MARCH 2022 CASES UPDATE

NEWS

Hello and a warm welcome to you all to 2022. As we say every year it seems, let's hope this is a good one and a return to somewhat of the normality we once knew!

Webinar

For those of you who joined us late last year for our webinar, or for those who couldn't join us on the day, you can now access a recording of the webinar on the KJK YouTube channel.

Welcome to Matilda Wise

We are pleased to let you know we've had a new Team Member join us this year. Matilda (aka Tilly) Wise started with us as a law clerk in January 2022. She will be admitted to practice in April 2022 and is looking forward to developing expertise in her particular interest area of employment relations law, helping out Neville John in that regard.

Save the Date – KJK Legal presenting their Learning Update in June 2022

At this stage we plan to conduct another learning update on 22 June 2022 (Save the Date!), and anticipate it being a mix of in person and webinar event. We expect that by then we will have an outcome to the SA State Election, and more importantly a feel for whether there are likely to be any significant changes in the State's workers compensation scheme –although the issue of workers compensation wasn't a 'political football' or point of policy contention between the parties in the run up to the election(which makes for a change). Perhaps the exception to this will be how the new government grapples with the ramifications of the *Summerfield* case. Watch this space!

SISA

While no doubt there'll be plenty said over the coming months about Robin Shaw's pending retirement from SISA, it would be remiss of us not to note Robin's tireless advocacy for the self-insurance industry, and his long and unwavering support for those like our small firm, who get out there and advocate on behalf of their clients, SISA

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Members and the industry at large. Robin has been a shining example of someone always prepared to support those who support others.

Recent Cases of Interest at the SAET

Cleland v Return to Work Corporation of South Australia (Streaky Bay Shearing) [2021] SAET 236

Topic: Compensability of illness
Commentator: Melanie Conroy

This case concerns the compensability of an unidentified illness resulting in a fatigue condition. A causal connection was established, and the worker's fatigue condition was held to be compensable.

Background

The worker claimed compensation for an injury he allegedly sustained in the course of his employment as a shearer. There was no dispute that he had suffered a medical condition. The issues in dispute related to the nature of the condition, the compensability of the condition and what entitlements may arise.

The worker reported he was shearing wet sheep with a cold wind blowing. He stated he was soaking wet with sweat as well as from rain on the sheep. He developed drenching sweats that night and awoke the next day feeling fatigued and feverish.

By 16 April 2020 the worker had recovered sufficiently to consider a return to work but found upon doing so he lacked energy and became easily fatigued. Following completing work on 17 April, he ceased work and has not returned to work since.

The worker initially claimed he suffered from Q fever or chronic fatigue. Following receipt of expert medical opinions, the claimed injury was expressed as being a bacterial or viral infection on or about 2 or 3 April 2020 with consequent post-infection fatigue.

The worker continues to suffer from disabling fatigue, labelled by Prof La Brooy as chronic fatigue syndrome and by Dr McLeay as post-viral fatigue. Both experts agreed the worker's fatigue was a result of his viral illness, which the SAET accepted. The experts also agreed that as a result of the fatigue condition the worker was incapacitated for work.

Given the agreeance on the nature of the condition and the worker's incapacity the principal issue in question was the causation of the viral illness.

The worker claimed employment had made a significant contribution to this illness, because his working conditions on Friday 3 April 2020 predisposed him to becoming unwell as a result of the virus.

RTWSA (the respondent) submitted the onus of proof on the applicant was not discharged when on the established facts it is equally possible that the work did or did not make a significant contribution to the illness. In the absence of direct evidence, the inference of a significant contribution needs to be more probable than not: *Vormelker v Local Government Association Workers Compensation Scheme (City of Adelaide) [2021] SAET 188.* RTWSA also submitted the evidence did not establish the work conditions to which the applicant was exposed contributed to him succumbing to a viral infection.

The SAET held this was a case where the medical evidence accepted a causal link was possible, but it was not proven, such as in *EMI (Australia) Limited v Bes [1970] 2 NSWR 238.*

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As such the fact the working conditions from a medical viewpoint may have contributed (as in *Bes*), coupled with the compelling temporal connection between the work and the onset of symptoms, led the SAET to be satisfied the work undertaken by the worker was a significant contributing cause of the viral illness he sustained, rather than a mere coincidental occurrence.

The SAET considered the medical evidence established the worker's subsequent fatigue condition was as a consequence of the viral illness and therefore must be considered to be part of the compensable injury.

Key takeaway

This case is a good reminder that illnesses and diseases can also be compensable injuries. The medical support for establishing a causal connection doesn't have to be strong to overwhelming, but if it is a likelihood, and contemporaneity is strong, then causation becomes more possible.

NDIKURIYO V DEPARTMENT FOR EDUCATION [2021] SAET 254

Topic: Compensability of CRPS

Commentator: Melanie Conroy

This case discusses why Complex Regional Pain Syndrome (CRPS) was determined to be a separate injury and produced a separate date of incapacity from the injury that created the series of events leading to the CRPS.

Background

The worker sustained an injury on 10 August 2017 when working as an SSO. The worker was assisting a student. The student, when moving a chair, caused it to strike the worker's left foot causing a soft tissue injury. This claim was accepted for medical expenses only.

The worker three years later in March 2020 made a claim for CRPS. The worker asserted the CRPS arose because of the original soft tissue injury to his left foot.

The Department rejected the claim for CRPS on the basis it was a new diagnosis which related to the initial injury and not a new injury.

Issue

The issue in dispute was whether the worker had developed CRPS following the chair incident in 2017, and if so, whether the CRPS was a separate injury with a new date of injury.

The worker asserted he sustained the CRPS because of his initial injury in 2017 and the CRPS was a separate injury which developed over time. Therefore, it was the workers position there should be a new date of injury either being when the CRPS was diagnosed by Dr Clothier in March 2020, or on 27 May 2020 when he reduced his hours of work due to CRPS.

In contrast, the Department asserted CRPS was an injury that could not be separated from the initial 2017 injury.

The various medical experts, namely Dr Clothier, Associate Professor Cherry, Dr Champion and Dr Suyapto all agreed by reference to the Budapest Criteria the worker had CRPS. The SAET commented that it is the Budapest criteria which is to be applied

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for the purpose of determining whether the worker has CRPS. The IAG criteria only have relevance when assessing permanent impairment.

The medical evidence suggested the worker developed his signs and symptoms of CRPS over several years, and the SAET noted several matters pointed to the worker's CRPS being an injury as separate from the initial injury in 2017.

Firstly, the Budapest Criteria is a clinical diagnosis criterion, where the collective signs and symptoms which are required to be identified for the diagnosis of CRPS fit within the definition of injury in the Act.

Secondly, Associate Professor Cherry and Drs Clothier and Champion said in evidence CRPS is a condition which develops over time, in this case between 10 August 2017 and 4 March 2020 when Dr Clothier gave the diagnosis of CRPS.

Thirdly, CRPS is accompanied by pathophysiological changes, and this was supported by Associate Professor Cherry.

Finally, the AMA guides and the IAG contemplate a WPI assessment for the injury of CRPS as separate from the initiating or inciting incident.

The SAET commented to characterize CRPS as only a label for evolved symptoms following an inciting event fails to reflect the pathophysiological changes over time which led to the signs and symptoms of CRPS.

The SAET found the initial soft tissue injury in 2017 initiated the CRPS but the CRPS was the product of a course of pathophysiological changes since then and as such was a separate injury from the 2017 injury.

Applying section 188 of the RTW Act the SAET held the date of injury was 27 May 2020 which is the date of first incapacity (when the CRPS was diagnosed by Dr Clothier).

The SAET did not make any consequential orders, but implicitly a new injury date would give rise to new entitlements. It will be interesting to see if this aspect of the judgment comes under challenge by way of an appeal. Of course, given the nature of CRPS, it often leads to a WPI outcome of greater than 30% and 'serious injury status', making the issue of the 104-week entitlement period being somewhat moot.

Key Takeaway

This case is an example of a gradual onset injury and how a CRPS claim may be viewed. The SAET found the original injury initiated the CRPS, but as the CRPS is the product of a course of pathophysiological change since then it was deemed to be a separate injury. When assessing CRPS claims if lodged as a secondary injury an assessment of there will need to be an assessment of when the worker's incapacity arose, or when a diagnosis was made, as this is likely to be the relevant date of injury.

MARTINO V RTW CORPORATION OF SOUTH AUSTRALIA [2022] SAET 1

Topic: Evidence

Commentator: Melanie Conroy

This case considered an application to rely on medical evidence at trial that was not sought to be relied on until after the hearing commenced. Due to an unexpected change in evidence of a key medical witness, namely Dr Suyapto, the worker applied to call another medical expert who had a similar view.

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Background

The worker asserted he was entitled to lump sum compensation based on 6% WPI due to an injury to his lower back sustained in September 2015.

RTWSA contended the worker's degree of WPI should be reduced to take account of an earlier injury to his lower back sustained in 2004.

Issue

In this regard the SAET needed to make a finding of fact in relation to which level of the lumbar spine was injured in 2004.

The worker contended the two injuries to his lower back were different levels of the lumbar spine and opposed a deduction being made for the prior impairment. In this regard the worker relied on the evidence of Dr Suyapto and contended the 6% WPI as assessed by Dr Suyapto should be confirmed as there was no deduction for prior impairment.

When giving evidence Dr Suyapto changed his view in evidence. In cross examination he agreed with RTWSA that the 2004 injury and the 2015 injury were both to the L5/S1 level of the lumbar spine. At this point in time the worker sought to change position and submitted the PIA had miscarried and an IMA should perform a fresh PIA assessment.

The medical evidence of Dr Osti contained in a medical report suggested the 2015 injury was to the L4/5 level of the lumbar spine.

The worker prior to trial did not indicate he intended to rely upon the evidence of Dr Osti when trial orders were made. The worker didn't indicate he wanted to rely upon the evidence of Dr Osti until the hearing was in progress. The evidence of Dr Osti may have assisted the worker's case as to if the 2004 and 2015 injuries were to the same level of the lumbar spine.

The SAET refused the worker's request to rely on the evidence of Dr Osti. The SAET commented that it is not uncommon in adversarial litigation for a change in the evidence of a key witness to have serious consequences for the party that relies on the evidence. In addition to this the SAET noted the permanent impairment assessment process under the Act relies upon one assessment, made by an assessor chosen by the worker, which is not intended to be challenged by other assessments unless some error of approach or in the application of assessment methodology is present.

The SAET held the likely further delay would protract the hearing and impinge on other litigants and as such the request to rely on Dr Osti's evidence was refused.

Key Takeaway

The lesson here is to ensure all your applicable and supportive evidence is put before the SAET before the start of your case. Trying to fix things part way through a trial may not be allowed. It is easier to effectively no longer rely on an expert's evidence at trial, than it is to try to bring in new evidence or witnesses during the trial.

YARD V WOMEN'S & CHILDREN'S HEALTH NETWORK [2021] SAET 223

Topic: Period of Incapacity

Commentator: Suzana Jovanovic

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Background

The worker was employed as a Clinical Nurse in the Women's and Children's Hospital's paediatric unit. In March 2018, complaints of misconduct were made against the worker that she had behaved inappropriately by raising her voice and being argumentative and aggressive towards other fellow nurses.

A disciplinary process was put in place by the Hospital, which included suspension of the worker from employment for a period, placement on alternative duties, a finding of misconduct and a written warning. This process took approximately 5 months.

On 5 September 2018, the worker was advised by the Hospital of a decision to relocate her from the paediatric unit to the special care baby unit.

The worker did not accept the relocation and has not returned to work since.

On 10 September 2018, the worker lodged a claim for psychological injury sustained in March 2018 arising from the initial accusations, ongoing investigation, feeling isolated, unsupported, mistreated and loss of her professional reputation. The claim was initially rejected by the Hospital. However, after pursuing an Application for Review at the Tribunal, the claim was later accepted as compensable.

In December 2020, the worker lodged a further claim by asserting she sustained a new injury by way of aggravation on 5 September 2018.

Issue

The issue before the Tribunal was whether the worker's psychiatric injury gave rise to an incapacity in March 2018 and continued, or whether the worker sustained a new injury by way of aggravation on 5 September 2018 which would give rise to a new date of incapacity and a new period of workers compensation entitlements.

The worker's position was she had a partial incapacity for work up to 5 September 2018, after which she became totally incapacitated because of the aggravation. The respondent argued the worker's incapacity commenced in March 2018, and continued.

Held

It was held the worker sustained a psychiatric injury in March 2018, and that her psychiatric reaction to the events which followed the complaint made about her and the disciplinary process was a continuous process, and which led to the decision to relocate her to a different site. The relocation was part of the continuing process, as it was not separate from what had occurred since March 2018.

The Trial Judge also highlighted it would be difficult for the worker to prove the decision to relocate her to a different worksite was not reasonable action taken in a reasonable manner by the Hospital, or it was not reasonable action taken in a reasonable manner in connection with the worker's employment.

Further Issue

After completion of the hearing, the worker sought an order to re-open her case to tender further evidence. The worker's Application for Directions was refused as the Trial Judge was of the view the documents did not advance her case in any material way, and the justice of the case did not require the worker's case to be re-opened.

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Baker v RTWSA [2021] SAET 244

Topic: Waiver of time limit to claim surgical treatment expenses

Commentator: Suzana Jovanovic

Background

The worker sustained a compensable right shoulder injury in January 2019. She underwent right shoulder surgery in February 2019. However, due to ongoing symptoms of pain, stiffness and restricted range of movement, the worker underwent a second operation in September that year.

The worker's treating surgeon advised the worker might require further surgery or shoulder replacement, but this should be deferred as long as possible until her pain became unbearable.

In March 2021, the worker's treating surgeon estimated the worker had a 10 to 15% chance of needing rotator cuff surgery in the next 5 years.

Issue

The issue before the Tribunal was whether the time limitations imposed by section 33(20) should be waived to allow the worker to claim surgical treatment expenses at a later stage.

Held

The Trial judge found it was reasonable and appropriate for the time limit in section 33(20) to be waived to allow the worker to claim future arthroscopic rotator cuff repair surgery.

According to the Trial judge, the only test the worker needed to satisfy was that the extension of time was reasonable and appropriate. There was no requirement to prove the future surgery was probable as well.

It is important to note the relevant provision is not designed to give administrative certainty or actuarial simplicity to a Compensating Authority but rather is designed to provide certainty to injured worker about their future compensation rights to medical expenses. Decisions of the SAET will continue to reflect that reality.

Cardinelli v Local Government Association Workers Compensation Scheme [2021] SAET 239

Topic: Pre-approval of surgery

Commentator: Suzana Jovanovic

Background

The worker sustained a compensable right hip injury on 14 May 2019 whilst exiting a water truck in the course of his employment.

The worker underwent arthroscopic surgery in September 2019, but his recovery was not as expected. Whilst the worker had temporary improvement following a steroid injection, he continued to have symptoms, and ultimately his treating surgeon recommended further arthroscopic surgery.

The worker's request for pre-approval of the surgery and the costs thereof pursuant to section 33(17) was rejected by the Compensating Authority.

Issue

The issue before the Tribunal was whether the recommended arthroscopic surgery should be pre-approved as provided by section 33(17) of the Act, and where it was more diagnostic in nature than potentially curative.

Held

There was conflicting medical evidence which is summarized as follows:

- Dr Eriksen was of the view the worker had an abnormal pain response, arthroscopy was not indicated, and any surgical procedure is likely to increase rather than improve the worker's right hip pain. However, Dr Eriksen's opinion was not given much weight because his report was produced "on the papers" without him examining the worker.

- Associate Professor Clayer examined the worker and formed the view the worker was manifesting abnormal illness behaviour. However, given Associate Professor Clayer accepted the worker's groin pain and catching in the hip was consistent with pathology in the hip joint, and that the temporary improvement following the steroid injection was also consistent, his opinion was also given little weight.

- The worker's treating surgeon, Assoc Prof Rickman, provided evidence which the Trial judge found to be strongly persuasive. The treating surgeon explained the worker's symptoms had not changed and, if anything, were getting worse.

  According to the treating surgeon, part of the procedure would be a diagnostic procedure to ascertain what the problem was, but also to hopefully address any identified pathology. He disagreed that the worker's symptoms would likely worsen. Whilst he accepted the risks in performing a further arthroscopy, he was of the view this was the only option left given all other options had been exhausted.

  It was accepted that even if the arthroscopic surgery was only for diagnostic purposes, that would still satisfy the section 33(17) requirements.

  Considering the strongly persuasive evidence by the worker's treating surgeon, it was found the costs of the proposed surgery are reasonably incurred by the worker in consequence of his compensable work injury.

DERJAHA V RTW CORPORATION OF SOUTH AUSTRALIA [2021] SAET 233

Topic: Whole Person Impairment Assessment and combination of injuries

Commentator: Neville John

This case examined whether impairments to both shoulders should be combined. Ultimately the SAET was satisfied the impairments were so connected that they arose from the same cause and as such the impairments were combined.

The case also examined the topic of scarring, and whether a deduction for previous scarring was required. The SAET held the scarring impairments arose from different injuries or causes and should be assessed separately. Therefore, no deduction was required.

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Background

The worker was employed by Woolworths as a store person at Big W Monarto Distribution Centre. He had accepted compensable claims for his right and left shoulders. As these claims were under the old Act, his Section 43 entitlements were paid and assessed based on 6% WPI.

The worker suffered a further injury to his left and right shoulders (the second shoulder injuries) in 2020 when employed as a Truck Driver. Both injuries were accepted as compensable.

The worker's lump sum compensation pursuant to sections 56 and 58 of the RTW Act for the left shoulder injury (including scarring) was determined at 3% WPI. His whole person impairment resulting from the right shoulder injury (including scarring) was also determined at 3%. The impairment assessments were not combined. Neither assessment individually met the 5% minimum WPI threshold, and his claim was rejected.

The worker challenged the decision, and the matter of the worker's permanent impairment was referred by the SAET to an IMA, Dr Bastian. He provided increased assessments of 4% for each shoulder following on from the 2020 injuries, and an additional 1% for scarring.

The worker submitted his permanent impairment assessments should involve a combining of the impairments for the second left shoulder injury, the second right shoulder injury, and the two scarring assessments in relation to surgery, under the authorities of *Return to Work Corporation South Australia v Preedy, Return to Work Corporation South Australia v Summerfield* and *Gooch v Return to Work Corporation South Australia.*

In relation to the scarring, the worker submitted the scarring from the first left and right shoulder injuries were unrelated to the currently claimed shoulder injuries, and as such, the impairments resulting from them should be ignored (*Gooch).*

RTWSA contended there can be no combination of impairments on the basis the second left shoulder injury and the second right shoulder injury were plainly separate and distinct injuries under the authorities of *Marrone v Return to Work Corporation*; *Zaidi v Return to Work Corporation of South Australia (No. 2)*, and *Donovan v SA Ambulance Service.*

In relation to the scarring, RTWSA submitted the previously assessed scarring in relation to the first shoulder injuries should be deducted.

The SAET was satisfied the impairments arising from the second left and right shoulder injuries were so connected that they can be said to have arisen from the same cause. In arriving at this decision, the SAET considered it was significant the worker was able to continue working for a decade after his original injuries. It was only following a specific incident causing the second left shoulder injury that symptoms developed in the right shoulder a relatively short time thereafter.

In relation to the scarring the SAET found Dr Bastian was permitted to disregard the impairments from the surgical scarring following the first right and left shoulder injuries as being from unrelated injuries or causes. Hence the impairments from the surgical scarring for the second right and left shoulder injuries should be assessed without regard to the pre-existing scarring. By assessing the scarring impairment solely in terms of the scarring from the second surgeries, the directive in s22(8)(g) is not engaged.

The SAET also recognised that the sum effect of all the worker's scarring was still only 1% WPI yet gave the worker additional compensation anyway – suggesting there was a 'lacuna' in the legislation in this regard.

The SAET held the worker was entitled to have his impairments for the second right and left shoulder injuries combined for the latter injuries, together with the additional 1% for scarring.

STRAWBRIDGE V RTWSA [2021] SAET 243

Topic: Hearing loss claims – Frequencies

Commentator: Tracey Kerrigan

There have been some more recent cases on various aspects of hearing loss claims which may be of interest to readers and especially those of you dealing with what seems like a never-ending stream of such claims.

In Strawbridge, Aux Judge Clayton considered 2 determinations which dealt with the interaction between the State and Commonwealth schemes. That is probably not of great relevance to most claims managers, but what is useful in the decision is the commentary/findings on the inclusion of losses at the lower frequencies when the worker's PIA was assessed.

Judge Clayton was asked to determine whether losses at 1000 and 1500 hertz should be included in the assessment. Dr Hains and Dr Gristwood did not include those losses, but Dr Baxter included the loss at 1500 hertz in his assessment.

Dr Hains gave evidence the loss at 1500 hertz should be included, as it is not affected by noise exposure unless a worker is exposed to continuous noise rather than intermittent noise. Dr Baxter under cross-examination agreed with that statement and also conceded, on the facts of the case, the worker had only been exposed to intermittent noise from the mid-90s. So, there wasn't evidence of continuous exposure.

Judge Clayton found only the losses between 2000 and 4000 hertz should be taken into account.

He also accepted there was insufficient evidence of a progression in the worker's hearing loss between November 2007 and October 2008. At that time, the employer was under the Commonwealth scheme and therefore the Judge upheld the rejection of the claim. The worker had previously had a claim prior to 2007, and received lump sum compensation under the State Scheme.

MURDOCH V RTWSA [2021] SAET 248

Topic: Hearing loss claims – Prior redemption

Commentator: Tracey Kerrigan

In this case the worker sought payment of hearing aids and a lump sum for permanent impairment. In August 2016 the worker accepted a redemption of medical expenses and income maintenance. The Redemption Agreement referred to "any other injury arising from employment". There was no reference to hearing loss as being one of the injuries that was either expressly or implicitly included in the Redemption Agreement.

The evidence indicated the worker was aware of hearing issues for at least 10 years, and so prior to the execution of the Redemption Agreement.

Deputy President Judge Crawley found the worker was estopped from pursuing a claim for hearing aids. The worker's solicitor referred the Judge to *Stephenson* and argued the worker was not estopped from pursuing a claim for hearing aids. However, the Trial Judge found the terms of the agreement were clear and made in circumstances where

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the respondent was seeking to finalise its liabilities for all injuries suffered, and hearing loss was such an injury and had already been sustained.

The worker was still able to pursue a lump sum for permanent impairment. Deputy President Judge Crawley also commented on the methodology adopted by Dr Corlette, who only relied upon his audiogram taken on the day of the assessment. He found the doctor should have regard to **all** relevant audiological tests, and if he had done so he would have been satisfied the assessment was not accurate. Accordingly, Deputy President Judge Crawley found that the PIA assessment could not be relied upon.

Watch this space – We would be very surprised if this decision was not appealed, given the reliance upon the redemption agreement as an estoppel. This is particularly relevant to self-insurers who have in the past often settled claims with an "all injuries discharge" and are then faced with a claim for hearing loss sometimes many years after the settlement is achieved. Much may depend on the evidence as to when the worker first became aware of their hearing loss.

This may require a compensating authority to, if necessary, seek records from the audiology providers who have reviewed the worker over time.

MACRAE V RTWSA [2022] SAET 15

Topic: Hearing loss – Audiograms

Commentator: Tracey Kerrigan

This case is of importance because of the comments of President Justice Dolphin about the use of and reliance upon serial audiometry, particularly where the conditions under which those audiograms are taken. This can be important where an employer has a hearing monitoring program in place, and over time employees are sent to have their hearing tested.

The main issue was whether the worker was suffering hearing loss due to exposure to noise or as a result of a congenital condition of otosclerosis (abnormal bone growth in the middle ear).

One of the issues that arose during the hearing was the reliability of audiograms undertaken in 2010 (pre-employment), 2016 and 2018. President Dolphin noted that Regulation 67 of the RTW Regulations 2015 is prescriptive in terms of how NIHL is to be established. It requires **both** an audiometric test as well as an examination by an ENT specialist.

The worker argued the audiograms had to be disregarded, because there was no evidence that they complied with the Regulations It does not appear any evidence about the circumstances of the audiograms, and whether they did comply, was led (or who knows, even could be led). The Trial Judge was critical of that. He was also critical of the fact RTWSA was relying upon Dr Hains opinion, when he had not physically examined the worker, but undertaken a review "on the papers".

Ultimately, he preferred the views of the 2 ENT specialists who had examined the worker, and found he had suffered hearing loss due to noise.

Key Takeaway

Lessons to learn from this case is that physical examination by an ENT specialist is always preferable, and any attempt to determine a claim simply based on an opinion without

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one, or without later obtaining back-up evidence including a medical review, may well be doomed to fail.

Furthermore, reliance upon serial audiograms, particularly if arguing that no exposure has occurred or no deterioration has occurred, will likely also fail unless there is evidence/confirmation that the audiogram/s comply with the regulations. That may require more information to be obtained if possible before using such audiograms as evidence, including who conducted the assessments, their qualifications, when, where and in what circumstances the assessments occurred.

ROBERTS V DEPARTMENT FOR EDUCATION [2021] SAET 255

Topic: Aspects of Section 18 of the Return to Work Act

Commentator: Mark Keam

This case is well known, having been the subject of an initial decision made by Deputy President Judge Crawley to not order the Department for Education ("the Department") to provide suitable employment to Ms Roberts, as she had previously requested.

Ms Roberts appealed against Deputy President Judge Crawley's decision. She was unsuccessful. In saying that, the Full Bench of the SAET did take the opportunity to clarify some of the issues addressed previously at trial and served to either confirm or change some of the matters previously adjudicated upon.

Distilling the Full Bench's decision on the multiple issues raised on appeal by the worker, can be summarised as follows:

1. It is a prerequisite for the initiating of a Section 18 Application that the worker be at least partially incapacitated for work, **but** if they are no longer incapacitated for work by the time a matter is adjudicated upon at trial then the Tribunal has no jurisdiction to make any order under Section 18 in favour of the worker;

2. The Full Bench acknowledged it is still possible to use the machinations of Section 18 to effectively achieve a promotion in employment by identifying a role as being suitable, even though otherwise it might have involved a merit-based selection process;

3. With specific reference to the public sector, and while acknowledging there are generally only a limited number of exemptions to the requirement that roles be filled through a merit based selection process, the Full Bench effectively said that the Act overrode the relevant provisions of the Public Sector Act and created an exception to the merit based promotion rule – this was an aspect of the matter the worker succeeded in, but without a positive outcome (given the Appeal was effectively decided on the first point raised above);

4. In terms again of the public sector, and the question of who is an 'employer' for the purposes of a Section 18 Application, the Full Bench confirmed it is the actual Department to whom an Application should be made, and there is no ability for an injured worker to seek to impose an obligation upon the broader public sector to provide suitable employment;

5. The Full Bench emphasised that in dealing with the question of whether or not an employer should be required to provide suitable employment to an injured worker, the matter necessarily involves looking at the workplace as a whole. In other

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words, the provision of suitable employment and its potential impact needs to be considered from a number of perspectives and not just of the worker themselves, but also in relation to their co-workers (e.g. maintaining industrial harmony) and of the employer who has to manage the workplace;

6. The Full Bench noted an employee who nominates a form of suitable employment that they have not in fact undertaken previously may well be very relevant factor in deciding whether to require an employer to provide that employment;

7. A litigant cannot complain if they raise an issue but don't lead enough evidence to substantiate that issue, and then finds the Trial Judge rules they are not persuaded by that part of the case at the end of the day. The Full Bench confirmed that a Trial Judge is not obliged to identify a weakness in any party's case, and in effect if you raise an issue, you must lead sufficient evidence to prove it or be at your peril if you don't.

For employers, the Full Bench's decision confirms Section 18 is not a free for all for injured workers in either attempting to secure themselves ongoing employment, or protection of their employment status, when they are no longer incapacitated for work. There must also be a reality about the type of employment being nominated as suitable, and as to the effect on the overall workplace of a worker seeking to re-enter that workplace under the cover of a Section 18 Application, where they are either not particularly experienced in the role identified, or there might be ramifications for industrial harmony within the workplace.

If nothing else, the case serves to identify that a properly prepared employer, who is cognisant of all the various issues that can arise under a Section 18 Application, stands a reasonable opportunity of defending such an Application.

Recent Cases of Interest at the SUPREME COURT

Paschalis v Return to Work Corporation of South Australia & Anor [2021] SASCFC 44

Topic: Serious Injury application and construction of section of subsections 22(8)(b) and 22(8)(g) of the Act

Commentator: Melanie Conroy

This case was an appeal to the Supreme Court against the finding of the Full Bench of the SAET (the Full Bench) that the worker had a whole person impairment (WPI) of 15 per cent, disentitling him to compensation as seriously injured worker under section 21 (2) of the Return to Work Act 2014.

Background

The worker sustained a psychiatric injury after a workplace incident on 7 August 2017. The worker asserted he was left humiliated after a practical joke was played on him. In the incident, the industrial painter discovered a co-worker had graffitied male genitals and a heart symbol on his hard hat.

The worker noticed his colleagues laughing at him after he had been wearing his hat for about an hour. The worker was "pissed off, shattered, angry and humiliated". He reported the incident to a supervisor and did not return to work after the event.

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The worker's doctor noted how distressed he was after the incident and diagnosed him with an "acute adjustment disorder with [an] anxious and depressed mood that is significantly exacerbated by his very prominent angry ruminations".

Expert evidence was also obtained from a psychiatrist, who described the worker's injury as a major depressive disorder with psychotic features.

The SAET accepted the expert evidence and held the breakdown of the worker's marriage was substantially contributed to by the work-related injury which also led to the subsequent breakdown of his relationship with his children.

The worker subsequently sought to be treated as a seriously injured worker. Dr Begg assessed the worker as having a WPI of 35 per cent, which was reduced to 15 per cent on account of a pre-existing impairment not related to the work injury. The deduction was made on the basis despite there not being a diagnosis for the pre-existing condition.

The Trial Judge found that the 20 per cent WPI deduction was erroneous and substituted back to the WPI of 35 per cent.

The employer appealed this decision to the Full Bench which concluded that the Trial Judge erred and restored the deduction resulting in a 15 per cent WPI.

The worker then appealed the finding to the Supreme Court on the basis the Full Bench:

- exceeded jurisdiction
- erred in adopting the 20 per cent deduction, and
- misconstrued section 28(8)(b) and section 22(8)(g) of the Act.

The appeal was dismissed by the majority, with Kourakis CJ dissenting.

It was held by the Supreme Court that the Full Bench did not substitute or make a finding of fact contrary to that of the Trial Judge. Rather, it identified an error of law in the Trial Judge's approach to the evidence.

As such it was permissible to have regard to the Act, and the Impairment Assessment Guidelines (IAG's) to ascertain the nature of the section 22 scheme, particularly where they establish an interdependent regime.

The Court stated a construction of the Act that permits compensation for injuries or impairments arising from injuries or causes which have no relevant connection to a compensable injury is inconsistent with the objects and the scheme of the Act as a whole.

Sections 22(8)(b) and (g) express the same legislative intention: only impairment attributable to the relevant work injury will be assessed for compensation. The difference between the provisions is that section 22(8)(b) is limited in application to injuries or causes that are "unrelated" to the relevant work injury, whereas section 22(8)(g) may apply even where previous injuries are related to the relevant work injury in some way. The previous injury need not be a work injury and may arise "because of a pre-existing condition".

Where a pre-existing injury or cause leading to impairment is identified as affecting any assessment of a work injury impairment, the assessor **must** recognise the impairment flowing from that pre-existing cause or injury, evaluate it, and deduct it from the work injury assessment.

The Court noted the IAG's provide for a two-stage approach to the assessment of WPI, whereby:

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- the assessor must first assess the worker's WPI taking into account both the relevant work injury and any unrelated or previous injury; and
- then deduct the degree of impairment attributable to any unrelated or previous injury, if present.

The Court held the Full Bench was correct to find that a condition that does not amount to a diagnosed psychiatric illness might still amount to an unrelated cause of impairment for the purposes of s 22(8)(b). The assessor when undertaking the PIA assessment must do the best they can, on the evidence that is at hand, because the Act mandates it.

The appeal was dismissed by the majority and in doing so upheld the 20 per cent deduction.

Key takeaway

This highlights that whilst it can be difficult to quantify the degree of permanent impairment of an unrelated injury or cause in accordance with the Guidelines and AMA5, it does not relieve the assessor or the Tribunal from undertaking the task of limiting the assessment of the degree of permanent impairment suffered as a result of the compensable injury to that compensable injury and nothing else.

When undertaking a PIA assessment, it is sufficient for an assessor to assess a worker's WPI in accordance with the Act, the Guidelines and AMA-5 and, as part of that assessment, make an appropriate allowance for any pre-existing impairment.

RETURN TO WORK (SA) V OPIE & ANOR [2022] SASCA 12

Topic: Outcome of appeal – Assessment of permanent impairment and pre-existing injuries under section 22(8)(b) and section 22(8)(g) of the RTW Act

Commentator: Melanie Conroy

This case concerns an appeal to the Supreme Court on the interpretation and how to apply section 22(8)(b) and section 22(8)(g) of the RTW Act.

Background

The worker had a pre-existing WPI of 15% as a result of a lower back injury in 1992 which was paid under the former WR&C Act. The worker then suffered a further lower back injury in 2014. The worker was assessed as having 28% WPI, before a deduction was made of 21% for pre-existing WPI.

The worker's entitlement to non-economic loss by way of a WPI was disputed, with the SAET and RTWSA having a differing view on how sections 22(8)(b) and section 22(8)(g) are to be applied.

The trial judge was satisfied the earlier spinal fusion in 1992 left the worker with a degree of pre-existing permanent impairment which section 22(8)(g) mandated be assessed then deducted in accordance with the Impairment Assessment Guidelines (IAG's).

On appeal the Full Bench of the SAET held that section 22(8)(b) represented an alternative to section 22(8)(g), which must be preferred under Chapter 1.38 of the IAG's to ensure the assessment of a higher degree of permanent impairment.

RTWSA were granted permission to appeal to the Supreme Court. It was RTWSA's position the Full Bench erred in law by:

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1. Finding that section 22(8)(b) of the RTW Act can be applied to the exclusion of section 22(8)(g) of the RTW Act if that results in the highest degree of permanent impairment, on the basis that chapter 1.38 of the IAG's sanctions this; and

2. Failing to apply section 22(8)(g) of the RTW Act where a portion of an impairment is due to a pre-existing injury that caused the worker to suffer an impairment before the work injury (although in this case to a separate area of the lumbar spine).

Central to the decision of the Full Bench is the proposition that each of section 22(8)(b) and section 22(8)(g) of the RTWA Act are, in the circumstances of this case, 'equally valid and applicable' methods of assessment and that the method that results in the highest degree of permanent impairment must be used.

Appeal

The Court of Appeal found the principle that requires the use of the method that results in the highest degree of permanent impairment is not a principle of general application. This principle only operates when the Guidelines and AMA 5 specify more than one equally valid, applicable method to establish the degree of permanent impairment.

The Court discussed there were two ways in which the worker's permanent impairment from 2014 could be assessed.

1. Assessing the WPI of the lumbar spine having regard to the double level fusion to the lumbar spine. This method of assessment incorporated the pre-existing WPI because of the fusion and as such section 22(8)(g) would apply.

2. The impairment from the fusion at the L4-L5 would not be regarded as being an impairment from an unrelated injury or cause and section 22(8)(b) would not apply. i.e. the pre-existing 20% WPI was to be disregarded because it was an impairment arising from an unrelated injury or cause. On this method section 22(8)(g) would not apply, with the result being that no deduction for the worker's pre-existing impairment is made.

In assessing the worker's permanent impairment to the lumbar spine, the Court commented neither the Guidelines nor AMA5 specified more than one applicable method. The DRE method needed to be followed and in the circumstances of this case chapter 1.38 of the IAG's was not engaged. Therefore, the Full Bench had made an error of law in applying the principle embodied in chapter 1.38, which requires the selection of the highest degree of permanent impairment where there is more than one equally valid applicable method of establishing permanent impairment.

Following the decision in *Paschalis*, the Full Court commented the Act is only intended to compensate work injuries and impairments caused by work injuries. When read together sections 22(8)(b) and 22(8)(g) express the same legislative intention, that only a work injury or an impairment that is attributable to a work injury is to be assessed and compensated. Therefore, impairments from unrelated injuries or causes are to be disregarded (section 22(8)(b)) or where there is a portion of an impairment due to a previous injury it is to be deducted (section 22(8)(g)) to ensure a worker is not compensated for impairments which are not caused by work injuries.

The circumstance of a particular case may require impairments from unrelated injuries or causes be disregarded in the sense of being deducted or subtracted under section 22(8)(b). This will depend on the nature of the impairment caused by the work-related injury and the connection between any impairment caused by an unrelated injury or cause.

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Based on this explanation the Court of Appeal held the Full Bench erred in finding section 22(8)(b) represented an alternative to section 22(8)(g) as there was no scope to choose between them.

The transitional provisions were also discussed because the monetary sum the worker would be entitled to due to the non-economic loss depended upon whether the 2010 Regulations or the 2015 Act applied, which was dependent on the worker's date of injury (1 January 2014). This injury was classed as an existing injury for the purposes of the Act, as it occurred before the designated date, being the date, the Act came into effect.

The Court held the worker's entitlement to compensation by way of non-economic loss was to be determined by reference to the Transitional Regulations, the 2010 Regulations and not the 2015 Regulations. The clear effect of regulation 5(2) of the Transitional Regulations was to preserve the approach to compensation which applied under the former WR&C (1986) Act and the 2010 regulations.

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, they can be found at www.austlii.edu.au.

Mark Keam - Editor

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