PAGE SEAGER
LAWYERS

Workers Rehabilitation & Compensation Tribunal

CASE COMMENTARIES ▪ July 2015

CONTENTS

TRELOAR v STATE OF TASMANIA [2015] (12 March 2015) TASFC 3

(Click here to view case)

Medical panels – Full Court Appeal

BACKGROUND

We have previously provided a commentary in relation to this case which has now been determined by the Full Court.

The initial decision before Chief Commissioner Carey involved a worker, Annette Treloar, who had suffered a permanent impairment as a result of a psychiatric injury. Conflicting psychiatric reports had been obtained by the parties as to the extent of any permanent impairment with the result that the Tribunal referred that issue to a Medical Panel.

However, before nominating the Panel members, the Tribunal changed its mind and said that it was unable to refer the question to a Medical Panel because although there was a psychiatrist who was prepared to sit on the Medical Panel, there was not a general practitioner who was 'accredited' to make Whole Person Impairment assessments.

Chief Justice Blow determined that there was no requirement that members of Medical Panels be accredited for, in this case, the assessment of psychiatric assessments. It was sufficient that there was a psychiatrist on the Panel and that it did not matter that other Panel members were not accredited by WorkCover Tasmania as medical assessors. All that was required was that a person sitting on a Panel be suitably qualified as a medical practitioner.

This decision was appealed by the worker to the Full Court.

THE DECISION

Escourt J delivering the Judgment of the Full Court said that Chief Justice Blow was correct.

All that is required was that those persons on the Medical Panel are suitably qualified and the term suitably qualified has 'nothing to do with being suitably qualified to consider a particular medical question as a member of a medical panel'. The reference to suitability is only relevant to whether a person can be placed on a register from whom they can be chosen to be on a panel.

Although this may lead to the unusual conclusion that a Medical Panel could decide the issue of a Whole Person Impairment even though they were not trained in the application of the Guides, the Court said that was not contrary to the clear legislative intent of the Act.

CONCLUSION

Presumably, in these circumstances, the matter will be remitted to the Tribunal and a new Medical Panel appointed.

SKILLED GROUP LIMITED v ANNING [2015] (14 MAY 2015) TASSC 18

(Click here to view case)

Supreme Court Appeal – Escourt J

BACKGROUND

In this case a Referral had been made to the Tribunal pursuant to Section 81A(5) of the Act.

The Tribunal had found that the employer bore the onus in relation to a Section 81A(5) Referral.

THE DECISION

In that case the Tribunal had found that it could not be satisfied that it was more probably than not that the skin portal, where an infection had entered, was not created in the course of the worker's employment.

THE APPEAL

The Appellant argued that the onus of proof was on the worker. Escourt J however found that that was not correct. That the onus on a Section 81A(5) Referral rests on the employer. That this was a situation where the worker was receiving workers compensation payments and in those circumstances the onus rests on the employer to show it was not liable to continue making weekly payments of compensation.

C v COMMUNITY & PUBLIC SECTOR UNION (REF NO. 125/2014) [2015] (12 MAY 2015) TASWRCT 16

(Click here to view case)

Stress claim/claimed bullying and intimidation

BACKGROUND

The worker alleged that she had been bullied by her employer and gave evidence of numerous incidents which had occurred in the work place. The Tribunal, after considering her evidence and also the evidence of two persons called on behalf of the employer, concluded that the incidents were either unimportant or not causative of any injury.

THE DECISION

It was found that the cause of her injury was an email that she had received from her employer following a mentoring type process. The employer succeeded in demonstrating that its conduct constituted reasonable administrative action which had been taken by it in a reasonable manner.

CONCLUSION

In these circumstances the worker's referral failed.

VOS CONSTRUCTIONS & JOINERY PTY LTD v N (REF NO. 346/2015) [2015] TASWRCT 21

(Click here to view case)

Section 81A Referral

BACKGROUND

This was a Section 81A Referral where the employer was unsuccessful.

The worker alleged that he had injured his right knee in October 2014. However, it was clear that the worker had had previous problems with his right knee and in particular going back to an incident in November 2010. The Referral was designed to show that any knee problem the worker had was not as a result of an injury in 2014 but perhaps as a result of something which had occurred in November 2010.

However, during the course of the hearing the worker put into evidence a report that he had no doubt been provided with by his treating medical practitioner from Dr Ruttenberg. Dr Ruttenberg had been engaged by the employer but the employer did not rely upon Dr Ruttenberg's report at the hearing. The worker however decided to do so.

This then led to an examination of Dr Ruttenberg's opinion. It seems that after considering Dr Ruttenberg's report, the Commissioner found that there was not sufficient material before him to conclude that the injury was not causally related to his employment.

THE DECISION

This is an interesting case which, on the face of it, seems to involve a consideration of competing medical reports with the Commissioner in effect preferring one view to the other. Generally speaking that is not the type of enquiry that the Tribunal embarks on on a Section 81A Referral.

CONCLUSION

As noted, the Commissioner found that there was not sufficient material before him to conclude that the injury was not causally related to his employment.

D v TASMANIAN PORTS CORPORATION PTY LTD (REF NO. 665/2013) [2015] TASWRCT 14

(Click here to view case)

Referral to a medical panel

BACKGROUND

We are seeing more cases concerning potential referrals to medical panels. Usually those referrals are made at the instigation of a worker's lawyer. This was such a case.

On 15 March 2012 the worker was manhandling a chain. The Neurosurgeon Mr Bittar expressed the opinion that D had suffered an injury to his shoulder (which had been operated on) but also to his neck. He recommended a cervical fusion. Dr Kapur, who had been engaged by the employer/insurer, expressed the opinion that although D had suffered a shoulder injury he had not suffered a neck injury. In any event, Dr Kapur took the view that neck surgery was inappropriate.

D's lawyer argued that the case should be referred to a medical panel.

THE DECISION

In Commissioner Chandler's view there was no doubt that the appropriateness of treatment advised by Mr Bittar qualified as a *'medical question'*. By the same token the opinions of Mr Bittar and Dr Kapur were in conflict and as the worker wanted the proceedings to continue there was jurisdiction for the Tribunal to make such a referral. However, the question was should he do that.

What was unusual about this case is that although there was clearly a medical question about treatment there was a dispute about whether this man had suffered a neck injury or not. That is not a medical question, indeed the worker's lawyer conceded that that question could only be determined by the Tribunal.

Accordingly, this was one of those cases where it was contended that a Medical Panel could decide the issue about treatment but the Tribunal would still need to conduct a hearing about the nature of the injury. Commissioner Chandler referred to this as a 'double barrelled process' and perhaps not surprisingly he decided that this would be an instance where it could not be said that a medical panel would provide a speedier outcome. The matter was ready for hearing and there was no reason why the Tribunal could not hear both the injury and the treatment issue. Obviously as both Mr Bittar and Dr Kapur would be required to give evidence before the Tribunal and it would follow that both Professor Bittar and Dr Kapur were able to give evidence about treatment.

Interestingly, Commissioner Chandler said that his 'ordinary inclination' was to refrain from referring a medical question unless all the parties favoured this course. He pointed out that consent of the parties to the use of a Medical Panel is not a precondition but a lack of consent by the employer does weigh to a degree. In this case Commissioner Chandler thought that the benefit of using a panel was outweighed by the benefit of the reference being determined by the Tribunal.

CONCLUSION

As noted, Commissioner Chandler's inclination is not to refer a matter to a medical panel unless both parties agree. However, that is not a precondition but in this case clearly the benefit of having the Tribunal to decide all issues outweighed the double barrelled approach.

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