IRS Industrial Relations Society of South Australia Inc.

NEWSLETTER

December 2015

A Quarterly Publication

SECRETARIAT

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Print Post Approved: PP535216/00024

PRESIDENT'S MESSAGE

Dear Members

I hope the past year was a rewarding one for you and on behalf of the Industrial Relations Society of South Australia, I wish you and yours a safe and happy festive season and 2016. We look forward to facilitating more excellent events and newsletters in 2016.

Best wishes,

Craig Stevens
IRSSA President

Independent medical advisers under the Return to Work scheme

BY MICHAEL IRVINE, ASSOCIATE, ANDERSONS SOLICITORS

In July 2015, the *Return to Work Act 2014* (SA) came into operation. This new law was a complete overhaul of the previous workers compensation legislation in South Australia and it has introduced many new concepts that have not previously applied to the management of South Australian workers compensation matters. Like with any major legislative development, it will likely take some time (perhaps years) to realise the full impact of many of these changes.

One significant change involves the introduction of Independent Medical Advisers (IMAs) whose expertise may be relied upon during the course of a workers compensation dispute in the South Australian Employment Tribunal ("SAET").

Often a Case Manager makes a decision about a worker's claim and the worker is not satisfied with the decision. A decision might involve a variety of different issues including:

- A rejection of a claim;
- A decision to refuse medical treatment, including surgery;
- A decision to cut off a worker's weekly income payments;
- A decision about a worker's permanent impairment compensation etc.

The worker can choose to appeal the decision through the SAET, in most cases with the support of a legal representative. The decision is disputed with an 'Application for Review'. Given the complexity of most legal disputes it is not recommended that a worker applies for a review without first seeking legal advice.

When the dispute makes its way to the Tribunal, it often becomes apparent that there is disagreement about elements of the worker's claim including the actual diagnosis of the injury, the severity of the injury, the need for medical treatment and many other complications. The worker may have evidence from their GP or other experts to support their case, whereas the insurance company may have completely contradictory medical evidence in its possession.

Before the Return to Work law came into operation, it was not easy to overcome a legal impasse caused by competing medical opinions. However, under the new scheme, the Tribunal may seek advice from an IMA about medical issues involving the particular worker.

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DID YOU KNOW?????

The South Australian Law Society has confirmed that all IRSSA seminars are recognised as CPD activities for the purposes of Practising Certificate requirements in South Australia. Legal practitioners in South Australia can claim 1 CPD unit for an active hour at an IRSSA seminar.

IRSSA is now calling for articles for its quarterly newsletter. Articles can be on any topical industrial relations matter and typically should be approximately 400 -500 words. If you are interested in submitting an article for the September newsletter please contact Justin Ward, IRSSA Newsletter Editor. Justin's email is justin.ward@sa.gov.au.

The Tribunal may refer a specific question to the IMA; for example, Dr Black suggests that spinal surgery is absolutely necessary to assist the worker with improving his/her function and pain reduction whereas Dr Green may recommend that the worker should simply continue with more conservative treatment like physiotherapy.

The worker wants surgery to be approved and a dispute has been brought before the Tribunal. In this case, the Tribunal may refer a question to an IMA regarding whether or not surgery is necessary.

Often questions are not as straightforward as the above example and they require a careful analysis of complex medical and other facts. It is expected that IMAs have a very high level of expertise in their area of specialisation.

The process of utilising an IMA is generally as follows:

1. The Tribunal, during the course of the dispute, identifies the specific question/s that should be referred to an IMA. The questions are generally determined following consultation with the parties to the dispute (via their representatives);
2. The Tribunal will nominate an IMA. Hopefully the parties to the dispute can reach an agreement regarding an appropriate IMA but if no agreement can be reached, the Tribunal can make the choice;
3. The Tribunal will contact the IMA and make the appointment for the worker to attend for a consultation with the IMA;
4. The Tribunal will write to the IMA asking the specific question/s and will provide relevant information including a statement of facts surrounding the dispute and copies of relevant medical material on file;
5. The examination will occur and the IMA will provide a medical report to the Tribunal;
6. In rare situations, if the IMA report does not lead to the resolution of the dispute, the IMA may be required to give evidence at a trial where one or both parties will have an opportunity to examine the IMA about his/her findings.

An IMA has a right to reject the referral, and a party to the dispute has a right to object to a particular IMA (for example, if a conflict of interest apparently exists, a party may oppose the referral to the IMA).

The IMA should not provide more information or opinions, apart from answering the specific questions posed in the referral letter.

One of the main purposes of the IMA process is to allow the IMA to provide a completely independent report; ie, the report will not be sought from the worker or the insurance company, but rather from the Tribunal itself. It is not uncommon for experts to be accused of bias in favour of the party requesting the report; in other words, when the insurance company requests a report, the report tends to be more favourable to their position, and vice versa when the worker requests a report. Similarly, treating doctors tend to be more sympathetic to their patients and provide favourable medical reports. It may be difficult for a treating doctor to give a truly objective report if the consequence might be to challenge the therapeutic relationship between the doctor and patient.

The objective of the IMA process is to attempt to eliminate this underlying bias in many medical reports. To maintain this objectivity, the parties to the dispute should not contact the IMA directly, but rather communication should go through the Tribunal.

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An IMA is able to confer with other health professionals before finalising their report. They can review test results and call for further tests if they believe that could assist them with their assessment; for example, the IMA confirms that the worker should undergo an MRI scan before the report can be finalised.

The IMA report does not interfere with the Tribunal's responsibility to be the ultimate trier of fact in relation to any given dispute. In other words, the IMA is a consultant to the Tribunal, and it is the Tribunal which makes the ultimate decision.

The IMA process is a new process, only established under the *Return to Work Act 2014 (SA)*, and the effectiveness of IMAs as a tool to assist with dispute resolution has not been fully realised or tested.

FAIR WORK ACT 2009 (Cth) AMENDMENTS BECOME LAW

By John Love, Partner, EMA Legal

In an early sign of the Turnbull government's ability to successfully negotiate with the Senate cross-benchers, the government was recently able to secure the passage of a number of amendments to the *Fair Work Act 2009* (Act), which commenced operation on 27 November 2015. However, the government was unable to secure the passage of all the amendments it originally sought.

The amendments are detailed below.

Protected industrial action

In perhaps the most significant change, unions will only be able to apply for protected industrial action ballots once bargaining for an enterprise agreement has commenced, either by the employer agreeing to bargain or where a majority support determination has been made.

Under this change, unions will no longer be able to take lawful industrial action prior to the start of negotiations, which overturns the Federal Court decision in *JJ Richards*.

Greenfields agreements

The parties negotiating greenfields agreements will now be subject to the good faith bargaining provisions in the Act.

In addition, a new, optional 6 month negotiation time frame will be established for negotiations, which will apply where notice is provided by an employer to the relevant union(s). If agreement cannot be reached within this 6 month time frame, the employer will be able to apply to the Fair Work Commission for the agreement's approval.

Parental leave

Under the parental leave amendment, if an employee requests an extension to their unpaid parental leave, the employer must not refuse the request unless the employer has given the employee a reasonable opportunity to discuss the request.

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Interest on monetary claims

The Act has also been amended to require the Fair Work Ombudsman to pay interest on unclaimed monies. The Ombudsman will be required to pay interest on amounts more than $100 that it has held for more than six months.

However, unlike the amendments outlined above which commenced on 27 November 2015, this amendment has not yet commenced.

Amendments that did not pass

The government was unable to secure cross-bench support in the Senate for the following amendments contained in the original *Fair Work Amendment Bill 2014*:

- Right of entry
- Annual leave
- Individual flexibility arrangements (IFA)
- Transfer of business

Implications

Practitioners in this area should become familiar with the amendments that limit the right of unions to take lawful or protected industrial action, the changes to greenfields agreements and parental leave. At this stage, it appears unlikely that the new government will attempt to make any further significant changes to the Act until after the next election, which is due in the second half of 2016.

Other news

Larissa Waters, Greens Senator for Queensland and Co-Deputy Leader of the Greens, has introduced a private member's Bill, *the Fair Work Amendment (Gender Pay Gap) Bill 2015*, which if enacted, will render null and void clauses of enterprise agreements, modern awards and employment contracts that seek to restrict the ability of employees to discuss the terms and conditions of their employment, such as salary levels, with other employees. The purpose of this Bill, as set out in the Explanatory Memorandum, is to remove these "gag clauses" because when "pay is set in secret by individual negotiation, women are at a disadvantage".

Important Decision – Termination of employment/alleged dismissal of victim of domestic violence

By Sandra Dann, Director of Working Women's Centre SA and Immediate Past President of IRSSA

On 23 July 2015, Commissioner Roe (Cmr Roe) of the Fair Work Commission handed down an important decision for workplaces and for women workers experiencing domestic violence, *Ms Leyla Moghimi v Eliana Construction and Developing Group Pty Ltd* [2015] FWC 4864

Ms Moghimi and her domestic partner were employed by the same company, Eliana. They did not perform the same role and did not have to directly interact to complete their work tasks.

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In January 2015 Ms Moghimi returned from a period of authorised leave, visiting her family overseas. She arrived home in the very early hours of the morning and was the vicitim of domestic violence shortly after. Her phone was taken and she was in fear of her life. The police attended and issued a Family Violence Safety Notice which excluded Ms Moghimi's partner from the home.

The next day the couple attended the Magistrate's Court where an intervention order was issued. Ms Moghimi was not able to phone her workplace to notify them that she would not be attending work but did get a message via Facebook to one of her colleagues asking them to notify management. Ms Moghimi's partner had notified the workplace that neither he nor Ms Moghimi was able to attend work.

The intervention order required that Ms Moghimi's partner not undertake a range of actions involving Ms Moghimi. The prohibited actions included violence, damage property, follow, publish any statements, or contact or communicate. When the Magistrate was informed that Ms Moghimi and her partner had a common workplace, the order was modified to require that the partner was not to approach or remain within 3 metres of Ms Moghimi instead of the usual 5 metre restriction to enable them to continue to work in the same office. Ms Moghimi agreed to this.

Ms Moghimi was unable to attend work the day after court as well but then returned to work. A meeting was convened with management. No work was allocated to Ms Moghimi and she was was told to wait to meet with one of the employers.

At this meeting Ms Moghimi was told it would not be possible for both she and her partner to work in the same workplace, despite the intervention order. The implication was that Ms Moghimi should resign. When she put it to her employer that either she or her partner would have to resign she was told, '*I can not help you*'. Ms Moghimi wanted to keep her job but was later provided with a resignation letter to sign. She felt helpless and felt she had no choice but to sign the letter.

Cmr Roe found that Ms Moghimi was dismissed at the initiative of the employer. He found that the employer knew about the intervention order and did not give her an opportunity to discuss how both employees could continue to work at the same workplace. Ms Moghimi gave evidence that she felt safe in the open office given that there were many other work colleagues around, He found that she was not accused of any misconduct or poor performance but that 'her only crime was to have a partner who worked in the same work place and who was the subject of a domestic violence Intervention Order. Cmr Roe found this in itself was not a valid reason for dismissal.

Ms Moghimi was awarded $27,500 in compensation. She found a new job at the same rate as her old position.

Women who experience domestic violence are strongly advised to add their place of work to an intervention order, whether their abusive partner works there or not. Workplaces need to ensure that an intervention order is not used to dismiss an employee. Workplaces can do many things to prevent and address the impact of domestic and family violence as a workplace issue – undertake training, conduct safety audits, implement safety plans in consultation with affected employees, develop and implement policies that recognise domestic violence as a workplace issue, include domestic violence clauses in enterprise agreements. Workplaces are significant communities where awareness of the impact of domestic violence can be raised and commitments made to ensure the safety of all employees. 76 women have died in Australia this year due to violence.

*******STOP PRESS*******

The following update comes via OHS Alert:

FWC rejects permission to appeal domestic-violence finding

An employer that was ordered to pay a domestic violence victim $27,500, after the Fair Work Commission found it forced her to resign, has been refused permission to appeal.

As reported by OHS Alert in July, FW Commissioner Julius Roe found Eliana Construction and Developing Group Pty Ltd unfairly dismissed the worker, who was the victim of domestic violence and worked in the same office as the perpetrator – her partner (see related article).

Commissioner Roe found the employer told the worker it was unable to protect her from her partner, that it wouldn't dismiss her partner, and that she should resign to help her employment prospects.

The employer applied for permission to appeal, arguing it acted "reasonably and diligently" in not terminating the partner's employment, and the FWC placed too much weight on family violence committed outside the workplace.
But FWC Vice President Graeme Watson, Deputy President Reg Hamilton and Commissioner Leigh Johns found there was "no issue of general application arising from [Commissioner Roe's] findings, and no issue of public interest".

"The findings about domestic violence were specific to the case in question, and related to [the worker's] absence from work because of domestic violence, and the consequent difficulties of [her] and her former partner working together in the office," they said.

Eliana Construction and Developing Group Pty Ltd v Moghimi [2015] FWCFB 7476 (6 November 2015)

VALE - LOUISE MILLER

It is with great regret that we advise members that Louise Miller, one of the Society's life members, recently passed away.

Louise joined the IR Society in 1978 and immediately became an active member and contributor.

In due course, Louise was recruited to the committee of management, (by our Patron) and became Treasurer, Vice President and ultimately President of the Society.

As a member of the committee of management for many years, Louise was involved in all aspects of the work of the Society including assisting with the organising of many of the Annual Conventions and monthly meetings. Louise was also a moving force behind the hosting and running of the very successful National Convention of the IR Society of Australia held in Adelaide in 1986.

Louise held a Bachelor of Arts degree majoring in Industrial Psychology. Her direct involvement in Industrial Relations commenced in her native Glasgow where she became the Clerical Union representative at a major colliery.

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On arriving in South Australia in 1985, Louise took a clerical position in the Public Buildings Department and after joining the Public Service Association she became in due course the senior PBD job representative. In that capacity, Louise organised a Combined Union Council involving for the first time blue and white collar Unions.

Louise was actively involved in campaigns regarding the capacity for married women to remain in the public service and equal pay.

Louise was subsequently elected to the Council of the PSA, became Vice President in the early 1980's and has been recognised as a Life Member of the PSA.

Louise held a number of representative appointments in her career including as a member of the Flinders Medical Centre Board of Management in 1991 during which she reorganised their Human Resources – Industrial Relations Department and dealt with a number of major industrial issues.

In her retirement, Louise was actively involved in many activities including as the President of the Adelaide Branch of the Australian Society for the Study of Labour History and a member of the Adelaide TAFE Council.

Louise was nominated as a life member of the IR Society in recognition of her contribution to the Society and the profession in a number of areas including:

- Her many years of active and dedicated service to the IRS Society and the committee of management and
- To recognise her contribution to the development of Industrial Relations within the Public Sector.

Greg Stevens and Commissioner Peter Hampton attended Louise's funeral on behalf of the Society.