2017 WINTER CASE UPDATE

INTRODUCTION

The rate at which the South Australian Employment Tribunal is handing down decisions continues apace. By the end of June 2017 the Tribunal had handed down almost 60 decisions, and we are therefore on target for a level of judicial decision-making that has not been seen in this jurisdiction for over a decade.

While there continue to be many and varied issues considered by the South Australian Employment Tribunal (SAET), there are clearly some continuing trends in relation to what is being strongly contested as far as the new legislative provisions are concerned under the Return to Work Act. They primarily relate to the question of approval of medical expenses/operative treatment, the permanent impairment assessment process, and application of the transitional provisions.

What has been of some surprise is the comparative lack of "causation" cases, whether they are dealing with either physical injury claims or psychiatric injury claims.

Again, there remain a significant number of cases on appeal to the Full Bench of the SAET, and while a number of matters have also progressed to the Full Supreme Court, there does not appear to be any guidance likely to be forthcoming from that Court in the foreseeable future. This is unfortunate are there are clearly differing views between the judges of the SAET as to key elements of the new legislation, that really warrant some degree of certainty being applied quickly. Nonetheless, we will keep on top of those cases as they are decided. You can expect another update very soon.

A [2017] SAET 35

The worker had suffered a psychiatric injury which meant that she was unable to return to work with her pre-injury employer. However, she had no incapacity whatsoever for her normal duties elsewhere on the open labour market. That open labour market was described by the SAET as being large – the worker was employed in the clerical field.

A notice was served upon the worker purporting to cease her weekly payments on the basis that she had ceased to be incapacitated for work as a result of her compensable injury. She challenged the notice on the basis that she still had a residual incapacity because she could never return to her pre-injury employer, and her earnings were also less where she was now working. Going against what has been the prevailing understanding of the law in this area, the Full Bench of the SAET decided on the facts of the case that the worker had no relevant incapacity for work, even though she probably could not return to employment with the pre-injury employer. They therefore dismissed the worker's challenge to the relevant notice, which may well give

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compensating authorities sufficient encouragement to look to cease weekly payments in similar circumstances, where the inability to return to work is a "site specific" issue, but where their capacity for work is otherwise not affected at all by their injury, and there is a large and broad open labour market in which they can otherwise seek employment.

ROBERTS [2017] SAET 36

This is the well-known case involving the remote location worker who developed a significant illness as a result of being bitten by a mosquito while she was residing in employer provided "substandard" accommodation.

In virtually going back to the 1980s, the Full Bench of the SAET effectively applied what is known as the old legal "but for" test as to causation. They noted that the worker's employment location and the circumstances of that employment were unique, and the worker's injury would not have occurred but for those circumstances i.e. the worker was where she was, and when she was, because of her employment.

The Full Bench's decision in this regard, following earlier decisions of the SAET, appear to be applying a somewhat liberal causation test when it comes to physical injury claims. The newly legislated causal test under section 7 of the Return to Work Act appears to be nothing more than a slight hurdle, than a particularly high barrier, for workers to overcome.

ANDERSON [2017] SAET 37

The worker had sustained an injury in the area of her groin and hip which was accepted as compensable. In 2009 she was paid a lump sum pursuant to the provisions of section 43 of the Workers Rehabilitation and Compensation Act. Due to the onset of degeneration in her hip she subsequently underwent a hip replacement operation in 2012, and then sought further compensation for the increased level of impairment that she suffered from. An issue arose as to whether the worker could pursue such a claim, where the compensating authority asserted that her later "injury" (the hip replacement operation) was basically to the same area as that part of the body for which she had previously received compensation. The compensating authority also asserted the operation could not be considered a new injury for the purposes of further compensation, because of the operation of section 7(6) of the Return to Work Act.

The SAET disagreed with the compensating authority, and described the hip replacement operation as not causing a new injury for the purposes of section 7(6) of the Return to Work Act, but was simply the course of treatment undertaken to fix an existing injury/problem. The SAET also considered that section 7(6) did not have retrospective effect in any event especially where the hip replacement operation, if it was an injury at all, occurred under the previous legislation in any event.

On a separate finding as to the facts, the SAET also found the hip operation was to a slightly different area of the worker's body than that area which was the subject of the previous assessment and compensation paid.

FARROWS [2017] SAET 38

The worker sustained injuries to her right and left knees in 2008. The injuries occurred on different dates, and were not causally connected. Notwithstanding this, the worker asserted the two knee injuries should be combined for the purposes of her overall permanent impairment assessment. The SAET disagreed, and held it would only be injuries of a similar nature, occurring in the same calendar year, such as an original injury and later aggravation thereof, which should be combined for the purposes of a permanent impairment assessment. Effectively, where two injuries are sought to be

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combined, they need to be "related" in some way, rather than merely occurring in the same year.

MANGANO [2017] SAET 40

In a somewhat unusual case, the worker sustained two separate but successive injuries to the same level of his spine. However, the separate injuries gave rise to different pathologies and different symptoms. The SAET found that in those circumstances there was no basis to take account of the original injury, so as to reduce the worker's overall entitlement for the later injury, when it came to assessment of permanent impairment.

RUDDUCK, KARPATHAKIS AND ASHFIELD [2017] SAET 41

In a somewhat unusual step, the Full Bench of the SAET handed down a joint decision in relation to three separate workers' disputes. They did so in circumstances where there were similar issues arising in relation to the matters concerned, dealing largely with the issue of pre-approval of medical treatment/surgery.

In two of the cases, the worker's request had been dealt with summarily in the initial stages of the dispute resolution process, particularly where it had been held that the relevant requests for pre-approval were not necessarily in compliance with the applicable regulatory requirements as to the information to be provided - to the point they were somewhat vague in what was being sought, when and why.

The SAET, in a split decision (which is on appeal) effectively found as follows:

1. Requests for surgical approval will all fall to be considered under section 33(21), and not section 33(17). Therefore the Regulation 22(2) requirements do not need to be complied with;

2. Even though requests for pre-approval of medical treatment might, at first instance, appear to lack much supported detail, the SAET found that an individual worker was still at liberty to supplement their request during the judicial process if necessary;

3. But, nonetheless, the expectation is that when a worker makes an application in the first instance, they should at least present medical support that is "cogent, reliable and reasonable";

4. A request for approval of treatment under section 33 seemingly does not have to be related to an accepted compensable injury before the compensating authority has to consider it – note the prevalence of requests for payment of hearing aids without a prior accepted claim in place;

5. Requests for therapeutic appliances are not “time limited”, and the costs of the appliance and associated surgery etc. is to be covered.

MARCH [2017] SAET 46

The SAET was asked to consider the issue of the use of surveillance film as part of the permanent impairment assessment process. The SAET confirmed the provision of surveillance film to a permanent impairment assessor should not occur prior to the time the assessment is being made, as there is an expectation upon the assessor in accordance with section 22(7)(b) of the Return to Work Act that they are to provide their opinion based only on the individual worker's presentation on the day of the actual assessment.

The SAET then went on to suggest that the provision of surveillance film to a permanent impairment assessor, perhaps in conjunction with the request that they review their opinion, is also a questionable course of action, as the permanent impairment assessor

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is then being asked to effectively assume an adjudicative function in deciding an issue of credit, which in the proper course of things that should be a function left to the judiciary.

There is nothing to stop a compensating authority, when confronted with surveillance film which would appear to undermine the basis on which a permanent impairment assessment is made, from making their own decision about the validity of the film and subsequent WPI outcome, determining the matter accordingly, and then leaving it to the SAET to decide on the final outcome. That final outcome might also involve the SAET not only hearing evidence as to the worker's activities, and its effect on the findings of the permanent impairment assessment, but also referring the matter to an independent medical advisor.

The SAET also had something interesting to say about an aspect of the evidence given by the relevant permanent impairment assessor during the trial, as to whether or not any video evidence would have affected the doctor's view of the worker's credibility - where the doctor suggested he had a particular ability that would have detected anything that cast doubt upon the worker's presentation during the relevant examination in any event, and we refer you to the comments at paragraph 30 of the judgment.

HALLAM [2017] SAET 47

The injured worker was someone who had a higher level of mechanical skills than the general public. He used to repair/maintain his own car prior to suffering his work injury, but was unable to do so afterwards. He therefore sought to have the cost of someone else servicing and repairing his car included in a return to work plan, on the basis paying for such a service would assist him to cope with his injury at home.

Given that the matter involved a very minimal amount of money, Deputy President Farrell dealt with the worker's application in a summary fashion instead of having the matter to proceed to a full hearing, which will be of comfort to those compensating authorities that will be faced with what might be an issue they would wish to defend, but where the overall cost involved in the issue concerned would ordinarily be far outweighed (as opposed to simply outweighed) by the legal costs that would be incurred in testing the point concerned.

In the case at hand, Deputy President Farrell found the worker was not entitled to seek what was effectively the replacement labour cost that the worker was seeking, as it was not objectively reasonable to do so in the circumstances of the case, even if it meant that the worker was financially disadvantaged. This was because it was considered vehicle servicing was a specialised skill, and to allow compensation in this regard would put the worker at an advantage compared to other injured workers in meeting the ordinary costs of living.

KAYE [2017] SAET 49

Having accepted the worker's claim for compensation, the compensating authority at a later time decided to initiate the permanent impairment assessment process. Subsequently, and having received a WPI outcome that he was dissatisfied with, the worker challenged it, and as part of the challenge asserted the whole permanent impairment process was null and void because he had not asked for the assessment concerned to be conducted. The SAET effectively said "bad luck", as the worker had acquiesced through the entire process in any event.

The issue of maximal medical improvement was also addressed by the SAET. It was noted the medical opinion relied upon expressed the view that while the worker had reached maximal medical improvement at the time of the assessment, there remained

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"a significant risk of deterioration in the medium term" according to the doctor. The SAET suggested the doctor had therefore misdirected himself as to the issue of whether maximal medical improvement had indeed occurred.

BOSS [2017] SAET 50

As part of a permanent impairment assessment process, the worker was given the choice of medical advisor. Having made his choice, the assessment took place. An initial report was provided by the assessor, but after what appears to have been a "peer review" process, the assessor modified his opinion, and reduced the WPI percentage from 5 down to 4, leading to rejection of the worker's request for a lump sum payment.

The worker asserted the relevant doctor's assessment had become invalidated because of the downward movement in the applicable percentage, and he was therefore entitled to seek a second opinion. The SAET said no, and confirmed that an assessment is to all intents and purposes always going to be a "one and only" assessment, as long as the eventual report is ultimately admissible into evidence at a hearing.

STREET [2017] SAET 51

The worker had sustained a bilateral shoulder injury, for which she was compensated for under the provisions of section 43 of the Workers Rehabilitation and Compensation Act in 2009. Subsequently, the worker's shoulder problems deteriorated, and she ended up requiring operative intervention. She was subsequently assessed to have a much greater level of permanent impairment than was the case previously, and therefore sought to be further compensated for that increased level of impairment. She did so by arguing Regulation 5 of the Return to Work (Transitional) (General) Regulations allowed her to make an extra claim for the level of impairment “not covered” previously (using the words of Regulation 5) by the earlier assessment.

The SAET disagreed, and found that in the absence of a further injury then there was no ability for a worker to claim further compensation, just because an initial assessment and determination was, in hindsight, premature.

NEMESIS [2017] SAET 54

In a somewhat unusual matter, involving not only the setting aside of a prior consent order, but the effective overruling of an earlier judicial decision, the SAET set aside the previous consent order because it was felt to be in the interests of justice to do so.

The worker had sustained a compensable injury for which he received compensation pursuant to the provisions of section 43 of the Workers Rehabilitation and Compensation Act in 2012. There were consent orders made by the SAET at that time as to the specific injury that was to be compensated for, and the orders also contained an additional clause saying that the worker had no further entitlements arising out of the particular injury concerned, or any other injury sustained on any other date in the course of his employment with his employer.

It was apparent that the worker was suffering from other problems at the time that he entered into the consent order concerned, although those problems were not necessarily the subject of formal claims for compensation. The worker effectively wanted to be able to base further claims for compensation on these other injuries, particularly with the intention to attempt to aggregate his various injuries for the purposes of a serious injury assessment.

In effect, the SAET in allowing the worker's request, seemed to take the view that the consent orders unfairly restricted the worker's rights to future compensation, in circumstances where the worker could not have foreseen the ramifications of what he was agreeing to previously. The restriction on the worker's ability to pursue what might

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have been considered a fair request to be treated as a seriously injured worker was found to be prejudicial to a grossly disproportionate extent to whatever prejudice the compensating authority might suffer otherwise. Because of the unusual way in which the ultimate decision to set the consent orders aside came about, it will probably come as no surprise to hear that the decision concerned will be appealed.

In the interim, it is worth noting two things when it comes to entering into consent orders which might have broad clauses that seek to release a compensating authority from a wider range of liabilities than those that are the strict subject of the dispute concerned. Compensating authorities should ensure they are specific about what is being compensated for, and what might be excluded from orders as to compensation, by way of various injuries. Even then, if there are serious, and possibly unintended, consequences that flow from consent orders, compensating authorities will need to be increasingly wary that the SAET might seek to set aside any such consent orders if the circumstances of the case are appropriate, and where potentially gross prejudice arises in relation to the worker, but not the compensating authority.

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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