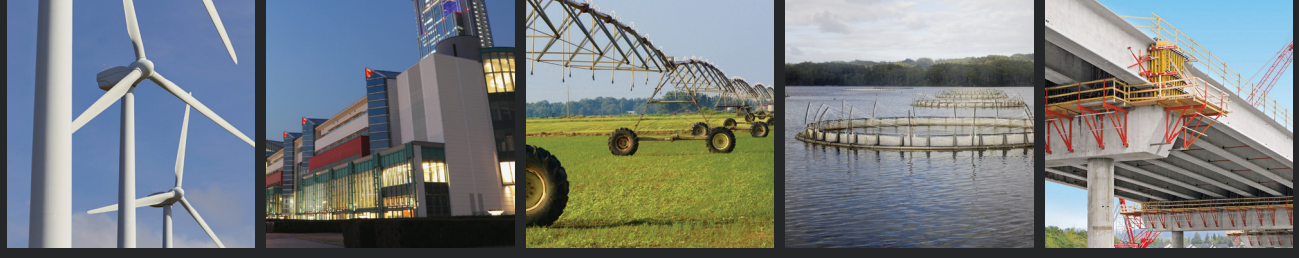

PAGE SEAGER

Workers Rehabilitation & Compensation Tribunal

CASE COMMENTARIES ▪ July 2016

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Practice Directions 2016

As you will know, the Supreme Court and the Workers Rehabilitation and Compensation Tribunal from time to time issue Practice Directions.

Practice Directions in this case contain advice to insurers, employers and the legal profession concerning how the Tribunal expect matters to be conducted.

There is nothing particularly new in these Practice Directions rather they are a consolidation of previous directions.

Direction 8.5 in relation to expert witnesses, now make reference to a Supreme Court Practice Direction issued recently about what should be set down in an expert's proof of evidence.

I would however make the following specific comments using the same paragraph numbering as are in the directions.

2. Section 81A and Section 77AB Referral Listings

We are told that these types of referrals will be processed as a matter of priority (within 48 hours).

As you know, if an employer receives a medical account, the employer has 28 days in which to dispute that account. It sometimes happens that an account is received but the employer then lodges a Section 81A Referral. Because Section 81A Referrals are usually heard and dealt with within say 14-21 days, the account may not be disputed because it is hoped that the Section 81A will be dealt with expeditiously and the Tribunal will make an order which will cover the medical account.

What this Practice Direction tells us is that an employer should make both a Section 81A Referral and a 77AB Referral in those circumstances.

The Tribunal will attempt to list both referrals together but there will be independent orders in respect to both.

As you know, Section 81A Referrals are now being dealt with by telephone. The Practice Directions tell us though that in some circumstances where, for example, the referral will involve detailed submissions, a formal hearing can be requested. If a worker intends to adduce evidence at a hearing then that should be provided no later than 3 days before the hearing.

You will see that the forms for Section 81A and 77AB Referrals have been updated and where they can be accessed.

In those cases where there needs to be a formal hearing that can now take place by video link.

2.2 Section 81A Orders

This reminds us that there is a need for care to be taken in seeking a consent order. It is not good enough simply to ask for an '*appropriate order*'. You will see the Tribunal sets down what are the '*appropriate orders*' in individual circumstances.

2.4 Provision of Supporting Material with Referral

This reminds us of a relatively recent Practice Direction which came about because consent orders were being sought for a reasonably arguable case determination but the Tribunal was concerned that the referral itself did not go into sufficient detail setting down the grounds upon which a dispute was sought. The Tribunal would receive a consent order signed by the worker but could not be satisfied that the worker properly understood what he or she was consenting to.

Accordingly, you will recall that the Tribunal said that the reasons for dispute should be drafted in plain English with reference to supporting documentary evidence.

2.5 Date of Order of Sections 81A and 77AB Referrals

This advises us that if we have a consent matter we need to make clear what date the order is to operate from.

3 Section 71 Referrals

We are told the Tribunal will where possible utilise Medical Panels. It remains to be seen as to whether there is any increase in the use of Medical Panels in 2016.

4 Section 132A (Settlement by Agreement) Referrals

This discusses evidence provided by usually a worker's lawyers to obtain the Tribunal's consent to a settlement.

Of course the Tribunal cannot say what is required but, for example, in relation to a case which is based on a return to work the Tribunal considers in the normal course this requires evidence of a return to meaningful work. You will see that in some circumstances there may be bona fide reasons why a worker does not wish to return to full time work.

6 Section 143P Notifications

This confirms that these types of disputes will be resolved at the lowest level and directly with key players and with urgency.

7 Conciliation Process

Nothing new seems to be added here.

You will recall that at least 12 months ago the Tribunal had spoken about a conciliator in an appropriate case identifying preliminary issues, medical questions and in some circumstances a statement of issues (see 7.2). That has not, to our knowledge, been adopted on many occasions.

7.3 Before Conciliation Conference

This deals with the statement of facts and issues in contention.

7.4 Disclosure of Medical Reports/Proofs during Conciliation Process

This underlines the need for parties to provide medical reports they intend to rely on at a conciliation to the Tribunal.

7.5 Conciliation Conference

Basically this provides that if the conciliator forms the view that the issues the subject of the referral cannot be resolved then the parties can go on to consider settlement of all the workers outstanding entitlements.

7.6 Attendances at Conciliation Conferences

This reminds us that insurers have no authority to release an employer from its obligation to attend a conciliation conference. Leave can however be granted in specific circumstances upon discussion with the conciliator.

8 MISCELLANEOUS

8.1 Notices to Attend/Produce Documents

This set down the process in relation to documents being received by the Tribunal prior to a hearing.

8.2 Referral to Arbitrated Hearing

Generally speaking dates for a hearing will be allocated within 6 weeks of an initial Prehearing Conference.

8.5 Expert Witness

As mentioned above, expert witnesses' proofs should comply with the Expert Witness Code of Conduct.

UNIVERSITY OF TASMANIA v K [2015] (18 December 2015) TASWRCT 43

(Click here to view case)

Medical opinion

In this case Chief Commissioner Carey did not accept medical evidence relied upon by the employer that although the worker had experienced symptoms of paraesthesia and a burning sensation which she related to work activities, that did not represent an exacerbation or aggravation of what was an underlying condition.

The Tribunal was critical of the medical evidence presented.

The decision in paragraph 18 to 21 sets down Chief Commissioner Carey's understanding of the meaning of the terms aggravation and exacerbation.

STATE OF TASMANIA (DEPARTMENT OF EDUCATION) v P [2014] TASWRCT 44

(Click here to view case)

Section 81A — Reasonably arguable case determination

FACTS

The worker was employed part-time as a clerk with the Department of Education. Her employment commenced on 26 July 1995.

The worker made a claim for compensation for a condition that was 'as a result of repetitive keyboard use/computer operations' and that she first noticed on 4 June 2014. The worker indicated on her claim form that she solely attributed the injury to the occurrence on 4 June 2014.

The initial medical certificate of Dr Michael Jackson diagnosed the worker with 'bulging disc cervical spine right C5-6, C6-7 foraminal narrowing'. The certificate recorded that the worker stated her condition was caused by an incident occurring on 4 June 2014 as a result of repetitive keyboard usage, and that the condition was consistent with the stated cause.

The worker was certified as wholly incapacitated for work and did not return to work from that date.

The employer disputed the worker's claim pursuant to Section 81A on the grounds that the worker did not suffer an injury arising out or in the course of her employment on 4 June 2014, and in the alternative if the worker was suffering a disease the worker's employment did not contribute to a substantial degree.

REASONS FOR DETERMINATION

The employer in filing the referral provided a quantity of documents including several emails, extracts from a calendar with notations indicating days when the worker was absent from work, and a Workstation Assessment Report.

The Workstation Assessment Report indicated that:

- the worker had suffered an injury to her neck some years ago;
- the worker had reported that there were ongoing symptoms from that injury for which she received chiropractic therapy;
- the worker had informed her Team Leader on a number of occasions that she was unwell because of 'pins and needles' in her right arm, headaches and symptoms affecting her shoulder and arm;
- the worker had informed her Team Leader that she needed to go home from work early on one occasion due to 'pins and needles' running down her face and struggling to use her right arm;
- the calendar showed that the worker had been absent from work due to these symptoms for days in February, March and July 2014 but was not absent in May or June; and
- the worker was absent for three consecutive days immediately prior to 4 July 2014 but on 4 July 2014 the worker did not report any injury, instead she advised her Team Leader that she was unwell because of shoulder and neck pain and left the workplace.

Although the employer did not provide any medical opinion that challenged the opinion of Dr Jackson, Commissioner Chandler found that the factual material outlined above was suggestive that the worker's condition on 4 July 2014 may have been a manifestation of the prior injury.

Commissioner Chandler determined that a reasonably arguable case existed. However, he noted that he had not come to the view without some hesitation.

PRACTICAL IMPLICATIONS

It is not always necessary to have a medical opinion to dispute a worker's claim on the basis that the injury did not arise out of or in the course of the worker's employment.

However, where a claim is disputed without medical opinion in support of the referral, it will be necessary to have strong evidence in another form.

THE STATE OF TASMANIA (DEPARTMENT OF EDUCATION) v W [2014] TASWRCT 48

(Click here to view case)

Where a reasonably arguable case is not found

FACTS

The worker made a claim for compensation on the basis that she suffered work related anxiety. The worker's injury occurred after she was advised by the Principal of the school on 11 June 2014 that a student had made an allegation against her. The student had alleged that the worker had pushed her over, however the allegation was fabricated.

After being told about the allegation the worker felt shocked and distressed, and she sent an email to the Principal that night expressing this. The worker felt anxious about attending work, and on 16 June 2014 she left work during the day with a doctor's certificate.

The employer disputed the claim on two counts, firstly that the worker failed to provide notice of the injury as soon as practicable; and secondly that the disease arose substantially from reasonable administrative action taken by the employer.

The matter came before the Tribunal to determine if there was a reasonably arguable case.

REASONS FOR DETERMINATION

In relation to the first ground, the employer asserted that it was not provided with notice of the injury until it received the worker's claim on 4 August 2014, more than a month after the worker was incapacitated by her condition.

The worker submitted that she gave notice of her condition to the Principal on 11 June, when she was first told about the allegation. She also gave evidence of two further occasions that week where she notified the principal of the effect that the incident had had on her.

The employer did not provide evidence to counter these assertions, and did not provide evidence from the bar table as to why notice was not given until the claim for compensation was made. As a consequence, the Tribunal was not satisfied that there was a reasonably arguable case that the worker had failed to give notice as soon as practicable.

In relation to the second ground, the employer claimed that the action by the Principal of informing the worker of the allegation made against her and investigating the allegation was reasonable administrative action. The Tribunal found, however, that the worker's mental illness was a result of the fact that the allegation was made by the student against her. The illness was not a result of the manner in which she was informed of the allegation or of the investigation. The Tribunal therefore determined that any administrative action by the employer did not have the negative effect on the worker, rather it was the allegation made by the student that caused the illness.

The Tribunal also considered the medical opinion of the worker's GP, who considered the worker's employment to be the major contributing factor in the development of her symptoms. The Tribunal therefore determined that the employer had not demonstrated a basis, either on a factual or a medical ground, to challenge that the worker's condition was caused by the student's allegation.

The Tribunal concluded that a reasonably arguable case had not been established.

PRACTICAL IMPLICATIONS

Although telling the worker an allegation was administrative action that was not the cause of the injury.

THE STATE OF TASMANIA (DEPARTMENT OF HEALTH & HUMAN SERVICES) v C [2015] TASWRCT 1

(Click here to view case)

Whether a reasonably arguable case exists

FACTS

A Section 81A Referral was before the tribunal.

The only material before the tribunal was the claim form and two workers compensation medical certificates of Dr Peter Rogers.

The claim form refers to 'continuation'/'re-occurrence.' The two medical certificates, both in the Continuing/Final form, diagnose 'reactive anxiety and depression due to workplace incident'.

The self-represented worker submitted that he had previously made a claim for anxiety which had been accepted by the employer. There had been another incident at work recently which 'brought things back' for the worker. No other information was provided as to the incident.

The worker submitted that he was advised by a representative of the employer that he would need to bring a new claim and need only describe a continuation or recurrence of the previous claim. The worker acted on the advice.

The employer did not dispute any of these submissions.

The employer disputed the claim on the basis that the claim form and medical certificates did not provide particulars to prove that the injury, being a disease which is an illness or disorder of the mind was contributed to a substantial degree by his employment.

REASONS FOR DETERMINATION

The Commissioner was not satisfied that a reasonably arguable case existed be it whether the claim was classified as a continuation of the previous injury or as a fresh claim.

If the claim was treated as a continuation then a reasonably arguable determination could not be made as the employer's remedy would instead lie with Section 81A(5) as the employer had accepted liability for that claim, because 84 days had passed since the initial claim.

If the claim was treated as a fresh claim, the only evidence as to causation was the reference in the medical certificate to a workplace incident and the worker's own assertion that an incident occurred at work to cause a recurrence of the pre-existing work-caused anxiety. The evidence was neither rebutted nor challenged. The employer adduced no other evidence. There was therefore nothing for the Commissioner to rely upon in making a reasonably arguable case determination in favour of the employer. The application was dismissed.

PRACTICAL IMPLICATIONS

A poorly detailed claim form and medical certificate are not going to be adequate in proving that a reasonably arguable case exists. Evidence needs to be adduced which the Tribunal can rely upon in being convinced that a reasonably arguable determination should be made.

LEARNING PARTNERS PTY LTD v H [2015] TASWRCT 3

(Click here to view case)

Administrative action NOT taken in a reasonable manner

FACTS

The worker was employed as a learning consultant.

The worker did not attend for work on Tuesday 4 November 2014. A director for the employer emailed the worker in the morning, after the work day had commenced, confirming knowledge of the absence and reminding her of the requirement to submit a leave form.

The worker responded stating that her absence was not anticipated and was out of her control, hence there being no leave form submitted yet. The worker stated that she would complete a leave form on the following day.

The worker attended for work on the following day and in the morning received another email from another of the employer's directors. That email stated the need for the worker to attend a meeting on that day to address a serious matter related to the worker's employment. The worker was invited to bring a support person with her.

The worker responded indicating that she was unable to attend the meeting due to the short notice and her elevated stress level. She sought further information about the meeting and said that she will be on stress leave until further notice.

The employer then sent a letter to the worker confirming the meeting was to discuss reasons for non-attendance at work, the failure to follow the leave policy, confirmation that a meeting will occur upon worker's return to work, requests for medical certificates for current leave, a request for return of work equipment and refraining from contacting clients. The letter also indicated that the matter was serious and may affect the worker's continuing employment.

The claim for compensation was made for an adjustment disorder. The initial medical certificate diagnosis an adjustment disorder with features of depression and anxiety following a distressing interaction with the employer on 5 November regarding a mistake with her leave.

The worker asserted that she could not obtain a flight to enable her to return to Tasmania in time for work on Tuesday. No reason was provided. The worker said that on the Monday night she sent a text message to the client relations manager indicating that she would not be at work the following day. The worker further asserted that she suffered a panic attack following receipt of the email regarding the required meeting.

The worker produced the employer's leave application form and highlighted the instruction that '*this form must be completed as soon as you return from sick leave or any other type of unexpected leave*.'

The employer disputed the claim on the basis of reasonable administrative action.

REASONS FOR DETERMINATION

The Commissioner accepted that the sending of the email on the morning after the worker's absence was administrative action. The issue for determination was whether this action was reasonable.

The Commissioner noted the absence as explained and the awareness of the worker to complete a leave form. It was further noted that there was no evidence that the worker had a history of absenteeism without prior notice or that the absence caused the employer any hardship, loss or inconvenience.

The Commissioner noted the reference to a 'serious matter' in that email and the reference to the possibility of the discussion affecting her on-going employment. It was determined that this response was not reasonable and was in fact 'heavy-handed and totally disproportionate to the seriousness of the worker's transgression'. The employer's application was therefore dismissed.

PRACTICAL IMPLICATIONS

In circumstances of disciplinary administrative action, the circumstances of the worker's history of disciplinary action or issues relating to the same matter may be relevant. This could generally be obtained from the employer.

THE STATE OF TASMANIA (DEPARTMENT OF JUSTICE) v R [2015] TASWRCT 7

(Click here to view case)

Whether a reasonably arguable case exists

FACTS

The worker made a claim for compensation for an injury that he said occurred on 11 November 2014 when he became aware of swelling and pain in his right foot. The claim did not specify a cause other that the worker noting 'normal day at work — don't know the reason'.

The worker had previously suffered an injury to his right foot in February 2014 when, in the course of his employment, an oxygen tank that he was carrying fell and landed on his foot. The worker eventually recovered and returned to normal work. In March or April of 2014 the worker developed a painful right foot after a physical altercation with an inmate in the course of his employment. Then in May 2014 the worker suffered a further flare up of pain in his foot following another altercation with an inmate.

In relation to the current condition, a report of Dr Reid suggested a possible diagnosis of chronic regional pain syndrome but does nothing to say how that would be causatively related to the initial injury (February 2014).

A report of Professor Barnsley suggested a condition of peroneal tendonitis but also does not appear to provide any causative explanation.

The general practitioner for the worker, Dr Tan, certified that there was a causative link between the symptoms and the initial injury. Dr Tan's evidence was that the worker's condition was not straightforward, all tests have been normal which made diagnosis of an injury difficult.

REASONS FOR DETERMINATION

The Tribunal noted that no diagnosis of the injury or disease that has caused the symptoms of the worker has been made. It was noted that there was apparently a resolution of the symptoms of the initial injury and no trigger to the current presentation. Further, the medical evidence raises questions about the relationship between the current symptoms and the initial weakness.

The Tribunal viewed the lack of diagnosis as a weakness to the worker's claim that may result in a finding that there was not the appropriate causal link between the condition and the employment.

Accordingly, the Tribunal made a reasonably arguable case determination.

PRACTICAL IMPLICATIONS

Where there is no firm diagnosis and no firm causative link between symptoms and employment a reasonably arguable case determination may be made on the basis that there may not be satisfactory evidence to convince a Tribunal at a hearing of the Section 25 requirements.

WOOLWORTHS LIMITED v D [2015] TASWRCT 4

(Click here to view case)

Whether a reasonably arguable case exists

FACTS

The worker made a claim for an injury suffered to his back in June 2012 and that claim was accepted.

The worker then made a further claim on 29 October 2014 for low back pain following moving bins in the course of his employment on 9 October 2014. This claim was disputed.

The employer relied upon the opinion of Professor Brophy that the worker had wholly or substantially recovered from the injury suffered on 9 October 2014 and was fit to return to his normal employment duties.

The worker argued that the continuing incapacity and need for medical services was as a result of the June 2012 injury, i.e. that no fresh claim for compensation was made.

The worker also argued that as there was no evidence in relation to the need for medical expenses and as such the Tribunal has no basis upon which to make an order in relation to the cost of medical and ancillary expenses.

REASONS FOR DETERMINATION

The Chief Commissioner was satisfied that a new claim existed as the Worker's Report and medical certificate indicate an onset of low back symptoms subsequent to moving bins. On the face of the claim the documents indicate that this activity caused the incapacity and the diagnosis was one of a disease with the symptoms becoming evident subsequent to moving the bins. There appeared to be no basis for accepting that the previous condition became symptomatic with no external cause. This was therefore a claim for a new injury as either the worker's back has been injured or an aggravation or exacerbation of an underlying spinal disease had occurred.

The abovementioned opinion of Professor Brophy was noted as clear and, if accepted, would allow the employer to establish that there was no liability to pay weekly payments.

The Chief Commissioner therefore made a reasonably arguable case determination.

PRACTICAL IMPLICATIONS

To dispute Division 2 of Part VI expenses it appears as though there must be some evidence regarding medical treatment required.

A previous injury that appears to become symptomatic without an external cause may not necessarily be treated as a fresh claim for compensation, i.e. a new injury.

BLH ENGINEERING & CONSTRUCTION PTY LTD v E [2014] TASWRCT 46

(Click here to view case)

When additional medical opinion can be given after the conciliation process

FACTS

A worker's weekly payments were terminated pursuant to a Section 86(1)(c) certificate, and the worker brought a Section 86(4) Referral in response. The matter was taken to conciliation, however the conciliation conference was unable to resolve the dispute and it was referred to hearing pursuant to Section 42G. The Section 42G(5) notice was endorsed by the conciliator and the employer's solicitor, but was not endorsed by the worker's solicitor.

The worker's solicitor then gave notice that he intended to provide additional medical opinion in support of the worker's case. Leave was sought on behalf of the worker under Section 42G(2) to allow the worker to rely on the new opinions in the hearing.

REASONS FOR DETERMINATION

It was noted that the purpose of Section 42G is that it obliges the parties to ensure that all their supporting medical evidence is available during the conciliation conference, so that each party is able to properly appreciate the nature, and the strength, of the other party's case. It was acknowledged, however, that an exchange of *all* medical evidence during conciliation is not always possible in practical terms.

Two medical reports provided by the worker following the conciliation conference were highlighted during conciliation as reports that he intended to rely on, despite them not being available at that time. There was no objection from the employer to these reports being relied on at the hearing.

The employer did object to the medical evidence of a radiologist being put forward at a late stage, without notice. The employer objected on the basis that they may wish to provide its own expert evidence in response, because the worker's lawyer should have known the relevance of the medical opinion earlier and because it would be prejudicial to introduce the evidence at that late stage.

It was held that it was 'unfortunate' that there had been a delay in producing the evidence. Despite this, as the opinion related to findings contained in the medical opinion of the Section 86(1)(c) certifying doctor, it was determined that the worker ought to be entitled to test the matter.

Finally, the worker sought leave to rely on medical opinion regarding the psychological problems arising from the physical injury. It was determined that the worker's psychological state at the date of the Section 86(1)(c) certificate was a relevant factor in determining his capacity for work. The worker's psychological state ought to have been addressed by the worker's lawyers during the conciliation; however the worker should not be prejudiced by the omission of his lawyer. No prejudice to the employer was made out, as the employer had already obtained a psychiatric assessment.

It was held that the relevance or weight of the medical opinions may be challenged at hearing, but it was not appropriate for this to occur at the preliminary stage of requesting leave. It had been established that the evidence went to matters that *may* be material for the Tribunal's ultimate decision. It was also noted that the interests of justice favoured the granting of the application, and as the worker was not receiving weekly payment at the time of the application further delay would cause general prejudice to both parties. The worker was given leave to rely on the opinions.

PRACTICAL IMPLICATIONS

Where a party has failed to provide medical evidence during conciliation, leave may be granted under Section 42G(2) if:

a) The medical opinions may be material to the Tribunal's ultimate decision;

b) There would be prejudice to the party seeking leave if the application is not allowed;

c) There would not be prejudice to the other party; and

d) The interests of justice favour leave being granted.

This is of course not a definitive list, but outlines factors to consider where a worker seeks to rely on additional medical evidence following the conciliation process.

This case also demonstrates that the relevance or weight of medical opinion should not be dealt with in a Section 42G(2) application. Rather, challenges to relevance or weight should be made at the hearing, if leave is granted.

WESTPAC BANKING CORPORATION, WESTPAC HEALTH SAFETY & WELLBEING v D [2014] TASWRCT 49

(Click here to view case)

What is administrative action

FACTS

The worker was employed at the Westpac call centre located in Launceston. The worker made a claim for compensation stating that she suffered panic attacks on 6 July 2014.

The workers compensation medical certificate stated that the condition was caused by an incident occurring on 23 June 2014. That certificate detailed the worker's explanation of the cause as:

(a) Being upskilled and unable to handle the pressure of the upskilling as she was not provided an adequate timeframe to do so; and

(b) Being unfairly judged on scorecards.

Attendance notes taken by the worker's general practitioner from a consultation with the worker on 7 July 2014 indicated that the worker presented in a state of distress; crying, anxious and panicky. These notes supported that the worker's distress was caused by (a) and (b) above. In relation to (a), the worker felt as though the employer did not understand that she required more time to learn, and the employer continued to push her in relation to the issue.

A report prepared by Consultant Psychiatrist, Dr Ian Sale, dated 24 October 2014 also confirmed that the worker become anxious as a result of (a) and (b) above.

Dr Sale's report described the panic attack incident whereby the worker became agitated and collapsed in the foyer of her workplace. She was then taken to a first aid room where she was 'detained' whilst the supervisors attempted to make arrangements for an ambulance to attend to take the worker to the Emergency Department of the LGH. The worker instead left with her husband who had been called.

Dr Sale also reported that the worker experienced anxiety caused by (a) and (b) above and the anxious symptoms 'sharply escalated' as a result of the worker being forced to remain in the first aid room.

The worker's mental health condition prevented the employer from having the worker undergo a psychiatric assessment.

It was not disputed that the worker suffered from a psychiatric condition and had been incapacitated by reason of that condition.

The worker submitted that retaining her against her will in the first aid room could not be classified as reasonable administrative action.

The employer submitted that it had an occupational health and safety obligation to protect the worker's welfare by preventing her from driving her vehicle from the workplace and ensuring that she sought appropriate medical assistance.

REASONS FOR DETERMINATION

A number of factors were identified as contributing to the development of the worker's illness but that some of those causes (i.e. the implementation of a new computer process and the performance assessment process) could arguably be classified as administrative action. A distinction was made however between whether a worker's difficulty is associated with actually performing her work duties or, alternatively, coping with the changes made to her employment workings or functioning, with the expression administrative action applying to the second rather than the first.

Chief Commissioner Carey made reference to the decisions of Evans J and Wood J, noting that the appropriate course of determining the cause of a mental illness and its connection to the employment requires a detailed assessment of evidence at an arbitrated hearing.

The Chief Commissioner confirmed that the incident in relation to the first aid room was identified as being a significant contributing factor in the worker's ongoing incapacity. It was determined that this situation was a unique factual circumstance that required greater factual and legal consideration.

It was therefore determined that a reasonably arguable case existed.

PRACTICAL IMPLICATIONS

Asserting that an illness or disorder of the mind substantially arose from administrative action based on health and safety obligations may be adequate to establish that a reasonably arguable case exists.

The actual duties performed by the worker (as opposed to the decisions or actions related to the workings or functioning of the workplace) are not always administrative action, depending on the relationship between the duties and the functioning of the workplace.

CGI TECHNOLOGIES & SOLUTIONS PTY LTD v H [2014] TASWRCT 58

(Click here to view case)

Challenging liability to make weekly payments after initial incapacity creating liability ceases to exist

FACTS

The worker suffered an injury to his lower back. In a Section 81A Referral, the employer disputed liability to pay weekly payments on two alternate grounds. Firstly, the employer claimed that the worker's injury did not prevent him from performing his pre-injury duties. Alternatively, the employer claimed that the worker was partially incapacitated, but that the restrictions he suffered could be accommodated for to allow him to continue full time work and receive his normal salary.

The employer relied on a medical opinion which stated that the back pain suffered at the time of the injury was only due to soft tissue damage and there had been no significant injury. The medical opinion also stated that the worker may have been partially incapacitated by the incident, as he was still feeling some pain, but that this could be accommodated for in his employment by allowing him to sit, stand and walk where comfortable. The employer confirmed that such suitable employment could be provided to the worker, and that he would be able to return to work full time and earn his usual wage.

The worker submitted that Section 81A did not apply to cases where an employer concedes initial liability to make weekly payment but then takes the view that it *no longer* has such a liability.

REASONS FOR DETERMINATION

It was held that in a Section 81A Referral an employer may rely on the fact that it does not have a liability to make weekly payments *at the time*. It was held that an employer is still able to dispute liability under Section 81A in a case where there was initially an incapacity which established a liability for the employer to make weekly payments, but that that liability ceased to exist. A reasonably arguable case was established.

PRACTICAL IMPLICATIONS

Where a worker suffers an initial incapacity, and liability ceases to exist, an employer is able to use this as a reason to dispute liability for a claim for compensation under Section 81A.

The lack of on-going liability can establish a reasonably arguable case under Section 81A.

L v KMART AUSTRALIA LIMITED [2014] TASWRCT 43

(Click here to view case)

Causation of injury or disease

FACTS

The worker made a claim for compensation dated 6 March 2013 in which he alleged to have suffered an injury to his lower back in the course of his employment over the period 1 and 2 March 2013.

The employer disputed the claim and the Tribunal ordered that a reasonably arguable case existed.

In this referral, the Tribunal's determination was limited to finding whether the worker had an entitlement to weekly payments, as neither party was in a position to address the worker's entitlement to medical expenses, or any entitlement pursuant to Section 71 of the Act.

It was conceded on behalf of the employer that the worker had been totally incapacitated for work from the date of the initial certification until the present time.

REASONS FOR DETERMINATION

The Tribunal accepted the worker's evidence (which was not challenged) that during the afternoon of 1 March 2013 whilst carrying out his work as a motor mechanic he became aware of low back pain. This was in the form of a 'constant low pressure pain' in a strap like distribution across his lower back. This pain stayed the same, and affected the same level of his back during the rest of his work day and that night at home.

The next morning when the worker arrived at work, the nature, distribution and level of his pain remained the same.

There was then an alleged activity that caused what the worker asserted in his evidence to be a transient but significant change in his back symptoms (**the Stool Incident**).

After the Stool Incident, the worker's symptoms returned to what he described as the base level.

Save for the transient change following the Stool Incident, the worker's back symptoms remained at the base level as to nature, distribution and level of pain throughout that day and were at that level when he started to drive home.

Subsequent to his arrival at home, there was a significant change in the level and nature of his symptoms.

Subsequent medical treatment occurred, initially conservative, and radiological scans identified that he had suffered a L5/S1 broad based disc bulge with superimposed central/right para-central disc protrusion.

The worker then underwent a L5/S1 posterior lumbar inter-body fusion and posterolateral bone graft placement conducted by Dr Dubey on 19 July 2013.

Chief Commissioner Carey said that what arose from the evidence were three questions:

1 Did the worker suffer an injury, if so what injury, in the course of his employment on 1 or 2 March 2013?

2 Did the worker suffer an injury (which was a disease) in the course of his employment and to which his employment was the major or most significant contributing factor?

3 Did the worker suffer an aggravation or exacerbation of an underlying disease on 1 or 2 March 2013 to which his employment was the major or most significant contributing factor?

Question One

Chief Commissioner Carey said that as to question one, there was no evidence of any incident or event occurring at or around the time that the back symptoms commenced. The worker could not identify any incident likely to have caused or resulted in some form of physiological change so as to be described as an injury. The Chief Commissioner's impression was that the symptoms merely developed whilst he was working with no particular aspect of his work identified as initiating the symptoms.

Despite the opinion of Dr Jackson that the worker's system of work involved prolonged work in a confined space, with lifting and twisting and his impression that it was heavy work, the Chief Commissioner did not accept this as an accurate description of the system of work due to a general outline provided by ergonomist Professor Caple and specific evidence by Mr Jones, an experienced mechanic, as well as his own experience and observations.

The Chief Commissioner said that there was no evidence of a particular incident or event that caused the onset of pain, but that the evidence was of gradual onset.

Question Two

As to question two, the Tribunal determined that the worker did suffer a degenerative back condition and that this had gradually progressed from at least 1995. However, the Tribunal did not accept that the worker's employment with the employer which amounted to approximately 3 years caused the worker's identified degenerative back disease that was present on 1 March 2013.

Chief Commissioner Carey said that he was satisfied that the degenerative back disease had been developing over many years preceding the worker's employment with the employer as evidenced by his previous episodes of low back pain and the radiological results that accompanied such incidents. He said that he did not accept the evidence of the worker or Dr Jackson suggesting that such previous incidents were merely transient episodes of muscle strain or non-specific lower back pain. Given that the worker in an interview described these incidents as episodes of a 'slipped disc' with a feeling 'like someone is digging a knife into a particular spot' and given that on occasion they were of a nature requiring radiological tests and on one occasion a referral to a neurosurgeon, the Tribunal accepted that there was clear evidence of a progressive degenerative disc disease which, from time to time, was symptomatic.

Question Three

The final question to be answered concerned the proposition that the worker's employment activities over the period 1 and 2 March 2013 and in particular at the time the pain symptoms commenced aggravated or exacerbated his pre-existing degenerative back condition so as to constitute an injury within the definition in Section 3 of the Act.

The worker's case was put on the basis that the end result was a product of the exacerbation or aggravation of a disease. There was no reference in the evidence or in submission addressing whether this was an acceleration or deterioration circumstance.

What arose from the evidence was the question whether the final resultant condition that resulted in incapacity, that being the disc prolapse, was the end result of an aggravation/exacerbation of the worker's disease or whether it was a separate event not causatively linked to the requisite degree to the worker's employment, perhaps as a separate injury or the naturally occurring end result of the non-work caused degenerative condition.

Before proceeding to determine this final question, Chief Commissioner Carey thought it necessary to outline relevant findings of fact bearing upon the matter:

- The worker's prior history of incidents of back pain were indicative of an underlying and progressing degenerative back condition and not separate and unrelated incidents of muscle pain or non-specific back pain.
- The Tribunal inferred that the worker was aware that these previous incidents related to some form of back or disc pathology as the worker referred to them as incidents of 'slipped discs'. Previous radiological scans indicated progression of the condition. The Chief Commissioner found therefore that immediately prior to 1 March 2013 the worker's degenerative back condition was at times symptomatic but not incapacitating.
- Chief Commissioner Carey accepted that there was some form of incident of pain/discomfort when the worker got off a stool on the morning of 2 March 2013. But the Chief Commissioner did not accept that the Stool Incident caused a dramatic change in the worker's back symptoms as the worker described to the Tribunal. Rather, it was merely an incident of ongoing pain and mobility restrictions he had suffered from the previous afternoon. The worker did not see it as significant as he did not describe it in his claim form nor did he provide that detail in history given to his treaters.

After considering the authorities on aggravation and exacerbation, Chief Commissioner Carey concluded that it was clear that in the context being considered one may use the word 'aggravate' as a synonym for the word 'exacerbate', and this was in accordance with normal English usage.

He said that the use of the term 'exacerbate' is a reference to the effects of the disease upon a person rather than an advancement or identifiable change in the disease itself. The Chief Commissioner said that this term was capable of applying to the onset of pain described by the worker as the base level and the pain affecting him throughout his time at work from mid-afternoon on 1 March 2013 until he concluded his work on 2 March 2013. It was not capable of application to the disc prolapse which upon the evidence is open to be described as an advancement of the degenerative disease to a more serious stage or level.

The Chief Commissioner said that it was possible to consider that the prolapsed disc upon the background of degenerative back disease was an aggravation of that disease as that happening made the disease itself worse or more severe.

The Chief Commissioner then went through the evidence of Drs Jackson, Dubey and Ruttenberg regarding aggravation. He said that the employment must, for the purposes of the Act, be the major or most significant contributing factor.

The Chief Commissioner said that taking all matters into account, it was arguable that the onset of pain at work on 1 March 2013 was an exacerbation of the underlying degenerative back condition. This, however, was likely in normal circumstances to have been transient.

The Tribunal was not persuaded that the process of disc prolapse commenced on 1 March 2013 as an ongoing aggravation of the underlying degenerative back condition. It was accepted that a frank disc prolapse can occur in a degenerative spine and in particular where a disc is bulged.

Chief Commissioner Carey said that it was clearly open on the evidence to find that the disc prolapse was the end point of a progression of the degenerative back condition in which case the disease itself would be the major or most significant contributor. He said it was also open to find that there was a sudden prolapse during the drive home and/or whilst the worker attempted to get out of his car. Such event might classify as a separate injury or of itself be an aggravation of the degenerative back condition. The Chief Commissioner said that in that case the travel and/or attempt to get out of the car could be significant contributors together with the disease itself given the minor nature of the physical activity that may have initiated that prolapse.

The Chief Commissioner said that the worker's employment duties over an extended period might well have contributed to the advancement of the degenerative condition but so would hereditary factors, aging, previous incidents/insults to the affected area, and social and recreational activities. It could not be said that the short period of work with the employer would, in those circumstances, be the major or most significant contributing factor.

Ultimately, the Tribunal was not persuaded that the disc prolapse as a manifestation of the aggravation of the underlying degenerative condition commenced in the course of the worker's employment on 1 March 2013. Chief Commissioner Carey said it was an equally tenable explanation if not in fact more probable that the worker's condition on 1 and 2 March 2013 was a separate event (on the background of pre-existing degenerative back disease) occurring whilst the worker was driving home or attempting to get out of his car at home. On balance, noting other explanations of equal or greater likelihood, the Tribunal did not accept that the disc prolapse on 2 March 2013 was as a result of an aggravation of the worker's degenerative back condition occurring in circumstances to satisfy Sections 3 and 25(1)(b).

The referral was dismissed.

PRACTICAL IMPLICATIONS

It is important in cases of underlying degenerative changes to look closely at the history of the onset of the symptoms, the work activities, and the worker's description to his treaters, so that causation can be determined.

STRANG v JOHNSTON, MCGEE AND GANDY PTY LTD [2014] TASSC 56

(Click here to view case)

Suing in the Supreme Court where no 30% whole person impairment

FACTS

The plaintiff alleged that he was injured in the course of his employment in two incidents, each occurring in July 2009.

The plaintiff was employed by Topgold Enterprises Pty Ltd (**Topgold**). Topgold provided the plaintiff's labour to Hazell Bros Group Pty Ltd (**Hazell Bros**) for the construction of a wood stave pipeline which Hazell Bros had contracted with the Hydro-Electric Corporation (**the HEC**) to build.

The plaintiff alleged that he was injured as a result of the defective design of a trolley that he was required to use for the work. The trolley was designed by Johnston, McGee and Gandy Pty Ltd for the HEC, for the use of Hazell Bros at the worksite.

The plaintiff did not sue Topgold or Hazell Bros as his injuries did not fulfil the relevant degree of whole person impairment required under Section 138AB of the *Workers Rehabilitation and Compensation Act 1988* (**the Act**) at the time (that being a 30% WPI).

The plaintiff instead sued Johnston, McGee and Gandy Pty Ltd and the HEC.

The HEC argued that the plaintiff's claim would fail if the plaintiff could not establish the impairment requirement. The plaintiff argued that the impairment requirement did not have to be satisfied to commence the action.

The HEC filed two interlocutory applications:

- Firstly, it applied for summary judgment;
- Alternatively, it applied for an order that the question of whether the proceedings could be commenced without satisfaction of the impairment requirement be tried separately and before any other question.

Associate Justice Holt dismissed both interlocutory applications.

REASONS FOR DETERMINATION

Summary Judgment

In considering the interlocutory applications, Associate Justice Holt stated that whether the plaintiff had to satisfy the impairment requirement prior to commencing the action depended upon whether the HEC was a principal to the plaintiff.

Whether or not a person is a principal depends upon the application of Section 29(1) of the Act.

The question that arose by reason of Section 29 of the Act, and which determined whether the impairment requirement applied to the plaintiff in his action against the HEC, was whether the

construction of the wood stave pipeline was *of the whole or any part of any work undertaken by the HEC in the course of or for the purposes of its trade or business*.

On this issue, Associate Justice Holt referred to the leading case of *Moir v Schrader* [1936] HCA 69. In that decision, Justice Dixon considers the application of legislative provisions, equivalent to Section 29, and says that:

> *'[where] work performed by the injured workman is necessary to enable the principal to carry out the operations the execution of which he has adopted as his trade or business, yet that work does not form a component part of the operations and only contributes or conduces to their performance or is preliminary or ancillary or incidental to them, then the workman must look to his direct employer for compensation.'*

Associate Justice Holt provided that it is a question of fact in each case whether the work that the principal has contracted out is a component part of the principal's operations, or merely work which contributes or conduces to the performance of such operations or is preliminary or ancillary or incidental to them.

Counsel for the HEC submitted that the replacement of the wood stave pipeline was for the purpose of generating electricity and was therefore work undertaken in the course of, or for the purposes of, its trade or business.

The plaintiff submitted that a detailed analysis of the operations of the HEC was required and that it had to be undertaken before a determination on the issue could be made.

To award a summary judgment, Associate Justice Holt stated that the plaintiff's case had to be so obviously untenable that it could not succeed.

Associate Justice Holt held that a detailed analysis of the evidence was required before it could be determined as a matter of fact, whether or not the HEC was a principal in the construction of the wood stave pipeline.

He could not exclude the possibility that detailed evidence presented at trial might ultimately result in a finding that the HEC, at the time of the plaintiff's injuries, was not in the business of constructing electricity generating infrastructure, or in particular in the business of undertaking heritage work such as the construction of the wood stave pipeline.

Associate Justice Holt dismissed the summary judgment application as he was not persuaded as a matter of fact or law, that the plaintiff's case was so obviously untenable that it could not succeed.

PRACTICAL IMPLICATIONS

Whether or not a person is a principal in respect of Section 29 of the Act will depend upon whether the work performed by the worker forms a component part of the operations of the principal's trade or business. If the work performed by the worker only contributes or conduces to the principal's operations or is preliminary or incidental to them, it is not a component part of the principal's operations and the worker must look to his employer for compensation.

Whether work that the principal has contracted out is a component part of the principal's operations is a question of fact in each case.

PEOPLE CONSULTING T/AS JOBWIRE EMPLOYMENT SERVICES v B [2014] TASWRCT 45

(Click here to view case)

Can dispute the claim within 84 days even though initially had accepted liability

FACTS

The worker made a claim for compensation alleging that he suffered a sprain injury to his neck in the course of his employment on 14 July 2014.

The employer accepted liability for this claim.

The employer then disputed that claim for compensation referring the claim to the Tribunal under Section 81A. The employer relied upon an opinion from an occupational physician and upon surveillance video of the worker.

The worker relied upon a continuing workers compensation medical certificate which certified the worker as totally incapacitated for pre-injury duties and requiring further treatment.

REASONS FOR DETERMINATION

The employer asserted that as at the date the claim for compensation was disputed the worker had recovered from the injury suffered and was not incapacitated for work as a result of that injury.

There was a dispute between the parties as to whether or not the worker had in fact recovered from the work injury which is accepted as occurring in July 2014.

Chief Commissioner Carey determined that Section 81A was available to an employer who initially accepts liability to pay compensation however later seeks to dispute that liability on the basis that the worker has recovered from his injury and no longer has an incapacity entitling him to compensation.

PRACTICAL IMPLICATIONS

Despite accepting liability for a claim, an employer can dispute liability under Section 81A with new evidence and they are still within the 84 days.

If still within the 84 day time limit and the employer has evidence that the worker has recovered, the employer does not need to dispute the claim under the provisions of Section 86, rather can use Section 81A to dispute foundational liability.

LAMONT v MRD SUPERMARKETS PTY LTD [2016] TASSC 16 (23 MARCH 2016)

(Click here to view case)

Section 81A referral — Supreme Court Appeal Blow C J

BACKGROUND

Commissioner Chandler had previously made a reasonably arguable case determination in relation to a worker who claimed that she had been verbally attacked, bullied and sworn at at work.

The reasonably arguable case determination had been made on the basis of a one page statement of Michael Duke, the employer. In his statement Mr Duke had said that he had investigated Ms Lamont's claim which involved interviewing all relevant staff members. In his statement he said those staff members had contradicted Ms Lamont's version of events. There were also specific denials on behalf the employer of any bullying etc.

On Appeal the worker contended that Mr Duke's statement contained so little information that the Commissioner could not have found that there was a reasonably arguable case. The Judge agreed.

The Judge pointed out that an employer was obliged to provide evidentiary material on which it relied at the Section 81A Hearing.

The Judge noted that Mr Duke's statement did not contradict the proposition that the worker had suffered some psychological disorder. However, the denials made about bullying etc. did not constitute assertions as to what may or may not have occurred. They were simply denials.

Mr Duke did not set down in his statement in what way the worker's account was contradicted. The Judge said it was not clear whether the worker's version of events was totally or partially contradicted. That may be important.

Whether that was so or not, the opinion of Mr Duke would have been of no assistance to the Commissioner who had to make his own assessment of the strength of the employer's case.

The Judge said the Commissioner could inform himself as to the strength of an employer's case by reading a summary of information in a document created by someone who had interviewed witnesses. However, without knowing what aspect of the worker's version of events were contradicted by who or anything else about the circumstances, the Commissioner was not in a position to understand what the employer's case might be. Accordingly he could not evaluate the prospect of the employer's case being successful at a final hearing.

PRACTICAL IMPLICATIONS

This case does not necessarily represent a tightening up of evidence required in relation to Section 81A Referrals. It does however provide a reminder of the need to carefully assess the strength of the evidence obtained by an employer. I think it does indicate that an employer relying on a statement which simply contains a denial of the assertions of a worker may be on shaky ground. Clearly there is a need to critically examine the material that is put before the Tribunal as to whether it does establish that if this material were ultimately successful at a hearing the employer would be able to escape liability.

C v ONE CARE LIMITED [2015] TASWRCT 26

(Click here to view case)

Application for costs for an adjourned conciliation conference

FACTS

The worker filed a reference to the Tribunal seeking compensation for a 15 percent whole person impairment. The employer disputed this claim and the parties were scheduled to participate in a conciliation conference on 23 June 2015.

The employer relied on medical reports from Dr Stanley-Clarke (Occupational Physician) and from Mr G M Kode (Plastic and Reconstructive Surgeon). The employer was awaiting a supplementary report from Dr Stanley-Clarke in response to Mr Kode's opinion that the worker's condition was not stable.

The employer received Mr Kode's report on 20 April 2015, consulted with Dr Stanley-Clarke for a second opinion on 30 April and on 8 May arranged for the worker to be re-examined on 15 June.

On 8 May the employer's solicitors advised the worker's solicitors that the 23 June conciliation conference may need to be adjourned as a result of issues raised in Mr Kode's report.

On 22 June at 12:17pm the employer's solicitors emailed the worker's solicitors seeking to adjourn the upcoming conciliation conference because they had not received Dr Stanley-Clarke's supplementary report.

On the morning of 23 June the employer's solicitors advised the worker's solicitors that they still had not received the report and that the conciliation conference could not proceed.

Following the adjourned conciliation, the worker made an application for costs under Section 59(2) of the Act. This section provides that parties can make an application in respect of the conciliation process if a party has unreasonably obstructed or prolonged the process, or not made a reasonable attempt to resolve the worker's claim throughout that process.

REASONS FOR DETERMINATION

The Tribunal determined that the 'conciliation process' included the preliminary stages of conciliation and the conciliation conference itself. Therefore, the process of organising a conciliation conference was captured by Section 59(2) of the Act.

However, the Tribunal determined that in delaying the conciliation the employer did not unreasonably obstruct, prolong or fail to make a reasonable attempt to resolve the worker's claim. Therefore, the employer's conduct did not satisfy Section 59(2)(a) or (b).

As the issue in dispute at the conciliation conference was the degree of whole person impairment the supplementary report was integral to the issue in dispute. As such, the employer was not in possession of all the information necessary to resolve the worker's claim.

The Tribunal considered that the employer had acted promptly throughout the process. They had contacted Dr Stanley-Clarke for a second opinion ten days after receiving Mr Kode's report and arranged for the worker to be re-examined soon after. Therefore, the employer acted reasonably, appropriately and promptly in adjourning the 23 June conciliation conference.

The worker's application for costs was dismissed.

PRACTICAL IMPLICATIONS

Conciliation conferences can be adjourned at relatively short notice (within 24 hours) if a party is awaiting information that is integral to the dispute.

Delay in receiving a report requested within a reasonable time does not constitute a party unreasonably obstructing, prolonging or failing to make a reasonable attempt to resolve the claim.

M v CEVA LOGISTICS (AUSTRALIA) PTY LTD [2015] TASWRCT 27

(Click here to view case)

Application to amend claim

FACTS

The worker claimed compensation for a lower back injury that occurred on 14 February 2012. The worker was diagnosed with an aggravation of a pre-existing condition described as 'known lumbar disc protrusion with recent symptoms'.

The worker attributed the original injury to a work related incident during July 2011. This was not included in the February 2012 claim, nor had the worker made a separate claim in respect of the incident.

The employer relied on the opinion of Dr David Ruttenberg that the worker had a pre-existing injury or pre-existing degenerative spinal condition that was aggravated by the February 2012 injury, but that the worker's continuing incapacity was no longer the result of that injury. As a consequence the employer terminated payments.

The matter was referred to the Tribunal for determination and the worker sought to amend the original claim to include a reference to the July 2011 incident, namely:

> *'A jarring incident whilst dismounting a forklift in July 2011 at work caused low back pain and symptoms intermittently afterwards but did not stop me from working. Then on 14 February 2012 I had a hold of the side gate of a semitrailer and while sliding it forward the cable supporting gave way causing me to take the full weight of it and/ or falling on me.'*

REASONS FOR DETERMINATION

The Tribunal refused the application to amend the claim on the basis that it would cause significant prejudice to the employer.

In doing so the Tribunal rejected the worker's argument that the amendment only provided historical background and did not give rise to a fresh claim. The Tribunal noted that, regardless, it was unnecessary to amend the claim as medical evidence could provide a historical background.

The Tribunal determined that the amendment would change the nature of the claim. It would mean that the employer would be deemed to have accepted that an injury occurred at work in July 2011 and be unable to rely on Section 81A to dispute the claim. As a consequence the employer would be liable for the worker's incapacity arising out of the July 2011 incident, whereas the employer had only accepted liability for the February 2012 injury.

PRACTICAL IMPLICATIONS

A claim cannot be retrospectively amended to include an additional injury or arguably an additional cause of injury.

KELP INDUSTRIES PTY LTD v K [2016] TASWRCT 2

(Click here to view case)

Notice required as soon as practicable

FACTS

The worker was employed as a casual operator in a kelp processing factory. The worker alleged that he suffered an injury to his back when '*lifting wood into the furnace*' on 26 August 2015. The initial workers compensation claim form indicated that the worker gave notice on that same day to the employer.

The initial medical certificate, which completed the claim and the employer's Incident Report, was completed almost three weeks later on 21 September 2015.

The employer provided a statement from the General Manager which stated that the worker told the Acting General Manager that he had lifted a large piece of wood, but did not report any pain or discomfort. The employer further asserted that the worker continued working his normal duties for three weeks following the 26 August 2015 with no complaints, reports or signs of pain and discomfort.

REASONS FOR DETERMINATION

The Tribunal found that a reasonably arguable case existed. Chief Commissioner Carey determined that if the employer's statement was accepted, the worker's claim may fail on the basis that it was unaware of the nature of the worker's injury until it received the Incident Report, and did not have notice of the injury as soon as practicable.

PRACTICAL IMPLICATIONS

If a worker does not provide the employer with details of the nature and cause of an injury, an employer may be able to dispute that it was given notice as soon as practicable.

B v A & T HALL FAMILY TRUST T/A ATH ENGINEERING AND MAINTENANCE [2015] TASWRCT 29

(Click here to view case)

Determination of worker or independent contractor

FACTS

The deceased was killed in an accident at a work site managed by ATH Engineering and Maintenance (**ATH**). His widow made an application for compensation on behalf of herself and her daughter as dependents.

At the time of his death the deceased was engaged as a contractor by ATH through his own business Riverview Contracting (**Riverview**).

The deceased had initially established Riverview for the purpose of securing work with Shaw Contracting. The deceased's widow gave evidence that the deceased had trouble getting the company to pay his invoices and decided not to perform any contract work in the future. As a result, he refused to continue contracting with Shaw Contracting but accepted work with the company as a 'fly-in, fly-out' employee in the Northern Territory.

Prior to the deceased's engagement with ATH he had invoiced clients through Riverview for work he performed.

The deceased had been performing heavy machinery work for ATH from February 2013 until his death in April 2013. Prior to his death the deceased had made arrangements for his friend, Barry Murrary (**Mr Murray**), to continue performing this work when the deceased was in the Northern Territory. It was asserted he was a 'worker' of ATH.

REASONS FOR DETERMINATION

The Tribunal determined that, at the time of his death, the deceased was not a worker employed by ATH. The Tribunal based this decision on the following reasons:

- the practical reality was that the deceased was a contractor;
- that Riverview was a bona fide business; and
- that ATH and the deceased intended to engage the deceased as a contractor.

In determining that the practical arrangement between the deceased and ATH was one of principal and contractor, the Tribunal primarily considered how the deceased was paid. The deceased invoiced ATH for hours completed, was occasionally paid at different intervals from ATH employees and did not receive penalty rates for overtime or weekend work. Additionally, no income tax or superannuation was deducted from his pay. It was also relevant that the deceased could have negotiated his own pay rate and that he held his own income protection policy.

The Tribunal also considered that the deceased could determine his own hours of work and that ATH would have dismissed him without following the employee dismissal procedure. Additionally, it was relevant that the deceased was not entitled to sick or annual leave. The Tribunal also noted that the

performance and attendance expectations of the deceased were not inconsistent with a contractual arrangement.

Finally, the Tribunal considered it relevant that the deceased drove to work in his Riverview vehicle and that the deceased was negotiating for Mr Murray to perform work for ATH through Riverview.

The Tribunal considered Riverview to be a genuine business because a Riverview logo was on the deceased's motor vehicle and on clothing worn by himself and Mr Murray. It was also relevant that the deceased used Riverview to claim the full range of taxable deductions.

It was significant that Riverview was a genuine business because it could be distinguished from a situation where an employer obliged an employee to create an impression of being self-employed.

The Tribunal found that it was the intention of the deceased and ATH that he was engaged as a contractor. The Tribunal accepted evidence on behalf of ATH that the deceased had requested to be paid as a contractor to minimise his child support liability. It was conceded by the deceased's widow that minimising this liability may have been a reason the deceased maintained the business.

PRACTICAL IMPLICATIONS

An interesting case involving an analysis of competing factors in a worker/Independent Contractor situation. In this case the Tribunal considered whether the person is contracted through a genuine business, the person's pay arrangements, whether the person can choose their own hours or personnel to perform the work and whether the person is entitled to employee benefits such as leave.

G v TOLL HOLDINGS LTD (REF NO 460/2015) [2015] TASWRCT 38

(Click here to view case)

Orders for costs

FACTS

The worker sought an Order for costs which was resisted by the employer.

The worker made a claim for compensation and throughout his claim a representative of the employer was present at his GP appointments. A copy of the worker's compensation medical certificate was provided to this representative at the conclusion of each appointment.

Sometime later the worker was advised that a rehabilitation provider had been appointed and would attend the GP appointments with him. The representative from the employer ceased attending these appointments. The GP began providing the employer's copy of the workers compensation medical certificates to the rehabilitation provider at the conclusion of each appointment.

The rehabilitation provider failed to provide these certificate to the employer, which the worker, based on the previous system, had assumed she would do.

The worker was pursued by the employer about a missing certificate and provided a copy of his own version. Later the worker received a letter from the employer's insurer advising that there had been a break in certificates under Section 69(13) and that there would be an investigation into ongoing liability for the worker's claim.

The worker was advised that he would receive no weekly payments during this time.

The worker engaged legal representation and they wrote to the employer's insurer requesting the immediate resumption of the worker's weekly payments.

As this did not occur the worker's lawyers filed a Section 60A referral requesting interim orders on the basis that by receipt of the medical certificate by the rehabilitation provider the insurer was estopped from denying that the certificate was not provided. Alternatively, if there was a gap in certification that only operated to suspend the worker's entitlement to weekly payments until the next certificate was served.

At the Section 60A hearing an application was also made to amend the reference to enable orders for final relief to be sought in the same terms as the orders sought for interim relief. This application was upheld enabling the s60A application to proceed.

The reference was then adjourned for the employer to have the worker medically examined as a precursor to deciding whether to dispute liability and file a Section 81A reference in relation to the *gap* certificate.

Teleconferences were subsequently held between the parties and at the last teleconference the insurer's solicitor advised that the insurer accepted that it remained liable for the worker's claim and that it would resume making weekly payments backdated to the date of termination.

The parties agreed that the worker's reference be adjourned sine die.

The worker asserted his reference was successful and therefore he should be entitled to costs.

The employer disputed this on three grounds:

1 The costs were incurred at least partly, as a part of the conciliation process and therefore were not recoverable pursuant to Section 59(2);

2 The employer should have its costs thrown away upon the original Section 60A reference hearing; and

3 That the same outcome would have occurred after the employer completed its investigation irrespective of the reference to the Tribunal.

REASONS FOR DETERMINATION

In relation to the first ground, Commissioner Chandler did not accept the employer's contention in respect of the conciliation conference as the teleconferences were merely to facilitate the earliest possible date for a hearing of the Section 60A referral and not a conciliation process.

In relation to the second Ground, Commissioner Chandler noted that without amendment to the Section 60A referral the Tribunal was unable to proceed and the amendment required the indulgence of the Tribunal. Commissioner Chandler agreed that the employer should have its costs thrown away upon the first hearing and made an order accordingly.

Finally, Commissioner Chandler considered whether the worker should have his costs upon the reference. Commissioner Chandler noted that the Tribunal had powers to make orders as to costs as it considered appropriate and the ordinary proper course was that costs followed the event and were awarded to the successful party.

It was noted that the ordinary course may be departed from if it was shown that the successful party's conduct was unreasonable or improper or did something calculated to occasion unnecessary litigation and expense.

In this instance Commissioner Chandler considered that the insurer had unilaterally terminated the worker's payments and then despite a written request failed to reinstate them. In these circumstances Commissioner Chandler found it reasonable that the worker made a reference to the Tribunal.

Commissioner Chandler noted that the final pursuit of a remedy in the Tribunal was unnecessary once the insurer eventually resumed weekly payments.

Commissioner Chandler therefore decided that the worker was the successful party and had not acted in a way that would disentitle him to costs.

Commissioner Chandler therefore made the order that the employer pay the worker's costs upon the reference.

PRACTICAL IMPLICATIONS

Even if a reference is adjourned sine die, if the referring party ultimately obtains a determination that the reference is seeking to achieve as a result of the opposing party abandoning their position, the referring party may be able to obtain an order for costs.

CAFÉ ON KING v B [2015] TASWRCT 33

(Click here to view case)

Adding grounds of dispute to a Section 81A referral after 84 days have passed

FACTS

The employer filed a Section 81A referral for a claim for compensation made by the worker in relation to an injury to her right elbow that she claimed occurred on 6 August 2014. The worker claimed that the injury occurred due to repetitive movement, such as chopping onions.

The claim form was dated 20 February 2015 and was served on the employer three days later. The employer's referral cited four reasons for dispute. However, at the hearing the employer sought to add a fifth ground, namely that the worker failed to give notice of her injury as soon as practicable contrary to Section 32(1)(a) of the Act.

The worker did not have notice of the employer's proposed amendment. However, her solicitor did not seek an adjournment and instead requested an opportunity to make submissions in writing upon the application to amend. Commissioner Chandler agreed to this and allowed the hearing to proceed on the basis that evidence would be received and submissions made on each ground of dispute, including the subject of notice.

In respect of the application to amend, in the written submissions, the worker submitted that the employer's application to amend was made out of time and therefore the amendment could not be made. The worker submitted that this was because Section 81A(1)(b) requires an employer to inform the worker of the reason for disputing liability within 84 days of receiving the worker's claim for compensation.

REASONS FOR DETERMINATION

In considering the application to amend Commissioner Chandler noted that Section 44 of the Act permits the Tribunal to amend any application or referral at the request of the person who lodged the application or referral. He stated that the section needed to be read in conjunction with Section 49 of the Act which requires the Tribunal to conduct its proceedings with '*as little formality and technicality, and with as much expedition, as the requirements of this Act and a proper consideration of the matters to be resolved permit.*' He also noted that the Tribunal has an overriding obligation to afford parties procedural fairness.

Commissioner Chandler stated that an employer was not precluded from disputing a claim for a reason not previously notified to the worker under Section 81A(1)(b), as the Act does not expressly assert this and if it did, there would be significant prejudice to employers in some circumstances. The non-notification of a reason of dispute under Section 81A(1)(b) is therefore just a factor to be considered by the Tribunal in exercising its discretion upon an application to amend.

As the worker had not submitted that she would be prejudiced by the amendment, Commissioner Chandler in referring to the sentiments of Section 49(b) of the Act, concluded that the employer was permitted to amend its application.

In considering whether there was a reasonably arguable case, Commissioner Chandler addressed whether the worker gave notice of the injury as soon as reasonably practicable. In an affidavit, the owner of the employer's business asserted that the worker complained to him of right arm pain on 6 August 2014 but she provided no further information which would have indicated that she suffered a work related injury until 6 October 2014 when she presented him with a medical account. This evidence was sufficient to support a reasonably arguable case determination.

Commissioner Chandler also addressed the issue of causation. He noted that the worker attributed her injury to chopping onions but it was the employer's evidence that the worker was not required to chop onions and there was a machine for this task. This evidence was also sufficient to support a reasonably arguable case determination.

PRACTICAL IMPLICATIONS

Section 81A(1)(b) does not preclude an employer from disputing a claim on a ground that the worker was not previously notified of in the Section 81A referral.

Where a worker has not been previously notified of a reason of dispute under Section 81A(1)(b) this will be a factor considered by the Tribunal in exercising its discretion upon an application to amend.

Where a worker has not asserted that he or she would be prejudiced by the Tribunal allowing the amendment of an application or referral, it is likely that the Tribunal will allow the amendment.

LANGFORD SUPPORT SERVICES v M [2015] TASWRCT 35

(Click here to view case)

Evidence in a Section 81A referral

FACTS

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

On 30 November 2014 the worker was involved in an incident in the workplace in which he twisted his right knee. The employer accepted the worker's claim for compensation and continued to pay compensation until the worker's incapacity for work ceased on 30 April 2015.

On 3 August 2015 a second claim for compensation was made by the worker for pain in the right knee allegedly attributable to the same incident on 30 November 2014. The Section 81A Referral submitted that any knee injury suffered by the worker after 3 August 2015 was not attributable to the worker's initial injury on 30 November or to a recurrence or aggravation of that injury caused by his employment.

In support of its submissions the employer tendered two signed statements from employees suggesting that the recurrence or aggravation of the worker's knee injury was a result of an extended period of walking and domestic gardening activities.

REASONS FOR DETERMINATION

The employer did not tender any expert medical evidence in support of the Section 81A Referral. The Commissioner considered that the unqualified evidence provided by the employees would not prevail over the unchallenged medical opinion of the worker's medical practitioner and others involved with his rehabilitation. The Commissioner therefore determined that there was not a reasonably arguable case to be found.

The Commissioner also commented that as a matter of common experience, he found it is highly unlikely that pain and swelling of the type experienced by the worker when gardening or walking would occur in an uninjured or fully healed knee.

PRACTICAL IMPLICATIONS

This decision demonstrates that evidence obtained from unqualified sources about the cause of an injury will not generally be sufficient to find an arguable case.

The Commissioner's observations may well go beyond what may be regarded as facts which as known as a matter of common sense. What is sometimes referred as things 'judicial notice' care be taken of.

S & L BOLTER PTY LTD T/AS KOLS CLEANING SERVICES v C [2015] TASWRCT 28

(Click here to view case)

Rehearing of a Section 81A hearing

FACTS

The Tribunal proceeded ex parte to determine a Section 81A hearing. Subsequent to the Tribunal's finding of a reasonably arguable case the worker applied for a rehearing.

REASONS FOR DETERMINATION

The worker explained that she had been out of Australia on a holiday at the time of the hearing. The worker contended that her employer had known this was to occur for some 12 months. The worker stated that she had been advised her by injury management consultant that nothing would occur regarding the dispute of her claim whilst she was on holiday.

This was disputed by the employer but it was conceded that the impression may have been given by the injury management consultant that it was possible that nothing might occur.

The Tribunal was required to consider Section 57(2) of the Act and whether it would be 'just and reasonable' to allow a rehearing.

The Tribunal needed to be satisfied that not only was there a reasonable explanation for the party's failure to attend the original hearing but also that evidence or submissions from that party might reasonably be expected to influence the Tribunal's determination upon a rehearing.

The Tribunal was satisfied in relation to the worker being under a mistaken belief that the matter would not proceed whilst she was on holiday but then advised that she did not wish to make submissions or submit evidence at any rehearing.

Given that, the Tribunal was therefore not satisfied that the rehearing of the matter would be just and reasonable. The application was dismissed and the reasonably arguable case finding remained.

PRACTICAL IMPLICATIONS

For a successful application for a rehearing the Tribunal must be satisfied that it would be just and reasonable to allow a rehearing and this must include:

a) That there was a reasonable explanation for the party's failure to attend the original hearing; and

b) That submissions or evidence from that party may alter or influence the determination upon a rehearing.

K v KELP INDUSTRIES PTY LTD [2016] TASWRCT 7

(Click here to view case)

When a worker is entitled to interim compensation pursuant to Section 60A of the Act following a reasonably arguable case determination

FACTS

The worker alleged that he had suffered an injury to his lower back in the course of his employment when he was lifting a piece of wood into a furnace on 26 August 2015.

The worker lodged a claim for workers compensation on 13 September 2015 but did not seek medical treatment for his injury until 21 September 2015.

The employer sought to dispute the worker's claim for compensation pursuant to Section 81A of the Act on the basis that the worker had failed to give proper notice to his employer of his injury as soon as was practicable. The Tribunal found in favour of the employer on that issue and found a reasonably arguable case.

The worker filed a Section 42 reference.

In preparation for a conciliation conference to occur on 17 March 2016, the employer arranged for the worker to see an independent doctor on 15 February 2016. Due to an oversight on behalf of the employer this did not occur, however, the employer arranged for the worker to see their independent treating doctor on 8 March 2016.

The worker applied for an interim order on 9 March 2016, pursuant to Section 60A of the Act, that the employer pays him interim weekly compensation, on the basis that

1 the delay attributable to the employer (outlined above) had substantially prejudiced the worker; and

2 it was in the interests of justice to grant the worker interim relief by way of compensation.

REASONS FOR DETERMINATION

The Commissioner was not satisfied that the conduct of the employer in delaying the worker's medical assessment by 22 days amounted to a delay that prejudiced the worker and therefore justified the granting of interim relief pursuant to Section 60A of the Act.

This was due to the fact that the delay in the worker seeing the employer's treating physician did not lead to any delay in the formal conciliation process as the conciliation was still on track to occur on 17 March 2016.

It was also not in the interests of justice to grant the worker interim relief because, whilst the worker has established that there was a serious case to be tried, the balance of convenience did not favour the granting of interim compensation. This was because the worker has not established that he was suffering from *actual* financial hardship and a conciliation was to occur in 8 days anyhow.

PRACTICAL IMPLICATIONS

So long as delay on behalf of an employer does not cause delay to formal tribunal processes i.e. delaying a scheduled conciliation date, it is unlikely that delay attributable to an employer that merely inconveniences a worker is going to be considered as having a prejudicial effect on the worker, to justify the granting of interim relief pursuant to Section 60A of the Act.

When a worker seeks interim compensation pursuant to Section 60A of the Act on the basis that it is in the interests of justice for the tribunal to make such an order, in addition to demonstrating that they have a solid arguable case they must demonstrate why the balance of convenience weighs in their favour e.g. they are experiencing actual financial hardship.

RON GEE ENTERPRISES v V [2015] TASWRCT 41

(Click here to view case)

Application of the employment connection test in Section 31A(3)

FACTS

On 24 October 2012 the worker injured his left ankle while working at a site in South Australia. His employer was Ron Gee Enterprises Pty Ltd. The employer's registered office and principal place of business was in Tasmania. The worker was a resident of Tasmania. The employer directed the worker to carry out fly-in fly-out contract work at various interstate sites, including the site in South Australia.

WorkCover South Australia refused the worker's claim on the basis that the worker's employment was not connected with South Australia and hence he did not have an entitlement to compensation in that state. The worker's claim was then submitted to the employer's Tasmanian insurer. The employer did not dispute liability to pay compensation and began making workers compensation payments.

The employer subsequently contended that South Australia was the state of connection for the purpose of determining the worker's entitlements to compensation. The employer applied to the Tribunal in Tasmania (**the Tribunal**) under Section 81A(5) and Section 42 of the Act, seeking a determination by the Tribunal as to the state of connection under Section 31A(3) and an order under Section 61 that compensation under our Act is not payable. The worker argued that Tasmania was the state of connection and that the employer was estopped from contending otherwise by virtue of Section 81AB of the Act. The latter because it had made payments to the worker.

REASONS FOR DETERMINATION

Commissioner Chandler determined:

1 That the employer was not estopped by Section 81AB of the Act from disputing liability for the worker's claim; and

2 That Tasmania was the State of connection.

The Estoppel Issue

The employer was not estopped from seeking a determination by the Tribunal upon the State of connection as a result of Section 81A(5) of the Act. It was legitimate for the employer to utilise Section 81A(5) to seek a determination upon the state of connection. Commissioner Chandler reasoned that Section 81A(5) exists in recognition of the fact that instances will arise where an employer, despite being deemed to have accepted liability by Section 81AB, may wish to dispute liability at some point in the future.

The State of Connection Issue

Commissioner Chandler applied the *cascading* approach to the employment connection test contained in Section 31A(3) and determined that Tasmania was the state of connection. The worker's employment

history demonstrated that while the worker did not have a habitual or customary workplace, he was usually based in Tasmania for the purpose of his employment.

Commissioner Chandler reached this conclusion on the basis of the following:

- The employer's registered office and principal place of business were located in Tasmania.
- The worker was a resident of Tasmania.
- The worker served the probationary period of his contract of employment in Tasmania.
- The administration of the worker's employment arrangements were attended to at the employer's principal place of business in Tasmania.
- The interstate contract work undertaken by the worker was for a fixed duration. Upon completion of the work, the worker would resume his duties at the employer's principal place of business in Tasmania.
- The worker's fly-in, fly-out roster incorporated a 7 day break which he spent in Tasmania.
- It was unlikely that the worker would have continued to work at the South Australian site beyond December 2012. If not for his injury, he would have been required to return to work in Tasmania after this time.

PRACTICAL IMPLICATIONS

This decision reinforces the cascading approach and the factors which may be taken into account in determining the state of connection.

L v SAXONS LOUNGE BAR (REF NO 725/2015) [2015] TASWRCT 37

(Click here to view case)

Section 42 — entitlement to compensation decision — average weekly earnings with 'same employer'

FACTS

The worker commenced employment at a lounge bar in January 2015. In around May 2015 the business was purchased by a new legal entity operated by Ms George. From this point in time the worker was employed by the new legal entity.

On 17 June 2015 the worker suffered a lower back strain when manhandling a 20 litre drum.

Ms George did not have a policy of insurance as required by the Act at the time of the worker's injury, and therefore had a personal liability for any award made to the worker.

The worker was incapacitated until 21 July 2015 and underwent physiotherapy treatment on the recommendation of his general practitioner.

The worker sought reimbursement of his treatment costs and weekly payments.

The Commissioner made orders requiring Ms George to pay the cost of treatment along with weekly payments.

REASONS FOR DETERMINATION

The worker was incapacitated for work from 18 June to 21 July 2015 and partially incapacitated thereafter.

At the beginning of 22 June 2015 the worker was paid wages of $218.05.

By Section 69(1)(a) a worker is entitled, in the case of total incapacity, to weekly payments equal to either his normal weekly earnings or his ordinary time rate of pay, whichever is the greater.

In this case there was no evidence of an ordinary time rate of pay and therefore payments were calculated using the weekly rate on the basis of normal weekly earnings.

Section 69(14) defines this to mean 'the average weekly earnings of the worker during the relevant period'. The relevant period being the time the worker was continuously employed by the same employer before the commencement of the period of incapacity.

Employment with Ms George was from 1 May 2015 to 18 June when the worker was incapacitated, therefore a period of 49 days or seven weeks. It follows that by Section 69(14)(b) the worker's average weekly earnings should be calculated by average the total earned for the seven week period he was employed by Ms George.

PRACTICAL IMPLICATIONS

When calculating normal weekly earnings pursuant to Section 69(14) remember that the reference to '*continuously employed by the same employer*' requires a reference to the legal entity, here that was Ms George's business, as opposed to the worker's employment with the café which commenced some four months prior.

VODAFONE HUTCHINSON AUSTRALIA PTY LTD v G [2016] TASWRCT 6

(Click here to view case)

Section 81A Referral — Defence under Section 25(1A)(c) that action by employer was reasonable or reasonably taken. Entitlement to compensation

FACTS

The worker is employed as a sales agent at a call centre. The worker claimed that he suffered an anxiety condition and GORD (gastro-oesophageal reflux disease) as a result of 'increasing work pressures and requirements'. The employer filed a Section 81A referral disputing the claim for compensation.

REASONS FOR DETERMINATION

The worker's two conditions — GORD and the anxiety condition — were dealt with separately by the tribunal.

In relation to the GORD, the employer's medical evidence suggested that there was no incapacity for work, but there was a need for ongoing treatment. Consequently, it was held that there was an arguable case in relation to the claim for weekly payments, but not the claim for expenses under Div. 2 of Part VI of the Act.

In relation to the anxiety condition, the reverse finding was made. Their evidence led to a finding that there was partial incapacity for work, but no need for treatment. Consequently, it was held that there was an arguable case in relation to the medical benefits.

The employer conceded that the worker had a partial incapacity for work caused by the work-related anxiety condition, but argued that its conduct constituted reasonable administrative action.

The only evidence which the employer put forward in support of this argument was a 'bald assertion' by the employer's HR manager that impugned changes in the workplace affecting the worker were 'reasonable and were implemented in a reasonable manner'. No detail of the changes or the reason behind them was given.

The Tribunal made it clear that there must be evidence about the substance and nature of the actions taken and other contextual evidence which might enable the tribunal to independently reach a conclusion that the employer's actions were reasonable and taken reasonably.

The Tribunal concluded that evidence led was insufficient to enable a finding of a reasonably arguable case based upon the administrative action defence under Section 25(1A)(c) of the Act.

PRACTICAL IMPLICATIONS

Determination of the reasonableness of a party's conduct (administrative action) is a matter for the Tribunal based upon the evidence, not the opinion of a witness. A party's contention that it acted reasonably without evidence in support of this provides little to inform that determination.

Such evidence may include information about the circumstances giving rise to the administrative action.

TASMANIAN SYMPHONY ORCHESTRA v P [2016] TASWRCT 9

(Click here to view case)

Section 81A referral — reasonable administrative action by an employer

FACTS

This was a Section 81A referral where the employer was successful.

The worker was the Deputy CEO and Marketing Manager for the Tasmanian Symphony Orchestra. He submitted a compensation claim for stress arising from a conflict resolution meeting with a staff member and a subsequent complaint made against him by the staff member.

The employer submitted that the convening and holding of the meeting and their handling of the complaint made by the staff member constituted *reasonable administrative action*. Therefore, Section 25(1A)(c) applied and a reasonably arguable case existed.

REASONS FOR DETERMINATION

Commissioner Chandler accepted the employer's submission. The evidence provided by the employer's Human Resources Manager demonstrated that the employer's actions were reasonable and that the employer may be able to avoid liability for the worker's claim under Section 25(1A)(c).

The convening and holding of the initial meeting was pertinent in the circumstances. The worker was advised of the complaint against him, supplied with written particulars of the complaint and an independent person was engaged by the employer to undertake the conflict management process with the staff member.

The Commissioner was satisfied that this constituted reasonable administrative action and that a reasonably arguable case existed. The Commissioner made orders pursuant to Section 81A(3)(c) and (d).

PRACTICAL IMPLICATIONS

This decision demonstrates reasonable actions which may be taken by an employer when handling complaints by staff members.

N v TASMANIA FEEDLOT PTY LTD [2016] TASWRCT 5

(Click here to view case)

The hearing of issues separately in the Tribunal — Section 49

FACTS

This case concerns a workers compensation claim arising from injuries to a worker's left arm and hand after a ball bearing was dropped on him while he climbed a ladder. Five issues were taken to the Tribunal, all of them ready to be tried. Three of the issues concerned the extent of the worker's whole person impairment and whether it met the threshold required to pursue common law damages.

Section 49(1)(b) of the Act provides that the Tribunal must conduct proceedings 'with as little formality and technicality, and with as much expedition, as the requirements of this Act and a proper consideration of the matters to be resolved permit'. Relying on Section 49(1)(b), the employer submitted that the Tribunal should make an order to hear the three issues about the extent of whole person impairment separately before it heard the two remaining issues because the Tribunal's determination would resolve the dispute more efficiently by:

- Increasing the probability of settlement.
- Causing the worker to discontinue the workers compensation claim in favour of common law damages.
- Reducing the number of expert witnesses called.
- Reducing the length of the hearing.

REASONS FOR DETERMINATION

Commissioner Chandler rejected the employer's submission. The Commissioner held that the considerations guiding the Tribunal's discretion to hear referrals separately are similar to the considerations guiding the Supreme Court of Tasmania's discretion to hear issues separately under *Supreme Court Rules 2000* (Tas) r 559(1).

Commissioner Chandler held that the Tribunal should only hear referrals separately when the 'utility, economy and fairness are beyond question'. It may be appropriate to hear referrals separately where determination of the referrals:

- Effectively resolves the dispute.
- Makes settlement highly likely.

Commissioner Chandler held that, in the circumstances, the probability that a hearing about the extent of whole person impairment would lead to resolution of the remaining issues without a further hearing was not sufficiently great to justify the order, considering the negative consequences if a further hearing were required. The negative consequences include:

- The need to hear a number of witnesses twice.
- The potential that the Tribunal may make conflicting findings about credit.
- Increased cost and delay.

PRACTICAL IMPLICATIONS

N v Tasmania Feedlot Pty Ltd is authority that Tribunal will exercise caution before making orders to hear issues separately.

The Tribunal only makes orders to hear issues separately when there is a high likelihood that determination of certain issues will lead to resolution of remaining issues without a further hearing.

See the commentary on Raper v Bowden [2016] TASSC 9 for a discussion on the decision of the Associate Judge of the Supreme Court on the matter of issues being trialled separately.

RAPER v BOWDEN [2016] TASSC 9

(Click here to view case)

Industrial accident — common law claim

FACTS

This case concerns a worker's negligence action against her employer. In the course of her employment, the plaintiff rode a quad bike into an unmarked drain and crashed. As a result, she sustained serious head injuries that put her in an 'almost vegetative state'. After 12 months, she was transported back to the United Kingdom when she lives in her parents' converted garage.

The defendant employer disputed liability and the amount of damages claimed. It was proposed the Supreme Court would hear evidence relating to the amount of damages in the United Kingdom for three weeks and then the Court would hear evidence relating to liability in Tasmania.

The defendant applied for an order to trial the issue of liability before the issue of amount of damages under *Supreme Court Rules 2000* (Tas) r 559(1), which provides that the Court may make orders to hear issues separately.

REASONS FOR DETERMINATION

Holt AsJ held that there is a presumption against issues being tried separately and so the party seeking that bears the onus to displace the presumption. His Honour held that it may be appropriate to hear certain issues separately where it is likely that resolution of the issues heard separately will:

- Effectively resolve proceedings.
- Significantly narrow the points in contention.
- Cause the parties to settle the matter out of court.

Although Holt AsJ accepted that costs would be saved if the issue of liability were heard first and separately, his Honour did not make the order sought because:

- He did not accept that determination of the issue of liability would narrow the points of contention about the amount of damages.
- Some witnesses would have to give evidence twice.
- Delay resulting from separate hearings would deprive the plaintiff of 'greater levels of care and comfort' for a longer period of time.
- The parties prepared their cases on the understanding the issues would be heard together.

PRACTICAL IMPLICATIONS

Raper v Bowden clarifies the factors the Court takes into consideration in determining whether to make an order to hear issues separately and the weight the Court is likely to give them. In particular in this case, the potential for delay to deprive plaintiffs of 'greater levels of care and comfort' for a longer period of time is a weighty consideration.

V v CATERPILLAR UNDERGROUND MINING PTY LTD [2015] TASWRCT 44

(Click here to view case)

Medical opinion disclosed pursuant to Section 90B(4) is still subject to a claim of legal professional privilege

FACTS

The worker seeks an order pursuant to Section 60A that the employer pay him weekly payments of compensation of $1,197.76. The employer required the worker to undergo an independent medical review pursuant to Section 90A, with Dr Loretta Reiter. The report was dated 30 July 2015 and annexed to a statutory declaration declared by the worker on 8 September 2015. The employer submits the report is inadmissible because the employer's claim for legal professional privilege over the report has not been waived.

REASONS FOR DETERMINATION

The document is not admissible into evidence due to the claim of legal professional privilege. The wording of Section 90B(4) is not sufficient to remove the ability for the employer to claim legal professional privilege over the report. The wording of the section ensures the worker obtains a copy of the report from their treating medical practitioner but does no more than that.

PRACTICAL IMPLICATIONS

A medical opinion which has been disclosed to a worker under Section 90B(4) can still be subject to a claim of legal professional privilege.

This is a surprising decision as it is probably commonly thought that once a report is sent to the GP it loses its privileged status. Accordingly, it is important to ensure that medico-legal reports are only ever provided to workers in accordance with the procedure set out by Section 90B and that they are not sent directly by employers to the worker.

V v CATERPILLAR UNDERGROUND MINING PTY LTD [2015] TASWRCT 45

(Click here to view case)

Section 60A — interim order — proceedings to obtain compensation

FACTS

The worker is employed as a fabrication boiler maker/welder at Caterpillar Underground Mining Pty Ltd (**CAT**). In mid-2009, the worker began to feel tingling in his right wrist when undertaking heavy work. He did not seek medical attention but attempted to self-manage his activities to decrease the tingling. In 2011 he was promoted to a role where he rarely had to perform hands-on work, however, whenever he did have to perform hands-on work, the tingling would flare up again. It developed into numbness.

In September 2013, the worker returned to his previous role when CAT underwent restructuring. The worker asserted that the tingling and numbness returned and developed into a constant ache. He began having trouble riding his motorcycle to work. He advised the First Aid Officer, Scott Clark. The worker was ultimately seen by Dr Barnes, General Practitioner, who prescribed fluid tablets for carpal tunnel syndrome. The worker was often absent from work due to wrist pain.

The worker had a nerve conduction test in January/February 2014 and then cortisone injections that provided relief for 3 months. His condition then deteriorated and he filed a claim for compensation on 26 November 2014.

The employer filed a referral with the Tribunal pursuant to Section 81A on the grounds that the claimed injury did not arise out of or in the course of his employment, and if the injury was a disease, his employment did not contribute to a substantial degree in accordance with Sections 25(1)(a), 25(1)(b) and 3(2A).

A reasonably arguable case was found.

REASONS FOR DETERMINATION

Although a reasonably arguable case determination was made, the worker applied for interim payments. He failed.

The worker submitted that there had been delay by the employer in making discovery, further delay would occur before the final hearing, and he would suffer financial hardship if interim relief was not granted.

The employer submitted that the delay had been caused by the worker seeking adjournments to obtain medical reports and not providing those to the employer.

Commissioner McKee found that neither party had engaged in deliberate delay, and said that the matter had progressed, albeit slowly.

The Commissioner said that an interim order may be granted if the interests of justice require it. Section 60A(2B) expressly provides that it is not a requirement for the making of an interim order that

the applicant might otherwise suffer serious or irreparable harm. Relevant to the issue is whether there is a serious question to be tried, which means that the applicant must show there is a case that can be seriously argued and has some substance.

PRACTICAL IMPLICATIONS

That the worker will suffer significant financial difficulties if an interim order is not granted is not enough to secure an interim order.

The balance of convenience involves weighing the inconvenience or injury the worker would be likely to suffer if the interim order was refused against the burden to the employer caused by granting the interim order.

A serious medico-legal issue regarding the worker's case will weigh against the granting of an interim order.

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