INTRODUCTION

The Workers Compensation Tribunal finished off 2014 with a flurry of decisions, quite a few of which bear some consideration. We see several trends developing as a result of the decisions that were handed down throughout 2014, including the limited prospects that litigants have for successfully appealing decisions made at first instance, and a possible softening of attitudes by the Judges at the Workers Compensation Tribunal in assessing applications to strike out Notices of Dispute for want of prosecution. Is this becoming a way in which the Workers Compensation Tribunal might be setting out to "prune" its lengthy list of matters that are backed up for hearing, and also those matters that are continually adjourned over periods of time that can amount to years?!

It will be important to remember, as the *Return to Work Act* commences later this year, there will still be a number of important decisions handed down by the Workers Compensation Tribunal after that time, and while there continues to be a run off of cases under the current legislation. Of course, there will also be a number of issues of common interest as between the two sets of legislation, as common principles arising under both Acts will be dealt with by either the Workers Compensation Tribunal (while it continues to exist) and the new Employment Tribunal.

Coleman [2014] SAWCT 42

Deputy President Lieschke identified the Workers Compensation Tribunal's role in dealing with section 43 disputes, and competing medical assessments, by confirming that the Tribunal's role is not to substitute its own assessment, or simply prefer one of multiple assessments, but to determine the correct application of the Permanent Impairment Assessment Guidelines to the accepted facts of the case. This opens up the Workers Compensation Tribunal's discretion to effectively pick the eyes out of various assessments and combine them with its own approach to the Guidelines to come up with an ultimate decision. See paragraph 65 of the Decision in this regard.

Deputy President Lieschke also made some useful comments about issues for consideration when deciding what approach to take when there are differing methods of assessment for a particular impairment, and especially where important factors such as range of movement might be different as between various assessing doctors. See paragraphs 103–107 and 114–122 in this regard.

Deputy President Lieschke then concluded that with respect to injuries to both knees, when using gait derangement as the most appropriate assessment vehicle, then there would only end up being one assessment overall. In the case at hand Deputy President Lieschke found there was a 20% WPI arising from gait derangement to the right knee, and that this meant that there would be a 0% WPI assessment for the left knee, even though of itself that limb was impaired.

Baker [2014] SAWCT 43

The Workers Compensation Tribunal looked into the issue of the effect of a prior injury and a new injury to the same area of the body, for section 43(7) purposes. It was submitted by the worker, who was seeking to avoid the application of the section 43(7) provisions, that if an initial injury simply leaves a 'vulnerability' to future trauma, then that is the deciding factor when it comes to assessing whether a prior injury is related to a later injury (and in that event if there is simply only a vulnerability to future trauma, then there is said to be no relationship between the two injuries).

The Workers Compensation Tribunal disagreed as to whether that was the applicable test. It comes back to the facts of each case, and to be mindful to give words such as 'aggravation' their plain ordinary meaning. The decision is also useful to read from the perspective of what might be considered to be the relevant differences between what is an aggravation, exacerbation, acceleration, recurrence or deterioration.

Sanders [2014] SAWCT 44

The worker issued an application seeking to restrict access by the other parties to medical information that had been summonsed to the Workers Compensation Tribunal. Deputy President Jennings agreed that there should be a restriction on the employer's access to what was considered to be non-relevant material, and made the important point that the issuing of a Summons in this regard should not be seen as a 'back door way' to access more information than a party was obliged to otherwise provide discovery of. This view, if it takes hold amongst workers solicitors, may see an increase in the number of applications by workers to have access to their medical records restricted.

Equally, in the event that there is properly discoverable material in the records, then President Jennings made it clear that the obligation is on the worker to make that fact known, by way of discovery. What is discoverable, as far as medical records are concerned, comes back to a basic test as to whether the documentation concerned may 'fairly lead to a train of enquiry'.

Reichelt [2014] SAWCT 45

The worker sought to hold the Compensating Authority to a settlement that had been agreed upon, after Minutes of Order had been prepared, but where the Compensating Authority then sought to renege on the settlement before the orders were filed because of new information that had been received.

Deputy President Gilchrist first asked the question as to whether the Workers Compensation Tribunal could effectively enter judgment on the orders in the circumstances. He indicated that the answer was yes, if he was satisfied on the facts that there had been an agreed settlement reached. There was a discretion to not enter judgment if it was felt that there had been no genuine agreement reached.

Deputy President Gilchrist indicated that if the Compensating Authority was then dissatisfied with the decision, that they had certain rights to seek to vary or set aside the decision under the Act (in the event that they could make a case for unfairness).

Deputy President Gilchrist's decision cuts both ways. Workers are at risk in similar circumstances, if they seek to renege on what is up until that point seemingly a clearly negotiated settlement. This is to be contrasted with the different rules that apply in relation to redemption agreements, where there are certain pre-requisites that must be met before a binding agreement is in place, even after an apparent agreement is reached as to a figure.

Reid [2014] SAWCT 46

The worker brought an application for a separate hearing on various preliminary issues. In essence, the decision is only one for litigation junkies to read. However, the decision also outlines the complexities of how section 35B and section 35C interact, and particularly where a worker is on and off work from time to time. The Tribunal's consideration of these issues would be of some importance, but for the fact that section 35B and section 35C are soon to disappear!

Sheriton [2014] SAWCT 47

The Full Bench of the Workers Compensation Tribunal confirmed a previous single Judge's decision that a payment of workers compensation benefits and a separate payment for the fact of an early termination of a worker's Contract of Employment were different in character, and therefore one could not be off-set against the other, even if they were effectively paid for a loss over the same period of time. In the case at hand, the lump sum payment for a worker's early termination of his Contract of Employment was not to be utilised as a means to reduce the weekly payments liability.

Caporn [2014] SAWCT 48

The case is interesting for the finding that notwithstanding that a worker was from time to time doing something that looked like work, he was still found to have had 'no current work capacity' for section 35B purposes. While his ability to do some work was considered, it was also important in the Tribunal's view to assess whether what was being undertaken was, or was not, suitable employment. In other words, assessing the primary issue for section 35B purposes involves a two-pronged approach, assessing what a worker's capacity for work might be, and then assessing to what extent the activities being performed have the look and feel of constituting suitable employment.

Dodds [2014] SAWCT 49

This case is one involving a section 36 notice, and was largely decided on its own facts.

Hastings [2014] SAWCT 50

An application was brought to strike out a worker's Notice of Dispute for want of prosecution. It is worth reading paragraphs 15–32 of the Decision, which will outline the Workers Compensation Tribunal's approach in cases where there is significant and unexplained delay. The Tribunal also noted the importance of a party's time, energy and resources not being wasted because of such continual delay, and also the impact that this has on the orderly conduct of all matters at the Workers Compensation Tribunal (where cases can effectively hold up the rest of the list, due to constant delay and applications associated with that delay).

Buckett [2014] SAWCT 51

This decision assumed some prominence in the media recently, involving a doctor who was involved in a motor vehicle accident while performing a 'recall' back to work. The doctor concerned had seen a patient one evening, and then came back in to work earlier the following morning to review the patient. He was due to commence work later that morning.

The Compensating Authority attempted to characterise the doctor's journey as simply an ordinary one, with no special characteristics that made it compensable. The Workers Compensation Tribunal disagreed, rightly so on the clear facts of the case. They concluded that it was not necessary that the worker was **directed** to come back to work to perform the recall, nor that he did not claim wages for the early return to work and trip associated therewith (even though legally he could have done so, but had chosen in the past not to do so).

Ali [2014] SAWCT 52

While this case largely deals with pre-trial issues and the provision of particulars and adducing of evidence prior to trial, it is useful to note that the Workers Compensation Tribunal recognised that there was the potential for a Compensating Authority to lead broader evidence in the pre-trial period then what might have been relied upon to substantiate the issuing of a section 35B notice in the first place, but that there will also come a time when it is too late to do so.

Schubert [2014] SAWCT 53

This is another case where a worker's dispute was dismissed for want of prosecution, again largely because of unexplained delay.

Shore [2014] SAWCT 54

The Full Bench of the Workers Compensation, on appeal, confirmed the trial Judge's decision not to set aside Consent Orders that were made in 2007, and dismiss the worker's associated application.

The worker had agreed to Consent Orders that had as part of them a notation that he agreed that he had ceased to be incapacitated for work as at the time of the Orders. The worker conceded that he agreed to a notation to this effect because he thought he was getting better, but didn't.

It was submitted that because the issues in dispute had not been formally expanded to cover the 'ceased to be incapacitated for work' issue, then this was a reason to set aside the Consent Orders. The Tribunal disagreed, noting the worker's concession as to his knowledge of the fact that the additional issue was going to be included in the Orders in any event, even if not via the official 'channels' (section 88DA).

The worker also argued that the trial Judge had gone over and above the wording of the legislation in deciding not only to look at what the interests of justice were in assessing the worker's application, but also looking to see if there were exceptional circumstances to why the worker's application should be supported. The Workers Compensation Tribunal disagreed that the trial Judge had taken into account broader considerations than the legislation allowed, but suggested that the trial Judge's comments simply recognised the fact that in a case where there were thousands of Consent Orders made every year, then the parties were entitled to consider that once the Workers Compensation Tribunal had signed and sealed such Orders, then that would ordinarily be the end of the matter.

Copies of the Decisions referred to above, can be found by following the links at http://www.industrialcourt.sa.gov.au/.

As always, if you have any queries concerning any of the issues that have come up in the cases discussed above, then please do not hesitate to contact us.

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