# 2017 SUMMER CASE UPDATE
# 1st EDITION

## INTRODUCTION

The handing down of judgments by the South Australian Employment Tribunal (SAET) has continued apace, with the overall number of judgments delivered this year rapidly approaching 150 in number.

Of course, not all judgments handed down by the SAET now relate to workers compensation matters, given the SAET's broadened jurisdiction to deal with other matters of an industrial and employment nature. Nonetheless, the SAET has had plenty to say on matters of substance in recent times.

As has been the trend this year, a great deal of time has been taken up by the SAET in dealing with issues arising pursuant to Section 58 of the Return to Work Act (the Act), and which in turn have flowed through to workers' possible entitlements under Section 21 of the Act in the event they are deemed to be seriously injured.

On a final introductory note, various matters are now slowly finding their way to the Full Supreme Court for consideration as well, and we will address one particular matter in this Edition.

## *POLLIDOUROU* [2017] SAET 101

The SAET discussed Section 113 of the Workers Rehabilitation and Compensation Act (now Section 188 of the Act), and particularly the issue of the fixing of a date of injury, where that can have a differing result depending on the medical condition/injury concerned and the compensation being sought.

In the case of a gradually developing injury, the date of incapacity first occurring is ordinarily fixed as the date of injury. However, in not all cases where an injury is suffered does an incapacity for work necessarily arise. Take the frequent case now of workers' complaining of an impairment of 'mastication and deglutition' as part of Section 58 claims.

In the case of this worker, there had been no incapacity arising from either the mastication or deglutition problems, and notionally no ability to fix a date of injury in the usual (deeming) way under Section 113. The SAET confirmed in such a situation,

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the date of injury was to be based upon the date when symptoms are first recorded as arising in relation to the condition concerned.

Running somewhat contrary to the "combination" cases involving multiple impairments for permanent impairment assessment purposes, the Full Bench of the Tribunal noted the applicable date of injury was therefore 2015 in the case of mastication and deglutition, which meant it was not to be combined with the earlier 'primary' injury sustained and from which the mastication and deglutition problems consequently arose. While this might have the consequence of pulling apart injuries for the purposes of not being combined under Section 58 of the Act, that is not to say that this affects the consequential combination of those various impairments when it comes to adding them together for the purposes of an overall assessment of impairment under Section 21 of the Act, and reference is made back to *Preedy's* case [2017] SAET 71 in this regard (although noting that matter is on appeal).

## *WRIGHT* [2017] SAET 105

The worker underwent a knee operation, and later developed lower back pain due to an altered gait said to arise from the fact of the original knee injury and subsequent operation on that knee. D.P. Lieschke found that it was open to combine the two impairments concerned for WPI purposes (the original knee injury and the later lower back injury) as he did not consider they arose from separate traumas, but from the one trauma or event, with one being secondary to the occurrence and treatment of the other.

## *PRENTICE* [2017] SAET 108

This case involves a dispute as to whether employment contributed to the onset of osteoarthritis in the right hip of a worker of a relatively young age. The case is mentioned primarily because of the criticisms levelled by the trial Judge at one expert medical witness (who is reasonably prominent in the medico-legal field), and as to the trial Judge's confirmation as to what the new Section 7 causation test is all about – a significant contributing cause will be one for which employment is responsible for a worker's injury in a 'real and meaningful sense'. Based on the decisions made by the SAET to date, something being real and meaningful is largely anything more than minuscule or fanciful.

## *KAYE* [2017] SAET 109

The SAET confirmed that once the Tribunal is seized of a dispute relating to a worker's Section 58 entitlements, then there is an obligation on the SAET to ensure a 'high quality decision' is arrived at.

In this case, the worker resisted a referral to an independent medical advisor by the SAET, to assess if he had reached maximal medical improvement. The SAET confirmed that it is they who effectively take control of the permanent impairment process once the dispute is lodged.

## *DE GREGORIO* [2017] SAET 114

The worker was seeking compensation for a proposed total knee replacement. The SAET, in addressing whether the worker had sustained a compensable injury against a background of longstanding non-work-related symptoms, quoted the High Court as follows:

> "There is an exacerbation of a disease where the experience of the disease by the patient is increased or intensified by an increase or intensifying of symptoms. The

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word is directed to the individual and the effects of the disease upon him rather than being concerned with the underlying mechanism."

The approach taken by the SAET in this case, in looking narrowly at the level of a worker's symptomology, appears at odds with other previous decisions of the High Court which have talked in terms of whether there has been an identifiable pathological progression of a degenerative condition, because of employment, in assessing whether a compensable injury has occurred.

Simply assessing compensability based only on the level of a worker's symptomology opens the door to a wider accessibility to compensation, given the difficulty that would ordinarily be encountered in effectively contradicting a worker's own self-described symptoms. That being the case, a more forensic analysis of the history, as given by the worker from time to time to treating doctors, will become even more important in assessing the true level of symptomology that arises in relation to long standing medical conditions, where the work injury is only one of a series of events along a time continuum.

## *PREEDY* [2017] SAET 118

As readers would be aware, Mr Preedy has been the subject of several decisions of the SAET. In an earlier decision, the SAET found he had a whole person impairment of greater than 30%. Issues arising in relation to how that assessment of impairment can be arrived at are currently on appeal.

In the meantime, the worker sought from the SAET, in a separate action, either summary relief or a declaratory judgment that he should be treated as being a seriously injured worker, because of that separate outcome as to his whole person impairment assessment.

ReturnToWorkSA resisted the application, based on the ongoing appeal as to the worker's Section 58 entitlements, and therefore it could not be considered that the worker's entitlements in that regard had been finalised, so any effects as to serious injured worker status had crystalized.

The judge looked at the consequences of what might arise should an order in favour of the worker that he was deemed to be seriously injured be made, against the background of a separate appeal. It was acknowledged this was a balancing exercise, and the judge was particularly concerned as to whether in making an order as requested by the worker, that might unduly or unintentionally effect any future rights of the parties. If that was not likely to be the case, then the Tribunal was comfortable an order could be made. In that event, the worker was declared to be seriously injured for the purposes of the Act. The approach has subsequently been followed in several other SAET decisions including *Graham* [2017] SAET 124 and *Mitchell/Stephenson* [2017] SAET 132.

It is likely workers' lawyers will now seek to use the Tribunal's power to make declaratory judgments more often in these circumstances. This power to make declaratory judgments was not previously available under the Workers Rehabilitation and Compensation Act, but is now quite likely to be utilised to enforce a worker's broader rights to compensation at any time when a judgment is made as to whole person impairment being at or above the 30% threshold, even if in different proceedings and where there might be still unresolved appeal rights.

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## *KHAN* [2017] SAET 126

The worker originally injured his knee in 2009. He experienced further problems thereafter, and received advice it was likely he would need a total knee replacement in the future, not just to deal with the effects of the work injury, but also because of the significant prior degeneration that was evident in his knee at the time of the original work injury.

The worker eventually settled his lump sum entitlements in 2013, consenting to various orders at the Workers Compensation Tribunal. That included an assessment for his permanent impairment arising from the knee injury. About a month later (one begs to ask why he entered into the consent agreement above?) the worker underwent a total knee replacement. He subsequently asserted his overall condition was now worse because of the undergoing of the surgery, and sought a further assessment of permanent impairment for his knee injury.

One of the arguments raised by the worker was the fact his total knee replacement involved an effect on parts of his knee and leg which were not affected by the original injury, and therefore fell outside of the scope of the prior consent orders, and could therefore be the subject of a further lump sum payment claim. The Tribunal disagreed, effectively saying "A knee is a knee is a knee". They found no further compensation was payable in the circumstances, emphasising the binding nature of the prior orders and coverage of compensation previously paid for the "knee". The SAET's approach in this regard was followed in a subsequent decision of *Reavill* [2017] SAET 128.

## *SACCO* [2017] SAET 130

Shortly prior to being required to attend for a workplace drug test, the worker fell and sustained injury. The worker failed the drug test, and was dismissed. He did not challenge that dismissal, but subsequently did decide to pursue a claim for weekly payments because of the injury sustained in the fall.

While the SAET found the worker did indeed sustain injuries in the circumstances concerned (and about which there was a deal of natural suspicion), his claim was accepted as far as compensability was concerned. However, the SAET also found the worker was guilty of serious and wilful misconduct in the failing of the drug test, and this disentitled him to any weekly payments subsequent to the time of his dismissal, and notwithstanding that he was either partially or indeed totally incapacitated for work.

The worker subsequently found another job, and argued he had therefore effectively restored mutuality, and should be paid make-up pay representing the difference between his income arising from the new job, and the income that he would have received if he was still employed with the pre-injury employer. While the SAET acknowledged the worker had a change of circumstances for the positive, and effectively mitigated his loss by obtaining new employment, they were not satisfied he had revived mutuality in all the circumstances. The SAET particularly noted the worker had lied about his drug consumption immediately prior to and after the workplace drug test had been undertaken, and effectively had not made any admission of fault in this regard.

The SAET therefore found the worker had not displayed the necessary trust and confidence that would ordinarily be expected for an ongoing employment contract and relationship.

The outcome in this matter does tend to underline the importance the SAET attaches to any purported revival of mutuality, and that there should not only be some form of

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change of circumstances for the positive, as far as an injured worker is concerned, but that full and frank admissions as to past wrongdoing, and a display of contrition, are also perhaps just as important as the fact of finding another job.

## *WATKINS* [2017] SASCFC 149

Readers will be familiar with this case, which involves judgments at both the judicial and Full Bench levels of the SAET, involving a worker who endeavoured to seek weekly payments under the new Act, subsequent to those payments being ceased under the old Act, in circumstances where the application of clause 37(6) of the Transitional Provisions was called into play.

A summary of the decision and its effect is as follows:

- where a worker is injured prior to 1 July 2015;
- has their weekly payments ceased, pursuant to Section 36 of the Workers Rehabilitation and Compensation Act, before 1 July 2015;
- undergoes an operation on their compensable injury on a date subsequent to 1 July 2015; and
- claims further weekly payments arising from incapacity occurring because of the operative treatment;
- then the operation concerned constitutes a new injury for the purposes of the Act, and effectively has an injury date of the same date as that of the original injury;
- and therefore, the applicable compensation entitlement periods that flow from that date are those arising under the Act – in other words, the worker effectively sustained a new injury for the purposes of the Act back in December 2014 when her original injury occurred, and her entitlement period for weekly payments of 104 weeks flowed from December 2014.

The significance of the Full Supreme Court's Decision is twofold. It effectively can backdate a new Act injury date to a date prior to 1 July 2015, for the purposes of the Act (although it would appear the decision will probably only have major ramifications for matters where an operation has occurred in the two year period after 1 July 2017).

Secondly, the circumstances of the case provide an exception to the otherwise blanket application of clause 37(6) of the Transitional Provisions, and where clause 37(6) will now be singularly restricted to 'existing injuries' (as in old Act injuries) and where there is no connection with the occurrence of an event such as operative treatment that might occur post 1 July 2015.

With the pace of judgments being handed down by the SAET, it is likely that we will have much more to report on before the end of the calendar year, and therefore readers can expect a further Summer Case update, either late this year or early in the New Year.

In the meantime, the Directors and staff of KJK Legal wish all of you a happy and safe Christmas and New Year, and look forward to being of service to you again in 2018.

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