2020 SUMMER CASES UPDATE

INTRODUCTION

Welcome to the first of our regular Cases Update for 2020, looking at some of the more significant cases coming out of the South Australian Employment Tribunal (SAET) and in the Full Supreme Court of South Australia, as we continue to come to grips with the many issues arising from the management of claims under the *Return to Work Act 2014* (the Act).

Regular readers of our Cases Update will be very familiar with the ongoing issue the SAET and Full Supreme Court have had in grappling with the interplay between sections 22 and 58 of the Act. While the long running *Preedy* litigation has now effectively come to an end (see the case discussion below) there are quite a number of other matters heading for the Appeal Courts, with the upshot that uncertainty is likely to persist in this area.

NEWSWORTHY MATTERS

The SAET's fully electronic/paperless Case Management System has now been in place for a number of months, and after some early glitches, it appears the new system is working reasonably well. However, if you are experiencing any recurring problems with the new system, then please let us know, and we will be more than happy to take issues up with the Registrar of the SAET on your behalf.

Turning to other previous newsworthy matters in our earlier Case Updates, the new dual streaming of litigation matters at the SAET has not progressed much further than when we last discussed the matter in 2019. However, it appears at least several members of the SAET judicial bench are more than prepared to endeavour to slot matters in for hearing where there is an urgency associated with them, and they can be listed outside of the usual call-over weeks from the hearing of the general litigation list. Matters such as disputes over requests for pre-approval of surgery, have been given priority by certain Judges, so any disputes that arise in this regard can see you facing a trial within 6 to 8 weeks of the matter being referred from conciliation.

By way of advance notice, we will be resuming our seminar series over late May and early June of 2020. Our seminar series is conducted by way of invitation only, so if you are particularly keen on attending one of our seminars then please email us at admin@kjklegal.com.au, and you can be added to the invitation list.

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Recent Cases of Interest at the SAET

Again, we will endeavour to aggregate the cases under discussion into broad topics, so readers can see how issues are developing as successive Judges deal with matters coming before them on similar topics.

Breen v Return to Work Corporation of South Australia [2019] SAET 208

Exactly how many sets of hearing aids do you need, and how often can a compensating authority be required to pay for them? This was the issue confronting Deputy President Judge Gilchrist, against a background of a worker who had been supplied with hearing aids in 2014, and then 2 further sets of them within weeks of each other in 2017. The compensating authority took issue with the initial timeframe between the provision of the sets of hearing aids in 2014 and 2017, asserting that hearing aids ordinarily had a useful 5 years of life, so it was unreasonable to be paying for a further set within that timeframe. The SAET disagreed with this argument, although it didn't go in any great detail on the matter concerned.

Separately, and more significantly, the SAET was asked to address the issue of a worker being provided with one set of hearing aids which were to be the subject of a request for pre-approval under section 33(17) of the Act, and then a second set several weeks later under a separate Commonwealth pension scheme, and where the worker would not have been required to meet the cost of the hearing aids.

The SAET ultimately decided the worker was not entitled to recover the cost of or have pre-approval for the cost of the first set of hearing aids, as they were not of such sufficiently significant difference to what he was getting for free from the Commonwealth, that it justified their purchase. In other words, the request for pre-approval failed the "*reasonableness*" test in the circumstances of the case, and where requiring the compensating authority to expend a further $6,500.00 to pay for hearing aids which were only going to provide the worker with a marginally improved hearing experience, was therefore disproportionate to their notional increased utility.

There was a separate argument about the whole question of whether the worker could even pursue the claim for recovery of the cost of the first set of hearings aids, where the hearing provider might have notionally waived the cost recovery potentially open to it in having already provided the hearing aids to the worker, if the worker was unable to recover the cost from the compensating authority. The Tribunal considered that circumstances have now moved on from a time when the worker must establish that they have some form of unbreakable contract or liability to meet the cost of the medical treatment/age concerned, before they can pursue such a matter.

Fulton v SA Police [2019] SAET 210

The SAET confirmed the increasing trend of utilising "*indicative assessments*" of permanent impairment is an acceptable basis to underpin a request for a worker to be treated as seriously injured on an interim basis, and furthermore the fact the assessor concerned was not accredited, and had also seen the worker previously in a treating capacity, did not invalidate the assessment concerned.

The SAET noted the framework around dealing with requests for serious injury status on an interim basis centres around Regulation 13 of the Act, and not section 22 of the Act, and so a different and less formal process can be pursued by an injured worker. Of course, that is not to say there might not be other evidence available on which the application for interim assessment might be considered, but if there is not then so be it.

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On a side note, the compensating authority argued the worker's application to be treated as seriously injured on an interim basis ought to be dismissed, because he was too ill to give evidence. The SAET disagreed, noting there was plenty of other evidence available to substantiate the nature and extent of the worker's condition without him having to give evidence.

Lohmann v Return to Work Corporation of South Australia [2019] SAET 213

The matter has wound its way from a Commissioner dealing with an Application for an Expedited Decision all the way to the Full Supreme Court.

The worker concerned lodged the Application over the refusal of the compensating authority to organise a permanent impairment assessment under section 22 of the Act, in circumstances where the worker was simply seeking the assessment of itself, but not any applicable compensation, and also where the various injuries to be the subject of the assessment included certain injuries that at the time the request was made had not been claimed, let alone determined/accepted by the compensating authority.

The Full Bench of the SAET declined the worker's request on several grounds:

- going back to the role the Commissioner had to play in the matter, it was not open to the Commissioner to make a decision on an expedited application that would force a compensating authority to make arrangements for a permanent impairment assessment, where the decision to be made by the Commissioner of itself was not in fact reviewable (where section 113 of the Act is directed to towards the SAET assuming the role of a decisionmaker in lieu of a compensating authority, in making a decision on a claim for compensation, and which gives rise to review rights thereafter);
- given the overall structure of the Act, and the intention to reduce to the greatest extent any cost and delay, ordering a permanent impairment assessment to take place without any compensation being attached to the assessment, is a waste of resources;
- it is not an appropriate matter for the SAET to intervene and provide declaratory relief in, as that course of action is only intended for matters where a binding declaration of rights, falling within the jurisdiction, is sought - all the more important in such a case as this where there was an absence of any claim for compensation; and
- it was inappropriate to put a compensating authority to the cost of potentially numerous section 22 assessments without any compensation attaching to those assessments.

Furner v Return to Work Corporation of South Australia [2019] SAET 232

In confirming the effect of the *Lohmann* decision, the SAET ordered the compensating authority to arrange for a permanent impairment assessment to be conducted because there was compensation attached to the request. The order for the arranging of the permanent impairment assessment was made notwithstanding the relevant claimed injury had already been rejected by the compensating authority as being compensable, and notwithstanding there was also an unresolved argument about the basis for the alleged injury concerned, and whether it was of an appropriate nature to be able to be assessed in the circumstances and under the applicable Guidelines (i.e. whether the claimed sleep disorder in the case had a neurological basis or not).

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Strawbridge v Return to Work Corporation of South Australia [2019] SAET 237

Evidencing how the different way in which these matters are brought before the Tribunal (by way of an Application for Directions, or via the nature of the dispute itself), the SAET was asked by a worker to force the compensating authority to make arrangements for a section 22 permanent impairment assessment to be conducted. There were complexities involved in the case at hand, with evidentiary issues arising that suggested the case of itself was somewhat tenuous.

In a case where there was a need for further exploration of the issues by way of evidence, the SAET believed its making a declaration in the circumstances of the case, or forcing the compensating authority to make arrangements for an assessment based simply on an Application for Directions, was a step too far.

It seems workers' solicitors are being effectively directed by the SAET that the section 113 Application for Expedited Decision process is not an appropriate vehicle to try to force permanent impairment assessments to be conducted, and nor will the SAET simply accommodate such requests during the ordinary litigation process based simply on an Application for Directions, particularly in circumstances where there are significant issues surrounding the matter. While there remains some inconsistency between some of the decisions in this area, the general thrust of the SAET's approach seems to be that they will be reluctant to step into the permanent impairment process until an actual dispute arises as a consequence of the process being undertaken, but not beforehand.

Palios v Return to Work Corporation of South Australia [2019] SAET 224

The worker lodged an Application for Expedited Decision, seeking the intervention of the SAET in making orders as to the worker's entitlement to various permanent impairment assessments and compensation. The situation was complicated by the fact there were multiple claims for multiple injuries/dates and not all had been identified as the subject of claims for compensation under section 58 of the Act. There are also multiple reports and supplementary reports obtained by the various parties in the matter.

Following a Commissioner declining to make any orders on the Application for Expedited Decision, the SAET then heard the matter as part of the internal review process commenced by the worker's request that the Commissioner's declination be reconsidered.

One issue that became particularly significant in the case was the contact between the parties and the appointed permanent impairment assessor after the completion of his reports, but before any determination was made in the matter. The compensating authority was seeking to have the assessor modify their report, which the SAET considered was a course of action that impinged on the credibility of the permanent impairment process, and where the assessor was meant to be at arm's length to the parties, and not subject to "*significant influence*" (the words used by the SAET) by the compensating authority.

The SAET considered there were only limited circumstances in which a compensating authority can contact the permanent impairment assessor **after** the latter's report is provided, and to do so they are only permitted to seek clarification of matters arising in the report, and not to do otherwise (e.g. try to change the opinion made). Therefore, any approaches you might as a compensating authority consider making to a permanent

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impairment assessor in relation to their report need to be carefully worded. Otherwise, the SAET directs that the compensating authority is to either accept the report as compliant or not, and determine accordingly. Only once a decision in that regard comes into dispute does the SAET indicate issues can then be taken further with the permanent impairment assessor concerned, and under the SAET's supervision. They also indicated the same situation applied to the worker's representatives, and that they effectively have no role to play in this aspect of the matter other than being consulted over the basis for the initial referral.

As a reminder, and to bring this whole discussion into a closed loop, readers will recall the SAET's previous view of the fact evidence, such as video film, is not meant to be provided to an assessor prior to their assessment of the worker, as the assessment is meant to be based on how the worker 'presents on the day'. The probity of other evidence, such as audiogram results in hearing loss claims or differing findings at other times as to range of motion on examination, is meant to be treated the same way. Such evidence can still be taken into account at a hearing, given the compensating authority remains vested with the discretion to either accept the PIA report as valid, or determine otherwise and let the whole matter play out at the SAET – and bringing in other evidence at that time.

Preedy v Return to Work Corporation of South Australia [2019] SAET 228

This case has now effectively come full circle, and having commenced its litigation path before Deputy President Calligeros several years ago, it has now been the subject of an eventual judgment by him, after the matter was remitted back by the Full Supreme Court. Ultimately, Deputy President Calligeros found the worker's left shoulder injury sustained at work in August 2012 should be combined for section 22 purposes with a neck injury subsequently occurring while the worker underwent physiotherapy treatment in April 2013, ostensibly for section 22 assessment purposes.

Interestingly, when the worker was first compensated by way of lump sum payments for the two different injuries, the first was compensated for under the *Workers Rehabilitation and Compensation Act 1986* (**the 1986 Act**) and the latter was compensated for under the Act (but, by virtue of the history of the litigation and agreement between the parties, the whole question of whether you could "*combine*" impairments assessed under the two separate Acts was not dealt with).

Effectively, the SAET was called upon to treat all injuries as coming under the combination principles of the Act, whereas if all injuries had been incurred and previously compensated for under the 1986 Act, then the issue of combination would have been decided differently (as per *Marrone*'s case).

While it was not necessary for his ultimate decision in the case, Deputy President Calligeros noted that over and above the fact of combination of the impairments for section 22 purposes, the Full Supreme Court had previously directed the combination would also be applicable (where it was being sought for compensation purposes) under section 58 of the Act, despite a differing test applying.

However, there remain several cases on appeal in this area, where an important issue has not yet been given significant consideration, although it was alluded to by Deputy President Calligeros in the most recent *Preedy* decision. Section 22(8) of the Act includes the words "*assessed together* ***or*** *combined*", which it seems the Courts have previously not given a great deal of attention to, other than apparently treating the words as meaning "*assessed together* ***and*** *combined*" (and indeed the word "*and*" featured in a separate judgment), which has the effect of seemingly leaving the

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Impairment Assessment Guidelines with nothing to do in this area of combination/aggregation. This issue is now bound to attract further judicial consideration, but in the interim compensating authorities will need to consider whether they continue to follow the apparent direction of the Courts, where combination or aggregation is expected more often than not, or take a conservative approach of either only allowing the full combination/aggregation outcome to occur in relation to section 22 assessments, but not when it comes to section 58 assessments of lump sum compensation, or neither, as some commentators suggest, where a strict application of the Impairment Assessment Guidelines would suggest impairments including consequential or sequelae type conditions might be "*assessed together, but are not to be combined for the ultimate aggregated whole person impairment outcome*".

SOLDI V WESFARMERS LIMITED [2019] SAET 241

The SAET was asked to consider what might constitute the contents of an appropriate application for the purposes of approval of further surgery, in circumstances where the surgery concerned is not going to fall within the usual time limit proved for by section 33(20). Just exactly what constitutes a sufficiently detailed application in this area, where the worker seeks an extension of time in which to access future surgery?

In the case at hand, the worker's section 33(21) request was eventually found to be constituted by two emails that had been sent on his behalf by his Union, attaching certain medical information. The emails only made vague reference to the applicable legislative provision, and were based on the view of an orthopaedic surgeon that was also vague about the actual likelihood of the surgery concerned, and the type of surgery that could occur. To quote the Orthopaedic Surgeon concerned "*…although unlikely, he may require surgery…*", with the Union conceding that the worker himself could not throw any light on what treatment might be required. Indeed, the surgeon concerned had earlier expressed a view that surgery wasn't "recommended, or currently indicated".

The compensating authority rejected the worker's request. During the dispute resolution process an additional opinion was obtained that suggested surgery was "*a possibility*", although there "*is no simple method of assessing when or if he will require surgery*". The compensating authority argued there was insufficient certainty attached to the request, as it needed to identify a need for surgery that would otherwise take place now, but was going to be undertaken in the future.

The SAET confirmed an application of this nature to extend time "*is [not] therefore the asking*". The proposed surgery needs to be expected "*to be undertaken at a later time*", which is a case by case decision. To more extensively quote the decision of the Full Bench of the SAET in this case:

> "*For an application under section 33(21)(b)(ii) and Regulation 23(2a)(b) to be successful there must be cogent, reliable and reasonable evidence that identifies the nature of the surgery, the benefits that the injured worker would obtain from it, the reasons why the surgery should not be undertaken within the medical entitlement period and the likelihood of it being undertaken in the future*".

The SAET emphasised the whole assessment in this area is to be a qualitative judgment in each matter.

A useful summary of the overarching principles to be applied in this area of approval for future surgery can be gained from a reading of paragraph 76-80 of the Judgment. Ultimately, in this case, the worker failed with his request, and a reading of paragraphs 82-84 of the Judgment identifies why, with the whole request largely falling into the

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category of being just a little too "*vague*" as to what, why, how etc.

Bukuru v Return to Work Corporation of South Australia [2019] SAET 243

As claims for section 56 lump sum payments continue to become more frequent, it pays to be across the various criteria that provide for the compensation formula in this area, under section 55 of the Act.

While assessing the base permanent impairment assessment and whole person impairment outcome is important, so is correctly establishing the hours worked factor for the purpose of the calculation. In many cases that will be straightforward, but not always.

In this case the worker concerned was employed on a permanent part-time basis, but part of his working day involved a "*sleepover shift*". This was generally considered to be passive overnight care, which was paid at a different rate to the worker's normal hourly rate, and where the overnight care did not always require that he undertake any actual act of work.

The sleepover shift payments were included in the worker's average weekly earnings calculation, but were they to be included in the section 55 assessment, as a precursor to any section 56 determination? Was this sleepover allowance to be characterised like an on-call allowance, or was it more associated with the general understanding of what "*work*" might be, and particularly for the purposes of section 56 entitlements?

While the applicable enterprise agreement in the case did not define sleepover shifts as part of a worker's ordinary hours of work, section 55 of the Act does indicate that any assessment of the hours worked factor should accord with any section 5 calculations as to average weekly earnings, and again it is noted the sleepover shift was included in this particular calculation.

Ultimately, the sleepover shift hours were held to be "*work*" for the purposes of section 55. On the facts of the case the worker was at his place of employment while the sleepover shift occurred, he was subject to the direction of the employer, and could be called upon at any time to perform duties during the shift. He was paid at a rate depending how long the shift was, and not at an overall fixed rate or value. The payment was characterised therefore as being in return for work performed, albeit at a differing rate, and was not a payment to compensate someone for the inconvenience of being on "*standby*" as being paid an on-call allowance is generally considered to be, and so more likely to be excluded from any hours worked calculation.

Albon v Department of Human Services [2019] SAET 256

The SAET took the opportunity to look at section 48(9) of the Act, and what to look at in deciding as to whether to continue a suspension of the effect of a section 48 notice. The SAET outlined what it considered to be the four applicable factors when making a decision in this regard.

Two of the factors are essentially combined, and they are whether the nature and circumstances of the case and the merits of the case, should be considered. Was the case at hand an "*open and shut case*", because if it wasn't, and there were real issues on the facts of the case, then that was something to be considered.

To put it another way, if it was reasonably open on the facts of the case for the worker to dispute the decision concerned, then this was strong consideration for the continuation of the suspension.

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The SAET looked at the conduct of the parties in endeavouring to resolve the matter, and whether the worker did anything that might have adversely affected a reasonable opportunity for the matter to be resolved. In other words, was the worker stonewalling any possible resolution of the matter? If not, then he or she should not be penalised by the lifting of the suspension.

Finally, and perhaps most significantly of all, the SAET directed that the question of undue financial hardship needed to be considered, and would that situation arise if the suspension of the continuation of weekly payments was lifted? Here the SAET looked more at the issue of the worker's income, and not necessarily how it might be spent afterwards (despite an inference in the case that the worker spent most of his income at the pub). It is notable that while the worker had also secured alternative employment, and had a new income stream, that of itself was not enough to lift the suspension, although the SAET did indicate the worker had, in those circumstances, an obligation to promptly notify the compensating authority as and when he received ongoing income from another source, so that it could be taken into account in balancing up his weekly entitlements.

RECENT HAPPENINGS IN THE SUPREME COURT

Two decisions of some substance were handed down by the Full Supreme Court in late 2019, although neither of those decisions disturbed the prior understanding of things.

- In *Kahn v Return to Work Corporation of South Australia*, the Full Supreme Court confirmed decisions made by several lower Courts, as to the primacy of the "*one assessment*" rule applying in the area of assessment of permanent impairment for lump sum payment purposes. In the case of Mr Kahn, he had received a lump sum payment pursuant to section 43 of the *Workers Rehabilitation and Compensation Act* for a knee injury, even though he knew at the time that he might require a total knee replacement in the future, and indeed came back looking for more compensation after that event occurred.

  The Full Supreme Court found the worker was not entitled to claim further compensation in the circumstances, even if he knew his circumstances were to change in the future. In that case, and short of a further work injury occurring, any deterioration arising simply by way of a passage of time, or alternatively by way of operative intervention, did not of itself give rise to any further entitlement to lump sum compensation. This issue is now playing out in the real world, where workers' lawyers are tending to suggest to their clients that where the possibility of a total knee replacement (or the like) is reasonably open as occurring at some stage in the future, then their clients should defer undergoing any permanent impairment assessment as long as possible – albeit this advice will come up against the likelihood that if the worker concerned is no longer at work at the time his or her weekly payments and medical expenses entitlements expire, then there may be a forcing of that worker's hand by having to undergo permanent impairment assessment if they want to endeavour to be treated as a seriously injured worker and prolong their benefits.

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A separate issue about whether or not to deduct any pre-existing impairment (arthritis in this case) from any assessment of impairment for the total knee replacement (if it was ultimately to be made) was not dealt with by the Full Supreme Court because of the effect of their decision under the "*one assessment*" rule, although this does effectively leave the earlier decision of the Full Supreme Court in place, to the effect any such level of pre-existing impairment, even if it is not strictly something that would be referenced in an assessment of impairment for a total knee replacement, still needs to be taken into account and "*must be deducted*" in any event.

- *Giameos v Return to Work Corporation of South Australia* is a matter where the Full Supreme Court has endorsed a longstanding approach when it comes to the pre-approving of ongoing medical treatment under the provisions of section 33(17) of the Act. The Full Supreme Court confirmed earlier decisions to the effect any treatment approved and to occur in the future, must be treatment that also occurs **within** the applicable medical expenses entitlement period, but will not flow over into any treatment occurring after the expiration of the entitlement period. In other words, and putting it in a practical way, if a three-month course of physiotherapy is sought to be pre-approved within six weeks of the end of the relevant medical expenses entitlement period, the worker can only effectively enforce pre-approval for the first six weeks of the overall period. The Full Supreme Court confirmed section 33(17) does not provide an additional basis to be compensated for medical expenses, and a worker still needs to come within sections 33(1) and (2) of the Act, and which are in turn limited by the provisions of section 33(20) of the Act, but not otherwise expanded in the circumstances.

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

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

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