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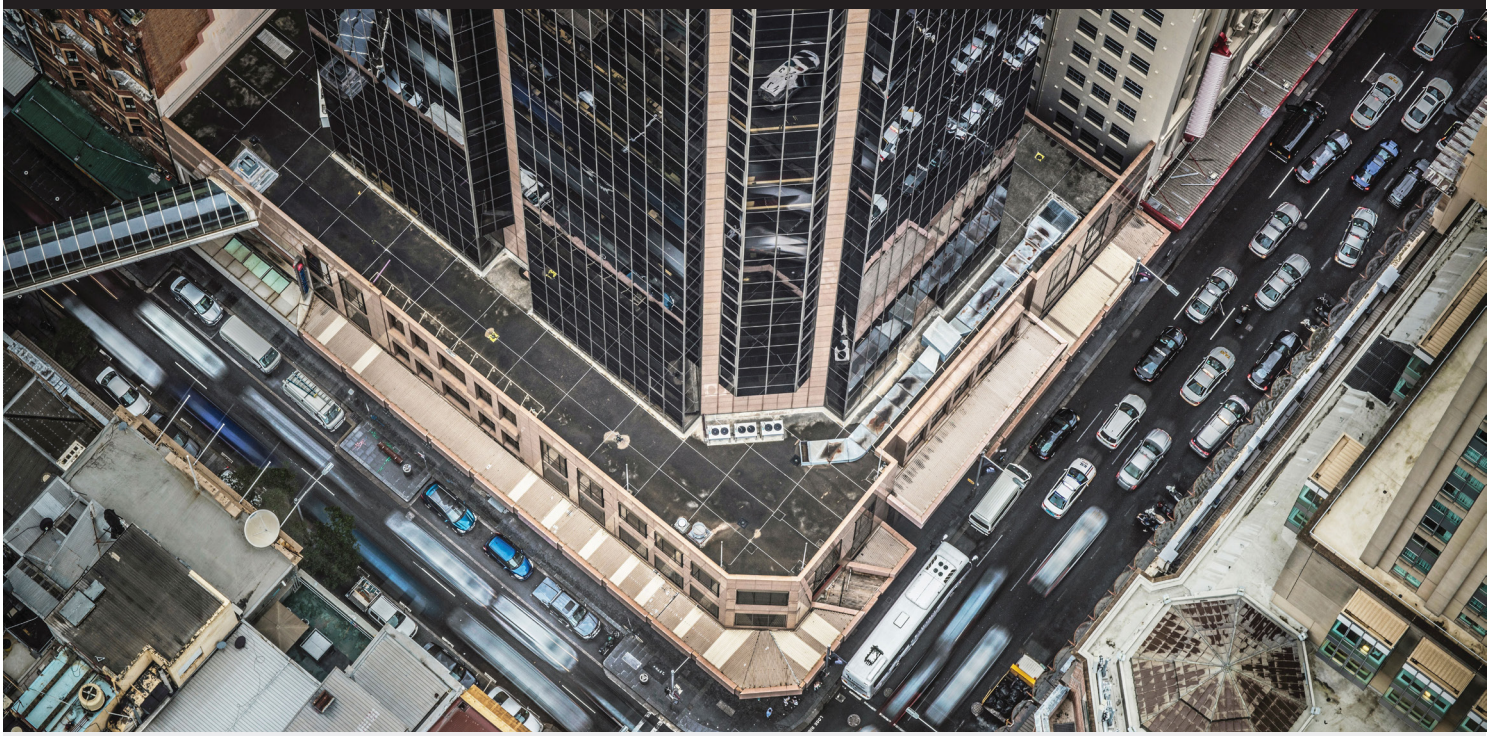

LEGISLATIVE DEVELOPMENTS

There are no legislative developments to report this month.

SHORT SHOTS

Brief case notes of interest, read more

RECENT DECISIONS

- **Worker successful in proving negligence after falling from a stepladder**
  Warda V Specialty Fashion Group Ltd [2018] NSWDC 218 (21 August 2018)

SHORT SHOTS

No s66 where death inevitable following injury

Hunter Quarries Pty Ltd v Alexandra Mexon as Administrator for the Estate of the Late Worker

LINK TO DECISION

The NSW Court of Appeal considered the meaning of the phrase 'permanent impairment' and determined that there is no entitlement to lump sum compensation under section 66 of the *Workers Compensation Act 1987* (the '1987 Act'), resulting from an injury so serious that death will inevitably follow within a short time.

The worker was killed at his workplace when an excavator he was operating tipped over and crushed him. Liability was accepted and payment of death benefits to the worker's estate was made pursuant to section 25 and 26 of the 1987 Act.

In 2016 the executor of the deceased worker's estate lodged a claim under section 66 of the 1987 Act seeking lump sum compensation for 'permanent impairment' by reason of the severe high force crush injury to the deceased worker's body.

The executor of the worker's estate commenced proceedings with the Workers Compensation Commission and the dispute was referred to an Approved Medical Specialist (AMS). The AMS found that the deceased worker's permanent impairment as a result of the injury was 100% WPI, however following a reconsideration of this decision; the AMS determined that the deceased had not suffered any permanent impairment. This decision was referred to the Medical Appeal Panel (MAP) which found that it was highly probable that the worker's injuries would be with him for the remainder of his life and assessed 100% permanent impairment.

The employer appealed the decision of the MAP. Justice Schmidt of the Supreme Court dismissed the appeal on the basis that 'permanent impairment' wasn't concerned with the consequences of impairment on a worker's lifespan.

The matter came before the Court of Appeal who reasoned that the term 'permanent impairment' involves some diminution in function experienced by a worker which is lasting, and that there must be some continued and enduring experience of living.

Simpson AJA noted:
The purpose of s66 of the Workers Compensation Act 1987 (NSW) is to compensate an injured worker for the loss of quality of life caused by the workplace injury that will continue for the duration of the worker's life. It is not a sensible or reasonable application of the provision to award compensation to an injured worker the duration of whose life is so circumscribed as to allow no meaningful benefit of the award of compensation to him or her and who had no awareness or consciousness of the loss of quality of life

Basten JA commented: "*Section 66(1) of the Workers Compensation Act envisages a continuing life with a compromised ability to work and a compromised capacity for the enjoyment of life. If a person's injuries are so severe that death is, in a practical sense, inevitable within a short period, the injury is described as fatal, not as resulting in an impairment.*"

The Court of Appeal found that there was no entitlement to lump sum compensation where death follows within a few minutes of an injury.

Decision Number: [2018] NSWCA 178
Decision Date: 16 August 2018
Decision Maker: NSW Court of Appeal

Slip up doesn't prevent journey claim

State Super Financial Services Australia Limited v McCoy

LINK TO DECISION

The worker injured her ankle when she tripped and fell on an uneven ground on her way from her hotel to her work Christmas party. The worker claimed that she fell because she was fatigued and was hurrying to arrive at the party on time. On 1 November 2015, the worker made a claim for compensation and the insurer disputed the claim on the basis that (a) the claim was not made within six months after the injury; (b) the worker did not sustain an injury arising out of or in the course of employment; and (c) there was no real and substantial connection between employment and the incident out of which the injury arose pursuant to section 10(3A) of the 1987 Act.

On 26 October 2017, the worker commenced proceedings with the Workers Compensation Commission claiming weekly benefits, medical expenses and lump sum compensation.

back to top

Arbitrator Egan accepted the worker's evidence that she was ignorant of her rights to claim compensation until 2015 and was therefore not prevented from pursuing her claim. The Arbitrator found that the worker was on a journey to which s10 of the 1987 Act applied and that there was a 'real and substantial connection' between the worker's employment and the incident, namely, that the incident occurred whilst the worker was tired and hurrying to arrive on time.

Section 10(3A) of the 1987 Act relevantly provides:
(3A) A journey referred to in subsection (3) to or from the worker's place of abode is a journey to which this section applies only if there is a real and substantial connection between the employment and the accident or incident out of which the personal injury arose.

The employer appealed the Arbitrator's award and alleged an error in law in the Arbitrator's finding that there was a real and substantial connection between the incident and employment. In summary the employer's submissions were:

1. The Arbitrator incorrectly drew an inference of a substantial connection between employment (the tiredness due to work and hurrying due to being on time to the party) and the incident (tripping), and that these inferences could not be drawn as there was no evidence that there was a strict timeframe or that the worker was fatigued.
2. The employer argued that there was no evidence that the worker may have been hurrying or that being on time was important to the employer. Therefore, the reliability of the evidence was not assessed against contemporary materials, objectively established facts and the apparent logic of events.
3. That the worker had not explained her logic behind her alleged fatigue and the need to arrive at the party by a certain time.

The President stated that the onus was on the appellant to show that the Arbitrator's findings were not supported by the evidence or that the evidence demonstrated a contrary view to that adopted. The President referred to the decision of Allsop J in *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833:

"In that process of considering the facts for itself and giving weight to the views of, and advantages held by, the trial judge, if a choice arises between conclusions equally open and finely balanced and where there is, or can be, no preponderance of view, the conclusion of error is not necessarily arrived at merely because of a preference of view of the appeal court for some fact or facts contrary to the view reached by the trial judge."

The President stated that the test to be applied under section 10(3A) of a 'real and substantial connection' requires an association or relationship between employment and the incident that may be provided by establishing that employment was the cause. However employment doesn't have to be the only, or even the main cause. The President remarked that the test in section 10(3A) is less demanding than the test to establish that an injury arose out of or in the course of employment under section 4 of the 1987 Act which requires a causative element.

The President remarked that the issue was whether the worker's evidence that she was hurrying and tired at the time of the injury established a real and substantial connection between employment and injury. He stated that the Arbitrator had correctly observed those factors that contributed to the worker's fall, and that whether those factors were connected to the injury required the Arbitrator drawing an inference. The President concluded that the Arbitrator had accepted the worker's evidence regarding tiredness and hurrying which was not 'inherently illogical or unreliable' or defective in some other material way, and that the Arbitrator did not err in doing so. The President also concluded that the Arbitrator's common sense inference that fatigue reduced the worker's reaction time and contributed to the incident was an inference that was reasonably open to be drawn.

The President dismissed the appeal and the Certificate of Determination was confirmed.

Decision Number: [2018] NSWWCCPD 26
Decision Date: 3 July 2018
Decision Maker: President Judge Keating

Extra body part assessment fails to increase s66 entitlement

Ilic v 2/11 Leonard Ave Pty Ltd (in liquidation)

LINK TO DECISION

The worker was compensated for 6% whole person impairment ('WPI') for an accepted lumbar spine injury, in accordance with a Complying Agreement dated 30 May 2012. In 2017, the worker brought a further claim for lump sum compensation.

back to top

An Approved Medical Specialist in a Medical Assessment Certificate of 5 March 2018 assessed 6% WPI, comprising of 2% WPI of the lumbar spine, 4% WPI of the right lower extremity and 0% WPI of the right upper extremity. On 19 April 2018, the Workers Compensation Commission issued a Certificate of Determination stating that the worker has no entitlement to further lump sum compensation, on the basis that the worker was assessed 6% WPI and was previously compensated in respect of 6% WPI for that injury.

The worker appealed the Arbitrator's determination submitting that the right lower extremity is a further condition which warrants a separate assessment and award. In issue was whether the consequential condition to the right lower extremity is compensable in circumstances where there is no change in the worker's overall assessment of permanent impairment.

President Judge Keating in his Decision of 20 August 2018 held that there was only one injury pleaded, and that the worker is not entitled to be awarded a further 4% WPI for the right lower extremity merely because it is a separate impairment to the lumbar spine and wasn't subject to the Complying Agreement. The President referred to section 322(2) of the Workplace Injury Management and *Workers Compensation Act 1998* which states:

"Impairments that result from the same injury are to be assessed together to assess the degree of permanent impairment of the injured worker."

The President reiterated that the impairments concern the same injury and must be assessed together. He concluded that the worker failed to establish an increase in WPI and therefore had no entitlement to further compensation pursuant to section 66A (3) (c) of the *Workers Compensation Act 1987*.

Decision Number: [2018] NSWWCCPD 34
Decision Date: 20 August 2018
Decision Maker: President Judge Keating.

back to top

RECENT DECISIONS

Worker successful in proving negligence after falling from a stepladder

Warda V Specialty Fashion Group Ltd [2018] NSWDC 218 (21 August 2018)

Link to decision

Summary

In a recent decision of the District Court of NSW, a worker's claim for work injury damages was successful after she established that her fall from a step ladder whilst working in a retail store was caused by the negligence of her employer.

Background

The worker sustained injuries to her left arm, elbow and shoulder when she fell from a two stepped folding ladder in a retail store on 31 March 2009. A customer had requested a garment that was on a display mannequin, located on a 'high display shelf'. The mannequin weighed approximately five kilograms.

In order to retrieve the garment, the worker placed the ladder just under the mannequin, climbed the steps of the ladder, reached above her head, took hold of the mannequin and started to descend the stairs. As she did so, the store telephone rang which momentarily distracted the worker. She had been instructed to answer the telephone promptly, and was the only staff member in the store at the time. The worker misplaced her footing on the second step, lost her balance and fell backwards.

The worker sued her employer in negligence, and claimed work injury damages for past and future economic loss. She was working part time at the time of her injury. Future economic loss was claimed on the basis that she would have obtained full time employment had she not been injured.

The employer denied that the worker's injury was caused by any negligent action on its part. It was further submitted by the employer that the worker had exaggerated the extent of her disabilities.

Decision

Judge Levy was impressed with the worker and thought she gave evidence in a straightforward manner. He was not satisfied that the worker had exaggerated her symptoms.

His Honour concluded that the risk of the worker falling was both foreseeable and significant. The narrow-based foot placement, combined with the high centre of gravity whilst supporting the mannequin, reduced the worker's stability. His Honour accepted the worker's liability evidence, and agreed that the employer should have reduced the risk of injury by providing a hooked mannequin and/or providing a proper work platform or more suitable step ladder.

Judge Levy stated the worker's conduct in becoming distracted by the telephone when it rang was 'nothing more than an incident of mere inadvertence', and this did not amount to contributory negligence. However, his Honour did not accept the worker's claim for future economic loss, and awarded future economic loss on a 'buffer' basis only.

Implications

This case reiterates the importance of developing and implementing safe systems of work to minimise the risks of foreseeable injuries. It does not matter if the task had been performed previously without incident when it is evident that there is a foreseeably dangerous situation.

back to top

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back to top