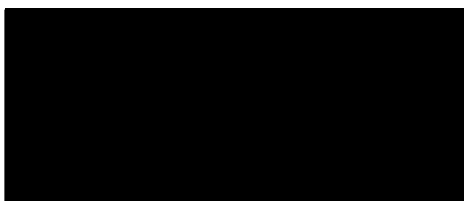


## Submission of Stanley Ranasinghe



Previous Mail Officer – Dandenong Letters Centre

1. I have had a long and complicated compensation history with Australia Post. It concluded with two permanent impairment claims -one for my physical injuries and one for psychological injury. **I have enclosed the Administrative Appeals Tribunal Decision and Reasons for Decision of 24 January 2008.**
2. Following this Decision I had to seek Comcare's assistance to get a correct assessment of compensation for permanent impairment and non-economic loss in relation to my psychological injury. Australia Post did not send me a questionnaire and based on incomplete evidence decided I was due no compensation. This was over-turned once I sought Comcare's assistance.
3. In summary, in 2001 my treating specialist's request for treatment for my injury was denied using the opinion of an FND. It took a year to obtain this treatment and by this time the condition had become chronic. Australia Post settled the claim in 2003 agreeing to accept reasonable medical costs. My costs to obtain this cost more than the treatment costs.
4. Liability was ceased using FND opinion in April 2003. I was dealt with under "the Australia Post Policy on the Management of Employees with Non-Work Related Medical Restrictions" while my case was pending. On November 2003 I was directed onto sick leave under the "Non-Work Related Policy. The AAT in August 2004 directed Australia Post to pay compensation and allow me to return to work.
5. Payments were then made for about 4 months, then the opinion of the FND, Dr Soliman was used to suggest I was fit to work full hours in January 2005 when my doctors maintained I could only work 4 hours a day for 3 days a week. I lodged a claim for permanent impairment. Compensation was again ceased. Permanent Impairment was denied. The AAT overturned these Decisions.
6. Please note the finding at paragraph 44: "Given that the requirement to comply with the Rehabilitation Guidelines is mandatory under the SRC Act, it follows that where the Rehabilitation Guidelines state that the rehabilitation program should be developed with the injured employee and the treating medical practitioner, that requirement is mandatory unless there is a sound basis for not doing so. No such basis was put forward by Australia Post."
7. Please read my AAT Decision of 24 January 2008 as it highlights the role played by FNDs and management to the detriment of my health.

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# Ranasinghe and Australian Postal Corporation [2008] AATA 66 (24 January 2008)

Last Updated: 25 January 2008

Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION [2008] AATA 66

ADMINISTRATIVE APPEALS TRIBUNAL )

) No V 200500243, V 200500244, ) V 200600489

GENERAL ADMINISTRATIVE DIVISION )

Re STANLEY RANASINGHE

Applicant

And AUSTRALIAN POSTAL CORPORATION

Respondent

DECISION

Tribunal Mr Egon Fice, Member

Date 24 January 2008

Place Melbourne

Decision

1. The Tribunal sets aside the reviewable decision of 9 February 2005, dealing with the rehabilitation program (dated 15 November 2004) and decides that it was not a valid determination pursuant to s37(1) of the *Safety, Rehabilitation and Compensation Act 1988*.
2. The Tribunal sets aside the reviewable decision of 9 February 2005 dealing with Mr Ranasinghe's capacity to increase working hours and decides that Mr Ranasinghe's capacity for work is limited to 4 hours per day for 5 days until the date that [REDACTED] determined he should further limit his work to 3 days per week.
3. The Tribunal sets aside the reviewable decision of 30 May 2006 and decides that Mr Ranasinghe should be paid compensation for permanent impairment and non-economic loss.

4. Mr Ranasinghe's costs of these applications should be paid by Australia Post in an amount agreed by the parties or in the event that the parties cannot agree, as taxed by the Tribunal.

(sgd) Egon Fice  
Member

**COMPENSATION - AGGRAVATION OF PRE-EXISTING OSTEOARTHRITIS – CHRONIC REGIONAL PAIN SYNDROME – IMPACT OF CHRONIC ADJUSTMENT DISORDER WITH MIXED ANXIETY AND DEPRESSION – RETURN TO WORK PROGRAM – FAILURE TO HAVE REGARD TO EMPLOYEE'S ATTITUDE TO RETURN TO WORK PROGRAM – FAILURE TO COMPLY WITH REHABILITATION GUIDELINES - CAPACITY TO WORK – PERMANENT IMPAIRMENT –NON-ECONOMIC LOSS**

*Department of Defence v Fox* (1997) 24 AAR 171

*McGuinness v Comcare* [2007] FMCA 1486

*Safety, Rehabilitation and Compensation Act 1988 s19, s24, s27, s37, s41, s62*

**REASONS FOR DECISION**

24 January 2008

Mr Egon Fice, Member

1. The three matters before me on this application are the consequence of an injury suffered by Mr Stanley Ranasinghe at his workplace in September 2001 and the decisions made by the Australian Postal Corporation (Australia Post), his employer. The first decision for review, dated 9 February 2005, arises from reconsideration of a determination made on 16 November 2004 which assessed Mr Ranasinghe as capable of undertaking a return to work program between November 2004 and January 2005, gradually increasing his hours of work from four per day to full time. The second decision for review, also dated 9 February 2005, affirmed a determination dated 25 November 2004. That determination deemed Mr Ranasinghe able to increase his hours of work to five hours per day from 15 November 2004; six hours per day from 13 December 2004; and full time from 10 January 2005. His failure to comply with the return to work program resulted in a reduction of Mr Ranasinghe's compensation payments in accordance with s19(4) of the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act). The third decision for review, made on 30 May 2006, is a reconsideration of a determination made on 4 April 2006 which denied liability for Mr Ranasinghe's claim for permanent impairment of his right hand and wrist.
2. In a decision dated 12 August 2004, the Tribunal found that Mr Ranasinghe suffered an aggravation of pre-existing osteoarthritis of his right wrist and chronic regional pain syndrome (CRPS). The Tribunal found that Mr Ranasinghe's injuries arose out of or in the course of his employment with Australia Post. Since the Tribunal's decision, Mr Ranasinghe claims he has suffered further injury which, generally speaking, is described as chronic adjustment disorder with mixed anxiety and depression. Mr Ranasinghe has not lodged a claim for this injury and therefore he accepts that it is not to be considered for the purposes of determining whether he suffers permanent impairment. However, according to Mr M Carey of counsel, who appeared on behalf of Mr Ranasinghe, the chronic adjustment disorder with mixed anxiety and depression should be considered from the point of view of Mr Ranasinghe's capacity for work and the appropriateness of the return to work program arranged for him. Although there has been no determination regarding Mr Ranasinghe's claim for secondary psychiatric injury, Mr Carey referred me to s 61 of the SRC Act which makes an exception to the rule concerning written determinations where medical expenses are involved.
3. The issues for consideration before me are:
  - a. *whether the determination by Australia Post that Mr Ranasinghe should commence a rehabilitation program dated 15 November 2004 was valid;*
  - b. *whether Mr Ranasinghe was reasonably capable of increasing his work hours in accordance with the return to work program; and*
  - c. *whether Mr Ranasinghe has suffered permanent impairment as a result of his right hand and wrist condition.*

**RELEVANT BACKGROUND**

4. Mr Ranasinghe injured his right wrist on 27 September 2001 while working for Australia Post. He sought medical attention from [REDACTED] his treating doctor. [REDACTED] certified him unfit for work until 12 October 2001 and then until 13 November 2001 [REDACTED] referred Mr Ranasinghe to [REDACTED] an orthopaedic surgeon, who examined Mr Ranasinghe on 8 November 2001. Mr Hoy diagnosed right wrist dystrophy and recommended a guanethidine block. After having Mr Ranasinghe examined by its own orthopaedic surgeon,

- Australia Post denied liability for the costs of Mr Ranasinghe receiving a guanethidine block.
5. On 22 February 2002 Australia Post made a determination of its own motion that it ceased to accept liability for what it described as *temporary aggravation of pre-existing changes to right wrist*. Mr Ranasinghe was placed on a graduated return to work program of four hours of light duties per day. He was required to sort mail into V-frames and also to work in the taxing section which dealt with misdirected mail. He was advised to work at his own pace.
  6. Mr Ranasinghe was examined by [REDACTED] an orthopaedic upper limb & hand surgeon, on 25 February 2002. At that time [REDACTED] diagnosed Mr Ranasinghe as suffering from a chronic SLAC (scapho-lunate advanced collapse) wrist with supervening acute RSD (reflex sympathetic dystrophy). He suggested Mr Ranasinghe would benefit from a guanethidine block. He saw Mr Ranasinghe again on 13 May 2002 and 24 June 2002 and reported that there was no improvement. He recorded that Mr Ranasinghe had persistent pain and continued to complain of swelling, sweating and colour changes. [REDACTED] noted that Mr Ranasinghe had not, by the date of his report, which was 29 July 2002, had any guanethidine treatment. Mr Ranasinghe was working four hours per day but reported significant pain and was using his left hand to perform duties. Mr Ranasinghe told [REDACTED] that although there was no formal compulsion to work at any particular pace, he felt pressure to perform extra duties or to use his left hand more often than he would have liked because he saw his work colleagues struggling with their activities. [REDACTED] recommended pain management and treatment for Mr Ranasinghe's RSD.
  7. Mr Ranasinghe brought his first application to the Tribunal for a review of Australia Post's decision not to pay the cost of a guanethidine block. Australia Post settled that claim on 24 January 2003, agreeing to accept liability for the reasonable medical costs of one guanethidine block treatment.
  8. Mr Ranasinghe underwent a guanethidine block on 24 February 2003. He obtained only temporary relief as a result of that procedure. [REDACTED] a specialist anaesthetist, recommended that Mr Ranasinghe receive a stellate ganglion block.
  9. Following a medical examination by [REDACTED] a plastic surgeon, on 18 February 2003, Australia Post reconsidered Mr Ranasinghe's claim and determined that it was no longer liable to pay compensation in respect of his injuries. After receiving a request for reconsideration of that decision, Australia Post affirmed the decision to cease liability in respect of Mr Ranasinghe's claim for injury to his right wrist.
  10. On 7 April 2003 Australia Post notified Mr Ranasinghe that liability for his claim would cease from that day. The following day Mr Ranasinghe was examined by his treating medical practitioner, [REDACTED] who issued him with a Workcover certificate of capacity indicating that he was fit to work full time, although performing restricted duties.
  11. Mr Ranasinghe remained on restricted duties but working full time five days per week on the basis of various certificates of capacity issued by [REDACTED]. Then, following the favourable decision made by the Tribunal in August 2004, Mr Ranasinghe obtained from [REDACTED] a certificate of capacity which again limited his working hours to four hours per day. The restricted duties remained.
  12. Mr Ranasinghe sought legal advice and his lawyers obtained a further report from [REDACTED] [REDACTED] examined Mr Ranasinghe on 15 July 2003 and reported that Mr Ranasinghe had sweaty palms and a bluish hue to the dorsal aspect of his hand (presumably the right one). He also reported radio-carpal swelling and a reduced range of motion and stiffness. [REDACTED] also noted that at his previous consultation, he had also observed sweaty palms and a discolouration of the skin. He was of the view that the symptoms were consistent with RSD.
  13. On 27 November 2003 Australia Post directed Mr Ranasinghe to take sick leave commencing that day. Australia Post indicated that it had completed a worksite assessment on 26 November 2003 and, because Mr Ranasinghe had favoured his left side and left hand, it considered that he had the potential to cause overuse of his shoulder and further wrist injury. Australia Post told Mr Ranasinghe that at the expiration of his sick leave credits and any other leave credits that he may have, he would be required to submit a leave application form.
  14. On 12 August 2004 the Tribunal decided that Mr Ranasinghe suffered an aggravation of pre-existing osteoarthritis of his right wrist together with CRPS. It also found that Mr Ranasinghe's injuries arose out of and in the course of his employment and that the effects of those injuries were continuing. It directed Australia Post to pay Mr Ranasinghe compensation in accordance with the SRC Act.
  15. In September 2004 Mr Ranasinghe recommenced work, limited to four hours per day, five days per week. There were also further restrictions, that he not engage in repetitive movement of the right wrist and that he be limited to lifting weights of no more than 1.5 kilograms. His duties involved sorting mail with his left hand into the V-frames.
  16. On 7 October 2004 Australia Post asked Mr Ranasinghe to attend [REDACTED] for further assessment. [REDACTED] examined Mr Ranasinghe on the evening of 18 October 2004 and completed a certificate of fitness for duty stating that Mr Ranasinghe could gradually increase his work hours over the next three months from four hours to full time. The certificate stated that Mr Ranasinghe could also work in the taxing office where damaged mail was sorted. He was to avoid repetitive use of his right hand and was restricted to a maximum lifting weight of 2-3 kilograms. That report formed the basis for what was described as a rehabilitation program for Mr Ranasinghe commencing on 18 October 2004.
  17. On 26 October 2004 Australia Post purported to reconsider, on its own motion, a determination said to have been made on 5 October 2004 regarding a rehabilitation program. Australia Post determined that the program should finish on 26 October 2004 rather than 1 November 2004. The reason for making this determination was said to be the assessment made by [REDACTED] on 18 October 2004. The determination said to have been made on 5 October 2004 was not before the Tribunal. Also, in a further letter dated 26 October 2004, Australia Post purported to make a determination under s 37(1) of the SRC Act that Mr Ranasinghe should undertake a rehabilitation program between 27 October 2004 and 15 November 2004. This program was said to be based on the report prepared by [REDACTED] on 18 October 2004.
  18. By a letter dated 27 October 2004 Australia Post informed [REDACTED] of [REDACTED] work capacity assessment made on 20 (sic) October 2004. The letter stated that Australia Post intended to prepare a *proposed graduated occupational return to work program* and attached to it was a copy of the program. It asked [REDACTED] to provide his approval for a trial of the proposed program, following his next review of Mr Ranasinghe. In a letter dated 29 October 2004 Mr Ranasinghe objected to [REDACTED] assessment of his capacity for work.
  19. A further rehabilitation program dated 15 November 2004, which was said to operate between that date and 18

January 2005, required Mr Ranasinghe to work five hours per day until 13 December 2004. He was then to increase his work hours to six hours per day and, finally, to full time commencing 10 January 2005. Mr Ranasinghe refused to sign the recommended program. This program, like its predecessor, was based on [REDACTED] review on 18 October 2004, although it prescribed additional duties.

20. Despite [REDACTED] report and the 25 October 2004 and 15 November 2004 rehabilitation programs prepared by Australia Post, [REDACTED] continued to issue Mr Ranasinghe with a certificate of capacity indicating his work was to be restricted to four hours per day. Such certificates were issued between 3 September 2004 and 22 March 2005. They may have continued for longer but those documents were not before me.
21. By a letter dated 5 December 2004 Mr Ranasinghe requested a reconsideration of the determination made on 25 November 2004 which deemed him able to increase his hours to five hours per day from 15 November 2004; six hours per day from 13 December 2004; and full hours from 10 January 2005. Australia Post reconsidered its determination and affirmed the original decision.
22. After Australia Post determined on 16 November 2004 that Mr Ranasinghe should increase his working hours to five hours, he sought a reconsideration of that determination. Australia Post affirmed that determination on 9 February 2005.
23. On 25 January 2005 Australia Post again determined that Mr Ranasinghe should undertake taxing work for Australia Post on a full time basis.
24. Mr Ranasinghe lodged a claim for permanent impairment on 16 December 2005. He was examined by [REDACTED] a consultant orthopaedic surgeon, on 9 February 2006 [REDACTED] opinion was that Mr Ranasinghe's exacerbation of his pre-existing arthritis had resolved, as had his CRPS. In his opinion, Mr Ranasinghe suffered only from the *underlying degenerative arthritis*. Australia Post rejected Mr Ranasinghe's claim for permanent impairment and upon review, affirmed that decision. Mr Ranasinghe lodged an application for review of that decision with the Tribunal on 8 June 2006.

## LEGISLATIVE SCHEME

25. The provision of rehabilitation programs is set out in s 37 of SRC Act. Insofar as it is relevant, s 37 provides:

### *37 Provision of rehabilitation programs*

*(1) A rehabilitation authority may make a determination that an employee who has suffered an injury resulting in an incapacity for work or an impairment should undertake a rehabilitation program.*

*(2) If a rehabilitation authority makes a determination under subsection (1), the authority may:*

*(a) provide a rehabilitation program for the employee itself; or*

*(b) make arrangements with an approved program provider for that provider to provide a rehabilitation program for the employee.*

*Note: A rehabilitation program that is being provided to a person under this section might cease if the person is also provided with rehabilitation under the MRCA (see section 18 of the CTPA).*

*(2A) A determination under subsection (1) is not a legislative instrument.*

*(3) In making a determination under subsection (1), a rehabilitation authority shall have regard to:*

*(a) any written assessment given under subsection 36(8);*

*(b) any reduction in the future liability to pay compensation if the program is undertaken;*

*(c) the cost of the program;*

*(d) any improvement in the employee's opportunity to be employed after completing the program;*

*(e) the likely psychological effect on the employee of not providing the program;*

*(f) the employee's attitude to the program;*

*(g) the relative merits of any alternative and appropriate rehabilitation program; and*

*(h) any other relevant matter.*

*(4) The cost of any rehabilitation program provided for an employee under this section shall be paid by the relevant*

authority in relation to that employee.

(5) Where an employee is undertaking a rehabilitation program under this section, compensation is not payable to the employee under section 19 or 31 but:

(a) if the employee is undertaking a full-time program—compensation is payable to the person of an amount per week equal to the amount per week of the compensation that would, but for this subsection, have been payable under section 19 if the incapacity referred to in that section had continued throughout the period of the program; or

(b) if the employee is undertaking a part-time program—compensation is payable to the employee of such amount per week as the relevant authority determines, being an amount not less than the amount per week of the compensation that, but for this subsection, would have been payable to the employee under this Act and not greater than the amount per week of the compensation that would have been payable under paragraph (a) if the employee had been undertaking a full-time program.

(6) An employee who is entitled to receive compensation under subsection (5) during a period is not entitled to receive rehabilitation allowance under the Social Security Act 1991 during that period.

(7) Where an employee refuses or fails, without reasonable excuse, to undertake a rehabilitation program provided for the employee under this section, the employee's rights to compensation under this Act, and to institute or continue any proceedings under this Act in relation to compensation, are suspended until the employee begins to undertake the program.

(8) Where an employee's right to compensation is suspended under subsection (7), compensation is not payable in respect of the period of the suspension.

26. The second determination made by Australia Post occurred after the rehabilitation program, consisting of an increase in working hours, had been determined by Australia Post. When Mr Ranasinghe refused to increase his working hours to five hours per day commencing 15 November 2004, Australia Post relied on s 19(4) for the purpose of determining the amount of compensation that Mr Ranasinghe would be paid. Section 19 of the SRC Act generally sets out the process of calculation of compensation payable to an injured employee having regard to the amount that an employee is able to earn from suitable employment. Section 19(4) of the SRC Act, insofar as it is relevant, provides:

(4) In determining, for the purposes of subsections (2) and (3), the amount per week that an employee is able to earn in suitable employment, Comcare shall have regard to:

...

(d) where, after becoming incapacitated for work, the employee received an offer of suitable employment on condition that the employee completed a reasonable rehabilitation or vocational retraining program and the employee failed to fulfil that condition—the amount that the employee would be earning in that employment if he or she were engaged in that employment; ...

27. Compensation for injuries resulting in permanent impairment is provided for in s 24 of the SRC Act. Section 24(1) provides that where an injury to an employee results in permanent impairment, Comcare (in this case Australia Post) is liable to pay compensation to the employee in respect of the injury. The other relevant parts of s 24 provide:

#### **24 Compensation for injuries resulting in permanent impairment**

...

(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.

...

(9) For the purposes of this section, the maximum amount is \$80,000.

28. Where an injury to an employee results in a permanent impairment and compensation is payable in respect of the injury under s24, Comcare (Australia Post in this case) is liable to pay additional compensation for any non-economic loss suffered by the employee (s27).

#### THE REHABILITATION PROGRAM

29. Mr Ranasinghe had ceased working at Australia Post on 27 November 2003 at the direction of his employer. That remained the position until the Tribunal handed down its decision on 12 August 2004, upholding Mr Ranasinghe's claims for compensation. He recommenced work in mid to late September 2004 on the basis that he worked four hours per day for a five day week. Mr Ranasinghe had obtained a certificate of capacity from [REDACTED] on 3 September 2004 which included a four hour per day work restriction along with a light duties restrictions.
30. On 7 October 2004 Australia Post wrote to Mr Ranasinghe indicating that it required him to attend an appointment for a rehabilitation assessment by [REDACTED] on 13 October 2004. Mr Ranasinghe was upset by that decision and wrote to [REDACTED] a rehabilitation delegate for Australia Post. In reply, [REDACTED] enclosed a copy of Australia Post's rehabilitation and return to work policy. That policy document stated that employees participating in occupational rehabilitation had certain rights and responsibilities under the SRC Act. Included amongst those is the following:

*[Injured employees] have the responsibility to participate fully in identifying and accepting a return to work program that is within their capacity and ability and will not aggravate their injury/illness; ...*

31. Mr Ranasinghe said in evidence that he was aware that the purpose of sending him to [REDACTED] for an examination was to get him to increase his working hours. He said that when he first returned to work after the Tribunal decision, he provided [REDACTED] certificate of capacity of 3 September 2004 to the person responsible for rehabilitation. That person apparently spoke to the duty shift manager who told Mr Ranasinghe *well, if you can't use your right hand it is no use for us to keep you. You go home.* Mr Ranasinghe said that he went home on that basis and the following day he was contacted by a rehabilitation officer from Australia Post who asked him to return to work at 3.30pm. Mr Ranasinghe declined because his shift started at 7.30pm that evening. At about 5.00pm on that day, the rehabilitation officer rang him again and told him not to come to work until he was provided with a medical certificate to say that he was fit. Mr Ranasinghe spoke with [REDACTED] of Australia Post and although he was not told specifically that he was required to go back to work on a full time basis, according to Mr Ranasinghe, he understood that to be [REDACTED] intention.
32. Mr Ranasinghe did not see [REDACTED] on 13 October 2004 but he received a letter from [REDACTED] dated 14 October 2004 stating that he was required to attend an appointment with [REDACTED] at 7.00pm on 18 October 2004. Mr Ranasinghe's evidence was that he kept that appointment. He provided [REDACTED] with a number of specialist reports and although [REDACTED] briefly looked at the reports, he did not examine them in any detail. He also told Mr Ranasinghe that he did not have a file as a result of earlier consultations and Mr Ranasinghe believed [REDACTED] opened a new file for him on that day. Mr Ranasinghe said that [REDACTED] looked at his hand as he turned it from side to side but he did not conduct any tests. According to Mr Ranasinghe, the entire consultation lasted five or six minutes. No rehabilitation plan was discussed with him.
33. [REDACTED] account of this examination was quite different. In a report which he prepared on 12 December 2005, he referred to Mr Ranasinghe complaining of *the same symptoms* on 20 October 2004. The reasons for that may be that [REDACTED] dated and signed the fitness for duty statement on 20 October 2004 even though he recorded Mr Ranasinghe being fit for work from 18 October 2004. Given that the appointment made with [REDACTED] was for 18 October 2004, and Mr Ranasinghe said he saw him on that day, it is more likely than not that the examination

- did take place as Mr Ranasinghe said on the evening of 18 October 2004.
34. In his evidence in chief ██████████ said he observed that both of Mr Ranasinghe's hands were sweaty. He said that his movement was restricted, his grip limited, as was any flexion. He said he discussed rehabilitation with Mr Ranasinghe. Under cross examination ██████████ agreed that the examination probably took place on 18 October 2004 rather than 20 October 2004. In addition to making a note of the increase in hours over the following three months, ██████████ referred to ██████████ indicating that there was no fax number for him and that the fitness for duty assessment should be sent to him. Also noted on that assessment form is that the treating doctor, ██████████ had been contacted and had agreed to the proposed program set out in the form. ██████████ was uncertain as to whether that certificate had been seen by ██████████ but thought that he had discussed it with him. He had no direct memory of that but he said that was his practice.
  35. ██████████ certificate of fitness for duty was addressed to ██████████ a rehabilitation delegate from Australia Post. In a letter dated 27 October 2004, ██████████ wrote to ██████████ stating that Mr Ranasinghe had been assessed by ██████████ on 20 October 2004 and enclosed ██████████ report. ██████████ referred to ██████████ indication that Mr Ranasinghe was capable of a graduated rehabilitation program commencing with four hours per day with restrictions, gradually increasing the hours to full-time work over the next few months. ██████████ also stated in his letter that he had requested the service provider, ██████████ to prepare a proposed graduated occupational return to work program. A copy of that proposed program was enclosed with the letter. ██████████ asked ██████████ to consider providing his approval for a trial of the proposed program following his next review of Mr Ranasinghe.
  36. However, ██████████ Australia Post's rehabilitation delegate, wrote to Mr Ranasinghe on 26 October 2004 and notified him of a determination made by Australia Post under s 62(1)(a) of the SRC Act to vary his current rehabilitation program (which restricted Mr Ranasinghe to four hours work per day), so as to adopt the program framed by ██████████ on 18 October 2004. The letter also stated that the new program would be issued to Mr Ranasinghe. In a further letter to Mr Ranasinghe, also dated 26 October 2004, ██████████ determined, for the purposes of s 37(1) of the SRC Act, that Mr Ranasinghe was to commence the rehabilitation program on 27 October 2004 as per the attached Australia Post rehabilitation program dated 25 October 2004. That rehabilitation program indicated that the only duties Mr Ranasinghe was to perform were those described as *taxing*. The hours were set out in an attachment to the program and they indicated that Mr Ranasinghe was to work four hours per day for four weeks commencing 18 October 2004; increasing on 15 November 2004 to five hours per day for four weeks; then increasing on 13 December 2004 to six hours per day for four weeks; and finally to work full time on 10 January 2005.
  37. Although Mr Ranasinghe wrote to the reconsideration officer of Australia Post on 29 October 2004 complaining about the fitness for duty assessment prepared by ██████████ Australia Post did not respond immediately to that letter. Rather, on 16 November 2004, it prepared a fresh rehabilitation program for Mr Ranasinghe. It differed from the rehabilitation program dated 25 October 2004 in that it included additional duties referred to as *quality control – labels and quality control missorts*. A sheet attached to the rehabilitation program indicated that from 15 November 2004, Mr Ranasinghe was required to work five hours per day for four weeks. This was despite the fact that ██████████ had issued a fresh certificate of capacity on 29 October 2004 stating that Mr Ranasinghe was restricted to four hours work per day. On 16 November 2004 ██████████ wrote to Mr Ranasinghe stating that Australia Post had made a determination under s 37(1) of the SRC Act that he was required to commence the rehabilitation program dated 15 November 2004, from 17 November 2004.
  38. There was no issue before me about the fact that the fitness for duty assessment of Mr Ranasinghe conducted by ██████████ was an assessment made under s 36(2) of the SRC Act. There was also no dispute about the fact that Australia Post is a rehabilitation authority for the purposes of the SRC Act and that ██████████ is a rehabilitation delegate of Australia Post. There was no dispute about the fact that the various return to work programs prepared on behalf of Australia Post constituted rehabilitation programs for the purposes of s 37 of the SRC Act. There was also no argument about the fact that Australia Post was an approved program provider.
  39. According to s 37(3) of the SRC Act, in making a determination about a rehabilitation program for an injured employee, the rehabilitation authority must have regard to each of the matters set out in subsection (3)(a) to (h). There is also a further legislative provision which must be considered. Section 41 of the SRC Act provides that Comcare may prepare and issue to rehabilitation authorities guidelines in relation to the performance or exercise by those authorities of their functions or powers under Part III of the SRC Act. Part III of course deals with rehabilitation. Section 41(2) provides that a rehabilitation authority must comply with any guidelines issued under s 41(1).

Clause 10(a) of the Rehabilitation Guidelines for Employers (Rehabilitation Guidelines) prepared by Comcare provides:

10. *A return to work plan as part of a rehabilitation program should:*
  - a. *be developed in consultation with injured employee and the treating medical practitioner ...*
40. It is of some significance to observe what was said by O'Loughlin J in *Department of Defence v Fox* (1997) 24 AAR 171 at 176. When dealing with s 37(3) of the SRC Act, he said that it required a rehabilitation authority, in order to satisfy that section, to have *adequate or sufficient* regard to those matters. Failure to do so would cause the authority to fail in the performance of its statutory obligation. O'Loughlin J also said that the rehabilitation authority would not comply with its statutory obligation if it merely had *token or nominal* regard to those matters.
41. There is a serious question as to whether Australia Post had adequate, or in fact any, regard to Mr Ranasinghe's attitude to the return to work program dated 15 November 2004 or to Clause 10(a) of the Rehabilitation Guidelines. Mr Ranasinghe's evidence was that he had a meeting with ██████████ on 15 November 2004. At that meeting he was given the return to work plan of the same date. He did not recall being asked for his views regarding that plan. He was not asked to take the plan to his treating doctor. He was asked to sign the plan but he refused because it involved increasing his hours.
42. ██████████ evidence was that although he had no specific notes about discussing any rehabilitation plan with Mr Ranasinghe, his recollection was that he did have a discussion and that Mr Ranasinghe told him he could not



follow the plan. In his clinical notes of 29 October 2004, [REDACTED] stated that both Mr Ranasinghe's hands were very sweaty. He also noted that Mr Ranasinghe was agitated by the rehabilitation section of Australia Post, believing they were pushing him back to work. [REDACTED] also noted that Mr Ranasinghe should work four hours per day as before. [REDACTED] said that the results of his examination were not much different to previous examinations and that his decision to continue Mr Ranasinghe on four hours was based on whether Mr Ranasinghe thought he could cope with situation. There was no evidence that [REDACTED] was either consulted or shown the proposed return to work program dated 15 November 2004. [REDACTED] clinical notes indicate that he next saw Mr Ranasinghe on 30 November 2004 when he noted Mr Ranasinghe was very depressed and he referred him to [REDACTED] a psychiatrist. [REDACTED] also said in evidence that at the time of the 15 November 2004 rehabilitation program, Mr Ranasinghe was in the care of [REDACTED] a specialist anaesthetist. [REDACTED] evidence was that he did see Mr Ranasinghe in September and December 2004 but there was no evidence that the return to work programs had been referred to him.

43. My conclusion from the evidence of Mr Ranasinghe [REDACTED] and [REDACTED] is that on the balance of probability, there was no adequate discussion with Mr Ranasinghe prior to the rehabilitation program of 15 November 2004 being determined. It is possible that the Australia Post delegates who dealt with Mr Ranasinghe assumed that the 15 November 2004 rehabilitation program was essentially the same as the 25 October 2004 rehabilitation program. However, that is plainly incorrect. The 15 November 2004 program required Mr Ranasinghe to complete a range of tasks with the restriction that there was no repetitive gripping or lifting in excess of 2 -3 kilograms with his right hand. The rehabilitation program of 25 October 2004 only required Mr Ranasinghe to complete the task referred to as *taxing*. Although both programs proposed that he would work the same hours for the various periods, the fact that the 15 November 2004 program incorporated additional tasks makes it significantly different. This is because, according to Mr Ranasinghe, he worked essentially with his left hand, with occasional assistance from the right hand or his knee to assist in picking up heavier objects when it was needed. Mr Ranasinghe suffers from osteoarthritis in his left wrist and increasing activity with his left hand over increasing hours of work would undoubtedly have had some adverse effect. This was recognised by Australia Post in November 2003 when it told Mr Ranasinghe to cease working altogether. In my view, to comply with the requirements of s 37(1)(f) of the SRC Act, Australia Post would have necessarily needed to discuss the additional duties for the extended hour periods with Mr Ranasinghe before implementing the program. The evidence is that no delegate of Australia Post did that.
44. It is also clear to me from the evidence given by [REDACTED] and [REDACTED] that neither of those medical practitioners was consulted prior to the implementation of either the 25 October 2004 plan or the 15 November 2004 plan. A rehabilitation authority must, pursuant to s 41(2) of the SRC Act, comply with the Rehabilitation Guidelines. The guideline at Clause 10(a) requires a return to work plan as part of a rehabilitation program to be developed in consultation with the injured employee and the treating medical practitioner. The clause uses the word *should* which seems, in that context, to express a duty or obligation. While it may not be possible to consult in every case, there was no evidence that it was not possible for Australia Post to consult with either [REDACTED] or [REDACTED]. Given that the requirement to comply with the Rehabilitation Guidelines is mandatory under the SRC Act, it follows that where the Rehabilitation Guidelines state that the rehabilitation program should be developed in consultation with the injured employee and the treating medical practitioner, that requirement is mandatory unless there is a sound basis for not doing so. No such basis was put forward by Australia Post.
45. The consequences of failure to meet a mandatory requirement under s 37(3) of the SRC Act were discussed by McInnes FM in *McGuinness v Comcare* [2007] FMCA 1486. In that case his Honour was dealing with the requirement to have regard to the employee's attitude to a return to work program (s 37(3)(f)). His Honour found that there was no valid decision under s 37(1) of the SRC Act because regard was not had to Mr McGuinness' attitude to the program. It seems to me to follow from that decision that a failure to comply with s 41 of the SRC Act has the same consequence. It constitutes a failure to comply with the provisions under Part III of the SRC Act dealing with rehabilitation. As McInnes FM said in *McGuinness*:

*the rehabilitation provisions of the SRC Act are an integral part of the legislative scheme designed to restore injured workers to their fullest pre-injury capacity.*

#### DEGREE OF INCAPACITY

46. In its determination dated 25 November 2004, Australia Post deemed Mr Ranasinghe capable of working five hours per day between 15 November and 12 December 2004; six hours per day between 13 December 2004 and 9 January 2005; and full time from 10 January 2005. Having made that determination, Australia Post applied s 19 (4)(d) of the SRC Act.
47. As a consequence of the 25 November 2004 determination, Australia Post decided that should Mr Ranasinghe continue to work four hours per day rather than increasing his hours in accordance with his deemed capacity, that would be taken into account when calculating the amount of compensation payable to him. Therefore, for the first period, one hour would be treated as non-compensable leave with a net weekly earnings top-up payment for the difference; for the second period, two hours would be treated as non-compensable leave with a net weekly earnings top-up payment for the difference; and as from 10 January 2005, any hours not worked beyond four hours per day would be non-compensable leave with no net weekly top-up payment.
48. There was a great deal of controversy about Mr Ranasinghe's capacity for work. Much of this controversy stemmed from the fact that, following an examination by [REDACTED] Australia Post ceased liability in respect of Mr Ranasinghe's claim for compensation on 7 April 2003. On the following day [REDACTED] issued a certificate of capacity which indicated that Mr Ranasinghe could work the full day, subject to lifting restrictions with his right hand and not performing repetitive wrist action. Under cross examination, Mr Ranasinghe confirmed that the condition of his right wrist did not change between 7 and 8 April 2003. He then continued to work full time until 29 August 2003 when Australia Post directed him to take sick leave. Following a dispute which was resolved in the

Industrial Relations Commission, Mr Ranasinghe returned to work on 20 October 2003 and continued to work full time until 27 November 2003 when he was again directed by Australia Post to cease work. Mr Ranasinghe said that he worked full time because he had to save *my job*. He said that he did suffer an increase in pain in his right wrist but that he worked more with his left hand. [REDACTED] continued to issue certificates of capacity approving full-time work but with restrictions on the use of the right hand until 3 September 2004. On that day [REDACTED] issued a certificate indicating that Mr Ranasinghe should restrict his work to four hours per day. This certificate was issued immediately following a decision by the Tribunal on 12 August 2004 that the effects of Mr Ranasinghe's injuries had not ceased and that he was liable to receive compensation payments in accordance with the SRC Act.

49. On 4 September 2004 Mr Ranasinghe recommenced work with Australia Post on the basis of [REDACTED] certificate of 3 September 2004. Mr Ranasinghe said in evidence that he didn't ask [REDACTED] to reduce his working hours to four but that it was [REDACTED] initiative. When asked why [REDACTED] changed his mind, Mr Ranasinghe said that [REDACTED] was not content to have him work full time after his compensation payments had ceased. Mr Ranasinghe said that he explained to [REDACTED] that he could not survive financially on four hours a day pay and requested that he be allowed to work full time. Mr Ranasinghe admitted that he probably told [REDACTED] that if he didn't work full time, Australia Post would pay him compensation for the hours he did not work. Mr Ranasinghe agreed that when he was working full time, he probably did not tell [REDACTED] that he was suffering any problems with his right wrist as a result of the duties he was undertaking for Australia Post. However, he said that he was working with his left hand and not his right hand. In addition to the above, [REDACTED] explained that Mr Ranasinghe has now suffered a secondary injury as a result of his right wrist problem. [REDACTED] referred Mr Ranasinghe to [REDACTED] a consultant psychiatrist, who first saw him on 9 December 2004. In a report dated 7 August 2006 [REDACTED] said that Mr Ranasinghe continued to attend him for treatment every four to six weeks, according to need. He diagnosed Mr Ranasinghe as suffering from a mixed anxiety/depressive condition which was largely reactive to his chronic pain. Mr Ranasinghe was treated with a combination of anxiolytic and antidepressant medication, and supportive psychotherapy. He has also benefited from meditation. [REDACTED] noted that Mr Ranasinghe's depression fluctuates in severity and he saw little prospect of a significant change in his psychiatric condition unless his physical health changed dramatically, which he believed to be unlikely.
50. [REDACTED] a psychiatrist, examined Mr Ranasinghe on 26 June 2006 and diagnosed him as suffering from an adjustment disorder with mixed anxiety and depressed mood. In [REDACTED] opinion, Mr Ranasinghe's symptoms were directly related to his injury, his chronic pain and disability arising from his injury. [REDACTED] also said that Mr Ranasinghe was likely to remain prone to depression and anxiety as long as his pain persisted and as long as he remained disabled.
51. At the outset, [REDACTED] indicated that it was Mr Ranasinghe's intention to rely on the secondary psychiatric injury for the purposes of the incapacity claim only. After discussion, [REDACTED] of counsel, who appeared on behalf of Australia Post, informed me that it was agreed between the parties that the psychiatric evidence would be admissible in respect of the incapacity claim only. Because there had been no claim made (or reconsideration of a claim) for psychiatric impairment, it did not establish a ground for the permanent impairment claim.
52. As [REDACTED] submitted, the essence of Mr Ranasinghe's claim that he could not work in excess of four hours per day was that he suffered from CRPS; his osteoarthritis was becoming worse; and he was now suffering from adjustment disorder with anxiety and depression. Other than the psychiatric problems from which Mr Ranasinghe now suffers, this is plainly in accordance with the findings of the Tribunal in its decision of 12 August 2004. As of that date the Tribunal was satisfied that the effects of Mr Ranasinghe original injury had not ceased and that Australia Post was liable to pay compensation for any resulting incapacity. Shortly after the Tribunal decision in August 2004, [REDACTED] provided Mr Ranasinghe with medical certificates of capacity which limited his working hours to four per day. In spite of this, Australia Post considered Mr Ranasinghe capable of increasing his working hours per day up to full hours by January 2005. Australia Post, not without reason, was somewhat cynical of Mr Ranasinghe's claim that his capacity to work was limited to four hours per day, after having worked full time for a period of some nine months previously despite continuing to suffer from the wrist injury and CRPS.
53. The essence of Mr Ranasinghe's claim that he is not able to increase his working hours due to the severe pain he suffers from his right wrist and the fact that he is concerned with the development of osteoarthritis in both wrists which, if exacerbated, might result in the loss of acceptable functioning of both hands. It is because of these concerns he has been diagnosed as suffering from anxiety/depression.
54. The difference in medical opinions regarding Mr Ranasinghe's physical condition seems to stem from the obviously sceptical approach towards CRPS taken by the medical practitioners who examined Mr Ranasinghe on behalf of Australia Post. For example, [REDACTED] an occupational physician, who examined Mr Ranasinghe on 14 June 2005, said that Mr Ranasinghe had an unusual history of right wrist and hand symptoms which followed a simple work activity. He said that the activity would not normally be expected to have resulted in a significant injury. He then said that Mr Ranasinghe now appeared to be *well entrenched in the sick role*. [REDACTED] referred to CRPS and said that there was considerable debate and controversy over the diagnoses of CRPS and that it appeared to have become a *catch all for anyone who has a problem that does not appear to follow the natural history of physical conditions following minor injuries*. He also said in his report that *the objective evidence for CRPS was minimal*. He did note some prominent sweating in both hands. He also noted:

*the non-anatomical sensory changes in both hands;*

*the long history of dramatically described symptoms which, according to him, were typical of abnormal illness behaviour; and*

*the fact that his right forearm was of greater muscle bulk than the left indicating greater use of the right arm even though Mr Ranasinghe tended to hold it in a support position throughout the consultation.*

55. Under cross-examination [REDACTED] said the he did not accept that Mr Ranasinghe had CRPS. He said that it was fair to say that he was cynical about CRPS. He was not prepared to defer to medical practitioners who had experience in dealing with CRPS. In fact, [REDACTED] went so far as to say he had no time for people who *do pain management*. [REDACTED] did however accept that a person suffering from a psychiatric disorder may have an altered perception about pain. He agreed that minor health problems in those circumstances can take on a major importance. He agreed that pain was a major factor in determining the capacity of a person to work.
56. [REDACTED] who was the only other medical practitioner to examine Mr Ranasinghe on behalf of Australia Post after the August 2004 decision by the Tribunal, said in his report that he had examined Mr Ranasinghe on four occasions. In his report to the Tribunal, he mentioned that the only occasion upon which he examined Mr Ranasinghe after the Tribunal decision was on 20 October 2004 (I believe that he intended to say that he examined Mr Ranasinghe on 18 October 2004). As Mr Ranasinghe said in evidence, that examination took about six minutes. There is nothing in [REDACTED] report about CRPS. However, under cross-examination [REDACTED] agreed that CRPS causes a patient to be oversensitive to pain; more so than the average person. He also agreed that a person with CRPS subjectively feels greater pain. When asked about a patient experiencing adjustment disorder and the effect on that person's pain, [REDACTED] agreed that it can be exaggerated; that it intensifies the experience of pain; and that a person suffering CRPS has a lower threshold for pain. [REDACTED] was not aware that in 2005 Mr Ranasinghe had been diagnosed with psychiatric problems. He did not consider that in preparing his report. Furthermore, [REDACTED] when told that Mr Ranasinghe had been sent home in November 2003 and that he effectively did not work again until September 2004, agreed that the absence would have had negative effect on him. He agreed that it would add to the difficulties Mr Ranasinghe faced to increase his working hours after that time away from work.
57. On the other hand, the medical practitioners who gave evidence on behalf of Mr Ranasinghe dealt squarely with CRPS. [REDACTED] who specialises in the treatment of pain, had been involved in Mr Ranasinghe's treatment since January 2003. He reviewed Mr Ranasinghe on 31 October 2005 and said that, on examination, for the first time he noted significant signs, including swelling, sweating and coldness. He said that this was in contrast to the previous two years of examination where the signs were quite subtle. On that occasion [REDACTED] suggested reducing Mr Ranasinghe's workload to assess the response. In his oral evidence [REDACTED] said that Mr Ranasinghe was also having significant symptoms of pain in his left hand and he was concerned whether to send him to physiotherapy. Mr Ranasinghe had previously had therapy from a [REDACTED] which he thought had been beneficial. When Mr Ranasinghe was working on a full time basis, [REDACTED] had told him that he thought Mr Ranasinghe was working too hard and this caused him some concern. In his oral evidence, [REDACTED] explained that in October 2005 he saw very clear signs of swelling, sweatiness and coldness in the right arm. He distinguished that from symptoms described by the patient. Under cross-examination, [REDACTED] was asked whether Mr Ranasinghe told him in 2003 that he wanted to have his employment restored. Although [REDACTED] disagreed, he said that Mr Ranasinghe told him that he wanted to go back to work as he really had to have a job and he did not want to be terminated. Mr Ranasinghe said he was willing to work with his left hand. [REDACTED] was aware that there would be pain in the left hand because he had taken a history of that from Mr Ranasinghe. He understood that Mr Ranasinghe's employer was saying to him, *well, even your left hand is no good, so we want to get rid of you*. For that reason, Mr Ranasinghe said that he could work with his left hand. That was why he recorded in the history that Mr Ranasinghe maintained he had been able to do left-handed sorting. He understood Mr Ranasinghe to be saying *well, I can do a good enough job with my left hand, and I want to keep that job*.
58. Under cross-examination, [REDACTED] pointed out to [REDACTED] that the work that Mr Ranasinghe was doing for Australia Post was lighter than anything he was likely to do at home. For that reason, [REDACTED] suggested that his pain would be equally aggravated by being at home as it would if he was at work. I should also mention that Mr Smith described that Mr Ranasinghe's task in sorting mail simply meant picking up a normal-sized envelope and placing it in a tray in front of him. [REDACTED] then attempted to compare that action and duties that Mr Ranasinghe might conduct around the house. He also said that there was no increase in pain as a result of being at work. He then suggested to [REDACTED] that if his [REDACTED] description of the work Mr Ranasinghe conducted for Australia Post was accepted, and it was lighter than anything he was likely to be doing at home, there was no reason why he could not increase his working hours per day without aggravating the pain. On that basis, [REDACTED] agreed with [REDACTED].
59. However, there are several problems with the way in which this comparison was put to [REDACTED]. First, the work that Mr Ranasinghe conducted for Australia Post was repetitive. In other words, Mr Ranasinghe did not merely lift one small letter and place it in a tray possibly once or twice every hour but, although the frequency was not described, it was repetitive. It was never suggested by Mr Ranasinghe that he conducted any repetitive work while around the house. In fact, I cannot think of any work which Mr Ranasinghe might conduct around the house which could be even vaguely similar to, as great in volume or as repetitive as sorting letters at Australia Post. Secondly, [REDACTED] misunderstood what Mr Ranasinghe said in his evidence in chief. He said when he went home he would use *this hand* (holding up his left hand). He also said that when he got home he could not sleep because the *pain is much more than the normal day after work*. He was then asked to confirm that the pain was worse after work compared to before work and he agreed.
60. [REDACTED] was asked whether Mr Ranasinghe raised the question of a return to work program in September 2004. [REDACTED] said he did not; but his clinical notes indicated that Mr Ranasinghe appeared to have won his case. He also said that Mr Ranasinghe had persistent pain and complained of pain on the left side. [REDACTED] had arranged to see him in a further six weeks.
61. On 7 June 2006 [REDACTED] an occupational physician, examined Mr Ranasinghe. She recorded a detailed history and upon examination said that she observed swelling and discolouration in the right hand as well as sweatiness in that hand. She also noted there was an atrophic appearance of the fingernails in the right hand compared with the left. Despite the fact that a number of medical practitioners noted no noticeable change in the appearance of Mr Ranasinghe's fingernails on his right hand, from where I sat in the hearing room, I observed the abnormal appearance of Mr Ranasinghe's fingernails before any medical practitioner was asked about it. It was clearly apparent, even from a distance. [REDACTED] also noticed sweatiness to a lesser degree on the left hand.

She noted altered sensation in the right hand and in the distal ulnar border of the right forearm to light touch and cold temperature. She said there was dysaesthesia in the right hand and an area of mechanical allodynia with the sensation of roughness being initiated with light touch. [REDACTED] opined that the diagnosis of CRPS was clear, with the criteria for Type 1 CRPS being clearly met.

62. [REDACTED] said that Mr Ranasinghe was not fit to continue in his employment on a full-time basis or increased hours. Her view was that he was struggling in the duties he then performed. She also commented that the lack of understanding of the condition by the various medical practitioners involved on behalf of Australia Post was unfathomable. She said that the condition was widely accepted and that the findings on her examination were typical. They are all recorded in standard basic textbooks of medicine. [REDACTED] also said that with unremitting pain it was common for patients to develop depression and anxiety and that one of the complications or sequelae for CRPS Type 1 noted in the literature is suicide because of the unremitting pain. She accepted that Mr Ranasinghe had no other financial option than to continue working four hours for three days per week but even that, according to her, was beyond his capacity.
63. [REDACTED] was also asked for her opinion about the way in which Mr Ranasinghe was working, predominately with the left hand but using his right hand to balance or assist in the movement of whatever it was he picked up with his left hand. [REDACTED] was highly critical of persons who have hand pain in one hand and return to work using only one hand. She said that was inappropriate work because it cannot be done with one hand. In her opinion, it was common for people with unilateral hand or arm pain who return to work with one hand, to be unable to perform their duties with one hand; and, by inference, that seemed to be defeating the purpose of the return to work. Furthermore, under cross-examination, [REDACTED] when asked whether in her opinion Mr Ranasinghe was working beyond his capacity, said she believed he was. She also emphasised the point that there was a great deal of difference between casual daily activity and work activity.
64. [REDACTED] an orthopaedic surgeon, examined Mr Ranasinghe on 18 October 2005. He suggested that the effect of the legal disputes surrounding Mr Ranasinghe's treatment may well have exacerbated reflex sympathetic dystrophy (now known as CRPS) because of its neurological basis. He was of the view that Mr Ranasinghe was not able to perform his pre-injury duties and that he was not able to undertake a job where he is required to lift repeatedly or forcibly use his right arm and hand. He also noted that because of the problems that Mr Ranasinghe also has with his left hand, which are unrelated to his work, returning to any form of manual work was difficult. He said that whether Mr Ranasinghe was able to increase his working hours was a difficult assessment to make; although he was of the view that Mr Ranasinghe had a real problem regarding the amount of work he was able to do and that the decision should be based largely on Mr Ranasinghe's view of his own capabilities. If there were increases [REDACTED] suggested that they be on a trial basis; and that if Mr Ranasinghe was not able to cope with the increase in hours then that should be taken as the accepted level of his capability.
65. In addition to CRPS, as I have mentioned above, Mr Ranasinghe has also been diagnosed with depression and anxiety. Both [REDACTED] and [REDACTED] agree that his anxiety and depression are related to his chronic pain and disability, generally arising from his right hand. Both psychiatrists agreed that this would impact on his capacity for employment and there is unlikely to be any change unless his physical health changes.
66. In my view, the medical evidence of [REDACTED] and [REDACTED] is seriously deficient because they failed to take into account the problems which Mr Ranasinghe experiences when attempting to work while suffering from CRPS. The evidence that a person suffering CRPS experiences elevated levels of pain despite what might appear to have been a relatively minor injury was not disputed by [REDACTED]. Also, while it was generally accepted, even by [REDACTED] that the type of injury suffered by Mr Ranasinghe often responds well to continued use of the injured limb despite pain, that clearly cannot apply where the injured person suffers severe pain. Dr Sutcliffe made that very clear in her evidence. It is also inaccurate to attempt to make a comparison between the pain suffered when Mr Ranasinghe is at home doing normal house duties and the pain he feels while he is at the workplace. All of the tasks described by Mr Ranasinghe, which he conducted after being injured, clearly indicate highly repetitive work. If an expert opinion were required, that was provided by [REDACTED].
67. I did not understand Mr Ranasinghe to be saying in evidence that the pain he experienced in his right wrist remained constant irrespective of whether he was at work or at home. He was specifically asked in his examination-in-chief whether the pain was worse after work compared to before work and he answered yes. [REDACTED] objected after this answer was given, stating that Mr Ranasinghe had previously said in evidence that *if I use the hand when I go home of an evening, the pain is much worse than after a normal day at work*. In fact, what Mr Ranasinghe said was this :

*... And when I go home, I use this hand, if I – when I go home I can't sleep because the pain is much more than the normal day after work ...*

68. What I understood Mr Ranasinghe to be saying was that he felt increased pain after a day's work at Australia Post. [REDACTED] understanding of that answer is incorrect.
69. In my view, the weight of evidence about, and the more accurate analysis of, Mr Ranasinghe's capacity to work is that it most certainly is limited due to the pain that he experiences in his right hand. This is exacerbated by his work and despite the fact that he predominately uses his left hand at work, as [REDACTED] so clearly explained, it is simply not possible to do the kind of work Mr Ranasinghe was asked to do without at times using the right hand for balance or assistance. Further, any such use of his right hand simply increases the pain level. On top of that, the undisputed evidence is that Mr Ranasinghe now suffers anxiety and depression as a consequence of his pain. There was no serious disagreement between any of the medical practitioners who gave an opinion that the anxiety and depression adds to Mr Ranasinghe's subjective level of pain and capacity to work.
70. There remains, of course, the apparent inconsistency in Mr Ranasinghe's behaviour where, after Australia Post ceased to accept liability for his injury, he returned to working full time. Immediately following his successful appeal to the Tribunal, Mr Ranasinghe saw [REDACTED] who gave him a certificate limiting his work hours to four per day. Under cross-examination, it was put to Mr Ranasinghe that he seemed quite capable of working full time, although

using his left hand more than his right, but he was not suffering an increase of pain in his right wrist. His answer was *I did but there was nothing I could have done, I had to save my job*. Also, the certificates that [REDACTED] provided, which indicated Mr Ranasinghe could work full time, all contained the restriction of lifting no more than 1.5kgs with no repetitive movements of the right wrist. Given the nature of the work Mr Ranasinghe was undertaking, and the fact that at times he needed to use the right wrist for balance or support, it was quite clearly not possible for Mr Ranasinghe to comply with the no repetitive movement restriction.

71. Mr Ranasinghe's concern about retaining his job with Australia Post appears, on the evidence, to be well-founded. On 27 November 2003 Australia Post wrote to Mr Ranasinghe directing him to take sick leave in accordance with its *non work related medical restrictions policy*. The letter also stated that it was unlikely that Mr Ranasinghe would be able to resume the full duties of a mail officer within three months. The letter stated it was noted that Mr Ranasinghe continually favoured his left hand and shoulder and that the left upper limb was being used repetitively. There was obviously some concern about the potential for that to result in overuse and wrist injuries on his left side. The letter noted that his performance was slow because of the requirement to use only his left hand. Although not expressly stated, the inference to be reasonably drawn from that letter is quite clear. Mr Ranasinghe was justified in considering that his job was in jeopardy. Mr Ranasinghe said in evidence that [REDACTED] did not want him to go back to working full time. Under cross-examination, [REDACTED] was asked whether he recalled what prompted the change in certificates from four hours per day to full time work. He said that he did not have a specific recollection of why that was the case but he recalled that Mr Ranasinghe suggested that he wanted to try to work full time. He also said that Mr Ranasinghe continued to have pain at that time.
72. [REDACTED] saw Mr Ranasinghe again on 3 September 2004, when he issued another certificate which limited his work to four hours per day. [REDACTED] had no recollection of this outside his clinical notes, which merely noted that fact. All that [REDACTED] could suggest was that the decision was made to allow him to return on the basis of what he felt he could cope with functionally. [REDACTED] agreed that the condition of Mr Ranasinghe's right wrist had deteriorated over time. He agreed that the deterioration was not the result of aggravation but rather it was the underlying cause. Nevertheless, [REDACTED] said that while it would not make the basic condition worse, it would be painful for Mr Ranasinghe to be doing any kind of activity.

In my view, the weight of the evidence points to Mr Ranasinghe's capacity to work being limited by the pain he suffers in his right wrist and his anxiety and depression. It is unhelpful to attempt to compare Mr Ranasinghe's work situation with his work around the house. The two are so dissimilar as to not provide any assistance at all. [REDACTED] made that abundantly clear. In addition to his pain, and as a consequence of it, Mr Ranasinghe now suffers from anxiety and depression. That in turn, as all the medical practitioners agreed, has the tendency to exacerbate Mr Ranasinghe's condition. Although Mr Ranasinghe worked full time for an extensive period of time in 2003 and 2004, he did so only because he believed that he was at risk of losing his job. Given the nature of the letter of 27 November 2003 from Australia Post, that fear was not unfounded. However, as [REDACTED] said, a person should not be placed in a position where they are forced to work despite extensive and debilitating pain. I am therefore satisfied that Mr Ranasinghe's capacity to work does not exceed four hours per day and, as he is currently on three days per week, I accept that to be the limit of his work capacity.

#### PERMANENT IMPAIRMENT CLAIM

73. Mr Ranasinghe's final claim arises from a reviewable decision that Australia Post made on 30 May 2006 to deny liability for a claim for permanent injury and non-economic loss. This claim was denied on the basis that Australia Post was not satisfied that Mr Ranasinghe met the threshold impairment level of 10 percent as is required under s 24(7)(b) of the SRC Act.
74. The difference in medical opinions regarding permanent impairment seems to stem from the fact that the medical practitioners who provided reports regarding impairment were of the view that Mr Ranasinghe did not suffer from CRPS. [REDACTED] in his report dated 20 February 2006, said there was no clinical evidence of CRPS because there was no change in temperature; change of pain in relation to touch; changes to the skin surface or texture; and that he sweats equally on both palms. Further, under cross-examination, [REDACTED] was asked about Mr Ranasinghe's fingernails and he said that they were normal. This was despite the fact that he didn't say anything in his report about fingernails. It simply is not possible to be certain whether he in fact noticed the fingernails on Mr Ranasinghe's right hand. According to [REDACTED] Mr Ranasinghe's pain and dysfunction was entirely consistent with his arthritis. He also said that CRPS often gets better. He did not offer any basis for that opinion. [REDACTED] insisted that the physical signs observed by other medical practitioners were not there when he examined Mr Ranasinghe. [REDACTED] was of the opinion that Mr Ranasinghe's work-related injury was temporary and had resolved.
75. In a supplementary report dated 11 August 2006, [REDACTED] assessed Mr Ranasinghe to have a 10 percent whole person impairment due to loss of range of movement of his right wrist. He assessed Mr Ranasinghe to have a 10 percent whole person loss under Table 9.1 of the *Comcare Guide to the Assessment of the Degree of Permanent Impairment* (the Impairment Guide). However, under cross-examination, he said that he had made an error and that should have been 5 percent. Under Table 9.4 [REDACTED] said that Mr Ranasinghe's impairment was 20 per cent for each upper limb. He noted that Mr Ranasinghe had difficulty grasping or holding. He agreed that Mr Ranasinghe's impairments were likely to continue indefinitely although this must be taken to mean his osteoarthritis problem rather than CRPS.
76. [REDACTED] assessed Mr Ranasinghe to have a 5 percent whole person impairment under Table 9.4 of the impairment guide. He attributed that to the accepted aggravation of right wrist osteoarthritis. However, he did say that he would question whether Mr Ranasinghe's employment could be seen as permanently aggravating his osteoarthritis of the right wrist. [REDACTED] was also sceptical about a diagnosis of CRPS. He said:

*It appears to have become a catchall for anyone who has a problem that does not appear to follow the natural history of*

*physical conditions following minor injuries.*

77. On the other hand, [REDACTED] who examined Mr Ranasinghe on 16 November 2005, was of the view that he did have an ongoing permanent impairment. He assessed Mr Ranasinghe's impairment under Table 9.1 at 15 percent due to a loss of more than half the normal range of wrist movement. In addition, he also assessed Mr Ranasinghe to have a 20 percent whole person impairment under Table 9.4 due to his difficulty in grasping and holding. He combined those two impairment ratings to arrive at a whole person impairment of 32 percent. He did not include any contribution to impairment by Mr Ranasinghe's left hand.
78. [REDACTED] opinion was that Mr Ranasinghe's CRPS was permanent and severe and that there was unlikely to be resolution or improvement in the condition with the current treatment available. [REDACTED] a consultant physician, assessed Mr Ranasinghe as suffering from a 20 percent whole person impairment under Table 9.4 because he had difficulties grasping and holding.
79. It seems to me to follow that, having accepted Mr Ranasinghe suffers from CRPS as a result of his right wrist injury, the impairment is likely to continue into the foreseeable future with no likelihood of improvement; and that as Mr Ranasinghe has undertaken all reasonable rehabilitative treatment for the impairment, his impairment as a consequence of CRPS is permanent. Although [REDACTED] has allocated 15 percent of whole person impairment as a consequence of loss of range of movement, he appears to be the only medical practitioner to have done so. All of the other medical practitioners have noted his difficulty in grasping and holding and have allocated 20 percent permanent impairment for his right wrist. On balance, I believe that Mr Ranasinghe should be compensated for this injury which has resulted in permanent impairment and that the degree of permanent impairment of his right wrist is 20 percent. On that basis, Mr Ranasinghe's compensation claim for non-economic loss pursuant to s 27 of the SRC Act is enlivened.
80. In a non-economic loss questionnaire completed by Mr Ranasinghe on 6 December 2005, which follows the Part B Tables in the Impairment Guide, he recorded the following:

Table 1 - Pain

- Pain occurring most of the time; restriction on activity and resistant to treatment - 4 points

Table 1 - Suffering

- Symptoms wide ranging; tend to dominate thinking; little time when free of symptoms; difficulty coping or performing activity; treatment necessary – 4 points

Table 2 - Loss of Amenities Mobility

- Nil

Table 2 - Loss of Amenities - Social Relationships

- Difficulties relating socially to anyone - 5 points

Table 2 - Loss of Amenities - Recreation and Leisure Activities

- Unable to undertake any satisfying or rewarding activities

Table 3 - Other Loss

- Nil

Table 4 - Loss of Expectation of Life

- Nil

81. Because there was no evidence to the contrary, I accept Mr Ranasinghe's evidence regarding his claimed non-economic loss. Using Table 5, the total of his scores under Part B of the Impairment Guide is 10 points.

## CONCLUSION

82. Regarding the reviewable decision of 9 February 2005 dealing with the rehabilitation program dated 15 November 2004, I am not satisfied that any regard was given to Mr Ranasinghe's attitude to that program prior to its purported implementation. Further, although a rehabilitation authority must comply with the Rehabilitation Guidelines, Australia Post failed to develop a rehabilitation program in consultation with Mr Ranasinghe and his treating medical practitioner. Therefore, the determination made by Australia Post on 16 November 2004 is not a valid decision pursuant to s37(1) of the SRC Act. Accordingly, it must be set aside. It follows that there has been no refusal by Mr Ranasinghe to undertake a rehabilitation program provided for him under s37 of the SRC Act.
83. Mr Ranasinghe's capacity to work is severely limited by his CRPS and the depression and anxiety he suffers as a result of unremitting pain. He is not capable of increasing his working hours beyond 4 hours per day. It cannot therefore be said that the offer of light work increasing from 4 hours per day for five days to full time work is an offer of suitable employment for the purposes of s 19(4) of the SRC Act. Nor did Mr Ranasinghe fail to complete a reasonable rehabilitation program. Therefore, there should have been no reduction in the compensation paid to Mr Ranasinghe as a result of his refusal to increase his working hours from 15 November 2004. Accordingly, the reviewable decision of 9 February 2005, affirming the determination of 25 November 2004, should be set aside.

and in substitution for that determination, it is decided that Mr Ranasinghe's capacity for work was limited to 4 hours per day for 5 days until the date [REDACTED] determined that he should further limit his work to 3 days per week.

84. I am satisfied that Mr Ranasinghe has suffered a permanent impairment and is entitled to compensation under s 24 and s 27 of the SRC Act. I am of the opinion that Mr Ranasinghe's whole person impairment was correctly assessed at 20 percent under the Impairment Guide. He is also entitled to non-economic loss calculated in accordance with the formula set out at s 27(2) of the SRC Act on the basis that his total of scores calculated under Table 5 is 10 points. The reviewable decision of 30 May 2006 should be set aside and compensation paid in accordance with the above.
85. Mr Ranasinghe's costs of this application should be paid by Australia Post in an amount agreed by the parties or, in the event that the parties cannot agree, as taxed by the Tribunal.

I certify that the eighty-five (85) preceding paragraphs are a true copy of the reasons for the decision herein of

[REDACTED]

Signed: [REDACTED]

Clerk

Dates of Hearing 27 April 2007, 9 – 11 July 2007 &

30 – 31 October 2007

Date of Decision 24 January 2008

Counsel for the Applicant [REDACTED]

Solicitor for the Applicant [REDACTED]

Counsel for the Respondent [REDACTED]

Solicitor for the Respondent [REDACTED]