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Précis Paper

Starr v Pendergast Painting Pty Ltd [2020] NSWSC 725

A discussion about *Starr v Pendergast Painting Pty Ltd* [2020] NSWSC 725, including a discussion about whole person impairment and the worker's basis of seeking judicial review.

Discussion Includes

- Key facts
- Appeal pathways
- Judicial review
- Whole person impairment
- Wednesbury unreasonableness
- Procedural fairness
- Constructive failure of jurisdiction
- Re-examination of worker
- Personal Injury Commission

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Starr v Pendergast Painting Pty Ltd [2020] NSWSC 725

In this edition of BenchTV, Tammy Wong (Barrister, State Chambers, Sydney) and Dr Simon Blount (Barrister, State Chambers, Sydney) discuss the case of *Starr v Pendergast Painting Pty Ltd* [2020] NSWSC 725, including a discussion about whole person impairment and the worker's basis for seeking judicial review.

Key facts

1. The worker injured his right shoulder rolling paint on an external wall of a residential property in the course of his employment. In 2015 and 2016, he underwent surgery to repair the right shoulder. In 2017, as a consequence of overcompensating for the injury in his right shoulder, the worker underwent further repair surgery to his left shoulder.
2. In 2018, a medical expert gave the opinion that the worker had fifteen per cent whole person impairment, which included one per cent of TEMSKI scarring because he found there is some disfigurement associated with the scarring in both shoulders. TEMSKI stands for the table for the evaluation of minor skin impairment and is used by assessors for determining impairment that has been caused by scarring following surgery.
3. In reliance on that report, the worker made a claim to his employer for fifteen per cent whole person impairment. In December 2018, the employer's insurer provided a report finding that the worker had ten per cent whole person impairment for both his shoulders, but nothing for TEMSKI scarring.
4. In January 2019, because the percentage of whole person impairment was in dispute between the employer's insurer and the worker's medical expert, the worker filed an application to resolve the dispute in the Workers Compensation Commission (**WCC**). It was then available to the arbitrator of the WCC to refer the dispute over the percentage of whole person impairment to an independent medical expert known as an approved medical specialist.
5. In February 2019, the approved medical specialist issued a medical assessment certificate for a total of fourteen per cent whole person impairment for the right and left shoulders, but nothing for the TEMSKI scarring. The expert had said that there were extensive tattoos over both of his shoulders and upper arms and, as a result, the minor arthroscopic surgical scars were barely visible.
6. The worker then made submissions, including photographs of his scarring, to the WCC and sought a reconsideration of the decision. The WCC treated this as the worker seeking reconsideration by the approved medical specialist of his own decision under section 350 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW). In April

2019, the approved medical specialist issued a further medical assessment certificate, declining to change his assessment.

7. The worker then filed an application to appeal against the decision of the approved medical specialist to the Appeal Panel under section 327 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW). The grounds of appeal were that the approved medical specialist had either proceeded on the basis of incorrect criteria, or made a demonstratable error in his decision, or both. The grounds of appeal in the submissions accompanying the application were limited solely to the question of TEMSKI scarring. The worker argued that the observations of his scarring were a better fit to the criteria for TEMSKI one per cent whole person impairment than they were at zero per cent whole person impairment.
8. The Registrar found that the grounds were made out so allowed the appeal to proceed to the Appeal Panel. The Appeal Panel confirmed the decision of the approved medical specialist, so the finding remained at fourteen per cent.
9. The worker then sought judicial review in the Supreme Court. The employer, the Registrar and the Appeal Panel constituted by the members were named in the summons for review.

Appeal pathways

10. There is a bifurcation of functions within the WCC that lead to different appeal rights.
11. The WCC has sole jurisdiction to determine whether or not as a matter of law and in fact there has been an injury.
12. On the question of injury, there is an appeal path from the arbitrator to the President and an appeal from the President to the Court of Appeal.
13. The question of degree of injury is a matter for medical experts. The pathway is an appeal from the approved medical specialist to the Appeal Panel. Once the matter has been decided by the Appeal Panel, the only way forward is to seek judicial review in the Supreme Court on the normal grounds that would associate with judicial review of any administrative decision.

Judicial review

14. To access judicial review in the Supreme Court, one summons for judicial review pursuant to section 69 of the *Supreme Court Act 1970* (NSW). Rule 59.3 of the *Unform Civil Procedure Rules 2005* (NSW) is relevant to judicial review. Form 85 is specifically developed for judicial review.
15. The time to commence a judicial review proceeding is limited to three months after the relevant decision was made (see Rule 59.10 of the *Unform Civil Procedure Rules 2005* (NSW)). This time can be extended with leave.

16. When the plaintiff commences the proceedings, he or she will generally name three defendants. The first is the substantive defendant, being the employer, who is usually the active defendant. The second is the Registrar of the WCC, who is now known as the President of the Personal Injury Commission, and who is the repository of an order for mandamus if the Court sends the decision back for redetermination. The third is the Appeal Panel as constituted by each person who sat on the Appeal Panel. Because the Appeal Panel is not a legal person, each of the three people who sat on the Appeal Panel are named.
17. Where the Registrar (now President) decides not to send the appeal to the Appeal Panel, the defendants are likely to be different, and will likely only the the employer as the first defendant and the Registrar as both the repository of the order for mandamus and the active decision maker.
18. Orders that a plaintiff can seek include certiorari, mandamus, prohibition and costs. Section 69 of the *Supreme Court Act 1970* (NSW) had done away with the old writs system and replaced writs with orders 'in the nature of', such as orders in the nature of certiorari, mandamus or prohibition. An order of certiorari will quash the decision that has been made. An order for mandamus will send the decision back for reconsideration by the appropriate body. Prohibition will prevent the decision maker from doing anything on the basis of the decision that is liable to be quashed.
19. It is also possible to obtain the equivalent equitable relief, such as a declaration that the decision is invalid, which is similar to an order for certiorari. An injunction will have similar effect to a mandamus or prohibition.
20. The most difficult aspect of a summons seeking judicial review is the grounds on which are relied upon to obtain the orders or declarations, rather than the orders sought, as the orders tend to be quite conventional.
21. The primary authority is *Craig v the State of South Australia* (1995) 184 CLR 163. A Tribunal will have made a jurisdictional error, which is an error that is sufficient for the decision to be quashed, if it identifies a wrong issue, asks itself a wrong question, ignores a relevant circumstance, takes into account an irrelevant circumstance or makes an erroneous finding or reaches a mistaken conclusion.
22. A decision will also be quashed if there has been a denial of procedural fairness, including a breach of the hearing rule. That is where the plaintiff hasn't been given a fair hearing, even though there may not be other errors. A decision will also be quashed if there is bias on the part of the administrative decision maker.
23. Once the summons has been pleaded, there is a procedure that follows, which is contained in parts 59.6, 59.7, 59.8 and 59.10 of the *Unform Civil Procedure Rules 2005* (NSW). It requires each of the defendants to file a response and for the parties to then exchange evidence and written submissions. The Court book will then be produced and given to the Court in preparation for the hearing.

24. The operative decision that is under review by the Supreme Court is that by the Appeal Panel. The decision of the approved medical specialist has merged into the decision of the Appeal Panel. The reconsideration of the approval medical specialist also probably merged into the decision of the Appeal Panel.
25. If the WCC issued a certificate of determination, that would have brought the WCC process to an end and it would have been necessary to seek a separate order that not only is the decision of the Appeal Panel quashed, but also the final Certificate of determination.

Whole person impairment

26. The sole issue on judicial review concerns the degree of TEMSKI scarring. If the worker could demonstrate just one per cent of TEMSKI scarring, he would have sufficient whole person impairment to be able to commence an action for work injury damages, which requires fifteen per cent whole person impairment.
27. The guidelines for the assessment of permanent impairment set out the standard against which degree of injury is to be assessed by reference to body parts. The guidelines deal with TEMSKI scarring according to a table. The table is divided into five categories and there is a category for zero per cent whole person impairment and a category for one per cent whole person impairment, and then the percentages rise from there up to 9 per cent whole person impairment for serious and quite disfiguring scars.
28. One can have some scarring but nevertheless only score zero per cent whole person impairment. The criteria for zero per cent whole person impairment is, amongst other things, that the claimant is not conscious or is barely conscious of the scars or skin condition. The one per cent whole person impairment category requires that the claimant is conscious of the scars or skin condition. Consciousness of the scar and skin condition is a key part of the assessment of those of these categories and was the critical issue in the determination of the matter in the Supreme Court. There are other criteria in those categories relating to colour matching and the way thes scar looks on the skin.
29. The Supreme Court has found in *Kolundzic v Quickflex Constructions Pty Ltd* [2014] NSWSC 1523 that the guidelines have the status of delegated legislation.
30. What the guidelines require is for the medical expert to determine the best fit between the medical evidence that the medical expert is observing and the criteria within the tables. A determination of best fit is almost by definition a discretionary decision because reasonably well trained minds can legitimately differ on what they consider to be a best fit considering all the evidence. It's not beyond the bounds of reasonableness that two different medical examiners looking at the same evidence will find that the evidence fits into two different categories.

Wednesbury unreasonableness

31. In this case, the evidence was clear enough to make it not really reasonable to find that the overall percentage of impairment was zero per cent. That is why the worker pleaded Wednesbury unreasonableness to attack the decision maker's discretionary decision as to best fit. In the foundation case of unreasonableness, which is *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, the Court of Appeal England accepted that it was open to a plaintiff seeking judicial review to make a plea the decision was so unreasonable that no reasonable decision maker could have made it. The plaintiff in this case failed. The brief facts of the case were that a cinema sought judicial review of a local council decision that the cinema could not show movies on Sunday. The Court of Appeal found that it was not a decision that was so unreasonable that no reasonable decision maker could have made it.
32. However, in this case, the worker pleaded Wednesbury unreasonableness but the decision of Justice Adamson did not really turn on a close analysis of Wednesbury unreasonableness. It turned on one of the criteria to make out one per cent whole person impairment and, for TEMSKI scarring, it is that the worker is self conscious of his or her scarring. In this case, there was no evidence that the worker was conscious of their scarring. Justice Adamson found that there is no evidence to support a finding of one per cent TEMSKI scarring and it cannot be unreasonable to find that the worker did not qualify for one per cent TEMSKI scarring. The ratio of her decision therefore turned on a question of evidence, rather than a question of close legal analysis of the principles of Wednesbury unreasonableness.
33. In *Minister for Immigration and Citizenship v Li* [2013] HCA 18, the Court held the decision will be legally unreasonable where it lacks evident and intelligible justification by reference to the terms, scope and purpose of the statute conferring the power.
34. In *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437, it was said that, unlike some other grounds for review, the reasoning process in a review for legal unreasonableness will inevitably be fact dependent.
35. In this case, even if the worker had pleaded legal unreasonableness, the result would likely be no different, because the lack of evidence supporting a finding for one per cent whole person TEMSKI scarring was, in Justice Adamson's mind, determinative of the matter.

<u>Procedural fairness</u>

36. The worker also pleaded denial of procedural fairness by reason of the Appeal Panel failing to examine him. The worker applied to be examined by the Appeal Panel on appeal, but the Appeal Panel declined his request. The worker relied on the refusal of the Appeal Panel to examine him as a ground of judicial review in the Supreme Court. This ground was also decided against the worker because, at first instance, he had an opportunity to, but had not, produced evidence addressing the criteria in the guideline, including the consciousness of his scarring.

37. This decision was consistent with the decision of the High Court in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6, where the Court said that, in order to establish a denial of procedural fairness, there must be practical injustice.

Constructive failure of jurisdiction

38. It may have been available to the worker to plead constructive failure of jurisdiction on the part of both the approved medical specialist and the Appeal Panel. Even though the worker himself had not volunteered the information of his consciousness of scarring, it may have been part of the duty to ask the worker whether he was conscious of his scarring. If the approved medical expert did not ask, it may have been part of the duty of the Appeal Panel to ask because it was an element of one per cent whole person impairment for TEMSKI scarring.

Re-examination of a worker

- In *Secretary, New South Wales Department of Education v Johnson* [2019] NSWCA 321, the Court of Appeal did express concern that an Appeal Panel had made a redetermination of the worker's degree of whole person impairment that was adverse to her without re-examining the worker. In this case, there was a supervening injury in between the worker injuring herself and then being examined by the approved medical specialist. The point was that it is important to look at the particular facts of the case.
- It may have been part of the duty of the Appeal Panel to examine the worker in circumstances where there was difficulty in apportioning the whole person impairment coming solely from the work injury and any additional impairment that might have come from the supervening event. It may have been the duty of the Appeal Panel to re-examine in that case because the Appeal Panel made an adverse decision to the worker.
- The Court in Boyce v Alliance Australia Insurance Ltd [2018] NSWCA 22 considered another case in which the driver in a motor accident case requested to be re-examined, but was not. The decision did not determine the overall duty of an administrative body on appeal to re-examine an injured person on request. The ratio of the decision turned on whether by reason of not having been re-examined on appeal, the worker had in fact been denied procedural fairness because she was unable to make further submissions in support of her case.
- There is therefore no general principle that administrative bodies are to re-examine workers on appeal. It is possible to argue on the particular facts that the Appeal Panel should have re-examined because of a supervening injury or because some other salient fact that may have made it necessary to re-examine the worker.

Personal Injury Commission

- As at March 2021, the Personal Injury Commission was created. It does not create difficulties in terms of judicial review when one reads the transitional provisions of the legislation creating the Personal Injury Commission.
- The *Workplace Injury Management and Workers Compensation Act 1998* (NSW), as amended, makes it clear that the role that was previously played by a Registrar is now played by the President of the Commission.

BIOGRAPHY

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Ms Wong has significant advocacy experience in commercial law, employment and industrial relations law, administrative law and native title law through acting for large corporations, not-for-profit-entities, Aboriginal Corporations and government and statutory bodies across a broad range of jurisdictions. She has particular experience in multi-party negotiations conducted in remote Aboriginal community contexts.

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Dr Blount practices in the areas of administrative law, appeals, commercial law and equity, insurance and wills and probate in the Court of Appeal, the Supreme Court, the Federal Court and the District Court. He is also the author of *Electronic Contracts 2nd ed* (Sydney: LexisNexis Butterworks 2015).

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