2018 SUMMER CASE UPDATE 2nd Edition

INTRODUCTION

While the clock has ticked over into 2018, the South Australian Employment Tribunal (**SAET**) was quite busy handing down judgments in the very last few weeks of 2017. With the SAET now in a short-term hiatus before the new legal year fully ramps up, it is a good opportunity for us all to catch our breath, but to also catch up on those judgments of any importance that have come to hand recently.

In this Edition, we will do our best to steer clear of Section 58 of the Return to Work Act (**the Act**), and any decisions associated with it, not because they are unimportant, but because the multitude of issues that have been arising in relation to this section of the Act have all been commented on in previous Editions, and many of the important cases in this area are now on appeal to the Full Supreme Court.

BREARLEY AND RULLO [2017] SAET 133

It seems that the prevailing approach at the SAET in relation to Section 7 of the Act, and causation, is to suggest nothing much has changed between now and when Section 30 of the Workers Rehabilitation and Compensation Act (**the old Act**) was in place. Effectively the SAET are saying the longstanding "but for" causation test applies – but for the fact of the worker's employment (and not necessarily in a contemporaneous sense) would the injury have occurred.

The SAET have also emphasised that the significant contribution test only applies when considering whether an initial injury is compensable. You do not apply the same test to any later causally related events which might give rise to an injury or sequelae – and see the later Decision in *Roberts* [2017] SAET 160, where a fall at home caused by dizziness was causatively connected back to a prior work-related injury that of itself had caused the worker to experience dizziness in the first place. Notably, employment insofar as being a significant contributing cause, is not restricted to the fact of a worker being in the course of their employment at the time injury occurs.

TOTH [2017] SAET 134

In this case, which we have discussed previously, the worker failed to succeed at first instance before a Deputy President of the Tribunal, but was nonetheless awarded costs of the proceedings. The worker subsequently lost an appeal to the Full Bench of the

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SAET, and was then pursuing an appeal to the Full Supreme Court. Her solicitors sought an order that the initial cost awarded by the trial Judge should be paid direct to them, and not be the subject of some form of set off against other possible costs the worker might eventually owe as a consequence of the appeal process. The SAET agreed, and this paved the way for the worker's initial costs entitlement to be enforced by her solicitors, and the sum concerned be paid to her solicitors, notwithstanding any possible later orders as to costs of other proceedings.

NEILSON [2017] SAET 136

The Full Bench of the SAET confirmed that when assessing whether to exclude the effects of any pre-existing and unrelated injury or cause from a whole person impairment assessment, then a referral to an injury management advisor was a preferred course of action if the general evidence in the matter was unsatisfactory as to whether or not to exclude the effects of that pre-existing and unrelated injury or cause. The SAET emphasised the new legislation evinces a clear intention – to disregard the effects on unrelated problems – even if that may initially be difficult to quantify (as the doctors in this particular case stated).

The later SAET decision in the matter of *Opie* [2017] SAET 138 shows this principle in play. A prior back injury sustained under the old Act, and which gave rise to an assessment under the then Third Schedule of that Act at 15% loss of function of the lower back and lumbar spine, was re-characterised as being a 20% whole person impairment assessment for the purpose of then assessing the extent of the overall impairment as a consequence of a later injury (which was 29% – with the worker ending up with only a 9% WPI assessment for compensation purposes).

McPHAIL [2017] SAET 150

The worker sought pre-approval to undergo medical treatment in the nature of an injection designed to block one of the nerves in the spine for a period of time. The evidence was the injection was not intended to have any lasting effect. An issue arose as to whether the injection was therefore to be considered surgery for the purposes of Section 33 of the Act.

The presiding judge found an injection could in some circumstances constitute surgery, but that if the injection did not permanently change any bodily function then this was not surgery for the purposes of the relevant provision. We query whether this will mean that rhyzolysis will not be considered surgery, and of course we do not know what view the other members of the SAET might take to this particular finding of the trial judge. We suspect this will be very much a case of "watch this space" in 2018.

VLASSIS [2017] SAET 153

The worker sustained an injury to his knee. Sometime later he developed septic arthritis in the knee joint. Unfortunately, that problem was not picked up by his then treating doctors, and he subsequently developed heart, lung and kidney failure. He claimed compensation for these latter conditions. His claim was rejected.

The SAET found the "negligent management and treatment of the worker" and "gross failures" of the then treating doctors in failing to pick up and treat the septic arthritis condition represented an intervening cause. This meant the compensating authority was entitled to deny liability for the effects of the sequelae to the septic arthritis. Part of the rationale for this finding was the failure of the medical providers to properly treat the worker, which represented an opportunity that was lost to properly deal with the septic arthritis issue which, had it been dealt with properly in the first place, would not have led to the later problems developing. This principle is often described as the

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“novus actus” principle – where an intervening cause arising in circumstances of third party negligence relieves another party of a liability at law.

VODDEN [2017] SAET 155

This is a case of being very careful what you wish for! The worker suffered bilateral knee injuries, and received lump sum compensation for both injuries under the old Act in 2007. In 2009 and 2010 he underwent operative treatment on his knees. He sought further lump sum compensation as a consequence. A determination was made by the compensating authority in June 2015 to allow for a further lump sum to be paid for the progression in the overall extent of the worker’s impairment that had occurred subsequent to the first compensation payments that were made. The worker disputed the determination concerned.

At trial the compensating authority took the view that under the new SAET provisions the whole matter had to now be assessed “de novo” i.e. afresh, and they could effectively go back on their determination and now argue the worker had no entitlement at all. The trial judge agreed. This was because the worker had not suffered from any further “injury” after the original determination, but had simply had surgery on his knees for the usual expected overall and general deterioration in the status of his knees. Furthermore, and because of the change in legislation meaning that surgery is no longer considered to be an injury of itself, then the worker had to be satisfied with what he had received by way of compensation in the first place under the old Act. Part of the rationale of the SAET in agreeing to this submission was that you will always take a chance if and when you resolve your lump sum entitlements. Sometimes your condition may get worse over time after you have been paid a lump sum payment, but equally on occasion your overall condition may get better, but at the end of the day you will only have one shot at your overall entitlements.

HALLAM [2017] SAET 162

The Full Bench of the SAET confirmed it is appropriate to treat some matters and compensation claims summarily when disposing of them through the dispute resolution process. In this case, the Full Bench confirmed a Deputy President was correct in disposing quickly of a worker’s request that car servicing be included in a Recovery and Return to Work Plan. Part of the reasoning for dealing with the matter summarily was the very minimal amount of the dollar cost of the claim being pursued.

The Full Bench also outlined that a worker seeking to have the cost of car servicing provided, which he would have otherwise undertaken himself, was not something designed to assist in his recovery per se, or his return to work, or his restoration to the community, and therefore was inappropriate to include in a Plan.

DEMARIA [2017] SAET 171

This case is notable for two reasons. The first is a worker was able to convince a Deputy President he was able to **re-establish** mutuality, even though it took until the very end of the trial for his “eventual sincerity” about being ready, willing and able to return to work to be established. This was despite the fact there was clear evidence that the worker had falsified documents while employed, was deceptive in his conduct leading up to his termination of employment, and had been less than full and frank in the giving of his evidence during the hearing (including a failure to fully admit to a drug problem) amongst other things. Notwithstanding this, the trial judge appears to have given the worker a very huge “benefit of the doubt” in allowing him to re-establish an entitlement to weekly payments. This case goes very close to setting a ‘low water-mark’ for what a worker must say and do to revive mutuality – although of course it is always possible to argue every case is dependent on its own facts!

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Secondly, the trial judge confirmed that notwithstanding the absence of any specific provision dealing with the concept of revival of mutuality in the legislation, it was still nonetheless a concept that underlay the legislation and its application in any event.

MANGANO [2017] SAET 172

This is an example of a case where an injury to the same level of the spine, on two different occasions, can nonetheless end up resulting in there being no deduction for the effects of an earlier injury when it came to assessing permanent impairment arising from a later injury. Simply put, the original injury in this case caused problems to the left side of a disc in the worker's spine. A later injury caused problems to the right side of the same disc in the spine. There was no strong evidence to say that the original injury actually played a causative part in the sustaining of the later injury, insofar as the later injury was not necessarily "due to" (being the relevant terminology in Section 22 of the Act) the former in causation terms, and to the effects of any old injury could be disregarded when assessing the effects of the new injury.

Referring back to the decision in *Neilson* [2017] SAET 136, the query is raised as to how to reconcile the two approaches. Do they stand on their own terms?

In *Neilson,* there was disregard for the effects of a prior non-compensable injury/condition when assessing the level of impairment to the same area of the body at a later time.

In *Mangano*'s case the effects of a previous injury were disregarded when it was not specifically to the same area of a disc of the spine.

In the former case, an overall impairment assessment was reduced. In the latter case, the effects of the later injury were able to stand on their own as a diagnosis based entitlement, without any deduction for the fact of the prior injury.

SHROD [2017] SAET 177

In this case the worker asserted for various reasons she should be entitled to nominate her own treating doctor for the purpose of undertaking a permanent impairment assessment. The argument was based largely on an assertion the Act itself did not preclude such an approach, albeit the issue was dealt with in the subordinate Impairment Assessment Guidelines and Impairment Assessor Accreditation Scheme.

The SAET disagreed, saying effectively that you should treat the Act, Guidelines and Accreditation system as all the one working system.

However, the SAET did leave open the door to a possible different outcome in an extreme situation where the prevailing "rule" may be varied. The SAET effectively left it for another day for another worker's representative to argue that the Tribunal of itself might have the power to modify the Impairment Assessor Accreditation Scheme (which sets out the treating doctor conflict of interest provision). We suspect it would take a fairly extreme factual circumstance for that situation to arise.

MARTINELLA [2017] SAET 179

The SAET determined that an in-principle settlement between two parties could not be enforced in circumstances where the worker died after signing a Redemption Agreement, but before that Agreement could be considered and signed by the compensating authority, and also in circumstances where associated Minutes or Order intended to help facilitate the settlement had not yet been sealed by the SAET.

The SAET again underlined the importance of the overall procedural aspects of finalising a Redemption Agreement, involving both parties signing the documentation concerned

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before it could be put into effect. It was all the more important in this case, where it seemed to be clear the compensating authority was very conscious of the need to ensure there was full agreement reached on all aspects of the proposed settlement, and all documentation appropriately executed by the worker, before it would consider the matter had settled and would sign off on the Redemption Agreement concerned.

LOOKING FORWARD

Hopefully 2018 might bring lesser numbers of SAET Decisions, and more than just the odd Full Supreme Court Decision, given the multitude of issues that remain undecided in the application of the new legislation. We anticipate a number of Decisions of the Full Supreme Court to start coming through by about mid-2018. Of course, this will be at about the time of the legislative review being finalised. That confluence of events should make for interesting reading.

As always, any of the Decisions referred to above can be accessed via the SAET's website or at www.austlii.edu.au.

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