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RECENT LEGISLATIVE DEVELOPMENTS

There are no recent legislative changes to report.

RECENT DECISIONS

- **When relocation is a reasonable thing to do**
  Cross v Secretary, Department of Education (2019) NSWWCCPD 20 (14 May 2019)
- **Playing the long game: section 11A success**
  AS v The State of New South Wales [2019] NSWWCCPD 18 (8 May 2019)
- **Working on scaffolding: A reminder for employers**
  Apthorpe v QBE Insurance (Australia) Limited & Ors [2019] NSWDC 135 (18 April 2019)

RECENT DECISIONS

When relocation is a reasonable thing to do

Cross v Secretary, Department of Education (2019) NSWWCCPD 20 (14 May 2019)

Link to decision

Summary

Under section 48A of the *Workplace Injury Management and Workers Compensation Act 1998* weekly payments can be terminated if the worker does not comply with return to work in suitable employment.

In this matter, Deputy President Snell found that the Arbitrator had erred in finding that the employer had not acted unreasonably. DP Snell found that this was the wrong test under section 48A. The correct test is whether the worker has made reasonable efforts to return to work in suitable employment. The onus is on the employer to prove that the worker acted unreasonably.

Background

The worker suffered injury to the lumbar spine and left shoulder while working at Orange High School. The claim was accepted and the worker was paid weekly compensation.

She underwent surgery on 30 July 2015 and did not resume work thereafter. On 16 August 2015, the worker moved to Melbourne to live with her fiancé, whom she married on 21 November 2015. She also sold her home in Orange during this period.

On 10 November 2015, the insurer informed the worker that she should commence suitable duties at Orange High School on 16 November 2015. The worker said she could not as she had no accommodation. On 22 February 2016, the insurer issued a Return to Work Plan requesting that she perform suitable duties at Orange High School. The worker was unable to do this and ultimately the insurer terminated her weekly entitlements under section 48A of the 1998 Act on the basis that she did not make reasonable efforts to return to work at her place of employment (Orange High School).

Arbitrator' Decision

The worker made a claim for weekly compensation payments in the Workers Compensation Commission.

There was evidence from the worker that, even though she had relocated to Victoria, she was prepared to work at Orange High School once certified fit to do so. That was until she found employment in Victoria. In the circumstances, the Arbitrator found that the respondent was not acting unreasonably in offering the worker suitable duties in Orange.

Decision of the Deputy President

The worker appealed the decision.

DP Snell found that the Arbitrator had erred in finding that the employer had not acted unreasonably. DP Snell found that this was the wrong test under section 48A. The correct test is whether the worker has made reasonable efforts to return to work in suitable employment. The onus is on the employer to prove that the worker acted unreasonably.

He then turned to consider whether, based on the facts, the worker had acted reasonably. He found:

- When the worker decided to sell her house in Orange and be with her fiancé, she sought and received assurances from claims officers of the insurer that it would not affect her benefits.
- In November 2015 when the insurer requested the worker take up suitable duties in Orange, the worker was already living in Melbourne. Despite this the insurer gave the worker a matter of days to travel to Orange and find accommodation in the context of having to drive from Melbourne with a frozen shoulder. He found her failure to go to Orange was reasonable.
- When the Return to Work Plan was issued in February 2016, the worker was living in Melbourne on a permanent basis. Relocating to Orange would have required her to leave her husband, who was also assisting her with her personal care. The worker refused to relocate and this was considered reasonable.

back to top

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RECENT DECISIONS

Playing the long game: section 11A success

AS v The State of New South Wales [2019] NSWWCCPD 18 (8 May 2019)

Link to decision

Summary

It is well known that the burden of establishing a section 11A defence to a claim for psychological injury rests with the employer.

It is also well known that section 11A defences are very difficult to make out from an evidentiary perspective, and are rarely upheld by Arbitrators.

In the recent decision of *AS v The State of New South Wales* [2019] NSWCCPD 18 (8 May 2019) (AS) Deputy President Elizabeth Wood upheld Arbitrator Perry's decision at first instance; finding in favour of the employer on its section 11A defence.

Background

Section 11A of the *Workers Compensation Act 1987* provides a complete defence to a claim for psychological injury in circumstances where the worker's injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by the employer with respect to one or more categories including transfer, performance appraisal, discipline and dismissal.

The employer bears the burden of proof in establishing each element of the defence and discharging that burden requires a combination of medical and factual evidence.

Medical evidence is required to establish injury, and particularly since the decision in *Hamad v Q Catering Limited* [2017] NSWCCPD 6, the whole or predominant cause.

Factual evidence is then required to demonstrate that the action taken by the employer falls within one of the categories covered by section 11A (such as discipline) and, that the action taken or proposed to be taken was reasonable.

Gathering the necessary factual and medical evidence takes time and there is often a tension between that process and the timeframes for making a liability decision. Insurers are also often under pressure from employers to apply an early section 11A defence in circumstances where it might be indicated but has not yet been fully explored.

The decision in *AS* is a rare example of a successful section 11A defence; undoubtedly the result of the insurer initially accepting the claim, and taking the time necessary to properly build its case.

Decision

The appellant (AS) was a senior Police officer who, at 1.10am on 10 February 2015 was notified that the Professional Standards Command were investigating allegations of misconduct made against him. Specifically, he was accused of behaving inappropriately towards a female colleague, harassing her in an attempt to discourage her from reporting the behaviour and of generally making inappropriate and offensive comments in the workplace.

AS ceased work on 16 February 2015 and consulted his GP who diagnosed an adjustment disorder and certified that he had no capacity for work. On 25 May 2015 he lodged a NSW Police Incident Notification alleging bullying, harassment, victimisation and being accused of something he did not do. The date of injury was recorded as 10 February 2015 at 1.10am.

Liability for the claim was initially accepted and over the two years that followed, the insurer obtained detailed statements from a number of witnesses. Some witnesses were spoken to on up to four occasions.

back to top

Also during that time, the insurer (and later its legal representative) obtained a series of reports from the qualified medico-legal psychiatrist; asking him to consider the factual and treating medical evidence as it came to hand.

In deciding the matter at first instance, Arbitrator Perry appropriately weighed the evidence provided by the employer's witnesses on the one hand, and AS on the other.

He also carefully considered the parties' respective medico-legal evidence and rejected AS's evidence owing to the inaccurate history relied upon by the doctor.

That process led Arbitrator Perry to uphold the insurer's section 11A defence and his reasons and conclusions were endorsed by Deputy President Wood in rejecting AS's appeal.

Implications

This decision does not create any new law and from that perspective is not particularly significant.

It is very important however, in reinforcing the value in playing a long game. That is, in taking the time to build a strong case, both medically and factually - even if it means paying benefits for an extended period in the meantime.

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RECENT DECISIONS

Working on scaffolding: A reminder for employers

Apthorpe v QBE Insurance (Australia) Limited & Ors [2019] NSWDC 135 (18 April 2019)

Link to decision

Summary

A roofing labourer has been awarded damages after successfully pursuing a claim in negligence against the builder, scaffolder, guttering contractor and his employer at a domestic building site. The worker fell from the roof when bridging planks connecting the roof and an adjacent scaffolding structure gave way.

Background

The worker was 18 years old of age when he fell six metres down a scaffolding void from a second storey scaffolding tower platform at a residential building site. It was his first day on the job. An adjacent scaffolding tower had been erected on site. Bridging planks were placed between the edge of the roof and the scaffolding platform, which the scaffolder maintained were secured prior to the worker's injury. There was a gap in the planks to accommodate a protruding scaffolding component.

The scaffolding tower blocked access for other tradesmen to undertake their work. As a result, the guttering contractor moved the bridging planks in order to facilitate his work on site, and later restored them to their former position. The guttering contractor submitted that he had moved the planks because they had not been tied down.

On the date of injury, the worker was filling skip bins with roofing tiles. After filling one skip bin, the worker saw another skip bin near the base of the scaffolding tower. The worker picked up some tiles and stepped onto the timber bridging planks with the intention of accessing the scaffolding tower when the planks collapsed and he fell.

Decision

After reviewing evidence from the scaffolder, guttering contractor and a WorkCover Inspector, Judge Levy determined that the bridging planks had not been secured by the scaffolder by either tie wire or by any other means. Once the guttering contractor moved the planks, he made no effort to indicate that the planks were not secure. The builder was not notified.

His Honour stated that if a proper inspection had been performed at roof level by any of the defendants, it would have been readily apparent there was a gap in the bridging planks, and the planks were not secure.

Each defendant owed the worker a duty of care, which varied between the defendants. The question of whether the builder, scaffolder and guttering contractor were negligent was determined in accordance with the *Civil Liability Act*, whilst any breach of the employer's duty of care was determined according to common law principles.

Judge Levy found that all of the defendants were negligent. His Honour accepted that the builder had breached its duty of care to the worker for failing to conduct an inspection from the upper level of the site works, whilst the scaffolder breached its duty of care by failing to secure the bridging planks or prevent access to the bridging planks. In the context of the works on site, the precautionary steps of inspection, barricading, posting warnings and securing the bridging planks involved comparatively little time and effort.

Judge Levy also held that the guttering contractor had breached its duty of care to the worker by failing to warn the builder that he had moved the bridging planks and left them unsecured. The employer was negligent for failing to assess how the worker could safely dispose of tiles whilst at roof level, and failing to assess the safety of the bridging planks.

When considering apportionment, His Honour compared the respective culpabilities of each defendant according to the degree of departure from the required standard of care. There was no evidence to suggest that any of the defendants had delegated their duty of care in relation to the site to any other party.

back to top

Judge Levy considered the causative potency of the scaffolder's conduct to be proportionally much greater than the other defendants. His Honour considered the culpability of the builder and guttering contractor to be on par, whilst the employer's failures were 'on a relatively minor and far lesser scale of culpability' when compared with the builder, scaffolder and guttering contractor. When the employer came onto the site and had the opportunity to carry out a site inspection, the site had already been rendered unsafe by the successive failures of the builder, scaffolder and guttering contractor.

The scaffolder was apportioned 40% of liability, whilst the builder and guttering contractor were apportioned 25% each. 10% of liability was apportioned to the employer. The worker's damages under the *Civil Liability Act 2002* were assessed at over $780,000, whilst his damages under the *Workers Compensation Act 1987* were assessed at over $280,000.

Conclusion

This case serves as a timely reminder of the employer's non-delegable duty of care on construction sites. Employers need to inspect the areas where their employees will be working to ensure safe access has been provided, and that the area is free from hazards and any potential risks of injury. This duty persists even in situations where the employer does not have overall control of the worksite.

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