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LEGISLATIVE DEVELOPMENTS

There are no legislative developments to report this month.

SHORT SHOTS

Brief case notes of interest, read more

RECENT DECISIONS

- **Injury related to former work colleague**
  Michael West v Boom Logistics Limited [2018] NSWWCC 36 (8 February 2018)
- **Safe system of work only as good as its enforcement**
  Baig v AWX Pty Ltd & Anor [2017] QSC 325 (20 December 2017)

SHORT SHOTS

Failure to satisfy requirements to substitute insurer

Mrdajl v Southern Cross Constructions (NSW) Pty Ltd (in liq)

LINK TO DECISION

The *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) allows claimants to substitute an insurer for a party in proceedings so as to recover directly from them in certain circumstances.

A claimant must show that the insurer was on risk under the relevant liability policy to obtain leave of the court.

The plaintiff sought leave to amend the pleadings to bring proceedings against the defendant's liability insurer (the defendant company having gone into liquidation). The plaintiff relied upon certain affidavit evidence that deposed to the existence of a policy with the insurer although the number and the nature of the policy was not disclosed. There was also a discrepancy in the names of the defendant and insured entity.

The court determined that the evidence did not establish the existence of a policy per se. 'A determination as to whether or not the policy covered the risk and was in place at the time of this risk can only be established by reference to the insurance contract or some documentary evidence bearing more closely upon it.'

As such the court found there was no proper basis upon which to grant leave pursuant to section 5(3) of the Act.
Application refused with costs.

Decision Number: [2018] NSWSC 161
Decision Date: 21 February 2018
Matter Number: 2014/148359
Decision maker: Walton J, Supreme Court NSW

Judicial review - appeal against MAP

Parker v Select Civil Pty Ltd

LINK TO DECISION

Judicial review by Supreme Court of NSW from a decision by a Medical Appeal Panel of the Workers Compensation Commission.

The plaintiff suffered psychological injury when an excavator that he was operating on a river bank began sinking into the river. The cabin filled with water and he thought that he would die. Plaintiff brought a claim for whole person impairment pursuant to section 66 that was referred to an AMS (22% WPI) from which the respondent employer appealed. The Appeal Panel determined to revoke the MAC and issue a new certificate for 9% WPI (below the 15% WPI threshold required to establish a lump sum entitlement for psychological injury).

The Appeal Panel conducted a preliminary review and determined that it was not necessary for the worker to undergo a further medical examination as there was sufficient evidence before it to make a determination.

The Court reviewed the MAP determination and found that the Appeal Panel had substituted its own opinion for that of the AMS as to which Class rating of impairment was most appropriate. There was no indication that the AMS had applied incorrect criteria or that his reasons disclosed a demonstrable error. As such there was an error of law on the face of the record.

Appeal Panel MAC and statement of reasons set aside and matter remitted to WCC to be determined according to law.

Decision Number: [2018] NSWSC 140
Decision Date: 21 February 2018
Matter Number: 2017/42928
Decision maker: Harrison AsJ, Supreme Court NSW

Messenger appeal

Hunter Quarries Pty Limited v Alexandra Mexon as Administrator for the Estate of Ryan Messenger

LINK TO DECISION

The NSW government is considering an appeal from the judgment handed down by the Supreme Court on judicial review from the decision of a Medical Appeal Panel – finding the relevant test for a successful claim under section 66 is not the duration of survival of a worker, but the permanence of the impairment.

The worker was a machine operator who suffered extensive crush injuries to his chest when a 40 tonne excavator that he was operating tipped over and crushed the cabin in which he was working. Co-workers who went to his aid could find no pulse and when police and ambulance attended he was pronounced life extinct.

An AMS found the worker suffered no permanent impairment while the Appeal Panel found that the evidence established that when he was injured, the worker suffered permanent impairment that gave rise to an entitlement to compensation under sections 9 and 66 of the Act. The Court considered the meaning of permanent impairment in the legislative context and affirmed the Appeal Panel's determination so that the deceased worker's estate was entitled to permanent impairment compensation pursuant to section 66 (100% WPI) in addition to the statutory lump sum death benefit under s25.

Decision Number: [2017] NSWSC 1587
Decision Date: 22 November 2017
Matter Number: 2017/153929
Decision maker: Schmidt J, Supreme Court NSW

Leave to proceed out of time

Crim v Vodafone Hutchison Australia Pty Ltd

LINK TO DECISION

Application to extend 3 year limitation period to bring a claim for work injury damages 6.5 years after plaintiff stopped working. Initially experienced somatic symptom later diagnosed to be psychologically determined - only realised cause of his symptoms nearly 4 years after stopping work.
Plaintiff then makes workers comp claim and needs to pursue two sets of proceedings in WCC before making a claim for work injury damages. No actual prejudice suffered by defendant by virtue of delay. Plaintiff did not deliberately allow limitation period to expire.

Leave granted to commence a claim for work injury damages against the defendant pursuant to s151D(2) of the Act.

Decision Number: [2017] NSWDC 404
Decision Date: 12 December 2017
Matter Number: 2017/186952
Decision maker: Neilson J, District Court NSW

RECENT DECISIONS

Injury related to former work colleague

Michael West v Boom Logistics Limited [2018] NSWWCC 36 (8 February 2018)

Link to decision

Summary

Even though the worker stopped to investigate an accident of a former work colleague, the Arbitrator found in favour of the worker on the issues of injury and substantial contributing factors.

Background

The worker was employed as a mobile crane operator. He claimed to have suffered PTSD as a result of finding the decapitated body of a former worker colleague who had apparently committed suicide in his vehicle at the road side.

The Arbitrator dismissed the worker's contention that he was on a prescribed 'journey' within section 10, then focussed upon whether or not the worker was *in the course of his employment*, and if so, whether employment was a *substantial contributing factor*.

Decision

After finding that the worker had reached the place of employment when he found the body, the Arbitrator had to then determine whether the worker's injury arose out of or in the course of employment.

At the time of the incident the worker was proceeding to the employer's depot to collect a work colleague and a work vehicle. This was done so as to arrive at the job site for the day at 7am. The Arbitrator found, based on these facts, that the worker was "on his employer's business" at the time he was travelling on the road. Therefore the worker was at least "in the course of employment".

The next issue was whether employment was a substantial contributing factor to the injury.

Counsel for the Respondent Employer made the following submissions:

> *Mr McManamey submitted that there was nothing about Mr West's employment that exposed him to the injury and that it was "sheer coincidence" that the deceased was a former work colleague and that Mr West was travelling to work at the time. Mr McManamey noted that Mr West's attention was drawn to the car on the side of the road because it belonged to a friend he had known for several years. Mr McManamey submitted that there was nothing in the evidence to suggest that the former colleague's suicide was connected with his employment. Although Mr McManamey acknowledged that in his supplementary statement, Mr West had given evidence that he had stopped to render assistance because he was a First Aid Officer. Mr McManamey submitted that, given that the car belonged to a friend and because he had relevant skills, Mr West would have stopped to render assistance in any event. Although Mr West said he considered it his duty to stop, there was no evidence to suggest that this was a workplace duty imposed upon Mr West or that he had been directed by his employer to render assistance in such circumstances.*

The Arbitrator found that the worker was on the road for no reason other than that his employment required him to collect a work colleague and a work vehicle. Although the Arbitrator acknowledged that the deceased was a former colleague, he found significance in the fact that the deceased only stopped working for the employer 8 days before. The Arbitrator also noted the worker's position as a First Aid Officer at the employer site was

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a real and substantial part of the worker's decision to stop and investigate. Furthermore, the Arbitrator noted the worker's first call was to his supervisor who directed another employee to attend the site. Accordingly, she found employment was a substantial contributing factor to the injury.

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RECENT DECISIONS

Safe system of work only as good as its enforcement

Baig v AWX Pty Ltd & Anor [2017] QSC 325 (20 December 2017)

Link to decision

Summary

In this case the Court held that even though the employer has designed a safe system of work, it was nevertheless liable in negligence for the worker's injury as it failed to enforce that system of work on a day-to-day basis, and failed to properly train its employees.

Background

The plaintiff was a young man who was employed as a labourer at an abattoir. He worked in what was called the 'paunch room' with another man.

The plaintiff's role was to cut a piece off carcasses that were hanging on a hook. Hooks ran along two chains, and the chains operated at a constant speed. However, the carcasses were placed on the chains at irregular intervals, so the task was not performed at a constant pace. The plaintiff had to perform the task approximately 1,600 times per day.

The plaintiff sustained an injury whilst performing this task. He alleged that the defendants were negligent in a number of ways, including by failing to institute a safe system of work. The defendants contended that if the task was performed at the pace and in the manner shown in a video supplied by them, then the system of work was a safe one. The plaintiff accepted this. However, it was the plaintiff's claim (supported by his co-worker who also gave evidence) that the video did not represent the usual pace and manner of work.

The Judge held that the faster the pace of work, the more likely it became that an awkward posture may be required and adopted by the plaintiff to perform the task, particularly when reaching across to the second (more distant) chain.

The defendants contended that the plaintiff had the authority to press a 'STOP' button, to halt the movement of the chains. The plaintiff disputed this. His evidence at the hearing was that he could not stop the chain himself, unless someone who was senior to him (such as his supervisor) told him to. This was supported by the evidence of his co-worker.

Overall, the Judge held that the work needed to be performed at a 'much faster pace on average than the pace shown in the videos'. It was found that 'the probabilities are overwhelming that reaching up would occur from time to time' and that this would require a one handed pull on a very large object (weighing between 50 to 90 kg) using a non dominant hand at an extreme outreach. The Judge concluded: 'it is highly probable that the forces involved exceeded those recommended. I am satisfied that a reasonable person in the employer's position would have taken precautions against this risk of injury bearing the probability that the injury would occur if care were not taken; the likely seriousness of the injury; and the burden of taking precautions to avoid the risk of injury.'

It was held that the defendants had failed to act as a reasonable employer to prevent the risk of injury to the plaintiff. In this regard the defendants had argued that the instruction to use the 'STOP' button was sufficient.

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This was not accepted. In this regard, the Judge noted that 'the problem is that the workers were not adequately trained even when it was their right to stop the chain. That you were having trouble keeping up and might have to adopt an extreme posture to do your work was not itself evidently an occasion to use a stop button and pause the chain.' The judge further noted that the defendant's submission in this regard:

> '…reverses the true position of law as to where the responsibility for devising a safe system of work lies … in effect, the system here was that an employer left it to an untrained worker (and in this case a 19 year old Afghani refugee with 10 weeks experience by the day in question) to determine when it was that the safety device should be activated.'

Accordingly, the plaintiff's negligence claim against the defendants was successful.

Conclusion

This case highlights the importance of employers not only having robust systems of work and training in place, but of continually ensuring that the training and systems of work are enforced on a day to day basis. It is not sufficient to have a safe system of work 'on paper'. There must be a safe system of work in practice.

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