

KJK LEGAL SEMINAR |

June 2024



TODAY'S AGENDA:

<u>TRACEY KERRIGAN:</u>	Hearing loss claims – an update on SAET cases
<u>NEVILLE JOHN:</u>	Terminating Employees on Workers Compensation and beyond
<u>CHRISSEY PSEVDOS:</u>	Video observations and CCTV footage – the material differences in the rules around discovery, production, and their use at the Tribunal
<u>MATILDA WISE:</u>	Some recent topical Tribunal cases
<u>MARK KEAM:</u>	Closing remarks



01

Hearing Loss Claims

Update on SAET cases

Legal fiction

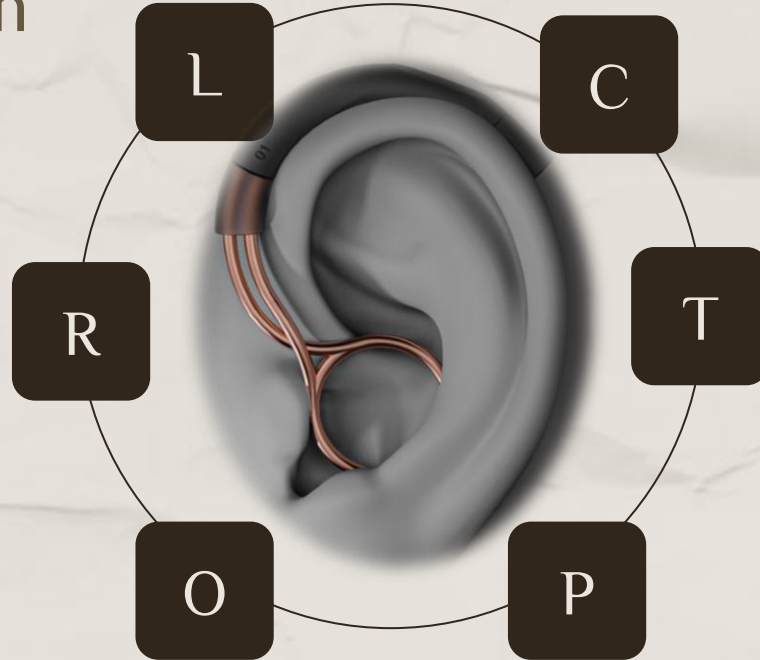
- whole of the loss is deemed immediately prior to claim

Retirement

- differences between retired and non-retired workers

Onus

- difficult to discharge onus resting on employers



Claims

- no shortage of claims

Time

- difficult to beat out of time claims using prejudice argument

PIA

- Permanent Impairment Assessments remain problematic

Burden of Proof cases:

Averay v RTWSA

- Pursued 2 former employers
- Both claims rejected
- 3 medical opinions
- Worker did not prove he had NIHL
- Onus not on employer

Hall v RTWSA

- Number of noisy employers
- Worker pursued Adhesive Labels
- Worker sustained hearing loss
- BUT were the noise levels at Adhesive Labels sufficient to cause NIHL?
 - i.e could Adhesive Labels discharge the onus it bears?

Burden of Proof cases continued:

Anderson v Department for Education

- Case decided on the papers
- Worker was a part time school bus driver
- Some driving was on dirt roads
- Paul Dewing provided reports and noise surveys replicating the conditions
- Competing medical views
- Employer had rebutted the presumption resting upon it
- Key takeaway:
 - Good noise survey
 - ENT medical report
 - Avoid reports “on the papers”

Burden of Proof cases continued:

Branford v Viterra Operations

- Worker was a drive over hopper attendant
- He worked for 2 periods of time on a seasonal basis
- There was a pre-employment audiogram
- Did the worker's hearing loss progress after commencing his employment?
- Dr Hains considered the audiograms were within the test / retest margin with no "significant change" in his hearing
- The judge disagreed and found in favour of the worker:

"no significant change and no measurable change is not the same as saying there is no change on the balance of probabilities."

Permanent Impairment Assessment:

Skuse v RTWSA

- 2015 audiogram was closer to date of retirement
- 2021 audiogram was for the PIA
- PIA assessor preferred the 2015 audiogram
- Held: PIA assessor could use his clinical judgement and was qualified to decide which audiogram to rely on
- Key takeaway:
 - This only applies to retired workers



Permanent Impairment Assessment:

Fitzgerald v RTWSA

ENT	Frequencies used	Binaural Hearing Loss	Whole Person Impairment
Dr Tomich	2000 – 4000 hertz	6.6% BHI	3% WPI
Dr Fagan	500 – 4000 hertz	15.4% BHI	8% WPI

- Worker had Meniere's disease and had surgery on his right ear causing hearing loss
- Worker was an electrician for many years
- Dr Tomich considered the noise exposure was intermittent
- Inclusion of the lower frequencies was not justified

Permanent Impairment Assessment:

Sweeney v RTWSA

- The worker appeared to have some non-work related symptoms
- The PIA assessor used risk tables to determine the worker's NIHL for deduction purposes
- The worker argued that the method of deduction was not authorised by the IAGs
- Trial judge found that the methodology used was permitted and that the PIA assessor used his clinical judgement
- However, on appeal, the Full Bench found that the method of deduction was **NOT** allowed by the IAGs
- The PIA report could not be relied upon so a referral to an IMA was the appropriate remedy



02

Terminating Employees
on Workers
Compensation and
Beyond



YES WE CAN



Disability Discrimination Act 1995:

Section 15

- Unlawful to dismiss on the ground of an employee's disability

Section 21A

- Exemption – Inherent requirements

Section 21B

- Unjustifiable hardship

Equal Opportunity Act 1994 (SA):

Section 67

- Unlawful to discriminate on grounds of disability by dismissing employee

Section 71

- Exemptions – if a person would not be able to perform the work adequately and without endangering themselves or others
- Respond to situations of emergency that should be reasonably anticipated in connection with the position / employment

Fair Work Act (Cth):

- General protections /
Dismissal

- Adverse action taken

- Discrimination –
physical or mental

- Exemption –
inherent
requirements of the
position

REVERSE ONUS



**MY FAVORITE
YOGA POSITION**

Temporary absence – Fair Work Act

- 3 months
- And not on paid personal / carers leave
- Time absent on workers compensation does not count

Return to Work Act 2014 (SA):

Section 18

- Obligation to provide suitable employment

Section 20

- Notice provisions

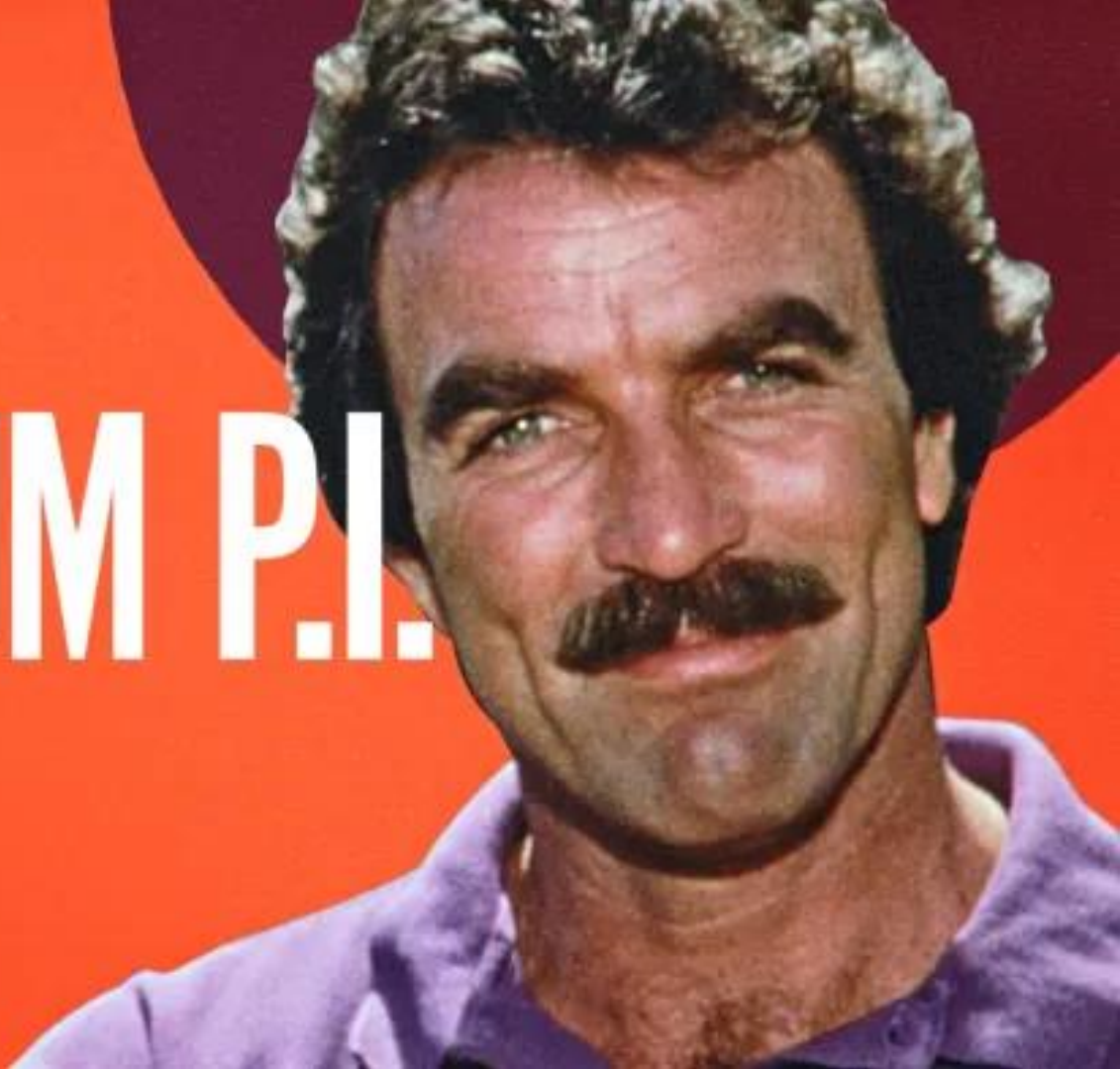
Scenarios:

1. End of entitlements

2. Performance issues

3. Serious and wilful misconduct

MAGNUM P.I.



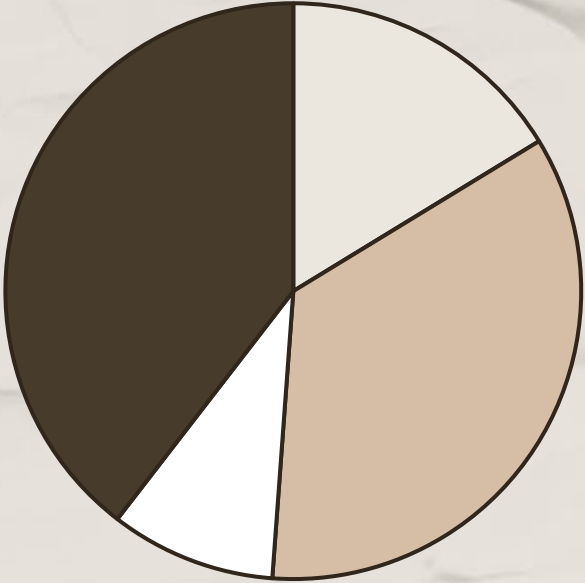
Steps towards termination – gathering evidence

■ Medical evidence

■ FCE / WSA

Job dictionary ■

Surveillance ■



■ 1st Qtr ■ 2nd Qtr ■ 3rd Qtr ■ 4th Qtr

Terminating “safely”



- Reasonableness
- Genuine risks – inherent requirements – would the job be the same if the requirement was removed?
- Procedural fairness – essential

Mr Trump will see you now...





03

Video observations and CCTV footage

What will we discuss: a snapshot

What do we commonly use it for:

- ❑ CCTV footage
- ❑ Surveillance footage and / or stills

i.e., compensability, discontinuances, the permanent impairment assessment process

- Section 104 of the Return to Work Act 2014
- Rule 57 of the *South Australian Employment Tribunal Rules 2022*
- The authorities and the key points to take from them

CCTV Footage

- Footage which depicts the incident/injury in question...or not!

Obviously, where an injured worker alleges by way of a claim for compensation form, or record of interview / statement that a particular incident occurred in a particular way and that is not evident from the footage – we want to rely on that footage by way of alleging a contrary position.

Where the CCTV footage does show an incident occurring in some capacity, it can be useful to seek expert medical opinion as to whether what is shown in the footage is consistent with the stated cause of the injury etc...

Surveillance film / stills

Commonly obtained without the injured worker's knowledge in order to determine whether an injured worker is:

- Malingering – misrepresenting their injury.
- Demonstrating a greater (or lesser) capacity than that being reported or certified.
- Fraudulent behaviour – receiving workers compensation entitlements to which they may not be entitled to (i.e., because it is alleged that the injured worker is engaging in work).

This can also include monitoring social media profiles.

Section 104 of the *Return to Work Act 2014*:

Section 104(3) provides:

- (3) When a matter is referred to a conference under section 43 of the South Australian Employment Tribunal Act 2014, each party must, in accordance with the rules of the Tribunal—
 - (a) disclose to the member of the Tribunal presiding over the conference the existence and nature of all evidentiary material in the party's possession relevant to the matter; and
 - (b) at the request of another party to the proceedings, give the party access to the relevant evidentiary material.

It should be noted that s104(4) then provides:

- (4) However, if the member of the Tribunal presiding over the conference agrees, a party need not give another party access to evidentiary material if—
 - (a) the material is a paper, videotape, compact disc or other electronic recording of photographic material, or a report of surveillance; or
 - (b) the disclosure of the material could prejudice the investigation of a suspected offence.

Rule 57 of the South Australian Employment Tribunal (SAET) Rules 2022

Disclosure and production of documents

- R57(1) – Each party must disclose the documents that are, or have been, in the party's possession, custody or power to produce and are directly relevant to any material issue in a proceeding.
- R57(4) – A party to a proceeding may object to producing a document on the basis that the document is privileged from production, or if there is some other good reason why the document should not be produced.
- R57(6) – In proceedings under the *Return to Work Act 2014*, and in relation to evidence which comprises still or moving images of a worker taken without their knowledge or consent, the Tribunal may order that such evidence be disclosed and produced to the other parties to the dispute only if:

Rule 57 of the SAET Rules 2022 continued:

- (a) the disclosure and production is by consent; or
 - (b) the evidence has previously been produced to a medical expert who is treating the worker; or
 - (c) the decision under review relies on a medical opinion that is wholly or predominantly based upon the evidence; or
 - (d) the Tribunal is satisfied that, in the interests of justice, there are good reasons that justify the disclosure and production of the evidence.
-
- R57(7) – In proceedings under the *Return to Work Act 2014* where a party is in possession of evidentiary material the disclosure of which could prejudice the investigation of a suspected offence, and the party seeks to not disclose the material on that basis, the party can make an ex-parte application to be exempted from complying with s104(3) of the *Return to Work Act 2014* and the application will be heard by a Presidential member.
 - R57(8) – A Presidential member who makes an order under sub-rule (7) may make such further or incidental orders thought fair and appropriate in the circumstances, including but not limited to, delaying or adjourning the hearing of any compulsory conciliation conference or imposing a time limit on any order made under sub-rule.

Australian Postal Commission v Hayes [1989] FCA 176; (1989) 23 FCR 320

Surveillance film:

The rationale for excusing production of surveillance film is explained in the judgment of Justice Wilcox in this matter:

"In a case where there is a dispute as to the existence of a physical disability, being a disability whose existence or otherwise cannot be established by independent objective evidence and in relation to which the acceptance or rejection of the claimant's account of his or her symptoms is likely to be critical, counsel contend that the right to cross-examine effectively must include the right to test the credit of the claimant. One way of testing the credit of such a claimant, counsel say, is to ask questions which require the claimant to commit himself or herself in relation to the extent of the disability -- the actions which he or she can, and cannot, perform -- before confronting the claimant with a film depicting his or her actions. If it should happen, in such a case, that the film shows the claimant performing actions which have been said to be impossible, doubt may be cast upon the claimant's credit, causing the tribunal of fact to be cautious about relying on the claimant's evidence in relation to matters incapable of objective demonstration. If, in such a case, a claimant has seen the film before he or she has become committed to an account of the disabilities, the claimant may tailor his or her evidence so as to accommodate the film, leaving false evidence unexposed and uncontradicted.

I think that the above submission must be accepted."

BHP v Mason (1996) 67 SASR 456

Justice DeBelle expressly referred to:

- The tribunal was bound by the decision in Hayes. However, I consider that case must be seen as the high point for a party who is seeking to have otherwise relevant documents withheld from disclosure to another party. Hayes was decided in 1989. The intervening years have seen increased openness in the litigation process, together with a move away from the traditional adversarial "ambush" method of conducting trials.
- He did not think it was correct to say that the decision in Hayes must be seen as a high-water mark or that non-production of the film is an "ambush method of conducting trials".
- To state that the film will trap and expose an unwary witness is to assume the answer. It is not to be assumed that the film will necessarily expose falsehood; it might corroborate the witness. Further, the judicial officer is able to control proceedings to ensure that a witness is fairly cross-examined.

Key takeaway:

"recognised that there are exceptional cases where a party can demonstrate that the temporary suppression of a document is necessary for the proper presentation of its case and where the ideal of openness must give way to the obligation to give all parties a reasonable opportunity to present their case."

Gilbert v Women's and Children's Hospital [2003] SAWCT 43

At the commencement of the hearing of the judicial determination in this matter, Counsel for the worker, raised, for the first time, a number of preliminary issues upon which he sought the Tribunal's rulings.

- the validity of the Notice of Discontinuance dated 18 September 2001;
- who should be dux litus (the first to litigate); and
- whether certain video film and related surveillance reports should be the subject to inspection by the applicant before the commencement of her evidence.

The employer discovered but declined to produce unless ordered, certain surveillance reports and video film.

The worker submitted:

- inspection was necessary so that the worker may know the case she was required to meet.
- this was said to arise in the circumstances that the employer's s36 notice asserted that the worker was fit for certain work which she had refused or failed to undertake, and that this assertion was supported, in part, by the medical report of Dr North, in which Dr North had indicated that he had viewed video of the worker "covering the period 16th to 24th June 2001, which shows her standing for extended periods, bending and undertaking repetitive tasks".

Gilbert v Women's and Children's Hospital [2003] SAWCT 43

- The worker further submitted that given Dr North's report had been discovered and produced; the worker should have all material upon which Dr North relied in reaching his opinion.
- Counsel for WCH conceded that the video film formed part of the basis for Dr North's opinion.
- The worker submitted that the video film had been obtained by the exempt employer as part of its statutory function of making a determination in relation to a claim for compensation. In proceedings concerning the dispute of such a determination, procedural fairness requires that, at some stage in the proceedings, film of which the worker is the subject will be produced to the worker. The authorities are clear that premature production to the worker might have the effect of depriving the defendant of natural justice and that in proceedings of this kind there is justification for withholding film of the worker's activities until he or she has been cross examined about his or her physical capacity and activities.
- Deputy President Judge Parsons did not accept the submission that without seeing the video film the worker did not know what case she was meeting on the basis that the proceedings centered around whether the worker had an incapacity for work which prevented her from undertaking certain specified work.

Paul Halliwell v Department for Correctional Services [2024] SAET 14

CCTV footage of incident:

- Application for Directions made by the Department.
- The worker alleged an injury to his left knee sustained on 3 May 2023.
- By decision dated 6 July 2023 the Department rejected the worker's claim.
- Within the decision, the Department relied on a statement from the worker, a medical report, and CCTV footage of the incident, in order to support its rejection.
- The Department alleged the CCTV footage showed no evidence of any twisting motion or limping (as alleged by the worker) during the reported timeframe.

The Department resisted production of the CCTV to the worker during the dispute resolution proceedings. The worker's solicitors pressed for unqualified production of the CCTV footage of the incident in question, which the Department had refused to provide, on the basis that either:

- The worker had a complete memory of the incident, in which case he could recount it without the need to refresh his memory by reference to the CCTV footage;
- The worker had an incomplete memory, in which case he could say what he could recall.
- Or the worker had no recollection, in which case he could say so.
- The worker's evidence could not be the result of reconstruction, having had the benefit of the CCTV footage.

Paul Halliwell v Department for Correctional Services [2024] SAET 14

The Judge considered the application of Rule 57(4) and 57(6)(d) of the of the South Australian Employment Tribunal Rules 2022 and suggested the worker could potentially be directed to give his evidence-in-chief, regarding the circumstances of the alleged injury, orally.

Held

The Judge found there was no good reason why the CCTV footage should not be produced. The Judge determined the principles of natural justice and procedural fairness compelled the production of the footage.

Furthermore, noting the Department had relied on the CCTV footage in its decision to reject the worker's claim, then without a copy of it the worker was denied a reasonable opportunity to respond to the adverse determination made against him, and this needed to be corrected immediately.

In dismissing the application for directions, the Judge ordered the Department to produce the CCTV footage to the worker's solicitors within 7 days.

Key takeaway

Noting that most, if not all, lay witnesses give their evidence-in-chief through witness statements and this has been a long-standing practice in this State for over 25 years at the SAET, and its predecessor the Workers Compensation Tribunal, unless the circumstances are exceptional, the usual practice of evidence-in-chief through a witness statement following disclosure and production should prevail.



04 Some recent topical Tribunal cases

Assistance for Self-Represented Litigants

Dowdy v Return to Work Corporation of South Australia [2024] SAET 40

Re-Determination -The Dos and Don'ts

Longford v Department for Education [2024] SAET 11



Thanks!

Do you have any questions?

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SISA August Forum Sponsor

Don't forget we are sponsoring the Self Insurers of South Australia Inc (SISA)
August Forum on **16 August 2024**.

Details: Getting to grips with Complex Regional Pain Syndrome.

Join our Chrissy Pseudos, as we hear from Dr Dilip Kapur, Anaesthetist and Pain Medicine Specialist, and delve into the issues surrounding diagnosis, treatment and assessment of CRPS. Dr Kapur will also discuss the proposed changes to the Impairment Assessment Guidelines, which look to improve some of the difficulties presently experienced in diagnosis of CRPS in the workers compensation jurisdiction.

Our Tracey Kerrigan will then provide an update on permanent impairment assessments and how to best prepare your referrals in order to achieve the most appropriate and accurate outcome.

