2016 SPRING TRIBUNAL CASES UPDATE

Introduction

While it might have been a long and wet winter, the South Australian Employment Tribunal has certainly not been in hibernation over that period of time. Decisions have been coming through thick and fast, although it is also fair to say that quite a number of them are still addressing issues that arose under the prior legislation. That has particularly been the case in a procession of decisions dealing with the question of whole person impairment.

Preedy [2016] SAET 36

The worker originally sustained an injury to his shoulder. Later on, he was receiving physiotherapy to treat the injury. He had the misfortune of sustaining an injury to his neck as a result of that treatment. Initially, the worker received a lump sum payment pursuant to section 43 of the Workers Rehabilitation and Compensation Act ('the old Act') for his shoulder injury. He later sought an assessment of whole person impairment for his neck injury, in January 2016, pursuant to section 58 of the Return to Work Act ('the Act'). In doing so, he wanted to have his shoulder and neck assessments combined, as this would have resulted in him being certified as "seriously injured" for the purposes of the new legislation.

The Tribunal looked at section 22(8)(c) of the Act, and the question of combining impairments arising from the same injury or cause, and then section 58(6) of the Act regarding the combining of two or more work injuries from the same trauma, and decided that in cases such as this the provisions of section 58 effectively trumped those of section 22, and consistent with the earlier line of authority arising from *Marrone's* case, determined that you could not combine injuries from separate traumas for the purpose of any serious injury assessment. This is not to be confused with what might be described as the "sequelae" cases, where various impairments arise at a later point in time as a consequence of an earlier injury – see below.

Pollidorou [2016] SAET 37

In this case, the worker sustained an initial physical injury, and later developed psychiatric sequelae and symptoms associated therewith, and then also developed other associated medical conditions arising from the original injury. In particular, the worker had undergone operative treatment to repair her injured shoulder. Further complexity was added to the case because various medications that she was taking to treat both her pain and her depressive/anxiety condition that she developed as a sequelae, gave rise to various physical manifestations of impairment.

Deputy President Lieschke determined that the various physical injuries the worker sustained and the operative scarring that occurred later on, were all to be combined, assessed and compensated pursuant to the one prescribed sum/year. He also found that the various physical ailments arising from the consumption of medication, whether to treat the physical or psychiatric injuries, should also be combined, but did not proceed to make a final assessment as to whether all of those problems should be related back to the same date as the original injury.

***Watkins* [2016] SAET 38**

In another case where the significant impact of clause 37(6) has come to light, the injured worker sought weekly payments as a consequence of becoming totally incapacitated due to surgery undertaken after 1 July 2015. The worker had previously been in receipt of a section 36 discontinuance notice under the old Act. In finding that the later surgery was not a "new injury" because of section 7(6) of the Act, the Tribunal went on to determine that the worker was not entitled to weekly payments for the time off work required by the fact that she underwent surgery, because of the application of clause 37(6) of the Transitional Provisions.

***Mitchell* [2016] SAET 42**

The worker suffered from long standing noise induced hearing loss. At the time that he commenced employment with his most recent employer, the worker underwent a pre-employment audiometry test. Later on the worker sought a lump sum payment pursuant to section 43 the old Act. In determining the matter, the Compensating Authority asserted the worker was only entitled to have part of his overall noise induced hearing loss compensated as against the current employer, and only to the extent that the Compensating Authority was satisfied the worker's hearing had deteriorated post the commencement of his most recent employment.

The South Australian Employment Tribunal disagreed with the Compensating Authority's approach. They confirmed that the whole of the worker's hearing loss is deemed to occur on the date of notice of claim, and will fall to be compensated for by the last employer who was on risk as far as noise exposure is concerned. The only defence that the Compensating Authority had was to set out to prove that the last employer on risk did not expose the worker to noise. In these circumstances, and where there is an ability to proportion between employers as to potential hearing loss assessments, section 118(4) and (5) of the Act provide for recovery of a contribution of the compensation payment from an earlier employer, but only in certain defined circumstances.

***Masehela* [2016] SAET 42**

In this case, an employer had sought for the worker to be assessed by an independent medical specialist as part of a pre-trial process concerning a disputed claim. The employer was refused the ability to have an independent medical assessment organised, with the presiding Deputy President of the Tribunal relying on Rule 35 of the South Australian Employment Tribunal Rules, which limits the number of experts that a party might call in a case. On appeal, the Deputy President's decision was overturned.

The Full Bench of the Tribunal emphasised that the starting point for a party's right to arrange for independent medical assessment during the dispute resolution process was Rule 86, which allows any party to proceedings to make application for a worker to be assessed. The application is then only subject to Rule 35 restrictions on the limit of the number of experts that can be called in a case – which in this matter was clearly not an issue that was going to be called into play.

The Tribunal also went on to make the quite pertinent observation that the parties should endeavour to reach agreement on issues such as referral for independent medical

assessment, and that only if reasonable discussions have not led to agreement being reached, should the parties seek the intervention of the Tribunal.

Baillie **[2016] SAET 46**

This decision might well be familiar to many of you, as it has received some media publicity of late. The matter involves a worker who had sustained an injury to her back. She was subsequently advised to undertake Pilates as a means to assist in her recovery from her injury. As part of undertaking Pilates, the worker was instructed in various certain exercises, some of which placed particular strain on her knees. It was while undertaking one of these particular exercises that she subsequently injured her knee. The worker sought to claim compensation for her knee injury on the basis that it was causatively connected back to her original work injury and her employment.

The Tribunal agreed with the worker's assertions in this regard. It found that the only reason she sustained the knee injury was because of the fact she was performing specific exercises for her back injury. That was said to be significant enough to say that the worker's injury arose from her employment, and because of her need to undertake exercises to assist in her recovery from the back injury. The Tribunal found that there was a clear and unbroken chain of causation in the series of events that comprised her back injury, treatment for the injury, the Pilates exercises that were authorised and approved by the compensating authority, and ultimately paid for by the compensating authority.

Significantly, the case was decided under the previous legislation. The Tribunal was therefore not called upon to address the question of whether the new causation principles under section 7 of the Act might have led to a different result, but one would suspect that the outcome would be the same given the specific circumstances of the case (and as probably borne out by more recent cases).

Dallimore **[2016] SAET 47**

In another case where the question of assessment of the worker's whole person impairment came to involve a multitude of issues, the South Australian Employment Tribunal determined that the original injury to the worker's hip, and a multitude of physical complications that arose as a consequence later on, should all be combined in the one whole person impairment assessment. The rationale was that in Mr Dallimore's case he had only suffered the one work injury, with various impairments arising thereafter, but in Mr Marrone's case (discussed many times previously) he had suffered a particular injury at one point in time, and then suffered a later injury to a separate body party due to overuse of that body part. In other words, the "sequelae" cases would tend to involve assessing all various impairments as one, but that injury sustained in separate traumas altogether should be assessed separately.

Moretta **[2016] SAET 53**

Another well publicised and recent decision of the South Australian Employment Tribunal, involved a worker who sustained injury while attending a social activity at the Adelaide Oval on a public holiday. Again, the matter involved assessment of the provisions of the old Act, albeit there is a similar provision in the Act (section 7(7)).

What was all important in this particular case, and why the worker failed with his claim for compensation, was that while he was expected to network and market on behalf of his employer, his attendance at Adelaide Oval on this occasion was at the invitation of the client, as a reward for services provided. The evidence also indicated that if the worker had refused the invitation it would not have reflected adversely on either his own promotional activities or in the promotion of his employer's business. That being said, we query whether if the worker had misbehaved at the function concerned, instead of being injured, would he have had his employment potentially terminated if his misbehaviour was particularly significant? Again, while this might depend on the circumstances of the particular case, it does set up an interesting paradox between what might constitute an employment connection for the purposes of sustaining an injury, compared to an employment connection for the purposes of the unfair dismissal laws.

There have been several other recent decisions handed down by the South Australian Employment Tribunal which would ordinarily warrant comment on. However, those decisions are the subject of forthcoming appeals, and in those circumstances it is likely that more appropriate guidance will be gained once appeal decisions in those matters have been handed down. In any cases where this occurs, and the decision handed down is of significant and immediate impact on any claims management issues, then we will provide a Special Case Update.

We also note the Tribunal has continued to be very busy with the handing down of decisions very recently, so you can expect another update from us in the near future.

As always, copies of the South Australian Employment Tribunal decisions can be accessed at www.saet.sa.gov.au.

Should you have any queries concerning any of the issues addressed in the above cases, then please do not hesitate to contact us.

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