2016 AUTUMN TRIBUNAL CASES UPDATE

Introduction

We welcome you all to another year of Tribunal case updates, and while it has taken some time this year for there to be a critical mass of cases to discuss, it seems there are plenty of important decisions in the pipeline.

In this Update we will touch on several decisions from back in 2015, which were handed down quite late in the piece, as well as a selection of the more interesting cases from both the now defunct Workers Compensation Tribunal and the South Australian Employment Tribunal as handed down this year.

Finally, we will touch on an interesting issue that has arisen lately in relation to the question of the possible interaction between a past redemption of weekly payments, and an ongoing entitlement to medical expenses past the notional 30 June 2016 cut-off date.

Workers Compensation Tribunal Cases

Hutchings [2015] SAWCT 55

The Tribunal was called upon to decide whether it was appropriate to accept an application to **amend** a prior Consent Order, compared to setting aside a prior Consent Order.

The worker sought to have a Consent Order amended on the basis the average weekly earnings figure agreed in the prior Orders was incorrect. The application was made without the consent of the other party. The Tribunal confirmed they would only entertain an application to amend an Order without consent if the amendment sought was the only possible correct outcome, and even then they would also have to be satisfied that there was no "mala fides" (sharp conduct) by the other party in arriving at the original Consent Order.

Bosson [2015] SAWCT 62

This case is worth a read if you have the time, and are interested in looking at the question of work stress and strokes. There is a detailed analysis by the Tribunal of expert evidence given in this regard. In the case at hand, the Tribunal was prepared to accept expert evidence that there is a link between work stress and strokes.

Clifton [2015] SAWCT 63

This case is a useful recitation of the approach the Tribunal takes in deciding issues where there are alleged sequelae to an earlier injury, and who has the burden of proof in this regard. Paragraph 82 of the decision provides a useful outline/summary in this regard.

Stephenson [2016] SAWCT 3

This case identifies an issue where a party might have a suspicion about a state of affairs, and which can lead to the request for a Summons to be issued regarding extensive medical

records. The compensating authority was chasing records for what were described as "unknown practitioners", and sought an order for the issuing of a Summons accordingly, or in the alternative an order that the worker name those particular practitioners that he had seen in the past in relation to the injury concerned.

The Tribunal decided that it was inappropriate that it should be asked, on an application by a Compensating Authority, to order the provision of information that should have been requested from the worker in the first place. The Tribunal emphasised that only in light of a refusal to answer a request will the Tribunal intervene, and direct the worker to provide what might otherwise have been considered to be reasonably required information.

This case is also notable for the interplay between what is considered to be each party's interest in the accessing or denying of access to medical records. The Tribunal was prepared to make an order for a Summons to be issued for certain medical records, but was not prepared to require their provision covering an unlimited period of time before the worker's injury. We will comment on this issue further below.

***Chadwick* [2016] SAWCT 5**

In one of the rare cases concerning noise induced hearing loss to proceed to trial, the matter is notable for several elements of the evidence given by the ENT experts regarding hearing loss. Some of those notable evidentiary matters are the following:

- it seems that the effects of temporary excessive noise exposure can be "repaired" during subsequent quieter periods of time;
- the older you are the less susceptible you will be to deafness because of noise exposure; and
- any argument mounted by a Compensating Authority concerning substantial prejudice because of the late lodging of a claim will require much more evidence than the mere fact that a lot of time has passed from when the claim ought to have first been lodged. Positive evidence such as lack of accessibility to the machinery said to have caused noise induced hearing loss, or the establishing of the inability to contact relevant witnesses, as a matter of fact, is the type of information that will need to be brought forward to justify a substantial prejudice argument.

***Patterson* [2016] SAWCT 6**

The Tribunal undertook yet another analysis of the provisions dealing with expedited decision requests. Readers are directed to paragraphs 19 – 29 of the decision in particular, for the three essential elements to consider in deciding if there is undue delay that requires rectification:

- it is for the Tribunal, and not a worker, to decide if there is undue delay;
- undue delay is not mere delay, it means **unacceptable** delay;

- there must have been at least 14 days since a request for a decision has been made before an application will be entertained, and it also has to be clear that there has been no decision in fact made within that time.

South Australian Employment Tribunal Cases

***Kerekes* [2016] SAET 2**

The Tribunal was asked to supress the identity of the injured worker. The decision outlines the basis on which the Tribunal might agree to supress a person's name, or some or all of the reasons for a decision that is to be made. The fact that a party might be identified, and which causes embarrassment, is not enough.

The Tribunal indicated that "cogent reasons" would need to be advanced before any suppression of what would otherwise be public information would be entertained and gave as an example the possibility that an injured worker's current employment be compromised if the decision enters the public realm, or where there might be a reasonable likelihood of psychiatric harm being suffered by the injured worker if the decision is made public, or they are identifiable.

***Lavers* [2016] SAET 3**

The Tribunal confirmed while there is ordinarily expected to be only one permissible assessment to take place for section 22 purposes, on a later application lodged at the SAET the Tribunal has the power to order a further assessment to occur as part of the dispute resolution process.

***Walmsley* [2016] SAET 4**

As many of you would be aware, this decision, involving section 18 of the *Return to Work Act* (the Act), has received a good deal of written publicity. In that event, we do not propose to cover a lot of the ground that has already been covered in the public realm. Anyone wanting a detailed analysis of the decision can contact us and we will be more than happy to provide a one.

Notwithstanding the above, there are a number of useful take home messages that arise from the decision, including:

- if you are providing a range of made-up duties to a worker as part of assisting them in returning to work, then make it clear that that range of made-up duties is not a long term solution to the situation;

- do not let the opportunity to change the path of rehabilitation pass you by, if after six months an injured worker is not showing much likelihood of returning to their pre-injury duties, section 25(10) of the Act is available to assist in a change of direction for the return to work and rehabilitation process;

- in relation to the above, understand that a return to pre-injury duties is the primary objective of the legislation, but not the only objective, and that there is a cascading effect in relation to return to work obligations;

- in assessing whether it is reasonably practicable to continue to provide suitable employment to an injured worker, matters such as the frequency with which they have aggravated their injury in the past, the financial impact on the employer if they are required to continue to provide made-up duties, the ability or inability to provide meaningful duties, and a worker's adaptability for or productivity in any role identified, might all be relevant factors in deciding if it is reasonably practicable to provide suitable employment, but no one particular factor is likely to be more determinative than any other in the Tribunal's assessment. The whole matter is one big balancing equation.

There is essentially a three step process that the Tribunal will undertake in assessing any application a worker brings pursuant to section 18 of the Act, involving:

- an initial assessment of whether the worker's application might be excluded by any of the provisions of section 18(2) of the Act;

- an assessment of whether suitable employment can be made available by the employer; and

- even if suitable employment can be provided, whether in all of the circumstances it would be appropriate to require the employer to take the worker back (if they have had their employment previously terminated).

The Tribunal also confirms that when making an order as to the provision of suitable employment by an employer, the Tribunal does not intend to be overly prescriptive as to the exact nature of the work provided. They will also not require an employer to create a new role if that would not be a reasonable outcome in the circumstances, and as a final point they also indicated that an application in this regard can be brought by a worker whether they are still in employment with the pre-injury employer or not, and such applications are not time limited.

***K* [2016] SAET 5**

In a decision that might well have broader ramifications for the operation of the Act, the Tribunal was asked to sort out a permanent impairment dispute where there was an original injury, and then a multitude of apparent sequelae to the original injury, either because of the natural progression of the injury concerned, or the fact that consumption of medication in order to treat the original injury concerned, led to other medical problems developing.

The Tribunal confirmed that where an original injury might occur, and then naturally occurring consequences arise as part of a course of events, then in that circumstance the various medical problems/injuries would be aggregated for whole person impairment purposes. In this way the Tribunal differentiated such circumstances (such as an original injury, the taking of medication, and the development of subsequent medical problems) from

what might be the more classical sequelae scenario of an original injury to one limb, and then the later development of problems in the other limb due to overcompensating for the original injury. In the latter case, injuries and their sequelae can still be split apart for whole person impairment purposes, in the event that the injuries concerned, and the sequelae arising from those injuries, occur in separate calendar years (see *Marrone's* case as discussed in earlier Case Updates).

***Yacoumis* [2016] SAET 6**

Following on from the *Stephenson* decision referred to above, the Tribunal was again asked to deal with a request for the issuing of a broad ranging Summons for production of medical records. In this case, the Tribunal was not satisfied that the broad ranging request was anything more than a "fishing expedition", given that it was not based on any particular factual matters that would substantiate the request concerned.

The Tribunal noted a worker's complete medical history will not necessarily be the subject of a Summons unless there is some form of factual basis for the making of such a request, and not merely the outside chance that trawling through years and years of medical records might throw up something useful to substantiate a further line of enquiry, or some form of useful basis for cross examination of the worker.

It seems that in a succession of recent cases the Tribunal is indicating that it will not simply acquiesce in any request for the production of a complete medical history for an injured worker unless there is a justifiable basis to do so, or the request is with the consent of the worker concerned. In the absence of consent of the worker, some form of probative information on which to base a wide ranging request will need to be brought forward.

An Interesting New Issue

With the likelihood that many injured workers will no longer be able to have their medical expenses covered from 1 July 2016, as they have not been in receipt of weekly payments for in excess of 12 months by that time, a number of avenues are being explored by workers' representatives to avoid such an outcome.

One argument that has been raised of late has been the suggestion that a past redemption of weekly payments, but without an accompanying redemption of medical expenses, might mean that an injured worker will continue to have an entitlement to medical expenses post 1 July 2016.

The argument in this regard is based on the suggestion that were it not for a redemption payment being made in relation to weekly payments, the injured worker concerned would be taken to be receiving weekly payments. Reference is made to section 49(2) of the Act in this regard. In other words, were it not for the redemption payment, the worker would otherwise potentially have still been receiving weekly payments as of 1 July 2015, and therefore there is a notional entitlement to ongoing medical expenses in that event.

The injured worker concerned might have expected to continue to receive weekly payments until 30 June 2017 at the latest, and so their actual entitlement to payment of medical and like expenses can continue for a further 12 months after that date.

The argument being made is likely to attract the attention of the regulator. We anticipate that the case where the argument has been identified will come before the Tribunal in the near future. We will provide an update in this regard as part of our Winter Tribunal Cases Update. In the meantime, if you are confronted with a similar argument in any of your matters, then do not hesitate to contact us to discuss how you might best respond to any such argument.

Finally, and on a quick note to finish, the Full Bench of the Tribunal heard argument this week on clause 37(6) of the transitional provisions to the new Act. As you would know, clause 37(6) is said to be a bar to a worker claiming weekly payments after 1 July 2015 for an 'existing injury', where weekly payments were previously discontinued under the old Act. The Tribunal has reserved its decision, but we anticipate it will make its judgment on the matter known fairly soon. We will update you all once that occurs.

As always, copies of the Workers Compensation Tribunal decisions can be accessed at www.industrialcourt.sa.gov.au, while South Australian Employment Tribunal decisions can be accessed at www.saet.sa.gov.au.

As always representatives from KJK Legal are available to answer any queries that you might have in relation to issues that arise out of the cases discussed above.

Please feel free to contact us at your convenience.

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