2018 SPRING CASE UPDATE

INTRODUCTION

We face confusing times, in more ways than one. We are fast approaching the onset of summer, yet the current weather feels more like mid-winter. It can be a little like that when trying to come to grips with the many varied issues that confront decision-makers in trying to implement the provisions of the *Return to Work Act* ('the Act').

In this update we will do our best to draw together from the multitude of cases that are currently being handed down by the South Australian Employment Tribunal (SAET) into a useful guide on how to manage claims on a day to day basis.

The SAET are fast approaching the handing down of 200 decisions in the calendar year, which is a rate of judicial decision-making that has not been seen for many years. With a multitude of issues still working their way through the Court system, the SAET is beginning to feel the strain, with listings for 3 day trials now being made in 2020!

What the above means is that the quality of your claims determination making is even more important, because if a matter comes into dispute justice may be a long way off, which can literally have the effect of litigation becoming pointless with the passing of time. As many workers are now discovering, significant delay in the hearing and determination of rejected compensation claims can mean their notional entitlement to claim compensation, particularly by way of pre-approval for the incurring of medical treatment, is gone by the time they get to trial!

REES [2018] SAET 112

In another example of a case where the SAET has set the bar high when it comes to attempts to set aside previous consent orders, it confirmed there need to be "exceptional circumstances" before it will exercise its discretion in that regard. In the case at hand there was nothing particularly new about the evidence sought to be relied upon in endeavouring to set aside consent orders, and where all that had happened in the case was a new firm of solicitors formed a different view as to the worker's prospects for success with his claim, and therefore sought to have an original consent order set aside. The application was refused.

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Puhara [2018] SAET 114

In an outcome that should be of interest to both self-insured employers and registered employers alike, the SAET found there was no difficulty in making an order to co-join proceedings, and which involved a worker pursuing an action against his employer for the provision of "suitable employment" under section 18 of the Act, and a dispute against a determination made by the relevant claims agent over certain recovery/return to work services.

The co-joining of the proceedings was made notwithstanding there might in due course be issues in trying to sort out the question of costs, where there are differing rules as to costs between section 18 matters and general matters within the SAET's dispute resolution jurisdiction.

The co-joinder of the proceedings was also seen as appropriate in circumstances where the employer was not only a party to the section 18 proceedings, but had also joined into the separate proceedings arising from the claims agent's determination. What was also important in determining whether or not the proceedings ought to be joined was the crossover of some of the issues between the two sets of proceedings, and a commonality as to potential witnesses and evidence.

Paschalis [2018] SAET 121

In this case the worker was assessed as having a 35% WPI under the GEPIC scale for a psychiatric injury. While that aspect of the assessment was not in dispute, there was a question raised as to whether there ought to be a deduction for a pre-existing injury or condition from the final assessment.

The evidence in the case suggested the worker had a pre-existing impairment of his thinking, perception and judgment, which arose from a personality vulnerability. While there did not appear to be any evidence of a specific pre-existing illness or medical condition, the examining psychiatrist had inferred the worker had an existing impairment based on the extremity of the worker's psychological reaction to the work incident that triggered his compensable psychiatric illness.

The Tribunal ultimately concluded that a vulnerability is not an illness or medical condition.

Nonetheless, on the basis the vulnerability **might** have constituted a pre-existing condition, the Tribunal went on to consider the evidentiary threshold for how such a pre-existing condition might be assessed. The examining psychiatrist had literally estimated the level of the prior impairment. The SAET found this to be an incorrect approach, and reference back to the Impairment Assessment Guidelines and their strict criteria was to be expected in coming to any conclusion on the percentage arising from any possible pre-existing condition. This would literally require a pre-compensable injury GEPIC assessment of whatever pre-existing psychiatric injury was evident.

Keenan and Ors [2018] SAET 130

In what is quite a common occurrence, a number of injured workers received certain back-payments as a result of the coming into place of a new Enterprise Agreement. Those back-payments included a one-off sign on bonus, and a retrospective wage increase applied from an earlier date in time.

In relation to the latter payment, the relevant compensating authority sought to reduce the workers' weekly payments to take account of the back-payment, when they came to making a particular weekly payment for each of the workers.

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The Tribunal found that while there is always a need to take account of any income earned in a particular week when making a weekly payment for that week, it was beyond the provisions of section 39 of the Act to effect a reduction in the weekly payment entitlement for that particular week to take account of some other back-payment that was not strictly payable for the week concerned. As a consequence, the SAET found that it was not appropriate for each worker's weekly payments to be reduced in the given week concerned for anything other than wages earned in that week.

Simounds [2018] SAET 135

The worker and compensating authority came into dispute over the worker's entitlement to weekly payments, where the compensating authority had rejected such a claim based on the worker's purported serious and wilful misconduct which had led to his termination from employment.

Prior to the SAET proceedings fully getting underway it was agreed between the various parties that the worker's claim to the Fair Work Commission for unfair dismissal should be heard first. Naturally, those proceedings only involved the worker and the employer. The worker failed in his application in that jurisdiction. On this basis, the employer, being also a party to the SAET proceedings, sought to have the worker's SAET Application dismissed on the basis of estoppel, relying on the fact of the outcome of the Fair Work Commission proceedings.

The question was whether the finding the worker had engaged in gross misconduct, as an element in the unfair dismissal outcome, should be similarly found as a matter of fact, and without the need for any further evidence, in the SAET proceedings. The SAET found the outcome of the Fair Work Commission could not bind the parties in the SAET proceedings, particularly insofar as there is a differing test between the two jurisdictions, and that gross misconduct is not the same as serious **and** wilful misconduct.

In a separate issue entertained by the SAET the question was raised as to whether in having to deal with the serious and wilful misconduct aspect of the SAET proceedings there was effectively a re-litigation of whether or not the worker's dismissal was unfair. The SAET found this was not the case, as one set of proceedings dealt with a worker's employment rights, and the other set of proceedings dealt with the worker's compensation rights. The Tribunal was also "comforted" by the understanding that in the SAET proceedings there was not only an employer involved, but also a compensating authority, and where their interests were somewhat different, and where the compensating authority was not a party to the Fair Work Commission proceedings.

Dowden [2018] SAET 136 and *Gordon* [2018] SAET 137

Both of these cases deal with the question of what constitutes "surgery" for the purposes of section 33 of the Act, and both involved injections of a particular nature.

In the *Dowden* matter the worker was to undergo steroid injections administered by a surgeon, in a hospital operating theatre, and under a general anaesthetic. The SAET pointed out the stark contrast between this form of medical treatment and what might be more simply described as a "flu jab" occurring on a normal visit to a G.P. The essential features of the treatment being undertaken, and which also involved what was described as the "skilful placement of the needle in a notoriously vulnerable and tricky part of the back" underlined the Judge's reasoning.

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In *Gordon* the worker was to undergo Synvisc injections and/or an arthroscopy. Synvisc injections are apparently designed to replace or substitute the loss of normal lubricant in a knee joint. The trial judge looked back into medical history and outlined the progress in the way in which medical conditions are now treated, such that surgery as we currently understand it to be (cutting into the body) is giving way to more revolutionary forms of treatment. In an analysis of what the treatment proposed involved, it was decided the injections concerned could well fall within the definition of "therapeutic appliance" as there was an artificial substitution or replacement of a party of the body, whether it might be "attached, inserted or implanted".

As time passes it is becoming increasingly clear the SAET is giving an expansive definition as to what might constitute "surgery".

Searles [2018] SAET 138

In a lesson as to "getting your ducks in a row" before going to trial, the compensating authority initially sought at trial to rely upon a peer-review report as a basis upon which to attack the findings made by an impairment assessor. The peer-review report was not considered to be a medical report for the purposes of Rule 62 of the South Australian Employment Tribunal Rules, and therefore there was an issue as to its admissibility into evidence. To get around this problem, the compensating authority sought a subsequent "compliant" report from the peer-reviewer, that met the requirement of Rule 62. However, because of the timing of the attempt to introduce that report into evidence (late in the proceedings and after the close of the worker's case), the report concerned was again not admitted into evidence.

As a lesson to compensating authorities who might be intending to rely upon the outcome of a peer-review process at trial, it is imperative that any such peer-review opinion be converted into a compliant report for the purposes of Rule 62. There is nothing to stop a basic peer-review report being obtained and relied upon as part of the decision-making process, but when it comes to the litigation process it is all the more important that a compliant report be obtained prior to trial.

Nemesis [2018] SAET 140

This matter has been bouncing around the SAET for some time now, and most recently was the subject of a decision of the Full Bench of the SAET.

Initially, a consent order had been set aside by a Deputy President Magistrate on several grounds, including that the worker had been unduly prejudiced by the terms of the consent orders entered into sometime previously, as it denied him what could have been considerable entitlements once the *Return To Work Act* came into being. The Deputy President Magistrate had also found he had the power to look into and set aside the previous consent orders, under an expanded interpretation of the scope of section 88DA of the *Workers Rehabilitation and Compensation Act*.

The Full Bench of the SAET overturned the Deputy President Magistrate's decision. As a first and primary point, the Full Bench found that a change in the law much later after the making of initial consent orders cannot be relied upon as a basis to set aside those consent orders, and that in looking to consider whether there are "exceptional circumstances" justifying the setting aside of a decision, those exceptional circumstances must relate to or arise from events that occurred **at about the time** the initial settlement would have been entered into.

While consent orders entered into under a misapprehension as to the existing law might potentially be set aside in the future, a later change in the law which might be to the detriment of a party is not a sufficient factor.

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Consistent with previous decisions, where the party seeking to resist an order seeking to set aside a previous consent order has "acted with clean hands" at the time a consent agreement is entered into, it will usually find their position supported by the SAET at a later point in time.

On the question of whether there was a jurisdiction in the SAET (as it was at the time of making the consent orders) to approve of provisions within the orders that potentially did away with a worker's future rights, the SAET found there was nothing to stop the parties enlarging the issues in dispute to cover an outcome that not only dealt with the entitlements specifically being compensated for as part of the consent orders, but other possible entitlements that had not yet been particularly assessed or defined. The use of "all injuries" clauses continues to survive, although the extent to which they can be utilised against workers in later claims will remain a question of the facts in each case as to the respective party's knowledge of various medical conditions which may purport to be covered by extended orders.

Hillyer [2018] SAET 141

In this case the Full Bench of the SAET confirmed the outcome of a decision at first hand, that reference to a 30.25% "loss of function of a whole person", as assessed under the pre-April 2009 legislation did not constitute a "whole person impairment" assessment that could be adopted at a later time for the purposes of the *Return to Work Act.* The SAET confirmed the material difference between the methodology in arriving at assessments under the pre-April 2009 legislation, and the current legislation, and the subtle difference as between a whole person impairment and a loss of function of the whole person.

The Full Bench also confirmed that in a case where the entitlement to medical expenses had been left open at the time of a redemption of weekly payments, this did not mean a worker could contend for their ongoing payment where it was asserted that a redemption of those weekly payments was only converting their nature from one form to another (from weekly payments to a once off payment) and which were in substitution of the entitlement to weekly payments until retirement age. The Full Bench of the SAET confirmed the provisions of section 49(2) of the *Return to Work Act* are limited in their application and scope to that section, and not to be cross-referenced to any period for the receipt of weekly payments that might apply under section 33 of the Act.

Kaye [2018] SAET 143

There were two important elements to this decision, involving a self-represented worker who was subjected to the whole person impairment assessment process, without his having specifically made a request in that regard.

On a first issue, the SAET found that as a matter of fact the worker had not reached maximum medical improvement at the time that his whole person impairment assessment was conducted, and it was beyond the trial judge to go past that fact and refer the worker on to be reviewed by an independent medical adviser. The Full Bench of the SAET found the Deputy President hearing the matter at first instance should have instead set aside the whole determination, on the basis that the process could not continue once maximum medical improvement was not established as a prerequisite.

Separately, the Full Bench by way of two of the Judges handing down the decision explained in great detail what ought to occur as part of the undertaking of the whole person impairment process, for the purposes of sections 22 and 58 of the Act, particularly with reference to what information ought to be provided to a self-represented worker.

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The SAET confirmed the importance of the provision of full information to a worker as to their rights and entitlements under the Act, including identifying the significance to a worker of the outlining of all of their impairments they might seek to have assessed (so that they are not led astray and become victim of the "one and only assessment" rule covering the impairments to be assessed), that they should be provided with the details of **all** potentially qualified examiners for their medical condition concerned (and not a selection of perhaps only three as is sometimes the case), and to advise of the potential consequence of the outcome of a whole person impairment process, particularly with reference to the 30% threshold and its impact on future entitlements.

While a number of the comments made by the Judges in the case are perhaps strictly not binding as a matter of law, it would be no surprise to see ReturntoWorkSA and its auditors taking on board what the Judges have said, and raising the level of expectation as to compliance by compensating authorities in the provision of adequate information to workers as part of the whole person impairment process. In that regard, **the decision is therefore well worth a comprehensive read**.

HARRIS [2018] SAET 150

This case is an example of the ability for the SAET to insert itself into the whole person impairment assessment process. The worker's dermatitis condition was the subject of a whole person impairment assessment. As part of the assessment there was a need to place the worker in one of several tables which measured the effects on activities of daily living (ADL) by the medical condition concerned. The trial Judge found it was not so much a medical question as to where a person fell within a particular table for ADL purposes, but was something within the remit of the SAET to make findings about.

The SAET also emphasised it is the tables within the AMA Guidelines, and not any examples that might be associated with those tables, which are the prime determinative factor in assessing whole person impairment. In other words, as has been the case with several examiners in the past, it is inappropriate to simply associate an injured worker's impairment with that outlined for another person/example within the AMGA Guidelines, and instead specific reference should be made to the provisions and criteria of the tables themselves.

As always, we welcome your feedback on any of the issues raised in the cases discussed above, or to answer any questions that you might have in relation to their application to your day to day management of claims.

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