

Latest WCT Cases

After a slow start to the year, the Workers Compensation Tribunal has been pushing out a number of decisions of late. The strong word on the ground is that this is a reflection for a change of policy by the claims agents, regarding the increased frequency of rejection of stress claims, and an increased emphasis on pushing out section 35B in decisions.

Be that as it may, there are still some other issues on which to focus our attention, even if a good number of the decisions concerned are not particularly ground breaking in a claims management sense.

Kosmala [2014] SAWCT 4

The Workers Compensation Tribunal confirmed that in looking at the costs of the conciliation process, there are separate amounts allowed at separate times of the process – up to the time of the first conference attendance, and then afterwards. The Workers Compensation Tribunal decided it was not appropriate, as a Conciliation Officer had done, to allow the maximum for one part of the process, and then effectively transfer some of the costs of that process into an allowance for costs of the second part of the process.

The Tribunal also indicated (without deciding) that **any costs of the conciliation process cannot include those costs of a solicitor/client nature**, even if the resultant sum claimed comes within the overall maximum limit allowed.

Cheriton [2014] SAWCT 5

This is a stress claim that was predominantly decided on its own facts. The employer fell into error in deciding to terminate a senior employee's Contract of Employment earlier than the expected duration of the Contract, and for what were considered to be unreasonable grounds. See also **[2014] SAWCT 21** for further consideration of the actual compensation payable to the worker concerned, and whether it could be off-set by the early termination payment that he received.

Climas [2014] SAWCT 6

This matter involves an appeal on various questions of (purported law) that the Workers Compensation Tribunal found weren't questions of law at all. However, paragraphs 40 and 41 of the Decision are a useful read, to understand the difference between medical sciences' approach to proof and the possible/probable causes conundrum, and the approach that is taken by the Court to the same questions.

Erfurth [2014] SAWCT 7

This matter involved an application to call a Rehabilitation Co-ordinator to give evidence. There had been no statement obtained from the Rehabilitation Co-ordinator, and objection was taken by the worker (based on section 28(3) of the Act) as to the actual reliance upon anything that might have been said to the Rehabilitation Co-ordinator. At the end of the day, the Workers Compensation Tribunal made an order that a statement from the Rehabilitation Co-ordinator could be provided as part of the Trial Book, and marked for identification, but

that it was to be left to the trial Judge to rule on the question of admissibility – which would normally only occur either with the worker's consent, or where the Rehabilitation Co-ordinator's statement addressed an issue of potential fraud.

Athans [2014] SAWCT 8

The dependent partner of a deceased worker had utilised a lump sum that she received on account of the worker's death to help retire debts, and create various forms of investment from which she was able to live off, and to meet the cost of living expenses on which she had previously been dependent upon the deceased worker. The claims agent concerned, when undertaking an annual review, adjusted the dependent partner's weekly payments benefit and significantly reduced the ongoing benefit because of the earnings from the investments.

The dependent partner challenged the decision, but the Workers Compensation Tribunal found in favour of the claims agent. The case concerned has attracted a good deal of publicity, and is in fact on appeal, but its current outcome reflects one of several potential oversights that the legislators did not foresee when drafting the various provisions concerned. Of particular consideration was the fact that in this case the dependent partner had made good use of the money, rather than frittering it away, and effectively disintitiled herself to ongoing weekly payments.

Sales [2014] SAWCT 9

In this case, the Workers Compensation Tribunal approved of a settlement for a section 43 payment to a worker who was under a disability, and whose interests were being protected by a litigation guardian. While details of the settlement approved are not known, the case involved the worker seeking a further section 43 payment under the post-2008 provisions, having already received a monetary sum equating to 99.85% of the previous maximum lump sum payment. Unfortunately, we will never know what the Workers Compensation Tribunal actually thought about the realistic prospects of the worker succeeding with the argument that was being brought.

Bitmead [2014] SAWCT 10

On an Application for Directions concerning the seeking of effectively a split trial, the Tribunal, in indicating that it was not going to agree to the request made, confirmed that it had a mandate pursuant to the Act to effectively get on with matters, and not be side tracked or delayed by preliminary points.

Weeding [2014] SAWCT 11

The worker alleged that he sustained hypertension as a compensable injury, arising from a prior and compensable psychological injury. The Workers Compensation Tribunal agreed. The trial Judge referred to the worker's obligation to prove causation in fairly broad terms, in paragraph 3 of the Decision. Whether the test for causation will be as easy under the proposed new Act remains to be seen.

Daniels [2014] SAWCT 12

Another situation where the Workers Compensation Tribunal was called upon to approve of a settlement, where the worker was profoundly disabled as a result of a stroke, with the Tribunal making consent orders to put into effect the settlement, based on counsel's advice.

Goodwin [2014] SAWCT 13

The worker sought to bring a claim in two jurisdictions, involving unfair dismissal at the State Industrial Relations Commission, and for workers compensation at the Workers Compensation Tribunal. The actual respondents to the actions were different in the two cases (being a local Council and then then Local Government Association). However, the application for the cases to be heard together was granted, as the issues concerned were largely similar between the two jurisdictions. Interestingly, if the matter had involved the Workers Compensation Tribunal and the Fair Work Commission (a Commonwealth body), than it is likely that the presiding Judge would have not ordered the matters to be jointly heard together, as there are differing considerations that apply in trying to hear such cases together.

Hughes [2014] SAWCT 14

The worker suffered a psychotic episode at work, which was attributed by him to various work events and circumstances, and especially the fact that he was working in an isolated employment location. The trial Judge was troubled by what he saw as an apparent reconstruction of the worker's evidence, with the causes of his condition growing in number as time passed, and also with some of the inconsistencies described in the medical evidence.

Shore [2014] SAWCT 15

In this matter, the worker was attempting to convince the Workers Compensation Tribunal to set aside consent orders that had been made 5½ years earlier. He failed to do so, largely because the Trial Judge relied on a principle of the finality of litigation, especially where the worker had been represented by a legal practitioner at the time of the original settlement. The worker had agreed that he had "ceased to be incapacitated" at the time of the original settlement, which is a common term inserted into Minutes or Order by the claims agents when looking to close off claims for only a closed period. Even though the worker's condition considerably altered at a later time, this was not of itself sufficient for the previous settlement orders to be set aside. The decision proves that **sometimes the Workers Compensation Tribunal will enforce time limits!**

Markotic [2014] SAWCT 16

The worker had lodged a claim for compensation, alleging psychiatric injury as a result of a workplace investigation of her conduct. Some of that conduct was possibly illegal, and SAPOL were involved. The worker made application to the Workers Compensation Tribunal that the police investigation file ought to be the subject of an order for production by way of a Summons, as it might contain matters relevant to her employment and her dismissal. The Workers Compensation Tribunal refused on the grounds that the application was basically

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"fishing", and against the public interest, and effectively suggested that the worker's expectations about obtaining access to the police file had an unreality about them.

Wang [2014] SAWCT 17

This matter involved an appeal by the worker against a decision of the Workers Compensation Tribunal that one of his disabilities was not work related. There were also cross-appeals by the employer on elements of the decision. While there were lots of purported questions of law, the Workers Compensation Tribunal decided that in reality there weren't.

One issue that the Workers Compensation Tribunal did decide is that where there are two separate injuries that might cause an incapacity for the same period of time, there is no entitlement to double compensation – effectively the worker had been trying to argue that combining the two periods and amounts of weekly payments together, but capping the payments at effectively the 100% rate overall, was a way to avoid the step down provisions. The Tribunal disagreed.

Toth [2014] SAWCT 18

Another case where there was **an attempt to strike out a Notice of Dispute** at a preliminary stage. And again, the Tribunal found that the high hurdle that had to be overcome in this regard was not met – that **the Tribunal had to be satisfied that a worker's case was "so obviously untenable that it cannot possibly succeed or that it is manifestly groundless"**. The decision is a salutary reminder of the difficulties faced when attempting to strike out Notices of Dispute on technical grounds prior to trial.

Warren [2014] SAWCT 19

This decision is largely confined to its own facts, although when compared to the earlier decision of Hughes (No. 14), it is interesting to note that in this case the trial Judge found that expanding grounds for a psychiatric claim, despite a specific lack of complaint of key historical and causal issues to the treating doctor, did not give the trial Judge sufficient cause to particularly doubt the worker's evidence.

Lock [2014] SAWCT 20

Again, a psychiatric claim largely decided on its own facts, which weren't particularly in dispute. However, the Workers Compensation Tribunal did suggest that in the case of workplace management of an ill employee, it is always important to deal with issues with empathy, and not to press issues where there is no urgency involved in what was a very sensitive situation, which in this case, was a significant cause behind the worker's ultimate psychiatric injury.

Cheriton [2014] SAWCT 21

Following on from its earlier decision as to the compensability of the worker's condition, the Workers Compensation Tribunal was subsequently called upon to decide the extent of the worker's entitlement. The worker had received a termination payment at the time of his dismissal. The employer sought to have that payment off-set against the workers

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compensation entitlements for a particular period of time. However, the trial Judge found that there had been no double compensation for the worker in receiving both weekly payments and the termination benefit, as they **were not being paid for the same loss or event**. The termination payment was not being made because the worker was ill (as was the case with his compensation), but was for the fact the employer breached the contract of employment instead. No off-set was allowed notwithstanding the fact that the payment concerned effectively covered the remainder of the period of the worker's contract of employment, which also covered part of his period of incapacity.

Rezai [2014] SAWCT 22

In this case, the worker asserted three different compensable disabilities. Only of them was ultimately accepted as compensable. It was also found to be partially incapacitating. However, the two non-compensable disabilities possibly led to the worker being totally incapacitated, and therefore were likely to affect the worker's ongoing entitlement to weekly payments. The trial Judge has called on the parties to make further submissions as a consequence of his findings, and if the non-compensable injuries do indeed totally incapacitate the worker, then in accordance with a decision under the old Workers Compensation Act (*ETSA v Hartwell*), the worker concerned might find that his entitlement to weekly payments is drastically reduced, or done away with altogether.

Kapetanios [2014] SAWCT 23

The worker and the employer had negotiated a settlement agreement, at the Workers Compensation Tribunal, which was reflected by the worker signing a handwritten note at that time setting out certain of the terms of the settlement that were to be put into effect. Ultimately, the worker decided to pull out on the settlement concerned. He did so before he had received the various forms of redemption advice that were required, and before a number of the finer details of the settlement had also been agreed upon.

The Tribunal found that the settlement agreement was not enforceable, particularly in circumstances where it involved a redemption payment, and **where the necessary prerequisites (the professional, financial and medical advice) had not been obtained**. Interestingly, the Workers Compensation Tribunal did indicate that if all of those advices had been obtained, and all other aspects of the matter agreed, then the settlement might still have been binding even if the worker had thereafter tried to pull out of the agreement prior to the Workers Compensation Tribunal giving the necessary section 42 approval.

The Workers Compensation Tribunal also indicated that notwithstanding some aspects of the settlement "falling over", other aspects of the settlement as negotiated might still have been capable of being enforced by one party as against the other. The decision concerned emphasises the fact that a binding settlement in workers compensation almost never occurs at the time of the actual discussions between the parties, but only upon the completion of the various documents that might be associated with implementing the settlement, and not beforehand.