in every case, result in the determination being set aside because of that irregularity. An order setting aside the impugned determination will be required before it is rendered ineffectual. ...

Accordingly, the Full Bench of the Tribunal relevantly held that there was jurisdiction to set aside a notice on the ground of procedural irregularity; that is, a basis other than a review of the merits of the decision as set out in the notice.

43 WorkCover submitted that the Tribunal’s observations in *Rundle* misunderstand the Tribunal’s function. Although WorkCover accepted that a defective notice does affect rights unless and until it is set aside, it was said that it

³³ *Rundle v WorkCover Corporation / Vero Workers Compensation (SA) Ltd (P & O Transport Australia (SA) Pty Ltd)* [2006] SAWCT 12.

³⁴ *Rundle v WorkCover Corporation / Vero Workers Compensation (SA) Ltd (P & O Transport Australia (SA) Pty Ltd)* [2006] SAWCT 12, [25].

³⁵ *Rundle v WorkCover Corporation / Vero Workers Compensation (SA) Ltd (P & O Transport Australia (SA) Pty Ltd)* [2006] SAWCT 12, [28].

is not to be set aside by the Tribunal on any basis other than a review of the merits of the decision set out in the notice. Further, it was said that the approach of the Full Bench in that decision exemplifies first, the Tribunal exceeding its jurisdiction in exercising a supervisory jurisdiction over WorkCover and, second, the Tribunal failing to exercise its jurisdiction to determine the dispute on its merits; that is, in the present proceeding to determine whether the worker had a current work capacity.

44 Insofar as the decision in Rundle is contrary to my conclusions above, I am of the view that that decision was incorrect.

Procedural Fairness

45 The submission of WorkCover was that Parliament had struck a balance in favour of providing for a section 35B determination to be made without hearing from the worker and then provided for processes of reconsideration, conciliation and judicial determination in the event that a worker continued to dispute a decision. At each further stage, rights of procedural fairness are provided. It was said that the scheme of the Act, when viewed as a whole, provided for procedurally fair decision-making without WorkCover affording the worker a hearing in advance of the section 35B determination.

46 WorkCover drew attention to the High Court decision in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* where McHugh J discussed in some depth the issue of procedural fairness:³⁶

It is true that the existence of appeal or review rights may affect the extent to which the requirements of natural justice apply at an earlier level of decision-making. But there is no general rule that a right of appeal or review necessarily denies or limits the application of the rules of natural justice. There is no inflexible rule that the presence of a right of appeal or review excludes natural justice. As Barwick CJ said in *Twist v Randwick Municipal Council*: "The mere existence of an appeal may not in some circumstances satisfy the requirements of natural justice." In the same case, Mason J said that:

" ... the earlier cases should not be regarded as deciding that the presence of an appeal to another administrative body is an absolute answer to a departure from natural justice or the standard of fairness. The existence of such an appeal does not demonstrate in itself that the inferior tribunal is at liberty to deny a hearing."

Indeed, the insistence by this Court of "plain words of necessary intendment" to exclude the rules of natural justice has led courts to reject the view that a right of appeal might provide an answer to a complaint that procedural fairness was denied in relation to an initial determination. The cases indicate, however, that the presence or absence of certain factors can often be relevant in determining whether such a right does exclude or limit the rules of natural justice. ...

[Footnotes omitted.]

³⁶ *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, [146].

47 McHugh J went on to discuss some of the factors referred to by the relevant authorities. WorkCover drew on each of the factors identified by McHugh J and in doing so, submitted that the majority of the factors favour the construction advanced by WorkCover rather than the worker. However, in making this submission, WorkCover cautioned against giving too much weight to the factors identified by McHugh J due to differences in the statutory schemes.

48 The factors discussed by McHugh J in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* can be conveniently summarised as follows:

- Whether the original decision is preliminary or final – the requirements of natural justice are less likely to apply to preliminary decisions.
- Whether the original decision is made in public or private – the requirements of natural justice are more likely to apply to decisions which are made in public. In a public hearing, a person's reputation may be at risk of being damaged.
- Whether the original decision maker must comply with formalities – where the original decision maker is required to follow formal procedures, it can be inferred that the appeal is not the sole source of procedural fairness. Conversely, where the original decision maker is not required to follow formal procedures or provide reasons for the decision, it can be inferred that the right of appeal excludes the requirements of procedural fairness.
- Whether the decision is of an urgent nature.
- Whether the appellate body is judicial, internal or domestic – where the appellate body is a court, it is more likely that the right of appeal is intended to limit or exclude the need for the original decision maker to comply with the requirements of procedural fairness.
- Whether the breadth of the appeal is limited or is to be heard *de novo* – if there is to be a *de novo* appeal on the merits of the case, it is more likely that the original decision maker does not need to comply with the requirements of procedural fairness, or is only required to do so to a limited extent.
- Whether the nature of the interest, the consequences for the individual and the subject matter of the litigation suggest that the original decision maker would need to comply with the requirements of procedural fairness.

49 Counsel for the worker drew attention to observations of Judges of the High Court, pointing out that the mere fact that there might be an appeal on the merits

does not in all circumstances satisfy the requirements of procedural fairness. To put it another way, the mere fact that there may be a merits appeal did not absolve WorkCover when making a section 35B determination from departing from the rules of procedural fairness.

50 Reference was made to the High Court decisions in *Twist v Randwick Municipal Council*,³⁷ *R v Marks; Ex parte Australian Building Construction Employees Builders Labourers' Federation*³⁸ and *Brettingham-Moore v St Leonards Municipality*.³⁹ Counsel for the worker emphasised that those cases turned on different factual and procedural circumstances and that care had to be taken in their application to the facts and the legislative scheme under consideration in the within appeal.

51 It was contended by the worker that before the section 35B determination was made, the opportunity should have been afforded to the worker to provide the decision maker with material submissions in support of his contention that he continued to have no current work capacity. Counsel went so far as to suggest that the worker should have access to any material to be put before the decision maker by WorkCover so that he could respond to that material. It was said that if this required the preparation of further expert reports, then the worker should have the opportunity to follow through the necessary steps to obtain such expert advice. It was suggested that the worker should be allowed sufficient time, if need be months, to prepare material and to respond.

52 Counsel for the worker drew attention to the earlier extracted observations of the High Court in *Annetts v McCann*.⁴⁰ It was said that the terms of the *Workers Rehabilitation and Compensation Act*, and in particular section 35B, conferred power upon a decision maker acting in a *quasi* public office, being a power to destroy, defeat or prejudice the worker's rights, interests and legitimate expectations. It was said that the rules of natural justice regulated the exercise of the power. Those rules had not been excluded by plain words or by necessary intendment.

53 Counsel for the worker pointed out that subsections 36(4) and (5) had the effect that a decision to discontinue weekly payments is not affected by the worker lodging a notice of dispute.⁴¹ Subject to a special order, payments will

³⁷ *Twist v Randwick Municipal Council* (1976) 136 CLR 106.

³⁸ *R v Marks; Ex parte Australian Building Construction Employees Builders Labourers' Federation* (1981) 147 CLR 471.

³⁹ *Brettingham-Moore v St Leonards Municipality* (1969) 121 CLR 509.

⁴⁰ *Annetts v McCann* (1990) 170 CLR 596, 598.

⁴¹ Subsections 36(4) and (5) are in the following terms:

(4) Subject to complying with subsection (3a), a discontinuance or reduction of weekly payments under this section takes effect in accordance with the terms of the Corporation's notice under subsection (3).

(5) The effect of a decision to discontinue or reduce weekly payments is not affected by the worker lodging a notice of dispute under Part 6A.

cease notwithstanding the lodging of the notice. It was asserted that disputes in the Tribunal could take a long time to be completed and in most cases would exceed the length of notice considering the cessation of payments under sections 36(3a)(bb) and 35B(6). It was stressed that if ultimately a worker received a favourable decision at the end of the process, and notwithstanding the payment in respect of accrued rights, hardship may well arise as a result of that worker being without entitlements for what may be a substantial period of time.

54 Counsel for the worker accepted that on the lodging of a notice of dispute, a reconsideration had to be undertaken. It was said however that as the reconsideration had to be completed within seven days, unless there is an extension of time, there would be little opportunity for a person lodging the notice of dispute to provide further material or to make meaningful submissions.

55 Counsel submitted that the core of the worker's case was that there is no clear legislative intention to exclude or limit procedural fairness to be afforded to a worker to allow the worker to respond and to submit and show that he or she has no current work capacity.

56 In my view, the right to procedural fairness did not arise in regard to the making of the section 35B determination.

57 Section 2 of the *Workers Rehabilitation and Compensation Act* sets out the objects of the statute. These include the establishment of a workers rehabilitation and compensation scheme that achieves a reasonable balance between the interests of employers and the interests of workers. Another object is to provide for the efficient and effective administration of the scheme. The final object identified in section 2 is the reduction of litigation and adversarial contests to the greatest possible extent.⁴²

⁴² The terms of section 2 in full are as follows:

(1) The objects of this Act are—

- (a) to establish a workers rehabilitation and compensation scheme—
 - (i) that achieves a reasonable balance between the interests of employers and the interests of workers; and
 - (ii) that provides for the effective rehabilitation of disabled workers and their early return to work; and
 - (iii) that provides fair compensation for employment-related disabilities; and
 - (iv) that reduces the overall social and economic cost to the community of employment-related disabilities; and
 - (v) that ensures that employers' costs are contained within reasonable limits so that the impact of employment-related disabilities on South Australian businesses is minimised; and
- (b) to provide for the efficient and effective administration of the scheme; and
- (c) to establish incentives to encourage efficiency and discourage abuses; and
- (d) to ensure that the scheme is fully funded on a fair basis; and
- (e) to reduce the incidence of employment-related accidents and disabilities; and
- (f) to reduce litigation and adversarial contests to the greatest possible extent.

(2) A person exercising judicial, quasi-judicial or administrative powers must interpret this Act in the light of its objects without bias towards the interests of employers on the one hand, or workers on the other.

58 The dispute giving rise to the present proceedings had its genesis in the section 35B determination in May 2010. The dispute can be summarised as follows – was WorkCover correct to determine that the worker had “a current work capacity”? A complaint was raised about the way in which the determination was made. It was said that the determination had been made unfairly in that the worker had been denied procedural fairness. This complaint was not, in any relevant sense, a dispute under the Act. It was a complaint that related to the process of dispute resolution.

59 In the present case, the worker exercised his statutory right to lodge a notice of dispute with the Tribunal. The Tribunal is to undertake a judicial determination of the dispute and, in doing so, is bound to arrive at its own decision based on the evidence before it and in circumstances where it is bound to afford the worker procedural fairness. In particular, section 94C(1) directs the Tribunal to have no regard to decisions taken in previous proceedings.

60 The worker’s notice of dispute as lodged before the Tribunal related to WorkCover’s determination that the worker had a current work capacity. Pursuant to section 85 of the Act, as earlier extracted, the Tribunal was directed to address the substantial merits of the case. The dispute was whether the worker had a current work capacity. The Full Bench, in treating the issue to be determined as one of procedural fairness, denied itself the capacity to consider the substantial merits of the dispute.

61 The proceedings in the Tribunal focused on the worker’s complaint about procedural fairness. The dispute concerning the worker’s current work capacity appears to have been put to one side while the procedural debate proceeded. The decision of the Full Bench was delivered on 22 January 2011. On 4 March 2011, permission to appeal to this Court was granted and on 10 March 2011 a notice of appeal was lodged pursuant to that permission. The parties in the proceedings before this Court focused again on the complaint of a want of procedural fairness. The dispute about the worker’s capacity remained ‘in the wings’. This entire process appears to have been at odds with one of the primary objects of the legislation.

62 It is relevant at this point to again recall the terms of section 85 – “the Tribunal must act according to equity, good conscience and the substantial merits of the case, without regard to technicalities and legal form”. It may be observed that had the worker proceeded to litigate his dispute considering his work capacity and addressed the substantive merits of his case through proceedings in the Tribunal, that dispute would, in all likelihood, have been resolved by now. Instead, the Tribunal is yet to embark on that dispute. More than 12 months has been spent dealing with issues other than the substantial merits of the dispute.

(3) The Corporation, and the employer from whose employment a compensable disability arises, must seek to achieve a disabled worker’s return to work (taking into account the objects and requirements of this Act).

63 The *Workers Rehabilitation and Compensation Act* addresses the rights of employers and workers, the rehabilitation of injured workers and the minimisation and resolution of disputes. The legislative scheme ensures that disputes arising between employer and worker are first addressed at an administrative level, then by conciliation and, finally, by a full hearing *de novo* before an independent judicial body, the Tribunal. Thereafter, the parties are afforded rights of appeal to the Full Bench of the Tribunal and ultimately a limited right of appeal to this Court.⁴³

64 In the present proceeding, two administrative decisions were made. The first, the section 35B determination which was made by a delegate of WorkCover. That decision concerned capacity for work. The Act provided for the worker to be advised of that decision after it had been made. There is nothing in the Act to suggest that the worker had a right to be heard or any other rights of procedural fairness with respect to this administrative process.

65 The statute mandates in the event of the determination being disputed, a redetermination by a different delegate of WorkCover. The worker is to receive notice of the section 35B determination and is given notice of his or her rights in regard to the redetermination process. The worker, as occurred in the present case, is to receive a copy of the information that was before the initial decision maker. This redetermination is to be conducted promptly. The redetermination is to occur within seven days or within such extended period as may be directed by the Registrar.

66 The worker is entitled to procedural fairness with respect to the redetermination process. This is evident from the terms of Divisions 2 and 3 of Part 6A of the Act.⁴⁴

Division 2—Notice of dispute

⁴³ 86—Appeal on question of law

- (1) An appeal lies on a question of law against a decision of the Tribunal constituted of a single presidential member to a Full Bench of the Tribunal.
- (2) An appeal under this section must be commenced, heard and determined in accordance with the rules.

86A—Reference of question of law and final appeal to Supreme Court

- (1) A Full Bench of the Tribunal may refer a question of law for the opinion of the Full Court of the Supreme Court.
- (2) Subject to subsection (2a), an appeal also lies on a question of law against a decision of the Full Bench of the Tribunal to the Full Court of the Supreme Court.
- (2a) An appeal cannot be commenced under subsection (2) except with the permission of a Judge of the Supreme Court.
- (3) On a reference or appeal under this section, the Full Court of the Supreme Court may—
 - (a) decide the question of law;
 - (b) refer the matter back to the Tribunal with directions the Full Court considers appropriate;
 - (c) make consequential or related orders (including orders for costs).

⁴⁴ *Workers Rehabilitation and Compensation Act 1986* (SA) Divisions 2 and 3 of Part 6A.