LATEST WCT CASES

With all of the publicity surrounding the recent passing of the Return to Work Bill in recent times, it is easy to forget that the ordinary day to day activities of the Workers Compensation Tribunal have continued.

Decisions of the Workers Compensation Tribunal have been handed down with increasing frequency of late. This situation is only likely to continue, with the dispute numbers for this year skyrocketing over the last several months. There is clearly a concerted attempt by the claims agents to "clear their decks" of older claims, while injured workers are by all accounts vigorously pursuing any section 43 entitlements that they might have before the "one in all in" rule comes into place from July 2015, as far as assessment of multiple impairments from the one compensable injury is concerned.

As well as dealing with a number of the more recent Workers Compensation Tribunal decisions that have been handed down, **we will also comment on one or two cases from other jurisdictions that are of interest**.

Haggard [2014] SAWCT 24

Simply another decision where the approval of compromise of a claim involving a person under a disability was granted.

Symes [2014] SAWCT 25

Another case where the Workers Compensation Tribunal decided a section 30A case essentially on its own facts, but involving the continually vexing problem of defending such a claim where the worker alleges his or her psychological condition is a sequelae to their physical injury, while the Compensating Authority endeavours to argue that the condition is a stand-alone injury and non-compensable under section 30A.

Dodds [2014] SAWCT 26

While the matter deals with a pre-trial procedural issue, it is worth noting that the worker's attempt to "split" the trial into two parts, with the first part being directed more towards what is a preliminary point, and the second part directed towards the merits of the matter, was unsuccessful. The Workers Compensation Tribunal again confirmed that it is wary when parties attempt to raise what are preliminary points regarding the jurisdictional coverage of the Workers Compensation Tribunal.

Gooding [2014] SAWCT 27

An analysis of section 6 and the territoriality provisions was undertaken by the Workers Compensation Tribunal. While the outcome was largely dependent upon the particular facts of the case, it is worth noting that temporary placements out of the State, and the fact of temporary employment beforehand, do not necessarily affect the overall nature of a relationship between an employer and its employee, which was always of a continuous nature in any event.

Iapadre [2014] SAWCT 28

While the matter only related to an Application for Directions again, it was notable that the Workers Compensation Tribunal was prepared to agree to a stay of the South Australian proceedings at the request of the Compensating Authority, in circumstances where the worker was pursuing a similar claim interstate, and in which State the worker's injury arose. The Tribunal granted the stay of proceedings, even though the South Australian action was in a more advanced state than the action in the Northern Territory.

Cerin [2014] SAWCT 29

As the latest decision in a long running test case, Deputy President Hannon found that a Rehabilitation and Return to Work Plan prepared by the Compensating Authority was unreasonable insofar as it did not direct attention to the assessment of the availability of suitable duties with the pre-injury employer. Deputy President Hannon, while acknowledging that he did not have power to effectively make the pre-injury employer re-employ the worker, stated that he could insert into a Plan a provision that the availability of work with the former employer be "further investigated".

Deputy President Hannon indicated that if the further investigation of the availability of suitable employment disclosed the fact that there was work available, and that the employer was not prepared to make that work available, then it was for WorkCover to take steps to penalise the employer, if so advised.

It is noteworthy that the Return to Work Bill contains new provisions which deal with obligations cast upon employers to provide suitable employment, and if necessary, to be the subject of "return to work" orders by the new Employment Tribunal. How this will line up with the *Fair Work Act*, when an injured worker is previously lawfully dismissed, will no doubt play out through 2015 and 2016 in the various courts.

Nonkovic [2014] SAWCT 30

While the case again simply involves an Application for Directions, it is notable for the discussion in the Judgment regarding dismissing Notices of Disputes for want of prosecution. The Workers Compensation Tribunal pointed out that its jurisdiction is intended to be an expeditious one, and that 17 months of unexplained delay in the progression of a dispute is too much.

This is likely to be a much more common issue with the new legislation, which is intended to create an even more timely and expeditious jurisdiction. In that regard, the five factors that the Tribunal looks to in deciding whether or not to strike out matters for want of prosecution are worth noting, and we refer you to paragraph 16 of the Judgment.

Pavljuk [2014] SAWCT 31

Again, simply another matter where an order for compromise was made on a settlement involving a dependency claim.

Vlotman [2014] SAWCT 32

Another case involving an application to dismiss various Notices of Dispute for want of prosecution. Here the section 36 dispute had lingered in the Tribunal for some time, and would not be resolved anytime soon, as the worker was currently incarcerated. The Tribunal found that there was no prejudice to the worker in allowing the section 36 notice to take effect in the circumstances.

Rezai [2014] SAWCT 33

The worker was challenging the rejection of his various claims for compensation, which involved a physical injury and alleged psychiatric sequelae. The Workers Compensation Tribunal eventually found that the worker had sustained a compensable lower back injury, which gave rise to a partial incapacity for work and an entitlement to weekly payments. The Tribunal also found that the worker's psychiatric condition was not compensable, and that it was potentially an intervening cause as to the worker's entitlement to weekly payments, as it of itself might totally incapacitate the worker.

Ultimately, the Workers Compensation Tribunal decided that the issue regarding the possible intervening cause of a non-psychiatric condition had not been identified between the parties in the Statement of Issues, and to find against the worker in this regard very late in the piece was unfair. It is understood that the decision concerned might well now proceed by way of an appeal, primarily based on the argument that it is not for the parties to identify what might be the potential ramifications of a finding of fact as against the existing law.

Paje [2014] SAWCT 34

The worker challenged the setting of her average weekly earnings, which had simply been based on her last 12 months' income. The worker had received a pay rise during the 12 month period concerned, and thus it was argued that to set her rate based at least partly on a lower hourly rate as was paid during part of the 12 months beforehand, was unfair. The Workers Compensation Tribunal agreed, emphasising yet again the notional of "fairness" that underlies the entire approach to section 4 and the setting of average weekly earnings.

The Workers Compensation Tribunal indicated that it is not compulsory to use the full 12 month period under section 4(1) if it produced an unfair result, and a shorter period can be used if it does give a fairer outcome. In the alternative, if that is still not the case, then the option is to look at section 4(6) and the income of relevant comparators. In the circumstances, it seems almost impossible to consider a scenario where a straight application of 12 months prior wages would ever be used in the setting of average weekly earnings, other than in circumstances where there had been no variation to the rate of pay during the period concerned.

Lawless [2014] SAWCT 35

Again, as with the *Cerin* matter, this is a long running case involving issues concerning steps taken to require an employer to provide suitable employment under a Rehabilitation and Return to Work Plan. In the latest of a number of decisions involving Mr Lawless, the Full Bench of the Workers Compensation Tribunal overturned Deputy President Hannon's decision regarding the unreasonableness of a term of Rehabilitation and Return to Work

Plan, on the basis that the Plan concerned had long since expired. Once the Plan concerned had expired, the Workers Compensation Tribunal found that there was nothing left to modify, and that the Workers Compensation Tribunal should not indulge in making declaratory decisions which might affect yet to be approved Plans.

We consider it quite likely that issues in this regard will be more particularly addressed under the new Return to Work Bill, and the Employment Tribunal, by some form of fast tracking of disputes of this nature.

Weeding [2014] SAWCT 36

In what is really an extended exercise in assessing the competing concepts of legal proof and scientific proof, the Workers Compensation Tribunal supported a finding of a section 43 entitlement for cardio vascular disease which was found to be the result of hypertension.

Cabrera [2014] SAWCT 37

This decision is noteworthy in a number of respects. Firstly, the Workers Compensation Tribunal was not troubled to provide the worker with a three year extension of time in which to pursue his dispute. Secondly, the decision addresses issues regarding the categorisation of impairment for section 43 purposes. Lastly, the Tribunal dealt with the issue of pre-existing conditions and to what extent they might be taken account of to reduce a worker's entitlement to a lump sum payment. The simple fact that there was evidence on x-rays of degeneration of the spine, without anything more by way of overt symptomology, was not sufficient in the Tribunal's view to form the basis for an argument that the overall entitlement should be reduced for the fact of a pre-existing condition.

Ettridge [2014] SAWCT 38

This is another in a long line of cases involving Mr Ettridge and WorkCover, on which we have previously commented on. The worker has been attempting to establish that the WorkCover Corporation are estopped from rejecting his claim for compensation because of certain actions that WorkCover took in relation to how it treated the worker's employer and its acceptance of levies paid by the employer. The worker failed to establish the necessary circumstances that would enliven the entitlement to argue estoppel, and paragraphs 31 to 35 of the Decision are the nub of the case, and what must be established in order to give rise to an estoppel argument.

McDowell [2014] SAWCT 39

The case involves an annual review of the dependency payments being made to a widow and children pursuant to section 44 of the Act. The dependency payments were initially set at twice State average weekly earnings, being the maximum sum payable. At the time of the annual review under section 45 of the Act, an argument was made that an increase of greater than the applicable twice by State average weekly earnings figure, as revised for that year, should be allowed (in other words, effectively applying a cost of living increase at a percentage rate and sum that was greater than the amount by which twice State average weekly earnings rose as an overall figure). The Workers Compensation Tribunal disagreed, finding that once average weekly earnings are set at twice State average weekly earnings, then they are capped at that varying figure for all time.

Barnes [2014] SAWCT 40

Many of you might have read about this case in the media, as it was certainly well publicised. The case involved a teacher who unfortunately suffered a massive heart attack on his first day back at work after a prolonged absence from work due to a prior stress claim. The case largely dealt with issues about whether the heart attack on the day was an "injury simpliciter", or a secondary injury or disease, or a condition to which section 31(5) would apply – in the circumstances of an aggravation at work of a pre-existing cardiac condition.

Again, the judgment highlights the different approaches between scientific and legal causes of a condition. Deputy President Gilchrist confirmed that it is the obligation of the Workers Compensation Tribunal to look at the "totality of the evidence", both medical and otherwise, in assessing compensability. Therefore, despite significant scientific/medical reservations as to a causal link, Deputy President Gilchrist found that when looking at the totality of the evidence there was an "irresistible view" that the worker's acute anxiety on the morning that he recommenced teaching, and his collapse and subsequent death, was a series of events so close (in time) and so dramatic that it was not difficult to find compensability.

Ktisti [2014] SAWCT 41

A decision very much dependant on its own facts, although interesting from the point of view of a worker seeking to establish section 43 entitlements for physical injuries that were said to be a sequelae to a stress condition, rather than the other way around. The Tribunal found there was no evidence to support any assertion as to the physical impairments alleged.

As usual, for all of the Workers Compensation Tribunal decisions referred to above, they can be accessed via www.industrialcourt.sa.gov.au.

The Supreme Court considers issues relating to professional advice received when negotiating a redemption payment

Again, another long running and well publicised case has reached an apparent final conclusion.

The Full Supreme Court has recently dealt with the question of the compliance with the provisions of section 42 of the Act, where the injured worker (Mr Mericka) was attempting to have a Redemption Agreement set aside.

Of particular interest in the case is the Full Supreme Court's Decision that when receiving professional advice a worker is not expected to be provided with advice as to the **merits** of the payment being made. The Full Supreme Court also found that the timing of the receipt of professional advice, compared to the time of the signing of a Redemption Agreement, is not always a crucial issue, but that it would be best served by all concerned to ensure that a worker receives the necessary advice before he eventually signs the Redemption Agreement.

Mericka's case [2014] SASCFC 99 can be found at the Austlii website – www.austlii.edu.au.

When a good Samaritan goes one or two steps too far

A recent Administrative Appeal Tribunal case is noteworthy for the way it applied the recent well known High Court decision in *Comcare v PVYW*, to do with the question of employment connection, where a worker undertakes activities that are not ordinarily expected of them in the course of their employment.

In the case at hand, the injured worker was employed by Linfox. He was delivering fuel to a petrol station. While he was undertaking this task, he intervened in an altercation between two other people who were at the petrol station. In fact, the worker persistently intervened in the situation, to the point where he was subsequently assaulted and sustained injury.

While the case will no doubt be characterised as being dependent on its own facts, the Administrative Appeals Tribunal did acknowledge that there would be times when an employer might expect an employee to assist a person in need, such as to intervene and try to end a confrontation occurring in a public place. However, the Administrative Appeals Tribunal also found that there was a limit to which such activity might be considered to be within the realms of employment, and what an employer might expect of their employee.

Once the employee concerned eventually went too far in his intervention, and undertook voluntary and deliberate actions which he would have known might create an unusual risk of injury to him, then he took himself outside of the course of his employment. The Administrative Appeals Tribunal therefore confirmed rejection of the worker's claim for compensation.

For those interested in reading the decision concerned, O'Loughlin and Linfox Australia Pty Ltd [2014] AATA 577 can again be found on the Austlii website – www.austlii.edu.au.

As always, if you have any queries regarding anything arising from the above commentary then please don't hesitate to contact us.

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