The News As We Know It

LATEST WCT CASES

Introduction

After a slow start to 2014, as far as the rate of decision-making is concerned, the Workers Compensation Tribunal has been ramping things up of late.

It looks like we can expect there to be a considerable number of decisions handed down in the very near future, judging by the amount of disputes that have been pushed through the system over the last six or more months, and as there is a "clearing of the decks" before the advent of the Return to Work Act.

While we will be facing a new piece of legislation, a number of the issues that the Workers Compensation Tribunal are dealing with now will have equal application to the new legislation and the jurisdiction of the South Australian Employment Tribunal including several of the cases discussed below.

On a separate issue, KJK Legal is involved in the following events, which you might be interested in attending:

1. SISA's annual Closing the Loop conference is on 30 July. You can find a link to the conference at www.sisa.net.au. KJK Legal are again pleased to be a sponsor of the event.

2. The annual Both Sides of the Fence workers compensation seminar is on 16 October, so put that in your diaries as well. More details and registration for the seminar will be published soon. Our Mark Keam is a member of the event organising committee, and he advises that the committee are working hard on a comprehensive agenda dealing with many aspects of the new legislation.

Jones [2015] SAWCT 1

Another example of an unsuccessful application for summary judgment. In order to make such a judgment the Tribunal felt that it would have to make various factual findings, which meant summary judgment was inappropriate.

Robeson [2015] SAWCT 2

The primary issue at stake was the appropriate procedure for the hearing of a Section 35B case. As that section of the current legislation is not repeated in the new legislation, then issues as to procedure in this regard have lost their importance.

Kaur [2015] SAWCT 3

The worker sought an order from the Workers Compensation Tribunal permitting her and her lawyer to inspect her workplace, subsequent to the rejection of her claim. One of her treating doctors had already inspected the workplace previously, but the worker challenged whether that earlier inspection was adequate, and whether the doctor had seen all of the duties etc.

The Workers Compensation Tribunal agreed that it had the power to make such an order, and while there was no specific rule under the Workers Compensation Tribunal rules, the Workers Compensation Tribunal confirmed that in such a case it was therefore appropriate to apply any applicable Supreme Court Rule covering the situation.

The Workers Compensation Tribunal allowed the worker's request, believing it to be in the interests of justice, and where to do so was likely to save time and costs in the long run.

We can expect to see more of these applications in the future, with workers, their lawyers and treating doctors requesting permission to inspect the workplace, particularly where causation will now be a live issue in the future.

Allowing an inspection of the workplace is not carte blanche permission for a worker and their solicitor to do anything they like, speak to anyone they like etc. There are strict rules surrounding workplace inspections as part of litigation. They are not a basis to enable workers and their lawyers to question people or to take statements from other employees while they are there. Paragraph no. 25 of the decision sets out the parameters upon which inspections can be conducted.

Lawless [2015] SAWCT 4

The Full Bench of the Workers Compensation Tribunal was called upon to make an order as to costs on the worker's ultimately unsuccessful dispute. As opposed to the ordinary rule that the loser pays on appeal, the Workers Compensation Tribunal ordered that each party bear their own costs. They considered that there were sufficiently unusual circumstances to depart from the usual rule, including the fact issues identified by the parties were not fully dealt with previously by the Workers Compensation Tribunal. You can expect to hear a lot more submissions of that nature, from unsuccessful appellants, where the various new provisions of the Return to Work Act are tested before the Courts.

Cannon [2015 SAWCT 5

At paragraph 4 of the decision there is a useful short summary of how the Workers Compensation Tribunal (and in due course the South Australian Employment Tribunal) will approach Section 30A cases dealing with the question of reasonable action – it is not all just about the decision taken, but how and why it is implemented.

Nesbitt [2015] SAWCT 6

While the Workers Compensation Tribunal deals with a number of issues in the case, it is its discussion of Section 4(6) that is of particular interest. The Workers Compensation Tribunal confirmed that there are no circumstances in which Section 4(6) can be utilised to look prospectively of what happened at a workplace after the date of injury, when it comes to setting average weekly earnings. Average weekly earnings must always be assessed on a retrospective basis. The Workers Compensation Tribunal also noted that Section 4 is directed towards getting a "fair average" when assessing average weekly earnings, and not a "fair result".

The decision was also noteworthy for the fact that the worker was not to be criticised as breaching her obligation of mutuality, when she resigned to take on a higher paying job. The Tribunal noted that if she had been paid fairly in the first place, by way of the setting of her

average weekly earnings at a higher rate, then she would have not had the motivation to leave the pre-injury workplace.

Catford [2015] SAWCT 7

This matter dealt with a worker's claim to have various non-cash benefits included in his average weekly earnings. He was a Chef on The Overland passenger train, and in that regard received various benefits including accommodation, laundered clothing, a uniform allowance, a sleeping cabin and showering facilities, while working on the train.

The Workers Compensation Tribunal confirmed that it was necessary to look at the non-cash benefits provided, and firstly consider whether they would be included in what a worker would ordinarily "make" as earnings, and secondly that they needed to come within Section 4(13) and Regulation 7 as well. In that regard, the Workers Compensation Tribunal felt that any allowance towards accommodation should not be given an expansive definition, to cover some of the other claimed allowances that the worker made, including food.

At this point in time, the Workers Compensation Tribunal has not published its decision in [2015] SAWCT 8. We can only speculate as to why – it is presumably the subject of an application to suppress names and or information.

McDonald [2015] SAWCT 9

In a rather interesting and convoluted case, the Tribunal had to deal with differing permanent impairment assessments, and the use of video evidence that was obtained at about the time of one of the assessments that was under challenge. Of particular note was the compensating authorities attempted use of the video evidence to show that ranges of motion exhibited by a worker during permanent impairment assessments were inconsistent with those observations and notionally objective evidence.

Instead of directly relating the observation evidence to the range of movement assessments of a particular doctor, the Workers Compensation Tribunal appeared to simply rule out certain elements of the doctor's assessment because of internal inconsistencies relating to the range of movement exhibited by the worker in any event. Interestingly, the Workers Compensation Tribunal in going on to prefer another doctor's evidence, still excluded certain of that doctor's findings in relation to range of movement as not being reliable, and ultimately came to a view on permanent impairment that was less than either of the two opinions expressed by the doctors involved in the case.

Nelson [2015] SAWCT 10

While this case is very much decided on its own facts, as a reasonable action taken in a reasonable manner dispute, it is notable that the Workers Compensation Tribunal still found against the worker even though she herself perceived that her transfer in employment was a demotion. The worker's perception in this regard was not taken to be decisive, in circumstances where there had been no change in her classification, the transfer met the needs of the business concerned, and was undertaken in a reasonable manner.

Aitro [2015] SAWCT 11

In a somewhat unusual turn of events a worker consented to summary judgment being entered against him on a Section 35A dispute, even though it meant a possible right of recovery of weekly payments against him (presumably there was more to his concession than meets the eye!).

Tivey [2015] SAWCT 12

While the case is very much one dependent upon its own facts, it is an unusual medical situation that the Workers Compensation Tribunal was called upon to consider. The worker had injured her back, and at a point in time later on an infection came to occur in that same area of her back. The Workers Compensation Tribunal accepted that there could be, and indeed was, a link between the two events and the medical problems associated with the infective process were therefore considered to be compensable.

Cheema [2015] SAWCT 13

Again, a case very much dependent on its own facts. Notwithstanding that the Tribunal was satisfied that the worker had been involved in a motor vehicle accident, they did not accept that he had injured his back at the same time, largely because the accident occurred at such a slow speed, where there were factual issues regarding contemporaneous reporting of the injury, and an inconsistent history provided as between witnesses.

Henstridge [2015] SAWCT 14

Another case involving an application for dismissal of a worker's Notice of Dispute for want of prosecution. In agreeing with the application brought by the Compensating Authority, the Workers Compensation Tribunal also indicated that there were probably grounds to strike out the worker's Notice of Dispute much earlier in time, once it had been indicated to the Workers Compensation Tribunal that she had instructed her advocate to concede the dispute. The application to strike out the proceedings was brought against a background of a failure for any Minutes of Order to be lodged on behalf of the worker, confirming the previous instructions to concede the dispute. The Workers Compensation Tribunal seems prepared to entertain applications for striking out of disputes in circumstances where there is at least a clear indication in one or another from a worker, or their representative, that they do not wish to proceed with a dispute, without requiring more.

As always, copies of the decisions discussed above can be accessed at www.industrialcourt.sa.gov.au.

Again, if you have any queries concerning any of the issues that we have discussed in the cases referred to above, then please do not hesitate to contact us.

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