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RECENT DEVELOPMENTS

- **Reforms to simplify dispute resolution system for injured road users and workers claiming compensation**

SHORT SHOTS

Brief case notes of interest

- Arbitrator's finding of capacity upheld on appeal
- Death due to assault at home arising out of or in the course of employment
- Fresh or additional evidence will only be allowed on appeal in exceptional circumstances
- Claim made materially different from claim pleaded

RECENT DECISIONS

- **No right of appeal where $5,000 threshold not satisfied**
  Westpac Banking Corporation v Dinning [2019] NSWWCCPD 33 (11 July 2019)
- **Finding of total loss of earning capacity despite residual physical capacity**
  Mahdi v Marble Design (Aust) Pty Ltd [2019] NSWDC 287 (25 June 2019)

RECENT DEVELOPMENTS

Reforms to simplify dispute resolution system for injured road users and workers claiming compensation

Media release: Minister for Customer Service
Victor Dominello
9 August 2019

The Minister has recently confirmed that consultation will take place on changes proposed as part of the state government's response to the NSW Parliamentary Law and Justice Committees 2018 review of the workers compensation and CTP schemes.

One of the key proposals is for the establishment of a single personal injury commission to hear claims and disputes designed to provide greater alignment of the dispute resolution processes across the schemes.

The implementation of these changes will involve consultation with scheme providers and stakeholders to determine the best model to achieve this objective.

Notably, the committees' report recommended that:

- The workers compensation CTP dispute resolution systems be consolidated into a single commission by expanding the jurisdiction of the Workers Compensation Commission; and
- The commission should be independent and judicial, have officers who are statutorily appointed presiding officers; have provision for a judicial appeal mechanism, publish its decisions and allow claimants to access legal representation.

back to top

SHORT SHOTS

Arbitrator's finding of capacity upheld on appeal

El-Chami v DME Engineering Services Pty Ltd
18 July 2019
Workers Compensation Commission
ADP King SC

LINK TO DECISION

Worker suffered injury when struck by a heavy steel beam at work. Insurer's decision to decline further liability for weekly payments determined by arbitrator finding injury not sufficient to produce any relevant incapacity for work although medical treatment reasonably necessary as a result of work injury.

On appeal, DP King was not satisfied that the arbitrator's decision displayed any error, observing that although it was possible to discern in the evidence, a contrary view which might have been arrived at, the arbitrator had taken the opposite view and the conclusion would otherwise have been much more fragile and open to complaint than the one he came to.

In terms of any internal inconsistency in the arbitrator's reasoning, ADP King stated that 'it is by no means uncommon for people to be fit enough to work or go about particular activities whilst at the same time are reasonably requiring a level of treatment and medication. The argument does not distract from the correctness of the arbitrator's decision.'

Death due to assault at home arising out of or in the course of employment

SL Hill and Associate (de-registered) v Hill
22 July 2019
Workers Compensation Commission
DP Wood

LINK TO DECISION

The worker's death was caused by injuries inflicted by her defacto while at home where she conducted her employment duties for the employer (in a support role for the defacto's business providing financial advice). The defacto was found not guilty of the worker's death by reason of mental illness.

A claim for the lump sum death benefit (brought on behalf of the dependent children of the deceased) was declined on the basis that her injuries were not sustained in the course of her employment – crime scene photographs showed the worker died in her bed in her pyjamas. The arbitrator found the evidence was insufficient to make any findings as to when the worker died or that she died in the course of her employment in the absence of any temporal connection between employment and injury. Police found work papers and equipment in the bedroom and the arbitrator found that her work day 'had not begun'.

On appeal, President Keating concluded that the arbitrator had failed to properly consider all of the evidence and had focussed on the time of death. He remitted the matter to another arbitrator for re-determination.

The next arbitrator found that the worker's death arose out of or in the course of employment (either performing her work related duties at the time of her assault or was on call) and that her employment was a substantial contributing factor.

On appeal, DP Wood considered that the motive behind the assault was attributable to the defacto spouse's delusions that problems in the business were due to the worker's conduct notwithstanding that his beliefs were irrational.

The course of employment was said to cover not only the actual work but what the person was employed to do as well as the general nature and circumstances of that employment.

DP Wood found that the arbitrator had considered other factors that played a part in the assault before ultimately deciding that employment was a substantial contributing factor to her injuries and death.

Appellant failed to establish error on the part of the Arbitrator – appeal fails.

Fresh or additional evidence will only be allowed on appeal in exceptional circumstances

Sutherland v DE Maintenance Pty Ltd
26 July 2019
Worker Compensation Commission
DP Snell

LINK TO DECISION

The appellant (worker) sought to rely on fresh evidence comprising a statement by a solicitor identifying a medical report – leave of the Commission is required to rely on fresh evidence that will not be granted unless satisfied that the evidence concerned was not available to the party, and could

back to top

not reasonably have been obtained by the party before the proceedings concerned or that failure to grant leave would cause substantial injustice in the case – s352(6) WIM Act 1998.

DP Snell refused to admit the fresh evidence on the basis that a further medical report could have been obtained before the arbitration hearing.

DP Snell nevertheless held there was an appealable error by the manner in which the arbitrator dealt with the interpretation of an MRI scan and failed to give the findings appropriate weight, and therefore allowed the appeal and remitted the matter to another arbitrator for re-determination.

Claim made materially different from claim pleaded
Petreski v Ors Group Pty Ltd
9 August 2019
District Court of NSW
Abadee DCJ

LINK TO DECISION

Claim made materially different to draft pleading attached to the Pre-Filing Statement in the worker's claim for work injury damages for psychological injury allegedly due to persistent bullying and harassment.

Defendant brought an application to strike out proceedings pursuant to s318(1)(a) of the *Workplace Injury Management and Workers Compensation Act 1998*.

Worker had initially particularised a direct claim of negligence against the employer but then altered the pleadings to allege that the employer was vicariously liable for the conduct of its servants or agents, considered an alternative case.

The cause of action initially made was materially different to the action pleaded and the statement of claim was ordered to be struck out.

RECENT DECISIONS

No right of appeal where $5,000 threshold not satisfied

Westpac Banking Corporation v Dinning [2019] NSWWCCPD 33 (11 July 2019)

Link to decision

Background

The worker alleged that she suffered a psychological injury as a result of ongoing work stressors. The respondent disputed the claim and relied upon section 11A WCA. The worker filed an ARD claiming continuing weekly compensation and section 60 expenses, but she withdrew the weekly benefits claim at arbitration.

Decision

The arbitrator determined that the worker suffered a psychological injury in the course of her employment and that the section 11A defence was not established. A general order for payment of medical expenses was made. The medical expenses totalled $1,710.54.

Appeal

The appellant employer appealed the decision in its entirety. It argued that the monetary threshold was satisfied despite the fact that the worker had discontinued the claim for payment of weekly compensation at the original hearing.

The worker did not agree that the threshold was satisfied on the basis that there was no liability for the appellant employer to pay weekly compensation.

Deputy President Wood noted that section 352(3) of the *Workplace Injury Management and Workers Compensation Act* 1988 provided that "the amount of compensation at issue on the appeal" is both "at least $5,000.00" and "at least 20% of the amount awarded in the decision appealed against". Where there is no amount awarded (such as where there is an award for the respondent), subs (3)(b) of section 352 cannot apply, and the amount at issue is to be determined by reference to the compensation claimed in the proceedings before the Arbitrator.

Deputy President Wood discussed a line of authorities concluding with her latest decision in *Lambropoulos v Qantas Airways Limited* [2019] NSWWCCPD 17, in which she held that as there was no amount of compensation claimed before the Arbitrator and there was no amount of compensation directly at issue on the appeal, if the appeal succeeded, there would be no orders for the payment of compensation.

Given that in the present case, the appellant employer was only liable to pay the sum of $1,710.54 pursuant to the arbitral judgment, the monetary threshold was not satisfied and the appellant employer had no right of appeal.

Implications

In the course of the judgment, Deputy President Wood commented that it would seem that the intent of the legislation was to preclude minor or frivolous claims from being appealed. The Deputy President conceded to some extent that there were a number of cases where a decision of an arbitrator in respect of liability adversely affects, often significantly, the rights of a party, but an appeal cannot be brought because the monetary threshold has not been satisfied.

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back to top

RECENT DECISIONS

Finding of total loss of earning capacity despite residual physical capacity

Mahdi v Marble Design (Aust) Pty Ltd [2019] NSWDC 287 (25 June 2019)

Link to decision

Summary

This decision looks at the calculation of work injury damages. The case exemplifies how surveillance film can be used for forensic purposes. The case also takes account of the factors that a court will consider when deciding whether an injured worker has suffered a total loss of earning capacity despite having some physical capacity to perform suitable duties.

Background

The worker was employed by the defendant as a labourer. On 10 May 2012, the worker was unloading large marble slabs when a slab fell onto the worker injuring his ankles and left wrist.

There was no issue that the defendant's negligence had caused his injury, and the issue at trial was whether the worker had any residual earning capacity, and if so, to what extent?

Surveillance film

The worker told medical examiners and the court that he had developed an altered gait as a result of his injuries.

In response, the defendant relied on surveillance footage to show the worker walking without a limp. The defendant submitted that the worker should not be considered a reliable witness having regard to this evidence.

The trial judge reviewed the footage and was not satisfied that the film actually depicted the worker walking normally, i.e. without any pain or restriction. The judge rejected the defendant's submission that the worker was not a credible witness.

This result may have been different if the defendant had submitted the surveillance film to medical examiners for their review and comment and obtained an expert opinion on the difference in the gait pattern as seen in the video footage and the gait pattern alleged by the worker.

Factors relevant to finding of total economic loss

The trial judge was satisfied that the worker had a residual earning capacity but then considered the factors set out below to conclude that the worker suffered a total loss of earning capacity on the open labour market:

- The worker had tried hard to find work that was suitable given his restrictions but was unable to do so;
- The worker's limited English skills and work experience in Australia (being an immigrant from Iraq) were barriers to his finding work in Australia; and
- The worker was motivated to return to work to provide for his family, as evidenced by his enrolment in a course to obtain a Diploma of Community Service.

Implications

This case is a reminder that to obtain the full benefit of surveillance film, the footage should be sent to a medical expert to review. Also, even if a worker has a capacity for work, it is not a guarantee that a Judge will find that he or she has a residual earning capacity. During case management it is a good opportunity for insurers to work with rehabilitation providers and workers to upskill workers, particularly assisting an injured worker improve his or her English skills.

back to top

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