

The News As We Know It

2016 Spring Edition

A warm and belated welcome to the new 2016 – 2017 financial year from all of us here at KJK Legal.

We've been quite busy of late, as have many of you, with the bedding down of the changes that keep coming at us via the cascading implementation of provisions of the Return to Work Act.

That's not to say we haven't been quiet in other respects, as we've been out and about speaking at conferences, seminars, client training sessions and the like. 2016 has shown itself to be a challenging year on the workers compensation front, and 2017 is shaping up to be even more so. Strap in for the ride!



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The newly proposed expanded jurisdiction of the South Australian Employment Tribunal

In a recent paper KJK Legal Director Tracey Kerrigan (tkerrigan@kjklegal.com.au) outlines the proposed changes to the South Australian Employment Tribunal's jurisdiction the State Government is planning on making. Read [here](#) for full details of the amending Bill now before Parliament.

The High Court on workers compensation

The High Court has given consideration this year to several issues commonly arising under workers compensation law, including the question of whether symptoms alone, absent any diagnosable pathological change, can constitute an 'injury', and secondly the question of causation in 'stress claims' arising from reasonable administrative action by an employer. Our associate solicitor Carly Manuel (cmanuel@kjklegal.com.au) looks at the decisions concerned.

In the first case, *Military Rehabilitation and Compensation Commission v May* [2016] HCA 19, the High Court unanimously allowed an appeal against a decision of the Full Federal Court on workers compensation and considered the meaning of 'injury' in the Safety, Rehabilitation and Compensation Act 1988 (Cth) ('the Act').

The appellant, a former RAAF officer cadet, began to experience symptoms similar to vertigo that could not be diagnosed specifically, and which *gradually* arose after he received various vaccinations during the course of his employment. The result of the

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evidence was that there was no identifiable physiological pathology, although it was accepted that Mr May's reports of his symptoms were genuine, and there was a temporal relationship between the vaccinations and the symptoms.

The issue for the High Court was whether Mr May's symptoms alone, absent a diagnosable physiological change, constituted an 'injury' (other than a disease) under the Act. The joint judgment clarified that a physiological change doesn't have to be 'sudden' or 'dramatic'. Still, these considerations are relevant in determining an individual case upon its facts. Of course a finding of injury is more likely when the change is sudden or dramatic, such as the breaking of a limb. It is important to note that up until this case, the High Court had used terms such as sudden and dramatic as being indicative of a compensable injury.

The Court also held that inferences based on common sense have some role to play where no formal diagnosis can be reached. However in cases where the relevant physiological change is not readily observable, medical evidence will be required.

Implications

Although this case is concerned with Commonwealth legislation, the principles stated apply to workers compensation injuries in South Australia. Subjective reports of illness, even if they are genuine and accepted as such, are not enough to constitute an injury. There must be some underlying and medically diagnosable physiological change. Medical evidence will be required to support a diagnosis unless that diagnosis is so obvious that it can be inferred as a matter of common sense. The main point arising from the decision is that it is possible to satisfy the definition of injury in the case of a physiological change that is not sudden or

dramatic. However the absence of these factors will require compelling evidence on the facts of the case.

In the second decision, handed down this month, *Comcare v Martin* [2016] HCA 43, the High Court has unanimously allowed an appeal from the Full Federal Court on a worker's compensation decision involving a claim for the aggravation of a psychological condition as a result of reasonable administrative action.

Ms Martin had made allegations of bullying and harassment by her supervisor (Mr Mellett) at Comcare, who was later on a selection panel responsible for appointing someone to a position for which Ms Martin had applied. The panel did not select Ms Martin for the role and she was subsequently diagnosed with an adjustment disorder that rendered her unfit for work. Comcare rejected any liability to Ms Martin for compensation based on the exclusionary provision of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) ('the Act') that the injury suffered was as a result of reasonable administrative action. This legislative provision is replicated in similar form in Section (7) of the *Return to Work Act 2014* (SA).

Initially, the Administrative Appeals Tribunal found that Ms Martin's adjustment disorder had been caused by her failure to obtain the new role, and therefore was an 'administrative decision'. However, Mr Mellett's participation in this process meant that the decision making process had not been undertaken in a 'reasonable manner'. The decision was later overturned on appeal to the Full Federal Court.

In reaching its decision the High Court held that the Full Federal Court had erred in construing the phrase "as a result of" in Section 5a(1) the Act, and dismissed the

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“common sense” approach to causation said to have been taken. The High Court held that one must focus on whether, without the taking of administrative action, the employee would not have suffered the injury that was contributed to a significant degree by employment. It was also noted that administrative action need not be the sole cause and there may be multiple causes, some of which might even be related to other aspects of the employee’s employment. Further, the causal connection giving rise to the exclusion is met regardless of the nature of the perceived consequence, whether personal or professional, real or imagined, to a failure to receive a promotion. In this particular case it was Ms Martin’s realisation that having missed out on the promotion she would have to return to work under the supervision of Mr Mellett. In other words, a **worker’s perception of the action taken, as being in their mind unreasonable, is not the test.**

The decision moves to somewhat resolve the previous tension in the Commonwealth workers compensation scheme in that it appears administrative actions had to have contributed to the worker’s condition to a ‘significant degree’ before it could be said that her condition was ‘a result of’ the administrative action. Yet the decision also suggests that differently constituted Tribunals have differing views as to whether or not, in circumstances where it is accepted that employment has made a significant contribution to a condition, the administrative action (or actions) must reach the same threshold for the exclusion to apply.

Vale to self-insurance for South Australian Government Departments and Agencies?

While details are still a little sketchy about how it will all work, it now appears the State

Government has decided the new Return to Work Act is so successful that its own Departments and Agencies no longer need to be self-insured for workers compensation purposes, and will become ‘registered employers’ under the State’s workers compensation scheme as of July 2017.

This is sure to create a degree of upheaval within the State’s public service, where self-insurance has been the norm for decades. Claims management of government workers compensation matters will be handed over to the two current claims agents who manage the registered employer scheme.

Managing the transition from self-insured status to registered employer status can carry with it many challenges, both culturally as well as legally. KJK Legal has assisted many employers through this transition in the past. Interested stakeholders can contact KJK Legal Director Mark Keam (mkeam@kjklegal.com.au) if they would like to learn more about the challenges the transition may throw up.

New laws regarding unfair standard form contracts

Neville John, a director with KJK Legal (njohn@kjklegal.com.au), advises businesses that new Federal laws regarding unfair contracts have come into being.

The Australian Consumer Law has been amended to protect small business from unfair terms in standard form contracts. The law applies to all standard form contracts entered into or renewed on or after 12 November 2016 where the contract deals with the supply of goods or services, or the sale or grant of an interest in land, where at least one of the parties is a small business (defined as employing less than 20 people) and an upfront price is payable under the

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contract of no more than \$300,000.00, or \$1 million if the contract is for more than one year.

A standard form contract is one that has been prepared by one party to the contract and where the other party has little or no opportunity to negotiate the terms. In other words, it is offered on the "take it or leave it" basis.

The law sets out examples of terms that may be unfair which include:

- terms that enable one party (but not the other) to avoid or limit their obligations under the contract;
- terms that enable one party (but not the other) to terminate the contract;
- terms that penalise one party (but not the other) for breaching or terminating the contract;
- terms that enable one party (but not the other) to vary the terms of the contract.

It will be up to a Court or Tribunal to determine whether a term is unfair. The actual upfront price set and agreed by the parties is not a reviewable term.

The new law may impact contracts your business has with small businesses, and if a term is found to be unfair it will be void. Terms that cause significant imbalance in the parties rights and obligations, or are not reasonably necessary to protect the legitimate interests of the party advantaged by the term, and which cause financial or other detriment to a small business if it were to be relied upon, may well be found to be invalid or unfair.

We recommend you review any standard form contracts currently in place with small

businesses to ensure compliance under the new law, and should you require any assistance we are more than happy to provide guidance and advice.

Other important industry news and events

SISA Awards Dinner

It was another successful awards night in late September, when SISA held its annual dinner and awards night. KJK Legal were again proud to assist SISA, and the workers compensation industry, in sponsoring an award recognising outstanding achievements by injured workers in being able to successfully return to work.



And as for next year, you can now 'save the date' in your diary – 20 July 2017.

Both Sides of the Fence

Both sides of the workers compensation legal industry came together for the annual Both Sides of the Fence seminar in October this year. Again the number of attendees exceeded the organisers' expectations, and there was plenty of debate on the day about where the state's workers compensation scheme might be heading.

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Mark Keam is a member of the event organising committee, who work hard each year to continue ensuring the event is well run, and that it addresses all the important issues confronting stakeholders in the scheme. As preparations for next year's event will be underway soon, if you would like any particular topics addressed then please don't hesitate to contact Mark via email with your suggestions: mkeam@kjklegal.com.au

KJK Legal news

KJK Legal Precedents and Newsletters

KJK Legal are about to release the updated version of their Workers Compensation Precedents, which will be accessible via a log-in facility on our website.

In addition, we will be providing a service that updates the SISA produced precedents.

Both sets of precedents will be available to clients at no cost, and for other industry contacts an annual fee of \$200 +GST will be payable for access to the documents.

If you would like to sign up for the Precedents service, then please email us at admin@kjklegal.com.au and we will organise

for you to be given access to our website log-in facility.

Finally, we confirm that our regular Newsletters and Tribunal Cases Update will continue to be available to all clients and industry contacts at no charge. Again, you can access these via our website.

KJK Legal sponsorships in 2016

Again, throughout 2016, KJK Legal have been supporting both the workers compensation industry, local community organisations and valued KJK Legal contacts in their own charitable work. Included in our activities this year have been:

- Continued sponsorship of the Unley Mercedes Jets Football Club, who in 2016 played in Division 1 of the SA Amateur League for the first time;
- Sponsoring Mandy Madgen of eReports in her annual jaunt through the outback for the Variety Club. Mandy was again successful in raising many thousands of dollars for the needy children of South Australia, all the while making a 'monkey' of herself in doing so!



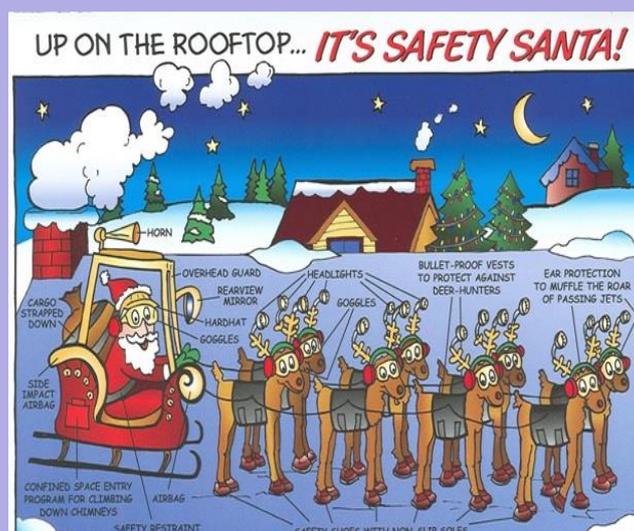
- A donation was made this year to Justice Net, an organisation supported by the legal profession, who provide funds and support for worthy applicants who

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cannot access legal assistance either financially themselves or through Legal Aid;

- Austlii, a not for profit organisation established to provide free access to Commonwealth and State legislation and decided cases, also received financial support from us during the year;
- Local artist Richard John (who some of you may remember from his time in Claims Management within government), is based at Port Elliot, and is a regular exhibitor at the annual SALA Festival held in August. KJK Legal were happy to support Richard's SALA opening night event.

As we come up to the festive season, it's important that we don't let our focus on safe worksites and safe work practices slip away. Even Santa realises the importance of safety in the workplace, and the need to ensure all his reindeers arrive home safely and to be with their families at this time!



On that note, we at KJK Legal wish you all a very Merry Christmas and Festive Season, and that you also enjoy a happy and safe New Year. We look forward to being of service to you again in 2017.