2019 SUMMER TRIBUNAL CASES UPDATE

INTRODUCTION

Welcome to 2019 and with a new year comes a fresh start.

We are introducing some changes to our regular cases update series, which we trust will continue to add value to the time you spend considering the issues that arise in the workers compensation jurisdiction, in particular.

As well as providing for the cases update to also cover matters of general interest in the employment field, our analysis of the cases handed down by the South Australian Employment Tribunal (SAET) with respect to the *Return to Work Act* (the Act) will also feature a "deep dive" into several of the cases, where an in-depth analysis is warranted.

We are always looking for feedback in relation to our service, including our publications, and look forward to your comments on the new format.

In 2018 the SAET handed down 225 decisions. That number is already approaching 30 in 2019, and with a reputed 400 plus cases currently listed for trial, it stands to reason that we are in for another very busy and litigious year at the SAET.

NEWSWORTHY MATTERS

ReturntoWorkSA announces changes to the end of year premium process.

Effective from the 2019-20 premium period ReturnToWorkSA (RTWSA) will be implementing some changes to the way in which a registered employer's premium will be calculated. As part of the consultation phase RTWSA provided the opportunity for all premium paying employers to provide feedback on the end of year process.

Based on the feedback provided the changes which are coming into effect are:

- providing more time for employers to give RTWSA remuneration information (up to 10 weeks instead of 3-4 weeks);
- allowing all employers to choose whether to pay their premium in 9 monthly instalments or one annual payment;
- employers will be able to choose whether their premium will be calculated based on actual remuneration for the previous year or based on estimated remuneration.

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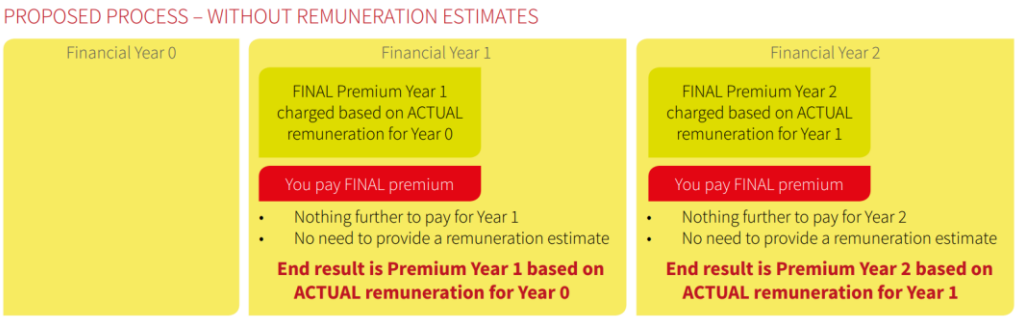
The outcome of feedback from the majority of employers was they are in favour of eliminating remuneration estimates, which means less information needs to be provided to RTWSA, and employers will not receive a premium adjustment at the end of the year. However, some employers did not support this change, so employers will be provided with choice to have their premium calculated under the new method of actual remuneration or based on estimated remuneration. Employers will be able to choose which method they'd like to use each year depending on their business needs.



Further information on the changes to the premium process and the consultation feedback can be found here.

Review of the model WHS laws

Safe Work Australia has released a report that it commissioned from former SafeWork SA Executive Director, Marie Boland.

The report contains 34 recommended changes to the Act and Regulations.

Some of the major recommendations and perhaps potentially controversial include:

1. Allowing Union right of entry to a workplace without an entry permit.
2. Removal of the 24-hour notice period for entry permit holders.
3. Substituting referral of health and safety disputes or issues to the relevant Court or Tribunal in a jurisdiction rather than to an Inspector.
4. A review of incident notification provisions such that they provide notification for psychological injuries.
5. An increase in penalty levels.
6. Expand Category 1 offences to include gross negligence.
7. Provide for a new offence of industrial manslaughter.
8. Develop sentencing Guidelines to provide consistency in an approach to sentencing of prosecuted matters.
9. Prohibit insurance for WHS fines.

The recommendations are just that, and if or when any or all of them are instigated, remains to be seen. We can expect some lively debate around some more controversial recommendations though. We will provide an update in the event discussions start progressing towards proposed legislation.

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RECENT CASES OF INTEREST AT THE SAET

OLIVER [2018] SAET 151

During the pre-trial process, the compensating authority made an application to the SAET for the lifting of a previous order the SAET had made pursuant to section 48(9) of the Act, on the basis the worker's continued behaviour was frustrating efforts to progress the management of his case. The worker was suspected of deliberately avoiding attending a functional capacity evaluation assessment.

The fact of the arranging of a functional capacity evaluation was not directly connected to the circumstances of the matter in dispute, but nonetheless the SAET felt that broader considerations could be looked at when assessing whether to continue the operation of a suspension order in relation to weekly payments. In other words, it can be by virtue of a worker's later actions or inactions that consideration can be given to lifting any suspension order. The SAET also noted that because of the very broad discretion given to decisionmakers in this area, there was nothing to stop orders being made on a conditional basis, i.e. as long as a worker is compliant with what is being asked of them in the future, then a suspension order will continue. Effectively, the SAET was prepared to use its powers as a stick to be used subject to a worker's immediate and ongoing compliance with any reasonable expectations or obligations placed on him or her.

GIAMEOS [2018] SAET 152

The worker was approaching the end of his entitlement period for medical expenses. Shortly prior to the time period expiring he sought approval to undergo a physiotherapy program. The extent of the physiotherapy program meant treatment would have continued past the end of the entitlement period if that treatment was approved. The issue became one of whether the worker could enforce pre-approval of a physiotherapy program in such circumstances. The SAET found that this was not possible, and that it remains the case that pre-approval for medical treatment can only cover medical treatment that would occur within the entitlement period.

The SAET also emphasised that in the case of the late lodgement of section 33(17) pre-approval requests, the worker will always be in danger of "missing out", where a decision is not simply able to be made within a short period of time, and actions such as seeking the intervention of the Tribunal, by way of an Application for Expedited Decision, will not assist either. It is to be noted the matter is on appeal.

MARRA [2018] SAET 163

The worker was assessed by a psychiatrist with a view to providing an informal opinion under the GEPIC provisions as to whether the worker might reach the 30% threshold, and if this was likely then he sought an interim seriously injured worker determination.

The informal assessment came back with an outcome that suggested the worker would, in due course, be likely to have a whole person impairment of more than 30%. Notwithstanding this, and for reasons not wholly clear from the SAET's decision, the compensating authority declined to make an interim assessment that the worker was seriously injured.

The worker challenged the decision not to grant him seriously injured status on an interim basis, and furthermore sought to require the compensating authority to refer him back to the same psychiatrist for the purposes of having a formal assessment undertaken in accordance with the provisions of section 22 of the Act.

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The compensating authority declined to agree to that course of action, on the basis the psychiatrist concerned had already seen the worker outside of the section 22 assessment process, and therefore the Impairment Assessment Guidelines precluded a referral back.

The SAET confirmed a previous line of decisions to the effect it does not have the power to intervene in the issue of the choice of a permanent impairment assessor for section 22 purposes. The SAET pointed to the high degree of correspondence and interrelationship between section 22, the applicable Guidelines and the service standards applying to permanent impairment assessors. Once a medical practitioner has seen a worker previously, then there are almost no circumstances (short of the consent of the compensating authority), by which a worker can force a compensating authority to utilise that doctor for permanent impairment assessment purposes, and the SAET will basically decline to become involved in the process.

With a consistent line of authority in this regard, if decisionmakers are confronted with similar pushes by worker's representatives in the future, then there is probably a reasonable basis to put those solicitors on notice as to costs, in the event they try to press the issue through the SAET.

Treloar [2018] SAET 173

The worker sustained a foot injury. To alleviate the injury, he was advised to wear orthotics and "supportive shoes". With the approaching expiry of his medical expenses entitlement period, the worker sought to have the orthotics and supportive shoes provided to him on an ongoing basis by saying they were therapeutic appliances.

There was no argument that the provision of orthotics to the worker were necessary on an ongoing basis, and because of his injury, and that the orthotics were a therapeutic appliance. However, the worker had an underlying problem with his feet that meant he required supportive shoes irrespective of the fact of the work injury. On that basis, the SAET found that the worker could not recover the cost of the same moving forward. The SAET also found that it was not appropriate for the worker to endeavour to argue that the provision of the orthotics **and** supportive shoes together constituted the one therapeutic appliance.

Although the worker failed in having the cost of the supportive shoes covered as a therapeutic appliance in this case, the SAET did recognise that there are circumstances where supportive shoes would constitute a therapeutic appliance in other cases, particularly where it could be shown they constitute "*any other appliance or aid for reducing the extent of an injury …*". It was simply that in this case the worker failed in this regard on the facts, because of his pre-existing problems.

Van Hattem [2018] SAET 177

This is the first of our 'deep dives' into some of the more important decisions we are covering in this update.

The SAET was asked to examine whether employment was the significant contributing cause of a psychiatric injury sustained by Ms van Hattem. The SAET held employment was the significant contributing cause of injury, as it contributed more to the occurrence of the injury than any of the other causes. The case has attracted some notoriety because of the fact of the worker's quite extensive past non-work related psychiatric history.

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The facts:

Ms van Hattem was employed as a teacher at Morphett Vale East Primary School and suffered a psychotic episode in March 2017. She made a claim for compensation for adjustment disorder with depressed mood, asserting that violent and angry children had hurt her and others physically and mentally. She asserted that workplace stress had exacerbated a mental illness. The claim was rejected by DECD.

The worker had suffered previous psychiatric episodes in June 2013 in which she experienced hallucinations, and believed her children were exposed to incest by her husband. Her relationship with her husband was also under strain. In the past there was also a failed property deal in which they lost $750,000.

In general, through 2014 and 2015 the worker managed teaching reasonably well and did not have as many difficulties as she did in 2013. In mid to late 2016, her mental health began to decline. She reported the number of students in her class with complexities increased significantly in 2017. Such as one of her students, who had a history of sexual abuse, and another with autism spectrum disorder.

She admitted herself to the Margaret Tobin Centre in March 2017 and the focus of this admission was her husband's negativity, and she also expressed frequent religious themes.

Submissions

It was submitted by DECD that in order to be the significant contributing cause of psychiatric injury, employment had to contribute more than any other cause to the occurrence of the injury.

Counsel for Ms van Hattem submitted there was in effect only one cause of injury. Therefore, the words "significant contributing" which precede cause do not matter if there is only one cause of the psychiatric injury.

Held

Weighing up the medical evidence provided by Dr Nelson, AP Khalid and Dr Blakemore, Deputy President Calligeros preferred the evidence provided by Dr Blakemore. He found the injury sustained was an adjustment disorder with depressed mood, and this was essentially a different mental condition that was evident previously.

The SAET found the current injury arose out of employment in the sense that employment was at least partly responsible for the injury. Dr Nelson and Dr Blakemore considered employment to be the most significant cause of the injury. AP Khalid thought the employment, relationship difficulties, and discontinuing Risperidone were equally responsible for her injury.

DP Calligeros view was the word "contributing" suggests there can be multiple causes of injury in the case of both psychiatric and non-psychiatric injuries. This was because it appears in both section 7(2)(a) and (b).

For employment to be "the significant contributing cause" of a psychiatric injury, employment must have made a greater or more significant contribution to the occurrence of the injury than the contribution from any other contributing cause, as opposed to being, in sum total, more than the collective responsibility of the condition due to other causes.

The SAET found the contributing causes of the injury were employment, Ms van Hattem's relationship difficulties with her husband and the reduction and eventually

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cessation of Risperidone, with employment being the significant contributing cause, and greater in effect than either of the other causes.

The decision of the SAET is on appeal, but if it is upheld at the higher levels of the jurisdiction then decisionmakers will need to be aware the causation test for psychiatric injury is perhaps not as strict as was initially believed when the legislation was first enacted.

Kager [2018] SAET 181

This case is always a lesson in the importance of being across the provisions of the American Medical Association Guides and the Impairment Assessment Guidelines (the Guides and Guidelines) or ensuring that a thorough peer review process occurs.

The injured worker was being assessed for permanent impairment purposes, having sustained, amongst other things, injury in the nature of carpal tunnel syndrome. Based on the absence of particular findings required by the Guides and Guidelines, and in strict application of their provisions, it was found the worker had no assessable impairment. However, the permanent impairment examiner went on to note the worker had a reduced range of movement of her wrist, which he attributed to the carpal tunnel surgery. The worker sought to be compensated for this problem.

The SAET disallowed the worker's claim, finding the Guides and Guidelines "cover the field", such that examiners cannot go behind the strict criteria outlined for any particular impairment assessment, even if that might lead to notionally unjust results. In effect, and in the absence of any particularly ambiguous clauses with the Guides and Guidelines, the decision is an indication to permanent impairment assessors that they should not go looking for alternative explanations to arrive at some form of impairment assessment, where the correct application of the provisions to a diagnosed injury might result in a perceived unfair outcome.

Hodder and Menz [2018] SAET 192 and *Waters* [2018] SAET 194

The SAET has confirmed that despite a finding it had no jurisdiction to rule on an issue arising on a worker's Application, that did not mean there was no consequential jurisdiction to order costs. In making this decision, the SAET clarified what had been a matter which had not been firmly resolved under the prior legislation. The SAET found that lodging an Application meant it was a "proceeding" to which the cost provisions could therefore be applied, even if the Application itself did not invoke any jurisdiction. That is not to say a worker, in lodging an Application which is patently going to fall outside of the SAET's jurisdiction, concerned cannot be put on notice as to a possible adverse costs order, as the ordinary costs rules will apply to whatever the outcome is.

Topsfield [2018] SAET 198

The worker was seeking the intervention of the SAET to support a request she should be treated as a seriously injured worker on an interim basis. She did so on the grounds there were various medical opinions in place which indicated that she may exceed the 30% threshold.

Having analysed the various medical reports in existence, the SAET found the worker's assessment was "on the cusp" of 30%. However, the Deputy President concerned was not certain the worker would eventually exceed the 30% assessment, as there were several issues for consideration, including whether all the alleged impairments were likely to be permanent, or at the level currently assessed, or whether they should all be combined in any event. Having found the worker's prospects meant she 'might or might not' exceed the 30% threshold, the Deputy President decided the worker would

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therefore not get the benefit of the doubt. It will be interesting to see if other Deputy Presidents adopt the same approach in borderline cases.

Pulford [2018] SAET 200

The worker sustained successive injuries to her right and then left shoulder. She was not able to make a return to work after the initial right shoulder injury and was therefore not deriving any earnings from employment at the time she sustained her left shoulder injury.

In due course, the worker made an application to receive an economic loss payment pursuant to section 56 of the Act for her left shoulder injury. Her entitlement was determined by the compensating authority at nil on the basis that the hours worked factor, for the purpose of the section 56 calculation, was nil.

The SAET reviewed the provisions of section 55 and 56 of the Act, and noted section 55(6) allowed for a decisionmaker to take account of factors other than the straight earnings, which would ensure there is a fair determination of the hours the worker was working or capable of working prior to the date of any relevant injury, and also to reflect the fact the later injury of itself no doubt had an impact on the worker's capacity for work (which section 56 is all about compensating for).

The SAET drew a distinction between the situation presenting itself under section 55, and that which arises under section 5, where in the latter case a worker who was earning no income at all in the 12 months prior to a work injury will effectively have an average weekly earnings rate set at zero dollars.

The well-known Supreme Court decision in *Last*, which applied to the provisions of section 5 of the Act was not held to apply in the case of section 55 and the hours worked factor.

In the case at hand, and despite the fact the worker had not been working prior to the occurrence of her left shoulder injury, the SAET felt that she probably had a residual capacity of about 8 to 10 hours of work per week prior to that time, if suitable employment might have been made available to her.

The lesson from this decision is you should not assume there will be a nil section 56 entitlement, where the injury being compensated for occurs against a background where the injured worker had not been earning any income for the preceding 12 months or more. The SAET will still find a way to achieve a "fair" outcome, although there is currently an absence of any guidelines which might provide clear direction as to how to assess the notional earning capacity and hours worked factor in such cases.

Heywood-Smith [2018] SAET 203

In the latest of a succession of cases surrounding the assessment of Mr Heywood-Smith's average weekly earnings, the SAET was asked to consider several alternative propositions as to how the worker concerned might establish he was entitled to an average weekly earnings figure that was greater than zero.

In accordance with the applicable principle under *Last's* case, the worker's average weekly earnings were set at zero because he had not been earning an income in the 12 months prior to sustaining a further injury.

As an alternative approach to trying to establish his average weekly earnings entitlement at greater than nil, the worker argued that either the application of the provisions of section 5(15)(b) or section 42 of the Act ought to apply. These provisions deal, in different ways, with the concept of the Federal Minimum Wage applying to any average weekly earnings payment.

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The SAET found the Federal Minimum Wage principles did not apply in either situation. They found section 5(15) was not a saving provision, to enable the worker to have an average weekly earning figure set at least at the Federal Minimum Wage, because the other substantive provisions of the section had already conclusively dealt with the way in which the entitlement was set. In other words, if there is no average weekly earnings sum **at all**, then the Federal Minimum Wage figure cannot be applied against it, as opposed to a situation where there is an unreasonably low average weekly earnings figure.

The SAET found that section 42 did not apply either, as it has a limited purpose as only applying to a situation where weekly payments are being paid, and not as to the rate at which those weekly payments should be set at in the first place.

Belperio [2018] SAET 210

The worker sustained an injury to his thoracic spine. It was discovered at that time he already had a pre-existing, but previously asymptomatic disability, insofar as several discs within his thoracic spine had become fused.

The worker was eventually sent for a permanent impairment assessment. The assessor concerned rated the effects of the previously asymptomatic condition at 20% and also rated the worker's current level of impairment at 20% as well. The compensating authority therefore effectively deducted one impairment percentage from the other and determined the worker's entitlement at nil. Not surprisingly, the worker challenged the decision.

The SAET supported the compensating authority's approach to the matter, finding the assessments effectively cancelled each other out. Furthermore, and notwithstanding the fact the underlying condition was asymptomatic, the SAET found that it was still a requirement for the permanent impairment assessor to deduct the effects of that condition from the current overall level of impairment. It is important to note in these circumstances the pre-existing condition must of itself be assessible in accordance with the applicable Guides and Guidelines, and give rise to a valid impairment assessment, as opposed to merely pointing to perhaps a "painful middle back" as pre-existing, but in the absence of any other evidence.

Oldman [2018] SAET 225

As with the *van Hatten* decision discussed above, this case deserves somewhat of a 'deep dive' to see what matters of importance can be gleaned from the comments made in the decision by the President of the SAET.

The facts and issues:

The worker had sustained a compensable injury to her hip, which precluded her from returning to her previous employment as a full-time primary school teacher. As part of attempts to rehabilitate her back into an alternative role, she had been offered work as a school services officer. The worker declined to take up an offer of employment in that regard. Instead, and eventually by way of a Section 18 Application, she asserted she should be provided with suitable employment as a school counsellor on a full-time basis.

One of the significant issues to be addressed in the case was the exact nature of employment as a school counsellor. It is here that the SAET delved right into the role concerned and provided an important lesson: that outcomes in these cases should not be dictated solely by reference to job descriptions and the like. The SAET heard evidence there were many aspects to the role of a school counsellor which fell outside of a straight job description. A lot of time was spent taking evidence on what were considered to be the "unstructured aspects" of the role, which in certain circumstances

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could give rise to a risk of injury to the worker or others – for example, a school counsellor's role could involve a worker being caught up in any number of situations that they might not be able to properly control, and where there was the risk of violence or the like.

The Tribunal also looked at the significant difference between the nature of the roles as a school teacher and a school counsellor, which played back into the obligation in section 18 for an employer to endeavour to provide suitable employment that is "equivalent to" the pre-injury role. Here it was noted there was not a great deal of equivalence in the employment concerned, where matters such as the seniority of the position, compared to the worker's previous role, the classification and pay structure, and need for merit base selection to the role of a school counsellor were all matters that indicated there was not a great deal of equivalence between the two roles.

It would seem the Tribunal will not generally be supportive of workers who might apply to literally jump from one stream of employment to another, even if they are within the same workplace.

As to the role itself of a school counsellor, the worker had put forward the argument that she was suited to the role without apparent restriction. However, when looking at the actual medical evidence as to the worker's capacity for work, it became obvious that restrictions on the worker's capacity meant there would have to be substantial changes to several fundamental elements of the role the worker identified. The SAET found if such changes were to be accommodated, then they would fundamentally alter the nature of the job, which would inferentially make the job pointless to perform, and this wasn't a role that the SAET should be engaging in.

The fact the worker was employed by a government department was put forward as a basis upon which the worker should rightly nominate a role they considered to be one constituting suitable employment, and then leave it for the employer to accommodate then, simply because the employer is "large". The SAET criticised this approach.

The SAET found the obligation is squarely on the worker to identify what they can do, and if that includes modifications to a normal role then so be it, but the SAET will still have the ultimate say on whether they would be prepared to compel an employer to provide work in such circumstances, and especially if the modifications proposed transform the elements of the identified role into something altogether different then what it is supposed to be.

The take home messages:

Some conclusions to draw from the decision are the following:

1. Look to more than just the job description or position description and consider all the potential elements of performing a role, in assessing whether the individual worker concerned truly has the capacity for the role concerned.

2. It is right to focus on the provision of suitable employment in equivalent roles, which does not mean effectively allowing a worker to necessarily change career paths.

3. Suggested suitable employment that will effectively change the nature of the employment relationship, have the worker gain a promotion that would otherwise be unwarranted, give rise to a whole new employment classification and wage level, and potentially avoid a merit-based selection process, are all factors which would seem to weigh against a worker's assertion that nominated employment might be suitable.

4. An identified role that is said to be suitable employment, but which requires such significant changes to the essential elements of the role that it no longer looks like the job that it is meant to be, is unlikely to be found to be suitable employment.

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5. Simply being a large employer does not allow a worker to effectively sit back and have the employer do all the work in the assessment of what might be suitable employment. The primary obligation is upon the worker to identify the appropriate employment they seek and clearly identify whether that may or may not require modifications to the role concerned.

As always, if you have any queries concerning any of the cases or issues discussed above, then contact us.

For anyone wishing to spend the time reading any of the decisions referred to above, then they can be found at www.austlii.edu.au.

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