FEBRUARY 2022 CASES UPDATE

NEWS

Welcome to our summary of some of the last cases handed down for 2021. While there continued to be many decisions handed down by the South Australian Employment Tribunal (SAET) after we commenced preparing this update, we thought we'd save some to include in the next update, along with kicking off the 2022 cases – and to keep your reading time under control.

We trust you all managed to find time for some well-deserved Christmas rest (is that a contradiction in terms?!), and you all enjoy a safe, happy and prosperous (in all respects) 2022. And thank you again for entrusting us with your legal needs over the last year. Your continued support is much appreciated.

KJK Legal sponsoring the February 2022 SISA meeting

We're a proud sponsoring of SISA's next forum on 11 February 2022. There's still time to register for Friday's event if you're interested.

KJK baby news

At the indulgence of the editor, the Keam family welcomed a new addition, Joshua Thomas Keam, to the extended family on 6 December 2022. Keen followers of the firm may note the likely AFL football allegiance of the new-born. A prize to the first person to spot the connection by emailing mkeam@kjklegal.com.au

RECENT CASES OF INTEREST AT THE SAET

Jackermis v Woolworths (SA) Pty Ltd and Return to Work Corporation of SA [2021] SAET 175

Topic: Construction of section 56(6) of the RTW Act

Commentator: Melanie Conroy

This case comments on the reduction of a further lump sum payable under section 56 of the Act when a new work injury is sustained and helps to define what is a new work injury.

Background

The worker injured her right shoulder in 2016 and suffered consequential injuries of mastication and deglutition. She received 17% WPI for the injuries and was entitled to $76,762.00 for economic loss.

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In July 2017 the worker sustained a new injury, this time to her left shoulder. Her whole person impairment was assessed at 13% WPI which equated to $45,188.72.

When assessing her lump sum compensation under section 56(6), the compensating authority, decided the injury in July 2017 was a "new work injury" for the purposes of section 56(6)(b)(ii). Therefore, the prior payment of $76,762.00 was deducted from $45,188.72, and as such they determined she had a nil lump sum entitlement.

The question in issue between the parties was what is meant by a "new work injury" under section 56(6)(b)(ii).

The worker contended that a "new work injury" means a work injury to the same body part. The worker argued as her left shoulder was injured in the second work injury, with the right shoulder being injured in the initial injury, different body parts were involved and therefore no reduction was applicable. The worker submitted section 56(1) speaks of a worker being entitled to compensation for loss of future earning capacity, and if section 56(6) is construed in a literal way then entitlement in connection with a subsequent injury will often be removed.

The Compensating Authority submitted the correct approach was to give section 56(6) its plain meaning and thus the purpose of the section was to ensure the lump sum payable does not result in the culmination of successive payments for successive injuries.

The SAET accepted that, whilst a literal interpretation may produce anomalous results, there is every reason to think Parliament intended the literal meaning to apply. The Tribunal was guided by the judgement in *Onody v Return to Work Corporation* [2019] SASCFC 56 where it was explained the surest guide to the intention of the legislature was to be found in the text of the language of statute.

The SAET found in favour of the Compensating Authority and upheld the decision to make a deduction for the prior injury.

Key takeaway

The purpose of section 56 is to provide compensation for the economic consequences of a workplace injury. The case confirms the application of section 56(6) of the Act, which directs that a deduction of a previous lump sum is to occur in the event a new injury occurs, irrespective of its relationship, or otherwise, to any prior injury.

Return to Work Corporation of South Australia v Pulford [2021] SAET 208
Topic: Hours worked factor under section 56(4)
Commentator: Melanie Conroy

This case is an appeal from the earlier decision that a notional hours worked factor (HWF), for section 56 assessment purposes can be used when a worker is not in employment at the time of the second injury.

Background

The worker sustained successive injuries to her shoulders and sought compensation under section 56 of the RTW Act.

After the initial injury to the right shoulder in 2014, the worker did not return to work. As she did not return to work, she did not have any earnings from employment at the time she injured her left shoulder (due to overuse) in November 2015, as she was in receipt of Income Support.

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The Compensating Authority determined the entitlement to section 56 compensation at nil because the HWF as determined under s 56(4) was nil.

The worker sought review of this decision and argued section 55(6) allowed a HWF to be arrived at by having regard to what is fair and appropriate. The trial judge held an award under section 56 can be made notwithstanding the worker was not working at the time of the second injury.

In making this decision the trial judge held that the HWF should be set having regard to the applicant's capacity to work after the right shoulder injury, which he found to be nine hours per week. In making this finding the trial judge considered it would be a fair approach was to notionally identify how many hours a week the worker could work after the right shoulder injury. The judge found this to be 9 hours per week. This finding was not one that either party asked the trial judge to make and was not one the trial judge indicated he was going to make.

On appeal, it was noted the worker at all material times since the initial injury in 2014 was certified as totally incapacitated for work due to the right shoulder injury. In light of these facts the Compensating Authority submitted it was not open to the trial judge to utilise section 56(6) in the way he did.

The Full Bench of the SAET held the trial judge was right to conclude the mere fact that a worker was not working at the time of the injury to the left shoulder did not preclude an award under section 56. In coming to this conclusion, the SAET commented that section 7(5) of the Act extends a worker's employment to several situations where a worker may not be working but may sustain a compensable injury.

They provided an example in support of this, namely a worker with a psychiatric injury may be required as part of a rehabilitation and return to work plan to undergo retraining. Whist undertaking the retraining the worker is injured. This injury would be compensable under section 7(5) of the Act, even though the worker was not in paid employment. Accordingly, the hours worked factor would be zero. The SAET commented that this outcome seems to be illogical and inconsistent with the legislative purpose of section 56.

The SAET provided some guiding criteria on what might be relevant to arrive at a "fair determination" of the HWF (as considered in the matter of *Toth*):

- Were the number of hours being worked by the worker at the relevant date typical of the number the worker had been working prior to that date?
- What was the reason for any variation?
- If the reason was because of the worker's reduced capacity to perform work, what was the cause of that diminished capacity?
- Was it due to a compensable injury, a non-compensable injury or event, or a combination of circumstances?
- Is the incapacity permanent or temporary? If temporary, how long is it anticipated that it would last?
- To what extent has the incapacity impacted upon the number of hours worked?

The SAET on appeal held they were unable to decide whether, in the circumstances of this case, the trial judge was correct in finding that because of the worker's circumstances, as at the date of the injury, it was not possible to arrive at a fair determination of the HWF.

They held that the trial judge's finding as to the hours worked was made in circumstances where the parties were denied procedural fairness, which could have had

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a bearing on the outcome. As such, they decide the trial judge's original decision could not stand, and the matter was remitted for a re-trial.

Key takeaway

We will need to await the outcome of the re-trial to get a definitive answer on this point. At this stage it is worthwhile being aware that, when setting the HWF, consideration may need to be given to not just whether the worker was in employment at the time.

Sharon Dabbs v Return to Work Corporation of South Australia [2021] SAET 184
Topic: Dependency claim
Commentator: Melanie Conroy

This case examines causation specifically in relation to myocardial infarctions.

Background

The worker was a mechanic and lived in Western Australia. He was the owner of Auto Masters in Marion, and former owner of an Auto Masters in Western Australia.

He travelled to Adelaide from time to time to work in the Marion store. On the 3 July 2017 he was working at his store in Adelaide. He passed away overnight due to what was found to be a myocardial infarction.

The questions in issue were:

- Did the myocardial infarction, which gave rise to the worker's death, arise in the course of employment?
- Where did the plaque rupture occur (which lead to the infarction)?

In relation to causation expert evidence was provided by Dr Mahar and Dr Ardill. Whilst their opinions slightly diverged, Dr Ardill reviewed Dr Mahar's report and stated he agreed with the opinions of Dr Mahar, albeit he stated on the balance of probabilities he did not conclude the worker's work duties caused acute plaque rupture, although he agreed it was a possibility.

The trial judge, Aux. D.P. Clayton, accepted the evidence of Dr Mahar and Dr Ardill and found on the basis of the medical evidence the worker suffered coronary heart disease. The trial judge also found the worker suffered a plaque rupture, which in turn caused myocardial infarction and death.

When examining the questions above, the trial judge commented that often there is no direct evidence of a relevant fact, but the court is entitled to draw inferences from the facts established.

In this case it was found the evidence established the worker was under financial stress, as well as pressure to get repair works completed by the end of the day on a car. His work, in particular changing tyres on four-wheel drives, was heavy. It was reported by colleagues the day before he appeared stressed and was sweating. Dr Mahar, in providing evidence, explained that sweating was an early sign of acute coronary thrombosis.

In consideration of the evidence the trial judge used the evidence of his sweating to draw a factual inference. He commented that the evidence left open the possibility the worker's duties contributed to the plaque erosion that occurred.

In the absence of evidence of any other cause and having regard to the fact the worker was stressed and seen to be sweating, the trial judge found the established facts

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enabled the SAET to draw an inference that the plaque rupture which precipitated the myocardial infarction and subsequent death occurred at work.

The trial judge specifically commented it was not a strong case, but the evidence was sufficient for him to be able to draw the inference required to establish causation.

Key takeaway

This case shows the trial judge was able to use factual inferences to conclude the myocardial infarction was compensable. As such, it is important when preparing a case for trial to ensure to have sound medical and factual evidence presented to the trial judge.

Interestingly, in the recent Supreme Court Case of *Return to Work Corporation of South Australia v Sunman & Ors [2021] SASCA 125,* which also concerned a death claim, it was held in finding the worker's death claim was compensable based on conflicting evidence on the causation of a stroke, the reasons of the trial judge were not adequate, and the matter was remitted for rehearing.

Capurso v Return to Work Corporation of South Australia [2021] SAET 198
Topic: Compensability of injuries and future surgery application
Commentators: Melanie Conroy & Suzana Jovanovic

Background

The worker injured her left knee and wrist when she tripped and fell whilst getting into a taxi in the course of her employment in 2017.

The worker then lodged a claim for a right shoulder injury which she related to using crutches and walking aids necessitated by the compensable injury to her left leg. The worker also lodged a claim for a right knee injury and requested a total knee replacement. The worker asserted the injury to her right knee occurred as a result of having an altered gait and placing more weight on the right knee due to her left knee injury.

Interestingly the worker's compensable injuries occurred against a somewhat unusual medical background, as she already had partial knee replacements in each knee in 2007, a total knee replacement in 2011 and then a right knee total knee replacement in 2013. She was also susceptible to developing bursitis and impingement in her shoulders.

The question before the SAET was whether the right knee and right shoulder injuries were consequential injuries.

In addition to this the SAET needed to examine whether estoppel applied to preclude the compensating's authority denial of claims due to previous consent orders which were made in in 2019 and 2020.

In relation to the right shoulder there were also issues as to whether:

- the application for future surgery to the right shoulder was made within time
- the surgery to the right shoulder was required
- the right shoulder condition could be identified, and
- the right shoulder surgery should be delayed.

In relation to the right knee there were issues as to whether:

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- an injury to the right knee was sustained
- if there was an injury to the right knee, was it compensable, and
- right knee replacement revision surgery was required

Expert medical evidence was provided by Dr Thoo, Dr Sood, Dr Liew and Dr Clayer.

In relation to the right knee the evidence showed the cause of any right knee injury was unclear. The treating orthopaedic surgeon, Dr Liew, expressed reservations as to whether there was a need for right knee replacement surgery. In the opinion of both Dr Clayer and Dr Thoo a revision total knee replacement was not the appropriate treatment for the right knee.

The SAET upheld the rejection of the worker's claim to her right knee and the claim for the right knee surgery, as a right knee injury was not able to be identified.

Conversely, in relation to the right shoulder injury, the medical evidence supported a finding the worker had developed a compensable right shoulder injury and aggravation from the use of crutches and other walking aids.

The date of right shoulder injury for the purposes of section 33(21) of the RTW Act was in this case not the date of the original injury in relation to which there was a causal relationship, but the date when the shoulder injury was sustained. The right shoulder injury was then deemed to have occurred on 19 February 2019, which was the date the worker first made a complaint of right shoulder symptomology.

The SAET held that as the date of injury was a new date of injury, and not relating it back to the date of the original injury (in 2017), the application for future surgery was made in time. The future surgery was held to be required, and as such it was reasonable and appropriate to delay surgery.

Wagenfeller v Return to Work Corporation of South Australia [2021] SAET 199

Topic: Combination and deduction of prior injuries for permanent impairment and discussion of same trauma

Commentator: Melanie Conroy

This matter was an appeal which considered the application of section 58(6) of the RTW Act.

The worker injured her lower back, hip and shin on 12 August 2015. She was employed as a carer, and when taking a client to a shop she was injured when the client's wheelchair struck her in the left shin, which pushed her between the shop counter and the wheelchair.

She had previous injuries to her lower back in 1998 in which she was assessed as having 5% loss of function to her lower back and lumbar spine.

In 2008 she suffered a further injury to her lower back and was assessed as having an 8% whole person impairment.

Subsequent to the 2015 injury, the worker was assessed by Dr Bastian for the whole person impairment assessment. He assessed her level of impairment to the lumbar spine as 7% WPI, the right hip at 3% WPI, and scarring at 1% WPI.

The worker submitted that if the injuries she sustained in August 2015 were regarded as a single injury, then section 58(6) of the Act required the injuries to be combined as they arose from the same trauma. Therefore, in accordance with section 58(6)(a) the injuries should be assessed together resulting in a WPI of 11%. Therefore, in accordance

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with the Impairment Assessment Guidelines, and the authority in *Onody v Return to Work Corporation* [2019] SASCFC 56, only the dollar amount should be deducted.

The Compensating Authority contended the lower back injury should not be combined, and as such the worker was not entitled to compensation for the lower back, as she did not reach the 5% threshold. Dr Bastian, in undertaking the assessment, noted that as the worker had a previous 8% WPI on account of the earlier back injury, this needed to be deducted, and determined the worker had no impairment.

The Compensating Authority's approach was in line with the reasoning and methodology applied by Dr Bastian and followed the approach *in Marrone v Employer Mutual Limited* [2013] SASCFC 67. The Compensating Authority submitted the injuries did not meet the same trauma test and stated only the hip and shin injuries arose from the same trauma and the impairment to the lower back was an aggravation of the earlier 1988 or 2008 back injury.

The SAET held that the injury to the worker's hip and shin arose out of the same trauma, however the injury to her lower back was partly attributable to her earlier back injuries. Therefore, the hip, shin and aggravated back injuries did not all arise from the same trauma.

The SAET further Court held, that for a worker to receive a lump sum, a work injury must result in a permanent impairment. The lower back injury the worker sustained in 2015 did not result in a permanent impairment greater than what was already in existence, therefore she was not entitled to compensation under section 58 of the RTW Act.

Key takeaway

In this case the SAET decided on appeal all the injuries did not arise from the same trauma (as the back injury was an aggravation) and commented that the deeming effect of section 58(6) does not operate to treat multiple injuries as a single injury for the purpose of clause 1.30 of the Impairment Assessment Guidelines (IAG).

Whilst the SAET expressed no concluded view about the application of clause 1.30 of the IAG, they passed comment that if they were to decide this matter then the relevant dollar amount for the prior injury would have needed to be deducted, not the percentage amount.

Prettejohn v Return to Work SA [2021] SAET 201
Topic: Serious Injury Application
Commentators: Melanie Conroy & Suzana Jovanovic

The worker sought to be treated as a seriously injured worker on an interim basis under section 21(3) of the RTW Act 2014 for the purposes of medical expenses.

Background

The worker sustained a compensable work injury on 20 November 2008 when she fell and fractured her right ankle and injured her left shoulder and right knee. There were further claims accepted for injuries said to be sequelae or consequential upon that 2008 injury, including injuries to the back, left groin and hip, right shoulder, neck, right ankle, left shoulder, thoracic spine, lumbar spine, right arm, right hand, right hip, right leg, right knee, right ankle, left arm, head, right ribs and whole-body convulsions. Some of these injuries related to a fall at home on 30 June 2011, when the worker's right ankle gave way.

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In her application to be treated as a seriously injured worker, the worker sought to combine the numerous impairments from the 2008 compensable injury and the fall in 2011.

The serious injury application under section 21(3) was only in respect to medical expenses, as the worker did not make a claim in respect of weekly payments of income support. This was because the worker's previous entitlements to income support did not transition to the RTW Act, and because her entitlement to income maintenance was ceased by agreement in consent orders of 9 March 2016.

In addition to the determining if the worker was seriously injured, the SAET needed to determine if an injection of intra-articular hyaluronic acid or Synvisc was a therapeutic appliance within the meaning of s 33(21)(b)(i) of the RTW Act. If this was so, the time limit for the provision of medical expenses under s 33(20) would not apply.

The medical evidence was lengthy and varied due to the many injuries suffered by the worker and the complexity of her presentation. However, generally speaking the evidence supported the worker's history of injury and level of impairment.

Dr Cohen assessed the worker for the purposes of an indicative permanent impairment assessment. He assessed her whole person impairment at 56%. Although the indicative assessment was likely too high, as it made no deductions or allowances for prior or unrelated injuries, the SAET commented it was probable that the eventual WPI assessment would be 30%, provided all the injuries were combined.

Overall, the SAET held the impairments from the 2008 injury and the injuries consequential to it, including impairments arising from 2011, were to be combined as they were from the same injury or cause under section 22(8)(c) of the Act.

It was noted the prior consent orders could not be relied upon to estop the Compensating Authority from denying a causal link between all the injuries and impairments. The SAET stated the consent orders were crystal clear in making a causal link to the 2008 injury, and they could not be undermined. As such, the SAET held the worker should be taken to be a seriously injured worker on an interim basis.

In relation to the worker's application for an injection of a form of hyaluronic acid to her knee, the SAET held, consistent with the approach in Return *to Work Corporation of South Australia v Williams* [2021] SAET 194, the substance constituted a "therapeutic appliance" within the meaning of s 33(21) of the RTW Act.

Fielden v SA Police [2021] SAET 204
Topic: GEPIC assessment for a psychiatric injury
Commentator : Tracey Kerrigan

Mr Fielden's case is a relatively rare one, involving a GEPIC assessment for a psychiatric injury. Mr Fielden was a police officer, who suffered a psychiatric injury during the course of his employment.

He requested an assessment of his whole person impairment be undertaken, to determine if he was a seriously injured worker. He nominated Dr Tony Davis as his PIA assessor. Initially Dr Davis assessed him as having a WPI of 35%.

SAPOL was concerned the PIA report contained errors in its methodology, and sought the worker's consent to communicate with Dr Davis but the worker refused. They then sought an opinion from Dr Clarke, who confirmed there were errors in the methodology and the report. SAPOL declined to rely upon the original assessment, and the worker filed an Application for Review.

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During the dispute resolution process, the solicitors for SAPOL were able to communicate with Dr Davis, who on receipt of the views of Dr Clarke confirmed he had made an error and reduced his assessment to 25%, meaning the worker would not be seriously injured.

The worker applied to have the original assessment upheld by the SAET or alternatively for a referral to an IMA.

Deputy President Judge Calligeros declined both requests. He found the further report provided by Dr Davis in essence "filled in the blanks" as to the class of impairments required, and why each class and severity rating was assigned. Therefore, there was no need to undertake an IMA referral.

This case demonstrates the need for care and attention to be applied when dealing with a GEPIC assessment for a psychiatric injury, to ensure the methodology applied is correct and the report contains the appropriate level of detail required to justify the severity ratings assigned by the assessor. This can probably best be achieved by a review by an independent psychiatrist such as Dr Clarke. Calling for production by the assessor of their working notes can also assist in supplementing the report detail.

The case also illustrates that the compensating authority is limited in their ability to communicate with an assessor in the absence of cooperation by an injured worker, or their legal representative, until at least the matter is before the SAET.

Return to Work Corporation of SA v Williams [2020] SAET 194
Topic: Therapeutic appliances/surgery
Commentator: Tracey Kerrigan

The issue in this case was whether Synvisc injections are a therapeutic appliance and/or surgery such that the time limit imposed by section 33(20) does not apply.

Synvisc is a gel like substance, which is injected into the knee joint to replace a natural part of the body, namely hyaluronic acid. It acts both as a lubricant and a shock absorber. It can delay the need for a total knee replacement. Over time Synvisc will absorb into the body so it has a limited time span.

At first instance, Deputy President Judge Calligeros found Synvisc was not a therapeutic appliance, but could come within the definition of "surgery". RTWSA appealed that decision.

On appeal, the Full Bench of the SAET by a 2-1 majority found Synvisc constituted a therapeutic appliance or aid. The majority judges (Deputy Presidents Judge Kelly and Judge Rossi) felt the meaning of "therapeutic appliance" should not be read down and limited, but should have broad application. Just because the "appliance" was delivered in a gel or liquid form did not mean that it did not fall within the meaning of appliance or aid. Deputy President Judge Kelly in particular felt there was no reason to confine "therapeutic appliance" to a solid object rather than a liquid. Further the mere fact the effect may be temporary, and might have to be repeated, was not decisive. Many such appliances (e.g. hearing aids) have a finite lifespan and need replacing.

D.P. Judge Kelly also considered Synvisc was a "prosthesis", as it replaced articular cartilage material within the joint. Again, being a liquid and temporary did not detract from that.

In making that finding, the Full Bench of the SAET did not then have to determine if Synvisc came within the meaning of "surgery", but the comments made particularly by Deputy President Judge Rossi suggest he thought it's use may be part of a surgery protocol.

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It is clear the SAET is prepared to adopt a fairly broad interpretation of what constitutes "therapeutic appliances or aids", is clearly conscious of the fact medicine is "ever changing and advancing", and the 12 month entitlement period in section 33(20) may be too limiting on the type of treatment an injured worker may need in the future (this being more a policy issue than anything).

Decision makers will need to be mindful of cases like this, where even 'temporary' surgical interventions may be requested ad infinitum, and make financial provision accordingly.

Storey v Return to Work Corporation of South Australia [2021] SAET 212 & Jones v Return to Work Corporation of South Australia (Mader Contracting Pty Ltd) (No 2) [2021] SAET 216

Topic: Costs

Commentator: Melanie Conroy

We commented on a few costs cases earlier in the year, and there are now a few more worth passing comment on. Costs cases are useful to help provide an understanding of the circumstances in which there may be a reduction of costs payable to a claimant/worker.

The case of ***Storey v Return to Work Corporation of South Australia*** [2021] SAET 212 concerned an appeal from a decision not to award costs on an unsuccessful application for a referral to an independent medical adviser in connection with an assessment of whole person impairment, as well as an application for costs following an unsuccessful appeal from the trial judge's substantive decision not to make the referral.

Background

The worker had noise induced hearing loss and Dr Gristwood assessed the worker's level of whole person impairment (WPI). Dr Gristwood elected to use the bone conduction results and assessed the worker's WPI at 3%. Had he used the air conduction results the overall assessment would have been 5% WPI.

The worker was dissatisfied with this result and obtained a further opinion from Dr Hains. Dr Hains believed the air conduction method should be used, and he arrived at an overall assessment of 4% WPI.

The worker issued proceedings to seek a referral to an Independent Medical Adviser. In the initial decision the trial judge found the worker acted unreasonably in bringing the Application for Review because there was no persuasive evidence to doubt the original assessment, nor was there evidence that a revised assessment could reach the threshold of at least a 5% WPI to qualify for a lump sum payment for non-economic loss. The trial judge then ruled there was to be no award of costs in favour of the worker.

On appeal it was held that the trial judge was right to conclude the worker's Application enjoyed no real prospect of success, and the worker had acted unreasonably in pursuing it. Further to this, no appealable error had been identified as to how the trial judge exercised his discretion as to costs.

In awarding costs, the Full Bench of the SAET was not bound by the view taken by the trial judge as to the appropriate order for costs. In the SAET's judgment, the appropriate order was for the worker to recover 50% of his costs of the appeal. This was because the SAET took the view the unreasonableness was in the worker's failure to consider the lack of evidence to support his legal argument, however the legal argument itself was not without merit.

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Similarly, in the case of ***Jones v*** Return ***to Work Corporation of South Australia (Mader Contracting Pty Ltd) (No 2)*** [2021] SAET 216 the worker was ordered to pay 50% of the costs of his Application.

Background

The worker claimed for ongoing weekly payments and medical expenses for multiple and severe injuries, and ongoing impairments claimed to have arisen from his employment with his employer Mader Contracting.

The worker had been assessed, for the purpose of treatment, by at least eight medical practitioners in multiple fields of multiple fields of specialty including general practice, occupational medicine, rehabilitation medicine, neurosurgery, orthopaedic surgery and rheumatology.

The Compensating Authority has rejected the worker's claims for weekly payments and medical expenses, on the basis the claimed injuries had not arisen from his employment.

The Compensating Authority sought orders to request the worker to attend two scheduled medical appointments, one with Dr Champion and the other with Dr Kapur. The employer supported the application.

The self-represented worker opposed the orders on the basis he had already attended medical assessments arranged by the Compensating Authority, and submitted the further assessments were unreasonable.

The SAET held the proposed further assessments were reasonably required in order for both the Compensating Authority and the employer to be able to properly present their cases as to whether the worker had sustained his injuries in compensable circumstances. Therefore, the orders sought were made.

In relation to the further application by the Compensating Authority that the worker should pay the costs of the application on the basis that he had acted unreasonably, the SAET held the worker did not raise a valid argument as to why he should not attend the arranged appointments. The SAET took the view the worker had acted unreasonably, and ordered the worker to pay 50% of the costs (including the Compensating Authority's liability to pay the employer's costs) of the Application.

Key takeaway

A worker may not be able to recover legal costs if the worker acts unreasonably, frivolously or vexatiously in relation to the dispute. If the worker acts frivolously or vexatiously in bringing the dispute, or their conduct in the course of a dispute is frivolous or vexatious, then the worker may not have their costs paid for. They also risk being ordered to pay some or all of the compensating authority, or employer's, legal costs under section 106(3) of the RTW Act. These cases are an example of when a worker has been deemed to have acted unreasonably.

During a dispute should another party be acting unreasonably, it is recommended to put them on notice of costs as soon as possible. Failure to do so could result in the Tribunal declining an application for costs.

Interestingly, we note the draft SAET Rules 2022 contain amendments to the rules on costs. Overall, the proposed amendments to the rules are practical and provide greater clarity on the processes and procedures to be followed. It is anticipated the proposed changes will support the Tribunal in providing a just, quick, and cost-effective resolution of the issues in dispute.

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The changes to the rules in relation to costs are significant and provide greater detail and clarity on the procedures to be followed. This information was lacking from the 2017 rules and is a sensible inclusion. The proposed rules contain specific rules at Part 16 in regard to the discretionary factors the SAET can consider when exercising its discretion as to cost, which includes any misconduct or unreasonable conduct of a party or a representative of a party in connection with proceedings.

We will provide an up to date analysis of the new SAET Rules once they are finalised and published.

Frech v Return to Work Corporation of South Australia [2021] SAET 231

Topic: Setting aside consent orders

Commentator: Tracey Kerrigan

This case concerns an attempt to set aside consent orders or "amend" the orders to enable the worker to pursue lump sum entitlements both for economic and non-economic loss.

The worker had submitted a claim in 2018 claiming that he had suffered a lower back injury from about 2010 onwards, being a gradual onset type injury. The claim was originally rejected, but during the process of conciliation agreement was reached the worker had suffered a lower back injury and the date of injury was fixed by agreement to be a 2010 injury under the 1986 Act.

Subsequently, the worker pursued his lump sum entitlements, and the section 22 assessment process was undertaken. The referral letter to the PIA assessor referred to an injury in 2010 but the report provided by the assessor noted that the worker questioned the date of injury and suggested that his low back pain became severe in mid-2016. The report was deemed by the claims agent to be "compliant".

The claims agent determined the worker's entitlement to a lump sum under section 58 only, as his date of injury was said to predate the 2014 Act, and therefore there was no entitlement to economic loss under section 56. The worker disputed the decision.

The Trial Judge held the previous consent orders were final orders of the Tribunal and carried the same weight as orders made following a trial. He found there was insufficient justification to set them aside. The worker had been represented by a solicitor at that time, and the orders reflected a compromise position at the time.

The Trial Judge also considered that 'stamping' the PIA report as compliant did not prevent GB from continuing to argue the entitlement related to a 2010 injury, rather than some later date referred to by the assessing doctor.

The Trial Judge was also asked to consider amending the consent orders to enable the date of injury to be changed. He refused to do so, and it seems he took a dim view of the worker's credibility and history of when his lower back pains commenced and worsened. He had given different dates to various doctors over time. He also was not convinced by the worker's assertions he did not understand the conciliation process, and noted he had provided written instructions at the time to his legal representative.

This case again demonstrates that the SAET is generally unwilling to interfere with consent orders, particularly where both parties are legally represented.

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Cirocco v Return to Work Corporation of South Australia [2021] SAET 241
Topic: Deemed work/worker – contract or arrangement under the Regulations
Commentator: Tracey Kerrigan

This case deals with a long running saga of whether Mr Cirocco was a worker within the meaning of the Act, either by way of a common law contract of service or under the deemed worker provisions in Regulation 5 of the *Return to Work Regulations 2015*.

The claimant was the sole director and majority shareholder of a company that was building properties under contract for another company. The claimant suffered a significant injury during the course of the work.

On appeal, Deputy President Judge Rossi considered the meaning of "work done under a contract, arrangement or understanding" in Regulation 5(1). The provision has 2 parts, namely are there 2 persons who have entered into a contract, arrangement or understanding and, if so, was that contract etc. for the purpose of a trade or business carried out by the other person?

Deputy President Judge Rossi noted that in dealing with this issue, there were at least 3 legal entities that had to be considered, namely the claimant, his company and the other company for whom the building work was being done. This is probably not an uncommon scenario in building construction, where there are often self-employed sub-contractors who have incorporated their businesses, and then sub-contract to other bigger construction companies.

Deputy President Judge Rossi referred back to an old decision of *Warrior v WorkCover* where Justice Lander noted the relevant legislative term encompassed both formal and informal arrangements, and even arrangements where the terms of the arrangement had never been properly discussed. A liberal interpretation was to be applied. The Trial Judge at first instance had failed to properly evaluate the nature of the arrangement between the claimant and his own company (even though he in essence is both).

Deputy President Judge Crawley also noted that even if the claimant was not receiving remuneration at the time of carrying out the work there was still an expectation of receiving a benefit in the future, namely when a profit was made on the sale of the building being constructed. The claimant was held to be a worker within the extended meaning of the Regulations.

The matter has in fact been remitted back to another judge for further consideration of the evidence.

As always, if you'd like to seek any further advice on the issues that we have identified above, then please do not hesitate to contact us.

If you wish to undertake further reading in relation to any of the decisions discussed above, they can be found at www.austlii.edu.au.

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