JUNE 2022 CASES UPDATE

NEWS

Hello and a warm welcome to our mid-year cases update and newsletter.

With changes of governments come changes of law!

With changes of government at Federal and State level recently, we can probably expect some significant changes to our workers compensation and employment relations systems in the near future. The State government has already flagged a change to the whole person impairment assessment scheme to address the financial ramifications of the *Summerfield* case. The Commonwealth government is about to address longstanding issues with the enterprise bargaining system, which is now basically not fit for purpose. It's going to be an interesting second half of 2022!

In addition, Safe Work Australia has just announced a raft of changes to the Model WHS Laws. Whether they are flagged for adoption quickly by the State government is not clear at the time we are going to press. Nonetheless, we will be issuing a detailed analysis of the proposed changes in the coming weeks.

Congratulations to Neville John for a WHS Doyle's Award in 2022

Our workplace legal specialist, Neville John, was again recognised by his peers in the annual Doyle's Guide, getting a Safety Law (WHS) commendation for 2022, with the firm also being recognised in this area of the law at the same time. Doyle's Guide is a broad peer-based recognition platform, where leaders in various legal sectors rate their competitors, so the acknowledgment of speciality in a given field certainly accrues some 'gravitas'.

Matilda Wise promoted to Solicitor

We are pleased to announce Matilda (Tilly) Wise, who commenced with us as a law clerk in January 2022, has now been admitted as a Practitioner of the Supreme Court of South Australia (in April), and has therefore formally qualified to practice as a solicitor. We wish her a long and successful career in legal practice. Tilly has a keen interest in

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workplace law, having taken a double degree incorporating legal and business studies (majoring in human resource management), and her expertise is something we are looking forward to in helping supplement our employment relations advisory service.

KJK Legal presents its next Learning Update in June 2022

We have set the date for our next Learning Update, with a breakfast session scheduled for 29 June 2002. This time we will be conducting a mixed in-person seminar and webinar, so you will have the option of attending either way at your convenience. Invitations have now gone out to those on our mailing list. If you are not sure you are on our mailing list, and want to be, then please contact us at admin@kjklegal.com.au , or sign up via the website at www.kjklegal.com.au

Topics we will definitely be addressing are the proposed legislative changes arising from the *Summerfield* case, along with some HR insights from Tilly on retention strategies for key employees in the post-Covid/great resignation industrial landscape.

And speaking of websites, we are in the midst of a major overhaul to the look and utility of the site, so watch that space!

New SAET Rules (and changes to our precedent documents) and new Impairment Assessment Guidelines (IAG's)

Not everyone is aware, but the SAET amended its Rules earlier this year, with effect from February. While many of the changes made don't affect compensating authorities in a direct sense, there are some key changes which trickle down into aspects of claims management. In particular, the old Rule 62 (referenced when seeking reports from doctors) is now Rule 66, and a subtle change to its wording has occurred.

We have updated our precedent documents, which you are able to access, so it would pay to take a look at what documents you are currently using as templates and check them against our latest template letters. Access to our precedent documents is free for clients, and available to anyone else at a modest fee. Again, contact us via the email address above, or via the website, if you want to know more.

Finally, a quick reminder the Impairment Assessment Guidelines are now up to a second edition, and applicable to any injuries to be assessed that occurred after 24 August 2021. Again, some of our precedent documents have been amended to reflect reference to the new Guidelines. The incoming State Government flagged some time back that it may review the second edition Guidelines, so again, watch this space.

Recent Cases of Interest

Return to Work (SA) v Opie & Anor [2022] SASCA 12

Topic: Compensability of illness Topic: Outcome of appeal – Assessment of permanent impairment and pre-existing injuries under section 22(8)(b) and section 22(8)(g) of the RTW Act

Commentator: Melanie Conroy

This case concerned an appeal to the Supreme Court on the interpretation of, and how to apply, section 22(8)(b) and section 22(8)(g) of the RTW Act where they both potentially apply to a permanent impairment assessment.

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Background

The worker had a pre-existing WPI of 15% as a result of a lower back injury in 1992, which was paid under the former WR&C Act. The worker then suffered a further lower back injury in 2014. The worker was assessed as having 28% WPI, before a deduction was made of 21% for pre-existing WPI.

The worker's entitlement to non-economic loss by way of a WPI was disputed, with the parties having a differing view on how sections 22(8)(b) and section 22(8)(g) are to be applied.

The Trial judge was satisfied the earlier spinal fusion in 1992 left the worker with a degree of pre-existing permanent impairment, which section 22(8)(g) mandated be assessed then deducted in accordance with the Impairment Assessment Guidelines (IAG's).

On appeal, the Full Bench of the SAET held that section 22(8)(b) represented an alternative to section 22(8)(g), which must be preferred under Chapter 1.38 of the IAG's to ensure the assessment of a higher degree of permanent impairment.
RTWSA were granted permission to appeal to the Supreme Court. It was RTWSA's position the Full Bench of the SAWE erred in law by:

1. Finding section 22(8)(b) of the RTW Act can be applied to the exclusion of section 22(8)(g) of the RTW Act if that results in the highest degree of permanent impairment, on the basis that chapter 1.38 of the IAG's sanctioned this; and

2. Failing to apply section 22(8)(g) of the RTW Act where a portion of an impairment is due to a pre-existing injury that caused the worker to suffer an impairment before the work injury (although in this case to a separate area of the lumber spine).

Central to the decision of the Full Bench was the proposition that **each** of section 22(8)(b) and section 22(8)(g) of the RTWA Act were, in the circumstances of the case, 'equally valid and applicable' methods of assessment, and the method that resulted in the highest degree of permanent impairment must be used.

Appeal

The Court of Appeal found the principle that requires the use of the method that results in the highest degree of permanent impairment was **not** a principle of general application. This principle **only** operated when the Guidelines and AMA 5 specified more than one equally valid, applicable method to establish the degree of permanent impairment.

The Court of Appeal discussed there were two ways in which the worker's permanent impairment from 2014 could be assessed.

1. Assessing the WPI of the lumbar spine having regard to the double level fusion to the lumbar spine. This method of assessment incorporated the pre-existing WPI because of the fusion and as such section 22(8)(g) would apply.

2. The impairment from the fusion at the L4-L5 would not be regarded as being an impairment from an unrelated injury or cause and section 22(8)(b) would not apply. i.e., the pre-existing 20% WPI was to be disregarded, because it was an impairment arising from an unrelated injury or cause. On this method section 22(8)(g) would not apply, with the result being that no deduction for the worker's pre-existing impairment would be made.

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In assessing the worker's permanent impairment to the lumbar spine, the Court commented neither the Guidelines nor AMA5 specified more than one applicable method. The DRE method needed to be followed, and in the circumstances of this case chapter 1.38 of the IAG's was not engaged. Therefore, the Full Bench of the SAET had made an error of law in applying the principle embodied in chapter 1.38, which required the selection of the highest degree of permanent impairment where there was more than one equally valid applicable method of establishing permanent impairment.

Following the decision in *Paschalis*, the Court of Appeal commented the Act was only intended to compensate work injuries and impairments caused by work injuries. When read together, sections 22(8)(b) and 22(8)(g) express the same legislative intention - that only a work injury or an impairment that is attributable to a work injury was to be assessed and compensated. Therefore, impairments from unrelated injuries or causes were to be disregarded (section 22(8)(b)) or where there was a portion of an impairment due to a previous injury it was to be deducted (section 22(8)(g)) to ensure a worker was not compensated for impairments which were not caused by work injuries.

The circumstance of a particular case may require impairments from unrelated injuries or causes to be disregarded, in the sense of being deducted or subtracted under section 22(8)(b). This will depend on the nature of the impairment caused by the work-related injury and the connection between any impairment caused by an unrelated injury or cause.

Based on this explanation, the Court of Appeal held the Full Bench of the SAET erred in finding section 22(8)(b) represented an alternative to section 22(8)(g), as there was no scope to choose between them.

The transitional provisions to the 2015 legislation were also discussed, because the monetary sum the worker would be entitled to due to the non-economic loss depended upon whether the 2010 Regulations or the 2015 Act applied, which was dependent on the worker's date of injury (1 January 2014). This injury was classed as an existing injury for the purposes of the Act, as it occurred before the designated date, being the date, the Act came into effect.

The Court of Appeal held the worker's entitlement to compensation by way of non-economic loss was to be determined by reference to the Transitional Regulations, the 2010 Regulations and not the 2015 Regulations. The clear effect of regulation 5(2) of the Transitional Regulations was to preserve the approach to compensation which applied under the former Workers Rehabilitation and Compensation Act (1986) and the 2010 regulations.

PARRY V RTWSA [2022] SAET 18

Topic: PIA assessment – needing a reliable basis for a compliant assessment

Commentator: Tracey Kerrigan

The worker was pursuing an assessment of his WPI both for the purposes of a lump sum but also potentially to form the basis of an assessment that he was a seriously injured worker (SIW).

The worker had suffered a compensable knee injury and undergone a total knee replacement. Dr Tran assessed the worker's WPI at 31%. The assessment provided by Dr Tran reflected a poor outcome from surgery.

RTWSA declined to issue a determination giving effect to that assessment.

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The matter proceeded to trial before D.P. Judge Crawley. At issue to a large extent was the worker's credibility. There were also issues as to whether the worker had reached MMI and criticism of Dr Tran's findings. There may have also been a question as to deduction of pre-existing osteoarthritis.

The worker provided an affidavit that his knee was still causing considerable problems, and in fact his condition had worsened post the assessment with Dr Tran. He had continued to seek treatment. He contradicted some of those assertions in evidence.

The treating surgeon Dr Pourgiezis however indicated that post surgery the worker was "very happy, no concerns". Both he and the GP noted a good outcome. Dr Tomlinson could not explain the change in level of symptomatology unless something had gone catastrophically wrong with the knee replacement. Dr Tomlinson was sceptical of the worker's complaints. But if they were true, he was not at MMI.

D.P. Judge Crawley did not accept the worker's evidence as a reliable basis for findings of fact. He also did not consider Dr Tran's assessment to be a reliable basis for a determination of WPI presumably due to his lack of acceptance of the worker's credibility. Subjective complaints by a worker are an "integral part of the process". If the worker's evidence was not accepted, in D.P. Judge Crawley's view, then "the whole assessment miscarried". Inevitably the worker was referred to an IMA for a further assessment. D.P. Judge Crawley did not consider there was a basis to ask the IMA examiner to deduct any pre-existing osteoarthritis in the absence of any substantive evidence.

Key takeaway

Although a lot of reliance is placed upon the assessor's view of the worker and his examination on the day of the assessment, if there is real concern about the worker's assertions during the section 22 assessment as compared to objective and/or subjective findings/comments made by or to other health providers in the lead up to the assessment, this may legitimately throw doubt upon the assessment itself.

Although the Tribunal has stated in past judgments that it is not a "free for all" when it comes to challenging Section 22 PIA assessment's, if there is **real doubt** about the assessment, and/or the assertions of the worker, the Tribunal is prepared to intervene. Of course, it inevitably leads to a referral to an IMA, as the Tribunal is unable to simply substitute its own assessment in this type of case.

But given the importance of the assessment process, particularly in respect to joint replacement surgery, and the liability that flows from a 30% assessment, it is useful to scrutinise both the worker's assertions and the findings of the assessor. Further, if the worker's assertions are of significant ongoing problems, for which treatment should really be undertaken, then query whether in fact MMI has been achieved.

BREED V UNIVERSITY OF ADELAIDE [2022] SAET 25

Topic: The timing of a PIA assessment – Sometimes it can be too early

Commentator: Neville John

Mr Breed claimed a neck injury arising from altered postures due to travelling to and sleeping in a hotel, and over four years of using an ergonomically unsuitable workstation, significantly contributing to the injury. The injury was of a painful neck with some right sided radicular symptoms.

The claim was for lump sum compensation and medical expenses, but not income support. The disputed degree of permanent impairment had been assessed at 16% WPI, including 1% for ADL.

The rejected claim was disputed, and D.P. Magistrate Lieschke found in favour of the worker regarding causation.

Dr Suyapto assessed the worker within 10 months of the injury.

The medical evidence accepted from Dr Carney was that nerve root injuries are injuries of peripheral nerves and are neurological injuries. The reason symptoms of altered nerve function in an arm can result from nerve root injuries is because of neurological damage to a peripheral nerve root. Radiculopathy is pathological damage in a nerve root, which necessarily is neurological damage. Only the spinal cord and brain are not included in peripheral nerves.

However, Dr Suyapto's assessment that the worker had loss of sensory function, with reduced power, and some atrophy was not accepted based on Dr Carneys evidence and the Respondent argued there was no longer any evidence of radiculopathy in the arms, and therefore the existence of that clinical finding at the time of the PIA should now be discounted or disregarded.

Importantly, it was held that the assessment was undertaken two months early, according to the IAG definition of medical improvement. The minimum period is expressed as being mandatory and it needs to be applied. While there are many criteria that are expressed to be merely advisory, and some criteria are expressed in ambiguous language, the minimum of 12 months before assessment was clearly stated.

The 12-month requirement was more than a technical rule. The evidence of some improvement means it was unclear whether or not the applicant's impairment would have been assessed in the same manner if more than 12 months had elapsed. The Deputy President concluded that the assessment was premature and must be set aside for this reason.

The worker, having now well and truly passed the 12-month minimum period, was referred to an IMA for re-assessment.

Key takeaway

Always be mindful of the need to ensure compliance with all the applicable provisions governing the permanent impairment assessment process. In this case there was a rush to push through an assessment. Commonly, workers' lawyers will take such a course of action without realising the full extent of the applicable guidelines and their requirements. And where there is objective evidence of ongoing medical/functional improvement, then it is appropriate to hold off on the push to conduct a permanent impairment assessment prematurely.

RTWSA v Nicholson [2022] SAET 33

Topic: Whole Person Impairment and deduction for pre-existing impairment

Commentator: Melanie Conroy

This case explored two key issues:

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1. The primary issue was whether Mr Nicholson's pre-existing knee osteo-arthritis needed to be symptomatic to be taken into account in assessing the degree of whole person impairment (WPI) for the purposes of the *Return to Work Act 2014*.

2. The secondary issue was whether it was open to appeal the Trial Judge's findings as to the correctness of the x-ray evidence relied upon by the assessing doctor. The Trial Judge found it was inappropriate for the assessing doctor to have used one of the x-ray reports, and the judge also found that another x-ray report relied upon by the assessing doctor was unreliable.

Background

Mr Nicholson, over the course of his working life, worked in the building industry in a variety of jobs for multiple employers doing heavy work.

He consulted his GP in 2015 due to having painful knees, and x-rays at that time showed signs of osteoarthritis. He subsequently suffered compensable work-related injuries to both knees and underwent a right and left knee replacement.

In 2018 Mr Nicholson explored his entitlements to lump sum compensation on account of various injuries, including his left and right knees. In conformity with the Act and the Impairment Assessment Guidelines, he nominated the occupational physician, Dr Bastian to assess his WPI.

Was the osteoarthritis symptomatic and should have a deduction been made?

The central question looked at that by the SAET was whether the osteoarthritis that had been diagnosed in both knees prior to the relevant injuries was a pre-existing condition that caused Mr Nicholson to suffer an impairment?

This is important as an under the RTW Act an 'impairment' is something different from an 'injury'.

The reference to both 'a pre-existing condition' and 'impairment' in section 22(8)(g) of the RTW Act indicates that an 'impairment' is different to a 'pre-existing condition'. A pre-existing condition only becomes an 'impairment' for the purposes of section 22 if that condition becomes symptomatic.

In Mr Nicholson's situation the Trial Judge found that, based on the medical evidence, the pre-existing osteoarthritis was not symptomatic in both knees at the relevant time, and as such was not an 'impairment' for the purposes of section 22 of the Act. Therefore, no deduction should have been made for pre-existing osteoarthritis.

Held

On appeal the SAET found that the trial judge erred in concluding Mr Nicholson's pre-existing osteoarthritis needed to be symptomatic to warrant deduction in connection with his assessment of WPI.

There was clear evidence Mr Nicholson had pre-existing osteoarthritis in both of his knees. Often in respect to pre-existing conditions there is little contemporaneous evidence of the **extent** of the impairment.

As explained by the SAET in the *Department of Health and Ageing v Neilson [2017] SAET 136,* the absence of contemporaneous evidence does not relieve the assessor or the Tribunal from undertaking the task of assessing the extent of the pre-existing impairment. The assessor must do the best they can on the evidence at hand.

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In the initial instance the Trial judge might have been right to conclude the use of the x-ray was inappropriate in connection with assessing the extent of pre-existing impairment in Mr Nicholson's right knee. He also might have been right to conclude that the second x-ray was not a reliable guide to use in assessing the extent of pre-existing impairment in Mr Nicholson's left knee.

However, the Trial Judge was not at liberty to conclude that there was no basis to make an assessment of pre-existing impairment. The Trial Judge needed to consider whether he had sufficient concerns about the assessment of Dr Bastian (who was the medical expert who relied on the x-rays) to be inclined not to act upon it.

In that event, the only course open was to refer the matter for an opinion from an Independent Medical Adviser. The matter was remitted back to the Trial Judge to consider whether he has sufficient concerns about Dr Bastian's assessment to believe a referral to an independent medical adviser was necessary.

Key Takeaway

If pre-existing osteoarthritis is not symptomatic at the relevant time/at the date of injury that does not preclude it being considered as an 'impairment' for assessment/deduction purposes.

RTWSA v Williams [2022] SAET 34

Topic: Compensability of illness

Commentator: Melanie Conroy

This case considered the combination of injuries in relation to aggravation injuries due to osteoarthritis.

The primary issue was whether the injuries to the Mr Williams' right and left knees should be combined for the purpose of a WPI assessment.

Background

Mr Williams an electrician sustained a work-related injury to his right knee in May 2013 working for a previous employer. He then commenced employment with a labour hire firm which placed him at the Australian Submarine Corporation. He sustained further injuries to his right and left knees in the course of his employment between May and August 2015 when undertaking physically demanding and repetitive work.

The claim for right knee aggravation osteoarthritis was accepted by a determination of 14 January 2016. The later claim for left knee aggravation osteoarthritis was accepted by a determination of 23 February 2016.

The whole person impairment (WPI) for the right knee was 21% after a deduction of 1% for the right knee impairment from the 2013 injury, and the WPI for the left knee was 22% after a deduction of 8% for pre-existing impairment.

The matter was disputed, with the issue on appeal being if the trial judge erred in finding that the impairments should have been combined.

Findings of the trial judge

The trial judge found that in May 2013 Mr Williams had sustained a significant injury, and he had some level of ongoing impairment of the function of the right knee and some ongoing symptoms, but the condition of the right knee was relatively stable until early May 2015.

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His "work activity" caused the injury to the **right knee** by way of aggravation and acceleration of the pre-existing degenerative changes, which rendered the condition of the right knee much more symptomatic and the level of impairment much greater.

The same "work activity" over the same period from early May 2015 caused an aggravation and acceleration of pre-existing degenerative changes of the **left knee** which had been productive of ongoing symptoms and impairment.

Each injury was given the date of injury of 18 August 2015, consistent with section 188 of the RTW Act which provides that injuries which develop gradually will be taken to have occurred when the worker first becomes totally or partially incapacitated for work. In this instance Mr Williams did not return to work after 18 August 2015.

The appeal

RTWSA appealed the decision of the trial judge to combine the impairments pursuant to either section 58(6) and/or section 22(8)(c) of the Return to Work Act.

The trial judge found the "work activity" of repetitive climbing of ladders/steps and working in a crouched/kneeling position by Mr Williams, during his employment from May 2015 to August 2015, caused aggravations of pre-existing conditions in both his knees and, as a result caused the impairments to each of his knees.

The finding was that there were no causative differences between what had caused the work injury and impairment to Mr Williams' right knee and what had caused the work injury and impairment to his left knee.

Accordingly, the trial Judge concluded that, pursuant to s 58(6) of the RTW Act, Mr Williams' assessed impairments for his right knee and left knee should be combined.

RTWSA submitted that it was not possible to identify the "work activity" between May and August 2015, or the thing or event which caused the impairment to each knee. To put it more succinctly, RTWSA submitted that it was an error of law to characterise the work activity over a period of three to four months as the same trauma without identifying more specifically what work activity caused what injury.

Therefore, under the test of "same trauma" as enunciated in *Marrone v Employers Mutual Limited* and confirmed in *Return to Work Corporation of South Australia v Preedy,* RTWSA submitted the impairments to Mr Williams' knees should not be combined pursuant to s 58(6).

Held

On appeal it was accepted that some aspects of Mr Williams "work activity" between early May and August 2015 were causes of his knee injuries. Each injury was deemed to be compensable by reference to that "work activity". However, it does not follow that the two injuries arise from the same trauma.

The term "same trauma" is confined to circumstances in which one and the same event or series of events, causes multiple compensable disabilities. Moreover, multiple injuries do not arise out of the same trauma or traumas unless the trauma or traumas have operated as a cause of all the injuries as supported by the case of *Wagenfeller v Return to Work Corporation of South Australia*.

The findings made by the trial judge in relation to the "work activity" do not lead to the conclusion that all of the events comprising of the "work activity" over the relevant three to four months are the exclusive causes of each knee injury. The trial judge did not reach that conclusion because the evidence before the judge was not sufficient to allow it.

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The SAET discussed the notion of "work activity" and commented that even when limited to certain actions over a three-to-four-month period, that this concept is too wide and does not in the court's view fall within the concept of the thing or event from which an impairment results. That is particularly so when there is no causal relationship between the two injuries and the impairments which have resulted.

On appeal the decision that the WPI for each knee was to be combined was set aside.

Key takeaway

In this case the evidence did not support that the impairments to Mr Williams' knees were caused by exactly the same trauma(s). The notion of them occurring in "work activity" was too abstract.

Emily Robinson v University of South Australia [2022] SAET 23

Topic: Compensability of illness

Commentator: Suzana Jovanovic

Background

The facts of this case were agreed. The worker sustained injuries to her right knee and right elbow on 3 September 2020 when she stood up from her chair at work to get a ruler from her colleague's desk, turned, took a few steps, and had her right knee collapse which caused her to fall and land on her elbow.

Issue

The issue before the SAET was whether employment was a significant contributing cause to the worker's injuries.

Held

Whilst the worker's actions were benign, they nonetheless caused injuries which the Trial Judge found to be compensable.

Section 7(2) of the Return to Work Act 2014 (SA) requires a physical injury to arise out of or in the course of employment, and for employment to be a significant contributing cause of the injury.

There were differences in the medical opinions of various doctors. However, the Trial Judge did not consider the differences to be material.

The Trial judge found the worker's knee gave way when she placed weight upon her leg and twisted in the course of performing her duties, and it was the carrying out of those duties which precipitated her knee to give way and subsequently fall. It was therefore found the work duties played a causative part. In considering whether employment was a significant contributing cause, the Trial Judge held that "but for" the worker standing up and turning in the course of her duties, there was nothing to suggest the injury to the knee and elbow would have occurred when and where it did.

Key takeaway

During the trial, the Respondent's counsel submitted there was no contribution from employment other than being the location where the injury occurred, and that this was very much a case of happenstantial occurrence. The Trial Judge disagreed.

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The case demonstrates that even the most benign actions, which could have easily occurred elsewhere, can be found to be compensable, which from an employer's perspective is quite concerning. The causation test brought in under the 2015 legislation is proving to be a very small hurdle for claimants to overcome.

KNIGHT V THE STATE OF SOUTH AUSTRALIA & ANOR [2022] SASCA 14

Topic: Appeal concerning whether weekly payments pursuant to section 39 of the Return to Work Act (2014) are earnings for the purpose of calculating Average Weekly Earnings (AWE's)

Commentator: Melanie Conroy

This case was an appeal to the Court of Appeal against a decision of the Full Bench of the SAET concerning whether weekly payments of compensation made pursuant to section 39 of the Return to Work Act 2014 should be considered as earnings for the purpose of calculating AWE.

The question considered was whether section 5 of the Act permits the calculation of AWE's based upon full time earnings (including weekly payments of compensation) or only actual, part time earnings.

Background

The worker was employed as a teacher. In April 2011 she was working full time and suffered a psychiatric injury following an incident in her classroom where a student brandished a replica gun. Her claim was accepted, and she was paid compensation under the former WR&C Act. She made a return to work on a part time basis due to the ongoing effects of the initial injury. She then made a new claim for an aggravation of the initial injury due to a similar incident at school in 2017. This claim was accepted as an aggravation.

The worker submitted:

1. Her work injury from April 2011 was a "work injury" for the purposes of section 5(9) of the Act when calculating her AWE for her aggravation injury. The worker contended that the concept of a "work injury" should be extended to include a "prior work injury".

2. While she was away from the workplace recovering from a work injury this should be constituted as "other leave" for the purpose of section 5(3) of the Act and as such the receipt of weekly payments of compensation should be considered as an amount paid under that section.

The Trial Judge held weekly payments of compensation for the worker's prior injury (i.e., the top ups of Income Support due to her initial injury) did not constitute payment of leave which could be considered in the calculation of her AWE's. The Trial Judge also found that section 5(9) of the Act did not apply to a prior injury. It is confined to the work injury for which compensation is being claimed.

The Full Bench upheld the trial judge and found neither section 5(3) nor section 5(9) of the Act permitted the worker's weekly compensation payments to be included in the calculation of her AWE.

The Court of Appeal was not persuaded by the worker's submissions and found the calculation of the worker's AWE's should be confined to the amount she was receiving in exchange for her labour. As such, the amounts received by way of weekly payments of compensation pursuant to section 39 of the Act must be left out of account. Weekly

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payments of compensation are not amounts paid whilst on leave within the meaning of section 5(3) of the Act.

The Court of Appeal also found reference in section 5(9) of the Act to a "work injury" means the injury for which AWE must be set and it does not extend to a prior injury, particularly one which the worker has received or is entitled to receive compensation.

Because the matter was of some importance, permission to appeal was granted, but ultimately the appeal was dismissed.

The Court of Appeal, on the question of whether the term a "work injury" in section 5(9) of the Act encompassed a prior work injury, followed the reasoning in *Heywood-Smith* to the effect this definition only refers to the subject work injury, not a prior injury.

The Court of Appeal also commented the worker's construction of section 5(3) gave rise to tension, as it is implicit in section 50 of the Act that the absence of a worker from employment due to a compensable injury is not a form of leave. In effect the position the worker was advocating for would have amounted to a form of double compensation. The worker would have received double compensation in that she would have received weekly payments for the subject injury calculated (in part) by reference to the weekly payments received in respect of the prior injury, for which she had already been paid (or had an entitlement to be paid) compensation in the form of weekly payments or a lump sum in respect of that prior injury.

The Court of Appeal made it clear that reference to a "work injury" in section 5(9) is reference to the injury for which the calculation of AWE is being determined and not any other prior injury.

Key Takeaway

This case confirms the longstanding approach to AWE's that worker's compensation payments are not considered as earnings in the calculation of AWE's and that a "work injury" does not encompass a prior injury for the purposes of the applicable section.

SHARMA V RTWSA [2022] SAET 6

Topic: Estoppel

Commentator: Matilda Wise

The issue in this case, is whether a prior decision made by the SAET about the compensability of injuries prevents an argument about whether to combine injuries for the purpose of permanent impairment assessment.

Mr Raj Sharma ("the worker") submitted a claim for a left foot injury sustained during the course of his employment in April 2017. He then subsequently submitted claims for a left shoulder, right shoulder and neck injury and upper and lower gastrointestinal injuries due to his use of opioid medications for the pain of his left foot injury. At a previous trial, only his left foot and gastrointestinal injuries were found to be compensable.

The worker's argument was his permanent impairments from his left foot (32% WPI), and gastrointestinal injuries (18% WPI) were from "the same cause" and, therefore should be combined for the purpose of his overall whole person impairment.

The initial trial resulted in a finding the worker had been troubled by his left foot injury since he first sustained it, and setting aside the claimed shoulder injury, he did indeed take pain medication for his left foot injury, irrespective of other reasons. The worker

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then took this to mean he could combine his injuries for a permanent impairment assessment, and that RTWSA was estopped from arguing to the contrary, or that there were other causes for the taking of the medication.

On review of initial decision, Deputy President Judge Gilchrist DPJ considered whether the previous decision had created an issue estoppel. Deputy President Gilchrist determined the earlier Tribunal findings were made in the context of the judge the issue as to whether those gastro-intestinal injuries resulted from his ingestion of opioid medication for his compensable injurie as a causation issue. He further reiterated the tests for compensability and the test for the combination of whole person impairment under the Act are not the same. Therefore, a finding the worker was ingesting opioid medication for reasons to do with his left foot injury as a causation issue, would not be inconsistent with a later finding the whole person impairment caused by the gastrointestinal issues was not from the same cause as the left foot injury. There was no necessity in the first case to deal with the issue of what other causes there might be as an essential aspect of any judgment on causation between the left foot injury and the consumption of pain killing medication – it was enough in causation terms for there to be a significant work related contributing cause, and that was all.

Deputy President Judge Gilchrist was of the opinion RTWSA was not estopped from putting forward the argument the worker's use of opioid medication use was for reasons other than his left foot pain, and therefore might not be combined, for the purpose of a Permanent Whole Person Assessment.

Key Takeaway

The test for compensability and the test for assessing and combining injuries for the purpose of permanent impairment assessment are different tests. Therefore, just because an injury is found to be a result of the ingestion of medication for a compensable injury (amongst several reasons), this does not automatically prevent the Respondent from arguing about what the cause of the problem might be, and any issue of combination, for permanent impairment assessment purposes later on.

ASKARI-GAZLACHEH V RTWSA [2022] SAET 11

Topic: Estoppel

Commentator: Matilda Wise

The issue in this case whether the findings in previous proceedings before the Tribunal impact what injuries can be assessed for the purpose of a section 22 assessment.

Mr Askari-Gazlacheh ("the worker") had a fall at work and submitted a claim for back injuries under the former WR&C Act. The claim was accepted on the basis he had sustained a lumbar back strain, and soft tissue injuries to his right shoulder and left knee. He received weekly income maintenance payments based on his assertion of incapacity for work.

Seven weeks later, the Corporation referred the worker to another doctor who found he had ceased to be incapacitated for work. He was not suffering any other physical or psychological injuries due to his fall. His weekly payments were discontinued.

The worker challenged this decision and submitted further claims for a neck, right hip, left shoulder, right shoulder, upper and lower digestive, and psychiatric injuries. These claims were rejected. The matter was heard before Deputy President Judge Hannon.

The Deputy President set aside the determination concerned and made decisions on their connection to the fall at work. He found the Respondent had not established the worker had ceased to be incapacitated when the initial section 36 notice (the equivalent of section 48 of the Return to Work Act) was provided to him, and that the worker's neck, left shoulder and right knee injuries were not connected to his fall. He made no findings on the ongoing compensability of the right shoulder, and upper and lower digestive systems. A lot of the case surrounded the issue of whether the worker really had actual physical injuries, or his problems were more psychiatrically based.

Very much later in time, the worker was considering his options regarding his lump sum entitlements and looking to have a section 22 assessment undertaken. He nominated Dr Suyapto as his assessor.

In his report dated 14 June 2019, Dr Suyapto had been requested to assess the degree of whole person impairment for the worker's lumbar spine, right shoulder, left knee, right hip, upper and lower digestive systems, and liver.

Contrary to the case of Sharma v RTWSA, Return to Work put to the SAET the issue estoppel doctrine should be applied in a practical way, and therefore the submissions made by the worker in subsequent proceedings as to being able to use all of Dr Suyapto's findings of the various compensable or non-compensable injuries was unenforceable.

Deputy President Judge Gilchrist found the previous SAET decision did not prevent the worker from asserting he had an assessable permeant impairment of his lower back, as the question of permanency was not in issue originally – it was just an issue as to incapacity.

As for his neck, right hip, and left shoulder, as Deputy President Judge Hannon originally found these injuries to be non-compensable, the worker was estopped from seeking a whole person impairment for them.

However, as Deputy President Judge Hannon did not make a decision on the connection between the worker's right shoulder, liver and upper and lower digestive systems and the incident at work, the worker was still entitled to have these parts assessed.

The case fell to be decided on what aspects of the previous decision were essential aspects and findings, so as to create a later issue estoppel.

Key Takeaway

When trying to determine if the issue estoppel doctrine applies, the key aspects of any previous determinations made in earlier proceedings between the parties should be identified, so that if in the subsequent dispute those same issues are likely to need to be determined again then the doctrine applies.

Umesan Kanjilathukandathil v RTWSA and RC Williams Pty Ltd [2022] SAET 44

Topic: Breach of mutuality

Commentator: Suzana Jovanovic

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Background

The worker claimed weekly payments and medical expenses for a psychiatric injury which he attributed to bullying and harassment.

This matter involved the issue of compensability. The worker was found to have a compensable exacerbation of an underlying depressive illness.

The focus of this case summary is the issue of breach of mutuality. The respondent argued that the worker's entitlement to weekly payments was extinguished for a period of 8 months whilst the worker travelled overseas without the respondent's consent.

The worker acknowledged that he travelled overseas to India for a period of 8 months. The worker also explained that he informed his solicitor of his intended travel, and that he understood that his solicitor would give notice to the claims manager. The reason for the worker's travel to India was vague and not explored. So, was there a breach of mutuality which warranted a discontinuance of the worker's weekly payments?

Held

It was held the respondent had not proved the necessary facts, specifically that it had been notified of the intended absence and declined consent for the overseas travel. The respondent did not discharge the evidentiary onus upon it, as it did not call the worker's solicitor or claims manager to ascertain whether a request for consent was received and/or given.

Furthermore, the Trial Judge found that even if the respondent had proven it declined consent for the overseas travel, the evidence was too vague to make a finding that the weekly payments should be discontinued.

Key takeaway

This case demonstrates the importance of making enquiries and identifying witnesses to give evidence at trial, and that decision makers need to be mindful that on occasion the onus rests of them to identify a state of affairs, rather than the worker doing so - especially in mutuality cases.

KOMADINA V CIRJAK [2022] SAET 49

Topic: Fair Work Act

Commentator: Melanie Conroy

This case looks at the penalties awarded against an employer for contraventions of the Fair Work Act and the Building and Construction On-Site General Award 2010 (the Award). A penalty of $33,050.00 was handed down to the employer (Creation Ceramics) for underpaying their former employee in the amount of $146,000.00 over four years.

Background

The employee, Mr Komadina sought penalties from his former employer for a range of contraventions.

Mr Komadina worked for Creation Ceramics from 2013. He commenced employment with Creation Ceramics when he was 18 years old. The employer was a family friend.

Mr Komadina was not:

- given a contract of employment
- told the basis of his employment
- told the legal identity of the employer

In addition to this he was not provided with any Award information. He was initially paid between $12 to $13 per hour. This amount was incrementally increased over the years. From August 2018 he was being paid $23 per hour, which was still below the Award.

Mr Komadina raised with the employer in November 2018 his concerns about being underpaid and they reached a private agreement to pay him $10,000.00 in backpay and for travel arrangements. After this date the hourly rate did not change, and he continued to not be paid at the Award rate or to be paid any overtime or allowances. Superannuation was also not being paid at the correct rate.

The employer contravened the Award as:

1. The terms of engagement were not specified
2. The employee was not informed of the terms of the casual employment
3. The minimum wages were not paid over the employees' whole period of employment
4. No special allowance or industry allowance was paid
5. The metropolitan radial allowance was not paid
6. No overtime rates were paid
7. The correct superannuation payments were not made

Penalty considerations

The SAET took into account that the employee was young and inexperienced. The employer did not cooperate in the proceedings nor the remedial orders and showed no contrition. The employer's failure to provide the required information about the nature of the employees' employment, the identity of the employing entity, his classification or the terms and rates of pay, was central to the subsequent exploitation of the employee. Individual deterrence was an important object of setting the penalty.

A combined penalty of $33,050.00 was handed down for all the contraventions. Costs were also awarded against the employer to pay the employees (applicant's) legal costs. Costs may only be awarded for a party's unreasonable actions in relation to a proceeding. The employer was found to have acted unreasonably and was required to pay the employees legal costs from the date of service of the proceedings and up to the receipt of default orders.

Key Takeaway

This case shows that the SAET will treat breaches of the Fair Work Act and relevant Awards seriously. For an employer it's best practice to report any underpayment to the Fair Work Ombudsman as soon as possible, and to cooperate thereafter, of face what can be (as in this case) significant financial penalties.

As always, if you'd like to 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, they can all be found at www.austlii.edu.au.

Mark Keam - Editor

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