2019 SPRING CASES UPDATE

INTRODUCTION

Welcome to our Spring cases update. We trust that you survived the latest winter, and certainly there were plenty of South Australian Employment Tribunal ("SAET") cases to digest over those cold winter nights by the fire!

While it seems to be a recurring feature, we again find ourselves following plenty of cases before the Full Supreme Court, with matters being referred on for appeal, albeit without a similar rate of judgments being handed down. In other words, there is somewhat of a backlog, which we don't expect to be cleared until 2020.

Taking things even further, one particular decision of note that has been winding its way through the appeal system has now been the subject of an application for leave to appeal to the High Court.

So, there is plenty to address, and let's get on with it.

NEWSWORTHY MATTERS

As we outlined in our last cases update, the SAET are endeavouring to move to a new fully electronic/paperless system for the management of dispute resolution. This has led to some teething difficulties with issues such as the proper notification of hearings to all parties, and just how to go about finalising matters where notations to consent orders are desired. There is an opportunity for stakeholders to directly address issues in this regard, as there will be a presentation at the forthcoming Both Sides of the Fence Conference on 1 November 2019 by members of the SAET.

Many of you will also have noted the recent publication of a discussion paper by the President of the SAET, who is looking at creating a dual stream system for the management and allocation of matters for hearing, subject to whether they are cases involving a potentially seriously injured worker outcome or not. Feedback to the Tribunal in this regard concludes on 25 October 2019, so please get in quick if you wish to have any issues addressed.

Continuing with our popular seminar series, KJK Legal are holding several seminars over the coming weeks, on 23 October, 6 November and 20 November 2019. If you have not received an invitation to attend a seminar, but wish to do so, then please email us at admin@kjklegal.com.au (subject to places being available at one or more of the events).

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RECENT CASES OF INTEREST AT THE SAET

As background to some of the cases to follow that we will discuss, it is worth recapping the outcome in several earlier cases, as a way in which to track the evolution of issues coming up before the Tribunal. That has certainly been the case with section 22 and the permanent impairment assessment process, from the perspective of both the logistical way in which to go about the assessment process, and the legal issues that are thrown up in what is being assessed.

Turning back in time, and addressing logistical aspects of the permanent impairment process, the SAET has said the following:

- In *Clayton Church Homes Incorporated v ReturnToWorkSA* [2019] SAET 113, when considering an assessment of complex regional pain syndrome, the requirement was that a diagnosis of the condition had to have been present for at least a period of one year immediately before the date of the permanent impairment assessment, and as a consequence, it is important to seek out as much medical information as possible to be able to establish that fact before any permanent impairment assessment actually proceeds.
- In the matters of *Adom* [2019] SAET 123 and *Baker* [2019] SAET 128, questions arose as to the arrangements that were being made before independent medical assessments under the Tribunal's Rules were to take place. In both cases, the workers concerned were trying to have additional impairments included in the IMA referrals. One worker (*Baker*) succeeded in having additional assessments included, as he had not been legally represented at the time original permanent impairment assessments were being made, and the Tribunal felt it was important the worker's rights be protected because of the otherwise strict requirements under the "one assessment rule". Conversely, in the second of the cases (*Adom)*, the worker did not have the additional impairments included in the assessment, as he had been legally represented during the initial permanent impairment assessment phase, and was seeking to have an assessment included in the referral that he had not mentioned to doctors previously.

As a consequence, to maintain the primacy of the "one assessment rule", it is important all potential impairments to be assessed are identified in the pre-referral process, but if they are not then the SAET is more likely to be sympathetic to any later complaints by an unrepresented worker, compared to a represented worker.

ADOM V RETURNTOWORK SA NO. 3 [2019] SAET 188

Mr Adom's case came before the SAET again subsequent to the above referred to decision. The issue in the most recent decision related to what information should or should not be put before an independent medical advisor, who was to assess the worker under the Tribunal Rules. It was felt appropriate the doctor who was to assess the worker in their capacity as an independent medical advisor should not necessarily have all of the relevant medical information placed before him or her, particularly as it might relate to issues that are in dispute between the parties, and opinions expressed by other doctors as to the applicable permanent impairment assessment to be made. This was not to say that important background information such as diagnostic findings, and reports that deal with earlier findings on examination, should not be put before the assessor, but it was important in the SAET's view that the pending independent medical assessment not be influenced by any "opinion" expressed by another doctor.

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Smith v Central Adelaide Local Health Network [2019] SAET 197

Previous cases at the SAET have emphasised the primacy of whether or not a worker is at maximum medical improvement ("MMI") before the permanent impairment process commences. In the case at hand, there was an issue as to whether or not the worker was at MMI at the time of the assessment, particularly where she was still undergoing medical treatment for her condition, which was prone to fluctuate from time to time. The SAET approached the matter from a common-sense perspective that, particularly with psychiatric injuries, there is always going to be a degree of fluctuation in the severity of the condition, if not ongoing medical treatment, including hospitalisation, from time to time. That's not to say the worker, from an overall perspective, had not reached MMI.

The SAET emphasised if one was to look only at a narrow snapshot of the worker's condition, then it was quite possible a finding as to MMI would not otherwise be capable of being made for many years. Using a somewhat broad rule of thumb, the SAET found where a worker had been relatively stable for the three month period immediately prior to the permanent assessment being made, and had not been hospitalised during that time, then that was an appropriate period in which to satisfy the decisionmaker MMI had been achieved, even though there might be a daily variation in the level and severity of symptoms.

McMahon Services Australia Pty Ltd v Return to Work Corporation of South Australia and Paschalis [2019] SAET 199

Taking the permanent impairment assessment process for psychiatric injuries one step further, the issue in this case was the extent to which a worker's impairment assessment should be the subject of a deduction on account of an unrelated injury or cause affecting the worker's overall condition. In the case at hand, the worker was noted to have pre-existing issues in dealing with relationships and the world generally, problems with alcohol, and probably had a personality disorder. Some of the doctors concerned were not prepared to go so far as to say that the worker actually had a pre-existing psychiatric illness.

The SAET found the bar is not set so high that a pre-existing condition must be a diagnosable psychiatric illness, and particularly pointed to the fact the wording in the relevant provision talks in terms of unrelated injuries or causes, such that the latter did not necessarily have to include a diagnosed or diagnosable psychiatric illness. In doing so, the SAET drew a line between the need for there to be a psychiatric diagnosis in order to make a permanent impairment assessment for a mental injury, and the separate requirement to disregard or deduct any unrelated or pre-existing impairments (whether they be an injury or by way of a cause).

The SAET also went on to say that while the evidence may be imperfect as to the issue of discounting a prior injury or cause, nevertheless, the SAET was bound to consider whatever evidence there was in an endeavour to apply the statutory directive as to excluding previous conditions.

Walker v ReturnToWorkSA [2019] SAET 201

Taking our theme of permanent impairment assessment and its intricacies even further, the SAET in the case of *Walker* was asked to decide on the issue of whether bruxism and other problems, emanating from a psychiatric reaction to a physical injury, could nonetheless be included as assessable impairments when it came to lump sum compensation entitlements. In other words, were the physical effects of psychiatric

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sequelae to a physical injury a sufficient basis to avoid the statutory prohibition on lump sum payments for psychiatric impairment.

The SAET found that bruxism, and temporomandibular joint dysfunction associated with it, and things that flow from that (including problems with mastication and deglutition), and which might arise from a psychiatric condition will not result in a lump sum entitlement to compensation under section 43 of the *Workers Rehabilitation and Compensation Act*, (nor probably section 58 of the *Return To Work Act* – where the applicable legislative prohibition is quite similar).

In *Walker*'s case, it was submitted that the worker's physical injuries in causing him pain led to the bruxism and other problems as opposed to being the result of his psychiatric sequelae, but the evidence more particularly established that such problems as bruxism are more directly associated with anxiety and depression (even if those conditions are the result of experiencing pain), and hence the statutory prohibition applied. By analogy, problems such a dry mouth syndrome and GI problems, where they are the result of the consumption of psychiatric medication, would not be able to be assessed for lump sum payment purposes.

Ahmad v Thomas Foods International Consolidated Pty Ltd [2019] SAET 156

The worker had received various lump sum entitlements under the provisions of the *Workers Rehabilitation and Compensation Act*. His assessments in that regard were made after the implementation of the whole person impairment assessment process under that Act, dating back to 2009.

Subsequently, the worker asserted he was entitled to have the various impairments assessed again for the purposes of section 22 of the *Return To Work Act*. The argument ran that while the worker had his impairments assessed previously for the purposes of lump sum compensation, that did not stop him from asking for assessments again under the current legislation, with a view to being declared seriously injured, as opposed to seeking further lump sum compensation.

The SAET disagreed with the approach, and while noting that 'Table of Maims' assessments that might have been conducted before 2009 meant a worker could have updated assessments made of whole person impairment for the purposes of section 22 of the current Act, he did not get a second "bite of the cherry" in this regard for whole person impairment assssments validly made after 2009. The SAET looked at the Transitional Provisions to the legislation, and felt that clause 44 of Schedule 9 of those Transitional Provisions was of primacy, in that so far as a worker had their entitlement for non-economic loss determined under the previous legislation, then any assessment in that regard stood as an assessment both as to an entitlement to lump sum compensation later on, or for the purposes more broadly of an assessment as to serious injury work status under section 22.

Department of Education and Child Development v Dolan [2019] SAET 166

As this matter is currently the subject of an appeal to the Full Supreme Court (discussed further below), we will only briefly deal with the matter, to point out where issues in the case might be heading.

The essence of the original decision in this case was the fact that what might otherwise (in an objective sense) be considered to have been reasonable actions taken by an employer in dealing with the individual worker, but because of some of her antecedent

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issues, it meant she should have been in effect treated differently to the ordinary employee who might have been unaffected by any pre-existing personal circumstances.

In effect, the Tribunal initially found that the usual industrial and disciplinary processes that might have been put into effect for any other employee should have been moderated for this particular worker. The Full Bench of the SAET agreed with the Trial Judge's views in this regard.

To quote the Full Bench of the Tribunal:

> *"… the Department ought to have taken into account that she had been subjected to a variety of personal and work stressors over a lengthy period of time. It is clear that the Judge took the view that the stressors had a negative effect on Ms Dolan, and caused insecurity and a sense of a lack of appreciation. In my view it can be readily inferred that the Judge thought a more nuanced and less formal approach ought to be have been taken in the Department's dealings with Ms Dolan."*

Department for Education v Van Hattem [2019] SAET 193

Again, the Full Bench of the SAET was called upon to consider issues arising in a claim for psychiatric injury. The facts of this case are well known, and have received a great deal of media attention, largely around the quite serious events that impacted upon the worker in the classroom, but also the significant other life events and circumstances that were at play at the time that she was injured.

In appealing against the Trial Judge's decision, the Department sought to argue the Trial Judge's approach fell into error, in finding it was necessary to be satisfied employment is a more significant contributory cause than any other cause, when addressing the statutory test involving "**the** significant contributing cause".

In effect, the Department argued employment related contributing causes need to be aggregated and then compared to the aggregating of significant non-employment contributing causes, and only in the event that the former are greater than compensability might arise, as opposed to the Trial Judge's indication that to meet the requirements of the disqualifying provisions, the reasonable action significant contributing cause has to be "**the** significant contributing cause" over and above all other and possibly individually significant contributing causes.

Ultimately, the Full Bench of the SAET found on the facts that the only significant contributing cause of the worker's injury related to her employment and they left the aggregation argument outlined above for another day.

Without necessarily also determining other arguments that were put forward by the Department as to interpretation, the Tribunal ultimately gave the following direction:

> "*We caution that in effect reading a word or words into a provision, rather than giving meaning to the words which are there, can create its own difficulties. The phrase "**the** significant contributing cause" means something more specific than "a significant contributing cause", but the legislative direction may simply be to evaluate the facts of each case to determine if employment was in truth **the important or influential contributing cause** of the injury, as expressed by the Full Court in Roberts."* (the mosquito case)

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McGee v Local Government Association Workers Compensation Scheme [2019] SAET 207

In a case that will be of some possible ramifications for those self-insurers who are effectively a group of employers, the SAET found a worker was able to pursue an application for suitable employment under section 18 of the *Return To Work Act* against the Local Government Association, as the nominated employer under the legislation covering all local councils. In other words, the worker was not barred from pursuing a section 18 application simply because he nominated both the Local Government Association at large in pursuing his Application, and where he asserted and particularly sought the provision of suitable employment by some specific local councils (including the council with whom he was working at the time of his injury, and several other local councils in his local residential area). Whether, by analogy, the SAET would find that there is no similar bar to Applications brought by injured workers against other self-insurer groups (e.g. Wesfarmers and Woolworths come to mind) or the State of South Australia remains to be seen.

Recent happenings in the Supreme Court

Over the last several months there have been a number of matters where leave has been sought to pursue appeals to the Full Supreme Court, and in brief summary they are as follows:

- *Vlassis* – to what extent issues of intervening cause impact on the statutory test for compensability of injuries.

- *Barnes* – where leave to appeal was refused, in circumstances where ReturnToWorkSA was endeavouring to set aside a judgment that found a causal relationship between an original left knee injury, subsequently slowly developing right knee and right hip problems, and a fall at home that resulted in a right shoulder injury. The Supreme Court, in declining leave to appeal, found the case was not particularly raising any general principles of importance.

- *Agnew* – in this case, ReturnToWorkSA effectively had two "bites at the cherry", in seeking leave to Appeal against a prior Decision of the Full Bench of the SAET. Their application for leave to Appeal was initially rejected by the Chief Justice, but then a Full Bench of the Supreme Court overruled that decision, effectively finding the Appeal could proceed, as it raised issues of significance as far as the transition between the *Workers Rehabilitation and Compensation Act* to the *Return To Work Act* was concerned, effecting certain entitlements that did not arise under the latter legislation, but now arise under the current legislation, dealing with claims for certain forms of compensation by dependants upon the death of an injured worker. The Decision of the lower Court had effectively opened up the breadth to which claims could be pursued, and disputes brought before the Tribunal, in circumstances where a discretionary ex gratia payment would have otherwise been the only recourse for dependants.

- *Dolan* – the findings of the lower Courts have been called into question, particularly where it is asserted by the Department for Education that the Trial Judge's reasons for effectively allowing this injured worker to be held to a higher threshold, when it came to the need for reasonable actions by the employer, were inadequate. This segued into a further argument there were inadequate factual findings as to the employer's actions that were said to be unreasonable.

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- *Northcott* – this matter involves the question of whether a worker can effectively extend their 104 week entitlement period, because a later injury or condition (which is a consequence of an earlier injury or condition) incapacitates them at a later time, or can only give rise to an entitlement for 104 weeks of weekly payments for effectively **the same period** as the entitlement period for the initial injury. The SAET had previously found that was the case and an injured worker, whose later consequential condition gave rise to incapacity occurring somewhat later in time after incapacity arising from the original injury, did not get to extend the applicable time clock. The worker is effectively seeking to have this outcome set aside.

BOUND FOR THE HIGH COURT

ReturnToWorkSA is seeking leave to appeal to the High Court from the Full Supreme Court's Decision in the matter of *Stevenson*, which as readers well know has been the subject of a number of judgments over time dealing with the effect of Consent Orders, and endeavouring to obtain discharges for impairments that may not have been the subject of claims for compensation at the time Minutes of Orders have been sealed by the Tribunal. The particular question the High Court will be asked to consider is whether, under a claims based workers compensation system, must Consent Orders be confined to disposing of claims for compensation for injuries or impairments already in existence and known by the worker to be compensable, or can conditions known but not necessarily considered compensable or claimed as such, be effectively finalised as well?

The issue being raised is of some significance insofar as not only the current practice of the Tribunal is concerned, but as to the potential ramifications for many matters settled in the past involving similar concessions being made by injured workers as part of Orders made by the SAET finalising their entitlements.

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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