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WORKERS COMPENSATION & SELF INSURANCE

Estoppel and "Contracting Out" of Workers Compensation Legislation

By Patrick Walsh & Tiffany Walsh

Two recent decisions of the Supreme Court of South Australia comment on the issue of "contracting out" of workers compensation legislation, these decisions being *Stephenson v Return to Work Corporation of South Australia* [2019] SASCFC 89 ("***Stephenson***") and *Mitsubishi Motors Australia Limited v Kowalski* [2019] SASCFC 95 ("***Kowalski***"). Their Honours, in *Stephenson,* also ruled on the issue of estoppel in the context of claiming compensation for work related injuries.

Both of these decisions are of particular significance when it comes to the issues that can be dealt with in consent minutes of order filed with the South Australian Employment Tribunal ("**the Tribunal**").

Stephenson v Return to Work Corporation of South Australia [2019] SASCFC 89

Stephenson concerned the issue of whether a worker can waive their rights as to future entitlements that may arise with respect to lump sum compensation under Section 43 of the *Workers Rehabilitation and Compensation Act 1986* (SA) ("**the WRC Act**").

In *Stephenson*, the appellant, Mr Paul Stephenson, suffered a compensable spinal injury, as a result of which he underwent a spinal fusion operation and was prescribed various medications including opioids and antidepressants. Mr Stephenson was awarded lump sum compensation as result of having suffered 16% whole person impairment ("**WPI**") of the lumbar spine, and 1% WPI of his skin as a result of scarring from the surgery. For the purposes of Section 43(6) of the WRC Act, these injuries were treated as having arisen from the same 'trauma'.

Mr Stephenson later claimed lump sum compensation pursuant to Section 43 of the WRC Act for injuries to his thoracic spine and left shoulder. This claim was ultimately accepted, and consent orders were made awarding Mr Stephenson lump sum compensation for a 10% WPI attributable to his thoracic spine and left shoulder. These injuries were defined as "***sequels***" to Mr Stephenson's previous spinal injury. Further, it was noted that Mr Stephenson had "*no further or other entitlement pursuant to section 43 of the [WRC] Act arising from his compensable injuries sustained on 19 January 2009 mentioned in paragraph 1.1 above and/or any sequel thereof*".

At a later date, Mr Stephenson made a claim for compensation for impairments to his upper digestive system, lower digestive system, mastication and deglutition, and his skin. Mr Stephenson's claim was based on the assertion that these impairments had been caused by the pain medication used following his surgery.

Initially, His Honour Hannon DPJ held that the claims were not precluded by the consent order, and that Mr Stephenson was entitled to lump sum compensation awards with respect to those injuries. This was because, even though Mr Stephenson was aware of some

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of the symptoms associated with the impairments, he was not aware that those symptoms might develop into impairments. Accordingly, he was "*not suffering from a compensable impairment*", "*and did not understand that the orders precluded him from pursuing a claim for any future impairments.*"

The Return to Work Corporation of South Australia ("**RTWSA**") appealed this decision to the Full Bench of the Tribunal. The Tribunal overruled the decision of Hannon DPJ and Mr Stephenson appealed to the Full Court of the South Australian Supreme Court. The question at issue was whether a worker is able to waive future potential Section 43 entitlements for impairments which they are not yet aware of, at the time of the waiver.

RTWSA argued that, as a term of the consent orders was that Mr Stephenson had "*no further or other entitlement pursuant to section 43 of the [WRC] Act arising from his compensable injuries*", he was estopped from his further claim. Mr Stephenson argued that:

> "*… the Tribunal has power or jurisdiction to make a determination or order as to entitlement on a claim for lump sum compensation at the time the determination or order was made, but did not have power or jurisdiction to order or determine that there could never be such an entitlement in the future.*"

His Honour Kourakis CJ accepted Mr Stephenson's contention.

His Honour noted further that "*Mr Stephenson's claim has proceeded on the premise that he was not suffering the digestive system and mastication and deglutition impairments when the consent order was made. It follows that there can be no cause of action estoppel*." His Honour then went on to note that even if Mr Stephenson had been suffering the impairment at the time that the consent orders were made, it wouldn't matter that the procedure for assessment of that impairment had not yet been undertaken.

His Honour found that all that the phrase in the consent orders that Mr Stephenson had "'*no other entitlement' for any sequel of the identified spinal sciatica and shoulder injuries*" could do was order that "*there was no sequel of those injuries production an impairment which would entitle Mr Stephenson to an award pursuant to s 43 of the WRC Act for those conditions **as of that date***." Only if Mr Stephenson had been suffering the impairment now claimed at the date of the orders would he had been precluded from seeking lump sum entitlement pursuant to Section 43 of the WRC Act.

His Honour ordered that the orders of the Full Bench be set aside and the orders of His Honour Hannon DPJ be reinstated.

Practical effect of decision

The practical effect of the *Stephenson* decision is that:

1. Within the context of consent minutes of order:

   "*… there is no statutory obstacle to an agreement which confers benefits on a worker of a kind or amount which could not be the subject of an award of compensation in exchange for the worker consenting to a particular determination of his claims for compensation for identified injuries alleged to have been suffered*"; and

2. The WRC Act does not permit the concession of claims which may arise in the future.

Mitsubishi Motors Australia Limited v Kowalski [2019] SASCFC 95

Amongst other things, *Kowalski* concerns the question of whether an agreement to concede a claim for compensation recorded in consent minutes of order amounts to "contracting out" of the WRC Act.

In *Kowalski*, the Respondent, Mr Kazimir Kowalski, made multiple claims for compensation against Mitsubishi Motors Australia Limited ("**MMAL**") from 1989 onwards. In late 1998 there were 15 ongoing actions with respect to those claims.

On 26 December 1997, Mr Kowalski suffered a heart attack which he asserted was caused by the stress of his disputes and, on 22 April 1998, he made a claim for compensation against MMAL asserting the "*aggravation, acceleration, exacerbation, deterioration of a pre-existing heart disease and depression, heart attack (myocardial infarction)*". Mr Kowalski also made two further claims, being:

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- a claim for "*disfigurement, travel expenses, rehabilitation services, scarring, medical costs and hospital costs*" on 3 August 1998 which he alleged arose as a result of his heart attack and surgery; and
- a claim to "*'clarify' his earlier claims*" on 13 October 1998.

On 26 October 1998 MMAL and Mr Kowalski attended a mediation. The above claims had not been determined at the date of the mediation. As a result of the mediation, on 27 October 1998 MMAL and Mr Kowalski entered into a Heads of Agreement ("**HoA**"). There were various iterations of the HoA that were prepared on 26 and 27 October 1998. In accordance with the terms of the HoA, consent minutes of order were filed with the South Australian Workers Compensation Tribunal ("**the SAWCT**") in which a consent determination was made rejecting Mr Kowalski's claim for compensation with respect to his heart attack.

Mr Kowalski then applied to have the consent determination set aside, on the basis that the HoA was invalid as it violated Section 119 of the WRC Act – in other words, that the HoA was an attempt to "contract out" of the WRC Act. This application was dismissed by the SAWCT.

After a number of years had passed, Mr Kowalski sought (and was granted) permission under Section 39 of the *Supreme Court Act 1935* (SA) ("**the SC Act**") to apply to the Tribunal to have the consent minutes of order set aside on the basis that the HoA was signed *non est factum* with him not being made aware of changes in the version that was signed (and that these changes affected the validity of the HoA). The reason that Mr Kowalski had to seek permission under Section 39 of the SC Act is because he is considered to be a "vexatious litigant". MMAL was initially refused permission to appeal the decision to give Mr Kowalski permission to make his application to the Tribunal, and so appealed to the Full Court of the Supreme Court of South Australia.

Their Honours Kourakis CJ and Peek and Parker JJ ultimately found that paragraph 4.3 of the HoA, which required that Mr Kowalski "*discontinue all actions and proceedings currently subsisting between Kowalski and MMAL*", was not inconsistent with Section 119 of the WRC Act. They considered that:

> "*It is a compromise of the dispute between MMAL and Mr Kowalski over the statutory rights conferred by the [WRC Act]. As such, it is premised on the existence of those rights and therefore does not exclude or modify the operation of the [WRC Act]. The [WRC Act] contemplates the determination of disputes by orders of the kind made in the consent determination, whether or not a collateral payment is less, or for that matter more, than may have been awarded if the compromise had not been reached.* ***The critical distinction for the purposes of s 119 of the [WRC Act] is between agreements which resolve disputed claims of existing injuries and for consequential statutory entitlements, and agreements which preclude a worker from bringing claims for future injuries and impairments should they ever eventuate.***"

Their Honours also considered paragraph 4.1 of the HoA, which required that Mr Kowalski not "*institute any legal proceedings and or legal complaints with any Court, Tribunal or body in respect of the matters set out in paragraph 1 hereof nor to joint MMAL as a defendant in the Action against R J Cole & Partners and Dowd*", and found that this paragraph may contravene Section 119 of the WRC Act. Their reasoning was "*because it precludes the bringing of future unidentified claims and it is not perfected by the making of an order in the SAWCT in accordance with the provisions of the [WRC Act].*"

Their Honours further considered this did not assist Mr Kowalski, however, in making an application to "*set aside a consent determination made pursuant to a compromise lawfully reached*", and that paragraph 4.3 of the HoA was not inconsistent with Section 119 of the WRC Act.

Practical effect of the decision

The practical effect of the *Kowalski* decision is that:

- if a worker has sustained an injury; AND
- consent minutes of order are filed with the Tribunal in which the worker concedes their

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entitlements with respect to that injury; THEN

- this does not amount to a violation of Section 119 of the WRC Act, or Section 191 of the RTW Act.

Concluding thoughts

The application of the decisions in *Stephenson* and *Kowalski* may be limited by Section 22 of the RTW Act, which limits an injured worker to one assessment; unless they suffer a further trauma giving rise to a permanent impairment.

However, the question remains as to whether a worker who hasn't had an assessment pursuant to Section 22 of the RTW Act can make concessions with respect to their WPI. This question is not directly answered in the *Kowalski* decision, and it may depend on whether this would be considered to be a current entitlement or a future entitlement.

Provided the concession is made in respect of a "current" impairment, such that the worker is able to know the concession being made, it seems unlikely that this would fall afoul of Section 119 of the WRC Act or Section 191 of the RTW Act, provided there is expert evidence as to the extent of the entitlement.

Their Honour's reasoning with respect to paragraph 4.1 of the HoA (that it may contravene Section 119 of the WRC as it operated to "*preclude the bringing of future unidentified claims*") may apply to mean that this is a future entitlement, and that a worker cannot make concessions with respect to their WPI if they have not had an assessment pursuant to Section 22 of the RTW Act.

Conversely, if their Honour's reasoning with respect to paragraph 4.3 of the HoA (drawing the distinction between "*agreements which resolve disputed claims of existing injuries and for consequential statutory entitlements, and agreements which preclude a worker from bringing claims for future injuries and impairments should they ever eventuate*") applies and, regardless of the fact that a worker has or has not had a Section 22 assessment, the injury is existing, a worker may be able to make concessions pursuant to their WPI.

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