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LEGISLATIVE DEVELOPMENTS

New PIAWE for workers injured on and from 21 October 2019

Workers Compensation Amendment (Pre-injury Average Weekly Earnings) Regulation 2019

The NSW government has published a Regulation as anticipated by the *Workers Compensation Legislation Amendment Act 2018* relating to changes to the method of calculating PIAWE for the purpose of determining a worker's entitlement to weekly payments of compensation.

The Regulation commences on 21 October 2019 with the objective of simplifying the calculation of pre-injury average weekly earnings by providing that overtime and allowances are no longer excluded from PIAWE as the weekly average of a worker's gross earnings over 52 weeks prior to their date of injury (subject to adjustment in some circumstances).

There will effectively be two different methods for calculating PIAWE for workers injured before and after the commencement date.

Employers and workers will be able to agree on the PIAWE amount to be applied as an alternative to the insurer making a PIAWE work capacity decision. The agreement must be approved by the insurer.

Link: Reference guide for PIAWE provides an overview of the changes.

New workers compensation Guidelines

New Guidelines issued by SIRA governing insurer conduct and case management will apply to all claims from 21 October 2019 replacing the Guidelines previously issued in December 2018.

Link: Workers compensation guidelines

Amended Standards of Practice

Amendments to SIRA's *Standards of Practice: Expectations for insurer claims administration* and conduct designed to deliver effective claims management practices will also apply from 21 October 2019.

Link: Standards of practice: expectations for insurer claims administration and conduct

RECENT DECISIONS

MAC appeal not a MAC appeal

Ali Sleiman v AGR Tyres (18 September 2019)

Summary

The worker appealed a Medical Appeal Panel (MAP) decision under section 327 of the *Workplace Injury Management and Workers Compensation Act* 1998 (the '1998 Act') which is normally reserved for appealing a Medical Assessment Certificate (MAC).

This decision makes it clear that a party cannot appeal a MAP decision under the section 327 appeal provisions which relate exclusively to MAC appeals.

Background

The worker lodged a claim for 46% WPI for injuries caused by the 'nature and conditions of employment' with a deemed date of injury of 14 May 2014. Liability for the injuries had previously been accepted by the insurer.

In a MAC dated 19 January 2017, the Approved Medical Specialist (AMS) Dr Truskett assessed the worker as having 2% WPI being less than the compensable threshold under section 66(1) of the 1998 Act.

The worker lodged an appeal against the MAC in February 2017 and was referred for examination by Dr Drew Dixon, being a member of the MAP.

A decision was issued by the MAP dated 16 June 2017 revoking the original MAC and replacing it with a new MAC in which the worker was assessed with a compensable 14% WPI.

Almost 2 years later, the worker appealed the MAP decision.

Appeal of MAP decision

In late August 2019, relying on section 327(a) & (b), the worker lodged an appeal from the MAC issued by the MAP. There is no time limit for such an appeal based on sub-sections (a) & (b) (deterioration and further evidence).

The thrust of the appeal was that there was new evidence available which showed that the worker's condition had deteriorated resulting in a higher WPI since MAP member, Dr Drew Dixon, examined him on 24 May 2017.

The worker conceded that he was appealing the 14% WPI assessment only 'for the purposes of a work injury damages threshold dispute' noting that he was required to establish a WPI of at least 15% to be eligible to pursue a claim for work injury damages.

The appeal was referred to a delegate of the Registrar (Parnel McAdam) to decide whether the appeal had prospects of success.

Mr McAdam determined that the appeal against the MAP could not proceed. His decision included legal justification as to why the appeal could not proceed including:

- An assessment of a medical dispute is performed by an AMS at first instance who prepares a MAC.
- Section 327(1) of the 1988 Act enables a party to the medical dispute to appeal against a medical assessment.
- 'Medical assessment' is defined in section 4 of the 1998 Act to mean an 'assessment of a medical dispute by an approved medical specialist'.

In view of the above and the fact that Dr Drew Dixon had examined the worker in his capacity as a member of the MAP and not as an AMS, it follows that the section 327 MAC appeal provisions cannot apply to a MAP decision.

Mr McAdam also highlighted some practical problems with the section 327 appeal provisions applying to a MAP decision including that, if permissible, a MAP decision could be subject to review by another MAP. Not only would it be inappropriate for an appeal to be determined at the same level of authority, but also there 'would be a never-ending right of appeal'.

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Implications

The worker's objective was to satisfy the 15% WPI threshold in order to pursue a work injury damages claim.

However, it is now clear by virtue of this decision that a party cannot appeal a MAP under the appeal provisions of section 327. That section relates exclusively to appealing from a MAC.

This decision is a timely reminder to carefully consider the basis for any appeal brought from an earlier decision or determination in proceedings in the Workers Compensation Commission.

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RECENT DECISIONS

The stringent nature of an employer's duty of care: a duty "to seeing that care is taken"

Hossain v Unity Grammar College Ltd and Ors [2019] NSWSC 1313 (1 October 2019)

Link to decision

Background

The worker sustained injuries in a gas explosion at Unity Grammar College (the College), where he was employed as a caretaker and night watchman. The explosion was caused by the defective installation of a gas system several years earlier.

A 'second stage regulator' had been placed in a location that was unsafe, and contrary to the instructions of the manufacturer. It was also contrary to the provisions of the relevant Australian Standard and the provisions of the (DGR) *Dangerous Goods (Gas Installations) Regulation 1998* (NSW) (which has since been repealed) .

The circumstances that gave rise to the risk of injury were essentially that the 'breather vent' was located internally, causing a build-up of gas to form above the ceiling.

The experts (of which there were four) were unanimous in their opinion that if the regulator had been affixed externally, this would have prevented the build-up of gas and the explosion would have been entirely avoided.

An important finding of fact made by Mr Justice Campbell was that there was no compliance plate attached to the gas installation, as required by various provisions of the DGR.

At the time of judgment, the active defendants in the proceedings were as follows:

1. **The College,** as the worker's employer.
2. **Insurance Australia Limited**, who insured the deregistered **Binah Projects Pty Ltd**. Binah were the principal contractors responsible for the construction of the College.
3. **Five State Universal Plumbing Pty Ltd**, the plumbing and gasfitting contractor which performed secondary gasfitting work (not the original defective work).
4. **Elgas Ltd**, who supplied and installed the LPG gas tank.
5. **Bernie Cohen and Associates Pty Ltd**, who the College engaged as the private building certifier for the construction work. Cohen was originally sued by the worker as a defendant. That claim was discontinued but Cohen remained a party to the proceedings by way of a cross claim filed by the College.

The company responsible for the defective installation, Enma Plumbing Pty Ltd (Enma) was not joined to the proceedings. Enma was not insured and had been deregistered.

Decision

Justice Campbell noted the non-delegable nature of the duty of care owed by the College to the worker. In defining the scope of the employer's duty of care, Judge Campbell referred to the comments of Mason P in *TNT v Christie* [2003] NSWCA 47. Mason P found that an employer's duty of care will be imposed regardless of personal fault on the employer's part, if the worker can

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prove that the damage was caused by a lack of reasonable care on the part of someone (not necessarily the employer) within the scope of the relevant duty of care.

His Honour also referred to *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, where the High Court established a further category of a non-delegable duty of care. Justice Campbell quoted from the unanimous High Court decision as follows:

> *It has long been recognized that there are certain categories of case in which a duty to take reasonable care to avoid a foreseeable risk of injury to another will not be discharged merely by the employment of a qualified and ostensibly competent independent contractor. In those categories of care, the nature of the relationship of proximity gives rise to a duty of care of a special and "more stringent" kind, namely a "duty to ensure that reasonable care is taken". Put differently, the requirement of reasonable care in those categories of cases extends "to seeing that care is taken".*

Justice Campbell was of the view that the negligence of Enma provided a sufficient basis for a finding of negligence on the part of the College. This is because the damage was caused by the lack of reasonable care, on the part of someone (Enma) within the scope of the employer's duty of care.

The College submitted that it was not a qualified gasfitter, and the knowledge of such an expert should not be imputed to it. Justice Campbell stated:

> *But I think this is no answer to an employer's obligation. The employer's obligation is to maintain the safety of the premises not just to provide premises which are at the outset apparently safe.*

It was found that the defect, which made the workplace unsafe, would have been discovered upon reasonable inspection. The absence of the compliance plate, and the position of the second stage regulator, would have been obvious on inspection by anyone who had familiarity with gas installation.

Justice Campbell also found the remaining defendants (and cross defendant) liable. His Honour apportioned liability equally between each defendant (and Cohen as cross-defendant). The worker was awarded over $3,000,000 in damages.

Implications

This case emphasises the scope of the employer's non-delegable duty of care. The special relationship between an employer and employee requires a more rigorous standard of care to be applied. This standard of care extends to a duty "to seeing that care is taken", and cannot simply be discharged (or delegated) by engaging an independent contractor.

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RECENT DECISIONS

Alleged assault of a co-worker: Is the employer vicariously liable?

Johnson v State of New South Wales [2019] NSWSC 1206 (11 September 2019)

Link to decision

Background

The worker was a former police officer of the NSW Police Force (NSWPF). The worker made a claim for work injury damages in respect of psychological injuries arising out of her employment. The claim was made against the State of NSW (the State) pursuant to the *Crown Proceedings Act* 1987 (NSW).

The worker alleged that her injury arose in part by an assault occasioned against her by another police officer, Mark Gorman. Mr Gorman denied that the assault ever took place.

Prior to determining whether the assault did in fact occur, the Court was required to determine if the State was vicariously liable for the alleged actions of Mr Gorman pursuant to the *Law Reform (Vicarious Liability) Act* 1983 (NSW).

Decision

Associate Justice Harrison noted that when considering the vicarious liability of the State for the conduct of police officers, the common law applies.

> Her Honour considered what is currently the authoritative case on vicarious liability under common law, being the High Court decision of *Prince Alfred College v ADC* [2016] HCA 37. At paragraph [81] of that case it was stated:
>
> *…the relevant approach is to consider any special role that the employer has assigned to the employee and the position in which the employee is thereby placed vis-à-vis the victim. In determining whether the apparent performance of such a role may be said to give the "occasion" for the wrongful act, particular features may be taken into account. They include authority, power, trust, control and the ability to achieve intimacy with the victim. The latter feature may be especially important. Where, in such circumstances, the employee takes advantage of his or her position with respect to the victim, that may suffice to determine that the wrongful act should be regarded as committed in the course or scope of employment and as such render the employer vicariously liable.*

Later in the High Court's judgment it was stated:

> *The "relevant approach" … is necessarily general. It does not and cannot prescribe an absolute rule. Applications of the approach must and will develop case by case. Some plaintiffs will win. Some plaintiffs will lose. The criteria that will mark those cases in which an employer is liable or where there is no liability must and will develop in accordance with ordinary common law methods. The Court cannot and does not mark out the exact boundaries of any principle of vicarious liability in this case.*

In the current case, for the purposes of considering if the State was vicariously liable for the alleged actions of Mr Gorman, Her Honour assessed the worker's case 'at its highest on the facts as pleaded in her statement of claim'. It was noted that those facts included that Mr Gorman and the worker were at the relevant time working together at the Parramatta Children's Court. The worker alleges that whilst they were at their place of work, Mr Gorman forced himself against her and sexually assaulted her.

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After considering the legislation and the various case law, Her Honour noted that the State 'will only be vicariously liable in circumstances…when a person is acting within their authority or alternatively is performing an authorised act in an unauthorised manner.'

In finding that the State was **not** vicariously liable for the alleged actions of Mr Gorman, Her Honour commented:

> *…a police officer who makes an arrest with the use of physical force, in the performance or purported performance of his duty as a police officer, is distinguishable from a police officer who, in the performance or purported performance of his duty as a police officer, sexually assaults a trainee police prosecutor while they are in the same room. While the State of New South Wales provided the opportunity for the alleged tort, it is difficult to see how the State of New South Wales provided the occasion for the wrong. The sexual assault alleged was an act unconnected with the police officer's duties as a prosecutor. Also it cannot be said that the sexual assault of a junior employee was a mode of performing a function he was required to do.*

Implications

The decision confirms that an employer will not always be vicariously liable for the actions of its employees.

If the wrongful action of an employee is unconnected with their duties, and was not a mode of performing a function they were required to perform as part of their employment, then the employer will not be liable.

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