2017 NEW YEAR TRIBUNAL CASES UPDATE

Introduction

Hello and welcome to 2017. We trust the year is a successful one for you in whatever you set out to achieve, both personally and professionally.

With a flurry of decisions handed down over the last month or two of 2016, the South Australian Employment Tribunal particularly had further cause to look into the many varied aspects of the permanent impairment assessment process. While the decisions handed down have predominantly been by way of single Judges, there are some common threads emerging as to the proper approach to the whole assessment process.

We are aware that there is at least one pending decision from a Full Bench of the South Australian Employment Tribunal dealing with permanent impairment issues. Hopefully that decision will definitively settle some of the vexed questions about the way in which to go about the permanent impairment process, particularly as to the issue of the combining or non-combining of various injuries occurring over different periods of time. With that in mind, we are planning a special case update edition once that decision is handed down, and will take the opportunity at that time to outline what we consider to be the important aspects of the whole process, as a guide to Compensating Authorities as to their decision making process.

In the meantime, there have also been a number of other interesting decisions handed down by the South Australian Employment Tribunal on issues as to compensability under the *Return to Work Act* (in which we query whether the new causation test for physical injuries really represents anything different than what has gone beforehand), and matters affecting the role of the Compensating Authority in the investigation and determination of claims.

QW [2016] SAET 71

In this matter there was an issue as to whether the worker was allowed to restrict the extent of medical information that could be made available for inspection by other parties to the litigation. The South Australian Employment Tribunal (SAET) held that an order for disclosure of information in medical records can be restricted for broader purposes than mere relevance. In this case, a restriction was based on the disclosure of certain information as it would have offended the concept of "public interest immunity" – the information related to a possible sexual offence that had no connection with any work injury sustained.

The SAET also considered the extent of the general obligation of discovery, and confirmed that what is required of each party is the discovery of any material that might directly or **indirectly** lead to a train of enquiry, or which might in some other way, otherwise advance or damage either the applicant's or the respondent's case. In this event, the SAET ordered the provision of an almost complete set of the worker's medical records.

***Crespan* [2016] SAET 73**

In this case a dispute arose as to the initial validity of a permanent impairment assessment report. The worker sought to review the contents of the report itself, even though she was doing so in the absence of an actual determination as to permanent impairment assessment.

The SAET decided that it had no jurisdiction to deal with any such request, in the absence of a determination as to entitlement to compensation.

***Puccio* [2016] SAET 75**

Sometime previously the worker had been assessed as having a 28% whole person impairment and was paid a lump sum accordingly. Later on the worker obtained a further report from the same permanent impairment assessor, who now concluded that the worker might have a higher WPI at 30%. The worker naturally sought to rely on this report for a finding as to serious injury. The SAET declined to make a fresh order as to the 30% WPI for serious injury purposes, and also declined a request made by the worker for an extension of time in which to challenge the original section 43 determination made several years previously.

The SAET confirmed that it was not a good enough reason to grant an extension of time on the basis that a particular doctor might have arrived at a different assessment of overall impairment at a different point in time than the same doctor had assessed previously. There needed to be a higher level of evidence than that (e.g. clear error in terms of the earlier assessment) before the Tribunal would consider intervening in these circumstances. Hopefully, the SAET is sending a clear message to workers in this regard that a previous assessment as to permanent impairment is most likely going to be a stand for all time, unless there are very good reasons to depart from that assessment.

***Abraham* [2016] SAET 76**

The worker sought to challenge the permanent impairment assessment that formed the basis for a decision as to serious injury entitlement. Acknowledging that there was a "one and only" assessment generally to be utilised for permanent impairment assessment purposes, the SAET did indicate that a PIA report could be challenged if there was reason to believe that the report concerned might not be **admissible into evidence** for any particular reason, as a matter of law. In other words, if a medical report did not pass the test for admissibility, then the report was not going to be binding on any party. Examples in this regard might be where the parties come into information at a later time that undermines the basis for the initial assessment or, as in this case, the basis for the decision when called into question was then the subject of an inadequate explanation as to findings by the assessor concerned.

In the case at hand, a request that the SAET therefore refer the worker to an independent medical advisor was an open consideration, although the SAET did indicate that in allowing this possible course of action, it was not a signal to injured workers that it was a "free for all" in the challenging of any and all permanent impairment assessments made under the new scheme.

***Neilson* [2016] SAET 77**

Yet again, this is a case involving permanent impairment assessment issues, and while it was a matter determined under the *Workers Rehabilitation and Compensation Act*, there are lessons for assessments under the new legislation as well.

In *Neilson's* case there were two competing assessments of permanent impairment. One of the challenges made to one of the reports concerned was the fact that the approach taken by the doctor was more based on experience than science, particularly as to the use of measuring equipment for the purposes of assessing range of movement and the like. Predictably, the SAET sided with that doctor who approached the matter from a more scientific basis than simply using such 'techniques' as relying on one's eyesight for estimating range of movement on the injured body part.

The second and more important issue arising from the case is the fact that there was a clear pre-existing problem with the relevant body part that was being assessed. However, the mere fact of the knowledge of a pre-existing injury was not sufficient for the SAET to intervene, particularly in the absence of the two permanent impairment assessors declining to do so as well. The reluctance to intervene in this respect rose particularly from the fact that there was a lack of cogent evidence as to the true extent of the pre-existing injury, particularly when it came to any possible application of the Impairment Assessment Guidelines (and their predecessor) in trying to accurately establish what might have been the level of whole person impairment that could have arisen from any earlier injuries that were sustained prior to the relevant compensable injury. It would seem that there is now going to be a very high hurdle went it comes to any possible deduction for the effects of an unrelated disability or cause (as opposed to deducting monetary sums previously paid – a different consideration).

***McBride* [2016] SAET 78**

The Tribunal was asked to rule upon a complaint by the worker as to the selection process for the permanent impairment assessor. The SAET confirmed that it did not have jurisdiction to entertain such a request, but did also confirm that in due course the worker could challenge the permanent impairment assessment of itself at a later time, but only in terms of whether or not the report concerned was admissible into evidence as a matter of law. In other words, complaints as to the permanent impairment process of itself will need to be ventilated by aggrieved workers in another jurisdiction (the common law courts) than the SAET.

***Giuliani-D'Onofrio* [2016] SAET 79**

One of the predominant reasons why injured workers lodge claims for psychiatric injury relates back to the fact of less than perfect workplace relations existing between the worker concerned and others with whom they work. In this case, what was previously a friendly outside of work relationship with a co-employee became a dysfunctional relationship. The effects of the dysfunctional relationship spilled over into the workplace where the worker and the alleged antagonist worked together in common employment.

The SAET found that this was enough to create an employment nexus, where their personal conflict continued to be played out in the workplace. That is not to say that all ongoing

dysfunctional personal relationships in the workplace will give rise to the necessary nexus to then establish compensability, but certainly the way in which the relationship might play itself out in terms of workplace interaction, and how one employee treats another as far as employment issues are concerned, becomes important to consider.

***Brealey* [2016] SAET 80**

In this case, the worker had a very long standing history of employment related knee injuries, for which she was required to undergo operative treatment from time to time. As part of dealing with the worker's ongoing problems, she was required to undergo a knee manipulation. Some six weeks after this event, she was descending a single concrete step at her home. The worker felt a stabbing pain in her knee, which caused her to fall and fracture her right ankle.

The SAET found that the ankle injury was a direct result of the worker's knee injury, and was therefore compensable, even though the worker had not been employed for over five years by the time the ankle injury occurred. The "significant contributing cause of the injury" was not necessarily contemporaneous with the performance of employment duties, but the fact of employment in the past. The decision is a continued affirmation of the SAET's very conservative approach to applying the new causation test, especially for physical injury claims.

***Munn* [2016] SAET 81**

The Compensating Authority determined to reject a worker's claim without necessarily fully investigating the matter. This included the failure to take up the option of sending the worker for an independent medical assessment. Subsequently, the circumstances surrounding the worker's injury changed, and it became apparent she might need operative treatment. The Compensating Authority therefore decided at this point in time, during the dispute resolution process, that the worker should be referred for an independent medical assessment. The worker declined to attend so the Compensating Authority sought the SAET's intervention. Without making a final order on the matter, the SAET indicated that if the Compensating Authority was prepared to place the worker on interim benefits, then the SAET would look favourably at the employer's request to compel the worker to attend the independent medical assessment, in the event that she continued to decline to do so.

The SAET was somewhat critical of the Compensating Authority's choice to pre-emptory reject the worker's claim, without undertaking a proper investigation of the matter. While it conceded that this issue is always a balancing act, the SAET did point out that Compensating Authorities must be mindful that the SAET will not always step in and help the Compensating Authority later on if it chooses not to exhaust its full rights to undertake proper investigation of a claim **prior** to making a determination.

***Shord* [2016] SAET 82**

Another decision by the SAET, where they again confirmed that the sorting out of issues arising under the permanent impairment assessment process, including disputes as to the choice of assessor, are not within its jurisdiction.

***Hann* [2016] SAET 85**

While the decision relates to a rejected claim for an alleged psychiatric injury, the Tribunal did make an interesting finding that mere anger, distrust and frustration (as part of a general unwillingness to return to work with the pre-injury employer) would not necessarily be considered as sufficient grounds to support an alleged continuing inability to work. There must be a medical basis for incapacity, rather than a preference not to return to work due to personality factors that allowed for the relevant anger, distrust and frustration to be played out.

***March* [2016] SAET 86**

The worker requested a permanent impairment assessment with a particular doctor, who then provided a report and assessment as to whole person impairment. It was known that the Compensating Authority actually had video film of the worker at that time, and which called into question the extent of the worker's impairment. The Compensating Authority declined to provide that video information to the permanent impairment assessor at the time of the assessment. However, the Compensating Authority then sought to use that video film at a later point in time as a basis on which to challenge the actual assessment arrived at by the doctor concerned. The worker objected to the Compensating Authority's approach.

Interestingly, the SAET disagreed with the worker, finding that to actually provide the video film to the doctor prior to the time of the assessment might be somewhat **prejudicial**, and that it was appropriate to assume the worker would be honest and candid in his or her presentation to the relevant permanent impairment assessor. In other words, video film perhaps should be withheld at the time of any permanent impairment assessment that is conducted, to first assess whether the worker is or is not being fully honest and candid with the doctor concerned, before either resubmitting the information concerned to that doctor, or having the information laid before the SAET at a later time when a decision might be made that there is sufficient evidence on which the permanent impairment assessment report's findings might be called into question.

In any event, in the case concerned, the permanent impairment assessor did eventually see the video film, and concluded that it did not change his opinion. Notwithstanding this, the SAET disregarded the doctor's views, and came to its own conclusion that the opinion concerned could not be relied upon. As a consequence, the SAET indicated that it was likely that a referral would be made to an independent medical assessor, but perhaps first only after the making of certain factual findings by the SAET. This last aspect of the matter was left to further submissions by the parties.

Pending Supreme Court Appeal

Readers will be aware of previous commentary made regarding the case of ***Brennan-Lim***, involving evidentiary issues as to permanent impairment. The Full Supreme Court has granted leave for the worker in the case to appeal against the decision of the Full Bench of the SAET. One of the issues in the case will be the question of the significance of findings on the date of assessment (as opposed to information about the impairment before or possibly after the date of assessment – see section 22(7) of the Return to Work Act). We will update you once any judgment in the matter is handed down.

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

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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