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Employers Liability Newsletter

May 2018

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INDUSTRY NEWS

New Dispute Resolution Process for Workers Compensation

The NSW government has announced plans to reform the workers compensation dispute resolution system.

This follows the release of a discussion paper seeking feedback on options to improve the system (see our April Newsletter).

Essentially, the merit review and procedural review processes currently performed by SIRA and WIRO will no longer continue and all disputes will go to the WCC.

The reforms include the following:

- All enquiries and complaints from injured workers that are not resolved with their insurer will be directed to the WIRO for assistance,
- All enquiries and complaints from employers and other system participants will be referred to the SIRA, and
- The WCC will undertake all dispute resolution once an internal review is completed by the insurer, removing these functions from SIRA and WIRO.

WIRO will continue to administer the ILARS to provide legal support to injured workers.

Further legislation will be enacted to give effect to the changes. The objective is to provide a one-stop shop for resolving disputes and a system that is more user friendly and supports claimants in their return to work and good health.

Reference:

State Insurance Regulatory Authority (SIRA)

Workers Compensation Independent Review Office (WIRO)

Workers Compensation Commission (WCC)

Independent Legal Aid and Review Service (ILARS)

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RECENT DECISIONS

No Evidence of Injury – No Problem

Palise v Australian and New Zealand Banking Group Limited [2018] NSWWCCPD 13

Link to decision

Summary

The worker challenged an Arbitrator's factual finding that she did not sustain a neck injury. The determination of the appeal focussed upon whether the Arbitrator had failed to properly consider the worker's own evidence and contemporaneous medical evidence in respect of her neck complaints.

Background

The worker was employed by the Bank as a part-time personal banker. On 10 June 2014, the worker slipped at work and fell over landing heavily on her left side. She claimed to have suffered injuries to her left hand, left shoulder, knee, hip and neck and was certified unfit for three days before returning to restricted duties.

The insurer accepted liability for weekly payments and medical expenses in respect of soft tissue injury to the left knee and lower back, aggravation of the left shoulder, acromioclavicular joint arthritis, left middle/index finger and left ulnar nerve neuritis at the elbow.

The worker underwent a left carpal tunnel release in March 2015 (liability declined) followed by surgery in August 2015 for left arthroscopic decompression, rotator cuff repair, bicep procedure and excision of the AC joint (liability for which was accepted by the insurer).

In December 2016, the worker made a claim for lump sum compensation under section 66 in respect of the injury on 10 June 2014 that was declined by the insurer. However, the insurer accepted that she had a 5% WPI in respect of the left upper extremity.

The worker then filed an Application to Resolve a Dispute (ARD) in the Workers Compensation Commission claiming lump sum compensation in respect of the injury to her neck, left shoulder and left wrist.

At first instance

The matter proceeded to a conciliation/arbitration hearing before an Arbitrator who found in favour of the respondent in respect of the neck injury. He held that the worker had failed to discharge the onus of proving that she had injured her neck. As the combined impairment for the left shoulder and wrist did not meet the section 66 threshold of greater than 10% WPI, the Arbitrator declined to refer the matter to an AMS for assessment.

On appeal

The worker appealed from the Arbitrator's decision and the matter was determined by President Judge Keating 'on the papers'. He upheld the appeal, finding that the worker had injured her neck and remitted the matter to an AMS to determine the degree of impairment for the left shoulder, left wrist and cervical spine.

In coming to his decision, President Keating closely examined all of the evidence. He noted that the Arbitrator had highlighted the absence of any contemporaneous report of a neck injury in the medical certificates issued from November 2014 to April 2015, the GP's clinical notes or in the medical histories obtained by medical specialists who had examained the worker.

The Arbitrator had also observed that the fact that the worker was referred for imaging of her cervical spine in July 2014 and May 2016 did not necessarily confirm (or even infer) an injury but was to exclude the possibility of nerve root impingement.

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President Keating, however, accepted the worker's submissions that the arbitrator had failed to provide sufficient reasons for rejecting (or impliedly rejecting) her evidentiary statement and had failed to accept the medical evidence in support of her neck injury.

President Keating determined that the worker's evidence was 'crucial' to the issue as to whether she had suffered an injury to the neck and '…the arbitrator's failure to deal with the worker's evidence in any satisfactory way was an error in the fact-finding process'. In this regard, he referred to the High Court decision in *Waterways Authority v Fitzgibbon* [2005] HCA 57 as to the importance of the sufficiency of reasons given by a primary judge.

The worker submitted that the Arbitrator had failed to grapple with the brevity of the clinical notes of the treating GP and that an inference drawn that a record of increasing neck pain recorded on 31 July 2014 was not indicative of previous complaints of neck pain, was not available on the evidence.

President Keating noted that the worker had given sworn evidence of an injury to her neck on 10 June 2014 and persisting stiffness associated with some dizziness and headaches. He found that her evidence was consistent with the evidence as a whole and there was no persuasive evidence to the contrary. 'She appeared to be a stoic individual returning to work within a short period of time after the injury, notwithstanding the serious nature of her injuries. I accept her evidence'.

President Keating stressed that care should be exercised when relying upon clinical note extracts and referred to the Court of Appeal decision in *Container Terminals Australia Ltd v Huseyin* [2008] NSWCA 320 which cautioned that apparent inconsistencies in such evidence should be carefully considered by having regard to the following:

(a) The health professional who took the history had not been cross-examined about:

  (i) the circumstance of the consultation,

  (ii) the manner in which the history was obtained,

  (iii) the period of time devoted to that exercise,

  (iv) the accuracy of the recording,

(b) The fact that the history was probably taken in furtherance of a purpose which differed from the 'forensic exercise'…,

(c) The record did not identify any question which may have elucidated replies,

(d) The record is likely a summary rather than a verbatim recording,

(e) A range of factors may have influenced the record, e.g. fluency of English, the doctor's knowledge of the background circumstances, the patient's understanding of the purpose of the questioning, etc.

President Keating proceeded to find in favour of the worker. He said that while the absence of any contemporaneous clinical records of a neck injury during the initial GP visits was a '…relevant and important matter, as the appellant submits, it was not determinative'. He found that the evidence as a whole overwhelmingly supported a conclusion of a neck injury and went '… well beyond conflicting inference of equal degrees of probability'.

Implications

This decision highlights that '…the lack of a contemporaneous record of neck injury is not determinative' and the evidence must be evaluated in its entirety.

The decision also provides a caution against insurers and claims managers relying upon extracts of clinical notes in isolation.

Decided: 5 April 2018

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SNAPSHOTS

High Court revokes special leave to consider employer's duty of care during workplace investigation

Govier v The Uniting Church in Australia Property Trust (QLD)

Link to decision

The worker was employed as a disability care services provider who suffered physical and psychological injuries when she was attacked by a co-worker in December 2009. The worker was hospitalised as a result of her injuries and her employer commenced an investigation into the incident the same day. The employer issued a letter to the worker the next day which required her to attend an interview to discuss the incident and informing her that she would be put off work on full pay until the investigation was completed.

The worker did not attend the interview. She presented a medical certificate stating that she was unfit for work. Approximately two weeks later, the employer sent another letter to the worker that was critical of her conduct during the incident and required her to show cause as to why her employment should not be terminated. The worker did not respond and did not return to work.

The worker developed chronic post-traumatic stress disorder and a depressive disorder. She sued her employer in negligence, claiming that it had breached the duty of care that it owed to her in the way that it had handled the investigation. The matter was heard in the District Court, Queensland where a judge held that although the letters sent by the employer had caused distress and aggravated the worker's psychological injury, the employer did not have a duty of care to avoid or minimise the risk of psychological harm while investigating a workplace incident.

The worker appealed the decision and the Queensland Court of Appeal unanimously confirmed the decision of the trial judge.

The worker then applied for and was granted special leave by the High Court to appeal from the decision of the Queensland Court of Appeal.

The matter came before the High Court on 13 April 2018 where the issue for consideration was framed in terms of whether the employer's duty of care to exercise the power to conduct an investigation is sourced as an implied contractual obligation or is a tortious obligation or both.

As the hearing proceeded, the absence of the employment contract as an exhibit became increasingly problematic given that the nature of the duty could not be properly considered without understanding the contractual framework.

Following a short adjournment, the Court resumed and stated (per Bell J) that: 'The contract of employment is not in evidence. In the course of the hearing, its centrality to the determination of the issues on which special leave to appeal was granted has emerged. It follows that the proceeding is not a suitable occasion on which to determine those issues'.

The Court revoked special leave so the matter did not proceed effectively leaving the final determination with the decision by the Queensland Court of Appeal.

Decision Date: 13 April 2018

Matter Number: B51/2017

Decision Maker: High Court

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SNAPSHOTS

Appeal against inferences and findings against host employer and labour hire employer

Rail Corporation New South Wales v Donald; Staff Innovations Pty Ltd t/as Bamford Family Trust

Link to decision

The worker sued Railcorp (host employer) and Staff Innovations (labour hire employer) for damages in respect of a back injury sustained due to the nature and conditions of his employment as a labourer. The worker's duties included a substantial amount of jack hammering work. The worker alleged that the defendants were negligent by their failure to rotate tasks and ensure adequate rest breaks.

The trial judge found in favour of the worker awarding damages against Railcorp under the *Civil Liability Act 2002* ($1,236,913) and against Staff Innovations under the *Workers Compensation Act 1987* ($861,108).

The defendants appealed claiming that the trial judge had erred by drawing certain inferences regarding the work undertaken and whether the worker received adequate rest breaks.

The Court of Appeal reviewed the evidence on each of the grounds of appeal noting that inferences drawn must be supported on the evidence, finding that some of the inferences were not supported. The worker's injury was attributed to nature and conditions of employment with a specific occurrence of pain on a given date (rather than a specific incident of injury). The Court found that Railcorp had permitted an ad hoc system of work to operate by which the worker did all of the jackhammering work. A worker in his position was unlikely to ask for help – affirming trail judge's finding of no contributory negligence.

Breach of duty of care by the labour hire employer – non-delegable duty, failure to undertake adequate inspections or to make enquiries (possibly by speaking to the worker) to ascertain the system of work in place.

Although the appellant was partly successful on appeal, it was not successful in displacing the trial judge's determination.

Appeal dismissed.

Decision Number: [2018] NSWCA 82

Decision date: 24 April 2018

Matter No: 2017/51509

Decision maker: NSW Court of Appeal

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