

Workers Compensation:

Revocation of election by an injured worker is not so easy

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Prior to 1 April 2001, a worker made an election either by finalising a claim for lump sum permanent disability compensation in the Compensation Court or by filing common law proceedings in the District Court or Supreme Court. As a result of recent amendments to the *Workers' Compensation Act 1987* (NSW) effective from 2 April 2001, the election is brought forward to the date on which the worker files an Application for Determination in the Compensation Court claiming lump sum permanent disability compensation or amends an existing Application for Determination to add such a claim.

It is thus necessary for workers' solicitors to consider carefully before commencing Compensation Court proceedings whether their client's injuries may in fact reach the necessary common

law threshold. Following the High Court's decision discussed below, it will be more difficult for workers to obtain the leave of the Court to withdraw an election to receive lump sum compensation even where it is acknowledged that the worker's condition has deteriorated following the election.

In the matter of *State of NSW v Taylor*¹, the High Court has narrowed the scope available to an injured worker to revoke a prior election to claim permanent loss compensation in order to commence common law proceedings to recover damages. In doing so, it found erroneous the NSW Court of Appeal's interpretation of the words "no reasonable cause to believe" found in Section 151A(5)(c) of the *Workers Compensation Act 1987* (NSW).

Section 151A provides: "(2). A person to whom compensation is payable under this Act in respect of an injury is

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not entitled to both:

- (a) permanent loss compensation in respect of the injury; and
- (b) damages in respect of the injury from the employer liable to pay that compensation;

but is required to elect ...
“(5) If:

- (a) a person elects to claim permanent loss compensation in respect of an injury; and
- (b) after the election is made, the injury causes a further material deterioration in the person's medical condition that, had it existed at the time of the election, would have entitled the person to additional permanent loss compensation; and
- (c) at the time of the election, there was *no reasonable cause to believe that the further deterioration would occur* (emphasis added);

the person may, with the leave of the Court and on such terms (if any) as the Court thinks fit, revoke the election and commence proceedings in the Court for the recovery of damages in respect of the injury.”

The facts of Taylor's case

The worker was employed as a cleaner and suffered injury to his back on 19 October 1992. In August 1993, he claimed permanent loss compensation and in September 1994 he settled his lump sum claim. The election was made when Mr Taylor banked his settlement cheque in November 1994. However, in early 1995 he experienced more frequent and severe pain and in October 1995, he commenced common law proceedings in the Supreme Court just within the three-year limitation period. As the worker's previous election to receive lump sum compensation was irrevocable, he was required to apply for leave to withdraw his earlier election and to proceed with his damages claim. That application was made in April 1997.



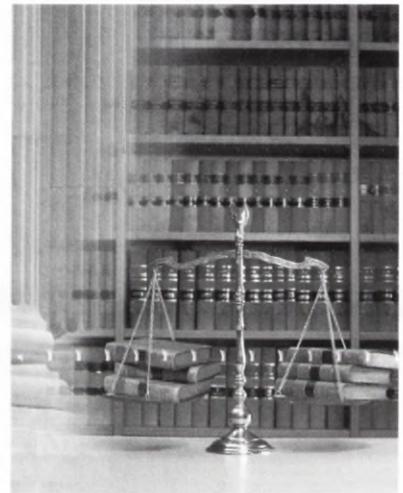
Proceedings to revoke the election

At first instance, Master Greenwood granted leave to the worker to withdraw his election and to file fresh common law proceedings out of time which were duly filed. However, the worker's employer appealed Master Greenwood's decision which was reversed by Murray AJ who found that there was ample evidence to show that there were reasonable grounds to believe that further deterioration would occur. Murray AJ considered that the various medical reports available to the worker "revealed that the worker's condition prior to and at the time of his election might well have deteriorated, and that further surgery was at the very least, possible". The worker then sought leave to appeal the decision of Murray AJ. On 2 June 1999, the Court of Appeal set aside Murray AJ's decision and confirmed Master Greenwood's decision. On 15 March 2001, the High Court, by a majority, set aside the order of the Court of Appeal and ordered that the appeal to the Court of Appeal be dismissed. In allowing the appeal, the High Court held that the Court of Appeal's decisions in the present case, as well as in an earlier case of *Francis v Dunlop (t/as Wagga Shower Screens and Glass)*² where a similar construction had been placed on section 151A(5)(c), were erroneous.

The stand taken by the Court of Appeal in both cases was that what mattered was the belief of the worker at the time he made the first choice to claim compensation rather than damages. Emphasis was placed on the words "there was no reasonable cause to believe that the further deterioration would occur". Giles JA stated: "It must be asked whether a reasonable person knowing what was known or ought to have been known to the worker would expect a further deterioration in fact suffered by the worker as something more probable than not."

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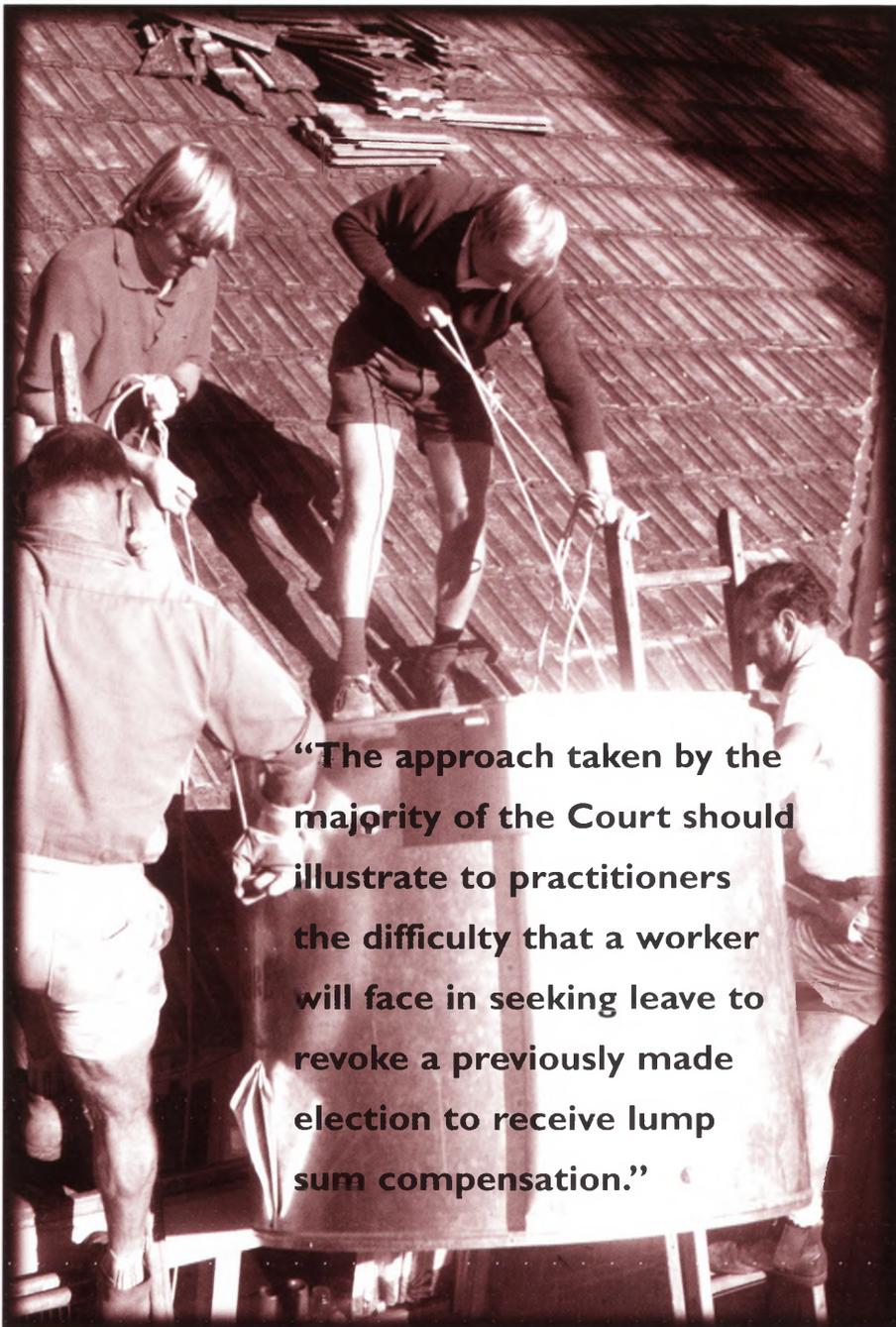
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“The approach taken by the majority of the Court should illustrate to practitioners the difficulty that a worker will face in seeking leave to revoke a previously made election to receive lump sum compensation.”

High Court’s decision

The majority of the High Court (Gleeson CJ, McHugh and Hayne JJ) rejected the Court of Appeal’s approach and held that the belief of the injured worker (or a person in his position) was not relevant. Section 151A required the Court: “To determine whether it would be unreasonable for a person to believe that the evidence before the Court, concerning the Applicant’s condition at the time of election, demonstrated that the further deterioration would occur. The reasonable cause for belief is determined by reference to the evidence before the Court concerning the Applicant’s condition at the time and expert opinion as to what the medical prognosis for that condition was at that time. What the Applicant knew or ought to have known is irrelevant ... It is the Court’s view of all of the evidence and not the injured person’s belief, reasonable or otherwise, that is decisive”.

The majority formulated the following test: “Given the medical condition of the applicant at the time of the election and the expert opinions at to his prognosis at that time, would it be unreasonable for a person to believe that the condition would further deteriorate as it had? The applicant for leave must prove a negative. He or she must show that it would be unreasonable for a person to hold that belief.

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The applicant will prima facie discharge that onus by tendering evidence indicating that such a belief could not reasonably be held. If a prima facie case is established, the employer has the evidentiary burden of showing that there exists another body of evidence that indicates a contrary conclusion."

The High Court referred to the opinions of three doctors who had prepared reports on behalf of the worker. Dr Evans, a medico-legal specialist, reported on 19 November 1993 that the worker's prognosis "is uncertain". Dr Nott, the worker's GP, had stated in a report dated 3 March 1994 that it was: "Too early for a final opinion on permanent impairment, as [he] may improve, or deteriorate or further surgery may in fact totally relieve his problem."

Dr Sengupta, the worker's orthopaedic specialist, stated in a report dated 27 June 1994 that the worker's "long-term prognosis, at this stage, remains guarded, as his condition may deteriorate and he may require further surgical treatment."

On the basis of these opinions, the High Court held that the worker "failed to prove that, at the time he made his election, there was no reasonable cause to believe that the further deterioration would occur." In other words, the High Court found that, at the time of the election, it would not be unreasonable to believe that the further deterioration

would occur. It should be noted that for the purpose of the appeal, the parties did not dispute that the worker's condition had in fact deteriorated.

Minority judgments

Both Kirby and Callinan JJ gave separate dissenting judgments. Kirby J was critical of the "obscure concepts and incomplete ideas" conveyed by the "ungainly language" of section 151A(5)(c) as it is presently drafted and urged a reconsideration and clarification of the provision so as to remove the ambiguities that have thus far necessitated "judicial guesswork" in the interpretation of the section. Kirby J held that it was open to the Court of Appeal to conclude "that no reasonable cause was shown to believe that the deterioration would occur as it did. Some deterioration was anticipated both by the worker's medical advisers and by the worker himself. But deterioration to the significant extent that happened was not expected."

Callinan J held that the test "cannot sensibly be taken to be an entirely impersonal and objective one ... the test is of likelihood not possibility ... 'Would' ... connotes neither possibility nor certainty but probability. Among the circumstances that will obviously be relevant to the reasonableness of the worker's belief are his or her access and entitlement to information and ... assistance

available to ascertain what is likely". Callinan J held that "there was not material available to the respondent (worker) acting reasonably to believe that the further material deterioration would be likely to occur".

Conclusion

The result of the High Court's decision was that the worker, despite an acknowledged deterioration in his condition, was denied the opportunity to sue his employer for common law damages and had to be satisfied with the settlement he obtained in the Compensation Court. The approach taken by the majority of the Court should illustrate to practitioners the difficulty that a worker will face in seeking leave to revoke a previously made election to receive lump sum compensation. Only in cases where there is nil or scant evidence of the possibility of any deterioration is a worker likely to be able to satisfy the "no reasonable cause to believe" criterion of s.151A(5)(c) in order to succeed in an application for leave to revoke an election. □

Footnotes:

¹ [2001] HCA 15 (15 March 2001)

² Unreported, 16 December 1998

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