

# FEDERAL COURT OF AUSTRALIA

## **Broadhurst v Comcare [2010] FCA 1034**

**Citation:** Broadhurst v Comcare [2010] FCA 1034

**Appeal from:** Broadhurst and Comcare [2010] AATA 251

**Parties:** **KAREN BROADHURST v COMCARE**

**File number:** ACD 16 of 2010

**Judge:** **BUCHANAN J**

**Date of judgment:** 22 September 2010

**Catchwords:** **ADMINISTRATIVE LAW** – compensation for injuries - notion of whole person impairment – obligation to pay compensation in the event of a 10% degree of permanent impairment – not open for the purpose of deciding whether an entitlement to compensation exists for the *Guide to the Assessment of the Degree of Permanent Impairment* to effectively direct that a choice be made only between 8% or 13% degrees of permanent impairment – use of the American Medical Association’s *Guides to the Evaluation of Permanent Impairment*

**Legislation:** *Administrative Appeals Tribunal Act 1975* (Cth) ss 42D, 43(1), 44  
*Safety Rehabilitation and Compensation Act 1988* (Cth) ss 4, 5A(1)(b), 14(1), 24, 28

**Cases cited:** *Cannie v Comcare* (2006) 226 CLR 535  
*Comcare v Kay* (1997) 26 AAR 124  
*Comcare v Tiesay* (1992) 38 FCR 181  
*Fellowes v Military Rehabilitation and Compensation Commission* (2009) 240 CLR 28  
*Parker v Military Rehabilitation and Compensation Commission* [2007] FCA 1161  
*Whitaker v Comcare* (1998) 86 FCR 532

**Date of hearing:** 17 August 2010

**Place:** Canberra

**Division:** GENERAL DIVISION

**Category:** Catchwords

Number of paragraphs:	71
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**IN THE FEDERAL COURT OF AUSTRALIA  
AUSTRALIAN CAPITAL TERRITORY DISTRICT  
REGISTRY  
GENERAL DIVISION**

**ACD 16 of 2010**

**ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL**

**BETWEEN:                   KAREN BROADHURST  
                                  Appellant**

**AND:                        COMCARE  
                                  Respondent**

**JUDGE:                    BUCHANAN J**

**DATE OF ORDER:        22 SEPTEMBER 2010**

**WHERE MADE:            SYDNEY**

**THE COURT ORDERS THAT:**

1.    The decision of the Administrative Appeals Tribunal is set aside and the matter is remitted to it.
2.    Any application for costs is to be made within 14 days supported by short written submissions. Any response is to be made within a further 7 days.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.  
The text of entered orders can be located using Federal Law Search on the Court's website.

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JUDGE:             BUCHANAN J

DATE:              22 SEPTEMBER 2010

PLACE:             SYDNEY

REASONS FOR JUDGMENT

BUCHANAN J:

*The present appeal*

1           This is a proceeding in the original jurisdiction of the Court pursuant to s 44 of the  
*Administrative Appeals Tribunal Act 1975* (Cth) ("the AAT Act") by virtue of which a party  
to a proceeding before the Administrative Appeals Tribunal ("the AAT") may appeal to this  
Court on a question of law from any decision of the AAT in that proceeding.

2           The proceeding of the AAT which gives rise to the present appeal was an application  
by Ms Broadhurst for review by the AAT of a decision by Comcare that she was not eligible  
for compensation under s 24 of the *Safety Rehabilitation and Compensation Act 1988* (Cth)  
("the SRC Act") arising from an injury she suffered. The injury was the result of events  
which occurred on 12 April 2005.

*The statutory scheme*

3           Section 14(1) of the SRC Act provides:

14(1) Subject to this Part, Comcare is liable to pay compensation in accordance  
with this Act in respect of an injury suffered by an employee if the injury

results in death, incapacity for work, or impairment.

4

Section 24 of the SRC Act then provides as follows:

24(1) Where an injury to an employee results in a permanent impairment, Comcare is liable to pay compensation to the employee in respect of the injury.

- (2) For the purpose of determining whether an impairment is permanent, Comcare shall have regard to:
  - (a) the duration of the impairment;
  - (b) the likelihood of improvement in the employee's condition;
  - (c) whether the employee has undertaken all reasonable rehabilitative treatment for the impairment; and
  - (d) any other relevant matters.
- (3) Subject to this section, the amount of compensation payable to the employee is such amount, as is assessed by Comcare under subsection (4), being an amount not exceeding the maximum amount at the date of the assessment.
- (4) The amount assessed by Comcare shall be an amount that is the same percentage of the maximum amount as the percentage determined by Comcare under subsection (5).
- (5) Comcare shall determine the degree of permanent impairment of the employee resulting from an injury under the provisions of the approved Guide.
- (6) The degree of permanent impairment shall be expressed as a percentage.
- (7) Subject to section 25, if:
  - (a) the employee has a permanent impairment other than a hearing loss; and
  - (b) Comcare determines that the degree of permanent impairment is less than 10%;an amount of compensation is not payable to the employee under this section.
- (7A) Subject to section 25, if:
  - (a) the employee has a permanent impairment that is a hearing loss; and
  - (b) Comcare determines that the binaural hearing loss suffered by the employee is less than 5%;an amount of compensation is not payable to the employee under this section.
- (8) Subsection (7) does not apply to any one or more of the following:
  - (a) the impairment constituted by the loss, or the loss of the use, of a finger;
  - (b) the impairment constituted by the loss, or the loss of the use, of a toe;
  - (c) the impairment constituted by the loss of the sense of taste;
  - (d) the impairment constituted by the loss of the sense of smell.
- (9) For the purposes of this section, the maximum amount is \$80,000.

5

The SRC Act defines "permanent" as follows (in s 4):

*permanent* means likely to continue indefinitely.

The SRC Act defines "impairment" as follows (also in s 4):

*impairment* means the loss, the loss of the use, or the damage or malfunction, of any part of the body or of any bodily system or function or part of such system or function.

Section 5A(1)(b) defines "injury" relevantly for present purposes as:

*injury* means:

- ... (b) an injury (other than a disease) suffered by an employee, that is a physical or mental injury arising out of, or in the course of, the employee's employment;

Some features of s 24 should be noted. Section 24(1) imposes a liability on Comcare to pay compensation in respect of an injury which results in a permanent impairment. That liability is subject to the operation of s 24(7) – namely, if Comcare determines that the degree of permanent impairment is less than 10% an amount of compensation is not payable. Comcare's determination, as decision maker, is to be carried out under s 24(3), (4), (5) and (6). Those provisions interact. Under subs (3) Comcare is directed to pay the amount of compensation assessed under subs (4). Under subs (4) that amount is to bear the same percentage relationship to the maximum amount fixed in subs (9) as the percentage determined by Comcare under subs (5). The degree of permanent impairment determined under subs (5) is to be determined under the provisions of the approved Guide. Under subs (6) the degree of permanent impairment determined by Comcare in an individual case is to be expressed as a percentage.

#### **The background facts**

Comcare has accepted a number of claims from Ms Broadhurst relating to different periods of employment. Injuries which pre-dated the one with which the present proceedings are concerned (which are of historical interest only) occurred on 18 November 1988 (low back strain); 18 February 1992 (left sacroiliac joint strain) and 20 June 1996 (facet joint inflammation in the lumbar spine). I mention those earlier matters only to emphasise that the matter which the AAT was required to consider was ultimately independent of those earlier incidents and Ms Broadhurst's latest claim for compensation was not affected by any earlier claim.

10 The incident on 12 April 2005 concerned an injury to Ms Broadhurst's back but the  
consequence of the injury which was considered by Comcare, and by the AAT, was resulting  
impairment in Ms Broadhurst's legs. There is an issue between the parties whether the injury  
suffered was to her back or to both her back and her legs. That was not an issue before the  
AAT where Ms Broadhurst's case was advanced on the basis that the relevant injury was to  
her back, resulting in an impairment to her legs. The wider contention advanced on the  
appeal will be mentioned again when a satisfactory context in which to appreciate its  
significance has been established.

11 The AAT found that, as a result of the injury to her back on 12 April 2005, Ms  
Broadhurst suffers a permanent impairment to her legs. However, the AAT concluded that  
the degree of permanent impairment suffered by Ms Broadhurst, as a result of the injury, was  
less than 10% and that she was not entitled to compensation. That conclusion was  
substantially dictated by the contents of, and instructions in, the approved Guide referred to in  
s 24(5) of the SRC Act.

#### The Comcare Guide

12 Section 28 of the SRC Act authorises Comcare to prepare a document called *Guide to  
the Assessment of the Degree of Permanent Impairment* ("the Comcare Guide") setting out  
criteria by reference to which the degree of any permanent impairment of an employee  
resulting from an injury shall be determined. The Comcare Guide must be approved by the  
relevant Minister and is a disallowable legislative instrument. Section 28(4) of the SRC Act  
makes the Comcare Guide binding on primary decision makers (including Comcare itself)  
and on the AAT.

13 The current version of the Comcare Guide (the Second edition) is dated 2005 and  
came into effect for claims received after 28 February 2006. Ms Broadhurst's claim was  
made on 29 September 2006 and the Second Edition of the Comcare Guide therefore applied  
to the assessment of her claim for compensation. The Comcare Guide identifies diagnostic  
and functional characteristics of a wide variety of disabilities, conditions and diseases and  
assigns a percentage degree of "whole person impairment" at increasing levels of severity,  
often (but not only) in 5% bands.

14 From time to time there has been criticism of the extent to which the Comcare Guide  
has been or is faithful to the legislative directives in the SRC Act governing its preparation  
and content (see e.g. *Comcare v Treacy* (1992) 38 FCR 181; *Comcare v Kay* (1997) 26 AAR  
124; *Whitaker v Comcare* (1998) 86 FCR 532 at 544-545 (“*Whitaker*”); *Canute v Comcare*  
(2006) 226 CLR 535 (“*Canute*”); *Parker v Military Rehabilitation and Compensation*  
*Commission* [2007] FCA 1161; and *Fellowes v Military Rehabilitation and Compensation*  
*Commission* (2009) 240 CLR 28 (“*Fellowes*”).

15 In particular, instructions in the Comcare Guide concerning use of the notion of whole  
person impairment have been challenged. The High Court made it clear in *Canute* that the  
impairment which is to be assessed under s 24 is an individual “impairment” in the sense  
defined in s 4 – namely, one concerning a part of the body or a bodily system or function.  
Section 24(5) refers to “the degree of permanent impairment of the employee”. It has been  
made clear that the reference to “impairment” in s 24(5) is to the same “impairment” referred  
to in s 24(1) – i.e. impairment in the defined sense, assessed individually. The High Court  
then made clear in *Fellowes* that, in the case of each individual assessment under s 24, any  
reference in the Comcare Guide to “whole person impairment” may only be used to make an  
assessment, in respect of individual injuries, of how the particular impairment would reduce  
the functional capacities of a normal healthy person.

16 Regrettably, the Comcare Guide has usually not been amended in response to any  
judicial finding of deficiency or lack of fidelity to the SRC Act. Resolution of any  
inconsistencies between the provisions of the Comcare Guide and the requirements of the  
SRC Act therefore has to be accomplished by recognising that the Comcare Guide cannot  
alter the requirements or operation of the SRC Act. It must, if it is possible to do so, be given  
a construction that is consistent with a proper construction of the SRC Act. If that is not  
possible it must, to the extent necessary, be treated as unauthorised.

17 It is important to emphasise, therefore, that the obligations on Comcare under s 24 of  
the SRC Act are independent of the functions given to it under s 28 of the SRC Act. Under s  
24 Comcare is a primary decision maker with respect to the assessment of individual claims  
for compensation and is bound to apply the provisions of s24 consistently with a proper view  
of the requirements of the SRC Act. If there is a conflict between the SRC Act and the  
provisions of the Comcare Guide, Comcare’s obligation as a decision maker is to give

primacy to the requirements of the SRC Act, despite s 28(4). The same obligation applies to the AAT.

18 Certain "Principles of Assessment" are set out in Part 1 of the Comcare Guide. They include:

Each table in Part 1, Division 1 contains impairment values expressed as percentages. Where a table is applicable in respect of a particular impairment, there is no discretion to choose an impairment value not specified in that table. For example, where 10% and 20% are the specified values, there is no discretion to determine the degree of impairment as 15%.

(Emphasis added)

19 This instruction has particular relevance to the present matter.

20 Table 9.7 deals with "Lower Extremity Function". The following directions are given in the Guide in connection with the use of Table 9.7:

Table 9.7 (see following page) should only be used to assess impairment from objectively identified orthopaedic or neurological conditions arising in and affecting the lower extremities. It may not be used to assess impairment from conditions manifesting principally as pain with no clinically demonstrable lower extremity pathology.

...

Table 9.7 may be used to assess lower extremity impairment arising as a result of spinal cord damage. Observe the special procedure set out in the introduction to Part III of this Chapter. However, Table 9.7 is not to be used to assess lower extremity impairment arising as a result of nerve root compression, or other neurological sequelae of other spinal conditions. These should be assessed under:

- Table 9.6.1, Table 9.6.2a or Table 9.6.2b (tables dealing with Spinal Nerve Root Impairments and Peripheral Nerve Injuries Affecting the Lower Extremities, see pages 82-83); or
- Table 9.15: Cervical Spine (see page 114); or
- Table 9.16: Thoracic Spine (see page 115); or
- Table 9.17: Lumbar Spine (see page 116).

(Emphasis in original)

21 The effect of these directions, on their face, was to exclude consideration of Ms Broadhurst's circumstances under Table 9.7. The impairment in her legs arises as neurological sequelae of an injury to her lumbar spine. The impairment manifests principally

as pain with no clinically demonstrable lower extremity pathology and not from an objectively identified orthopaedic or neurological condition.

22

Table 9.17, which is referred to in the notes accompanying Table 9.7 as a possible source of guidance for neurological sequelae of lumbar spine conditions, deals with impairment arising from lumbar spine injuries, including impairment of the legs. The first three values which appear in Table 9.17 are accompanied by the descriptions set out hereunder:

NWPPI	Criteria
0	<p>No significant clinical findings, no observed muscle guarding or spasm, no documented neurological impairment, no documented alteration in structural integrity, and no other indication of impairment related to injury or illness;</p> <p>or</p> <p>No fractures.</p>
8	<p>Clinical history and examination findings compatible with a specific injury. Findings may include: significant muscle guarding or spasm; asymmetric loss of range of motion; or nonverifiable radicular complaints, defined as complaints of radicular pain without objective findings.</p> <p>No alteration of the structural integrity and no significant radiculopathy;</p> <p>or</p> <p>Prior clinically significant radiculopathy and radiologically demonstrated disc herniation, consistent with the radiculopathy, but radiculopathy no longer present following conservative treatment;</p> <p>or</p> <p>Fractures:</p> <ul style="list-style-type: none"> <li>• Compression fracture of one vertebral body of less than 25%;</li> <li>• Posterior element fracture without dislocation (not developmental spondylolysis) that has healed without alteration of motion segment integrity;</li> <li>• Spinous or transverse process fracture with displacement without a vertebral body fracture, with no disruption of the spinal canal.</li> </ul>
	<p>Significant signs of radiculopathy, such as dermatomal pain and/or in a dermatomal distribution, sensory loss, alteration of relevant reflex(es), loss of muscle strength or measured unilateral atrophy above or below the knee compared to measurements on the contralateral side at the same location</p>

13	<p>(may be verified by electrodiagnostic findings);</p> <p>or</p> <p>History of a herniated disc at the level and on the side consistent with objective clinical findings, associated with radiculopathy, or employees who have had surgery for radiculopathy but are now asymptomatic;</p> <p>or</p> <p>Fractures:</p> <ul style="list-style-type: none"><li>• Compression fracture of one vertebral body of 25% to 50% - healed without alteration of structural integrity;</li><li>• Posterior element fracture with displacement disrupting the spinal canal - healed without alteration of structural integrity.</li></ul>
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(WPI denotes whole person impairment)

23 Table 9.17 applied, by its terms, to Ms Broadhurst's impairment. A majority of the medical practitioners who assessed her injury and impairment against the criteria listed in Table 9.17 concluded that the appropriate value assigned by the table to her circumstances was 8% WPI.

24 One issue which required determination by the AAT was whether the exclusions accompanying Table 9.7 should be regarded as ineffective. If Table 9.7 applied to the assessment of Ms Broadhurst's impairment to her legs it was probable that it would yield a more favourable result than an assessment under Table 9.17

#### The AAT Decision

25 The decision of the AAT was given on 9 April 2010. The AAT decision set out the applicable statutory scheme and then the background events preceding and connected with the incident which occurred on 12 April 2005. The AAT described the consequence for Ms Broadhurst of the impairment resulting from the injury she suffered in 2005. The AAT went to some trouble to summarise the agreed medical evidence resulting from reports from a number of doctors. It is not necessary, for the purpose of the present appeal, to repeat that summary.

26 The first question which required resolution was whether Ms Broadhurst had recovered from the incident which occurred on 12 April 2005 and whether her current

symptomatology was “due to the underlying degenerative and arthritic disease in her lumbar spine”. The AAT noted that “it was conceded by both parties that Ms Broadhurst suffered an ‘injury’ to her back on 12 April 2005 and that her leg condition, which is the subject of this claim, is secondary to, or a *sequela* of, that incident in conjunction with her previous back injuries”. After discussing how particular medical evidence was relevant to an assessment of this question the AAT concluded that the “evidence establishes to the Tribunal’s satisfaction that it was the aggravation of her spinal conditions, principally due to the work-related incident on 12 April 2005, which caused Ms Broadhurst’s leg condition to become symptomatic”. The AAT found that her condition was permanent within the meaning of s 24(2) of the SRC Act. These findings satisfied the requirements of s 24(1) of the SRC Act with the result that Ms Broadhurst would be entitled to compensation unless the degree of her permanent impairment was less than 10%.

27 The AAT then turned to the question of whether any table in the Comcare Guide was relevant to the assessment of the degree of Ms Broadhurst’s impairment and, if more than one, which was the relevant one. It accepted that “where two Tables are both applicable, the decision-maker must assess the degree of permanent impairment under the Table which yields the most favourable result to the employee” (referring to *Whitaker*). The AAT found that Table 9.7 did not apply because no “objectively identified orthopaedic or neurological condition” was present in Ms Broadhurst’s legs. The AAT excluded from consideration, for reasons which it gave, some other tables and then turned its attention to Table 9.17. It noted the structure of the Table which I have earlier set out and made the following comment (at [84]):

The Tribunal notes that it is unfortunate that this disjunction between bands of percentages has been inserted into the Guide and expresses the hope that in the forthcoming republication of the Guide, this issue will be addressed to avoid the obvious problems of assessment it has created for medical experts and others.

28 The AAT then noted that a rating under Table 9.17 was appropriate because the descriptors assigned corresponded to Ms Broadhurst’s circumstances.

29 The AAT accepted the views of a majority of medical practitioners who made an assessment in accordance with Table 9.17 that the degree of Ms Broadhurst’s whole person impairment was 8%, rather than 13% (there was one medical practitioner who assessed Ms Broadhurst at 13%). The fact that Ms Broadhurst’s level of impairment was assessed at 8%

was significant because under s 24(7) of the SRC Act a level of impairment of at least 10% is required before compensation is payable for an impairment of the kind suffered by Ms Broadhurst.

30 The consequence of the AAT's findings was that Ms Broadhurst was not entitled to compensation under the SRC Act. Comcare's decision to refuse compensation was affirmed.

### Grounds of Appeal

31 It is not necessary to set out all the grounds of appeal. Many contained introductory statements. Some were intended to suggest that the AAT had given inadequate reasons for its decision, a contention to which I will return in due course. Ms Broadhurst also contended that it was not open to Comcare, when it prepared the Comcare Guide to render "non-compensable" those categories of impairment which arose from functional consequences without specific diagnostic support.

32 The grounds of appeal which I have found to be ultimately significant may be distilled as follows (using the actual language of the grounds of appeal):

- (e) ... it was not a valid exercise of the power conferred in sections 24 and 28 for the respondent to draft the Guide or any tables in the Guide in a manner that:
  - iii. Makes it impossible to determine whether an applicant attains the statutory threshold of 10% per section 24(7) of the Act in relation to an impairment via the device of drafting a table in terms of 8% and 13% gradations leaving no means to determine whether the impairment does or does not attain the level of 10%.
  - iv. Purports to increase the minimum compensable impairment from the statutory 10% threshold to a higher level via the device of drafting a table in the Guide in terms of 8% and 13% gradations with the consequence that the minimum compensable percentage for an impairment governed by that table is thereby increased to 13% insofar as 8% is below the compensable threshold.

33 In written submissions filed before the hearing of the appeal Ms Broadhurst's legal representatives also advanced a more general attack on the use in the Comcare Guide of the notion of "whole person impairment". No objection was taken to that issue being raised, either in written submissions filed by the respondent or at the hearing of the appeal.

34 It is the two suggested areas of invalidity (use of the notion of whole person  
impairment and failure to provide a means of assessing 10% impairment) which, in my view,  
raise the most substantial issues for consideration on the appeal

**Submissions made on the Appeal**

35 In the submissions made on behalf of Ms Broadhurst there was a general attack made  
upon the Comcare Guide. Arguments were advanced to the effect that the Guide failed to  
comply with the requirements of the SRC Act in various respects. Many of the attacks made  
had no significance for an assessment of Ms Broadhurst's circumstances and I do not think it  
appropriate to deal with them. However some of the challenges were focussed upon matters  
which require some consideration. For example, it was contended in the written submissions  
in chief for Ms Broadhurst that the Comcare Guide was required;

24. (b) ...to assess degree of impairments in respect of the separate parts of the  
body or bodily systems and not just a whole person assessment;

and:

25. It is not open to the authors of the Guide to particularly:

- (f) provide a methodology that does not permit the ascertainment of whether a particular category of impairments does or does not reach the 10% minimum threshold and in lieu thereof substitute a new a [sic] higher threshold of 13% in lieu of the 10% fixed in section 24;
- (g) draft the Guide in a manner that provides only alternatives of 8% or 13% for categories of impairments with the consequence that an impairment found to satisfy the 8% but not the 13% is assumed not to satisfy the minimum 10% threshold of section 24 because the Guide has failed to address relevant criteria for the 10% level. Meeting 8% but not reaching 13% says nothing about whether the impairment would or would not have reached 10%.

36 So far as the use of particular tables in the Guide was concerned it was argued on Ms  
Broadhurst's behalf that Table 9.17 of the Comcare Guide infringed a suggested requirement  
that the Comcare Guide provide, in every case, a method of assessing functionally based  
impairment (as well as diagnostically based methods) and that Table 9.7, being closest to Ms  
Broadhurst's circumstances, should have been used by the AAT with a notional amendment  
eliminating those matters which rendered it, in terms, inapplicable.

37 In the written submissions, the complaint about the way the Comcare Guide dealt  
with, and assessed, functionally based impairment was developed by first drawing attention  
to the fact that the definition of "impairment" in s 4 of the SRC Act identified both  
"functional" and "diagnostic" consequences of an injury. Then it was contended that it is not  
open, under the SRC Act, consistently with the definition of impairment to:

25. (b) provide only a means of assessing diagnostically based impairments (the  
second limb of the definition of impairment) and to ignore the assessment of  
functionally based impairments (the first limb);
- (c) draft the Guide in a manner that relegate all functionally based  
impairment to less than 10% irrespective of the actual degree of impairment;

38 It was submitted that the AAT had failed to address arguments of this kind and that it  
had failed to disclose reasons why the arguments were not acceptable.

39 The written submissions in reply for Ms Broadhurst further developed the suggestion  
that use of a "whole person" approach in the Comcare Guide was inconsistent with the SRC  
Act, as well as the contention that use of 8% and 13% values in Table 9.17 prevented an  
assessment of whether Ms Broadhurst suffered from less than 10% impairment of her legs.

#### **Assessment of functionally based impairment**

40 In order to have a practical consequence for her own circumstances it was necessary  
for Ms Broadhurst to convert her complaint about how the Comcare Guide treats impairment  
which has little or no diagnostic support into a contention about how the Comcare Guide  
should be construed and applied. She did this by arguing that Table 9.17 wrongly devalued  
only functional impairment and that Table 9.7 wrongly excluded functional impairment  
resulting from limitations arising from pain.

41 These contentions face immediate and subsequent obstacles which are fatal to them.  
First, as I will discuss further, there is no warrant for refusing to apply each Table in  
accordance with the instructions which accompany it. The present is not a case where  
identified instructions or directions are directly inconsistent with the SRC Act, or the Table  
itself, and must as a matter of construction be ignored (cf. for example, *Whittaker*).

42

Secondly, the weight to be attributed to the significance of particular manifestations of an impairment, or of diagnostic indicia in relation to it, is a matter for judgment. The Comcare Guide is to be prepared having regard to medical opinion. Section 28 of the SRC Act provides:

- 28(1) Comcare may, from time to time, prepare a written document, to be called the "Guide to the Assessment of the Degree of Permanent Impairment", setting out:
- (a) criteria by reference to which the degree of the permanent impairment of an employee resulting from an injury shall be determined;
  - (b) criteria by reference to which the degree of non-economic loss suffered by an employee as a result of an injury or impairment shall be determined; and
  - (c) methods by which the degree of permanent impairment and the degree of non-economic loss, as determined under those criteria, shall be expressed as a percentage.

...

- (6) In preparing criteria for the purposes of paragraphs (1)(a) and (b), or in varying those criteria, Comcare shall have regard to medical opinion concerning the nature and effect (including possible effect) of the injury and the extent (if any) to which impairment resulting from the injury, or non-economic loss resulting from the injury or impairment, may reasonably be capable of being reduced or removed.

43

The complaints made about the assessment of functionally based impairment are complaints about the medical judgments used in the preparation of the Comcare Guide. They do not, in my view, give rise to any question of inconsistency with the SRC Act and should not be accepted.

#### **Which Table applies?**

44

The appellant argued that Table 9.17 deals only with injuries to the lumbar spine whereas it is Table 9.7 that does (or should) deal with injuries to the legs. It was in connection with the second part of this proposition that the appellant desired to attribute to the incident on 12 April 2005 a resulting injury (as well as impairment) to Ms Broadhurst's legs and not just her back. I do not accept either element of the proposition.

45

Although it was argued on the present appeal that, as a result of the incident on 12 April 2005, Ms Broadhurst has an injury to her back and to her legs that contention was not advanced to the AAT. On the contrary, before the AAT it was contended only that she

suffered an injury to her back which resulted in an impairment to her legs. The contention that was advanced in the present appeal was in support of the proposition that Table 9.7 (which deals with "Lower Extremity Function") should be treated as applicable to her notwithstanding that her circumstances are explicitly excluded. There is no warrant for taking such an approach. If Ms Broadhurst's circumstances fall within the operation of a table in the Comcare Guide they should be assessed in accordance with that table. If they do not, the Comcare Guide directs (under the "Principles of Assessment") that they be assessed in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment* ("the American Guide") current at the time of assessment. I shall return to this direction in another connection later.

46 I am satisfied that the attempted recharacterisation of the "injury" suffered by Ms Broadhurst could not have the effect claimed about the application of the tables in the Comcare Guide. Regardless of how Ms Broadhurst's injury is characterised Table 9.7 did not apply to the assessment of an impairment arising from it. The application of Table 9.7 was expressly excluded. There was no basis for treating the table as applying to something that it does not. Equally, Table 9.17 did apply in its terms to the assessment of her impairment, whether or not Ms Broadhurst's injury is characterised as an injury to her back or to both her back and her legs.

47 Subject to the matters which follow, insofar as the AAT concluded that Table 9.17, and not Table 9.7, should be applied, there was no error in that approach.

#### **The notion of whole person impairment**

48 Part of the system established by the Comcare Guide for dealing with multiple injuries, and a single injury resulting in multiple losses of function, involves aggregating assigned percentage values for whole person impairment and using a "Combined Values Chart" to obtain a lesser value for "overall impairment" than a simple addition of the two (or more) impairment values would provide. Those aspects, in particular, of the Guide are now unreliable as a result of successful challenges to that approach. However, to date, the use of the notion of whole person impairment as a means of assigning a final value to an individually assessed impairment has survived. The present proceedings involve, in part, a direct challenge to the use of "whole person impairment" as a measure of compensation for an impairment which warrants compensation under the SRC Act.

49 In *Carnie* and *Fellowes* the High Court decided that the SRC Act required the individual assessment of each permanent impairment and did not permit any such assessment to be reduced by reference to the occurrence or existence of another impairment, whether resulting from the same injury or earlier occurring. In *Carnie* the High Court emphasised (at [15]) the centrality of “an injury” to the scheme upon which Comcare’s liability to compensate depends. More recently, in *Fellowes* the High Court gave a confined meaning to statements in the Comcare Guide suggesting that it was permissible to reduce the assessment of impairment resulting from an injury if it did not result in an increase in whole person impairment of the employee.

50 One question in the present case is whether the use by Comcare of the notion of whole person impairment in the Comcare Guide is permitted by the SRC Act at all or whether it is contrary to the SRC Act. Neither *Carnie* nor *Fellowes* required a determination of that issue. In *Carnie* it was sufficient to decide that the Combined Values Table in the Comcare Guide could not operate to reduce an appropriate level of compensation assessed by reference to individual injuries. In *Fellowes* it was enough to reject the contention that an overall increase in whole person impairment was required before a subsequent injury warranted compensation. The High Court did not say in either *Carnie* or *Fellowes* that it was not permissible to ultimately assess a measure of compensation for each impairment by reference to an assessment of the degree of whole person impairment represented by an individual impairment.

51 There are reasons to think that the SRC Act contemplates, or at least permits, such an approach. First, both s 24(5) and s 28(1)(a) refer to “the degree of permanent impairment of *particular employee*” (my emphasis). It is now clear that what must be assessed is an individual impairment but there seems no reason why that assessment may not be expressed in terms of whole person impairment. Secondly, such an approach is the only way to avoid anomalous results. Section 24 of the SRC Act requires the degree of each impairment to be expressed as a percentage and for compensation to be calculated by applying that percentage to the “maximum amount” (which is specified in s 24(9) - \$80,000). If it was not possible to convert degrees of individual impairments into degrees of whole person impairment for this purpose the result would be that compensation for the least disabling impairment (in the defined sense) would be required to be the same as compensation for the most disabling impairment. Such a result would be inequitable and appears unintended.

52 I am satisfied, therefore, that neither *Canute* nor *Fellowes* requires a conclusion that  
the notion of whole person impairment may not be used to express a degree of individual  
impairment of an employee provided each impairment is, as required by *Canute* and  
*Fellowes*, assessed individually and without reduction.

53 It follows that the challenge to the use of whole person impairment values generally in  
the Comcare Guide which was advanced in the submissions made on behalf of Ms  
Broadhurst should be rejected.

#### Table 9.17

54 Integral to the scheme established by s 24 of the SRC Act, it appears to me, is the  
notion that an employee is entitled to compensation (and Comcare is liable to pay such  
compensation) unless Comcare (or another decision maker) determines (and is able to  
determine) that the degree of permanent impairment resulting from a particular injury is less  
than 10%.

55 Table 9.17 does not permit attention to be given directly to that issue. The result of  
the stated values set out in Table 9.17, and the instruction in Item 7 of the Principles of  
Assessment not to depart from assigned values given in tables, has the consequence that Ms  
Broadhurst was determined to have a degree of permanent impairment less than 10% because  
it was not assessed at 13% or higher. The arrangement in Table 9.17 appears to me to  
frustrate the operation of the statutory scheme which guarantees Ms Broadhurst  
compensation unless Comcare (as decision maker) determines that the degree of permanent  
impairment is less than 10%. Comcare has not done that, and nor did the AAT. In the  
inevitable continuum of functional impairment between the descriptions assigned to 8% and  
13% by Table 9.17, if Ms Broadhurst was not impaired precisely by 8% then she may, even if  
not 13% impaired, have been 10%, 11% or 12% impaired (objectively speaking) rather than  
9% impaired.

56 In my view the statutory instruction in s 24 of the SRC Act that Ms Broadhurst be  
compensated unless her degree of impairment is less than 10% cannot be defeated by the  
adoption of an administrative procedure in the Comcare Guide which denies the material  
which is necessary to assign (or not assign) a 10% value for impairment and instructs that an  
impairment is 8% if it is not 13%.

57           What is the consequence of the tension I have identified between the provisions of the  
Comcare Guide and the basic requirement that compensation for a permanent impairment is  
only denied where the degree of permanent impairment is assessed by the decision maker as  
less than 10%? How is that inconsistency to be resolved?

58           I do not think that it is inconsistent with the requirements in s 28 of the SRC Act  
stating how the Comcare Guide is to be prepared that the Comcare Guide assigns values to  
degrees of permanent impairment in clearly identified bands or that it directs, for the purpose  
of assessing levels of compensation, that there is no discretion to assign a value which is not  
thereby identified. The difficulty I have identified does not concern the measure of  
assessment. It arises in connection with identification (or denial) of a guaranteed statutory  
entitlement. There are three possible approaches to the resolution of this second, and  
confined, difficulty. One approach would be to treat Table 9.17 as invalid. Such an approach  
would exceed the dimensions of the problem. Another approach would be to treat the  
instruction in item 7 of the "Principles of Assessment" as invalid insofar as it prohibited  
determination of the specific question whether Ms Broadhurst's impairment was (or was not)  
less than a precise value of 10%. A third option would be to treat Table 9.17 as not  
applicable to the resolution of that specific question.

59           Neither the second nor third option are entirely satisfactory but in my view the third  
option preserves, so far as it can be done, the operation and content of the Comcare Guide  
while still addressing the requirements of s 24 of the SRC Act. The Comcare Guide makes  
provision for the resolution of assessments that cannot be made under the Comcare Guide.  
Item 12 of the "Principles of Assessment" provides (subject to exceptions not here relevant):

In the event that an employee's impairment is of a kind that cannot be assessed in  
accordance with the provisions of Part 1 of this *Guide*, the assessment is to be made  
under the edition of the American Medical Association's *Guides to the Evaluation of  
Permanent Impairment* current at the time of assessment.

...

Any reference in this *Guide* to the American Medical Association's *Guides to the  
Evaluation of Permanent Impairment* is a reference to the edition current at the time  
of assessment, unless there is reference to a specific edition.

60           The current edition of the American Guide is the sixth edition. I shall return to it  
shortly. Under the fifth edition of the American Guide a determination whether Ms

Broadhurst is entitled to some level of compensation would have been straightforward and would have enabled satisfaction of the requirement I have identified for a reliable distinction between a level of 10% impairment and less than 10% impairment.

61           Table 15.3 of the fifth edition of the American Guide set out “*Criteria for Rating Impairment Due to Lumbar Spine Injury*”. The descriptors of matters which fall within the ranges there identified, of 5-8% impairment of the whole person and 10-13% impairment of the whole person correspond without relevant difference to the descriptors of such matters in Table 9.17 which are applied to the values of 8% and 13% respectively. Like Table 9.17, the descriptions in the fifth edition of the American Guide clearly encompassed impairment of the lower limbs. If the AAT was required to assess Ms Broadhurst’s circumstances, using the medical evidence which was before it, by reference to the fifth edition of the American Guide rather than the Comcare Guide then it would inevitably determine that Ms Broadhurst did not fall within the 10-13% range. In other words, it would determine necessarily that her degree of permanent impairment was less than 10%. In those circumstances it would be bound to affirm Comcare’s decision as it earlier did.

62           However, it is not the fifth edition of the American Guide which must (or may) be used to make this assessment. The Comcare Guide requires the current edition to be used. The position under the sixth edition of the American Guide is less straightforward. There is no longer to be found the same level of correspondence that previously existed, for example, between the descriptors in Table 9.17 of the Comcare Guide and those in Table 15.3 of the fifth edition of the American Guide. It also seems likely that the American Guide would be found in some cases to contain instructions or methods of calculation which infringed the requirements expressed in *Carrile* and *Fellowes*, although that does not present a problem in Ms Broadhurst’s case.

63           My own examination of the sixth edition of the American Guide suggests that probably the relevant table to be used to assess Ms Broadhurst’s circumstances in order to decide the specific question of whether her impairment should be judged to be less than 10% for the purpose of s 24(7) of the SRC Act is Table 17.4 “Lumbar Spine Regional Grid: Spine Impairments”. It appears to me that use of that table would confirm that, under the sixth edition of the American Guide also, Ms Broadhurst would necessarily fall into a class of impairments from 1 – 9% and not the class of 10 – 14% or higher.

64                   However, that is not a matter about which I have heard argument and I may be wrong. It is apparent that changes have been made in the methodology employed in the latest edition of the American Guide which I might not fully appreciate as a result of my own study of it. The appropriate course, therefore, is to permit the AAT to give attention to that issue with the benefit of further argument. The AAT has medical evidence which may permit it to decide whether the degree of Ms Broadhurst's permanent impairment of her legs is less than 10% in accordance with the sixth edition of the American Guide. If the evidence is insufficient the AAT has adequate power to permit or require such evidence to be obtained, if it decides that the appropriate course is for it to make the assessment itself, rather than remitting that question for the attention of Comcare. The AAT possesses a power to remit a matter during proceedings before it (see s 42D of the AAT Act) or as a consequence of setting aside a decision under review (see s 43(1) of the AAT Act). Consideration of those possible courses of action would be a matter for the AAT.

**Failure to give adequate reasons**

65                   In my view there is no substance in the suggestion that the AAT failed to address the matters which required its attention, or failed to provide reasons adequate to explain its conclusions. Some contested matters were resolved in favour of Ms Broadhurst. The matters which were not, as the case was argued before the AAT, concerned whether Table 9.7 was applicable to her circumstances and whether Table 9.17 was "*ultra vires*" in its assignment of values of 8% and 13% (but not 10%) of whole person impairment. The general challenge to the use of values for whole person impairment, which I have in any event rejected, was not relied upon before the AAT.

66                   The AAT gave adequate reasons for its conclusion that Table 9.7 did not apply to Ms Broadhurst's circumstances. I agree with its conclusion. There remains no issue to be addressed by the AAT concerning Table 9.7.

67                   The AAT did not accept that Table 9.17 was inapplicable to a decision whether Ms Broadhurst suffered less than a 10% impairment in connection with the use of her legs. I have disagreed with it about this issue and that will lead to further consideration of that issue.

68           However, subject to that issue being further considered, there does not remain any  
matter which requires further explanation or further attention by the AAT which would, on  
that account, require that the matter be remitted to it.

**Conclusion**

69           The decision of the AAT will be set aside. The case will be remitted to the AAT to  
decide, in accordance with the sixth edition of the American Guide if possible, but otherwise  
as the AAT determines, whether the degree of Ms Broadhurst's permanent impairment is less  
than 10% under s 24(7) of the SRC Act or, alternatively 10% or more. In that assessment,  
Table 9.17 of the Comcare Guide is to be treated as inapplicable.

**Costs**

70           Ms Broadhurst's notice of appeal formally sought an order for costs but no  
submissions were addressed by either party to that issue, either in writing or orally. If an  
order for costs is sought, Ms Broadhurst is to provide short written submissions in support of  
any such application within 14 days and Comcare, if it opposes the order sought, is to  
respond within a further 7 days.

71           Unless a party expressly requests a hearing, a decision will be made on costs without  
a further oral hearing.

I certify that the preceding seventy-  
one (71) numbered paragraphs are a  
true copy of the Reasons for  
Judgment herein of the Honourable  
Justice Buchanan.

Associate:



Dated: 22 September 2010

