# 2019 WINTER CASE UPDATE

## INTRODUCTION

Welcome to our latest case update for 2019.

We have been kept busy trying to track the multitude of decisions and issues being addressed at the South Australian Employment Tribunal ("**SAET**") over the last several months, so there is plenty to inform you of in this update.

While there remain a number of significant cases outstanding before the Full Court of the Supreme Court, decisions by that court concerning various key provisions of the *Return to Work Act* ("**the Act**") remain pending.

## NEWSWORTHY MATTERS

You may or may not yet have experienced the new system being adopted by the SAET concerning the filing of documents wherein the SAET are endeavouring to move to a fully electronic system. As for the adoption of any new IT system, there are the inevitable teething problems, however one issue causing some concern (and needs clarification soon) is the ability or otherwise to incorporate "notations" as a part of any Consent Orders filed by parties to litigation. Differing views are being expressed as to whether such notations will or will not form part of any Consent Orders made. This issue is of some significance when it comes to matters such as the recording of ex gratia payments as a means by which to resolve disputes, where the actual claim itself might be the subject of an order confirming its rejection.

The Registrar of the SAET is due to speak at the forthcoming Both Sides of the Fence Conference in November 2019, and no doubt there will be plenty of questions to be asked at that time in relation to the new system.

Talking of the Both Sides of the Fence conference, KJK Legal are pleased to be a sponsor of the event this year and encourage all industry participants to consider attending the conference. Details concerning the conference can be found at Both Sides of the Fence Conference Details.

On a more personal note, KJK Legal are pleased to welcome Carmel Preece back to work after an extended period of sick leave. Carmel will be easing herself back into work over the coming months, but I am sure she will appreciate hearing from our clients and contacts.

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## RECENT CASES OF INTEREST AT THE SAET

### *GIAMEOS* [2019] SAET 55

In supporting a decision of a Deputy President of the SAET at first instance, the Full Bench of the SAET confirmed that where pre-approval for medical treatment is sought under section 33(17), then the medical treatment concerned can only take place within the applicable entitlement period under section 33(20). A compensating authority should be conscious of making this point clear, in the event that any pre-approval request is made shortly prior to the expiration of the applicable entitlement period.

The above may not be the end of the matter, as the Supreme Court has just granted Mr Giameos leave to appeal the decision to the Full Supreme Court. It is doubtful the matter will be dealt with before the end of 2019.

### *LOHMANN* [2019] SAET 59

The worker, by way of his solicitors, sought to invoke the section 22 permanent impairment process, notwithstanding that a number of body parts and allegedly impaired functions he was seeking assessment of had not even yet been the subject of a claim for compensation. In effect, the worker was endeavouring to gain a serious injury certification without necessarily establishing there would be any lump sum payments arising from some or all of the alleged impairments.

After the compensating authority declined to agree to the worker's request that a section 22 assessment be made, the worker sought the intervention of the SAET on an Application for Expedited Decision, to try to compel the relevant compensating authority to invoke the section 22 process. The SAET found that it was appropriate for the Commissioner of the SAET to decline the worker's application insofar as the SAET did not have specific jurisdiction to deal with the complaint about a failure to arrange a section 22 assessment in connection with a possible claim.

As an alternative course of action, the worker endeavoured to have the SAET make a declaration that the worker was entitled to a section 22 assessment in any event. The SAET asked itself in what circumstances a declaration might be made, and whether that could simply be on the basis of an assertion of an injury that should be the subject of a permanent impairment assessment, or whether there should be something more. The SAET confirmed that the process should only effectively kick in at a time when an injury is asserted, **and** there is to be a claim for compensation arising as a consequence of the asserted injury (e.g. a lump sum payment pursuant to section 58 of the Act).

### *MCCARTHY* [2019] SAET 61

An injured worker had received a payment representing the full prescribed sum for various injuries he had sustained in 2000, with his entitlements being assessed in accordance with section 43 of the *Workers Rehabilitation and Compensation Act* ("**the 1986 Act**"). Subsequent to the worker undergoing later operative treatment, he had sustained some additional impairments, and sought compensation for the same, and in accordance with the potentially higher applicable prescribed sum that would apply if his entitlements were assessed under the Act.

The SAET found that as the worker had received the applicable full prescribed sum previously, he was not entitled to any additional compensation, even as a consequence of the later effects of surgery and any sequelae arising from that surgery. The SAET held although some of the surgical sequelae were notionally a new injury for the purposes of the Act, section 7(6) of the Act directed that any surgical injury should be treated as

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part of the original injury, and so any later impairment is also covered by an applicable prior determination.

## *Knight* [2019] SAET 64

In the continuation of a succession of cases starting with *Last* under the 1986 Act, and *Heywood-Smith* under the Act, an injured worker failed to overturn a decision that effectively reduced her rate of average weekly earnings for a second injury, where her level of earnings at the time of the second injury had clearly been effected by the fact of a prior work injury. The worker sought to differentiate earlier cases by asserting that section 5(9) of the Act applied, such that where the worker's capacity for work, and income earning ability at the time of her second injury, had been impacted upon by the fact of the first working injury, then it was appropriate to adjust the average weekly earnings rate accordingly. The SAET declined to agree with the worker, suggesting that where a level of earnings is impacted upon by the gradual onset of a work injury, that work injury is considered to be the current work injury, rather than the effects of any prior work injury.

But in a further way in which to approach the situation, the SAET did agree with the worker that section 5(6) applied to the calculation of average weekly earnings for the second injury, where the worker had been working at only 0.4 FTE at the time of the second injury, but had been working in different roles at up to 0.6 FTE as well, and therefore it was "fair" to strike an average that reflected more the 0.6 FTE level of income, particularly where work was continuing to be sought on behalf of the worker at that amount of hours.

## *Power* [2019] SAET 79

The worker suffered the misfortune of sustaining serious head injuries when he fell on to the hard floor of a bathroom at the Adelaide Convention Centre, while he was attending an Awards Night hosted by his employer.

As a first point, the SAET found there was sufficient evidence to suggest the worker was present at the event in the course of his employment even though it was a social activity, as his attendance was undertaken at the direction or request of his employer.

That said, the SAET then still had to decide whether insofar as it was now considered the worker was in the course of his employment at the time of the incident, whether his employment was a significant contributing cause of the injury. The SAET decided that the mere fact the worker was present at the Adelaide Convention Centre did not provide a sufficient nexus with his employment to be a significant contributing cause. They found, on the facts of the case, that the worker being present at the Adelaide Convention Centre meant his employment was merely the occasion for the occurrence of his injury, rather than a significant contributing cause. The significant contributing cause was in fact a medical episode which had caused the worker to pass out. The medical episode of itself had nothing to do with anything arising from the worker's employment, and as a consequence the worker's claim failed.

## *Harrington* [2019] SAET 80

In one of the few decisions where section 18 of the Act has been litigated, Ms Harrington was seeking the provision of suitable employment in her pre-injury role as an enrolled nurse, albeit with various modifications. She was resisting an attempt by her employer to require her to instead perform clerical duties.

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While the worker had some medical support for the fact she could perform modified enrolled nursing duties, the SAET also understood that in performing such duties the worker could not always be made safe from further injury. In particular, the SAET noted there were occasions, particularly in an aged care nursing environment, where there could be uncontrolled events such as patients falling, and where the worker might have to undertake unexpected physical activities which would compromise her injuries.

In the circumstances, and where the worker's work, health and safety could not be guaranteed because of the unpredictable nature of the working environment (notwithstanding what might be considered the performance of ordinarily appropriate duties) there was a sufficient risk of injury to the worker that it was not appropriate for the employer to be compelled to provide her with suitable employment of the nature sought.

## *Summerfield* [2019] SAET 106

The worker sustained a succession of injuries over time, to the effect that an original left hip injury occurred, and which required a total hip replacement operation. Subsequently, the left hip injury and total left hip replacement caused the worker to alter his gait, experience muscle weakness and left leg shortening. In turn, this led to a lumbar spine injury and lumbar spine impairment.

The worker subsequently sought to have all of the various impairments combined for the purposes of impairment assessment under section 22 of the Act. In doing so, the worker asserted the various impairments all arose from the same injury or cause and should therefore be combined. The SAET found in the first place that the various impairments did not all arise from the same injury, insofar as the worker's lower back problems resulted from the fact of the altered gait, but not from the prior operative treatment on the hip. However, insofar as the second limb of section 22(8)(c) of the Act was concerned, the impairments were to be combined because they all arose from the same initial cause.

The decision is a clear example of the need to address the two limbs of section 22(8)(c) of the Act when combining various injuries/impairments. However, insofar as the worker was endeavouring to have all of the injuries combined for the purposes of a lump sum payment pursuant to section 58(6) of the Act, the SAET confirmed that combination should not occur as all of the injuries (as opposed to impairments) did not arise from the same trauma. In coming to this conclusion, the SAET confirmed that the earlier decision of *Marrone*, arising under the 1986 Act, was still good law as far as the issue of non-combination in concerned for the purposes of section 58 of the Act, even if it is not for the purposes of section 22 of the Act.

## *Clayton Church Homes Incorporated v ReturnToWorkSA* [2019] SAET 113

The SAET was called upon to determine whether the Impairment Assessment Guidelines provision as to the assessment of complex regional pain syndrome, which required a diagnosis of that condition being present for at least a period of one year, was to be a diagnosis that applied in any period of time prior to the date of the permanent impairment assessment, or must only apply in relation to the 12 months immediately preceding the date of the permanent impairment assessment. The SAET found in favour of the latter interpretation, such that there is a need for an injured worker to establish a continuous presence of the condition for the period of 12 months concerned before the date of assessment. Given the significant lump sums that arise from assessments of complex regional pain syndrome, it would therefore be important for decisionmakers to ensure they obtain a range of the available medical information

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(as comprehensive as possible) to substantiate the presence of the condition and its diagnoses over the relevant period.

As with any other assessments of permanent impairment where potentially significant lump sum payments are involved, it would be appropriate for decisionmakers to ensure they access all available medical records, treatment notes and the like for all practitioners whom the worker will have consulted in the prior 12 month period, or obtain medical advice as to whether or not the applicable diagnosis can be made over the entire period concerned.

## *Wyszecki* [2019] SAET 115

The worker was employed in a remote location, as a FIFO. In January 2017 the worker experienced various medical problems, which were initially thought to be heat stress, but which ultimately ended up being the result of a minor brain bleed. At the time the worker experienced these problems he was in fact misdiagnosed, and appropriate treatment was not provided to him.

While the worker wanted to leave the applicable work location, his employer declined to assist him in this regard. He then subsequently experienced further medical problems in February 2017 which was found to be a major brain bleed. The evidence suggested the latter event would not have occurred if the worker had been appropriately treated at the time of the initial event.

A question arose as to whether the fact that the worker was not permitted to access appropriate medical treatment in the first place for what was effectively a non-work related condition, gave rise to a sufficient nexus between the medical event and the employer's actions, such that the latter became a significant contributing cause to the February 2017 medical event.

The SAET agreed that was the case, and thus what occurred in February 2017 became compensable. The SAET found that the Act applies to employment in a broader sense as far as the employment relationship is concerned, and an employer's actions, and not just to the work duties performed under the employment relationship, can be relevant.

In effect, in this case, the denial of receiving appropriate medical investigation and treatment, at a remote location, became what the SAET considered to be an "important or influential cause", to use the language of the Full Supreme Court in *Roberts* case.

## *Adom* [2019] SAET 123 and *Baker* [2019] SAET 128

We are dealing with these two matters together, as they represent different sides of the same coin.

In *Adom*, the worker had challenged a permanent impairment assessment and determination undertaken under section 22 of the Act. As part of the challenge to that decision, he sought to have an additional impairment assessed at the time that he was being referred for an independent medical assessment (IMA) under the Tribunal's Rules. The Tribunal declined to agree to the worker's request, suggesting that on the facts of the case, to allow the additional impairment to be assessed would undermine the one assessment principle "enshrined" in section 22 of the Act.

In *Baker's* case, an assessment was to be conducted under section 22 of the Act, and while the worker engaged in the referral process, it ultimately came to light that not all of his potential impairments were included in the assessment referral, and therefore the worker sought to have those further assessments included in the subsequent IMA process.

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In *Adom's* case, the worker's effort to have the additional impairments included in the IMA referral failed. In *Baker's* case, they succeeded. The same Deputy President of the SAET decided both cases.

In the former case, the SAET noted the worker had been legally represented at the time the initial section 22 assessment was organised, which counted against him. Additionally, the further impairment he was seeking an assessment of had not been mentioned to doctors previously.

In contrast, Baker had referred to his further various impairments to a number of doctors prior to them being assessed, and he was not legally represented at the time the assessment arrangements were being made. As a consequence, while there is said to be a "one assessment rule", the Tribunal will use its powers at the IME stage to include additional impairments where the justice of the case requires it. That will be a question of fact in each case.

The outcome of the two cases again emphasises the need to be thorough in the ascertaining of what impairments are to be included in any referral for a section 22 assessment, to ensure that the "one assessment" principle is maintained as far as possible.

## *Northcott* [2019] SAET 138

Again, while this case is very much one decided on its own facts, insofar as whether various injuries might or might not be combined for the purposes of a section 22 assessment, there was an interesting argument put forward on behalf of the worker.

The evidence suggested the worker had suffered various impairments over time, all of which were related back to an original injury, and then the various consequences/sequelae of that injury. As an alternative to try to combine the injuries in that way, the worker sought to assert that the general nature of her employment, on an overall basis, gave rise to her various impairments and so they should all be combined on these grounds. The SAET disagreed, indicating that the passage of time and the undertaking of various work duties, does not give rise to a sufficient basis to combine the various impairments.

## Recent happenings in the Supreme Court

While we will not go into detail concerning the background to the case, followers of decisions of the SAET and its predecessors, and of the Supreme Court jurisdiction, will be aware of the longstanding litigation between Mitsubishi Motors Australia Limited and a former employee of that organisation, Mr Kowalski. In a recent decision of the Full Supreme Court involving the relevant parties, a document described as "Heads of Agreement" was called into question, insofar as its impact was concerned on the worker's asserted entitlement to claim compensation for injuries arising from his employment that were not strictly known at the time that the Heads of Agreement were entered into, with associated Consent Orders made.

The Court was asked to consider the predecessor to section 191 of the Act (**section 119 of the 1986 Act**). The Full Supreme Court agreed that insofar as Heads of Agreement (or other similar Deeds of Release) might purport to impact upon a worker's right to bring future unidentified claims for injuries, then such provisions of the document would probably contravene the legislative provision concerned, but insofar as agreement might be reached in relation to known/identified claims, then the same could not be said. As a matter of general approach, "you cannot contract out of what you do not know".

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In a somewhat related sense, the Full Supreme Court has recently handed down its decision in the matter of *Stephenson v Return To Work Corporation of South Australia* [2019] SASCFC 89. This particular matter has been winding its way through the jurisdiction for some time now, and as readers might remember, the worker sustained a lower back injury, underwent subsequent operative treatment, was thereafter prescribed various medications, some of which caused subsequent impairments including to his digestive system and the like.

Initially, the worker sought a lump sum payment for his lower back injury and associated surgical scarring that occurred in treating the lower back injury. He received a payment, pursuant to section 43 of the 1986 Act. The worker then later claimed for additional injuries to his thoracic spine and left shoulder. His claim was rejected, but then as a consequence of Consent Orders entered into at the Workers Compensation Tribunal, the worker received compensation for those additional impairments, but there was also a notation that the worker had "no further or other entitlement pursuant to section 43 of the Act" arising from the various compensable injuries that were sustained in 2009 (the date of the original lower back injury) or as to any sequelae thereof.

It was this aspect of the Consent Orders, purporting to disentitle the worker to any subsequent claims for compensation, that was given consideration by the Full Supreme Court. The Consent Orders that had originally been made by the Workers Compensation Tribunal as to the exclusion of any further or other entitlements, had occurred as a consequence of the expansion of issues in dispute before the Tribunal at that time.

The Corporation sought to have the exclusionary consent clause upheld for various reasons, effectively based on what the worker had consented to and should be held to, and that to allow workers to ventilate further claims after a settlement along those lines was contrary to the interests of the applicable legislation insofar as the reduction in the extent of the number of disputes might be concerned.

In effect, the Full Supreme Court sided with the worker, and upheld the judgment of the Deputy President at first instance in the SAET, by finding that the limiting effect of the Orders concerned had to be set aside, in circumstances where the worker had impairments which were not particularly claimed at the applicable time or present at the applicable time.

The Full Supreme Court also found that the proper construction of the Act, and dispute resolution provisions, did not effectively allow for resolution of "entitlements at large". As a matter of practicality, it is therefore always important in endeavouring to cast as wide a net as possible over any resolution of a claim for impairment assessment, that all possible applicable impairments are identified and covered off in any Consent Orders, whether that be way of a payment of compensation or the specific rejection of compensation for the various impairments concerned. In the circumstances, "all injuries discharges" as sought by compensating authorities are likely to be limited in their effect to what is known and claimed, as opposed to what is not known and not claimed.

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

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

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