2018 AUTUMN CASE UPDATE

INTRODUCTION

Well, 2018 has certainly started with a rush in judicial decision-making terms. With most judges at the South Australian Employment Tribunal ("**SAET**") on deck, decisions have been coming through thick and fast.

Again, the decisions are showing a common thread. Frequent disputes over whole person impairment and serious injury applications appear to be dominating the matters referred for trial. That, of course, is not overly surprisingly, given the restricted access to longer terms entitlements under of the scheme.

More significantly, we are now just beginning to reach the point where the Full Supreme Court is starting to hear further test cases (*Preedy*), or at least list them for argument. We remain hopeful that judicial guidance on some of the more contentious aspects of the legislation will be coming through soon, although it will be interesting to see what those outcomes are in light of any recommendations coming out of the current Mansfield legislative review.

Vodden [2018] SAET 3

The worker appealed to the Full Bench of the SAET against a decision of a Deputy President, who had agreed to summarily dismiss his Application challenging the discontinuance of his weekly payments. Readers will recall at first instance the issue confronting the SAET was, at least in part, whether the claims agent was correct in ceasing weekly payments because of the passage of time (104 weeks) in the absence of the issuing of a section 48 notice. The Full Bench of the SAET found that to give proper effect of the legislation, even when weekly payments cease because of the passage of time, formal determination pursuant to section 48 of the Act is still required.

Furthermore, the Full Bench of the SAET accepted an argument put forward by the worker, that on the facts of the case concerned, there was at least an argument to be made as to whether or not the worker might be seriously injured, and so it was inappropriate to summarily dismiss the Application challenging the cessation of payments. This was against a background of the worker at the time separately pursuing serious injury certification through the permanent impairment assessment process.

The Full Bench of the SAET did identify that short of a worker pursuing a permanent impairment assessment outcome that might lead to a serious injury certification, then a worker might still be at risk of their Application being summarily dismissed if they cannot point to some mistake in the calculation of the 104 weeks of weekly payments,

KJK LEGAL

GETTING IN CONTACT:

Ground Floor
157 Grenfell Street
Adelaide SA 5000

PO Box 3638
Rundle Mall SA 5000

+61 8 7324 7800

admin@kjklegal.com.au

kjklegal.com.au

particularly where there might be an argument about the date on which incapacity for work first occurs, and which sets the starting time for the 104 week clock.

Reilly [2018] SAET 7

Further to the *Vodden* decision, the SAET was subsequently called upon in this case to rule on an Application for summary relief was brought by a claims agent in light of the worker's challenge to a decision to cease his weekly payments because 104 weeks had expired. The claims agent had asserted their decision pursuant to section 48 of the Act was not reviewable. The SAET disagreed with them in this regard.

However, in circumstances where the worker was not able to establish that he was likely to meet the 30% whole person impairment criteria (on which there was no evidence at all at that time), and was not able to point to any potential error on the facts of the case as to the 104 week period, then summary dismissal of the worker's Application was granted in favour of the claims agent. The decision did not mean the worker was forever denied the opportunity to establish he ought to be treated as seriously injured, as there were separate proceedings in relation to his whole person impairment assessment, and the SAET noted the serious injury provisions allow for retrospective resumption of weekly payments, in the event a worker is treated as seriously injured at a point in time after their payments have otherwise ceased pursuant to section 48 of the Act.

Berden [2018] SAET 27

This decision deals with the issue of whether additional medical evidence could be called in support of a challenge to a permanent impairment assessor's report. In the case at hand, a dispute arose as to whether the original assessor was wrong not to incorporate the worker's hearing loss at 1500Hz, which can be permitted in certain circumstances under the Impairment Assessment Guidelines.

The SAET confirmed additional evidence can be called if there is a reasonable basis on which to assert that a permanent impairment assessment outcome **might** contain error. Insofar as the question of whether it was appropriate to include 1500Hz as part of the assessment of the worker's hearing loss, the Tribunal accepted that to do so (and which has the effect of increasing the overall level of the assessed hearing loss) should only occur in exceptional circumstances, and particularly where the worker is exposed to essentially continuous and very loud noise in the course of their employment. It is not enough to utilise the 1500Hz findings when exposure to extreme levels of noise might only be occasional.

Stephenson [2018] SAET 29

Mr Stephenson had pursued claims for lump sum payments under the provisions of the old *Workers Rehabilitation and Compensation Act*, and negotiated a settlement with the claims agent. As part of that settlement, consent orders were filed, which included the usual form of "all injuries" discharge, whereby the worker accepted he had no further claims for impairment arising from the particular work injury.

At a later point in time the worker lodged further claims arising from the original injury, and although he knew he had certain other medical problems at the time he first settled his claim, he was not aware they were going to turn into some form of permanent impairment. At first instance, the SAET set aside the previous consent orders to the extent that the worker could then pursue further impairment assessment.

The Full Bench of the SAET decided on appeal that it was impermissible in the circumstances of the case to go behind what were effectively considered to be fairly

KJK LEGAL

GETTING IN CONTACT:

Ground Floor
157 Grenfell Street
Adelaide SA 5000

PO Box 3638
Rundle Mall SA 5000

+61 8 7324 7800

admin@kjklegal.com.au

kjklegal.com.au

clear-cut consent orders. The Full Bench of the SAET indicated it was not a question of what the subjective intentions of the parties were at the time the original consent orders were entered into, but what was to be made of the terms of those consent orders using 'ordinary principles of contractual construction', and asking the question as to what a reasonable person in the position of either party would believe was meant by the words concerned in the orders made.

In those circumstances the Full Bench of the SAET found the worker was to be held to the effect of the consent orders previously entered into, and could not pursue any further lump sum claims arising from the original injury and any consequences arising from it that formed the subject of the original consent orders. The Full Bench of the SAET acknowledged it is often the case that parties in the throes of negotiating a settlement will agree on some matters being included in a compensation payment, but also waive some other potential entitlements, as all being part of the usual "give and take" of negotiation.

Zelenko [2018] SAET 34

In a similar way to which the *Stephenson* decision created an estoppel as against the worker in seeking to avoid the consequences of prior consent orders, in this matter the issue of estoppel arose again, ending in two different ways. What was in dispute in the case, at least in part, was whether or not the worker could assert an entitlement to lump sum compensation for a back injury said to have been caused at the same time as other compensable injuries, in which it would be added to the assessment of impairment for those injuries to achieve seriously injured status.

Initially, the worker endeavoured to hold the Compensating Authority to a decision that it had made a number of years ago, when at a particular point in time it had issued a determination accepting the lower back injury had occurred on the same date as other compensable injuries. Because the Trial Judge was not satisfied the worker did sustain an injury to his lower back, as a matter of fact, on the relevant date alleged, it was found the claims agent was not later estopped from endeavouring to depart from its earlier determination, which accepted a connection between the lower back injury and the other injuries.

However, at a later point in time, consent orders had been filed at the Workers Compensation Tribunal in relation to further claims for permanent impairment brought by the worker, and at which time reference was made in the relevant consent orders to the acceptance of the lumbar spine injury as sustained on the same date as the earlier injuries. In that event the Trial Judge found the Compensating Authority was estopped from denying the state of affairs, such that the worker could progress with the pursuing of his attempt to aggregate the lower back injury with the other and earlier injuries.

While it is no more than a broad rule of thumb, it would appear decision makers will have better grounds to avoid an estoppel argument in circumstances where they might have made a determination in the past they seek to depart from at a later point in time, but will be much more likely held to a past state of affairs, and any concession as to liability, in circumstances where consent orders are involved.

Laurence [2018] SAET 35

The issue in this matter was whether or not results of audiometry, which were conducted at a point closer in time to when a worker ceased employment, ought to be used in a whole person impairment assessment process, over and above the audiometric findings made at the actual time of the permanent impairment assessment conducted. The rationale for this argument was said to be the fact the assessment of

KJK LEGAL

GETTING IN CONTACT:

Ground Floor
157 Grenfell Street
Adelaide SA 5000

PO Box 3638
Rundle Mall SA 5000

+61 8 7324 7800

admin@kjklegal.com.au

kjklegal.com.au

hearing, as at about the time of the cessation of employment, was likely to be a more accurate reflection of true liability.

The SAET disagreed, pointing to the fact the whole process surrounding permanent impairment assessment is directed towards how a person presents on the day of the assessment. That is not to say other evidence, including test results on other occasions, might not form part of the overall consideration of the matter, but it would not achieve a higher evidentiary value unless, in the SAET's words, 'cogent or compelling circumstances to disregard' the relevant test results altogether were presented.

Treloar [2018] SAET 39

The worker suffered from a compensable injury to his right foot. It required the provision of orthotics. As it turned out, there were only a limited range of shoes the worker could wear which enabled him to properly position the orthotics. When the wrong type of shoes were utilised, the orthotics would not be held in the proper position, and the worker experienced ankle soreness. He therefore sought to recover the cost of the particular shoes that he was required to buy, asserting that they of themselves were a therapeutic appliance.

The Tribunal disagreed (and contrary to a much earlier decision of an earlier Deputy President). In doing so, the Trial Judge adopted the ordinary grammatical sense of the words "appliance" or "aid" in the relevant legislative provision to indicate that shoes of themselves were not to be defined as such, over and above the actual therapeutic appliance which was being placed within the shoes.

Backhouse [2018] SAET 40

This decision has received some degree of media publicity, and the relevant facts might be well known to most of you, but briefly stated the worker suffered an injury while playing cricket in between two different shifts at work, and while he was living and working at a remote location.

The decision in the case is not particularly surprising, given the facts of the matter. As indicated above, the worker was living at his place of employment. He was conducting a physical activity in a period of time when he was transferring from nightshift to dayshift, and there was an expectation from his employer that he would endeavour to 'reset' his body clock in between the two rotating shifts. The activity of playing cricket clearly had a connection with his employment in this regard, given there was a positive duty imposed upon him by the employer's Code of Conduct and policies to maintain a degree of activeness between the change of shifts.

Interestingly, while part of the worker's obligation to take precautions against impairing his fitness for work included avoiding the effects of fatigue, stress, alcohol or other drugs, no significance was placed on the fact the worker had consumed several beers before engaging in the cricket game. We are not sure if this is an indication by the SAET of an acceptance of the significant cultural inter-relationship between 'having a few beers' and participating in a subsequent game of cricket (notwithstanding the rate at which this seems to lead to personal injury being incurred!).

Holding [2018] SAET 43

The parties came into dispute over the costs to be payable to the worker, following resolution of a SAET dispute over pre-approval of medical treatment. Not only had the worker instructed her solicitors to challenge a determination in relation to medical treatment, but they were also retained to consider issues relating to a possible serious injury certification. The worker sought to recover her solicitor's costs of the latter

KJK LEGAL

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Ground Floor
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Adelaide SA 5000

PO Box 3638
Rundle Mall SA 5000

+61 8 7324 7800

admin@kjklegal.com.au

kjklegal.com.au

activities as part of the costs payable in relation to the application brought before the SAET over her medical treatment.

The Tribunal found against the worker, and while accepting solicitor's fees incurred in relation to the seriously injured certification aspect of the matter might well have been incurred in lieu of creating another dispute, that was not sufficient reason to allow the worker to recover those costs. The costs claimable can **only** relate to those reasonably incurred in challenging the specific decision concerned, and not matters of an ancillary nature.

Hogevonder [2018] SAET 44

This matter involved, in part, consideration of whether there ought to be a reduction from applicable whole person impairment assessments that were arrived at subsequent to a worker undergoing bilateral total knee replacement. The issue arose in two ways.

Firstly, whether there was evidence of any pre-existing and underlying problem prior to the time that the worker developed painful symptoms in his knees at work. On an evidentiary basis, the SAET was not prepared to find that there was any pre-existing condition, such as arthritis, which might have been capable of leading to a reduction in the permanent impairment assessment arrived at. This was particularly the case where the evidence would need to have established some form of assessable prior degree of impairment, in accordance with the Impairment Assessment Guidelines in any event.

A secondary argument was raised as to whether the fact of the worker's knee problems, as they existed immediately prior to the undertaking of the total knee replacements, constitute a pre-existing level of impairment that ought to be deducted from the eventual assessment made in relation to the total knee replacements – noting that the latter are assessed as a matter of effectively being deemed as either a good, fair or poor outcome from surgery (and are effectively set figures). The SAET disagreed, accepting the worker's submission the pre-operative level of impairment did not create of itself a pre-existing/prior work injury, so that there is a form of artificial differentiation between the impairment arising from the effects of surgery, and the impairment arising from the effects of prior injury – even though the surgery was undertaken to deal with the effects of the prior injury.

The SAET also addressed a further point arising in relation to the 'one-off assessment' rule that arises in accordance with section 22(10) of the *Return to Work Act*. During the pre-trial preparation process it became apparent the worker wanted to argue not only had he sustained his knee injuries as a consequence of his employment, but they in turn had led him to develop a lower back problem. This lower back problem had not been part of the permanent impairment assessment process. The SAET found in the interests of justice it was permissible for the worker to now pursue a further permanent impairment assessment in this regard (assuming compensability was established), as the independent medical advisor option available to the SAET as part of the dispute resolution process formed an effective exception to the 'one-off assessment' rule. In the circumstances, the Deputy President concerned referred the issue of the worker's lower back problems off to an independent medical advisor to advise on permanent impairment.

Farrell [2018] SAET 51

The background to this worker sustaining an illness or disorder of the mind is one of some notoriety, as it relates to the widely publicised issues arising within the South Australian child protection area.

KJK LEGAL

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Ground Floor
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Rundle Mall SA 5000

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admin@kjklegal.com.au

kjklegal.com.au

As part of the steps taken to ensure employees working in the SA government's child protection area were suitable to work in that role, all applicable employees were required to undergo psychological evaluation. Notification to all affected employees was undertaken at the one time, initially by way of email.

The worker in this case asserted that notification to her by email was an inappropriate and unreasonable course of action to take, and one which led to her decompensating in psychiatric terms. In a narrow sense it would be hard to understand why this might be the case, when the worker received the same notification as everyone else within the workforce. However, the worker concerned had a pre-existing psychiatric condition which was compensable, and which the Trial Judge found would predispose her to reacting adversely in a psychological sense to the requirement to undergo further psychological testing – which the worker asserted she was fearful she would fail because of her existing medical condition. The Trial Judge criticised the employer for not treating the worker (and any others potentially in the same boat) with a good deal more sensitivity by approaching them as individuals, rather than having them subject of a mass communicated email. The hypothetical reasonable employer was expected to have taken the next step to reassure the worker her psychological limitations or work restrictions would not automatically result in her failing the further testing, and that her prior problems would not be completely disregarded when it came to notification to the worker of the relevant directive that was issued.

The decision concerned is likely to attract a good deal of attention and comment, given the above expectations, as outlined by the SAET. Would it be reasonable to treat in a distinct way only those employees that are **known** to have psychological illnesses, whether they are work-related or not, compared to those who might not have notified the employer of the fact they do indeed suffer from a psychological illness? Otherwise how can you be sure who you might not adversely affect? Is it reasonable to adopt such a requirement with a workforce of the size of those affected by the directive made in this case (about 350 employees) as opposed to a much smaller organisation, where issues such as those concerned, and the course of action outlined, might be more easily facilitated?

Biz [2018] SAET 52

The worker had sustained injuries to both of her knees as a result of falling while descending a ladder at work. The resultant condition of her knees was such that it was actively discussed whether the worker might require bilateral total knee replacements and, if so, when. The fact this was a matter under active consideration led the worker to make an application to be treated as a seriously injured worker on an interim basis. The evidence was that it was possible the worker **might** undergo total knee replacements, in which case it would be reasonable to expect she would achieve seriously injured status when the effects of both total knee replacement surgeries, and the resultant impairment assessments, would be combined (as they occurred at the same time, and would result in minimum WPI of 15% each).

The SAET undertook an assessment of the wording of section 21(3) of the Act, and broke the provision down. Attention was given to the question of what is meant by a worker's whole person impairment being **likely** to be 30% or more. What did the word 'likely' mean in the circumstances? The Trial Judge considered the answer to the question was one that needed to be answered in the 'realistic immediate future', and while there was accepted to be a need for surgery at some point in the future, there wasn't the requisite level of certainty that the surgery would occur. Ultimately, the Trial Judge favoured an interpretation that meant surgery being more likely meant that it was either at or something close to 'more probable than not' and not something speculative, theoretical or that was not grounded in the real world.

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Ground Floor
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PO Box 3638
Rundle Mall SA 5000

+61 8 7324 7800

admin@kjklegal.com.au

kjklegal.com.au

Given there has been a prevalence of 'early' applications being brought by certain worker's lawyers, endeavouring to have their clients assessed as seriously injured on an interim basis in the absence of any actual permanent impairment assessments being conducted, the SAET's decision in this regard is timely.

While the SAET noted the worker effectively only had a once off opportunity to seek interim assessment as being seriously injured, the SAET also noted the legislation allowed the worker to apply to the SAET at some later point in time for a direction that the Compensating Authority reconsider the relevant request. However, any such further application would necessitate the need to show a change of circumstances – in this case the likelihood of imminent surgery being undertaken, because of course the fact surgery might have already been undertaken would serve to crystallise the situation and result in the matter proceeding to an assessment of permanent impairment in any event.

Any of the Decisions referred to above can be accessed via the SAET's website or at www.austlii.edu.au. As always, should have any queries concerning any of the issues arising from the cases discussed, then please do not hesitate to contact us.

KJK LEGAL

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Ground Floor
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Adelaide SA 5000

PO Box 3638
Rundle Mall SA 5000

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admin@kjklegal.com.au

kjklegal.com.au