2019 AUTUMN TRIBUNAL CASES UPDATE

INTRODUCTION

Welcome to our second case update for 2019, and as always there is plenty to consider and discuss when it comes to issues in workers compensation law.

There continue to be a number of issues being ventilated at the South Australian Employment Tribunal (SAET) and the Full Court of the Supreme Court of South Australia, not just with respect to the *Return to Work Act* (the Act), but also its ongoing interplay with the *Workers Rehabilitation and Compensation Act* (the old Act).

There have already been several matters this year where leave to appeal to the Full Court of the Supreme Court of South Australia has been granted, so we can anticipate a steady stream of decisions perhaps later this year, which will hopefully provide clarity around a number of contentious issues. We will briefly outline the various matters heading to appeal below, while also covering the very recent appeal decision in *Onody's* case, handed down a matter of days ago.

NEWSWORTHY MATTERS

Many of you will have had experience working with Stuart Cole and Tony Rossi, either in their capacity as barristers, or in the latter's case as a solicitor managing his own firm as well. Both Mr Cole and Mr Rossi were counsel who we briefed from time to time on our clients' behalf. Mr Cole has now been appointed as a Deputy President and Industrial Magistrate at the SAET, while Mr Rossi has been appointed as a Deputy President of the SAET and Judge of the District Court. We congratulate both on their appointments and wish them well in their future roles.

Closer to home, we farewell (temporarily) our junior lawyer, Melanie Conroy, who is soon to go on maternity leave. At the same time, we will be welcoming Anna Alexandris to the firm as a junior lawyer, taking Mel's place for the time being. It's exciting times for us all here.

RECENT CASES OF INTEREST AT THE SAET

FRKIC [2019] SAET 1

The worker had a lifelong condition of ankylosing spondylitis, which had the effect of

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fusing the vertebrae in his lumbar spine. In 2016 the worker injured his lower back when he fell at work. A question arose as to whether the ankylosing spondylitis condition should be deducted from any permanent impairment assessment that might be made in relation to the worker's compensable injury.

In considering ho to approach the situation, the SAET found the effects of the pre-existing condition and work injuries were in effect to be assessed in an overall way, insofar as they both contributed to the overall impairment, and that when it comes to "disregarding" impairments for unrelated injuries or causes for the purposes of section 22(8)(b) of the Act and clause 1.23 of the Impairment Assessment Guidelines, then this meant the effects of the pre-existing condition were to be deducted from the overall percentage arrived at, as opposed to not being considered as part of the overall percentage impairment in the first place.

The worker's solicitor also argued that apart from any issue as to deductibility, the ankylosing spondylitis being of a congenital nature, meant that it wasn't or shouldn't be considered an "injury or impairment "for the purposes of the deduction provisions". The SAET disagreed with this approach.

The SAET also found that notwithstanding the fact the ankylosing spondylitis did not particularly functionally impair the worker in his day-to-day activities, it still produced an evident range of restricted movement, and in that regard was capable of assessment as impairment, even in the absence of any overt symptoms.

PUHARA [2019] SAET 3

While on its facts, this is a case more concerned with the question of whether an employer was required to provide an injured worker with suitable employment, there was an ancillary issue as well that is of some relevance to all longer-term claims.

The worker's entitlement to weekly payments and medical expenses had ceased by the time that he brought his section 18 Application before the SAET. As part of his effort to be provided with suitable employment by his employer, the worker had also asked for certain rehabilitation services and a recovery and return to work plan be implemented on his behalf, and to facilitate his return to work. The compensating authority rejected the worker's requests in these respects, on the basis the applicable time limit under section 33 had expired.

The SAET overruled the compensating authority. The presiding Deputy President noted that sections 24 and 25 of the Act, dealing in turn with return to work services and return to work plans, did not contain any time limitations of themselves where a worker continued to be incapacitated for work. The SAET pointed out section 33, in dealing with the approval of recovery/return to work services, was intended to only apply to such services a worker might incur themselves, and seek recovery of the costs concerned, as opposed to any action taken by a compensating authority to approve services or plans under sections 24 and 25.

GAJIC [2019] SAET 7

The worker had an existing injury for the purposes of the Act. Notionally, she therefore only had an entitlement to weekly payments until 28 June 2017. In May 2017 the worker underwent an operation, having made a section 33(17) pre-approval request. The issue then became one of whether the worker could access any section 40 supplementary weekly payments after 28 June 2017, where her weekly payments were otherwise going to cease as of that date.

The SAET determined the worker could not access section 40 payments, and particularly referred to clause 37 of the Transitional Provisions of the Act. While the

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SAET identified that this established a potentially unfair and two-tiered system for potential entitlements, it was also noted workers with existing injuries also had a reasonably restricted right to access further surgery, where there was also a time bar applying under section 33(2)(b)(ii) of the Act as well.

KHAN [2019] SAET 11

The worker sustained a knee injury in 2009. He was paid a lump sum pursuant to the provisions of section 43 of the old Act in 2013. His entitlements in this regard were the subject of an order made by the Workers Compensation Tribunal at that time, as part of a broader negotiated settlement of various entitlements.

For reasons best known to the worker, he subsequently underwent operative treatment on his injured knee within a matter of weeks of finalising his compensation dispute and underwent a total knee replacement. The mere fact of the total knee replacement itself meant that the worker was capable of being assessed with a significant additional level of impairment over and above that for which he had received compensation previously. The worker therefore lodged a claim pursuant to the Act for that higher level of overall impairment resulting from the total knee replacement.

The SAET refused the worker's request, even though there was indeed a clearly higher rateable whole person impairment, and a different actual impairment to be assessed, albeit to the same body part. The SAET, in hearing the worker's appeal against a decision of a single Judge, confirmed there is intended to be a finality to any assessment associated with permanent impairment, and in circumstances where a worker chooses to finalise their entitlement before all possible surgical options might be explored, it is effectively a decision taken by the worker concerned at their own risk.

The decision concerned is of some significance as there are many situations where a worker, having finalised their claim for lump sum compensation previously, undergoes further operative treatment later, whether that later treatment and additional level of impairment arises either before or after the commencement of the Act.

The Supreme Court has recently granted leave to the worker to appeal on this whole issue of whether permanent impairment assessments can hold for all time, even if a later event might give rise to a differing nature of impairment to be assessed to the same area of the body (as opposed to simply a deterioration of a specified injury). It is also noted the Supreme Court granted the worker leave on a question of deductibility for what was found by the trial Judge to be a pre-existing condition, and therefore issues such as those that were ventilated in the *Frkic* case (discussed above) will most likely be explored.

STEVANJA [2019] SAET 25

Ms Stevanja was represented by K+K Legal, not to be confused with KJK Legal. She was employed by Cash Converters in its Port Adelaide store and on 29 December 2016 was struck by a motor vehicle in the store. She suffered injuries which were obviously accepted as compensable.

Almost a year later, in November 2017, Ms Stevanja's lawyers engaged the services of an occupational therapist to provide a dynamic clinical and activities of daily living assessment report. These assessments were conducted on 16 January 2018 and a report was prepared on 19 January 2018. An invoice was raised in the sum of $2,306.70.

The occupational therapist assessed the worker by interviewing her and reading various medical reports that had been provided to her by K+K Legal and then conducted functional and repetitive testing with the worker and had her undertake a

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musculoskeletal pain and shoulder pain and disability index. Her report summarised the medical evidence and recorded her findings based upon her interview and testing, and then later made recommendations for physiotherapy, home exercise programmes and raised the possibility of a pain management programme. It also made the usual recommendations for domestic and home help appliances and services.

Her lawyers then forwarded the report to EML with a request for payment. EML returned the invoice stating it did not think it was a reasonable expense incurred, noting neither the worker nor her lawyers had discussed the fact they were obtaining the assessment prior to it being undertaken, and the amounts claimed were higher than the gazetted rate.

The worker sought review of the decision to refuse payment.

RTWSA argued that there was no clear evidence the worker required the services of an occupational therapist, nor was there any issue (read dispute) between her and RTWSA that necessitated obtaining a report.

Secondly, it argued the expenses associated with the assessment and report were not reasonably incurred because the worker was still employed by Cash Converters at the time and there was no medical reason why the assessment and report were necessary. It argued the worker knew or should have known the assessment and report was of little or no benefit to her. It also submitted the assessment and report did not constitute medical treatment as required to be a medical service, nor was prior approval from the case manager sought or obtained. It argued this was not a medico-legal report and that the fees charged were far in excess of the gazetted rates.

The worker submitted that the OT did examine, assess and then report and it was all in connection with her injuries. She therefore incurred the costs of those services as a consequence of having suffered a compensable injury and the costs were reasonable because it was not unlikely the worker would require assistance with activities of daily living and the report itself confirmed that. She also argued the report should be regarded as a medico-legal report, the cost of which could be recoverable in accordance with established law.

Finally, RTWSA argued the report was not commissioned by a case manager or a treating medical expert, so the gazetted rate did not apply.

Deputy President Judge Gilchrist decided in favour of the worker. He said it was not necessary for there to be a dispute between the worker and RTWSA for the costs of the assessment and report to be recoverable. If it were, there would be disputes being created all the time just to get reports paid.

He also considered the OT's assessment and report should be regarded as a medical service pursuant to section 33 of the Act. He then considered whether it was the worker who incurred the costs or the worker's solicitor. He considered the worker's solicitor stood in the shoes of their client and acted as her agent. He assumed she provided instructions to obtain the report and therefore accepted she had incurred the expense 'personally'.

He then turned to whether the cost of the report was reasonable. He found it was not unreasonable for the report to be obtained and could not understand why RTWSA argued there was no medical reason why it should have been. He referred to the fact EML had already obtained its own ADL report that had recommendations about appliances and services to assist the worker.

He also pointed out that seriously injured workers aside, the Act provides only a limited window of opportunity for workers to procure medical services, so it was

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understandable a worker would err on the side of caution and secure the assessment and report sooner rather than later, to ensure any medical services recommended were requested and obtained.

In summary, the request and obtaining of the report without the knowledge of EML was considered reasonable.

The Judge then turned to whether the cost of the assessment and report was reasonable. He found the gazetted rates did not apply in this case and while it was understandable that RTWSA might prescribe guidelines to enable approval in advance of provision of certain medical services, it may be that the proviso to the Scale prescribed by OT760, the applicable gazetted rate, is intended to be no more than just that. That is, only setting the rate for those reports procured with pre- approval. If that is the case it has no binding legal effect because the Act makes no provision for the issue of such guidelines. It followed then that the procurement of a medical service outside of the guidelines would not act as a bar to the recovery of costs of the service.

He found that Item No. OT760 did not apply in this case because it was the worker who sought it, not EML at the request of the worker's treating doctor or with its approval.

The parties had not made detailed submissions about the quantum of the claim and probable reimbursement and they have liberty to apply. It remains to be seen whether Deputy President Judge Gilchrist awards more for the report fee than what is gazetted, which is likely, and whether RTWSA feel this is an issue of importance that requires further judicial determination or whether it will just concede with the extra $1,400.00 or so at stake.

Vlassis [2019] SAET 40

This case has been discussed by us previously, and more recently came on appeal before the Full Bench of the SAET. The case is an example where a compensable injury and its effects/compensability can be overridden by the effect of an intervening cause and provide a basis for the rejection of ongoing liability.

Mr Vlassis had sustained a compensable knee injury, and while being treated for that problem he developed an infection, which ultimately had serious ramifications for his overall health and ability to work.

On appeal, the Full Bench of the SAET supported the initial decision of the Trial Judge that the treatment provided to the worker for his infection was woefully inadequate, amounted to gross negligence, and effectively was an intervening cause in the course of the worker's treatment for his compensable injury.

The Full Bench of the SAET used common law principles in effectively overriding the original compensability principles arising under the Act, saying that a question of whether an injury arises out of or in the course of employment can be subject to broader causal considerations than would otherwise be considered in the application of the ordinary statutory tests arising either under the old Act or the Act.

The worker has recently obtained leave from the Supreme Court to take the matter further by way of an appeal to the Full Bench of the Supreme Court of South Australia.

Taylor [2019] SAET 49

The worker sustained a compensable injury to his lower back. At a later point in time he began to develop pain in his right hip. He lodged a claim for compensation for the right hip problems on the basis the altered gait arising from his lower back injury had brought on symptoms of pain in his right hip earlier than would have otherwise been the case. There was an acknowledgment in the matter the worker also had several

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other pre-existing problems, which it was found were ultimately going to impact on the condition of his right hip in any event.

While accepting there was a connection between the lower back injury and the right hip sequelae, because of altered gait, the SAET did not go on to find the fact of the lower back injury and altered gait was a **significant** contributing cause, taken against the background of the other problems that the worker was experiencing with his hip.

To quote President Dolphn in the matter, he said:

> *"…, I do not accept that the mere bringing forward of symptoms is necessarily enough under s 7(3)(a) of the RTW Act to establish compensability. Something more is needed, the straw will no longer suffice. The inclusion of the word "significant" requires an evaluative judgment to be made by the trier of fact as to the level of importance or influence of the exacerbating factor that brings forward the onset of symptoms."*

In circumstances where the effect of the potential contributing cause was not able to be satisfactorily quantified or defined by the medical experts in the case, the Trial Judge found that it was difficult to authoritatively assess the degree of contribution. The time delay between the injury and the sequelae was but one of several factors that assume some significance in the matter.

GIAMEOS [2019] SAET 55

The worker was approaching the end of his entitlement period for medical expenses. Shortly prior to the time period expiring he sought approval to undergo a physiotherapy program. The extent of the physiotherapy program meant treatment would have continued past the end of the entitlement period if that treatment was approved. The issue became one of whether the worker could enforce pre-approval of a physiotherapy program in such circumstances. The SAET held this was not possible, and it remains the case pre-approval for medical treatment can only cover medical treatment that would **occur within the entitlement period**.

The SAET also emphasised in the case of the late lodgement of section 33(17) pre-approval requests, the worker will always be in danger of "missing out", where a decision is not simply able to be made within a short period of time, and actions such as seeking the intervention of the Tribunal, by way of an Application for Expedited Decision, will not assist either. It is to be noted the matter is on appeal.

KNIGHT [2019] SAET 64

The calculation of AWE's has always been problematic when it comes to the issue of a second compensable injury that follows a period where the worker has been in receipt of weekly payments and off work (whether partially or totally) in the 12 month period prior to the second injury.

The issue this raises is how do you treat the weekly payments component for the purposes of the calculation of the second injury. Are weekly payments "earnings" within the meaning of Section 5(1)? This issue was dealt with under the old Act in the case of *Last v WorkCover* [2010] SAWCT 23. In *Last*, the worker was injured on 17 September 2007. He received weekly payments and returned to work in June 2008. Shortly after that he suffered another injury and made another claim. The Workers Compensation Tribunal held the workers compensation payments are not earnings, and therefore his AWE's for his second injury were set at nil and he was entitled to medical expenses only.

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There have been queries as to whether *Last* is still good law under the Act, particularly due to the reference in section 5 of the Act to a worker being entitled to at least earn the Federal minimum award.

In *Knight*, the worker suffered injury in April 2011 and did not return to full time work. She was in receipt of top up pay when she suffered a further injury in April 2017. Her claim was accepted. In the 12 months prior to the second injury she worked anything from 0.4FTE to 0.6FTE and also had a period of total incapacity for work.

Deputy President Judge Kelly held she was bound by the previous authority of *Last,* and weekly payments are not earnings for the purpose of the calculation of AWE's for the second injury.

There was then an argument as to whether section 5(6) applied – namely that due to the impact of the worker working less than full time and receiving top up pay that a fair average could not be achieved. The Judge agreed it was not possible to arrive at a fair average for that reason and the case fell within the "catch-all" phrase in section 5(6) which generally applies to workers who have worked less than 12 months and therefore comparative employees are looked at in terms of determining the average weekly earnings.

Deputy President Judge Kelly felt the rate should be calculated based on her being a 0.6FTE employee. She felt it was unfair on the worker that the employer had not in fact provided her with consistent work at the 0.6FTE level, even though that was what had been agreed between them.

HAPPENINGS AT THE SUPREME COURT

ONODY [2019] SASCFC 56

This matter deals with the issue of the relevant deduction to be made where a prior lump sum payment for noise induced hearing loss has been made, and whether one undertakes a percentage deduction under section 22(8) or a monetary deduction under section 58(7).

In *Onody* the worker received compensation for a 10.8% binaural hearing loss under section 43 of the old Act. He continued to work and was further exposed to noise. He submitted a claim in 2015 for further compensation. By that stage he had a 9% whole person impairment (his previous assessment equated to a 6% whole person impairment).

If there was a percentage deduction, then the worker had only suffered a 3% loss and arguably had no entitlement whatsoever (given the prevailing 5% threshold).

The Full Bench of the SAET found the Impairment Assessment Guidelines gave no clear guidance as to how to approach a case where a reduction may potentially arise under both section 22(8)(g) and section 58(7) namely, a percentage deduction **and** a monetary deduction. Ultimately, the Full Bench found that section 22(8)(g) should apply. That section requires a percentage deduction to occur.

Once the percentage deduction occurred, the worker fell below the minimum impairment threshold to receive further lump sum compensation, and was not entitled to compensation according to the SAET.

However, on appeal to the Full Supreme Court, the worker's appeal was allowed. Each of the judges gave a separate judgment on the appeal and what provisions of the Act applied. Ultimately Justice Stanley found that due to the special nature of hearing loss claims and the fiction created by section 188(2), that this created an exception to the

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provisions of section 22(8)(g). The whole of the worker's noise induced hearing loss was deemed to occur immediately prior to the claim being made. Whether the worker satisfies the threshold test in section 58(2) namely has a 5% WPI is determined by reference to the entirety of the WPI sustained at the time the worker gives notice of the claim (that is, the 'gross' overall figure including, but not in addition to, the prior compensated loss). This distinguishes claims for compensation for noise induced hearing loss from all other claims based on impairment assessment, according to Justice Stanley.

If the worker has received a previous lump sum for hearing loss, then the dollar amount of that payment must be deducted from the current claim. So, the entitlement is assessed by reference to the total WPI suffered and then the previous payment is deducted in terms of its monetary amount.

Justice Parker agreed with Justice Stanley's approach. Justice Blue took a different approach but achieved the same result, namely a monetary reduction rather than a percentage deduction. It followed that the worker was entitled to compensation based on 9% WPI, less the monetary amount of the previous payment.

MATTERS WHERE LEAVE TO APPEAL HAS RECENTLY BEEN GRANTED

As well as the above discussed matters of *Khan* and *Vlassis* being granted leave by the Supreme Court for appeals to proceed before the Full Court of the Supreme Court of South Australia, there are several other matters which are now "in the pipelines".

Summarising other matters that have recently been granted leave to proceed by way of appeal include:

- *Sacco* - where the Court will be asked to address issues as to whether a worker's dismissal for serious and wilful misconduct disentitled him from receiving weekly payments, particularly for any periods where the worker was totally incapacitated for work, and as to whether the worker had restored mutuality. This will involve the Court considering the test that should be applied when a worker does seek to restore mutuality.

  The Court will also be asked to address the unique situation that occurs when a worker, because of the dispute resolution process, finds themselves out of time in which to seek approval for medical treatment on a rejected claim for compensation.

- *Mills* - where the Supreme Court will be asked to consider issues in relation to the findings and reasonings of both the Trial Judge and Full Bench of the SAET. The outcome of the case is only likely to be of great interest to "black letter lawyers".

- *Schroeder* - the transitional provisions of the Act will be given consideration by the Supreme Court, where the worker had his payments discontinued before the commencement of the Act, underwent surgery after the commencement of the Act, and was seeking backdated weekly payments for various periods both prior to and after the commencement of the Act.

  Cases such as *Andrzejczak*, *Pennington* and *Watkins* will all come under consideration in this appeal, although obviously with the passage of time similar fact circumstances, and cases involving the transitioning of entitlements from the old Act to the Act, are hopefully becoming less frequent.

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As always, if you have any queries concerning any of the cases or issues discussed above, then please contact us.

For anyone wishing to spend the time reading any of the decisions referred to above, they can be found at www.austlii.edu.au.

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