Seal v Transfield Services (Australia) Pty Ltd **[2009] SAWCT 4**

WORKERS COMPENSATION TRIBUNAL (SA)

SEAL, Noel

v

TRANSFIELD SERVICES (AUSTRALIA) PTY LTD

JURISDICTION: Judicial Determination

FILE NO/S: 5405 of 2006

HEARING DATE: 15 December 2008

JUDGMENT OF: His Honour Deputy President Judge P D Hannon

DELIVERED ON: 18 February 2009

CATCHWORDS:

Section 36 notice - Previous judicial determination resulted in an order setting aside the notice - Matter remitted for further hearing after successful appeal by employer - Having regard to the additional considerations outlined by the Full Tribunal on the appeal, held that the worker was totally incapacitated as at the date of the s 36 notice due to a condition of substance dependence - Further held that the condition of substance dependence resulting in total incapacity was non-compensable - Order that the notice of dispute be dismissed and that the s 36 notice be confirmed – S 30(2) Workers Rehabilitation and Compensation Act 1986.

Seal v Transfield Services (Australia) Pty Ltd [2008] SAWCT 15
Transfield Services (Australia) Pty Ltd v Seal [2008] SAWCT 43
Jones v WorkCover Corporation/Royal and Sun Alliance Workers Compensation [1998] SAWCT 36
Price v The Corporation (1994) SAWCAT 45
Nguyen v Bridgestone TG Australia Ltd [2008] SAWCT 23
WorkCover Corporation v Sherriff Judgment S5831 dated 1 October 1996
Mills, *Workers Compensation (New South Wales),* Butterworths, 1979, 2nd ed
Jones v WorkCover Corporation/Royal and Sun Alliance Workers Compensation [1998] SAWCT 11

REPRESENTATION:

Counsel:	
Applicant:	Mr J Warren
Respondent:	Mr T Stanley QC
Solicitors:	
Applicant:	Dixon Gallasch Pty Ltd
Respondent:	Gilchrist Connell

Introduction

1 On 28 August 2006 Transfield Services Pty Ltd ("Transfield") gave the worker, Mr Noel Seal, notice of its intention to discontinue income maintenance payments under s 36 of the *Workers Rehabilitation and Compensation Act 1986* ("the Act"). The worker had been in receipt of payments since suffering right shoulder and neck injury on 20 October 2000.

2 The notice asserted that as a result of a non-compensable condition of drug dependence, the worker was either not ready, willing and/or able to undertake suitable employment, or was totally incapacitated for work. The notice asserted that the worker had thus breached his obligation of mutuality.

3 The worker disputed the determination. The matter proceeded to trial before me. I set aside the s 36 notice having concluded that Transfield had failed to establish that the worker was totally incapacitated.[1]

4 Transfield appealed against my decision. The Full Tribunal allowed the appeal. It held that I failed to take into account certain considerations relevant to the question of total incapacity.[2] The matter was remitted to me for further hearing and determination in light of those reasons.

5 No further evidence was called at the second hearing. Transfield relied on the record of the evidence tendered during the first hearing as collated in the appeal books used for the appeal decision. Counsel for the worker raised no objection to my proceeding on the material in this form.[3]

Issues for determination

6 I must first decide whether or not, as a result of substance dependence, the worker was totally incapacitated for work as at 28 August 2006.[4]

7 If I find that the worker was then totally incapacitated for this reason, a further issue is whether the substance dependence resulting in total incapacity is a non-compensable condition, or whether it arose from employment as a sequelae to the previously accepted compensable disability. This issue was not the subject of consideration in my first decision or on the appeal to the Full Tribunal.

8 The above issues arise from the assertions made by Transfield in the s 36 notice. The onus is upon Transfield to satisfy me that it has made out the

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[1] *Seal v Transfield Services (Australia) Pty Ltd* [2008] SAWCT 15 ("the first decision").
[2] *Transfield Services (Australia) Pty Ltd v Seal* [2008] SAWCT 43 ("the appeal decision").
[3] Evidence references will be made to the appeal books (AB) numbered 1 to 4, although the books were not formally tendered and marked as exhibits at the further hearing.
[4] The "drugs" or "substances" in question being mainly alcohol, but also marijuana.

allegations upon which it relies for the cessation of income maintenance payments.

The reasons of the Full Tribunal

9 In the first decision, I stated that I would find the worker to be totally incapacitated if, as a result of the incapacitating effects of the work injury and his substance abuse, he was as at August 2006, realistically unable to sell his labour in a genuine working environment. I then wrote:

> "Despite the extent of the constraints upon the worker's capacity for work as a result of the effects of the work injury as described by Dr Mills, I am not satisfied that it has been established that as at August 2006 the worker did not have a realistic residual capacity for labour which he could sell in a genuine working environment. I am not satisfied that, if he was offered suitable employment, the worker was not then capable of controlling the extent of his substance use such that it did not impinge upon that residual work capacity."[5]

10 On the appeal, Transfield contended that, in determining the issue of total incapacity, I was not entitled to have regard to whether the worker might be able to control the extent of his substance use if he had the opportunity to perform suitable work. The Full Tribunal rejected this contention, but held that an error of law arose because the scope of my consideration as to total incapacity was inappropriately limited to evidence relating to the worker's physical and mental capacity for work. The Full Tribunal held that I should also have addressed the question as to "what realistically might happen", and whether a "hypothetical prospective employer", possessing the qualities of a "reasonable employer," would employ the disabled worker.[6]

11 Thus, whilst a disabled worker might be considered to have a partial capacity for work because a reasonable employer might be expected to accommodate the worker despite the disability and attendant loss of condition, confidence and skills, the Full Tribunal considered that in some cases the deficiencies may be so great that a reasonable employer could not be expected to accommodate the disabled worker. The impact of the deficiencies was particularly important where, as in this case, aspects of the worker's condition gave rise to issues of compliance by the reasonable employer with its statutory obligations for occupational health safety and welfare.[7]

12 Accordingly, the Full Tribunal concluded that I omitted to address the question of "...whether, in light of Mr Seal's substance abuse as at

[5] Para [148] of the first decision.
[6] Appeal decision para [37].
[7] Appeal decision paras [38]-[40].

August 2006, a reasonable employer would employ him in the knowledge that it may take some time for his substance use to be brought under control and that there was no guarantee that this would occur."[8] In this regard, the Full Tribunal observed that there was expert medical evidence that "…could lead to a finding that a reasonable employer, knowing all of the facts, would form the view that offering Mr Seal a job was not worth the risk and that in turn would lead to a finding that he was totally incapacitated".[9]

13 The decision of the Full Tribunal, as I understand it, emphasises that the issue of whether total incapacity exists or not must include a consideration of whether a worker is realistically able or unable to sell his or her labour in a genuine working environment,[10] and that the reality test in this situation requires, among other things, a consideration of the view that a reasonable employer, "knowing all the facts", might form on whether it is worth the risk of employing the disabled worker.

The application of the Full Tribunal's reasons

14 In light of the above reasons Transfield contended that it was not necessary that evidence be put before me as to the characteristics or state of mind of the "hypothetical prospective employer" or the "reasonable employer". It was contended that judicial notice could be taken of such matters by application of an objective test which had regard to the standards of a reasonable employer in the circumstances. I was invited to adopt an approach analogous to that taken by the Tribunal in considering whether reasonable action was taken by an employer in a reasonable manner in the context of the exclusionary provisions under s 30A(b) of the Act: *Price v The Corporation;*[11] *Nguyen v Bridgestone TG Australia Ltd.*[12]

15 Transfield submitted that I should conclude that a reasonable employer, knowing all the facts as at 28 August 2006, including the history and effect of the worker's substance abuse, would form the view that it was not worth the risk of offering the worker a job. It would then follow, contended Transfield, that I should find that the worker was totally incapacitated by reason of his substance dependence.

16 The worker submitted that I could not reach a conclusion about whether he was employable or not on 28 August 2006 as a result of his substance dependence or for any other reason by taking judicial notice of what a reasonable employer might do. He contended that an employer, even if it

[8] Appeal decision para [41].
[9] Appeal decision para [41].
[10] As noted in *Jones v WorkCover Corporation/Royal and Sun Alliance Workers Compensation* [1998] SAWCT 36.
[11] [1994] SAWCAT 45.
[12] [2008] SAWCT 23 at para [81].

is taken to know all of the facts in evidence before the Tribunal, would have insufficient material before it to allow for any conclusion in this regard. The worker contended that further specific evidence on a range of matters would be required, including evidence from a labour market expert as to the availability and suitability of specific jobs for a person with the worker's disabilities and substance dependence issues, and evidence as to the willingness of his then employer Transfield to offer suitable employment.

17 I address the alleged evidential deficiencies below.[13] At this stage I observe that the reasons of the Full Tribunal do not appear to contemplate that the precise nature of suitable work in question be identified before a decision is made as to whether a reasonable employer would decide to offer employment to the worker or not. The reasoning at paras [37] – [39] of the appeal decision appears to assume the reasonable employer has employment available which is suitable having regard to the physical restrictions of the worker as certified at the relevant time, and that an appropriate allowance will be made on his return to work with respect to the need for work hardening, re-skilling, re-training and the like.

18 The worker also contended that there should be a limitation on the range of matters which the hypothetical prospective employer could be taken to know in coming to a conclusion as to the worker's employability. It was suggested, for example, that a reasonable employer could not be assumed to know of personal matters relating to the worker which it could not ascertain other than by legitimate inquiry through the employee interview process or otherwise. The implication was that the employer could not be assumed to know the full extent and effect of the worker's substance abuse and its impact on his employability as revealed by the evidence.

19 I do not consider that it is open to me to take such a limited view of the facts taken to be known by the reasonable employer. The inquiry I am directed to make by the Full Tribunal, particularly in light of para [41] of the decision, clearly requires me to assume that the reasonable employer making the decision as to whether or not it is worth the risk of offering the worker a job as at 28 August 2006, has knowledge of all the facts relating to the worker's employability as revealed by the evidence before me, including the history and effect of substance abuse, and the opinions of the expert witnesses as at the relevant date. Whether or not such information would be available to the prospective employer through the conventional recruitment process is not relevant to the inquiry I am bound to make.

[13] Paras [40] – [43] below.

20 The hypothetical exercise I am required to undertake necessarily involves the taking of "judicial notice" in the sense that I will apply in part the general knowledge I have acquired as a member of a specialist workers compensation tribunal to draw a conclusion as to whether a reasonable employer would be more likely than not to offer employment to the worker in all the circumstances. It involves an objective test. The impact of the circumstances of the worker on a decision as to whether it is worth the risk of employing him is to be made by reference to the standards of the reasonable employer.

21 The Full Tribunal has already engaged in this exercise to some extent. The implication of its reasoning is that a reasonable employer could realistically be expected to offer a disabled worker a job if it could be assumed that the deficiencies which arise from that worker's disabilities could be confidently addressed within a reasonable time frame.[14] The question is whether the facts of this case indicate that the deficiencies are so great that such an offer of employment could not be expected to be made.

Was the worker totally incapacitated as at 28 August 2006?

22 With some exceptions and qualifications, one of which is important in the context of causation addressed below, I accepted the evidence of the worker for the purposes of the matters decided by the first decision. I also accepted and relied upon the opinion of his treating medical practitioner, Dr Mills, in coming to my conclusions as to the extent of the worker's capacity for work. The factual overview now set out is drawn from the uncontested facts and the findings I set out in the first decision.

The facts taken to be known by the hypothetical prospective employer

23 The worker was qualified as a fitter and turner. He spent most of his working life of more than three decades as a maintenance fitter, and in his later years worked at a variety of places through labour hire agencies.

24 The disability resulting from the injury rendered the worker permanently unfit for his pre-injury work. He was totally incapacitated for work from October 2000 until 27 February 2001. From that time, he was certified fit for modified work which accommodated his right arm and shoulder problems,[15] apart from some periods of total incapacity due to additional factors such as substance abuse, depression and anxiety. As at 28 August 2006, the worker was certified by Dr Mills to be fit only for modified work of three hours a day three days a week due to his neck and shoulder problems.

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[14] Paras [37] and [38] of the appeal decision.
[15] And, as from 2004, left shoulder problems related to consequential overuse.

25 The worker attended seven work placements during the period from April 2001 to September 2003, all of which were unsuccessful for various reasons which were apparently not connected with any lack of application or cooperation by the worker, or to the effects of substance abuse. After September 2003 and up to April 2006, no further rehabilitation options were advanced, apart from what was described as "restoration to the community", which contemplated the formalising of various volunteer activities the worker had been undertaking from about 2004. The worker at all times indicated a willingness to undertake any suitable employment offered to him.

26 The worker had a long history of alcohol usage before his injury in 2000. At the time of his injury, he was a regular substance abuser, with a daily alcohol consumption likely to be at the hazardous level.[16] There was possibly a condition of alcohol dependence by this time. The worker also consumed marijuana on a number of occasions each week. The consumption of these substances took place after the working day, and to a greater extent on weekends or in the absence of work commitments.

27 The evidence of the worker was that his ability to attend work and discharge his duties up to October 2000 had not been adversely affected by his substance use, and that he had not been subject to any disciplinary procedures in this regard. There was no evidence to the contrary. It appeared that whilst he was in employment, the worker was able to limit his substance intake each day such that he was able to attend work and discharge his work duties as and when required.[17]

28 The worker's level of alcohol use substantially increased after his injury. Those treating and advising the worker became concerned about the effect on him and others of these elevated consumption levels, and at their suggestion the worker undertook counselling over the period from 2001 – 2004. Although the worker generally denied throughout that he had a problem with his level of alcohol consumption, he did concede that he was drinking too much at times. The worker lost the ability to control his alcohol intake on occasions, with the result that he was periodically totally incapacitated for work. Those periods included April 2001 - September 2001, June 2002 - October 2002, June 2003 - January 2004, December 2005 - February 2006, April/May 2006.[18]

29 Whilst there were fluctuations in the worker's level of alcohol consumption during the period from 2001 to August 2006, it generally remained at much higher levels than before the injury. He combined this with a daily use of a not insubstantial amount of marijuana.[19]

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[16] Paras [112] and [114] first decision.
[17] Para [115] first decision.
[18] Para [121] and [122] first decision.
[19] Para [123] first decision.

30 In about April 2006, Transfield proposed a rehabilitation and return to work program which required the worker to undertake clerical and administrative duties for three hours a day three days a week. Dr Mills was not prepared to endorse it, and made a note to the effect that on account of right shoulder limitations, severe anxiety and depression, and substance abuse, the worker was fit only for "restoration to community programs".[20] A further return to work proposal in similar terms was put forward by Transfield in October 2006 but was considered by Dr Mills to be inappropriate taking into account the worker's physical restrictions.[21]

31 The evidence of Dr Mills, by reference to his certificates, notes, reports and oral evidence, indicated that "substance abuse" was a contributing cause of the total incapacity during the periods referred to above. The conclusion Dr Mills had reached by 2006 was that although on physical grounds the worker could undertake modified duties on a limited basis, all rehabilitation attempts had been inappropriate, and that the injury problems, the substance abuse and failed rehabilitation made the worker unemployable, such that the prognosis was hopeless and he should retire.[22]

32 This opinion was qualified to some extent in that Dr Mills was of the view that, from his perspective as an occupational physician, and putting aside the detrimental health effects of ongoing substance abuse, there was some potential for the worker to return to work in a suitable rehabilitative environment. However, before any effective rehabilitation could occur, he considered that suitable employment had to be offered which accommodated the worker's physical restrictions and which was not otherwise inappropriate in the circumstances.[23] Such employment, if taken up by the worker, would then give him a goal to aim at and present the opportunity to address the ongoing substance abuse.[24]

What conclusion would a reasonable employer reach on these facts?

33 The hypothetical reasonable employer would be taken to be mindful of its obligation to comply with State and Federal anti-discrimination laws and in particular with the need for compliance with legislation prohibiting discrimination against applicants for employment suffering from a disability, whether employment related or otherwise.[25]

34 On the positive side as far as the worker is concerned, the reasonable employer would have regard to the fact that the worker had a long and

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[20] AB3/261.
[21] Comments of Dr Mills on proposed rehabilitation plan 17 October 2006 (AB3/214).
[22] Notes of Dr Mills (AB3/128); evidence of Dr Mills (AB1/224-225; 236).
[23] For example, work as a bar tender, which was provided at one stage inappropriately given the worker's predilection to alcohol abuse.
[24] Dr Mills at AB1/235.
[25] *Disability Discrimination Act 1992* (Cth.).

apparently successful pre-injury employment history, with no record of any disciplinary issues, whether related to substance abuse or otherwise, and that although the various rehabilitation attempts over the period 2001-2003 were unsuccessful, this appears not to have been due to any fault of the worker. Regard would also be had to the worker's ongoing involvement in voluntary community work, his stated willingness to undertake suitable work, his apparent ability to present reasonably well at interview,[26] and his belief that if he was provided with such work he would be able to manage any substance abuse issues, and that such an outcome may eventuate in the view of Dr Mills.

35 In addition, a reasonable employer would bear in mind that, in both April and October 2006, Transfield, in its ongoing capacity as the worker's employer, was prepared to explore rehabilitation and return to work options for the worker, albeit unsuccessfully. A relevant consideration would also be that in the opinion of Dr Mills, if the worker could control his substance abuse, he would be able to graduate within a reasonable time to modified duties for full-time hours.

36 On the other hand, the reasonable employer would have regard to factors which presented impediments to the worker's ability to return to work. These factors would include that the rehabilitation and return to work plans undertaken up to September 2003 had been unsuccessful, that since then there had been no further attempt to return to work, and that by August 2006 it was almost six years since the occurrence of the injury. Another factor would be the limited capacity of the worker for re-training which in the opinion of Dr Mills made the worker unsuited for administrative and clerical work.

37 In addition, the reasonable employer would have regard to the lengthy history and ongoing nature of the worker's substance abuse, and would be entitled to assume that well before August 2006 this had resulted in an ongoing state of substance dependence, and that the worker had a continuing lack of insight into the problem. Although the reasonable employer would know that at the time of the injury, the pre-existing substance abuse had apparently not interfered with the worker's employment capacity, it would know that substance abuse contributed to extensive periods of total incapacity for work from 2001, and that the recurring inability of the worker to control his substance abuse was continuing, if not escalating, during 2006.

38 Whilst the reasonable employer would take into account the evidence of Dr Mills that the ongoing substance abuse might be addressed once suitable employment had been taken up by the worker, it would bear in mind that a successful outcome was uncertain, and that Dr Mills seemed

[26] As indicated by his presentation to Transfield's medical experts during 2006.

to suggest that the reality was that the worker was unemployable because of the combination of substance abuse and his physical disabilities.

39 The reasonable employer would consider the worker's ongoing substance abuse in the context of its duties as an employer under the *Occupational Health Safety and Welfare Act 1986* ("OHSW Act"). The reasonable employer would know that from time to time the worker had been considered by Dr Mills to be unfit for work and a danger to himself and to others on account of substance abuse, and that he was prone to relapses into uncontrolled substance abuse when under stress. The reasonable employer would also have regard to the fact that the substance use included the ongoing daily consumption of marijuana, and Dr Goldney's opinion that this was an added factor which might have a detrimental affect on the ability of the worker to function in the workplace.

40 Notwithstanding these facts, the worker submitted that there was insufficient evidence upon which to reach a conclusion as to the effect of health and safety issues on the mind of the reasonable employer. The worker contended that because Transfield had called no evidence as to the type of suitable employment which might be offered, it provided no context in which to consider the health and safety implications which might arise if the worker was affected by substance use whilst at work. Different conclusions might be reached, it was submitted, if the work in question was conducted in an office environment rather than in the vicinity of machinery or moving vehicles or the like.

41 I do not consider that the lack of specific evidence in this regard advances the worker's argument. Even if it is assumed that suitable work was made available in a benign environment, where the worker was well away from moving machinery or vehicles, the potential for injury to himself or others on account of his being affected by substance abuse would necessarily be taken into account by the reasonable employer. The question raised by Dr Mills as to the ability of the worker to travel safely to work on such occasions could equally be raised in terms of the movement of the worker around any work-site. The lack of specificity as to the type of suitable employment in question does not prevent my taking into account the negative impact of health and safety considerations on the mind of the reasonable employer, or reduce to any significant extent the weight able to be attributed to such considerations.

42 The worker also submitted that the evidence overall did not permit me to reach a conclusion on the employability question because there was no evidence from Transfield to the effect that it would not have been prepared to employ the worker or offer him duties because of its knowledge of his substance dependence. That contention is correct as far

as it goes, and the absence of such specific evidence is one of the factors which the reasonable employer could be taken to know.

43 The evidence as to the attitude of Transfield indicated that it was prepared to continue to present return to work plans for the worker's consideration notwithstanding his disabilities. Whilst that may be considered to be a positive consideration in terms of the worker's employability, the fact that the proposals were considered by Dr Mills to not be suitable for various reasons, including the reason of substance abuse, would weigh in the mind of the reasonable employer against the employment of the worker.

44 The worker submitted that if I was against his submission as to the deficiencies in the evidence put forward by Transfield, and if I felt able to conclude that a reasonable employer would form the view that it was not worth the risk of employing the worker, and that he was thus totally incapacitated, I nevertheless could not further conclude that this incapacity was a result of substance dependence. The worker submitted that it was possible that a reasonable employer would simply decide he was not worth the risk of employing for reasons unrelated to substance abuse, for example, because he had not worked in almost six years, and had a limited ability to adapt to re-training or re-skilling. If these matters could lead on their own to a finding that the worker was totally incapacitated, it could not be concluded that there was total incapacity as a result of substance dependence.

45 I am not persuaded that the negative factors unrelated to substance abuse, on their own, would probably lead the hypothetical reasonable employer to decide it was not worth the risk of employing the disabled worker. No doubt they are disincentives, but they are not of such significance that a reasonable employer might not take the view that they could be appropriately addressed. They have to be balanced with the positive factors particular to the worker which I have already referred.[27]

46 However, when substance abuse issues are added, the balance turns strongly against the worker. I conclude that the worker's ongoing substance abuse as at 28 August 2006 gives rise to such a range of potential problems, risks and uncertainties, that a reasonable employer could not be expected to accommodate them. In my view, the reality of the situation is that the hypothetical reasonable employer, knowing all the facts, would form the view that offering a job to the worker was not worth the risk given the ongoing substance abuse and dependence issues.

47 It thus follows that the worker was as at 28 August 2006 totally incapacitated on account of his substance abuse/dependence.

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[27] Paras [34] and [35] above.

Does the substance dependence resulting in total incapacity arise out of employment?

48 The worker submitted that if, contrary to his primary contention, I found that he was totally incapacitated by reason of substance dependence as at August 2006, I should find that the total incapacity arose from the compensable disability. The causal connection was submitted to be that the inability to engage in work activity during the day, with the availability of time and consequent boredom, led to an increase in alcohol consumption to relieve that boredom. Further, it was contended that the worker consumed an increased amount of alcohol to seek relief from the pain resulting from his work injury, with the consequence that the increased alcohol consumption, and its ultimately incapacitating effects, were a direct consequence of the compensable disability.

49 Transfield contended that there was no basis for a conclusion that the worker's substance dependence and the resultant total incapacity arose from employment. It submitted that in the first decision I had implicitly found that the worker was not genuine in asserting that he used alcohol for pain relief. Further, it submitted that the mere fact that the worker became bored as a result of having extra time on his hands after the injury, and that he used that time to consume an increased amount of alcohol, could not be a sufficient causal connection with the compensable disability. Having regard to my finding that before his injury the worker was engaging in alcohol abuse with a hazardous daily level of consumption, and that he was possibly already alcohol dependent, Transfield submitted that the worker's subsequent reduction to a state of total incapacity by August 2006 was an inevitable consequence of his increasing level of substance abuse.

50 Before addressing these contentions I make some observations as to the applicable legal principles. A disability is compensable under s 30(2) of the Act if it arises out of or in the course of employment. The disability in issue here is not the worker's substance abuse or dependence of itself, but rather the disability of substance dependence resulting in total incapacity. There is no suggestion that this arose in the course of employment. The question is one of causation, namely whether the disability as described arose out of employment in the sense that it was a sequelae to the compensable disability of the right arm and shoulder.

51 The proper approach to a question of causation is outlined by the Full Court of the Supreme Court in *WorkCover Corporation v Sherriff*.[28] In that matter a claim for a back injury was accepted. The worker was dismissed from his employment about one month after the injury. Some two years later, in the course of employment with a different employer,

[28] Judgment S5831 dated 1 October 1996 per Lander J, the other two members agreeing.

he developed a condition described as "anxiety, depression". In considering the question as to whether the worker had suffered a "psychiatric sequelae" as a result of the back injury, Lander J observed that the causation issue involves:

> "… a factual inquiry, to be approached by a common sense evaluation of the chain of events and at all times applying the words of the Act to the medical condition as factually determined, so that the inquiry is always relevant to a disability, disease or secondary disability and whether any of the particular conditions arise from employment.
>
> In applying that common sense approach the Tribunal of fact will, on occasions, recognise that there is more than one event which might have 'caused' the disability. In those circumstances it will still be a question of fact whether the disability arises from employment. It is not, on this legislation, a question whether the employment was a material, proximate, real, or an effective cause, but a question as to whether on the facts as found the employment was significant enough to still be able to say that the proven disability, whether a disability, secondary disability or disease, arises from that employment. It is sufficient in my opinion to adopt the plain meaning of the words in the Act without adding any descriptive adjectives to those words. To determine a test which requires the proof by the worker that the employment was the real cause, the effective cause or the material cause would be to judicially amend the Act. Questions of causation are matters of fact and therefore, no test of causation needs to be propounded except that contained in the Act itself."[29]

52 In applying these principles to the case at hand, it is to be noted that although the worker was vulnerable as at October 2000 to an inevitable progression in his level of substance abuse, of itself this does not necessarily prevent him from establishing a causal link. The compensable disability need only be one of two or more material contributing factors, and need only accelerate the onset of a state of total incapacity that the worker might ultimately have reached in any event.

53 Further it is not necessary for the establishment of a causal connection that the substance dependence resulting in total incapacity be the natural, reasonable or probable consequence of the compensable disability. Thus it is not appropriate to bring into the balance against the worker's claim that his increased alcohol intake for the reasons alleged was irresponsible or indulgent, or that a successful outcome to his claim would seem to

[29] At p 6 of the *Sherriff* decision.

visit what may be perceived to be an unfair or unreasonable outcome on Transfield.[30]

54 The worker's evidence was that his level of alcohol consumption began to increase some two months after the injury. He said that as a consequence of not being able to work, and having time on his hands and becoming bored, he spent day time hours during which he would previously have been working at his local hotel where he consumed increased amounts of alcohol. He also said he consumed an increased amount of alcohol to obtain relief from the pain consequent upon his shoulder injury, and later as a method of coping with feelings of anxiety which arose particularly after what he perceived to be unsatisfactory dealings with rehabilitation consultants and claims managers at various times.

55 Dr Mills' analysis was that before the injury there was a history of heavy post-work drinking which had no reported adverse effect upon the worker's capacity for work. After the injury however, the lack of suitable work led to boredom and stress, and to a consequent increase in alcohol consumption, which was a continuation and extension of the worker's pre-injury heavy drinking.[31]

56 Dr Mills noted "emerging psychological factors" in May 2001, which he linked to increased levels of alcohol consumption.[32] His notes, reports and evidence generally make frequent reference to "non-organic factors" following the injury being anxiety, depression, substance abuse and self-medication.[33] His conclusion was that the worker's "alcohol abuse and his physical problems associated with WorkCover and the difficulties he was having all go together" and were "inextricably intertwined".[34]

57 The opinion of Dr Mills appears to support a causal connection with the compensable disability. However, the fact that there was an increased level of alcohol consumption following the injury does not of itself lead to the conclusion that there is a causal connection with the compensable disability. Whatever the reasons for an increase in the level of substance abuse, it would inevitably have effects which were intertwined and associated with the compensable disability and rehabilitation and compensation issues.

58 In the reasons for my first decision, although I expressed some reservations, I accepted the worker's evidence in general as to his stated

[30] With respect to this and the preceding paragraph, see the various authorities cited at Mills, *Workers Compensation (New South Wales),* Butterworths, 1979, 2nd ed at para [170].
[31] Evidence AB1/227-228.
[32] Paras [31]-[32] of first decision.
[33] For example, the report of Dr Mills dated 25 January 2006 (AB2/90).
[34] AB2/234; AB3/173.

levels of substance abuse, and observed that he gave evidence as to other matters to the best of his recollection.[35] However, I noted Transfield's submission that the reason proffered by the worker for his increased drinking was questionable, and I observed that the worker's asserted use of alcohol for relief of pain from his injury was likely to be a convenient explanation for an increased level of drinking.[36]

59 It was this observation which led Transfield to contend that, in effect, I had not accepted the evidence of the worker that he drank more alcohol following the injury to seek relief from his shoulder pain. I did not go that far in the findings I made for the purposes of the first decision, which focused on the extent of the worker's incapacity as at August 2006, rather than the causation question. However the worker's evidence requires further scrutiny in the causation context.

60 The worker attended on Dr Mills up to 50 times over the period from April 2001 to 2008. On occasions he reported the fact of ongoing pain, and at other times, when his escalated levels of alcohol consumption were being questioned, he made reference to various events that had caused him stress and which he associated with episodes of more excessive alcohol consumption than usual. Although the worker reported that he increased his alcohol consumption because he was bored through work inactivity, he made no mention to Dr Mills of increasing his alcohol consumption to deal with injury pain, nor it would appear, to the psychologist Mr Tomlian who saw him regularly, or to counsellors at the Drug and Alcohol Services from 2001 to 2004. Of itself this does not mean that the worker's increased alcohol consumption was not in part a response to post-injury pain, but the absence of any contemporaneous reports to this effect is a consideration which weighs against the reliability of his evidence in my view.[37]

61 I also have a more general concern. The evidence of the experts in this case adverted to the well accepted tendency of those afflicted by substance abuse to be unreliable historians as to the extent of and reasons for substance abuse and to engage in rationalisation of their behaviour and to divert responsibility for their conduct to external factors.[38] This is likely to have been the case with the worker given that throughout his presentation to those treating or counselling him from 2001 onwards, and in his presentation to Professor Goldney, and in his evidence, he demonstrated a persistent and almost complete lack of insight into the implications of his consumption patterns and of the need to change his behaviour.

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[35] Para [14] first decision.
[36] Para [145] first decision.
[37] Reference to increased alcohol use and pain was noted in the history taken by Professor Goldney, but this was in May 2006.
[38] Mr Tomlian AB1/121; Professor Goldney AB1/171-172; Dr Mills AB1/234.

62 Although I felt that the worker was ultimately frank in his admissions as to the general extent of his substance abuse, his response to questioning as to the reason for his increased drinking after the injury was, in my view, somewhat non-responsive, argumentative and defensive.[39] His evidence linking his increased alcohol consumption to the desire to seek relief from post-injury pain had the flavour of after the event rationalisation. His evidence in this regard is unreliable and I am unable to accept it.

63 There is no doubt that a sequential analysis of events shows that an increased level of alcohol consumption followed the work injury. Before the injury, and whilst in ongoing employment, the worker appeared to be able to curb his substance abuse to the extent that he retained an ongoing capacity for work. After the injury, his consumption levels rapidly escalated, and eventually led to total incapacity.

64 Professor Goldney was of the opinion that the worker's extensive pre-injury substance abuse was the result of his innate personality factors, and that as at October 2000, the worker was probably at a stage where his ability to control his intake in the future was tenuous, with his work capacity likely to become impaired as a result of substance abuse even if the compensable disability had not occurred. He also expressed the opinion that the rapid escalation in the worker's levels of consumption within some few months of the injury would not have occurred but for the alcohol abuse which preceded it over many years.

65 I accept Professor Goldney's opinions on these matters. I do not take Dr Mills to have expressed any considered view to the contrary as he did not analyse in detail the implications of the worker's longitudinal history of substance abuse or his vulnerability to incapacitating substance dependence in any event in the absence of injury.

66 In light of these matters, I do not accept that the worker consumed an increased amount of alcohol as a means of dealing with his injury pain. I have no doubt that he suffered some level of ongoing post-injury pain, but in my view, his increased alcohol consumption would have occurred with the extra time he had available after the injury regardless of his pain level at any one time.

67 As to the availability of extra time, I accept that immediately following the occurrence of the compensable disability the worker had no work activities to occupy his time during the day, and that with extra time on his hands he became bored. The worker might have sought to alleviate that boredom in any number of ways. He did so by seeking companionship for longer hours at his local hotel. Whilst there, and later

[39] For example AB1/27-29; 39-44; 49-51.

at home, he began to consume substantially more alcohol than previously.

68 I think it probable that the use of this time to engage in an increased level of alcohol abuse was due to the innate personality factors which led the worker to engage in prolonged alcohol abuse before his injury, including the consumption of additional amounts when free of work commitments, such as on weekends. It was not a result of the compensable disability, which had only led to the availability of an increased amount of time. Whilst the increased alcohol consumption followed the occurrence of the compensable disability, I do not consider that the compensable disability can be said to be a contributing cause.

69 The ongoing level of increased alcohol consumption following the injury soon began to have deleterious effects on the worker's condition as noted by Dr Mills from May 2001, and became intertwined with the rehabilitation process, and in turn resulted in stress and anxiety to the worker. This then led to further episodes of even more excessive alcohol consumption as previously noted, which were explained as a general response to blot out conflict connected with the worker's perception of inappropriate rehabilitation and claim management.[40]

70 On these facts I do not consider there is a common sense causal connection between the compensable disability and the substance dependence resulting in total incapacity. The compensable disability was not a factor which was significant enough to be able to say that the disability of substance dependence resulting in total incapacity arose out of employment, or that it was a sequelae to the accepted compensable disability.

71 It follows that Transfield has satisfied me that the disability of substance dependence resulting in the worker's total incapacity for work as at 28 August 2006 is not compensable. The occurrence of a total incapacity for work in these circumstances means the worker has breached his obligation of mutuality as alleged by Transfield: *Jones v WorkCover Corporation/Royal and Sun Alliance Workers Compensation*.[41]

Conclusion

72 On the question of whether the worker was totally incapacitated for work as at 28 August 2006, Transfield has satisfied me that a reasonable employer, knowing all the facts, and taking a realistic view as to what might happen, would form the view that offering a job to the worker was not worth the risk, given his substance dependence as at 28 August 2006.

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[40] Evidence of Dr Mills at AB1/231 and Mr Tomlian at AB1/116.
[41] [1998] SAWCT 11.

I am satisfied that, as a result of his substance dependence, the worker was then totally incapacitated.

73 Transfield has satisfied me that the disability of substance dependence resulting in total incapacity is not a compensable condition. I am satisfied that there is no common sense causal chain between the increased level of alcohol consumption after October 2000 and the compensable disability, and that there was a breach of mutuality as at 28 August 2006.

74 Accordingly I order that the notice of dispute be dismissed and that the s 36 notice issued by Transfield on 28 August 2006 be confirmed.

NOTE CAREFULLY:

Parties are advised that if a party wishes to appeal against any part of this decision which is appealable pursuant to s 86(1) of the Act such appeal must be filed with the Registrar in accordance with the form titled Notice of Appeal within 14 days of the delivery of this decision and must be served on all parties.

PUBLICATION OF THESE REASONS

It is the practice of this Tribunal to publish its reasons for decision in full on the Internet. If any party or person contends that these reasons for decision should not be published in full the party or person must make an application within seven days of the delivery of these reasons. The application shall be by an Application for Directions with a supporting affidavit and should be addressed to the presiding member(s). If no such application is lodged within the time specified these reasons will be published in accordance with the Tribunal's usual practice.