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RECENT LEGISLATIVE DEVELOPMENTS

There are no recent legislative changes.

RECENT DECISIONS

- **Lack of diagnosis not a bar to a finding of consequential injury**
  Arquero v Shannons Anti Corrosion Engineers Pty Ltd [2019] NSWWCCPD 3 (29 January 2019)

- **Reinstatement of injured workers**
  Hibbard v Lithgow City Council [2019] NSWIRComm 1020 per Commissioner Sloan

- **Performance Appraisal for s11A Defence**
  Dinning v Westpac Banking Corporation [2019] NSWWCC 49

- **Challenging the delegate's decision on grounds for appeal from AMS determination**
  Case 1: *Wentworth Community Housing Limited v Brennan* [2019] NSWSC 152 Harrison AsJ 27 February 2019
  Case 2: *Ballas v Department of Education (State of NSW)* [2019] NSWSC 234 Wright J 8 March 2019

RECENT DECISIONS

Lack of diagnosis no bar to a finding of consequential injury

Arquero v Shannons Anti Corrosion Engineers Pty Ltd [2019] NSWWCCPD 3 (29 January 2019)

Link to decision

Background

The worker injured his right knee in the course of his employment with Shannons on 18 December 2000. He subsequently underwent three surgeries to the knee including a high tibial osteotomy.

The worker received two lump sum compensation payments firstly in 2003 for 27% permanent loss of efficient use of his right leg at or above the knee and then in 2011 for a further 13% loss.

The worker then made a further claim for lump sum compensation pursuant to s66 for additional loss of efficient use of the right leg.

However, the worker also alleged that he suffered from a consequential left knee condition as a result of the right knee complaints for which he was entitled to be compensated.

The worker gave evidence that he had walked with a limp since 2005 and had first noticed symptoms in the left knee in 2014. He believed that any symptoms suffered prior to 2014 were masked by strong pain killing medication. There was no evidence to contradict the worker's evidence.

Decision

The Arbitrator initially determined that the worker had not discharged the onus of proof required in order to establish that he suffered from a consequential condition in his left leg as a result of his right leg injury.

The worker appealed from the decision that was determined by Deputy President Wood of the Workers Compensation Commission.

DP Wood reviewed the evidence and found that the worker's left knee symptoms arose as a consequence of his right knee injury.

DP Wood accepted that Dr Patrick gave a sufficiently rational explanation for the onset of the left knee symptoms. That is, the symptoms and condition in the worker's right knee had worsened since 2011 with reduced flexion and malalignment. The worker then placed greater weight on the left knee and the surgery undertaken in 2005 was known to cause undue strain on the opposite limb over an extended period of time.

DP Wood concluded that the worker had established the factual basis for his claim. The historical medical evidence provided proof of the facts relied upon and Dr Patrick gave a logical explanation for the development of left knee symptoms as a result of the right knee injury.

DP Wood found that the Arbitrator had taken into account an irrelevant consideration (no diagnosis) in arriving at his conclusion in respect of Dr Patrick's evidence and had failed to take into account historical material evidence and the worker's statement which provided a logical basis on which the necessary causal connection could be established.

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Implications

Although the delay between the original injury and the onset of symptoms for a consequential condition is a relevant consideration, this must be balanced against the nature of the injury sustained, treatment provided and the symptomatology that follows.

The absence of any reference to symptoms in contemporaneous clinical notes will not necessarily be determinative of the question of causation.

The decision emphasises the need to review all of the evidence as a whole in any case.

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RECENT DECISIONS

Reinstatement of injured workers

Hibbard v Lithgow City Council [2019] NSWIRComm 1020 per Commissioner Sloan

Summary

A recent case in the Industrial Relations Commission of NSW explains the law regarding an employer's obligation to reinstate injured workers who have been dismissed because of a work-related injury, and the matters to be taken into account when deciding whether or not an injured worker has satisfied the requirements for reinstatement.

Background

Mr Hibbard was employed by Lithgow City Council. An industrial dispute arose in the workplace, and Mr Hibbard was accused of intimidating other workers to support a petition to the employer about alleged bullying by a supervisor. Upon receiving the petition, the Council informed the workers that an investigation would be undertaken, and during that process the allegations were to be kept confidential until a decision was made regarding action, if any, that was to be taken.

Contrary to the direction to maintain confidentiality, Mr Hibbard had approached other workers encouraging them to maintain their support for the allegations against the supervisor, and in some cases intimidating those workers not to withdraw their support. The Council's General Manager cautioned the worker about breaching confidentiality regarding the complaint against the supervisor and intimidating other workers.

In October 2017, Mr Hibbard alleged that he had developed a psychiatric injury as a result of bullying by the supervisor and the General Manager. His claim was disputed.

In December 2017, Mr Hibbard was dismissed from his employment with the Council because of his misconduct in relation to the industrial issues at work.

In March 2018, Mr Hibbard commenced proceedings in the Workers Compensation Commission which were resolved on a compromise basis. After finalisation of the Workers Compensation Commission action, Mr Hibbard, through his solicitor, made an application for reinstatement relying on sections 240 to 244 of the *Workers Compensation Act 1987*. The Council refused to reinstate Mr Hibbard because he had been dismissed because of his misconduct, not because of his injury.

Mr Hibbard then commenced proceedings in the Industrial Relations Commission for an order that he be reinstated to his previous position. The application was unsuccessful.

Decision

In the Commission decision, the following observations were made:

In *Glenn Robson and GWA Group Limited* [2015] NSWIRComm 9 Walton J held as follows:

> The jurisdiction of the Commission under Pt 8 of the WC Act is enlivened in the event that each element of the jurisdictional criteria outlined in ss 241(1), 241(3) and 242(1) of that Act is satisfied.
>
> First, an injured worker must have been dismissed because he or she was not fit for employment as a result of the injury received: s 241(1) of the WC Act. (An injured worker is defined, for present purposes, as a worker who receives an injury for which they are entitled to receive compensation under the WC Act or the Workers' Compensation (Dust Diseases) Act 1942: s 240(2) of WC Act. Correspondingly, a person is the employer of an injured worker only if the subject injury arose (either wholly or in part) out of or in the course of employment with that person.)
>
> Secondly, that worker must have made an application to the relevant employer for reinstatement to 'employment of a kind specified in the application' (see s 241(1) of the WC Act) and produced 'a certificate given by a medical practitioner to the effect that the worker is fit for employment of the

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kind for which the worker applies for reinstatement' in support of the same (see s 241(3) of that Act). Whilst the requirement to produce a medical certificate attesting to the requisite fitness constitutes what has been described as the 'gateway' to the Commission's jurisdiction under Pt 8 of the WC Act, the certificate given by a medical practitioner for the purposes of s 241(3) is by no means conclusive of the application brought and, in particular, the resolution of whether the injured worker is fit for the purposes of s 243(2) and (3) ….

> Finally, the jurisdiction of the Commission is activated when the employer does not immediately reinstate the worker 'to employment of the kind for which the worker has so applied for reinstatement (or to any other kind of employment that is no less advantageous to the worker)': s 242(1) of the WC Act."…

In *Bindaree Beef Pty Ltd v Riley* [2013] NSWCA 305; 239 IR 52 Bathurst CJ …made the following observations:

> The presumption in s 244(1) has the effect of placing the onus on the employer to demonstrate that the reason for dismissal was not because of unfitness for employment as a result of the injury received. . . . The question in effect is why the employer dismissed the worker. That can only be considered in the context of the actual reasons for doing so. ... The question of whether the injury was a substantial and operative cause of the worker's dismissal is a question of fact to be decided by reference to all the circumstances including the employer's evidence as to such cause. … This inquiry inevitably involves consideration of the reasons of the decision-maker [i.e. the employer's representative].

After considering the evidence presented by Mr Hibbard and the Council, the Commissioner Sloan concluded:

> I am satisfied that any injury suffered by Mr Hibbard was not a substantial and operative cause of his dismissal, and so I find that the Council has discharged its onus under s 244(2).
>
> The evidence certainly does not support a finding that either Mr Faulkner or anyone else at the Council acted deliberately or maliciously to cause Mr Hibbard harm.
>
> I find that Mr Hibbard was not dismissed because he was not fit for employment as a result of the injury.

The Commissioner added that the initial application made by Mr Hibbard to the Council was also defective in that:

> The letter [seeking reinstatement] did not specify the employment to which Mr Hibbard sought to be reinstated. Rather, it was unclear on the point. It opened by seeking that Mr Hibbard be "reinstated and provided with employment" before going on to make reference to Mr Hibbard's alleged entitlement to be provided with "suitable duties" pursuant to s 49(1) Workplace Injury Management and Workers Compensation Act. It is not possible to discern from the letter whether Mr Hibbard was applying for reinstatement to his pre-dismissal position, for "suitable duties" or for some other employment. No "kind" of employment is specified.

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RECENT DECISIONS

Performance Appraisal for s11A Defence

Dinning v Westpac Banking Corporation [2019] NSWWCC 49

Link to decision

The worker made a claim for medical expenses for treatment of a psychological injury suffered as a result of being aggressively targeted and harassed by management in relation to her job performance.

The employer accepted 'injury' and 'incapacity' as alleged by the worker but raised a defence to the claim relying upon section 11A of the WCA. This led the Arbitrator to focus on the definition of 'performance appraisal' in the context of the section and the applicable case law which indicated that this was not an informal and ongoing process but rather, a limited discreet process like an examination to determine the employee's efficiency and performance.

The Arbitrator found that a series of meetings and discussions held between the worker and management concerning aspects of her work were not formal processes of performance appraisal but were in response to managerial issues that arose from her work. There were no specific processes put in place or guidelines established that could be recognised as constituting performance appraisal. In the absence of any overall assessment or evaluation of her work, the Arbitrator held that employer's actions were not related to any recognised procedure or appraisal so that the section 11A defence was not made out.

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RECENT DECISIONS

Challenging the delegate's decision on grounds for appeal from AMS determination

CASE 1: *Wentworth Community Housing Limited v Brennan* [2019] NSWSC 152 Harrison AsJ 27 February 2019

Link to decision

Background

The worker suffered a primary psychological injury in the nature of aggravated Bi-polar Affective Disorder Type 2 that was allegedly due to harassment and ill-treatment she received from other managers in the workplace culminating in January 2013.

The worker made a claim for lump sum compensation pursuant to section 66 of the WCA 1987 as to which compensation is only payable if the degree of permanent impairment resulting from the injury is at least 15%: section 65A(1) of the Act.

The matter was referred to an AMS to assess WPI with a subsequent finding of 24% WPI.

The respondent then sought to appeal from the decision of the AMS, however, the delegate of the Registrar issued a decision refusing the appeal on the basis that he was not satisfied that at least one of the grounds of appeal specified in section 327(3) of the WIM Act 1998 was made out.

The respondent's application to appeal from the AMS decision was on the basis that the AMS had failed to consider the evidence contained in the ARD and Reply, had based his opinion solely on the worker's subjective reporting of symptoms during the examination and had failed to compare the history obtained from the worker to the evidence contained in the ARD and Reply.

The respondent also sought leave to rely upon 'fresh evidence' consisting of reports obtained as an investigation of the accuracy of the AMS's history and circumstances. These were the primary subject of the appeal.

The respondent was particularly concerned that the AMS had relied solely on the subjective report of symptoms by the worker that she was unable to engage in social activities or go shopping. However, the surveillance and social media reports plainly contradicted those complaints.

Appeal from Registrar's decision

The respondent filed an application to appeal from the Registrar's decision by way of judicial review based on eight grounds to the effect that the Registrar's decision was tainted by jurisdictional error or error on the face of the record and erred in dealing with demonstrable error.

The respondent contended that the Registrar had erred by misconstruing the construction of 'additional relevant information' for the purposes of section 327(3).

In delivering her judgment Associate Justice Harrison of the Supreme Court commented that it was fair to say that aside from the general statements by the AMS, he did not specifically refer to either the surveillance or social media reports. The AMS also failed to address the respondent's submissions on the inconsistent matters raised in the reports and did not refer to the worker's statements in his reasoning, which suggested that he had overlooked the reports or failed to consider 'relevant and significant' material provided by the respondent.

Her Honour ultimately formed the view that the Registrar had erred when he stated that the AMS had regard to the material placed before him and that the evidence was broadly consistent with that sought to be relied upon in the appeal, in circumstances where the AMS had not referred to the discrepancy between the worker's evidence and the surveillance and social media reports.

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The Registrar was considered to have offered an explanation for, rather than a consideration of the underpinning error, which concerned whether the AMS had either failed to consider the material shown in the media posts and surveillance reports, or simply overlooked them. In Her Honour's opinion this constituted an error of law on the face of the record as the Registrar had misconstrued his statutory task under section 327(3).

The court ordered that the Registrar's decision be set aside and the proceedings remitted to the Workers Compensation Commission for determination.

Insights

The decision provides a useful guide to what needs to be considered by the Registrar (or his delegate) in deciding whether there are grounds for appeal under section 327(3) particularly in claims referred for psychological assessment by an AMS.

CASE 2: *Ballas v Department of Education (State of NSW)* [2019] NSWSC 234 Wright J 8 March 2019

Link to decision

Background

The worker made a claim for lump sum compensation pursuant to section 66 in respect of a psychological injury suffered during her employment as a primary school teacher for which liability was not disputed.

The matter was duly referred to an AMS who assessed 8% WPI falling within class 2 in respect of the "PIRS Category: Social and recreational activities". Relevantly, if the worker was assessed as class 3 in this category, her WPI would have been either 15% or 17% (thereby entitling her to a lump sum payment by having satisfied the 15% threshold applicable for psychological injury).

The worker filed an application to appeal from the AMS decision pursuant to section 327 of the WIM Act as to which the delegate of the Registrar determined that no ground of appeal under sub section (3) had been made out and as such, the appeal was not to proceed.

The worker then filed a summons in the Supreme Court seeking a judicial review of the decision on grounds including; failing to take account of whether the AMS had considered the correct criteria when assessing Social and Recreational Activities, failing to consider whether the activity of attending a club on her own to play poker machines was something that could be taken into account and erring in point of law when she considered that what matters were relevant to each category was a matter of discretion rather than an application of the guides.

Decision

Mr Justice Wright in delivering his decision, rejected the argument that the delegate of the Registrar had failed to properly consider the submission, as the delegate had specifically addressed the appropriate class under the heading 'social and recreational activities' and referred to six scales or categories that were not limited to classes other than the distinctions between different scales or categories.

His Honour went on to state that: the Delegate's reliance on the decision in *Jenkins* does not establish a failure to address or consider the argument put in the worker's submissions and even if the Delegate may have misapprehended precisely what was held in that decision, she had not misapprehended the argument put by the worker.

Note: *Jenkins* established that the process of rating psychiatric impairment is not to be approached on an overly rigid reading of the relevant provisions of chapter 11 of the Guidelines including the relevant tables.

His Honour found that none of the substantive grounds of the appeal had been made out and therefore dismissed the summons.

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