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Latest Workers Compensation Tribunal Cases

After a somewhat slow start to the judicial year in 2013, with there being very few decisions handed down in the first half of the year, the Workers Compensation Tribunal certainly got a hurry on in the latter part of the year. There were quite a few decisions published at the last minute. While many of the decisions are probably best described as being confined to their facts and circumstances, there were nonetheless several important decisions that will impact in the future on the way compensating authorities will manage their claims, and possibly even their employment practices. As ever, there were also a number of decisions involving claimants whose names will be quite familiar to long standing readers of the Workers Compensation Tribunal's decisions.

To read any of the individual cases concerned go to the Industrial Relations Commission of South Australia website

1. ***Smith v WorkCover Corporation (B & A Fisheries Pty Ltd)*** **[2013] SAWCT 31**

   Previously the compromising of death claims involving the possible entitlements payable to dependent children required the obtaining of counsel's opinion as a precursor to the granting of approval for this settlement by the Workers Compensation Tribunal. In this case, and in a latter case, Deputy President Gilchrist was prepared to approve a compromise negotiated between the parties, and involving a dependent child, without counsel's opinion. His Honour had conducted the conciliation proceedings between the parties, and therefore felt he was in just a good a position to consider the reasonableness of the settlement negotiated, and the protection of the

child's interests, than would have been the case if the further expense of obtaining independent counsel's opinion was pursued (and therefore also presumably avoiding any consequent delay).

2. *Awalt v Wattle Range Council* [2013] SAWCT 32 and later [2013] SAWCT 46

This is quite an unusual case in relation to not so much its facts, but the way in which it was conducted, involving a request to adjourn the trial at literally the last minute because of the potential complicating factor of several witnesses being exposed to actions under the Whistleblowers Protection Act (because of the nature of the evidence that would possibly gave). The matter took a further turn of events when the adjournment request was denied, which led to the compensating authority withdrawing its counsel from the trial after it had commenced.

Taking a lot of the "noise" out of the case (and it is one which gathered some publicity in the media as to its ultimate outcome), there was one important lesson to be learned for those who manage workplaces. That is always to be mindful of the potential application of the Whistleblowers Protection Act when receiving information from one employee about another employee, which might have been provided in confidence. Relaying that information to a third party, including the person being complained about, without obtaining the permission of the person who disclosed the information in the first place can potentially give rise to a breach of the Act concerned.

3. *Wang v Inghams Enterprises Pty Ltd* [2013] SAWCT 33

The worker obtained a judgment in his favour for basically the same compensation that had been offered to him prior to trial. In those circumstances, the compensating authority sought to have an adverse cost order made against the worker. Despite the fact that the ultimate award of compensation was very close to the offer as made previously, the preceding Judge still felt that there were sufficient differences between the terms of the offer and the compensation award, and that the offer did not address

all of the issues that might have been of concern to the worker (including some non-compensable issues), that the exercise of the discretion should be in the worker's favour. The matter has gone on appeal.

4. ***Silvestri v SA Health*** **[2013] SAWCT 34**

Basically, this was an appeal decision dealing with issues arising in relation to the purported adequacy of the trial Judge's findings, and the evidence led to substantiate them. A decision only to be read by lawyers, or those with nothing better to do on a rainy day.

5. ***Wall v WorkCover Corporation of South Australia (Standom Smallgoods Pty Ltd)*** **[2013] SAWCT 35**

This case revolved around a dispute as to the worker's future care needs. The worker was agitating for a long term and significant level of care to be provided. The Tribunal disagreed, finding that there was currently inadequate information on which to base any permanency with respect to the applicable Rehabilitation Program. An interim care award was made, and the parties sent away to organise for the obtaining of a comprehensive assessment as to the worker's needs.

6. ***Cerin v ACI Operations Pty Ltd*** **[2014] SAWCT 36**

This particular decision is part of a continuing case that has been before the Workers Compensation Tribunal for some time, where the worker is endeavouring to effectively force the employer to provide him with suitable employment under a Rehabilitation and Return to Work Plan. This particular decision is limited to issues of discovery. In that respect, the Workers Compensation Tribunal confirmed that relevance is the key criteria as to what is to be discoverable in an action, and that relevance overrides any issue as to what might the potential size of the documentation to be discovered, or how broad the request for discovery is.

7. ***Milovanovic v Transfield Services (Australia) Limited*** **[2013] SAWCT 37**

The issue was the question of whether the claimant was a worker or an independent contractor. The Workers Compensation Tribunal looked at the usual indicia to help decide that question, and there is a discussion of the applicable indicia at pages 8 and 9 of the decision.

The Tribunal noted that what the parties might label their relationship is not strictly a decisive factor, but in the case where there is ambiguity as to the true nature of the relationship, then it is permissible to look at what the parties might call the relationship.

The Workers Compensation Tribunal also entertained an argument by the compensating authority that the worker was effectively estopped from asserting a different set of circumstances, compared to what had been the case based on his past conduct and representations. In other words, where the matter might be equally balanced on the applicable indicia, then holding yourself out as an independent contractor, and describing yourself as such to the world at large, might possibly become decisive.

8. *Talbot–Male v The State of South Australia* [2013] SAWCT 38

The Workers Compensation Tribunal was asked to deal with several particular issues arising in relation to a death claim. The first was whether any lump sum payable under section 45A was to be reduced because of a past section 43 payment that might have been received by the worker before their death, but not strictly related to the compensable injury that caused death. The answer in this regard was yes.

The Workers Compensation Tribunal also was asked to deal with the question of interest on sums payable under section 45A, and whether any interest calculation is based on simple or compound interest. The answer in this regard was the former. It was also determined that the interest rate that will be applicable in relation to payment of the lump sum is to be the interest rate applying in the year that the sum concerned is paid.

9. *Higgins v WorkCover Corporation (Tower Concrete Pumping Pty Ltd)* [2013] SAWCT 39

This is another example of Deputy President Gilchrist's approach to the settlement of death claims, and being prepared to approve a compromise involving compensation payable to a dependent child without the need for independent counsel's opinion. Furthermore, His Honour also approved of the settlement sum being paid to the mother of the dependent child, and not to the Public Trustee as a matter of course, in circumstances where His Honour found the mother to be a mature and competent person, and fit and proper to act as trustee for her daughter.

10. *Lawless v Qantas Airways Ltd* [2013] SAWCT 40

In this case, the claims agent agreed with the employer to effectively divert the worker's rehabilitation away from the aim of returning to work with the pre-injury employer, to a aim of having the worker find employment with a different employer. In implementing this decision under a Rehabilitation and Return to Work Plan, the employer also proceeded to dismiss the worker from their employment.

The worker challenged both the decision under the Rehabilitation and Return to Work plan, as well as the termination of his employment, with it being noted that in the latter situation the worker had applied for relief from the Fair Work Commission. It is not clear what has happened to those latter proceedings.

In relation to the workers compensation dispute, the worker had to establish that the decision to divert him towards alternative employment was an unreasonable decision. The worker agitated for relief that effectively required the employer to provide him with a new contract of employment. The question became one of whether there was suitable employment available with the pre-injury employer, and whether that had been given proper consideration by the claims agent. As to what constitutes suitable employment in this regard is discussed at length at pages 34 to 36 of the decision.

Ultimately the employer had made the decision to terminate the worker's employment, and that of others, because it was becoming increasingly difficult to operate the workplace safely in their opinion. This was due to the significant number of employees who were on modified duties, leading to a work, health and safety issue in relation to the notionally healthy employees, who were being required to take on a much greater and heavier workload as a consequence.

In giving consideration to the matter, Deputy President Hannon stepped back a little from what he had previously discussed in the *Cerin* case [commented on in our December 2013 WCT cases update) insofar as he no longer believed that a Rehabilitation and Return to Work Plan could have the effect of requiring a worker's re-employment, as opposed to imposing on the pre-injury employer an obligation to at least provide suitable duties. Nonetheless, he did leave open the question of whether section 58B could be utilised in this way in any event, as opposed to merely being a monetary penal provision as between an employer and the WorkCover Corporation. As we have flagged previously, the interaction between section's 28 and 58B of the Act and the employers general industrial obligations under the Fair Work Act and/or at common law are likely to be a continuing topic of judicial interest this year (and quite possibly will be an area of the legislation given a lot more attention when the next lot of proposed amendments to the Act are brought forward by whoever wins the State election in several week's time).

11. *Moore-McQuillan v WorkCover Corporation (Wolf Air and Dive Shop)* [2013] SAWCT 41

This decision is a continuation of the saga that has been running between the worker and the WorkCover Corporation for a substantial part of the existence of the Workers Rehabilitation and Compensation Act. The worker had attempted to lodge appeals against previous decisions/appeals, and as a procedural matter his attempt to do so

was dismissed, with the Registrar directed to reject the lodgement of the documentation filed by the worker.

12. ***Akhlaqi v Employers Mutual Limited (Torrens Transit Services)*** **[2014] SAWCT 42**

The worker had been unsuccessful in previous litigation. He had subsequently lodged a further claim which was rejected, and thus he lodged a Notice of Dispute. The Compensating Authority endeavoured to have the Notice of Dispute struck out as endeavouring to re-litigate past decisions. The Workers Compensation Tribunal found that what the worker was seeking to agitate was effectively an aggravation of his earlier injuries with a later employer, and while the Workers Compensation Tribunal described the evidence in support of the worker's dispute as "weak", they concluded that that was not of itself sufficient to summarily dismiss the worker's claim as being destined to fail.

13. ***Soldi v WorkCover Corporation (Rota Forma Pty Ltd)*** **[2013] SAWCT 43**

This case largely revolves around procedural/evidentiary issues relating to section 35B cases, and particularly who has to present their case first in a situation where the worker has challenged a decision by the compensating authority that he or she has a current capacity for work at the end of the third entitlement period. While the Tribunal confirmed that it was the compensating authority who had the onus of proof in this regard, they decided that it was appropriate that the worker should present his or her case first.

It is also of interest to note that the worker endeavoured to undermine the section 35B assessment on the basis that what he was always compensated for was a back injury, and that while he had lodged a later claim for wrist injuries arising from the same incident (and which were referred to in the section 35B decision), he had not received 130 week's worth of weekly payments in relation to those latter injuries, (which were accepted for medical expenses only), and therefore could effectively avoid the

cessation of weekly payments on what amounted to a technicality. Unfortunately, this aspect of the matter was not finally determined by the Workers Compensation Tribunal, but is highly likely to come up again in future cases.

14. *Christian v WorkCover (K W & P L Mawdsley)* [2013] SAWCT 44

This claim involved a dispute as to the cause of a worker's fatal heart attack. The worker had suffered chest pains several days before the events of the fateful day. On that day he had only worked for about half an hour. All of the medical experts agreed as to the fact that the worker had suffered a heart attack several days beforehand, but there was a dispute between them as to whether the exertion that the worker went to on the last day of his life was sufficient to progress his condition in some material way. The Workers Compensation Tribunal accepted the evidence of one expert that it was reasonable to conclude that the physical activities undertaken by the worker during that half hour on the last day of his life were sufficient to accelerate his condition. His ultimate death was therefore considered to be compensable, notwithstanding the fact that all of the experts also agreed that the worker's death was probably going to be inevitable at some stage, because of the very high risk that he would suffer a fatal rupture to the heart muscle that had been damaged several days beforehand.

15. ***Henstridge v WorkCover Corporation (HF Betts & Co)*** **[2013] SAWCT 45**

The worker had the misfortune to suffer a complete loss of his arm at the shoulder joint as a result of a work injury. A dispute arose as to how his section 43 entitlements were to be determined. The worker sought to bring his entitlement within the AMA Guides only, on the basis that applicable restrictions on the extent of the impairment assessment under the WorkCover Guidelines should not apply because his complete loss of shoulder was said to be different from a complete loss of the upper extremity. If the worker was right he would have been able to obtain a payment of 70% of the prescribed sum instead of 60% under the WorkCover Guidelines. The Tribunal did not accept the worker's argument.

16. ***Bailey v GM Holden Ltd*** **[2013] SAWCT 47**

This is another case which largely depends upon its own facts as to causation of the worker's medical condition. He developed interstitial lung disease, which he attributed to exposure to certain substances in the workplace. Deputy President Gilchrist confirmed that it is for the trial Judge to make a common sense evaluation of all of the evidence in the matter, rather than simply approaching the decision on causation from the narrower perspective of scientific fact. Again, this decision is on appeal.

17. ***Ettridge v WorkCover Corporation (Gemini Electric Motor Company Pty Ltd)*** **[2014] SAWCT 1**

This decision continues the ongoing dispute between the claimant and the WorkCover Corporation over whether the claimant should be considered a worker for the purposes of the legislation. The Full Bench of the Workers Compensation Tribunal had remitted the matter to the trial Judge to decide certain issues as to estoppel, with the claimant alleging that by its conduct in certain ways WorkCover should be estopped from denying that the claimant was a worker for the purposes of the Act. The claimant pointed to issues surrounding employer registration, the basis on which the employer

paid levies and other matters, but failed to convince the trial Judge that the circumstances concerned created a situation whereby it would have been unfair for the WorkCover Corporation to deny the claimant was a worker for the purpose of a legislation. Interestingly, the trial Judge had some strident comments to make about the higher Courts seeming to permit a situation to occur whereby on any of the usual indicia applicable, the claimant would never be a worker under the Act, but can be considered to be so in the case of estoppel by conduct applying.

18. ***Ettridge v WorkCover Corporation (Gemini Electric Motor Company) Pty Ltd*** **[2014] SAWCT 2**

Not quite a case of déjà vu, but certainly a decision involving the same parties as the previously discussed case. In this latter case, Mr Ettridge was seeking to rake over certain prior issues by way of the lodging of a new Notice of Appeal. The Notice of Appeal was struck out on the basis that the matters that the claimant was raising were previously decided, and that a continued ventilation of them by way of a new Notice of Appeal was considered frivolous and vexatious.

19. ***Miller v WorkCover Corporation (Australian Wind Services Pty Ltd)*** **[2014] SAWCT 3**

This decision deals with the extra-territoriality provisions under section 6 of the Act. As you would know, where the claim is to be handled and where compensability is assessed, is determined by a three step test.

The worker had just been employed with the employer. He was injured when working in Western Australia. He had just gone to work there in the previous month. It was his intention to continue to work with the employer into the future, but that could have been at a number of possible locations.

With this in mind, the Workers Compensation Tribunal felt that Western Australia was probably not the place where the worker usually worked (the time to assess this being

too short), or would usually work in the future. This meant that the worker did not come within the first arm of the test in section 6.

The second arm of the test deals with where a worker would be usually based, and if usually based in one particular state then that was where the claim fell to be determined. In this case, it was found that as the worker habitually moved around a lot, and would do so in the future, so it could not be said that he was usually based in one State.

Therefore, the decision boiled down to the third limb of the test, which deals with the employer's principal location for the purpose of conducting business in Australia, and in this case it was found that the employer's principals locations was within South Australia, and therefore the worker's employment and his claim were connected with this state.

KJK Legal

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