

## Assessing applications for future surgery

The South Australian Employment Tribunal has recently delivered three judgments on the topic of future surgery applications which provide helpful guidance for self-insured employers when determining these applications.

The decisions are:

- [Sanders v Return to Work SA \[2021\] SAET 172](#)
- [Return to Work SA v Cooke \[2021\] SAET 163](#)
- [Clark v Return to Work SA \[2021\] SAET 156](#)

### Key Points

When making an application for future surgery under section 33(21)(b)(iv), the worker must provide "*cogent, reliable and reasonable evidence*" of the following:

- a. the nature of the proposed surgery,
- b. the benefits that the injured worker would obtain from the surgery,
- c. the reasons why the surgery should not be undertaken within the medical entitlement period; and
- d. the likelihood of the surgery being undertaken in the future.

In *Sanders*, the Tribunal considered the extent to which the specific surgery must be identified. A worker is not required to be truly specific or prescriptive as to the exact nature of the future surgery, however, the identification must be enough to enable the compensating authority to assess the merits of the application. In that case, the worker made an application specifying "*possible surgery to L5/S1 and L4/5*". The Judge held that this was insufficient stating that: "*what has been identified is little better than simply saying 'back surgery'*." The worker's application was dismissed.

In the remaining two decisions, *Cooke* and *Clarke*, the Tribunal considered the requirement of "*likelihood*" and held that, for an application to be successful, there must be a "*real or not remote chance or possibility*" that the surgery will be required. It does not require the likelihood to be a 50% or more chance, and even a small chance may satisfy this requirement as long as it is not remote.

Self-insured employers dealing with applications for future surgery should ensure workers provide reliable medical evidence tailored to the circumstances of the worker including clear evidence regarding the nature of the surgery and the likelihood of the surgery being undertaken in the future.



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