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RECENT LEGISLATIVE DEVELOPMENTS

There are no recent legislative changes to report.

RECENT DECISIONS

- **Claims for 'back pay' following application of section 39**

RSM Building Services Pty Ltd v Hochbaum [2019] NSWWCCPD 15 (18 April 2019)

- **Payment under deed does not damage claim for workers compensation benefits**

Neuroscience Research Australia v de Rome [2019] NSWWCCPD 13 (11 April 2019)

- **It's Election Time: Revoking an Election in Order to Pursue a Claim for Damages**

Glogoski v Workers Compensation Nominal Insurer [2019] NSWDC 154 (3 May 2019)

- **Employer not liable where third party fully responsible for breach of duty**

State of New South Wales v Charter Hall Retail Management Limited (formerly Macquarie Countrywide Management Limited and Anor [2019] NSWDC 95 (25 March 2019)

RECENT DECISIONS

Claims for 'back pay' following application of section 39

RSM Building Services Pty Ltd v Hochbaum [2019] NSWWCCPD 15 (18 April 2019)

Link to decision

Summary

In the recent decision of *RSM Building Services Pty Ltd v Hochbaum* [2019] NSWWCCPD 15 (18 April 2018) President Judge Phillips has confirmed that there is no entitlement to 'back pay' if the 21% WPI section 39 threshold is obtained at some point after weekly benefits have ceased at 260 weeks.

Background

One of the most significant changes brought about by the 2012 legislative amendments was the introduction of a five year (260 week) limit on the payment of weekly benefits for all workers with 20% WPI or less (section 39 of the *Workers Compensation Act 1987*).

In many cases, a worker's degree of impairment will have been determined before the 260 week point and in those cases, weekly benefits will continue or cease depending on whether or not the worker has 21% WPI or more at the time 260 weeks is reached.

In his decision in *Hochbaum*, published on 18 April 2019, President Judge Phillips has resolved the uncertainty around what happens if the 21% WPI section 39 threshold is obtained at some point after weekly benefits have ceased at 260 weeks. The question for determination was whether the worker is then entitled to receive back payment from the 260 week point or do benefits recommence only from the day that the threshold is satisfied?

At first instance, Arbitrator Bamber considered the phrase in section 39(2) that *this section does not apply to an injured worker* meant that benefits should be reinstated from the date last paid because section 39 "did not apply" in the intervening period.

In Mr Hochbaum's case the intervening period was almost 30 weeks.

Decision

In overturning the Arbitrator's decision, President Judge Phillips considered that the Arbitrator had overlooked the importance of section 39(3) in giving a proper interpretation to the section as a whole. He also rejected the respondent worker's submission that section 39(2) was beneficial and should be interpreted accordingly.

In short, the President found that section 39(2) should be read alongside section 39(3), directing attention to whether or not there is an assessment of 21% WPI or more. If there is, then section 39(2) is triggered to restore payments and section 39(1) will not apply.

In other words, a guillotine falls at the end of 260 weeks. It remains in place unless and until the worker obtains an assessment at or over 21% WPI. At that point (and only at that point) section 39(2) is triggered and the guillotine is lifted, restoring an entitlement to weekly benefits that did not exist the day before.

Implications

The decision in *Hochbaum* creates a dilemma for workers in a system where so much turns on a single WPI assessment. Is it better to bring the claim early in an attempt to avoid any interruption to weekly payments at 260 weeks? Alternatively, is it better to wait and tolerate months or years without weekly benefits post 260 weeks with a view to maximising the eventual WPI assessment?

The decision also confirms the primacy of work capacity decisions. Whilst section 39(2) might operate to lift the guillotine and revive an entitlement to weekly benefits, the amount to be paid, if anything is still determined by the insurer's latest work capacity decision.

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RECENT DECISIONS

Payment under deed does not damage claim for workers compensation benefits

Neuroscience Research Australia v de Rome [2019] NSWWCCPD 13 (11 April 2019)

Link to decision

Summary

A recent decision by Deputy President Wood considered the circumstances in which an earlier payment to a worker would prevent a claim for workers compensation benefits due to the provisions of s151A.

Background

The worker made a claim for payment of weekly benefits and lump sum compensation based on an allegation of a psychological injury due to bullying and harassment at work.

Prior to commencing proceedings in the Workers Compensation Commission the worker had lodged a general protections application with the Fair Work Commission. That application was settled by way of a deed pursuant to which the worker was paid $20,000. The deed indicated that this was for general damages due to the worker's pain and suffering. The deed also provided for a contribution of $15,000 to be made towards the worker's legal costs.

In response to the claim for compensation, the employer argued that pursuant to section 151A the worker was not entitled to workers compensation benefits as she had received damages and as such had no entitlement to compensation under the *Workers Compensation Act 1987*.

Decision

The Arbitrator initially found that there was no exclusion to the worker receiving workers compensation benefits and entered an award in her favour.

An appeal to Deputy President Elizabeth Wood primarily focused on the question of whether the worker had received damages and was thereby disentitled to workers compensation benefits.

The Deputy President noted that "damages" are defined in section 149 of the 1987 Act to include any form of monetary compensation and any amount paid under a compromise or settlement of a claim for damages (whether or not legal proceedings had been instituted).

Section 151A in turn provides that if a person recovers damages in respect of an injury from the employer liable to pay compensation under the Act then that person ceases to be entitled to any further compensation in respect of the injury.

In referring to previous authorities on the exclusion of compensation by virtue of the payment of damages, Deputy President Wood commented that it is not the execution of a deed that invokes section 151A but the actual recovery of damages. For the section to apply it is also necessary that the damages have been paid in respect of the same injury that is relied on in seeking workers compensation.

Deputy President Wood held that in the present case the application in the Fair Work Commission had not sought damages in respect of the same grievances for which compensation was claimed in the Workers Compensation Commission. This distinguished the matter from the decision of President Keating J in *Super R IP Pty Ltd v Mijatovic*. In that matter the President found the damages paid under a deed were in respect of the work injury.

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In passing, Deputy President Wood also noted that the deed entered into following the proceedings in the Fair Work Commission did not contravene section 234 of the 1998 Act, which prevents contracting out, as the deed specifically provided that workers compensation claims were excluded from the matters resolved.

Implications

If a defence under section 151A is to succeed it is necessary to show that any monetary sum paid to a worker was damages as defined in section 149 and that those damages relate to the same injury for which compensation is claimed.

It will be necessary to consider in detail the document or arrangement pursuant to which the monetary sum was paid in order to determine whether section 151A will apply.

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RECENT DECISIONS

It's Election Time: Revoking an Election in Order to Pursue a Claim for Damages

Glogoski v Workers Compensation Nominal Insurer [2019] NSWDC 154 (3 May 2019)

Link to decision

Summary

Prior to 27 November 2001, a worker could elect to receive lump sum compensation or damages (not both).

In this case, the worker recently applied to the District Court to revoke an election that he made in 2001 to receive lump sum compensation, as he now wanted to pursue a claim for damages.

The worker's application was unsuccessful. This was despite the fact that the worker sustained an exacerbation of his pain due to a separate incident after making his election.

Background

The worker was employed by Ansett Australia as a freight handler. He sustained an injury to his lumbar spine in February 2000, which required surgery. He then returned to work.

In August 2001 the worker elected to receive lump sum compensation rather than make a claim for damages. This election was required because, at that point in time, Section 151A of the Workers Compensation Act provided that a worker could receive lump sum compensation or damages, not both.

Two months later, in October 2001, the worker sustained an exacerbation of his injury when he assisted a co-worker to lift an item weighing around 65 kilograms. He never returned to work after that incident.

In or around 2018 the worker made an application to revoke his election so that he could pursue a work injury damages claim. In order for that application to be successful, the worker had to satisfy the Court that, at the time of the election, a reasonable person in his position would have had no cause to believe that further deterioration of his medical condition would probably occur.

The worker relied on, amongst other things, an Affdavit in which he swore that at the time he made the election, he had no reason to believe that his condition would deteriorate.

Decision

His Honour Judge Russell SC considered the legislative framework that applied. His Honour noted, importantly, that the worker's own opinion as to whether his condition would get worse at the time of making the election was irrelevant. His Honour therefore took no account of the worker's opinion in that regard.

His Honour accordingly focused his decision on the medical opinion expressed by various medical practitioners around the time of the worker making the election. His Honour noted, amongst other things, that:

1. No doctor suggested that the worker's condition would improve.
2. All doctors considered the worker to be permanently unfit for heavy work, and that he should not perform such work.
3. In October 2001 the worker was doing work involving heavy lifting even though he was under medical advice not to do so.
4. One doctor had noted the potential for an increase in impairment to the back and both legs.

In view of the above evidence, His Honour held that a reasonable person in the worker's position would have had reasonable cause to believe that further deterioration would probably occur.

In the circumstances, the worker failed to discharge his onus, and his application to revoke his election was unsuccessful.

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Conclusion

If a claim for damages is received as a result of an injury that occurred between 30 June 1987 and 27 November 2001, check to see if lump sum compensation was paid prior to 27 November 2001. If it was, this means that the worker made an 'election'. The worker accordingly cannot recover damages for that injury unless they apply to the Court to have the election revoked.

The Court will pay close attention to the medical evidence that was available to the worker at the time of making the election when determining whether leave will be granted for the election to be revoked.

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RECENT DECISIONS

Employer not liable where third party fully responsible for breach

State of New South Wales v Charter Hall Retail Management Limited (formerly Macquarie Countrywide Management Limited) and Anor [2019] NSWDC 95 (25 March 2019)

Link to decision

Summary

An employer was found not to have breached the duty of care owed to an injured worker where an uncommon hazard, not identified by the employer, caused injury to the worker. Rather, the entity in control and possession of the premises was held to be fully responsible as reasonable steps were not taken to avoid such a risk of injury.

The plaintiff ("employer") was employed by the State as a NSW firefighter. The State sought to recover compensation payments pursuant to section 151Z of the *Workers Compensation Act* 1987 made to the injured worker from an injury arising at the Metro Plaza Shopping Centre at Orange ("Centre").

The Court considered whether the employer had breached the duty of care owed to the worker in not identifying a hazard at the premises or whether the entirety of liability lay with the Owner and/or Management of the Centre ("Charter Hall").

Background

On 22 January 2007 the worker responded to a fire alarm at the Centre. The worker was escorted to the roof access door at the top of a ladder by a security guard to check an air conditioning unit. The door had a metal locking bar in front of it which had to be lifted in order to provide access to the roof.

The security guard opened the door and in doing so moved the locking bar to lean it against the wall on the side of the door. The worker and his partner went through the door, checked the unit, and after they were satisfied there was no fire, they exited.

Upon descending from the roof on the ladder the worker was struck on the neck by the locking bar. The worker suffered injury to his neck, and received workers compensation.

At all times the employer accepted that it owed a non-delegable duty of care as an employer to take reasonable care to avoid exposing the worker to an unnecessary risk of injury.

Decision

Judge Scotting of the District Court delivered judgment on 25 March 2019.

The Judge considered evidence given by the security guard that there was no mechanism installed to keep the locking bar in position by management of the Centre, and he had also described two prior occasions where the bar had fallen on him, both of which he reported to management.

Charter Hall were found to have breached its duty as occupier of the centre, having possession and control of the premises.

The Judge found that the duty to take reasonable care required management to protect the worker from a not insignificant risk which could reasonably be foreseen and avoided.

In deciding whether there had been a breach of the duty of care, Judge Scotting found the failure of management to restrain the locking bar posed a foreseeable risk of injury by it falling onto a person, and they had actual knowledge of the risk which caused the worker's injury.

In respect of the allegation that the employer bore responsibility, Judge Scotting found the worker had received

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training, on the proper use of ladders and risk assessment procedures in the course of his work as a firefighter. Despite this training, the worker had not perceived the danger of the locking bar as the set up was not common.

His Honour was not satisfied that the employer had breached its duty of care to the worker, and accordingly, he did not apportion any responsibility for the incident to the employer, but found Charter Hall to be wholly responsible.

Accordingly, the recovery claim by the employer was successful against Charter Hall.

Implications

This case re-enforces the longstanding principles of negligence found in section 5 of the CLA, and subsequent common law authorities, that an employer, as well as any entity that exercises control or supervision over a worker, will be found to hold a duty of care to that worker.

Each matter must be determined on its own facts. The mere existence of that duty does not automatically give an occupier a right to contribution from the employer to the worker's damages.

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