2017 AUTUMN CASE UPDATE

INTRODUCTION

It continues to be a busy year for those following the activities of the South Australian Employment Tribunal, and its handing down of important decisions on the machinations of the Return to Work Act. There are also plenty of decisions still flowing through from disputes that arose under the prior legislation.

Anecdotally, there are more than 50 judicial decisions that are currently on appeal to either the Full Bench of the South Australian Employment Tribunal, or further up the judicial ladder to the Full Supreme Court. It therefore stands to reason that a good number of the decisions we have previously commented on, and indeed a number of the decisions which we will comment on below, are on appeal.

HILLYER [2017] SAET 13

When assessing whether a worker was to be treated as seriously injured for the purposes of the Return to Work Act (**the Act**) the South Australian Employment Tribunal (**SAET**) looked to a past section 43 consent assessment for 30.25% loss of function of the whole person due to bilateral inguinal hernias. The worker asserted that such a prior assessment bound the compensating authority in terms of whether or not a worker might be now treated as seriously injured. However, the Tribunal found that the previous consent order did not constitute a prior assessment to the effect of there being a 30% whole person impairment for the condition concerned, and pointed to the fact that legislation at the time (in 2008) talked in terms of a loss of 'total bodily function' represented by a particular injury, which was materially different to the provisions of the current legislation. It meant the compensating authority was not the subject of an estoppel argument over the terms of the previous consent order, as the wording in the consent orders did not stand for what it said.

The worker also sought to argue that a past redemption of only his weekly payments somehow meant that he could avoid the operation of clause 34 of the Transitional Provisions of the Act, when it came to extending his entitlement period for medical expenses to be paid. The worker effectively asserted the effect of a previous section 35(5) figure under the Workers Rehabilitation and Compensation Act meant that he was 'deemed' to be in receipt of weekly payments on a continuing basis, 'but for' the redemption payment. However, the Tribunal said that this was not the same as an 'actual receipt' of weekly payments for the purpose of the continued application of section 33 of the Act.

The case is on appeal.

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MITCHELL [2017] SAET 16

The parties came into dispute over various impairments that were said to be related to a succession of lower back injuries sustained by the worker, and as a consequence of subsequent operative treatment undertaken for the back injuries. Consequent upon the operation occurring, the worker developed a number of medical problems, including a dry mouth, loss of mastication and deglutition, digestive system problems, bladder dysfunction and erectile dysfunction. Again, the SAET was asked for the purposes of section 43 of the Workers Rehabilitation and Compensation Act, to combine or not combine the various injuries/impairments.

In circumstances where the worker had suffered a succession of back injuries, it was found that the last date of injury in this regard was to be applied for the purposes of the prescribed sum concerned, and the effects of the operative treatment and all of the sequelae that arose from it were to be combined with the back injury for the purposes of an overall assessment under section 43. The decision therefore begins to see a correlation appearing between the approaches under both the old legislation and the new legislation, in relation to the 'to combine or not to combine' question, if we can relate Shakespeare to workers compensation legislation.

PANAGARIS [2017] SAET 18

In this case the SAET accepted a causal link between a work-related psychiatric condition and a later heart attack suffered by the injured worker. The psychiatric condition had caused the worker concerned to become withdrawn and socially isolated. He quickly went into a downward 'physical and mental spiral' according to the judge.

Various medical specialists accepted that there was good reason to consider that the worker's mental stress was a cause of what was understood to be a progression of the worker's previously undiagnosed coronary heart condition, particularly in the absence of any other likely causative factors, and despite the doctors concerned not being able to say exactly how the process occurred which led to the worsening of the underlying coronary heart disease. Notwithstanding this, the SAET was able to decide that the heart attack was a work related injury because it arose out of the worker's employment (because of the fact of the prior psychiatric condition) and in that event the worker's employment was also a significant contributing cause.

LEDO [2017] SAET 21

In this case Deputy President Lieschke arrived at a different view on the application of the provisions of section 33 of the Act, with respect to the approving of future surgery, than his counterpart Deputy President Calligeros, had previously arrived at (in *Tinti's* case – [2016] SAET 72).

Deputy President Calligeros stated that when considering whether future surgery is to be approved, the nature of the surgery concerned needs to be clearly identified, as well as the time that it is likely to be undertaken, and that the surgery concerned should not merely be speculative in possibility. Deputy President Lieschke took a different view, and came to a much less stringent test in this regard. He also considered that any suggestion that the surgery had to be of 'sufficient benefit' or be for 'good reason' were unnecessary criteria for assessing the issue. As long as the proposed surgery was 'reasonable and appropriate', even if not likely to occur until some unidentifiable time in the future, then that was sufficient to grant approval.

Again, we continue to see a tension between various judicial members of the SAET as to the application of some of the key provisions of the legislation, which only the appeal process is going to sort out. In the interim, taking a conservative approach to surgery approval requests is recommended until the position becomes clearer.

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DAVIES [2017] SAET 22

This was an appeal from an initial judgment which determined that the worker's psychiatric claim was not compensable, on the basis that there had been reasonable action taken by the employer in a reasonable manner. However, on the facts of the case, the Full Bench of the South Australian Employment Tribunal overturned the initial decision, and particularly pointed to the fact that the employer in this case, while applying the guidelines in its HR Manual, did not fully do so, and in fact held back on certain information on which a decision had initially been made to suspend the worker's employment, pending investigation of certain matters. While the Full Bench accepted that the employer had engaged in reasonable action in making a decision to suspend the worker from employment, its action was unreasonably implemented, due to the withholding of possible information.

It is always a balancing act in industrial cases as to how much an employer needs to provide by way of information to justify its decision-making process, even when that might not necessarily be an ultimate decision as to termination of employment. The lesson might be, in industrial terms, to err on the side of inclusion rather than exclusion of information in any such case, for fear a forensic examination of the decision-making process by the SAET might 'pick holes' in both what was done and what was said.

POWER [2017] SAET 23

In this case the worker sought an order from the SAET for the employer to provide contact details for a possible witness, who was apparently reluctant to be involved in the matter. The information concerned was likely to only be known to the employer.

Despite the worker having the onus of proof to establish his case, the SAET still ordered the employer effectively handover whatever information it could provide concerning the contact details for the potential witness. The SAET justified its decision on the basis that all parties were entitled to access to the evidence, and the witnesses who may provide it.

STEPHENSON [2017] SAET 24

We originally discussed this matter and decision [2017] SAET 7 in our 2017 New Year Tribunal Cases Update (2nd Edition).

This is a case involving the issue of an original injury and multiple sequelae arising from that injury, and the continued question of whether to combine or not combine the various impairments for non-economic loss assessment purposes.

In this case, there was an interesting issue as to the fact the worker concerned was assessed as suffering from separate problems to both his upper and lower gastro-intestinal tracks. Deputy President Hannon decided that in this case the separate assessments were not to be combined into the one overall impairment, and then placed into the combined values chart calculation, given they are specifically separated in assessment terms in the applicable AMA Guidelines.

ROBINSON [2017] SAET 27

This decision is of quite some significance in relation to the whole issue of average weekly earnings, the entitlement to weekly payments, and the interaction of the legislative provisions in this regard with the national minimum wage.

On a referral of a question of law to the Full Bench of the SAET, a question arose as to how the application of a section 49(2) sum to an average weekly earnings figure should be applied, when the effect of a reduction of the section 49(2) figure from the average weekly earnings figure would result in a worker receiving a weekly payment of less than the national minimum wage (as appropriately varied on a pro-rata basis to reflect the fact of part time employment).

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The Full Bench of the SAET decided on a split majority basis (2:1) that once a weekly payment figure is calculated, and then the section 49(2) reduction is applied, the actual weekly payments **cannot** be reduced below the figure of the national minimum wage.

It is said that this argument is now also going to be applied by the claims agents to cases involving the reduction of weekly payments after the first year of incapacity to 80%. Whether that eventuates remains unclear, as the decision is now on appeal to the Full Supreme Court. Hopefully, a decision in this regard will be made soon, because if a compensating authority is to apply the *Robinson* case as currently determined, but the decision is later overturned by the Full Supreme Court, then any notional overpayment that might occur in the interim will be a case of money spent, but not able to be recovered.

MITCHELL [2017] SAET 28

On appeal from an earlier decision a single Judge, the Full Bench of the SAET confirmed the 'rule' under section 113 of the Workers Rehabilitation and Compensation Act (and which would be applied in the similar terms under section 180 of the Act) applies so that a last 'noisy' employer can't reduce its liability to pay a lump sum for noise induced hearing loss, even though there is good evidence of the extent of a prior degree of loss due to earlier employment.

Deputy President Hannon found the employer with whom the worker was last exposed to noise will bear the **full liability** for any noise induced hearing loss claim, and cannot get the benefit of a reduction in their liability in the event that a clear prior/pre-employment loss can be established on the facts. The Tribunal confirmed that in such a case, it is for the employer who is liable to pay the compensation concerned, but that they also retained a residual right to seek recovery from any earlier employer/compensating authority.

As the SAET sets out, it is for the last noisy employer to initially address the question of onus of proof, and to put forward whatever evidence it might have that constitutes 'proof to the contrary' to the otherwise general application of the deeming provision. That evidence might involve:

- establishing that the work the worker was performing was not capable of contributing to the noise induced hearing loss as assessed;
- that an earlier noisy employer(s) caused all of the noise induced hearing loss;
- the whole of the noise induced hearing loss resulted from a non-work related cause;
- there was, in fact, a later noisy employer; and
- that the pre-employment extent of the hearing loss and the more recently assessed extent of the hearing loss are so close in percentage terms that the difference in figures falls within the test/re-test margin of error that the ENT specialists talk of (our addition to the possible grounds of defence).

Should you have any queries concerning any of the issues addressed in the above cases, then please do not hesitate to contact us.

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