

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

Not Restricted

No. 6234 of 2005

PAUL JOHN TAYLOR

Plaintiff

and

MOUNTAIN PINE FURNITURE PTY LTD

Firstnamed Defendant

and

DAVID BROWNBILL and PETER
LOWTHIAN (a Medical Panel constituted
under the *Accident Compensation Act 1985*)

Secondnamed Defendant

JUDGE: BONGIORNO J
WHERE HELD: Melbourne
DATE OF HEARING: 10-12 April 2006
DATE OF JUDGMENT: 15 December 2006
CASE MAY BE CITED AS: Taylor v Mountain Pine Furniture P/L
MEDIUM NEUTRAL CITATION: [2006] VSC 499

ADMINISTRATIVE LAW - Judicial review - Medical Panel appointed pursuant to s 63
Accident Compensation Act 1985 - Opinion - AMA Guides to the Evaluation of Permanent
Impairment - Misinterpretation of Guides - Error of law/jurisdictional error - *certiorari* -
Ignoring a mandatory requirement of assessment - Remitted for reassessment.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr M O'Loghlen QC with Mr A Pillay	Bellbridge Hague
For the First Defendant	Mr J Noonan SC with Mr M Fleming	Solicitor for the Victorian Workcover Authority

SC:SB

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JUDGMENT
Taylor v Mountain Pine Furniture P/L

HIS HONOUR:

- 1 On 27 November 1997 Paul John Taylor was injured when a truck which he was driving in the course of his employment with Mountain Pine Furniture Pty Ltd was involved in an accident near Benalla in north eastern Victoria. As a result of the accident Mr Taylor injured his neck and his left big toe.
- 2 The injury to Mr Taylor's toe was a dislocation of the interphalangeal joint which was treated by reduction and the suturing of an associated laceration. He has been left with a stiff left big toe which is otherwise well healed.
- 3 Mr Taylor's injury to the neck was a fracture of the lateral mass of the sixth cervical vertebra which was treated by surgery involving internal fixation and a C6-7 fusion. He has made a good recovery from his surgery and has been left with only the predictable stiffness associated with his fused vertebrae.
- 4 On 16 July 1999 Mr Taylor submitted a claim for compensation to his employer pursuant to s 98C of the *Accident Compensation Act 1985* ("the Act") in respect of the injuries which he sustained. The claim was accepted by the Workcover agent (QBE Mercantile Mutual) by letter dated 20 March 2001. However, as a consequence of a dispute concerning the assessment of the plaintiff's degree of impairment a medical question was referred to a Medical Panel pursuant to s 104B(9) of the Act. The medical question originally referred was:

What is the degree of impairment resulting from the accepted injury/s assessed in accordance with Section 91 and is the impairment permanent?
- 5 On 5 January 2004 the Medical Panel gave its opinion pursuant to s 67 of the Act on the medical question posed. Its opinion was that the plaintiff had a 16% whole person impairment resulting from the accepted injuries to his toe and neck when assessed in accordance with s 91 of the Act. It considered the plaintiff's degree of impairment to be permanent.

6 The plaintiff was dissatisfied with the assessment made by the Medical Panel and sought judicial review of its decision. Consequently, on 1 September 2004 this Court (Williams J) quashed the opinion of the Medical Panel on the ground that its reasons for reaching its conclusion were inadequate and thus it had failed to accord Mr Taylor procedural fairness.¹ The Court ordered that the medical question be referred to a differently constituted Medical Panel to be dealt with according to law.

7 On 19 November 2004 the newly constituted Medical Panel (the second defendant in this proceeding) answered the same medical question in the following way:

In the Panel's opinion, the worker has a 16% whole person impairment resulting from the accepted toes (sic) and neck injuries when assessed in accordance with Section 91 of the Act. The degree of impairment is permanent.

The figure of 16% was reached by the Panel by allotting a figure of 1% with respect to Mr Taylor's toe and 15% with respect to his neck and applying those figures to the Combined Values Chart found in the *AMA Guides to the Evaluation of Permanent Impairment* (Fourth Edition) - the statutorily mandated criteria by which permanent impairment is to be assessed for the purposes of the *Accident Compensation Act 1985*.

8 In this proceeding Mr Taylor challenges the process by which this Medical Panel reached its conclusion that his permanent disability assessed at 16%. His principal contention is that the Panel did not properly apply the relevant parts of the *AMA Guides* when calculating his impairment. In particular, he maintains that it erred in applying Chapter Three of the *Guides* with respect to his neck injury by failing to heed the requirement set out in paragraph 3.3d of the *Guides* (page 100). That requirement is that in assessing the degree of his impairment using the Injury Model (as described in Chapter Three) no heed should be paid by the assessor to any improvement to his neck condition consequent upon the surgery he underwent. Thus, says Mr Taylor, the Panel took into account an irrelevant consideration, namely the improvement brought about by his cervical spinal fusion and/or failed to take into account a relevant consideration, namely the pre-surgery condition of his

¹ [2004] VSC 324.

neck.

The Panel's Opinion

- 9 The Medical Panel stated that, in reaching its opinion, it acted in accordance with the "Specific Procedures and Directions" in Section 3.3f at page 101 of the Guides. Chapter Three of the Guides is the chapter concerned with the musculoskeletal system. The procedure set out in Section 3.3f involves 10 steps, the fourth of which is a consideration of the permanency of the impairment being assessed. It contains a cross reference to Chapter One of the Guides and to the Glossary.
- 10 The Panel's decision referred to Section 1.1 (page 1) of the Guides which contains the following statement:

The Guides defines 'permanent impairment' as one that has become static or stabilized during a period of time sufficient to allow optimal tissue repair, and one that is unlikely to change in spite of further medical or surgical therapy.

The Medical Panel contrasted this statement with the statement contained in Section 3.3d of the Guides - Evaluating Impairments: The Injury or Diagnosis-related Estimates Model where this statement appears:

With the Injury Model, surgery to treat an impairment does not modify the original impairment estimate, which remains the same in spite of any changes in signs or symptoms that may follow the surgery and irrespective of whether the patient has a favorable or unfavorable response to treatment.

In reaching its conclusion, the Panel decided that the definition of permanent impairment contained in Section 1.1 of Chapter One of the Guides, quoted above (which is similar to, but not identical with, the definition of permanent impairment contained in the Glossary included in the Guides) required it to assess Mr Taylor's permanent impairment based upon his post-surgery condition. In other words, it resolved what it saw as an "apparent conflict" between the two parts of the Guides referred to by discounting Mr Taylor's assessment because the surgery he underwent appeared to have been successful. In doing so it preferred what it considered Section 1.1 (and the Glossary) meant to the directive in Section 3.3d.

- 11 The question for this Court is whether, in taking that approach, the Medical Panel was carrying out the statutory function conferred upon it by s 67(1) of the *Accident Compensation Act 1985*; that is to say whether it was answering the medical question asked of it pursuant to s 104B(9) of that Act according to law. The proper interpretation of the Guides is a question of law, even if the application of their requirements and conclusions reached as a result of that application are questions of fact.²
- 12 To evaluate the correctness of the Medical Panel's approach it is necessary to consider the content of Chapter Three of the Guides (The Musculoskeletal System) and in particular Section 3.3 (the Spine) in more detail.
- Chapter Three - The Musculoskeletal System*
- 13 Chapter Three of the Guides provides mechanisms for the assessment of permanent impairment of those parts of the body described as the musculoskeletal system. It has sections which deal with the upper extremities, the lower extremities, the spine and the pelvis. Each of these sections is, itself, divided into sub-sections depending upon the parts of the body being considered.
- 14 The introduction to Chapter Three directs the reader to a study of Chapters One and Two and the Glossary at page 315 of the Guides before attempting an assessment using Chapter Three. For present purposes it is sufficient to note that in Chapter One and the Glossary there are definitions of "permanent impairment" to which reference has already been made.
- 15 Chapter Three, Section 3.3 relates to the spine. It commences by offering two different methods of approach to the assessment of permanent injury to the spine. One, which it says applies especially to traumatic injuries is called the "Injury Model". Its use involves assigning a patient to one of eight categories on the basis of objective clinical findings. The Injury Model is sometimes referred to as the "Diagnosis-Related Estimates (DRE) Model". The other is called the Range of

² *Masters v McCubbery* [1996] 1 VR 635, 651 (Ormiston JA).

Movement model.

- 16 In its introductory remarks concerning the spine the Guides emphasise that only one of these models should be used to assess permanent impairment. It directs an assessor to the Injury Model if a patient's condition is one of those listed in Table 70 of the Guides. This table, to which reference will be made again, describes a patient's condition and assigns various categories to that condition, which categories lead to an attribution of a "percent" to the patient as being his or her permanent impairment of whole body function. Those remarks also contain a further definition of permanent impairment. Again, it is similar to but not identical with those definitions contained in Chapter One and in the Glossary. These differences are not material in this case.
- 17 In Mr Taylor's case, no question of which assessment approach should have been used arises. The Medical Panel used the Injury Model as it apparently considered that Mr Taylor's condition could be adequately described by one of the descriptors used in Table 70. As neither party suggested that this determination, which involves a clinical judgment within the particular expertise of the Medical Panel, was erroneous, it need not be considered further.
- 18 The use of the Injury Model requires the examiner's clinical findings and other medical information to be applied to Table 70 of the Guides to produce a spine impairment category having a number from I to VIII. That spine impairment category is then applied to Table 73 (for cervicothoracic spine impairment) to provide the "percent" whole person impairment resulting from the identified injury to the spine. In some cases further analysis in accordance with the Guides must be undertaken before a final conclusion can be reached and it may even be appropriate in some cases to consider the Range of Movement Model as well. However that is not the case here. The only question is whether, in using the Injury Model the Panel ought to have taken any account of the remedial effect which surgery had had on the condition of Mr Taylor's neck.

- 19 The Medical Panel recognised that if it ignored the effects of surgery on Mr Taylor it would have determined a whole person impairment of 25% of body function in his case³. It said:

On the basis of the available medical information the Panel considers the worker had a fracture dislocation of C6/C7 with postural element fracture with mild spinal canal displacement, as well as radiological evidence of loss of motion segment integrity (instability) as defined in Section 3.3b of Chapter Three, prior to the surgery in February 1998. If the Panel assessed impairment resulting from the accepted neck injury prior to the surgery in accordance with Table 70 there would be a whole person impairment of 25% for a cervicothoracic spine Category IV impairment pursuant to Table 73.

In Section 3.3d the Injury (or DRE) Model is described more fully in the following terms:

The Injury Model attempts to document physiologic and structural impairments relating to insults other than common developmental findings, such as (1) spondylolysis, found normally in 7% of adults; (2) spondylolisthesis, found in 3%; (3) herniated disk without radiculopathy, found in more than 30% of individuals by age 40 years; and (4) ageing changes, common in 40% of adults after age 35 years.

The Injury Model relies especially on evidence of neurologic deficits and uncommon, adverse structural changes, such as fractures, dislocations and loss of motion segment integrity. Under this model, DREs are differentiated according to clinical findings that are verifiable using standard medical procedures.

With the Injury Model, surgery to treat an impairment does not modify the original impairment estimate, which remains the same in spite of any changes in signs or symptoms that may follow the surgery and irrespective of whether the patient has a favorable or unfavorable response to treatment.

- 20 This description makes it clear that evaluation using this model or method concentrates on the degree of severity of the insult on the spine by the traumatic event which caused the permanent impairment, measured by reference to its effect on the patient. It is in this context that it directs the examiner to ignore the effect of surgery. Examples given as illustrations of the use of the Injury Model show that the intention of the Guides is to remove from account any effect of surgery – remedial or adverse. One example, pertaining to the lumbosacral spine, assessed a patient who had a positive result from a disc removal and spinal fusion to treat a herniated

³ That is to say 26% including that related to the left big toe.

nucleus pulposus at L4. The example specifically took out of account the effect of surgery. Another example, closer to the problem in Mr Taylor's case, concerned a patient who had had successful surgery to fuse her C5-C6 joint to treat a large herniated nucleus pulposus between those two vertebrae, with radiculopathy present with respect to C6. Her permanent impairment was also assessed as if the surgery had not been performed.

- 21 The *Accident Compensation Act 1985* requires the Medical Panel to assess impairment using the *AMA Guides*. This attempt by the legislature to introduce some degree of objectivity into the assessment of impairment for compensation purposes represents a significant application of the rule of law in an area where one of the fundamental principles of justice – that like cases should be treated alike – has particular importance. Nothing would discredit a compensation system more quickly than the idiosyncratic application of criteria to the determination of an injured person's impairment and hence their entitlement to compensation at a particular level. Although the efficacy of the application of the *AMA Guides* to achieve a just result for injured people may be debated, as the law stands they must be applied regardless of any personal view of the assessor called upon to make the assessment. Whilst the interpretation of medical matters referred to in the Guides and the exercise of clinical judgment must be left to the medical examiner who is applying them, it is not within that medical examiner's remit to ignore an express direction contained in the Guides as to how a particular objective fact is to be treated in making an assessment. Thus it was not within the power of the Medical Panel in this case to reach its assessment of Mr Taylor's impairment after taking into account the effects of surgery performed on his cervical spine.
- 22 That the Guides require the effects of surgical intervention on the spine to be ignored in assessing permanent impairment does not mean that the fact that surgery has been undertaken must be ignored by the assessor. On the contrary, the assessor must ensure that the effects of any surgery are carefully noted so that they can be consciously disregarded in reaching a conclusion as to permanent impairment. If

surgery has been successful (as in this case) the assessor looks only at the effect or effects of the trauma on the pre-operation patient, applies Table 70 to those effects (or, where necessary, considers other criteria provided by the Guides to reach an appropriate conclusion) and proceeds to the whole person impairment assessment provided by applying the result obtained from Table 70 to Table 73.

- 23 Where surgery has been unsuccessful the task of the assessor may, in some cases, be somewhat more difficult. It is the effect of the surgery which must be ignored in reaching an assessment. Thus, any sign or symptom of the original injury still present after the surgery must be taken into account in applying Table 70. Those detriments which must be ignored are those actually caused by the surgery; that is to say which can be said to have been a result, not of the original trauma, but of the surgery itself. It is only "changes in signs or symptoms that may follow surgery" that are to be ignored; in this instance the word "follow" is synonymous with "caused by". That this is so is reinforced by the Guides' emphasis that it is a favourable or unfavourable response to *treatment* which must be ignored. Any other interpretation of the requirement that surgery be ignored which did not differentiate between the effect of the original trauma and the effect of the surgery could lead to grave injustice to the injured person. A failure to so differentiate those effects would introduce an unacceptable risk of injustice in the assessment of impairment and thus the assessment of compensation. It is clearly not a requirement of the Guides.

The First Defendant's Argument

- 24 Mr Noonan SC, for the first defendant, submitted that the overriding requirement of the Guides that an assessment of permanent impairment should only be made when the patient's residual disabilities were stabilised and permanent, meant that the injunction as to ignoring the effect of surgery in respect of a spinal injury must be read in the context of that overriding requirement. It must therefore take into account, so his argument went, the patient's post surgical state regardless of the directive in the Guides at page 100. In effect, the directive must be ignored.

- 25 Mr Noonan relied upon the judgment of Balmford J of this Court in *Bayliss v Transport Accident Commission*⁴ where Her Honour was considering the same question in an appeal from VCAT concerning an assessment of permanent impairment made by the Transport Accident Commission in respect of a person injured in a transport accident. She resolved the dilemma inherent in Mr Noonan's submission by characterising the statement at page 100 of the Guides as "an oversight".
- 26 With respect to Her Honour, I am unable to agree with such a characterisation. The meaning of the direction is entirely clear. It runs to six lines in a part of the Guides describing the Injury Model of assessment with respect to spinal injuries. An oversight is an inadvertent mistake. I find it impossible to so characterise the clear words of the paragraph at page 100 of the Guides to which I have referred. As I hope I have already made clear the Injury Model of assessment concentrates on the injury to the patient's body effected by the trauma. It is entirely consistent with such an approach that the effects of surgery - whether successful or unsuccessful - should be ignored.
- 27 Balmford J's conclusion that the Guides required an assessor to ignore the effects of surgery in determining permanent impairment in respect of a spinal injury was an oversight depended upon her accepting that the overall tenor of the Guides was that an impairment assessment should only be undertaken when injuries have stabilised. She referred to various places in the Guides where such a requirement is mentioned and saw it as an overriding requirement, essential to their application. But such a view, which is undoubtedly correct, is not inconsistent with the requirement that in assessing permanent impairment the effect of surgery is to be ignored. The requirement that injuries must have stabilised before a permanent impairment assessment can be made is a directive as to *when* that task may be undertaken or, more correctly, when it cannot be undertaken. The requirement that surgery be ignored in undertaking a permanent assessment is a directive as to *how* the task must

⁴ (2004) 9 VR 267.

be undertaken. This directive is of the same character as a requirement that a particular procedure must be employed or a particular criterion must be applied to certain clinical findings in the assessment of permanent impairment. It is not inconsistent with the overall thrust of the Guides that stability and permanence are essential pre-requisites to a valid assessment of permanent impairment.

28 Balmford J also referred to the *dictum* of JD Phillips JA in *Lake v Transport Accident Commission*⁵ to the effect that the AMA Guides are only guides and that it was important "not to become too legalistic" about them. But in *Lake*, His Honour was referring to the task of assessment required by a medical assessor in reaching a conclusion on a medical question by the application of the Guides. Such a situation is distinguishable from that in this case where the Medical Panel has ignored a clear directive that in applying the Injury Model of assessment in respect of spinal injuries it must ignore the effects of surgery.

29 Mr Noonan also referred to what he said were inconsistencies which would arise between the Injury Model and the Range of Movement Model were each of them to have been applied to Mr Taylor's condition as it was when he was assessed. But at least in this case, the application of the Guides is peculiarly a medical matter. It is for the Medical Panel to determine whether the Injury Model or the Range of Movement Model is appropriate. It does so by applying its clinical information or data (history, examination, observations, tests etc.) in accordance with the Guides. This it did in Mr Taylor's case. It was entitled to do so - it was virtually required to by the circumstances⁶ - and no error is alleged in its conclusion that the Injury Model was the appropriate approach to take in assessing Mr Taylor's permanent impairment. The problem arose at the point at which the Medical Panel did not apply the requirements of that model to the data which they elicited from a study of Mr Taylor and his injuries. There being no error in the selection of the approach to be taken, the question of whether a different approach would have produced an inconsistent

⁵ [1998] 1 VR 616, 625.

⁶ The Guides (paragraph 3.3) direct the assessor to the Injury Model where, as here, the patient's condition is one of those listed in Table 70.

result is not to the point.

Conclusion

30 In refusing to give effect to the direction at page 100 of the *AMA Guides* that, in assessing Mr Taylor's permanent impairment, it must disregard the effect of surgery to his cervical spine, the Medical Panel failed to exercise its powers according to law. This error of law is manifest in the Medical Panel's determination and, accordingly, by the application of s 10 of the *Administrative Law Act 1978*, it is an error of law on the face of the record. It is probably also a jurisdictional error⁷. No discretionary considerations have been urged upon the Court as to why an order in the nature of *certiorari* should not follow a determination that the Medical Panel committed an error of law. Accordingly, the plaintiff is entitled to judicial review of the Medical Panel's determination and consequential relief.

31 Having regard to the fact that the only error made by the Medical Panel in this case was to fail to apply the prohibition on taking into account the plaintiff's surgery in reaching its conclusion there would appear to be no reason why the matter should not be remitted to the same Medical Panel to be determined according to law. IT is familiar with the facts and has already, in effect, decided the point. Having regard to its statement quoted in paragraph 19 of this judgment, a reconsideration and determination of the matter by the same Panel would not be inappropriate and should lead to a prompt resolution of Mr Taylor's case.

32 Subject to hearing counsel as to form the following orders will be made by the Court:

1. That there be an order in the nature of *certiorari* directed to David Brownbill and Peter Lowthian, a Medical Panel constituted pursuant to the *Accident Compensation Act 1985* that its opinion dated 19 November 2004 concerning one Paul Taylor be brought into this Court and quashed;
2. That the medical questions submitted to the said Medical Panel by QBE

⁷ *Craig v South Australia* (1995) 184 CLR 163, 179; *Re Refugee Review Tribunal; ex parte Aala* (2000) 204 CLR 82; *MIMA v Yusuf* (2002) 206 CLR 323, 351 (McHugh, Gummow and Hayne JJ).

Mercantile Mutual, a Workcover agent on 24 October 2003 concerning Paul Taylor be forthwith determined by the same Medical Panel according to law and in accordance with this judgment; and

3. That the first defendant pay the plaintiff's costs of and incidental to this proceeding to be taxed.

CERTIFICATE

I certify that this and the 12 preceding pages are a true copy of the reasons for Judgment of Bongiorno J of the Supreme Court of Victoria delivered on 15 December 2006.

DATED this Fifteenth day of December 2006.



AB

Associate to Justice Bongiorno