SUPREME COURT CASES UPDATE

RECENT DECISIONS OF THE FULL SUPREME COURT

As promised recently, we have prepared a special case update to address a number of the important decisions handed down by the Full Supreme Court this year, on issues arising under the *Return To Work Act 2014* ('the Act').

Given the broader significance of some of the cases, we will delve a little deeper into a number of them, than we normally would in our regular SAET cases updates.

ROBINSON [2018] SASCFC 32

The worker sustained an injury in 1998. Her claim was accepted, and weekly payments were set at an initial rate of $312.00 per week.

In 2000 the worker's weekly payments were reduced as a consequence of a "two year review" to the rate of $54.00 per week. In the following year the worker redeemed her entitlement to weekly payments, and a figure of $291.00 per week was set for the purposes of section 35(6)(a) of the *Workers Rehabilitation and Compensation Act 1986* ('the 1986 Act'), now section 49(2) of the Act.

The worker had the misfortune to aggravate her injury in 2014. At that time, she was only working on a part-time basis. Her weekly payments were set at $347.00.

The claims agent looked to see what the worker's proper entitlement to weekly payments should be because of the fact of the new injury and the past redemption payment.

In accordance with the appropriate process as outlined by earlier Full Supreme Court decisions, the claims agent went back to the 1998 claim, and adjusted up to the current day the average weekly earnings rate. This resulted in a figure of $595.00. From that, they deducted the applicable section 35(6)(a) figure, because the sum of $595.00 was the higher of the average weekly earnings across the two claims.

Deducting the previous section 35(6)(a) figure from the higher of the weekly earnings rates resulted in a figure of $304.00, which was determined to be the rate the worker was going to be paid. That figure was below the national minimum wage as applying to the worker's average hours at work, and was naturally challenged by the worker.

The Full Bench of the SAET said that the approach taken by the claims agent was wrong, and the worker's entitlement had to be increased up to at least the level of the national

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minimum wage which, when applied pro-rata to the worker's hours at work, resulted in a figure of $333.00 per week.

The Full Supreme Court disagreed with this approach. Significantly, it found the provisions of section 49(2) override the provisions of section 42 of the Act (the national minimum wage safety net provision). That is the primary outcome of the case.

However, the Full Supreme Court then went on to make observations about section 49(2) of the Act and the effect of previous redemption payments. They basically stated that whatever figure is arrived at for section 49(2) purposes at the time a redemption is agreed and paid is not binding!

The Full Supreme Court indicated that what a decisionmaker is required to look at is what weekly payment the worker should be taken to be receiving, but for the redemption. It is the weekly payment that would have been payable in the relevant period (by reason of the previous injury).

Unfortunately, in saying this, the Full Supreme Court has given us a destination, but not a road map as to how to get there.

What this means has been the subject of quite a bit of debate, and it will now become a question of how the SAET will apply what is a very vague principle. Effectively, the SAET would be looking to extrapolate out the period over which a previous section 49(2) figure provides. Will this mean putting a section 49(2) figure of $500.00 per week into a $10,000.00 redemption payment, to arrive at a period of effective reduction in the weekly payments for 20 weeks? Time will tell.

Perhaps, as has been said recently, the decision might be of very little impact because any pre-1 July 2015 redemption payment will have little impact now in section 49(2) terms because the 104 week effective period will have long since passed for which there is an entitlement to weekly payments for any pre-1 July 2015 injury. That appears to be the way RTWSA is approaching the matter. They've applied the principle that as most claims last for only a maximum 104 weeks, then that's the maximum period of the effect of any past payment.

Finally, it is almost a virtual throwaway line, without it being part of the essential findings and judgment of the case, the Full Supreme Court noted the purpose of section 42 of the Act, in setting a Federal minimum wage safety net, is to protect a worker's entitlement where there is a reduction of their average weekly earnings to 80%, and where that would result in the ongoing weekly payments being less than the national minimum wage – seemingly to ignore the possible application of any section 49(2) provisions for the moment. This fits with RWTSA's approach in this area, such that the Federal minimum wage provides a basement for weekly payments after the commencement of the second year of those weekly payments.

In any such case then, decisionmakers will need to be alive to the amount that the Federal minimum wage represents at the time that they undertake any reduction in weekly payments in the second year of incapacity – but we suspect this will all be subject to further litigation as the issues are fleshed out at the SAET. In the circumstances a conservative approach might be warranted.

KARPATHAKIS AND RUDDUCK [2018] SASCFC 45

In a joint decision involving Messrs Rudduck and Karpathakis, the Full Supreme Court had cause to look closely at the interaction of the various provisions of section 33 of the Return To Work Act, concerning the entitlement to medical expenses.

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In both cases the workers concerned brought applications pursuant to sections 33(20) and (21) of the Act, seeking pre-approval for future surgery.

The responsible claims agents determined to reject the worker's requests, in part at least because the requests did not comply with the provisions of section 33(17) and Regulation 22 of the Act, and so the workers concerned did not jump through the necessary hoops regarding the medical and factual support required to grant their requests for pre-approval.

The Court reviewed the overall legislative intended provisions of section 33 of the Act, and noted the following basic tenets of the legislation:

- section 33(1) sets out the basic entitlement to medical expenses;
- section 33(2) restricts the range of services available;
- once you are through the gate under section 33(1) and (2) then an entitlement to payment of medical expenses arises, but subject to the qualifications and adjustments made through sections 33(3) - (16);
- sections 33(17) and (19) are an acknowledgment of the practice under the previous legislation, where in appropriate cases workers were able to gain certainty as to their future treatment needs by way of pre-approval by the compensating authority for the incurring of certain costs, including those associated with an operation;
- section 33(20) sets a time limit for the entitlement to medical expenses, depending on the individual circumstances of a particular worker, and as related to their then entitlement or otherwise to weekly payments;
- because of the way the overall legislation is framed, where in general there are limited time periods for access to various entitlements (weekly payments and medical expenses), section 33(21) in answer to the narrow window as to potential entitlements, creates a safety net in appropriate circumstances, so as to limit the impact of section 33(20).

Looking back at the actual cases concerned, the Full Bench of the SAET had initially found each of the workers concerned should have only invoked the provisions of section 33(21) of the Act and the decisionmakers should not have had reference to section 33(17) at the relevant time, or required it to be complied with. This meant that the requirement to jump through the hoops imposed by Regulation 22 was unnecessary.

The Full Supreme Court agreed with this approach but went further to say that a section 33(21) application was really only brought as a vehicle to deal with the time limits otherwise applicable in accordance with section 33(17) request for pre-approval. The Court recognised the section 33(21) request as invoking a more informal process. It is a process that is merely intended to determine or accept an application for future treatment, so as to vary the time limit otherwise imposed by section 33(20). It doesn't go so far as to specifically approve an operation on a particular date, or of a particular type.

Furthermore, the Court also acknowledged that when it came to the appropriate time for the surgery concerned to be undertaken, then a section 33(17) request would still be required. In other words, a decision under section 33(21) simply allows for a deferral of the ultimate decision-making time.

The request itself under section 33(21) therefore does not carry with it a set of minimum prerequisites as do section 33(17) and Regulation 22. Both the Full Bench of the SAET and the Full Supreme Court acknowledged that in those circumstances there may not be as much information available as one would ordinarily expect for a section 33(17) and Regulation 22 request, but this did not stop a worker in any

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particular case from supplementing the information provided at the time of the initial request, should the request for the extension of the applicable time limit be rejected, and the matter come into dispute.

The Courts have recognised section 33(21) requests are, by their nature, going to be broad and often lacking in specificity. There is a recognition that there must be an allowance made for circumstances to change, such as the nature of any surgery that might be proposed, rather than the mere fact of the need for surgery of itself.

In looking to determine any such requests, the Full Supreme Court emphasised that a compensating authority should not simply consult its own interest in making a decision in this regard, although requests for extending the time limit that are of their own nature so thin and lacking in detail or substantive merit should, at the very least, be queried and challenged.

The Court also noted that applications under section 33(21), in not carrying a similar time limit for a determination to be made, as is the case under section 33(17) of the Act, means a less structured decision-making process can be followed, and more time taken to fully consider the matter, if required.

Conversely, the Court clearly indicated that if a worker wants to invoke the section 33(17) pre-approval process then they should, as a matter of necessity, get their ducks all in a row before making any application. An inadequately substantiated application is essentially an invalid application in this regard.

LI [2018] SASCFC 52

While this decision deals with section 30A of the 1986 Act, the legislative provisions concerned are substantially similar under the Act, other than the transposing of the "a substantial cause" provision to a "the significant contributing cause" provision under the latter legislation.

While the decision concerned deals with the provisions arising under the former legislation, it remains relevant as far as its potential application is concerned, to claims submitted at the current time, but which reference events and allege an injury which might arise prior to 1 July 2015 (and so the old causation test under the 1986 Act would apply).

The Full Supreme Court overturned the construction that the Full Bench of the SAET had given to section 30A of the 1986 Act. The Full Supreme Court reaffirmed the need to establish that insofar as an employment related cause or causes are claimed to have resulted in a psychiatric injury, then it remains important for a compensating authority to be in a position to establish that the cause of injury did not wholly or predominantly arise from one of the various disqualifying provisions. This consideration does not become irrelevant in the event that there are various other non-work related causes. The "wholly or predominantly" issue only needs to be considered in the context of overall employment causes.

PREEDY [2018] SASCFC 55

The facts in this case do not bear a great deal of repetition, as Mr Preedy's claim has been winding its way through the judicial process for several years now. Briefly, as a reminder, Mr Preedy had sustained an original injury to his left shoulder, for which he received an 11% impairment assessment, and later sustained a neck injury while undergoing medical treatment for his left shoulder, and which attracted a subsequent assessment of 27% whole person impairment.

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Mr Preedy sought to have the two injuries combined for the purposes of a seriously injured worker application. The case brought into question the interplay between the provisions of section 22 and section 58 of the Act. Part of the compensating authority's argument in support of its appeal, that the various injuries should not be combined, arose from assertions that the injuries concerned did not arise from the same trauma, that section 58 governed the question of "combination" and not section 22 of the Act.

In support of his argument that his impairment should be combined, the worker sought to establish a key difference between the provisions of section 22 and section 58 of the Act, when it came to firstly the question of assessment of impairment, and then subsequently to the assessment of entitlement to any lump sum payment.

The worker also asserted that section 22 was the key provision in the legislation, which governed the question of "combination", and that an expansive interpretation, as to what might or might not be combined as far as injuries occurring at different times are concerned, should be favoured. In other words, as long as there was a notionally unbroken causal chain, then combination could be permitted, not just for the purposes of any section 58 assessment of entitlement to a lump sum payment, but also as to combination of the various impairments for the purposes of a serious injury assessment under section 22 of the Act. The Full Supreme Court agreed.

While the issue of "combination" has seen the SAET regularly drawing a connection between original injuries and consequences arising from those original injuries, including such things as medical treatment sequelae, the one area where "combination" had not been permitted was in the area of what might be described as an injury occurring due to overcompensation as a result of activity in respect of the originally uninjured limb, due to the fact of sustaining injury to the limb on the opposite side of the body (*Marrone's* case).

In *Preedy's* case, the principles outlined in *Marrone's* case was held to no longer be applicable in the circumstances of section 22 of the Act, given the different statutory context in which *Marrone's* case arose (under the 1986 Act).

It is clear that RTWSA have contemplated the likelihood the Full Supreme Court would expand the scope of the "combination" principle to cover both sections 22 and section 58 of the Act, and as a consequence the gateway to serious injury certification being pushed wide open, as we understand legislative amendment, and/or a recasting of the Impairment Assessment Guidelines, will now be actively pursued by RTWSA – and was certainly a feature of their submissions to the recent *Mansfield* review of the Act .

The financial consequences of the *Preedy* decision are said to be very significant, and running to hundreds of millions of dollars. Given the state of the law as it currently is, decision makers are going to need to be even more careful in establishing to their satisfaction what, if any, multiple impairments that may be alleged are truly part of the one causal chain, or have reached maximum medical improvement, as opposed to being impairments that might still be amenable to further medical treatment (or in some cases the cessation of certain types of medical treatment – opioid medication, for example).

Matters pending determination at the Full Supreme Court

As a consequence of the decision in *Preedy*, it is understood that the separate appeal in the matter of *Mitchell*, another combination case, might no longer be pursued. Similarly, because of the outcome in the recent decision of *Roberts*, on causation, the separate appeals in the matters of *Brealey* and *Rullo* are no longer being pursued.

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However, there still remains a number of other matters involving various aspects of the legislation that are still proceeding before the Full Supreme Court, including the following:

Return to Work Corporation of South Australia v Renfrey

This case involves a worker who gave notice of a hearing loss claim when his then employer was licensed under the Comcare legislation. The Full Bench of the SAET effectively backdated his injury under the deeming provisions of section 113(2) of the 1986 Act to a time when the employer was registered under the South Australian Scheme, and the whole of the loss was to be compensated under the state scheme.

Return to Work Corporation of South Australia v Vodden

This is the case that explores the issue of whether an information letter sent by a claims agent to a worker, telling them that their 104 week period of weekly payments was going to end, could be considered as a reviewable decision, given the strict application of the relevant provision of the Act (as submitted by the Return To Work Corporation).

The decision is not particularly significant to most self-insurers, who appear to have taken the option previously of ensuring a section 48 discontinuance notice was issued in any event where a worker's entitlements were approaching or had passed the 104 week time limitation period.

Stephenson v Return to Work SA

This case is all about Consent Orders that were entered into which purported to modify or exclude a worker's entitlement to claim future compensation, and where those past orders denied the worker the ability to seek compensation for further permanent impairments which would have assisted in his effort to obtain a serious injury certification.

The decision largely will address various jurisdictional issues, and particularly whether the SAET can have the power to make a pre-emptive declaration that a worker has no entitlements, when making Consent Orders. Decision makers should follow the normal process in this regard until further notice.

Onody v Return to Work SA

This is the case where a worker who sustained a hearing loss and was compensated initially, had a further assessment of hearing loss at a later point in time. The difference between the former and the latter assessments was 3%. A question was whether this of itself meant the worker was not entitled to any further compensation paid (even though his primary impairment exceeded the 5% threshold), and also whether or not there should have been a monetary deduction from the 9% as assessed subsequently.

Based on the comments of the Justice who granted the application for leave to appeal, it is likely that the long understood status quo will remain, which would be to the effect of the worker being compensated for the 9% assessment, less the sum of the previous payment. However, in the interim, compensating authorities who wish to take a conservative approach to the situation, would be within their rights to reject any claim for consequential hearing loss that is less than 5% over and above any prior compensated loss.

Any of the Decisions referred to above can be accessed via the Courts Administration Authority of South Australia 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.

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