JULY 2021 CASES UPDATE

INTRODUCTION

Just when we all thought we were heading back to normality, the 2020 pandemic has come back to haunt us, and things have now been upended again. Notwithstanding, we have pulled together our resources to again provide you with our regular South Australian Employment Tribunal Case Update.

In providing you with our Case Update, we are now going to take a different approach. You will find us producing the updates on a somewhat more regular basis, although they will be shorter in length. Hopefully, this means you will all be kept abreast of relevant judicial developments at the Tribunal on a more frequent and easily digestible bite-sized basis!

Editor: Mark Keam

RECENT CASES OF INTEREST AT THE SAET

THELAN V UTILITIES MANAGEMENT PTY LTD [2021] SAET 6

Topic: Places of employment and journeys

Commentator: Suzana Jovanovic

Mr Thelan housed a work vehicle on his property. In September 2019, Mr Thelan received a text message requesting he attend a callout. He changed into his work attire and entered the work vehicle parked on his driveway. Whilst seated in the driver's seat of the work vehicle, Mr Thelan dropped his keys onto the driveway. He leaned out to pick up the keys which caused a strain to his back. He lodged a claim, which the compensating authority rejected.

The SAET found Mr Thelan was not at the place of his employment because he was not required to carry out employment duties within the vehicle in his driveway. However, it was held the injury occurred in the course of a journey between his residence and employment.

It was found that Mr Thelan was entitled to be paid for the time when he suffered the injury and was travelling to work to carry out employment duties. He had therefore been injured during that journey.

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The judge, for the sake of completeness, also turned his mind to the issue of whether the "real and substantial connection" test was satisfied. It was found the test is not whether there is a real and substantial connection between the accident and employment, but rather between the journey and employment – a broader test. Ultimately, it was found Mr Thelan sustained a compensable injury in the circumstances.

McBain v Return to Work SA [2021] SAET 65

Topic: The use of surveillance evidence during the PIA process

Commentator: Neville John

The value of good surveillance footage came to the fore when Mr McBain claimed lump sum compensation pursuant to Section 56 and 58 of the Act for his arm, neck, and lower back injuries. Pursuant to Section 22, he was assessed by Dr Thoo as having a total of 7% WPI regarding the arm and neck, and 5% for the lumbar spine, although Dr Thoo considered the latter was due to pre-existing degenerative disease and therefore not work related.

Mr McBain disputed the determination (excluding the lumbar spine assessment) and contended the 5% should be combined with the remaining 7%, and that he was asymptomatic pre-injury. ReturnToWorkSA and the employer, IWS, contended any aggravation of the lower back was temporary only. They relied upon a combination of summonsed General Practitioner notes, treating specialist records, and comments made or not made to them by Mr McBain, in conjunction with surveillance film taken of Mr McBain over a 3 day period, some two years prior to the Section 22 assessment.

Mr McBain's credibility was squarely in issue and Judge Kelly was not convinced he exhibited signs of any ongoing impairment two years prior to the assessment, resulting in Dr Thoo's assessment being overturned.

Here, the value of the surveillance footage, even though quite old, was, in combination with subpoenaed notes, a useful tool in saving the Corporation a significant lump sum payment.

Malejcic v Department of Treasury and Finance [2021] SAET 86

Topic: The use of surveillance evidence during the PIA process

Commentator: Neville John

In contrast with Mr McBain's case, Deputy President Lieschke was not swayed by significant surveillance footage taken over a 4 year period both prior to and post a PIA assessment from Dr Jennings – amounting to 14% WPI of the left shoulder, 11% right shoulder, 5% lower back, 4% right and left elbows, 3% hip, and 2% for scarring. The assessment was conducted in October 2017 and the surveillance footage, some 4½ hours of it, covered periods in 2015, 2017, 2018 and 2019.

The compensating authority wanted the matter referred to an independent medical assessor, and for them to see the film before providing a second opinion. Lieschke DP refused the request, stating he did not think the film would assist any independent assessor, as he found the worker to be a credible witness. He preferred the treating specialist's opinions supporting the worker over the various independent medical experts that had viewed the film, who did not consider the worker to have as significant

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restrictions as assessed by Dr Jennings.

In a very small victory, Lieschke DP deducted 1% from the activities of daily living assessment, otherwise leaving the assessments untouched.

Martin v RTWSA [2021] SAET 111

Topic: NIHL

Commentator: Tracey Kerrigan

Ms Martin was 90 years old at the time of submitting her claim for NIHL. She worked in a clerical role for Peterson Industries between 1965 and 1995. Her claim was apparently some 25 years out of time. The claim was rejected on a number of grounds, including that her employment did not expose her to noise capable of causing NIHL, and the compensating authority was prejudiced by her failure to bring the claim earlier.

The worker bore the onus of proving she was exposed to noise capable of causing NIHL. She gave evidence her office was just inside the front door of the factory and also a reception area of sorts. She was exposed to noise from the factory.

After discharging that onus, the onus then shifted to the Corporation to prove it had been prejudiced in the determination of the claim. No real evidence was led on this issue, despite the fact the business had closed some years ago, and obviously no information could be obtained to respond to her assertions. It appears the Corporation simply relied on the lapse of time as being evidence of prejudice.

Judge Calligeros followed the approach taken by Judge Hannon in *Grimwade v RTWSA* regarding when the timeframe for making a claim runs. In *Grimwade*, it was from the date the worker incurred an account for provision of hearing aids. Judge Calligeros found the worker became aware of suffering hearing loss in 2016, and that is when the time limit ran from.

This case establishes that no matter how long it has been since a worker was employed, it is still possible to get NIHL claims over the line. Employers/compensating authorities cannot simply rely upon the "passage of time" argument as being sufficient to establish prejudice. There must be more than that. The SAET will look at factual evidence as to when the time limit runs from, but it is not simply the date the worker was last employed.

Lambe v Return to Work Corporation of South Australia and Southern Scapes Retaining Walls and Excavations Pty Ltd [2021] SAET 114

Topic: The suspension of payments during a section 48 dispute

Commentator: Suzana Jovanovic

Mr Lambe received a determination which discontinued his weekly payments following an alleged breach of mutuality for failure to attend his employment to perform suitable duties.

A dispute was lodged with the SAET, and Mr Lambe applied to have the operation of the decision suspended by virtue of s48(9) of the *Return to Work Act 2014* (SA).

The Commissioner made an order to suspend the operation of the discontinuance determinations on four occasions, which meant the weekly payments were to continue. However, on 30 April 2021 the Commissioner vacated the order, which meant that the

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weekly payments were then ceased.

Mr Lambe sought to have the s48(9)(b) order reinstated. The question here is, can an application be made to reinstate an order made pursuant to s48(9)(b), if it had not been made before or had not been extended? The Tribunal held it had jurisdiction to reinstate the suspension order depending on the nature and circumstances of the case, any conduct relevant to a reasonable opportunity for resolution of the proceedings, the potential for undue financial hardship, and whether the worker's disputation of the decision to discontinue is reasonably open.

In effect, payments under a s48(9)(n) order can cease and then be reinstated at any time whilst the dispute is on foot. Amongst other factors, the Tribunal declined in this case to reinstate the order on the basis Mr Lambe's strained financial circumstances did not amount to undue financial hardship. The matter could still be revisited by either party later on, subject to any new evidence of changed circumstances.

Ridley v Return to Work Corporation of South Australia [2021] SAET 116

Topic: Scarring assessments under challenge at the SAET

Commentator: Oliver Fragnito

This matter deals with whether an IMA should be appointed to assess scarring resulting from surgery for a worker's injury, or whether the Judge (Tribunal) should make the assessment.

The Corporation's lawyers asked that an IMA make the assessment, whereas the worker's lawyers asked the Tribunal to make the assessment.

It was held that while the Tribunal could assess the scarring, an IMA should make the assessment otherwise a step in the dispute resolution process will be bypassed, as well as overriding the 'one assessment' rule.

Under the RTW Act, Table 13.1 of the IAG concerns the evaluation of minor skin impairment and sets out criteria for assessments of WPI from 0% to 9%. The criteria from 0% WPI to 2% WPI are all based upon the appearance of the scarring, how conscious the worker is of the scarring, and the effect of the scarring upon the worker's performance of ADL. While the adherence of scarring to underlying tissues is a criterion for assessments of WPI of 3% or greater, and may call for the exercise of medical expertise, adherence was not an issue in this matter.

The Judge referred to the matter of *Harris v GM Holden Limited*, where it was held the Tribunal could substitute its findings in relation to the impact of ADL for an erroneous assessment without having to seek a further medical assessment to that effect. They also referred to the matter of *Burnett v Return to Work Corporation of South Australia*, where the doctor who conducted a PIA incorrectly chose the DBE method of assessing lower limb permanent impairment over the ROM method. No complaint was made about the reliability of the ROM method assessment. The ROM method was the most appropriate and specific method of assessment within the meaning of Chapter 3.6 of the IAG, and was applied instead., as an example of the Tribunal effectively exercising its own power to 'make an assessment' and apply a clinical judgement of a sorts.

In this matter, the Judge took the view a Presidential member of the Tribunal is able to assess scarring in the present context. They said the issue is whether they should proceed to make the assessment in the circumstances of this case.

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The Judge said if they were to assess scarring it would be undertaking part of the assessment process outside of the context of being seized of hearing the matter, where the answer to a legal issue is ultimately determinative of the outcome. It would also remove the usual step of referring a disputed assessment to an IMA. The Judge therefore referred the worker's assessment of an WPI due to scarring to an IMA.

Karas v Return to Work Corporation of South Australia [2021] SAET 121 & *Ahmad v Thomas Foods International Consolidated Pty Ltd* [2021] SAET 126

Topic: Assessment of permanent impairment and Transitional Provisions

Commentator: Melanie Conroy

The recent cases of Mr Karas and Mr Ahmad confirm a now fairly settled area of law in regard to the application of the Transitional Provisions and Permanent Impairment Assessments.

The cases confirm the Transitional Provisions prevent the agitation of assessment for new injuries, and any double dipping or reassessment when it comes to prior assessments. The Transitional Provisions do allow for conversion to Whole Person Impairment (WPI) from the Table of Maims used under the previous Act, the *Workers Rehabilitation and Compensation Act* (1986) (**WR&C Act**). The provisions do not allow for new injuries said to arise from the same past trauma or cause to be added to and assessed as an additional part of that process.

Additionally, the cases comment on how the Transitional Provisions operate in regard to serious injury applications.

In the case of *Karas v Return to Work Corporation of South Australia* [2021] SAET 121, Mr Karas sought a determination by the SAET as to whether an assessment arranged by the Corporation pursuant to Transitional Regulation 4(2) of the Return to Work (Transitional Arrangements) (General) Regulations 2015 should have been an assessment of ***all*** impairments suffered by Mr Karas arising from his work injury irrespective of when they arose, and may or may not have been previously assessed in accordance with section 22 of the *Return to Work Act 2014*.

It was held that Mr Karas, in making an application in accordance with regulation 4 (where the purpose of the assessment was to translate into a whole person impairment percentage those assessments that had previously been made in accordance with the Maims Table under the WR&C Act) was limited to only having 'converted' those Maims Table assessments and not anything that may have arisen later on and being the subject of a section 22 assessment and section 58 compensation (if possible). It was noted Mr Karas did not make an application to be assessed pursuant to section 22 of the *Return to Work Act 2014*, nor was this part of an application to be deemed seriously injured.

In a similar theme, *Ahmad v Thomas Foods International Consolidated Pty Ltd* [2021] SAET 126 concerned an appeal from a Deputy President's decision that clause 44 of the Transitional Provisions to the *Return to Work Act 2014* (**RTW Act**) precludes an assessment of whole person impairment (WPI) pursuant to section 22 of the RTW Act where the relevant impairments have already been assessed for WPI under the former WR&C Act.

The worker, Mr Ahmad was seeking an assessment of the combined whole person impairments resulting from his existing injuries, which were all sustained under the

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WR&C Act. He sought to have the broader combination test under section 22 of the RTW Act ('arising from the same trauma or cause') applied to his already determined permanent impairments pre-2015 injuries, which did not all arise from the same trauma or cause as now understood under the RTW Act.

The appeal was dismissed, with the Tribunal holding it is not the effect of clauses 29 and 44 of the Transitional Provisions to entitle Mr Ahmad to an assessment of WPI in accordance with section 22 of the RTW Act, where prior injuries had been the subject of a prior assessment under the WR&C Act.

As always, if you seek any further advice on the issues that we have identified above, then please do not hesitate to contact us.

If you wish to undertake further reading in relation to any of the decisions discussed above, they can be found at www.austlii.edu.au.

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