2017 SPRING CASE UPDATE

INTRODUCTION

As we are all aware, this was likely to be quite a busy year at the South Australian Employment Tribunal (SAET), as parties continue to test the parameters of the 2015 legislation, with many matters proceeding to Appeal.

If legal advisors and case managers were looking for consistency from the SAET, it is gradually coming about, particularly in the area of permanent impairment assessment and serious injury certification. Having said that, there are also still a number of matters winding their way towards the Full Supreme Court as well.

SCHROEDER [2017] SAET 59

The worker sustained a lower back injury in 2012. His weekly payments were ceased in May 2013, on the basis that he had made a return to work. In March 2016, he underwent operative treatment, the effects of which caused an ongoing partial incapacity. He also had an existing partial incapacity arising from the original injury, having not returned at any time to his full normal duties.

Subsequent to the operation in March 2016, the worker sought weekly payments. His request was declined because of the application of clause 37(6) of the *Transitional Provisions* to the new Act. He sought to challenge this Decision.

In accordance with the *Watkins* case, the SAET accepted the worker was suffering from a "new injury" within the meaning of the *Transitional Provisions* because of the surgical treatment, but the applicable date of injury for this "new injury" was the original injury date in 2012. The SAET held that any entitlement to the 104 weeks of weekly payments that arises from sustaining this new injury were effectively to commence in 2012. Therefore the entitlement period had expired by March 2016 in any event.

The Deputy President hearing the matter conceded that this state of affairs seems to be "unfair and arbitrary for a worker … who has done his utmost to return to work following his injury". However, unless the decision in *Watkins* is overturned, this state of affairs will continue.

HARRINGTON [2017] SAET 65

In one of the rare Section 18 cases that has found its way to judgment, the employer in the matter concerned was challenging the SAET's jurisdiction to determine an Application brought by the worker under Section 18.

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By way of background, the worker sustained an injury at a time when she was employed as a nurse. Thereafter, she was never able to return to her full normal duties. At a later point in time the employer identified administrative duties as being suitable for the worker, and in early 2016 advised the worker she would be transferred to a new role. The worker objected to this course of action and asserted in a Notice brought before the SAET, in accordance with Section 18(3) of the Act, that she was capable of remaining in her pre-injury role, with some modifications, and should not be compelled to be transferred to administrative duties.

The employer asserted that the worker's Application was invalid, as there was work on offer, and so there was no question open for the SAET to address. The SAET disagreed. It found the mere fact of the offering of employment does not take away the jurisdiction to hear a worker's Application when, in matters such as the current case, the worker was challenging the alleged suitability of the employment concerned. Effectively, the SAET jurisdiction is much wider than simply ruling on whether an employer should be required to offer work or not, but also as to the suitability of the work on offer.

PREEDY [2017] SAET 71

The Full Bench of the SAET overturned an earlier Decision that did not allow for a worker to combine the effects of an original left shoulder injury and the effects of a later neck injury, which had occurred while he was undergoing physiotherapy for his shoulder injury. The SAET indicated that Sections 22 and 58 are not separate in their application and effect, and that Section 58 is subordinate to the provisions of Section 22.

Paragraph 38 of the Decision is most relevant. It is worth quoting in full:

> "*For the purposes of making the assessment under s22, multiple impairments from the same injury or cause are to be assessed together or combined, but in connection with an assessment of non-economic loss under s58, they are only combined if they arise from the same trauma.*"

In this case, the combination of the original injury and the later treatment injury was permitted for the purposes of a Section 22 Application, because the original injury and the later injury were said to arise from the "same cause" even if they might not be capable of being combined for lump sum compensation purposes under Section 58 of the Act, because the two injuries did not arise from the same trauma.

DALLIMORE [2017] SAET 72

The Full Bench of the SAET confirmed that a judge cannot substitute their own views as to the appropriate ratable impairment and class when considering various injuries for permanent impairment assessment purposes. Placement of an injured worker within a particular ratable impairment and class must be based on the prevailing medical evidence, and where there are competing views in this regard, then the obligation is on the judge to accept one or other of those views, and not some third option which might represent a half way point between the two views.

However, this directive does not extend so far as to the discretion that might be available to the judge when it comes to deciding where to fit an injured worker within a particular class of impairment, and thus the appropriate percentage range within a class of impairment.

HANN [2017] SAET 74

This was an Appeal against a decision of a Deputy President of the SAET, who had found the effects of a worker's psychiatric condition had resolved at a point in time, and

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thereafter his failure to present for work which was on offer to him had been motivated by his unwillingness to return to work, rather than any illness.

The Full Bench reviewed the medical evidence in the matter and confirmed that for partial incapacity purposes, a susceptibility to the relapse of a medical condition, which could well have occurred if the worker was required to return to work, was therefore considered to constitute a partial incapacity for work.

LI [2017] SAET 75

The Full Bench of the SAET overruled a Decision of the Deputy President who had found against a worker where the employment related causes of the worker's injury were wholly or predominantly due to various disqualifying actions, but that there were various other causes that were not work related.

The Full Bench of the Tribunal appeared to take steps to limit the potential application of the disqualifying provisions, to the effect that if any work-related factors are the whole or predominate work cause of a worker's injury, but are not the only cause of the worker's injury (and where other work causes are not work-related at all), then the disqualifying provisions are not so easily applied. Conversely, if the work-related causes are also the only cause of the worker's condition, and they are all "disqualifying" factors, then the limiting provisions of the legislation can be applied.

It seems illogical to say that a compensating authority can defend a claim under the disqualifying provisions, if there are various work causes which are the only cause of the condition, compared to a situation where the only other possible causes of the condition are not work related at all (as opposed to some work-related causes being reasonable action etc. and some work-related causes not). Unsurprisingly, the matter is on appeal to the Full Supreme Court.

Case managers faced with this potential situation should consider obtaining legal advice before making any determination on liability.

MALTHOUSE [2017] SAET 80

The Full Bench of the SAET has confirmed the restrictions applying to pre-approval requests under Section 33(17) are time limited. This relates to both a request for any applicable treatment for which pre-approval is sought, which request must be made before the end of the relevant period, and that the treatment for which pre-approval is being sought must also occur before the end of the entitlement period.

In that case, the Tribunal identified that if time is running out on a worker's pre-approval application, then the expectation is they will instead incur the expense concerned, rather than risk a delayed pre-approval process. In saying this, the Tribunal noted the test for acceptance of incurring of a medical expense is the same whether the worker meets the cost up front and seeks reimbursement, or asks for pre-approval.

The Full Bench also confirmed the worker was entitled to his costs of pursuing the matter concerned, even though he had by and large lost on all the issues that were being raised through the dispute process. The Tribunal accepted that, by virtue of the changes to the legislation, there will be times when a novel argument might be raised, with a proper legal basis, concerning a provision about which there is little authority, and will likely justify an award of costs in favor of the worker irrespective of the facts (which in this case were clearly against the worker).

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MITCHELL [2017] SAET 81

In this case, the compensating authority sought to argue that the effects of an original injury and the adverse consequences of later medical treatment should not be combined for whole permanent impairment assessment purposes, as opposed to a situation where there might be an original injury and then the later adverse effects of surgery (as opposed to treatment).

In pursuing this line of argument, the compensating authority was attempting to distinguish *Martin's* case. The argument was unsuccessful.

Effectively, the Full Bench of the SAET is now prepared to give an expansive definition to the concept of what might be considered the "injury" which flows from what might not be just the immediate effects of an accident, but what develops later. In saying this, the SAET did accept that the *Marrone* situation still stands outside of this approach to the question of combination of impairments.

THOMPSON [2017] SAET 82

The Full Bench of the SAET took the opportunity to review the role that it plays in the new dispute resolution system, and as to the question of how to properly identify and litigate issues, where the Full Bench accepted that the system does not allow for the usual form of Court pleading that might apply in other jurisdictions.

The Tribunal identified the importance of properly addressing at the conciliation stage what issues might be arising in a matter, ensuring that all parties to the matter are clear as to what is at stake, and what evidence arises or needs to be obtained in relation to the issues concerned, before entertaining any overt action such as acting on an Application that might be brought to strike out an Application for Review. The lesson seems to be that the SAET should not allow a pre-emptive strike out Application to succeed unless the facts and circumstances surrounding the matter are very clear, and that any alleged deficiency in a worker's case is not amenable to further clarification and factual enquiry first. This should be addressed by the parties through the conciliation stage.

In the case at hand the Full Bench noted the worker's Application, to stop overtime being removed from his average weekly earnings calculation, might on a narrow reading of the facts be without much foundation, but there were insufficient facts to be sure that was the case, and hence a more thorough exploration of the potential issues surrounding the whole matter should have been addressed further during the conciliation stage. The initial decision to strike out the worker's Application was therefore overturned.

PIERCE [2017] SAET 83

In this matter the worker had sought to require the compensating authority to pre-approve certain types of medical treatment for injuries which were still being investigated as to their compensability, but were said to be alleged consequential injuries to the primary injuries. The Tribunal ruled against the worker in the matter, which perhaps again emphasizes the need for injured workers to be timely in their lodging of pre-approval requests under Section 33 of the Act, and that the taking of a very broad axe approach to any pre-approval application is inappropriate (e.g. asking for anything and everything that might possibly arise from the treatment of a compensable injury, and alleged consequential problems, without any degree of specificity).

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VODDEN [2017] SAET 88

The injured worker received a letter in June 2017 advising that his on-going weekly payments were to cease at the end of that month, because he was not at that time considered to be a seriously injured worker. While the worker, at about that time, was pursuing certification as a seriously injured worker, it had not been granted.

Despite the fact the letter (apparently) concerned was not issued in accordance with Section 48 of the Act, the SAET agreed with the compensating authority's request that the worker's Application be struck out, and did so on the basis that it was considered that the workers' entitlements has "ceased by operation of the law" (being the effect of the *Transitional Provisions* of the new Act) and there was therefore no reviewable decision to consider.

The issuing of what is effectively an "information letter", to notify a worker that their weekly payments are ceasing, seems at odds with the historical approach to the cessation of weekly payments under the legislation from time to time, which is generally to require the issuing of an appropriate/valid determination (under the current legislation, utilising the provisions of Section 48). If the decision concerned comes under further challenge, by way of an Appeal, or a separate action brought on behalf of a different worker, then prudence might dictate that notification to a worker that their entitlements are going to expire at the end of the 104 week period should be confirmed by way of a Notice issued pursuant to Section 48, rather than an "information letter". Case managers should keep this issue under active review, as the issue clearly remains contentious.

As always, if you have any queries concerning any of the issues that have been identified arising from the cases discussed above, then please do not hesitate to contact us.

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