

Workplace Injury Case Note

September 2007

GAIDA –v– Q-Comp & Anor [2007] QSC 197

The decision of *GAIDA –v– Q-Comp & Anor [2007] QSC 197* highlights a deficiency either in respect to the legislative drafting of the *Workers' Compensation and Rehabilitation Act 2003* or with the scope of the insurance coverage provided by the Government for workers suffering from industrial deafness.

Claims for industrial deafness and loss of dependency (compensation for being financial dependent upon a worker who has died as a consequence of a work accident) are dealt with separately to the mainstream claims for other work related injuries.

Section 125 of the *Workers' Compensation and Rehabilitation Act 2003* outlines the entitlements of a worker to claim compensation for industrial deafness. Effectively, the worker is entitled to receive three types of payments. The first relates to travelling expenses which the insurer considers are necessary and reasonable for the worker to obtain medical treatment, undertake rehabilitation, attend on a Medical Assessment Tribunal or to undertake an examination by a registered person. The second relates to payment for medical treatment provided to the worker by a registered person. The third category of payment relates to compensation offered following an assessment of permanent impairment.

Workers who suffer industrial deafness do not have an entitlement to receive weekly benefits. The logic behind this decision is probably that a worker who suffers hearing loss at work is not prevented from working in the way that a worker, for example, who may suffer a traumatic injury to the leg resulting in a leg amputation.

In *GAIDA –v– Q-Comp & Anor*, the Court looked at section 211 of the *Workers' Compensation and Rehabilitation Act 2003* and in particular what was intended by the Government in allowing for the cost of medical treatment for an injury for *medical treatment by a registered person*. The Court was asked by the applicant to consider whether hearing aids could be claimed from the workers' compensation insurer. The Court correctly identified that section 125 of the *Workers' Compensation and Rehabilitation Act 2003* limited the worker to claim only three types of benefits as a consequence of industrial deafness.

Section 211 of the *Workers' Compensation and Rehabilitation Act 2003* also contains in section 211(1)(b) an entitlement of a worker to receive nursing, medicines, medical or surgical supplies, curative apparatus, crutches or other assistive devices given to the worker otherwise than as an inpatient in a hospital. Section 211(1)(b) does not apply to claims for industrial deafness.

The Court in *GAIDA –v– Q-Comp & Anor*, had to consider therefore whether section 211(1)(a), medical treatment by a registered person which was an expense that a worker suffering industrial deafness was entitled to, could conceivably contain expenses for hearing aids.

The Court considered that a hearing aid was either a curative apparatus or an assisted device. It was an expense of a type covered by section 211(1)(b) of the *Workers' Compensation and Rehabilitation Act 2003*. The Court also considered as a matter of statutory construction that any expense which fell within section 211(1)(b) was an expense that was different to any expense contemplated within section 211(1)(a). That is, *medical treatment by a registered person* does not include expenses associated with nursing, medicines, medical or surgical supplies, curative apparatus, crutches or other assisted devices given to a worker otherwise than as an inpatient at a hospital.

The Court did not consider, however, what services would fall within the ambit of section 211(1)(a). That is, the Court did not provide any direction as to what might be intended by the words for *medical treatment by a registered person*. The Court did this as the matter before it did not relate to the correctness of the decision to reject the claim, but whether the Q-Comp Review Unit had authority to undertake a review of the decision of *Qantas Airways Limited* to reject the worker's claim for payment of medical expenses relating to the provision of hearing aids.

The worker, having had his claim for hearing aids rejected by Qantas Airways Limited, forwarded an Application for Review to the Q-Comp Review Unit to review that decision.

Q-Comp determined, accepting the submission of Qantas Airways Limited, that the *Workers' Compensation and Rehabilitation Act 2003* did not empower Q-Comp to review decisions made pursuant to section 125 or 211 of the Act. The power of the Q-Comp Review Unit, to review decisions of workers' compensation insurers, is contained in section 540 of the Act. If the matter does not fall within the scope of section 540, then there is no right to have a decision reviewed to Q-Comp.

The worker argued before the Supreme Court, that Q-Comp have the power to review the decision pursuant to section 540(1)(b)(ii) of the *Workers' Compensation and Rehabilitation Act 2003*. That is, that the request for provision of hearing aids paid for by the workers' compensation insurer was an application for compensation.

The Court identified that compensation is a defined term under the *Workers' Compensation and Rehabilitation Act 2003* and means amounts for a worker's injury payable under Chapters 3 and 4 by an insurer to a worker ... or anyone else ...

Chapter 4 of the Act deals with injury management and in particular includes section 211 dealing with the extent of liability for medical treatment. Chapter 3 of the Act deals with compensation and includes section 125(1) which provides that a worker is entitled to compensation for industrial deafness under Part 10 and section 211(1)(a) and section 219(1) and not under any other provision.

The Court determined *the proper scope of section 540(1)(b)(ii) is limited to a decision concerning whether or not to accept an application for compensation, which is a decision contemplated by section 134 of the Workers' Compensation and Rehabilitation Act where an insurer must make a decision to allow or reject an application by a worker asserting injury from an event at work*. The Court came to this conclusion as section 540(1)(b)(vi) was contained within the Act enabling a decision of an insurer to allow or refuse an entitlement to claim for payments of a fitted prosthesis or a medical aid or crutch or another assistive device, a decision concerning payment of hospitalisation at a private hospital or travelling expenses. The Court therefore concluded that there was no right of review of section 211 in respect to medical treatment and did not have a power pursuant to section 540 to undertake a review of the decision of the insurer to reject the worker's claim for hearing aids.

COMMENT

This decision highlights the inequity of insurance provided to workers under the *Workers' Compensation and Rehabilitation Act*. Where the assistive device required by a worker is a prosthetic leg, generally that will be paid for by the workers' compensation insurer. A worker suffering industrial deafness does not have his/her assistive device paid for by the insurer.

This case also highlights the difficulties that stakeholders, namely workers, insurers, lawyers and the Q-Comp Review Unit have in determining what decisions made pursuant to the *Workers' Compensation and Rehabilitation Act* are and are not reviewable. It is clear, given that section 540 identifies approximately 20 types of matters that can be reviewed as opposed to every decision, that there is a direct intention of Parliament to make certain decisions not reviewable or unreviewable.

If the intention of Parliament were to enable all decisions made to be reviewable, then section 540 would not contain the level of detail about what is reviewable that it does.

All is not lost, however, for workers who wish to recoup medical expenses for hearing devices. Section 125, which prohibits those expenses, forms part of Chapter 3 of the Act dealing with the worker's right to obtain statutory compensation benefits. A worker may be able to recoup these expenses as part of a damages claim if he/she can prove negligence as claims for damages are governed by Chapter 5. It is arguable that the reference in section 125 to a worker's entitlement to compensation for industrial deafness by virtue of the definition of *compensation* within the Act only limits their Chapter 3 and 4 entitlements and does not prohibit a general entitlement to access those expenses by way of damages under Chapter 5.

The difficulty for workers is that firstly they must be able to establish negligence on the part of their employer to access this means of recovery for hearing devices and secondly, the cost associated with conducting a claim for damages are likely to exceed the costs of the expenses claimed unless there is a long term repeated replacement requirement for the hearing devices.

With accepted claims for workers' compensation, workers who are assessed with a work related impairment which is permanent, are offered lump sum compensation on account of their injury. For workers who suffer industrial deafness and choose not to sue for damages, they must spend their lump sum payment on devices to treat their medical condition. A worker provided with a prosthetic limb, is generally not required to spend their lump sum on their treatment.

**For further information please contact Susan Andersen
07 32236479
sandersen@qmtlaw.com.au**