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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

- **Amended section 66 claim rejected as earlier MAC prevails**
  Jasbir Singh v B & E Poultry Holdings Pty Ltd (26 July 2018)
- **Beyond employment - when an injury is not foreseeable**
  Sandro Puleio v Olam Orchards Australia Pty Ltd [2018] VSC 109 (21 March 2018)
- **Labour hire recovery - failure to establish negligence against host employer**
  Coles Supermarkets Australia Pty Ltd v Ready Workforce (A Division of Chandler McLeod) Pty Ltd (28 June 2018)

WORKERS COMPENSATION GUIDE - 10TH EDITION

This year marks the 20th anniversary of the TurksLegal Guide to Workers Compensation in NSW and we are excited to announce the launch of our new interactive online version of this resource at the end of August 2018.

Our new online Guide will enable you to quickly navigate, search and browse up-to-date information and guidance in relation to compensation for workplace injuries in NSW.

More information on how to register coming soon.

SHORT SHOTS

Death itself cannot be the injury

Miller v State of NSW

LINK TO DECISION

On 15 April 2011, the worker, Mrs Miller, died after suffering a severe asthma attack while she was driving a community transport vehicle in the course of her employment.

The worker was driving passengers from Brewarrina to Dubbo, when she began coughing and gasping for air. After continuing to drive while coughing for 25 minutes, the worker was persuaded by her passengers to pull over to the side of the road in a remote location. The worker attempted to alleviate her symptoms taking two puffs on a Ventolin inhaler but passed out. Two nurses who were travelling on the bus and a paramedic, who happened to be following the vehicle, administered CPR until police and a doctor with a defibrillator and resuscitation equipment arrived at the scene. Despite all of their efforts, the worker was declared dead at Nyngan Hospital approximately two hours after having lost consciousness having suffered a fatal cardiac arrest.

The deceased worker's husband made a claim for compensation pursuant to section 25 of the 1987 Act which provides that lump sum compensation is payable if death results from a workplace injury.

At the initial hearing, the arbitrator found that the worker's pre-existing medical condition (asthma) was the cause of her death which was not aggravated by her employment. The worker appealed from the decision that was affirmed by an Acting Deputy President of the Workers Compensation Commission.

An appeal was then filed in the NSW Court of Appeal in which the appellant submitted that:

'The Acting Deputy President erred in finding that the relevant 'injury' causing death was the 'aggravation, acceleration or exacerbation of the asthma condition leading to the acute asthma attack'. Rather than the 'aggravation, exacerbation or deterioration of the asthma attack and/or the cardiac arrest,each having been substantially contributed to by the ***unavailability of necessary medical treatment at the remote location at which the acute asthma attack occurred by reason of the deceased's employment'.***

The respondent submitted that: ***'it was never put, either to the Arbitrator or the Deputy President, that there was an injury simpliciter in the form of a cardiac arrest or anoxia which was the injury which was to be determined by the Arbitrator.'***

The Court of Appeal observed that the appeal was confined to an appeal "in point of law" and that the main argument was that the arbitrator had failed to address the correct injury and that the Acting Deputy President did not apply the relevant provisions of the Act to the correct injury.

The Court rejected the appellant's submissions and concluded that "*a failure to make a finding, either at first instance or on appeal that was not sought cannot be an error, let alone an error of law.*"

Irrespective of the narrow confines of the appeal, the Court indicated that the outcome of the appeal would not differ given the difficulty in establishing causation, that is, whether it was found that the worker had in fact passed away as a result of the remote location of her employment.

The Court found that there was no evidence to suggest that if the worker had not been working remotely and had recognised the seriousness of her attack, she would have sought medical treatment earlier.

Decision Number: [2018] NSWCA 152
Decision Date: 12 July 2018
Decision Maker: NSW Court of Appeal

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RECENT DECISIONS

Amended section 66 claim rejected as earlier MAC prevails

Jasbir Singh v B & E Poultry Holdings Pty Ltd (26 July 2018)

Link to decision

Background

The worker made a claim for lump sum compensation for 13% WPI following a work injury to his lumbar spine for which he had undergone surgery. The degree of permanent impairment was disputed.

The worker commenced proceedings in the Workers Compensation Commission and the dispute was referred to an Approved Medical Specialist ('AMS') for determination.

A Medical Assessment Certificate ('MAC') was subsequently issued on 29 June 2016 in which the AMS assessed the worker as having a 14% WPI.

Remarkably, the worker discontinued the proceedings prior to a Certificate of Determination being issued that would have determined his lump sum entitlement in accordance with the MAC.

The worker then brought an 'amended' claim for 16% WPI that was the subject of further proceedings in which a threshold claim for work injury damages was also made. The respondent offered to resolve the matter based on the previous MAC issued in June 2016 to which it was asserted the worker was bound.

The offer was rejected by the worker and the matter proceeded to determination by the Commission.

The worker argued that he was entitled to recommence his claim in accordance with the principles stated in *Avni v Visy Industrial Plastics Pty Ltd* [2016] NSWWCCPD 46.

In *Avni*, President Keating held that Rule 15.7 of the 2011 Rules, preserves a worker's rights to recommence proceedings at any time, without penalty and that the issuing of a MAC was not a final determination of proceedings.

The respondent accepted the principles in *Avni*, namely, that a worker could recommence a claim but disputed that a worker who discontinued a claim after a MAC had been issued was entitled to bring a new claim for the same injury on which the earlier MAC was based following the 2012 amendments to the legislation.

The respondent submitted that the worker was bound by section 66(1A) of the *Workers Compensation Act 1987* (the '1987 Act') and Clause 11 of Schedule 8 of the 2016 Regulations, which provided that a worker is prevented from bringing a second claim for lump sum compensation unless the first claim was made prior to 19 June 2012.

Decision

The matter came before Arbitrator Moore who found the worker was not entitled to bring the 'amended' claim under section 66(1A) of the 1987 Act and section 322A of the *Workplace Injury Management and Workers Compensation Act 1998* (the '1998 Act').

The arbitrator stated that the terms of section 322A of the 1998 Act were explicitly clear i.e. if a MAC has been issued in respect of an injury, a worker cannot simply obtain a further assessment of the degree of impairment.

The arbitrator observed that the only relief available to the worker would have been to seek a reconsideration of the findings of the MAC as provided by section 329 of the 1998 Act.

In short, the arbitrator found that the worker was bound by the terms of section 66(1) of the 1987 Act and that in the absence of a claim for lump sum compensation

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being brought prior to 19 June 2012, the worker was only permitted to bring one claim for lump sum compensation.

Arbitrator Moore concluded that the decision in *Avni* was not relevant in the circumstances of the case.

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RECENT DECISIONS

Beyond employment - when an injury is not foreseeable

Sandro Puleio v Olam Orchards Australia Pty Ltd [2018] VSC 109 (21 March 2018)

Link to decision

Summary

The Supreme Court of Victoria recently considered whether an employer was negligent in circumstances where its employee died after operating a tractor (which was not part of his normal role) while under the influence of alcohol.

In finding that the employer was not negligent, the Court noted that the deceased did not have a history of consuming alcohol at work, working while intoxicated or undertaking another employee's work. Accordingly, it was held that the employer could not reasonably have foreseen the event occurring. As the event was not foreseeable, it followed that the defendant did not breach the duty it owed to the deceased to take reasonable care for his safety.

Background

The deceased was employed as an Orchard Technician at the 'Annuello' orchard. On 28 August 2013, after working a full day, he went home to collect his dinner from his wife. He returned to the orchard where he sometimes slept at about 5:30pm. His body was then found the next morning near a tractor on the property.

Tests reported that he had a blood alcohol reading of 0.18. The evidence established that the deceased had been performing a task that was not assigned to him, outside of work hours while he was intoxicated. He had failed to apply the handbrake on the tractor while it was on a slope which led to him sustaining fatal crush injuries.

The deceased's wife made a claim against the employer claiming damages for nervous shock. In order for her claim to succeed, she needed to establish that her husband's death was caused by the negligence of his employer.

Decision

The Court held that the deceased's intoxication and failure to apply the handbrake could not be attributed to any negligence on the part of the employer and dismissed the claim.

The Court noted that an employer has a duty to take reasonable care for the safety of its employees. This does not mean that an employer must safeguard its employees from every danger imaginable.

The accident occurred outside normal work hours and while the deceased was performing a task outside of his employment duties. The Court held that the duty owed by the employer does not and should not extend to outside of work hours or outside of the worker's employment duties. The Court observed that to extend the employer's duty in such a way would 'erode the deceased's and other employees' personal autonomy' and 'interfere with their private lives in a way unacceptable in a liberal democracy'.

Further, as the deceased did not have a history of consuming alcohol at work, working while intoxicated or undertaking another employee's work, the defendant

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could not reasonably have foreseen the injury occurring. It followed that as the injury was not foreseeable, there was nothing that a reasonable person in the employer's position would have done to prevent or minimise the risk of injury to the deceased.

Implications

While the duty of care owed by an employer to its employees is significant, it is not all-encompassing.

In determining whether an employer is negligent, it must be considered whether the actions of the employee were reasonably foreseeable. In situations where an employee chooses to pursue a 'frolic of their own' that is outside the scope of their employment, the foreseeability test may not be met and the employer will not have breached their duty of care.

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RECENT DECISIONS

Labour hire recovery - failure to establish negligence against host employer

Coles Supermarkets Australia Pty Ltd v Ready Workforce (A Division of Chandler McLeod) Pty Ltd (28 June 2018)

Link to decision

Summary

This decision recently handed down by the NSW Court of Appeal highlights a number of practical aspects of litigating section 151Z recovery claims that can be critical to the final outcome.

Background

Ready Workforce, described as being a Division of the Chandler Macleod Group, claimed indemnity from Coles Supermarkets in respect of workers compensation paid to one of their employees who was injured while working at a Coles warehouse.

The worker was performing her duties as a picker and packer at the Coles warehouse at Smeaton Grange when she suffered an injury while working the morning shift on 17 November 2011.

The worker was filling an order and had driven a machine (a DCP Personal) to an aisle to collect some plastic bags of dry dog kibble that were required to be manually loaded onto the machine.

The worker was injured at approximately 7am when upon turning to retrieve a second bag from the shelves, she slipped and fell landing hard on the ground and striking the pallet machine. The worker had slipped on a fine layer of crushed dry kibble that was like dust that was on the floor.

Compensation was paid by CGU as the workers compensation insurer of Ready Workforce to and on behalf of the worker.

Notably, the worker did not pursue a civil claim for damages in respect of her injury against any of the parties.

Labour hire arrangement

Ready Workforce claimed that the worker was their employee and that she was 'lent on hire' to Coles pursuant to a labour hire contract entered into between Coles and Chandler Macleod Group Limited, the parent company of Ready Workforce.

Ready Workforce alleged that Coles had breached the duty of care that it owed to the worker by failing to provide a safe system of work which had caused the worker's injury.

Coles denied that the worker was employed by Ready Workforce and contended that she was employed by Chandler Macleod. Coles also denied breaching its duty of care and claimed that the injury was sustained partly or wholly by the negligence of Ready Workforce so that any indemnity should be reduced accordingly.

Decision at first instance

The primary judge found that Coles had breached the duty of care and that if it had been sued (by the worker), it would have been liable to pay damages totalling $438,024.92. Responsibility for the injury was apportioned 60% to Coles and 40% to Ready Workforce.

The damages payable by Ready WorkForce were assessed at $259,118.52 on which 40% was $103,647.41. The recoverable amount represented the difference between the employer's contribution ($103,647.41) and the compensation paid ($135,142.41) being $31,495 to which pre-judgment interest was added.

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A cross-claim brought by Coles against Chandler Macleod claiming indemnity based on a contractual agreement was rejected.

Coles then appealed from the decision and Ready Workforce cross-appealed contending that judgment should have been entered for the whole of the workers' compensation paid plus interest.

On appeal

Mr Justice Wright gave the Court's reasons for decision through which some judicial guidance can be drawn on the practical considerations that must be addressed when pursuing section 151Z recovery actions.

Identity of the employer

The primary judge had made inconsistent findings as to whether the worker was employed by Chandler Macleod or Ready Workforce.

This appears to have been partly due to the wording of a casual labour hiring agreement signed by the worker which referred to employment with Chandler Macleod Group Limited and *any of its related entities* ('Chandler Macleod').

The fact that the worker's wages were also paid by Chandler Macleod was not considered to be determinative of the question, a task that was made more difficult by the lack of any evidence of intra-group accounting or as to who had the right to control the worker in how she performed her duties.

The fact that payments were made by CGU as the workers' compensation insurer of Ready Workforce was taken to be a strong indicator of Ready Workforce being the worker's employer. To that extent, it was considered that Ready Workforce had discharged the onus to establish that it was the worker's employer.

Standing to sue

On considering the legal standing of Ready Workforce to pursue a claim for indemnity, his Honour noted the position in terms of the liability of an insurer being directly liable to pay compensation under the policy, section 159(2)(a) of the *Workers Compensation Act 1987*.

If the insurer paid compensation to discharge its own liability then the insurer would be the proper plaintiff to seek indemnity. However, if the insurer purported to act on behalf of the employer to discharge the employer's liability then the employer could seek the indemnity.

In terms of section 151Z(1)(d) the critical question was whether Ready Workforce was 'the person by whom the compensation was paid' that was found in the affirmative by virtue of the payments made by CGU on its behalf.

Employer as a tortfeasor

Justice Wright gave some consideration to the submission by Coles that section 151Z(1)(d) did not confer a right of indemnity in circumstances where the employer was itself a tortfeasor.

This submission was in part founded on the recent decision in *South West Helicopters Pty Ltd v Stephenson*, however, it was clear that the decision did not inhibit reliance upon the provision where the worker does not commence proceedings against the employer for damages. His Honour noted that in this case, the worker did not take proceedings against her employer so that section 151Z(2)(e) is engaged and the fact that Ready Workforce was itself negligent did not preclude it being entitled to claim indemnity, under section 151Z(1)(d).

Negligence of host employer

Critically, a party who is pursuing a section 151Z recovery claim must establish a liability in the third party to pay damages as a pre-condition to the right of indemnity.

The Court reviewed the finding of negligence against Coles and examined the reasons of the primary judge and the evidence, particularly focussing upon the cleaning system at the warehouse.

The evidence established that a sweeping machine went through the factory on a regular basis at least once a day although it was generally accepted that machine cleaning was done twice a day. There was a protocol within the warehouse for workers to pick up any debris and to mark any spillages with appropriate safety signage or to erect a barricade until the spill was attended to.

The floor where the slip occurred had been cleaned at 9:15pm the previous evening, however, there was no evidence as to when the warehouse closed that night. The warehouse did not operate 24 hours a day. His Honour determined that there were two shifts each day so that it

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was reasonable to infer that the second shift would finish at about 10pm or up to half an hour later. It could then be inferred that the cleaning was done within 45 minutes to one and a quarter hours before the conclusion of the second shift.

His Honour was particularly concerned that there was no evidence of what precautions a reasonable person in Coles' position would have taken to clean the aisles more frequently than once every 4 hours. He concluded that there was no evidence to support the finding made by the primary judge that a reasonable person would have cleaned the aisle more frequently that once every 4 hours. There was no evidence that the particular area in which the worker was injured was dustier or more prone to spillages than any of the other aisles in the warehouse.

Further, there was no evidence as to how long it would take to clean the whole of the warehouse premises and what number of machines would be required for that purpose. There was no evidence that slipping was a particular hazard of the job that the worker was doing.

Ready Workforce was required to establish the facts by which it could be determined whether Coles system of cleaning was inadequate or what additional cleaning a reasonable person in Coles position would undertake or what other steps it would undertake as a precaution against the risk of injury by slipping. His Honour determined that they had not done so, and that in his view, the finding that Coles was negligent should be set aside.

Permanent impairment threshold

The cross appeal by Ready Workforce contended that the primary judge's finding that the worker satisfied the 15% WPI threshold under section 151H so as to be entitled to recover damages against the employer should be set aside. Justice White observed that the primary judge's reasons for this finding were inadequate.

The primary judge did not say why or how he had reached his conclusion and none of the medical evidence directly addressed the degree of permanent impairment suffered by the worker in accordance with the WorkCover Guidelines. The primary judge merely stated that he had read the medical evidence tendered and was satisfied that the threshold was reached.

The finding on the threshold is significant as unless it is satisfied, the worker would not be able to claim damages against the employer and there would not be any basis for the third party (Coles) to claim contribution.

Outcome

It may seem ironic that his Honour indicated that he would not have given Coles leave to appeal were it not for the cross-appeal filed by Ready Workforce.

However, the amount raised in issue on the cross-appeal was more than $100,000 so that the cross-appeal was brought as of right in circumstances where justice then required that leave to appeal be granted to Coles.

As a result, the decision to set aside the finding of negligence against Coles meant that the judgment in favour of Ready Workforce was also set aside with Ready Workforce ordered to pay the costs of the trial, the appeal and cross-appeal.

While the decision by Ready Workforce to pursue a cross-appeal was presumably aimed at achieving a better result by reducing the finding on apportionment (something less than 40% on the part of the employer), this then led to the review of the liability of Coles that was ultimately fatal to the recovery action.

The decision clearly highlights the need to have regard to a number of practical aspects of pursuing recovery actions and perhaps most notably, the uncertainty that often surrounds the determination of negligence by a third party and the evidence that must be led to satisfy the plaintiff's onus to establish a liability to pay damages.

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