2018 WINTER CASE UPDATE

INTRODUCTION

In this issue we will be trying to depart from the usual aggregation of causation and whole person impairment assessment cases (although not entirely) and will take the opportunity to go back over some of the less well travelled provisions of the Return To Work Act 2014 ("**the Act**"). It is always useful to check in on the South Australian Employment Tribunal ("**SAET**") from time to time to see whether their line of thinking changes over time in relation to some of the less litigated, but nonetheless important, provisions of the Act.

In the coming weeks we will also take the opportunity to review a number of the recently decided Full Supreme Court Appeals, where we are now starting to see some clarity around issues of whole person impairment assessment, serious injury certification, and the "to combine or not to combine" question. We will also provide a quick update as to some of the further issues before the Supreme Court at the current time which are yet to be heard, or where judgment is pending. Therefore, there will be plenty of wintry weather reading for you all!

SOUTH AUSTRALIAN EMPLOYMENT TRIBUNAL DECISIONS

NEMESIS [2018] SAET 62

In an effort to find suitable employment, the worker sought and obtained a job in the Northern Territory. He sought approval from the claims agent to both relocate to the Northern Territory, and to have his relocation expenses paid for as part of moving. His request was rejected, and the matter proceeded to a hearing. There was no issue in the case that it was reasonable for the worker to have moved interstate to obtain work.

The worker was unsuccessful with his request, with the trial judge noting the worker was not able to have the expenses covered by section 33(2)(c) of the Act, as "approved recovery and return to work services", because they did not fit within the type of services allowed for in accordance with section 24(1) of the Act, nor were the expenses concerned approved/authorised under section 32(2)(i) of the Act – the general catch all approval provision. Finally, the parties agreed this sort of pre-approval was not the type contemplated by section 33(17) of the Act either.

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

ORLOVIC [2018] SAET 66

This case is a reminder of the occasional importance of putting a worker to proof in relation to any delay that might be associated with the lodging of a claim for compensation. In the case at hand, the worker concerned alleged he had injured his left shoulder at work in November 2011, ceased work with the employer concerned in February 2012, but did not lodge a claim for the alleged left shoulder injury until January 2016. Part of the issue in the case was whether the employer concerned, in investigating and determining the worker's claim, had been prejudiced.

The SAET confirmed an assessment of whether a decision-maker had been prejudiced in the proper determination of a claim involves a two-step process. Firstly, the onus of proof is on the worker to establish that the decision-maker has not been prejudiced in the proper determination of the claim. If the worker establishes that, then the onus shifts to the employer to prove the fact of prejudice. The Full Bench of the SAET, in looking at the facts of the matter, also confirmed prejudice needs to be associated with a proper determination of the claim as initially presented, and not with respect to aspects of the claim's management at a later time.

On the facts of the case, the compensating authority had been denied the opportunity to properly investigate the pathology and cause of the worker's symptoms as they arose initially in 2011, and to be able to cross reference those findings with the more recently established pathology. Prejudice was proven. However, questions as to the compensating authority's ability to reduce its ongoing liability, by arranging suitable rehabilitation and offering alternative employment, were not issues that were to be considered in assessing any prejudice in the proper determination of "the claim".

FORBES [2018] SAET 68

In a somewhat unusual matter, a self-represented worker at the commencement of a hearing up and left the courtroom, having become hostile. This was the culmination in a pattern of behaviour that had been occurring over a period of time leading up to the date of trial. The compensating authority applied to strike out the worker's claim, partly based on the worker's actions on the relevant day, and also due to the conduct of the prior proceedings, where previous trial dates had been abandoned/adjourned.

The trial judge had cause to consider various provisions of the *South Australian Employment Tribunal Act 2014* ("the SAET Act") including whether there had been a want of prosecution in the conduct of the proceedings by the worker, and whether her conduct was such she was pursuing the proceedings in a way which was causing unnecessary disadvantage to the compensating authority, so that pursuant to section 42 of the SAET Act the proceedings could be dismissed or struck out.

The trial judge looked at what type of facts and circumstances might give rise to conduct that unnecessarily disadvantages another party, but was not sure at the end of the day whether the worker's behaviour constituted that of a malicious litigant who was setting out, by cunning design, to pursue a course of conduct that would deliberately or unreasonably harm another litigant. Nonetheless, by virtue of the fact the worker ultimately engaged in a course of conduct that had continually wasted the SAET's time, and then literally walked out of court, this was sufficient to show there was a lack of want of prosecution of the proceedings, and they could be dismissed.

The decision is a salutary lesson in the extent to which behaviour of litigants can be tolerated by the Tribunal, but only for so long, until what constitutes fairly extreme behaviour will generate the basis on which to apply to summarily dismiss an action.

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

Sacco [2018] SAET 76

This case follows on from a previous matter where the worker pursued a claim for compensation that was initially rejected, but at trial the judge found he had suffered an injury but was in breach of mutuality. As a result, the worker had no entitlement to weekly payments (See *Sacco* [2017] SAET 130).

By the time the matter was dealt with the worker's 12-month period for payment of medical expenses had expired. He then made application to the SAET seeking an extension of time to make an application under section 33(17) for pre-approval of medical services to be incurred and/or a section 33(21)(b)(ii) time limit waiver. Although D.P. Hannon was sympathetic and found the SAET could grant an extension of time in certain circumstances under section 48 of the Limitation of Actions Act, to do so in this situation was a futile exercise. An application for an extension of time for pre-approval under section 33(17) could not extend the entitlement period as envisaged by section 33(20). The judge found the worker could not, by pursuing his dispute, be found to have made an application whilst the entitlement period was still in place.

D.P. Hannon also noted "*Section 33(20) does more than limit the time to make a section 33(17) application. It sets a time limit on the entitlement to any compensation under s.33 except for circumstances falling within s.33(21). The s.33 entitlement sought by the applicant will not be able to be revived by an extension of time within which to make a s.33(17) application.*"

Equally the judge would not have granted an extension of time to make a section 33(21)(b)(ii) application.

Given the current timeframes for hearing cases at the SAET this may result in workers, who are concerned about missing the expiration of the time period in section 33(20), putting in applications either under section 33(17) or 33(21)(b)(ii) in order to preserve their position if they ultimately prove at trial that their claim is compensable.

Goodrick [2018] SAET 78

In one of the rare examples of a Section 18 Application finding its way before a judge for hearing, a preliminary issue arose in relation to whether an employer, who might have sought to rely on a worker's prior dismissal for serious and wilful misconduct, had to effectively re-prove the state of affairs that justified the prior termination of employment, when seeking to defend a Section 18 Application brought by a worker to be provided with suitable employment.

The trial judge found the compensating authority was not required to effectively prove the circumstances of the dismissal again, particularly when the original termination of employment had been unchallenged. The SAET allowed the compensating authority to effectively establish its case of the summary dismissal being appropriate by the tendering of the documents associated with the dismissal at the relevant time, and it was then for the worker to endeavour to prove the opposite.

Heywood-Smith [2018] SAET 81

In this case, the SAET had to consider whether authorities determined under the WRC Act applied to the RTW Act. The worker had suffered a compensable injury and was in receipt of weekly payments. Whilst on weekly payments he suffered a second and third injury. He submitted claims for those subsequent injuries which were accepted for medical expenses only.

The issue arose as to whether prior WCT decisions of *Last* and *Toth* apply to claims under the 2014 Act. D.P. Calligeros accepted that he should follow those precedents.

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

Accordingly, the worker had no entitlement to weekly payments as his compensation payments did not constitute "earnings" for the purpose of calculating AWEs for the subsequent injuries.

He has however asked the parties to make submissions on the relevance/application of section 5(15)(b) and section 42, namely the relevance of the requirement to pay at least the Federal minimum award rate, which provisions of course were not contained in the 1986 Act. No doubt there will be a further decision on this issue to be provided in the coming months (see our Spring or Summer update) in due course).

Barr [2018] SAET 85

This particular decision attracted some media attention because of its somewhat unusual circumstances. The worker concerned was climbing over a retaining wall in the Tea Tree Gully Plaza carpark, to gain access to his employer's premises, in order to commence work. As with most shopping centres, the place of the worker's employment was contained within the overall area owned and managed by the shopping centre, with the employer's premises being leased from the shopping centre owners.

In deciding what was considered to be the worker's place of employment, the SAET recognised that as the Act is a piece of remedial legislation, it must be applied liberally and practically, so that in circumstances such as the present, not merely the floor space of the premises leased by the employer would necessarily be considered to be the relevant place of employment. Ultimately, the Tribunal found that areas such as the carpark and laneway immediately adjacent to the area leased by the employer were also to be considered part of the place of employment.

In a separate aspect of the matter, the Tribunal was also required to consider whether the worker, in clambering over the retaining wall, was engaging the behaviour necessary for him to prepare or be ready for work within the meaning of section 30(3)(a) of the *Workers Rehabilitation and Compensation Act* (with a similar provision in operation under the current Act). The SAET was again satisfied the activities of the worker at the time concerned could be characterised as his preparing for, or being ready for work. The worker had chosen to take the path to his workplace of climbing over the retaining wall, because he needed to be inside the premises before his scheduled 7.30 am start for work. The decision he had made to climb the wall was part of a shortcut he was effectively taking to make sure he was not late for work.

Kerekes [2018] SAET 89

The worker was seeking to recover the cost of her asthma inhaler, which she was utilising in order to treat her compensable injury. She sought to recover the cost of the inhaler as a "therapeutic appliance". The SAET disagreed with her in this regard. The SAET accepted the argument put forward by the compensating authority that the asthma inhaler was simply a device for the delivery of medication, and not a therapeutic appliance of itself. The SAET differentiated between the means of consuming medication, with the use of the medication itself.

The SAET also noted that there was a specific legislative differentiation between the cost of the provision of therapeutic appliances, and the entitlement to medicines and other materials, as allowed for pursuant to section 33 of the Act.

White [2018] SAET 91

A dispute arose in this matter as to whether the GEPIC assessment conducted by the independent medical examiner for the purposes of the worker's application for serious

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

injury assessment was an adequate assessment or not. The findings of the independent medical examiner had been put forward to the treating psychiatrist for comment, and issues arose whether there was adequate substantiation made by the independent medical examiner as to the various classes of impairment the worker was categorised in as part of the GEPIC assessment.

The SAET allowed the matter to proceed further on the basis that there was concern as to the adequacy of the independent medical examiner's report, and that while the whole point of the new legislation is to emphasise the importance of only having a sole medical opinion in this area, there were sufficient concerns to justify a referral to a Tribunal appointed IMA assessment in this case.

What the matter does emphasise is the importance of the original independent medical examiner conducting a very thorough assessment of a psychiatrically injured worker in accordance with the GEPIC provisions, to provide substantiation for any categorisation of impairment, and to display reasoning in the basis for the opinion given. In other words, assessments in this area should be given very close scrutiny as to the adequacy of the findings and reasoning of the independent medical assessor. Where there is concern in this regard, a peer-review process, and referral back to the independent medical examiner may well be necessary, before the decision-maker can be satisfied there is an adequate basis to proceed to determine the issue of whether or not the worker has a 30% whole person impairment.

Hallam [2018] SAET 93 and *Harvey* [2018] SAET 95

In two decisions of the SAET, with the former being a decision of the Full Bench of the SAET, the question of the proportionality of costs of litigation versus the sum of compensation claimed, were considered. In both matters, the SAET noted the minimal monetary value associated with the litigation concerned meant a reduced allowance for costs was appropriate, including assessing the costs concerned on a lump sum basis, rather than item by item.

One of the matters being litigated ultimately involved a sum of $145.00, while the second involved a dispute over the cost of hearing aids.

In both cases, the costs recoverable by the worker's solicitors were heavily reduced, which should be an outcome that provides comfort to compensating authorities in trying to defend such matters, particularly where the individual worker concerned might well find themselves having a solicitor/client cost liability that potentially outweighs the cost of the compensation being pursued.

Bibl [2018] SAET 94

There has been a succession of SAET decisions surrounding the issue of whether workers' applications for review, challenging a decision to cease their payment at the 104 week mark, can be summarily dismissed.

In the latest of these cases, the SAET noted the worker's challenge to the cessation of the weekly payments did not identify any specific reason why the notice being issued at the time was wrong, insofar as the 104 week mark had not been reached.

In this case, the worker had not actually been assessed for permanent impairment purposes at the time weekly payments were ceased, and so the SAET found that there was no reasonable basis on which it could conclude that the bar on the continuation of weekly payments after 104 weeks did not apply. It noted that by virtue of the operation of other provisions of the Act, the worker could, at a later time, be assessed as seriously injured, and an entitlement to backpay would arise.

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

Griffiths [2018] SAET 101

This matter is notable for one limited reason, but it might bear further research by decision-makers when it comes to assessing liability for what are described as "overcompensation" injuries e.g. the worker who claims that by virtue of their right knee injury, they overcompensate by leaning more onto their left knee, with the result being that the left knee subsequently becomes injured as well.

In this matter the prominent orthopaedic surgeon, Dr D Waters, gave evidence to the effect that *"I am not aware of an overcompensation mechanism with a good scientific explanation".*

In many cases, the connection between an injury to one limb and the development of an injury to the opposite limb is simply accepted as a natural consequence. The pain management physician, Dr D Kapur, also gave evidence in the case that while the overcompensation theory might be "superficially plausible", he was also noted to give evidence that "*there is remarkably little scientific evidence to support the concept and much to refute it*". Several scientific papers were cited by Dr Kapur in this regard.

While the facts of every case remain important in determining the possible connection between an injury to one limb and the later development of injury to another limb, and while the SAET in the past has been at pains to emphasise that scientific evidence about a medical issue is not the be all and end all of legal causation, it would nonetheless be worthwhile for decision-makers to consider seeking out and creating a database as to the appropriate scientific papers that were placed before the SAET in this case.

Hodder and Menz [2018] SAET 102

In two co-joined matters, the SAET was asked to consider whether a compensating authority had been correct in refusing to deem two employees to be seriously injured, notwithstanding their multiple impairments arising from a succession of injuries the workers concerned had sustained over the years. While both workers were significantly disabled as a consequence of various injuries sustained, in neither case were any of the injuries able to be combined to provide for an assessment of whole person impairment at greater than 30%. Both workers sought to have the compensating authority deem them seriously injured anyway.

In both cases, the compensating authority determined not to exercise its discretion to deem the workers as seriously injured. The workers sought to challenge the decisions concerned. The compensating authority asserted that the SAET had no jurisdiction to determine the workers' requests, because of the operation of clause 34(4) of the Transitional Provisions to the Act, which declare that a decision to make, or not make, a serious injury determination under section 34(2) of the Act, is not reviewable.

In effect, the SAET found that there was no jurisdiction to deal with the matter, because the process under clause 34, where permanent impairment assessments had long since been determined, was to be considered differently to the ordinary process applying under section 21 of the Act. The Transitional Provisions gave the compensating authority the ability to make a purely discretionary decision, which the SAET found parliament had clearly intended should not be reviewable.

Mitchell [2018] SAET 103

The brief point to arise in this case, which is of broader relevance, is the risk that a compensating authority might take in not seeking out and obtaining relevant information concerning a matter in dispute, as part of the pre-determination or conciliation process. In this case, the worker pushed for a hearing of the dispute "on

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

the papers", and without the taking of oral evidence, or to allow time for the compensating authority to garner further evidence.

In all of the circumstances of the case, including the fact that the trial judge considered there was adequate information available on which to make a fair decision, and where the costs of the compensation in dispute (certain household services) was not great, it meant that the matter could proceed in a very much truncated way. The lesson is clearly to go into the conciliation and litigation process with your eyes open, in the event you determine to not fully investigate a matter at the outset.

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

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