OCTOBER 2021 CASES UPDATE

NEWS

KJK turns 10!

We celebrated our 10th anniversary as a firm on 8 October 2021, with a function at the Majestic Garden Rooftop Hotel. We were fortunate to be joined on the evening by family, friends, clients, contacts, and contemporaries, all of whom have had some role to play in helping us to get where we are today. To all our valued clients, Tracey, Neville and Mark extend a heartfelt thank you and our utmost appreciation for the trust you've extended to us over the years, allowing us to provide to you the best possible legal service.

Save the Date – KJK Legal presenting their next Webinar in November

Following on with the trend of webinars being preferred over face-to-face seminars, KJK Legal are presenting the next in our webinar series, to be held on **Wednesday, 17 November 2021**. The webinar will cover issues associated with the vexed question of mandatory workplace vaccination from both an industrial and workers compensation perspective, commentary on the newly published Impairment Assessment Guidelines, the pick of this years' Supreme Court cases of significance, and some of the more interesting South Australian Employment Tribunal cases from 2021 – so there's plenty to look forward to.

We'll be sending out invitations to register for the event in the coming days. If you don't receive one, then please feel free to reach out to us.

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Recent Cases of Interest at the SAET (and a snippet for the Supreme Court)

Moodie v Viterra Operations Pty Ltd [2021] SAET 166

Topic: Costs & NIHL claims

Commentator: Melanie Conroy

This matter concerned the rejection of a claim for lump sum compensation for noise induced hearing loss ('NIHL'), and the validity of making a claim.

Background

The worker claimed and received a lump sum for NIHL in 1998. Subsequently within two years of his retirement, he made a further claim for a NIHL lump sum in 2014. This claim was not determined by the employer, nor did the worker pursue it.

The worker then made another claim for NIHL in 2020. The employer rejected the 2020 claim on the basis there was no work-related cause for any increased post-employment binaural hearing loss, and the hearing loss was partially attributable to non-work related degenerative inner ear disease.

The worker sought a review of this decision out of time. As the worker was not able to get in contact with Dr Baker, the sole medical expert who supported the 2014 claim, he sought another expert opinion from Dr Baxter. Dr Baxter was not supportive of his claim.

In the course of the dispute, the worker did not provide an explanation of why the 2014 claim was not pursued, nor did he explain why the 2020 claim was made in the alternative.

The Tribunal held the worker acted unreasonably in bringing the 2020 claim and noted this was the third time he had sought compensation for the same loss. The Tribunal specifically commented that making further claims is not an issue if a worker can show their hearing loss has deteriorated.

As such, the Tribunal declined to make an award in favour of the worker and costs were awarded against him pursuant to section 106(3) of the *Return to Work Act* 2014 ('the Act').

In situations where workers have been seeing multiple hearing loss providers over the years, this scenario is not all that unusual. It therefore pays to dig around into the worker's full post-employment history with hearing providers.

Girdler v Accolade Wines Australia Limited [2021] SAET 158
Topic: Section 22 assessment/concessions made or not made
Commentator: Tracey Kerrigan

This case is a follow on from earlier cases involving Mr Girdler and whether he is a seriously injured worker or not (see [2020] SAET 169). In an earlier case, Deputy President Judge Gilchrist found the employer had failed to identify any error in the permanent impairment assessment ("PIA') report that would justify the Respondent's application to have the worker referred for an independent medical assessment. The PIA report if accepted meant the worker would be treated as a seriously injured worker. The Judge found the employer's concerns were no more than "dissatisfaction" with the opinion, rather than identifying any real error.

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The employer subsequently applied to the Judge for permission to argue that certain injuries being claimed by the worker were not compensable, namely injuries to the cervical and thoracic spine. The worker opposed the application on the basis the employer had not properly contended that compensability of those injuries was in issue at trial. The Judge found the employer had not conceded compensability and should be permitted to argue the issue.
This subsequent ruling was to determine what that actually entailed. The Judge ruled the employer could argue the conditions affecting the cervical and thoracic spine were not compensable injuries, but the hearing was to be limited to that issue alone. The employer will be unable to argue about the findings of impairment made by the PIA assessor, so presumably if the Judge ultimately finds the injuries are compensable then the PIA assessment in its current form will stand. It would only be changed if the injuries to those body parts are found not to be compensable.

Burwell v Return To Work SA [2021] SAET 161 (20 August 2021)

Topic: Permanent Impairment Assessments in relation to deductions for prior injuries

Commentator: Melanie Conroy

Background

Mr Burwell had worked for many years in the mining industry and over time suffered a number of injuries to his spine. He sustained a work injury on 24 March 2010 to his L4/L5 disc and underwent a discectomy. The worker did not make a claim for this injury until 2017. It was accepted as compensable by the claims agent. A further work injury on 30 July 2015 caused injury to the disc at the L3/L4 level.

The issue before the Tribunal was the calculation of the worker's lump sum entitlements applicable to each injury. In particular was the issue of whether the WPI figure for the 2010 injury should be deducted from the percentage assessed for the 2017 injury.

The Tribunal examined the application of the Impairment Assessment Guidelines ('IAG's') and confirmed the approach taken by Dr D'Onise in the assessment - where there are injuries to different disc levels they can be assessed separately, and thus by implication represent different body parts. Dr D'Onise commented that he was not prepared to deduct the prior assessment of 10% for any 2010 injury from his assessment of 17% for the 2015 injury. At the time he made his original assessment in 2016 for the 2015 injury he interpreted the Impairment Assessment Guidelines in light of advice issued by WorkCover in a newsletter titled "The Permanent Impairment News". PIA assessors were advised that when assessing the spine, no deduction was to be made where there was a pre-existing impairment to the same part of the spine if the impairment was at a different anatomical location.

This advice to assessors was not changed until after the examination of the worker in a newsletter issued by RTWSA in March 2017. In the 2017 newsletter RTWSA advised that for the purpose of assessments the IAG and AMA5 divide the spine into three component parts, cervical, thoracic and lumbar, and each are to be treated as a body part which is not considered to be further divisible.

Dr D'Onise explained his assessment was based on the advice of WorkCover's 2010 advice.

The worker submitted that Dr D'Onise was correct not to deduct the 10% assessment for the 2010 injury from the 17% assessment for the 2015 injury because when arriving at each assessment no regard need be had for the other injury. In taking this approach Dr D'Onise was considered to have acted in conformity with section 22(8)(b) of the Act, as impairments from unrelated injuries or causes are to be disregarded in

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making an assessment. If the impairment was already disregarded, there was no need to deduct as this would amount to a double reduction in the assessment.

Paragraph 1.23 of the IAG's does not mandate strict adherence to deducting for prior injuries. It allows for an assessor to identify and disregard an unrelated or prior injury.

The Tribunal made comment that it was not a point that needed to be decided in this case, as it was clear the worker had separate injuries due to the effects of surgery at the different disc levels of the spine, however in the view of Deputy President Judge Kelly it is possible that the different disc levels constitute different body parts. This is because injury at each level attracts a different DRE categorisation.

It would not be surprising if RTWSA take this matter on appeal. We will let you know if that occurs but, in the meantime, decision makers will need to ensure they raise the newer directive with the permanent impairment assessor in the appropriate case on referral of such matters.

Aslan v Return to Work Corporation of South Australia [2021] SAET 191

Topic: Whole Person Impairment Assessment and compensability

Commentator: Melanie Conroy

This case concerned a dispute about:

- the compensability of additional foot injuries allegedly sustained by the worker
- the accuracy of his whole person impairment (WPI) in connection to his accepted right knee injury and
- whether any or all of the impairment assessments connected to his compensable back injury should be combined (including bruxism).

Background

The worker was employed as a tiler and suffered a compensable injury to his back in the course of employment. He suffered a further compensable injury to his right knee when getting out of bed. The worker then reported having pain in his feet. This claim was rejected by the compensating authority.

It was found the worker gave inconsistent evidence about when the foot pain commenced and the medical evidence as to the diagnosis of the foot pain was inconclusive. As such it was held the worker had not discharged his burden of proof, and the Tribunal was not satisfied the feet injuries arose from employment.

Putting the issue of compensability to one side, what was of interest in this case was the issue around the assessment of the impairment for the worker's knee injury. The worker was examined by Dr Jennings for his alleged physical injuries and Associate Professor Boffa for the alleged bruxism.

Dr Jennings in connection with the assessment for the right knee, noted there are various methods of assessment available for lower extremity impairments, which include muscle atrophy and diagnosis based. Dr Jennings took thigh measurements but was of the view the only appropriate method of assessment was diagnosis based in this instance. This resulted in a 1% WPI rating.

The worker took issue with the assessment of the right knee as he contended that had the thigh been correctly measured it would have revealed right leg atrophy, which would have resulted in a higher assessment than 1% WPI.

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The court made further enquiry in relation to the thigh measurements. The worker's thigh had been measured on four separate occasions by different doctors. The measurements made by Dr Suyapto and Dr Economos are broadly consistent. The measurements taken by Dr Jennings at the permanent impairment assessment were at odds with the assessments by Dr Suyapto and Dr Economos. The SAET expressed the view there was a possibility the measurements by Dr Jennings were wrong, and an opinion from an Independent Medical Advisor might be required.

This opinion was prefaced on the fact that, based on the evidence at hand, the worker would not reach the 5% WPI threshold unless the impairments were combined.

In relation to whether the impairments should be combined, the Tribunal noted this issue would turn on the outcome of the appeal in the matters of *Zaidi v Return to Work Corporation of South Australia (no. 2)* as well as the pending appeal to the High Court in the matter of *Return to Work SA v Summerfield*.

As such the case was deferred for a further directions hearing, however the Tribunal upheld the rejection of the worker's claim for compensation for his left and right feet.

Implications for employers

This case is a good reminder to have a critical eye when reviewing permanent impairments assessments, as it may be the case the assessment is not consistent with the methods of assessment stipulated in the IAG's, the assessor may have made errors in the calculations, or the measurements obtained may be at odds with the bulk of the other available contemporaneous medical evidence on the issue. In these situations, you may like to consider a peer-review of the report. Should you choose to write to an assessor to clarify their report, remember to ensure you have gained consent from the other side, as the Tribunal has made it very clear that unilateral communication with a PIA Assessor is not permitted except in limited circumstances (and as now overseen within the provisions of the new IAG's – see further below).

Symeon v Southern Cross Care [2021] SAET 192

Topic: Permanent Impairment and terminal illness

Commentator: Melanie Conroy

This case concerned an Application for Expedited Decision ('AED') for determination of a claim for compensation for permanent respiratory impairment due to compensable mesothelioma. The question in issue was whether the worker had reached maximum medical improvement ('MMI'), in view of having a terminal illness.

The worker was exposed to asbestos in the course of her employment with Southern Cross Care (SCC) and in 2014 she developed mesothelioma. She lodged an AED citing there had been undue delay in determining her claim for lump sum compensation.

There had been numerous attempts by the worker's representative to request the PIA process to commence, and they had provided evidence she had reached MMI.

The Tribunal commented that because of the way SCC had chosen to exercise its powers this issue required to be resolved by the Tribunal as SCC's repeated failure to explain why it did not accept MMI had been reached was not consistent with being a delegated decision maker under the Act.

The Tribunal held there was undue delay in SCC's refusal to arrange the PIA assessment. The Tribunal commented that the likelihood of an injury being terminal does not preclude a worker being at MMI, as the condition will not improve and is stable with a known prognosis. Whilst the Act requires the permanent impairment to

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be stable, it does not exclude an impairment that it stably deteriorating with an ultimate prognosis of death.

It was noted by the Tribunal that the new Impairment Assessment Guidelines eliminate any ambiguity on this point.

This case is a good reminder that if a worker's condition has been stable for three months and is unlikely to change in the foreseeable future it is likely it will be considered to be at MMI. As such, the fact the worker has a terminal illness is not a bar to a worker having their permanent impairment assessed.

It is also worthwhile remembering that in the case of a potential death claim, the worker or the worker's dependants will be entitled to compensation and support from the Scheme. Any monetary benefits will be paid regardless of whether they are paid before or after death, and that when a worker in such a case does not have dependants, they are still entitled to elect to undergo the PIA process and be paid their lump sum entitlement.

Spielhagen v Return to Work Corporation of South Australia [2021] SAET 164

Topic: Validity of Permanent Impairment Assessment

Commentator: Melanie Conroy

This case is of interest as it discussed what steps a compensating authority is required to undertake when informing a worker about the PIA process.

Background

The worker injured his shoulder on 2 January 2018 when working as a car detailer at a car dealership. The worker, after having the PIA process explained to him by the claims agent, elected to go ahead with his PIA for his compensable right shoulder injury. After the PIA for took place, the worker sought legal advice. After doing so he lodged a claim for a left shoulder injury and contended he should have been advised about the consequences of the PIA, including being told he could have lodged a claim for a left shoulder injury and that he should have considered waiting to see if surgery was required before having the PIA for all injuries/impairments.
The worker also contended that MMI was not present when the PIA was performed, given he subsequently had right shoulder surgery.

The Tribunal examined these issued and noted the worker's Application for Review did not make mention of most of the arguments he relied on, including the alleged left shoulder injury. Ultimately, the Tribunal preferred the evidence provided by others, as the worker's recollection was found to be poor and unreliable.

The worker submitted what was required of the claims agent in terms of explaining the PIA process, is similar to the professional and financial advice required to be given to a worker contemplating a redemption of weekly payments or medical expenses. This argument was rejected by the Tribunal and they noted the requirements described in *Kaye v Return to Work SA [2018] SAET 143* were complied with, namely that when dealing with an unrepresented worker in relation to a PIA process a compensating authority should take reasonable steps to ensure the worker is properly informed about the PIA process, including advising the worker there can only be one assessment. The Tribunal considered the worker's suggestion the PIA process should be explained to the standard of a redemption payment, was beyond the scope of the legislation and to require this type of explanation and acknowledgement by a worker they understand the nature and consequence of having a PIA would intrude of the province of the legislature.

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As such, the worker's contention the PIA process was not properly explained to him was not made out. The evidence showed the worker received not less than 4 or 5 verbal explanations of the nature and consequences of the PIA process, as well as pamphlets that provided similar explanations. The fact the worker chose not to seek advice from anyone other than his wife, and he did not think about whether he would need surgery in the future, weighed against him.

The Tribunal did not believe the PIA process should be set aside by reason of the alleged left shoulder injury. The court held that if the worker sustained a left shoulder injury it was minor and/or transient, and he went through with the PIA process having the knowledge of that injury.

In relation to the issue of the worker asserting he was not at MMI, based on the fact he had surgery about one year after the impairment assessment, the Tribunal found the expert medical evidence showed the right shoulder had attained MMI at the time of the PIA. The Tribunal specifically took into consideration the fact that at the time of the PIA the worker did not wish to have surgery. Therefore, the Tribunal held there was no good basis for disturbing the views of the doctors/medical experts who considered MMI was present at the time of the PIA.

What was also in issue in the was that the nominated PIA assessor, Dr Wyatt, only performed the range of shoulder motion tests once. The Guidelines which applied to the testing provided it should be repeated, with AMA 5 specifically stating that range of motion testing (ROM) should be performed 3 times and the first edition of the IAG at Chapter 2.5 providing that active range of motion should be measured with several consistent repetitions.

Dr Wyatt only conducted the ROM test once. On her evidence she only conducts the test once because she had once assessed a patient for a second PIA, afterwards the presentation was worse, and surgery was required. Based on Chapters 1.58 and 2.5 of the IAG's the Tribunal noted the PIA did not comply with the relevant standards and this called into question the validity of the PIA assessment. The Tribunal found range of motion testing should have been performed more than once. Therefore, the assessment of the worker's permanent impairment was referred to an independent medical adviser under Part 8 of the RTW Act.

<u>The takeaway:</u>

This case is a good reminder for compensating authorities there is a legal obligation to explain the PIA process fully in accordance with the principles in *Kaye v RTWSA,* although a degree of responsibility also falls upon the worker to consider their own best interests in making their decision.

The case also shows that scrutiny as to the validity of PIA assessments may be required, as should the assessment not be in accordance with the IAG's and AMA5, there is a risk the assessment won't be held to be valid. When in doubt about things such as ROM testing (especially where the suggested result is at odds with findings of ROM made by other medical or allied health practitioners at about the same time), it might well pay to call for the PIA assessor to produce their actual notes of the assessment to substantiate the findings set out in their report.

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Graham v Southern Adelaide Local Health Network [2021] SAET 159

Topic: Validity of permanent impairment assessment – Section 58 of the Return to Work Act 2014

Commentator: Melanie Conroy

As has been a consistent and regular topic before the Tribunal in the past year, the prohibition of communication with PIA assessors is discussed in this case.

The applicant, Ms Graham, sought a review of the decision by the employer, the Southern Adelaide Local Health Network (SALHN) that Ms Graham had no entitlement to a lump sum for non-economic loss pursuant to section 58 of the Act.

SALHN considered they were not able to determine whether she had an entitlement to a lump sum payment for non-economic loss pursuant to section 58, or for economic loss pursuant to section 56 of the due, to a non-compliance in the report of PIA assessor Dr Tran.

Ms Graham contended Dr Tran's report was in accordance with section 22 of the Act, and where applicable the IAG's.

SALHN maintained Dr Tran's report was non-compliant with respect to the assessment of the right elbow, as the doctor used the strength evaluation method. SALHN sought review a peer-review of Dr Tran's report with Dr Cherry. There was a divergence of opinion in regard to the method of assessment between Dr Tran and Dr Cherry.

The Tribunal accepted the assessment of Dr Tran, and commented he was an impressive witness. They noted the other method of assessing Ms Graham's impairment from the epicondylitis to her right elbow did not adequately have regard to the impairment related to strength reduction. Dr Tran's method of using a grip strength test was found to be a valid method of assessment.

When combined with Ms Graham's other injuries arising from the same cause, Ms Graham's whole person impairment (WPI) was 24% WPI.

The Tribunal expressly commented that it was concerned in relation to the manner in which SALHN undertook the section 22 process after it received the report of Dr Tran. The Tribunal noted whilst SALHN was entitled to seek the opinion of Dr Cherry, it was inappropriate to engage in the extent it did to communicate with Dr Tran and with a view to encouraging him to change his assessment. The Tribunal commented it was inappropriate to assert in correspondence with Dr Tran that he was **required** to change his report in order for it to be compliant.

The Tribunal commented that this case is another illustration of how the integrity of the section 22 process may be compromised by permitting subsequent communications with assessors once a report has been provided.

The integrity of the section 22 process, and how to properly approach that process, is preserved in the Second Edition of the IAG's which was gazetted on 24 August 2021. The Second Edition of the IAG's is applicable to claims with a date of injury on or after 24 August 2021.

The Second Edition of the IAG's provide clarity on the issue of unilateral communication and states the requestor cannot direct an assessor to alter their medical opinion. Clause 1.53 explicitly states a requestor must not direct an assessor to alter their medical opinion.

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In addition to this amendment, the main changes in the Second Edition are:

- Clarification on the definition of disregard/disregarded;
- Removal of the mandatory 1/10th deduction for a pre-existing injury (physical and psychological);
- Amendment to the provisions regarding contact with an assessor and stipulating RTWSA cannot direct an assessor to change their clinical opinion;
- Providing clarity on the issue of unilateral communication, and stating the requestor cannot direct an assessor to alter their medical opinion;
- Removal of the requirement for a surgeon to undertake the PIA assessment for musculoskeletal injuries if surgery has occurred.

Should you like more information on the changes to the Second Edition of the IAG's then please get in touch with us.

Franck v Return to Work Corporation of South Australia and Wrightville Services Pty Ltd [2021] SAET 162

Topic: Estoppel, fairness at trial and costs

Commentator: Melanie Conroy

This case concerned an appeal by the worker, Mr Franck, from a decision of the trial judge to uphold a challenge made by the employer to the claims agent's acceptance of the worker's claim. The trial judge found the worker had sustained his injury over the weekend and not at work. There was sufficient proof to warrant a finding in satisfaction of the *Briginshaw* principle as stated in the case of *Briginshaw v Briginshaw* (1938) 60 CLR 336. Broadly stated the *Briginshaw* principle is that the more serious the allegation, the greater degree of certainty a trier of fact will require before making a finding the allegation is true.

The trial judge was warranted to find that the worker injured his wrist over the weekend prior to the asserted date of injury of 15 October 2018, and his evidence as to the circumstances of his claimed injury at work, or alternatively on another weekday of that week was deliberately untruthful evidence.

It was for this reason the judge upheld the Employer's complaint about the determinations accepting the worker's claims.

On appeal the worker raised the following issues:

- the issue of estoppel in that, the Corporation's original determination accepting the claim prevented it from resiling from that position;
- there was such a significant disconnect between the evidence and the judge's findings that the judge denied the worker procedural fairness,
- the judge provided inadequate reasons for finding as he did, or so erroneously analysed the evidence that the analysis itself was an error of law
- he should not have had costs awarded against him.

On appeal it was held the original determination did not create any form of estoppel. Amongst other cases, the Full Bench referred to the principal in *Mitsubishi v Harbord* (1997) 69 SASR 75, which makes clear for an estoppel issue to arise it must do so arise by reason of something more than the making of a determination or the making of a payment. The Tribunal commented that, following precedent, it is for the party asserting an estoppel to establish the grounds to found that assertion.

Apart from the fact the claims agent had accepted liability on the worker's claim and made payments of income support, the only other assertion made by the worker was that the Tribunal should assume that forensic decisions about the way the case would be presented, and the evidence to be called at trial, as made by the worker before the

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trial, were based on the assumption the claims agent would not resile from its acceptance of the claim. The Tribunal found this mere assertion was not enough to raise an estoppel.

In relation to the issue of procedural fairness, the Tribunal accepted it is a significant thing to assert a witness has lied, and that a witness against whom that assertion is made should be made fully aware this is being contended. It was found the worker was on notice his credibility was in issue. In light of the statements, affidavits and the Statement of Issues and Contentions filed by the employer it was plainly contending the work incident that allegedly caused an injury to the worker's wrist did not happen. There could have been no illusion the employer was contending the worker's version of events were false. The Tribunal rejected the proposition by the worker there was procedural unfairness in the way in which the employer's legal counsel dealt with the worker at trial. There was no obligation for him to specifically put to the worker he had lied, as this proposition was already clearly in issue 'on the documents'.

The other issues raised in relation to there being a disconnect between the evidence and the judge's findings (denying the worker procedural fairness) and that the judge provided inadequate reasons for finding, or the judge erroneously analysed the evidence (an error of law), were all found to have been adequately dealt with. For example, the Tribunal commented that it was a matter for the judge to consider what was to be made of the worker's evidence and how he was to evaluate that evidence by reference to the other evidence adduced at the hearing. The judge had to make do with the evidence that contained inconsistencies all round, but none of this prevented him from being impressed by some witnesses and unimpressed by the worker's evidence.

On the appeal as to costs, the Tribunal held that as a matter of law the judge was permitted to make the orders that he did. A ruling as to costs involves a discretionary judgment and it was held the judge did not misapply the relevant legal principles, he did not fail to take into account relevant matters, he did not take into account irrelevant matters, and his conclusion was not so unreasonable or unjust as to require the Full Bench to substitute its own discretionary order. The Tribunal commented that just as an employer who acts unreasonably, by needlessly putting a worker to proof, could be expected to receive an adverse costs order that included paying the worker's costs, so too should a worker who through deceit maintains the prosecution of a false claim be at risk of paying an employer's costs.

The effect of the judge's reasons was he found the worker fabricated the alleged circumstances of his injury. Having made that finding, it was appropriate to make an order that reflected an adverse order for costs under section 106(3) of the Act, as this involves discretionary judgment. Therefore, the worker's appeal against the order for costs was also dismissed.

Clark v Return to Work SA [2021] SAET 156

Return to Work SA v Cooke [2021] SAET 163

Sanders v Return to Work SA [2021] SAET 172

Guyatt v Utilities Management Pty Ltd [2021] SAET 179

Topic: Cases on pre-approval of surgery

Commentator: Melanie Conroy

Since August 2021 several cases have examined the issue of future surgery applications.

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The first case *Clark v Return to Work SA* [2021] SAET 156 examines the likelihood of future surgery. The claims agent contended there was no evidence the worker's right shoulder condition would deteriorate, and without any such deterioration there was no likelihood the surgery would be undertaken in the future. The case considers the criteria in the well-known case of *Soldi* and discussed the meaning of likelihood of future surgery.

The worker sought pre-approval for surgery, being a potential manipulation and arthroscopic capsular release procedure to her right shoulder. The worker stated she would undergo the procedure if her right shoulder symptoms were to become unmanageable.

In the opinion of the worker's treating orthopaedic surgeon, Dr Shahrokhi it was likely she would require surgery to her right shoulder if she continued to be troubled by her symptoms. Dr Shahrokhi noted that, clinically, the worker would benefit from the proposed surgery.

Orthopaedic Surgeon Dr Low reviewed the worker at the request of the employer. He noted that if worker's condition deteriorated surgery had been suggested for her. He commented that at present the surgery was not indicated but if she deteriorates it is a possibility in the future. Dr Low also commented that there is no predictability as to how a disease process, particularly around the shoulder will pan out particularly when it is secondary to a right humeral fracture. In his opinion there was a low likelihood the worker would require manipulation and arthroscopic release in the future. He described her condition as resolving impingement and adhesive capsulitis.

The Tribunal considered the four guiding principles in the case of *Soldi's* case and noted the worker had submitted that the evidence established all four criteria had been met.

Regarding the likelihood of the future surgery, the worker submitted that the surgery was likely to be needed by her at an unspecified date in the future.

The claims agent contended it had not been shown there was a likelihood of the surgery being undertaken in the future. The claims agent also submitted the worker did not have to demonstrate the future surgery was 51% probable, but just that the possibility of the surgery was not merely speculative.

Aspects of Dr Shahrokhi and Dr Low's evidence supported the worker's case. In Dr Shahrokhi's opinion, given that the worker's symptoms had not fully resolved after two years he commented it is likely she would require surgery if she continued to be troubled by her symptoms. In Dr Low's opinion, although surgery was not presently indicated, it should be kept on the backburner for the future just in case and the option kept on the metaphorical stovetop.

The claims agent submitted that in order for any future surgery to become likely, the worker's shoulder condition had to first deteriorate, there was no evidence that her condition would deteriorate, and therefore future surgery is not likely.

The Tribunal reiterated that when assessing an application for future surgery, it is an evaluative judgement as to whether in the particular circumstances the extension was warranted. The Tribunal also made further comment that the word "likelihood" does not feature in section 33(21)(b)(ii) of the Act. The Tribunal reminded us this was introduced as part of a guiding explanation by the Full Bench in the *Soldi* case.

Given the remedial objects of the Act, to ensure persons who suffer work injuries receive high quality service, the Tribunal stated the measure of likelihood of the identified surgery to be undertaken at a later time is whether or not there is a real, or not remote chance or possibility, of that surgery being required.

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In assessment of the totality of the evidence of Dr Shahrokhi and Dr Low it was found there is a real or not remote chance or possibility that the worker would require the surgery in the future. As such the decision of the claims agent was set aside.

In the second case, *RTWSA v Cooke* concerned a decision on appeal. The initial decision found in favour of the worker, that there was a real chance surgery would be required. RTWSA appealed the decision and contended the test of the likelihood of the future surgical treatment is "sufficiently likely" and not the "real chance" or "possibility" as found by the judge. On appeal it was held the judge had applied the correct test, and provided there is a real, or not remote chance or possibility that the surgery will be required, the exemption to the time limit in section 33(20) will be met.

Background

The worker was employed as a disability support worker. In the course of her employment, she ruptured her left Achilles tendon and as a result of this she developed plantar fasciitis in her right foot. She underwent surgery to her left Achilles tendon in 2017.

The medical evidence foreshadowed that it might be possible that her Achilles tendon may re-rupture. If this happened the tendon would need to be reconstructed via keyhole release. All three medical experts in the case accepted there was a significant risk she might need future surgery, and this was sufficient to enliven the discretion to remove the time limit.

The judge found there was a real chance or possibility of the identified surgery being required in the future to treat the work injury. Having made the evaluative judgment identified in *Soldi,* the judge held that in respect of the identified surgery, no time limit should apply due to the likely impact of the work injury to the left Achilles tendon and to the right plantar fascia on the worker's future health and capacity.

On appeal RTWSA submitted there was insufficient evidence the surgery would be required, nor was there sufficient evidence which demonstrated that it was reasonable and appropriate for the surgery to be undertaken at a later time. It was suggested the evidence as spoken of in *Soldi* was lacking.

The Full Bench of the Tribunal held the judge correctly applied the relevant principles, and the appeal was dismissed.

In contrast to the two cases above in the third case of *Sanders v Return to Work SA* [2021] the worker failed to discharge the evidentiary onus. This case centred on the level of proof required of the need for future surgery. RTWSA argued the surgery application made by the worker was not valid because the essential requirements for an application under section 33(21) were absent. In addition to this, the need for surgery was not established to the requisite degree of probability as described in *Zippel v Return to Work SA.* In consideration of the evidence provided by the worker and the medical evidence the Tribunal was not satisfied the degree of likelihood for future surgery was present.

It was noted the nature of the possible surgery identified was really a list of all possible back surgeries and the nature of the proposed actual surgery was not specifically stated. The Tribunal also commented it appeared the likelihood of specific surgery was at the remoter end of the scale.

In the final case of *Guyatt v Utilities Management Pty Ltd* [2021], the worker applied for a declaration from the Tribunal that a document approving a request for pre-approval of surgery was a valid determination, that it had not been properly redetermined later on, and the decision to approve the surgery was binding upon the Employer.

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The employer contended the approval was not a binding determination, as the application for surgery did not comply with Regulation 22 of the Act, as the date of injury was omitted from the application.

It was held the omission of the date of injury was minor, was not complained of before approval was given, and the employer could easily discern the date of injury.

Background

The worker sought a declaration pursuant to section 26A of the *South Australian Employment Tribunal Act 2014* (the SAET Act). The power in section 26A confers an ability to make declaratory judgments and to make binding declarations of right, whether or not any consequential relief is or could be claimed.

The worker submitted a surgery request on a pro-forma from Dr Sandow, which the employer stamped the document stating "approved 20 August 2021", and with the signature of the Case Manager. The worker was seeking a declaration the initial surgery approval made by the employer was a valid surgery pre-approval pursuant to section 33(17).

The Employer contended the notation on the request from Dr Sandow was not a proper determination but a representation, as the pro-forma was not a proper claim for pre-approval. Section 33(18) requires a surgery application to be in accordance with the RTW Regulations.

Although the date of injury was not written on the application, it was readily discernible, and this was not a matter where there were multiple claim numbers or dates of injury.

The Tribunal found the Regulation had been so substantially complied with that to describe it as not being a proper claim would be a 'triumph of form over substance'. It was found the employer's determination to pre-approve surgery was valid and binding.

ASC Pty Ltd v McCormack & ASC Ship Building Pty Ltd [2021] SAET 195

Topic: Section 18 and who is the 'pre-injury employer'?

Commentator: Tracey Kerrigan

The issue of who is the "pre-injury employer" for the purposes of section 18 of the Act was dealt with in this case, where the worker was employed by a company that was part of a group self- insurance licence pursuant to section 129 of the Act. With a group self-insurer, one company is nominated under section 129 to be the nominated employer of all the employees of each company/business in the group.

Mr McCormack issued an application at the Tribunal pursuant to section 18, following being made redundant by ASC Shipbuilding Pty Ltd. ASC Shipbuilding was one of 3 companies registered as a group of self-insured employers. His section 18 application was directed to 2 of the other members of the group, even though he clearly was not employed with either of them at the time he suffered his work injury.

At trial, Deputy President Judge Kelly found the pre-injury employer for the purposes of section 18 of the Act was the nominated employer pursuant to section 129(12), namely the company that held the licence for the group. ASC was the nominated employer of the group for the purposes of the licence.

ASC appealed the decision to the Full Bench of the Tribunal, which has now handed down its decision. Deputy President's Judge Gilchrist and Judge Rossi found the "pre-

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injury employer" for the purposes of section 18 is the actual pre-injury employer, not the group nominated employer. The duty imposed by section 18 is to the actual employer from whose employment the worker's injury arose, and not any other related corporate entity.

While RTWSA has powers to encourage self-insured employers to provide suitable employment, that does not affect the interpretation of the legislation. The nominated employer for the purposes of the group self-insurance licence is not "the employer from whose employment the injury arose" for the purposes of section 18. Subject to whether the worker concerned wishes to take the matter further to the Supreme Court's Court of Appeal remains to be seen, but for the time being the decision confines the jurisdictional limit of the Tribunal in dealing with the responsible entity who can be called upon to comply with the section 18 obligation to provide suitable employment to an injured worker.

Deputy President Judge Calligeros issued a separate judgment, but was in agreement with the general principles set out above. He did comment that section 18 is a "stand alone code", and the section 129 principle applicable for self-insurance licences was not intended to intrude upon the operation of section 18.

The State of South Australia (in Right of the Department for Health and Ageing (SA Ambulance Service)) v Dohnt & ors [2021] SASCFC 22

Topic: When and where do sections 45 and 47 apply?

Commentator: Lachie Smith

In a decision made by the Full Bench of the Tribunal, surrounding the applicability of calculating "average weekly earnings" under section 45(1)(a) of the Act, it was concluded a change in remuneration effected by an enterprise agreement after the date of injury comes within the concept of "a change in a component of [a] worker's remuneration", thus warranting an adjustment of weekly earnings. It was also concluded that reference to "weekly wage" in section 5(15)(a) of the Act included allowances.

On appeal to the Full Court of the Supreme Court, RTWSA disputed the decision on the ground that section 47 of the Act exhaustively provides for the adjustment made to weekly earnings resulting from changes in rate of remuneration payable, thus precluding any adjustment pursuant to section 45. Section 47 adjustments are only available to seriously injured workers, as defined under section 21(2) of the Act.

The Appeal was allowed on the basis Full Bench of the Tribunal's answers were derived from a false premise that section 45 applied. The use of the word "component" within section 45(1)(a) should not be taken to replicate the more specific provision under section 47(3) as to "rates of remuneration". This provision has specific drafted applicability to fact scenarios including a change to a worker's rates of remuneration resulting from changes in awards or enterprise agreements the worker belonged to at the time of the injury. Relevantly, it was interpreted by Justice Livesey that "rates of remuneration" or "remuneration" are not considered "components" of remuneration under section 45.

As a result, the matter was remitted back to the Tribunal for final determination on the facts.

<u>The takeaway</u>

Changes in rates and allowances resulting from enterprise agreements following a work injury will not amount to change in a relevant component of remuneration when determining average weekly earnings under section 45(1)(a). These are properly

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construed as changes in "rates of remuneration" and only reviewable under section 47 if the worker is "seriously injured".

HEADING OFF THE TRACK A LITTLE – SOME RECENT EMPLOYMENT CASES

Panagiotas v Pickwick Group Limited [2021] SAET 187

Topic: Fair Work Act and Deeds of Release

Commentator: Neville John

This case involved two Federal Court actions, one for underpayment of wages and one for alleged sex discrimination and harassment.

The employee initially brought proceedings against the employer in 2017 claiming underpayment of wages in the sum of $57,000.00. A year later the employee instituted separate proceedings in the Federal Court against the employer and two other respondents seeking damages for the alleged inappropriate discrimination and harassment. Ultimately, she settled her Federal Court harassment claim and executed a Release and Discharge Agreement.

The respondents then disputed any obligation to pay the underpayment of wages, claiming that the employee had released them from the claim by signing the Discharge Agreement. The legal term for this is estoppel.

The Court disagreed with the employer. The Discharge Agreement itself was entered into in the context of the harassment claim and referred to that Court action and any claims that the employee had then, or in the future, arising from any injury, loss or damage suffered by her as a consequence of the events pleaded in the Federal Court action relating primarily to sex discrimination and sexual harassment. The Discharge Agreement provided that the employee undertake to discontinue any legal proceedings against the respondents, and including the Federal Court proceedings, that related to the conduct pleaded in those proceedings. The problem for the employer was that the pleadings in the Federal Court proceedings did not include any reference to the facts material to the employee's underpayment of wages claim.

The Court therefore held that the employee was not estopped from continuing with her underpayment of wages claim as the Deed of Release had not been drafted adequately to cover all the proceedings issued.

Lessons for employers:

This is a clear lesson to ensure that when settling any matters, whether they be arising under the *Fair Work Act* or any other jurisdiction where a Deed of Release is entered into, all matters contemplated to be released are specifically set out in any Agreement, such that there is no room for argument down the track. It is clear that the employer intended any settlement monies paid to the employee arising from the discrimination case to also include the pre-existing underpayment of wages claim, but the Agreement itself was not drafted in a precise manner in which to make that clear. Obviously, the employee did not accept that she had waived her rights to continue with the underpayment of wages action, and one would expect that if she had, she would have negotiated a higher settlement sum in global terms.

The drafting of a Deed of Release, or any agreement on termination, must be considered very carefully to ensure that all matters contemplated to form part of a settlement, or termination payment, are included, in order to avoid any doubt over what entitlements an employee is giving up and indemnifying the employer against.

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Geselle v Department for Health and Wellbeing [2021] SAET 167

Topic: Fair Work Act and Unfair Dismissal

Commentator: Neville John

This case involved a long-term Registered Nurse employed by the SA Government whose employment was ultimately terminated after a long-term absence from work as a consequence of an allegation that she had frustrated her contract of employment due to non-work related incapacity. The worker was deemed to be unsafe to perform her work as a Nurse due to obesity, a knee condition and falling asleep at work. She was suspended with pay for a period of 14 months.

The employee was denied her request to access accrued annual leave of some 500 hours, long service leave, and even 200 hours of paid sick leave.

Ultimately, the employer terminated the worker on grounds of frustration of contract.

The employer was aware that the worker was trying to seek treatment to alleviate her health problems and lose weight and when the worker sought re-instatement and re-employment under section 18 of the Return to Work Act, it was denied by the Respondent.

The Respondent employer fell into significant error by not seeking information from the worker's treating practitioners despite knowing that she was undergoing treatment and not seeking alternative duties broadly across the hospital system, except for one particular unit. The employer also disregarded notice of the worker's planned bariatric surgery and disregarded notice of a work related contribution to the obesity and knee condition.

The Tribunal found that the employment contract had not been frustrated by the worker and such the breach was based purely on the employer's subjective opinion of what the Tribunal termed to be short to medium term incapacity for heavy nursing duties without consideration of the steps already taken and planned by the worker to improve her functional capacity.

The employer fell into error by not attempting to obtain medical evidence from the worker's medical advisors contrary to its own policies and the Tribunal found that the employer was in part, motivated by invalid consideration of avoiding the applicant lodging a workers compensation claim for psychological injury.

The Tribunal also found that there were suitable alternative light nursing or administrative duties outside of the Medicine Division that could have been offered to her and the Respondent fell into error by only considering capacity for full heavy duties without modification in the short to medium term.

The employer was also criticised for not allowing the worker to access her accrued leave and did not even consider an application for leave without pay. It failed to follow its own policies and as such, her dismissal was harsh, unjust and unreasonable.

Not surprisingly, an order for re-employment was handed down and the Department was ordered to provide her with a suitable alternative role while she was undergoing ongoing treatment. The Tribunal also noted that the worker's mental health had been adversely affected by the unreasonably lengthy suspension and by the wrongful dismissal resulting in a delay in her weight loss progress following bariatric surgery and a delay in improvement in her capacity generally.

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Following a return to modified duties, the employer was also ordered to assess the worker's capacity for suitably modified roles conducted after a reasonable period post-surgery.

Lessons for employers:

The employer in this case took a hard line particularly in depriving the worker of her opportunity to take accrued leave while she was actively attempting to improve her health and capacity for work. The employer, while within its rights to claim frustration of contract where employees are unable to work due to non-work related conditions, fell into error by not exploring the medical aspects with the worker's own treating doctors before coming to its decision. There are steps required to be followed in relation to terminating employees for an inability to perform the inherent requirements of their job and this employer was found to fall quite short of that obligation.

Being a very large employer, the Tribunal also found that it had an obligation to explore alternative duties, particularly given the assertion that the worker's obesity and knee problems were at least in part, contributed to by her employment.

Terminating an employee who is absent for reasons other than work related factors is a precise and often drawn out process that requires careful consideration and investigation prior to forming a final opinion. Employers are strongly advised to take advice when circumstances such as these arise.

As always, if you'd like to 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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