How should the permanent impairment tables be interpreted?

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Whelan and the Department of Defence

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Employees who are injured in circumstances which are covered by the Safety Rehabilitation and Compensation Act 1988 (Cth) are entitled to claim a lump sum payment where the injury leads to "permanent impairment".

Such an impairment is only considered to be permanent if it is likely to be of indefinite duration when taking into account the factors set out in Section 24 of the Act. Those factors include the duration of the condition, the likelihood of improvement by treatment or otherwise and whether reasonable rehabilitation has been undertaken.

The level of impairment is assessed under tables set out in a guide to the assessment of impairment published by Comcare. Difficult issues have arisen in relation to the interpretation of those tables, particularly when assessing impairment under the various tables set out in Part 9 dealing with musculo-skeletal injuries.

Comcare have often rejected a claim for impairment on the basis that, in applying what they consider to be the correct table, there was no impairment even if an employee may qualify as being impaired under another table in that part.

It is now clear, in my opinion, that **Comcare is obliged to apply the table which is most favourable to the worker**. In a recent decision by Senior Member Dwyer in the Administrative Appeals Tribunal, re *Whelan and the Department of Defence*, issues arose as to whether an employee's impairment to her knees could only be assessed under Table 9.2 or whether there was an option to assess that impairment under Table 9.5. Under one of the tables the employee would be entitled to a lump sum payment while under the other the appropriate threshold could not be reached. The Tribunal reviewed the relevant authorities and referred to comments in the Federal Court case of *Ticsay* in finding that there is a discretion to choose the table which is most beneficial to the applicant. The Tribunal in *Whelan's* case found that it was appropriate to make an assessment under Table 9.5 even though the applicant would not have qualified for any payment under Table 9.2 because she had suffered no loss of movement.

This approach was also adopted in the decision re: *Kay and Comcare* where the Tribunal accepted that compensation could be payable under Table 9.1 or Table 9.4 in relation to a shoulder disability. In that case the Tribunal concluded:

"The Tribunal regards itself as bound to apply the table most favourable to the worker in accordance with the decision in Ticsay and Comcare."

Therefore, it is clear that employees should ensure that their entitlements to a lump sum payment are considered under a broad interpretation of the tables and in particular, even where there is no permanent loss of movement, there may be an entitlement under the other tables dealing with the effect of such an injury. ■

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St Vincents Hospital v Hardy

(Unreported, CA Qld, 6 May 1998)

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The Court of Appeal in Queensland has recently addressed the necessity for a Plaintiff to prove foreseeability of harm in the context of an action for breach of statutory duty based on the Workplace Health and Safety Act, 1989.

Betty Hardy was injured in a fall at work on 8 September 1993.

She was 63 years old and worked for the St Vincents Hospital in Toowoomba. She was a cleaner. She worked from 6:30 a.m. - 3:00 p.m. and fell at the end of her shift when she was tired. The Trial Judge found that "the position was simply that she was 63 and the job was getting beyond her".

She fell when she was ascending a set of stairs in the course of her duties. There was nothing wrong with the stairs; the Plaintiff argued that she had to move up and down four flights of stairs quite often in the building. She would not have fallen had she used a lift.

The Trial Judge found that the cleaners would not use the lifts unless they were moving equipment from floor to floor. The practice was largely the result