# SA Employment Tribunal restricts lump sum payments for hearing loss claims

On 9 March 2018, the Full Bench of the South Australian Employment Tribunal ('**SAET**') handed down a decision in the matter of *Onody v RTWSA* [2018] SAET 45, which has ramifications for the assessment and payment of lump sum compensation entitlements for noise induced hearing loss claims pursuant to section 58 of the *Return to Work Act 2014* ('**the Act**').

## Facts

In the *Onody* case, Mr Onody had previously submitted a claim to his employer for noise induced hearing loss, and was assessed as having a 6% whole person impairment ('**WPI**'). He received compensation accordingly.

He subsequently submitted a later claim for noise induced hearing loss, based on further exposure to noise with his employer. He was assessed as having a 9% WPI. A dispute arose between the worker and the compensating authority, ReturnToWorkSA ('**RTWSA**'), as to whether the worker was entitled to any further compensation, and if so, on what basis and method of calculation.

## Arguments

RTWSA initially argued that the worker was not able to submit a further claim. The basis of their argument was that due to the "fiction" created by the Act, namely that the whole of a worker's hearing loss is deemed to have occurred immediately prior to the giving of notice, this only permitted one claim. The Full Bench rejected that argument. The later hearing loss represented a further 'injury'.

The next issue was how to assess the compensation payable, given the prior payment made to the worker. The argument centered on the provisions of section 22(8)(g) of the Act, which requires there to be a reduction by the permanent impairment assessor of any existing impairment from a prior injury, as opposed to the provisions of section 58(7) which provide that where a worker suffers an aggravation etc. of a prior injury, and that worker has already received lump sum compensation for that injury, the case manager simply undertakes a monetary deduction of the lump sum previously

KJK LEGAL

**GETTING IN CONTACT:**

Ground Floor
157 Grenfell Street
Adelaide SA 5000

PO Box 3638
Rundle Mall SA 5000

+61 8 7324 7800

admin@kjklegal.com.au

**kjklegal.com.au**

paid from the compensation now payable for the total impairment now suffered. In Mr Onody's case that would mean his 9% WPI would be assessed on the basis of the prescribed sum applicable to his latest claim, with the payment previously received being deducted.

RTWSA argued if section 22(8)(g) of the Act applied to the case, then the prior 6% impairment was to be deducted from the current 9% WPI assessment. Given the balance was only 3% WPI, Mr Onody would have no entitlement according to RTWSA, as his impairment for his current injury was less than the minimum 5% WPI threshold.

Ultimately the Full Bench decided that as section 58(8) directed that impairment assessments are to be made pursuant to section 22, and given section 58(2) sets a minimum impairment threshold that must be satisfied for a worker to receive lump sum compensation, section 22(8)(g) ought to be applied. Accordingly, Mr Onody was found to have no entitlement to compensation, as the later injury resulted in an assessment falling below the 5% threshold.

It is not clear yet whether the worker will appeal the decision to the Full Supreme Court, but the decision certainly has ramifications for noise induced hearing loss claims, where workers often make multiple claims over time for noise induced hearing loss against the one employer. Whether the decision will apply more broadly to other types of injury is unlikely (due to the unique way in which hearing loss is dealt with under the Act), but it does show it is important when assessing an entitlement to lump sum compensation under section 58 that the compensating authority review whether the injury now being claimed for is an aggravation etc. to which section 58(7) of the Act applies, or a different and separate injury and where any earlier injury, which has already been assessed for permanent impairment, must be dealt with under section 22(8)(g) of the Act.

Should you have any queries regarding the impact of this decision on your claim management processes, then please don't hesitate to contact us.

KJK LEGAL

**GETTING IN CONTACT:**

Ground Floor
157 Grenfell Street
Adelaide SA 5000

PO Box 3638
Rundle Mall SA 5000

+61 8 7324 7800

admin@kjklegal.com.au

**kjklegal.com.au**