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LEGISLATIVE DEVELOPMENTS

There are no legislative developments to report this month.

RECENT DECISIONS

- **To assume or not to assume – WCC says do neither**
  Naylor v A Noble & Son Limited [2019] NSWWCCMA 144 (11 October 2019)
- **Judgment entered in the interest of the Insurer**
  Workers Compensation Nominal Insurer v Allmen Engineering Projects Pty Ltd [2019] NSWSC 1582 (15 November 2019)
- **Challenges to Indemnity Costs Orders in the Dust Diseases Tribunal**
  Piatti v ACN 000 246 542 Pty Ltd & Anor (No. 2) [2019] NSWDDT 8 (6 September 2019)

RECENT DECISIONS

To assume or not to assume – WCC says do neither

Naylor v A Noble & Son Limited [2019] NSWWCCMA 144 (11 October 2019)

Link to decision

Summary

The respondent worker injured both of his knees while undertaking employment with the appellant, which resulted in a number of surgical procedures.

The respondent had also previously injured his left knee as a teenager and had required surgery at that time. Furthermore, the respondent had a pre-existing degenerative condition in both knees.

The Approved Medical Specialist ("AMS") assessed the respondent for whole person impairment ("WPI") but failed to make a deduction for the prior injury or pre-existing condition.

The Medical Assessment Certificate ("MAC") was appealed and the Medical Appeal Panel ("MAP") determined that the assessment of a deductible must be based on the available evidence.

The MAP noted that it was incorrect to assume that a deductible portion applied on the basis that a prior injury or pre-existing condition was present. Similarly, it was incorrect to assume that a prior injury or pre-existing condition that was asymptomatic did not give rise to a deductible portion.

Background

The respondent suffered an injury to both knees on 19 October 2012 when he tripped over a pallet while working for the respondent. As a result, he underwent a number of surgical procedures:

- 2013 to 2014 – three arthroscopies
- 2016 – right total knee replacement
- 2017 – revision surgery to right knee
- 2018 – left knee replacement

The respondent served a claim for lump sum compensation as there was a dispute regarding the extent of any WPI. The Workers Compensation Commission ("WCC") subsequently referred the matter to an AMS for determination.

A MAC was issued, dated 25 June 2019, which noted:

> *Mr Naylor states that just prior to a fall at work on 19.10.2012 he was not experiencing any discomfort in either the right or left knee…During each surgery it was revealed there were arthroscopic findings of Grade II degenerative changes on the medial joint with small tears involving menisci. Further arthroscopic surgery to the right knee showed evidence of a loose body in the intercondylar notch and extensive Grade II and Grade III changes in the trochlear notch...*

The AMS also noted that the respondent had injured his left knee as a teenager and had undergone two arthroscopies at that time.

Importantly, the AMS assessed the respondent with a total of 44% WPI in relation to both knees and made no deduction for any previous injury or pre-existing condition.

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The appellant subsequently appealed the MAC and the matter was referred to a MAP. It was submitted that the MAC contained a demonstrable error as the AMS had erred by not concluding that a portion of the respondent's permanent impairment was due to a previous injury or pre-existing condition. Specifically, the appellant stated that the AMS had failed to provide a reason as to why he did not consider that there was any deductible and noted that both Independent Medical Examiners had previously assessed deductible portions.

The respondent worker's submissions outlined that the AMS was not required to accept other specialists' assessments and that his assessment was based on a correct medical history.

Decision

The MAP firstly considered section 323(1) of the *Workplace Injury Management and Workers Compensation Act* 1998 and the requirements surrounding the assessment of a deductible portion. They outlined the following process as determined in *Cole v Wenaline Pty Ltd* [2010] NSWSC 78 and *Ryder v Sundance Bakehouse* [2015] NSWSC526:

1. The level of the worker's permanent impairment must first be determined at the time of the assessment;
2. A prior injury or pre-existing condition must be identified;
3. It must be determined whether a proportion of the worker's post-injury impairment is due to the prior injury or pre-existing condition;
4. The extent to which the worker's post-injury impairment is due to the prior injury or pre-existing condition must be determined.

Importantly, the MAP indicated that steps three and four cannot be determined on the basis of assumption or hypothesis. They stated that:

> *…it cannot be assumed from the fact that a worker has a pre-existing condition or has had a previous injury that a proportion of the worker's impairment is due to that pre-existing condition or prior injury. Similarly, a pre-existing condition that is asymptomatic at the time a worker suffers injury may still contribute to an impairment a worker has from an injury, and so it cannot be assumed from the fact that the pre-existing condition is asymptomatic that it does not contribute to the worker's impairment from the injury.*

It was held that the key element to the determination of a deductible portion was whether the worker's prior injury or pre-existing condition made a difference to the worker's present impairment. If it did make a difference, then a deduction must be made.

Based on the evidence in this matter, the MAP found that the respondent's pre-existing degenerative condition in his knees contributed to the impairment that the respondent had. Accordingly, the MAC was revoked and the MAP determined a new assessment of 34% WPI.

Implications

This determination reiterates that the presence of a prior injury or pre-existing condition does not necessarily give rise to a deducible portion for the purposes of a permanent impairment assessment.

Similarly, just because a prior injury or pre-existing condition is asymptomatic, does not mean that a deductible portion should not apply.

The WCC has confirmed that the assessment of a deducible portion must be based on the available evidence as to whether the prior injury or pre-existing condition contributes to the present day permanent impairment. If it does, then a deducible must apply.

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RECENT DECISIONS

Judgment entered in the interest of the Insurer

Workers Compensation Nominal Insurer v Allmen Engineering Projects Pty Ltd [2019] NSWSC 1582 (15 November 2019)

Link to decision

Summary

The NSW Supreme Court held that an insurer will not be deprived of its presumptive entitlement to interest under section 100 of the *Civil Procedure Act* 2005 ('the CPA') even in circumstances where the payment of the recovery was made in separate proceedings to the insurer's recovery proceedings.

Background

The worker was a boilermaker who suffered catastrophic injuries on 10 March 2014 while lent on hire by his deregistered employer to a third party host employer ('Allmen') at their St Marys' premises. As at March 2018 the insurer, the Workers Compensation Nominal Insurer ('WCNI') had paid to, for and on behalf of the worker a total of $3,422,909.

On 19 March 2018 the WCNI commenced Supreme Court recovery proceedings against Allmen pursuant to section 151Z(1)(d) of the *Workers Compensation Act* 1987.

On 23 March 2018 to take account of its liability to pay work injury damages to the worker, the WCNI agreed to a reduced recovery amount of $2,965,562.76 in respect of payments made. The worker directed Allmen to pay that amount to the WCNI from damages payable in the worker's proceedings.

Allmen then resisted paying interest or costs to the WCNI in respect of the recovery proceedings.

On 15 November 2019 the matter was heard before Justice Campbell in the NSW Supreme Court to determine three issues:

a) Whether the WCNI's entry into the recovery agreement with the worker's representatives (and the subsequent payment 'on behalf' of the worker) entitled Allmen to a plea of accord and satisfaction barring the WCNI's remaining claims for interest and costs;

b) Alternatively, was the WCNI entitled to a judgment for interest only, given the language of section 100 of the CPA; and

c) Whether the Court's discretion governing the award of interest should be exercised so as to refuse the WCNI's claim.

Decision

Allmen attempted to argue that an accord and satisfaction had been reached when the initial reduced payment was made to the worker and the WCNI, and therefore the Court should exercise its discretion to not award interest to the WCNI. However this was argued by the WCNI to be nonsensical, as it had not agreed to dispose of the recovery proceedings in respect of interest and costs by communicating to the worker to accept a reduced payback.

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Justice Campbell referred to the judgment of Dixon J in *McDermitt v Black* (1940) 63 CLR 161 which said:

> *The essence of accord and satisfaction is the acceptance by the plaintiff of something in place of his cause of action. What he takes is a matter depending on his own consent or agreement. It may be a promise or contract or it may be the act or thing promised. But, whatever it is, until it is provided and accepted, the cause of action remains alive and unimpaired. The accord is the agreement or consent to accept the satisfaction.*

Justice Campbell determined that the recovery agreement was entered into after the proper commencement of the proceedings by the WCNI to pursue and protect its statutory rights, and at that time there had been 'no promise or contract' by Allmen, and therefore it did not defeat the WCNI's proceedings.

As for Allmen's argument regarding section 100 of the CPA, reference was made to the case of *Nine Network Australia v Birketu* where a debtor paid a large debt one week before the commencement of proceedings in an attempt to resist paying interest. The Court in that instance decided there was no reason why interest should not be awarded as the loss was only suffered due to the debtor's breach.

Justice Campbell determined that the plaintiff should not be deprived of its presumptive entitlement to compensatory interest under section 100 of the CPA, and also advised that the CPA defines judgment as including any order for the payment of money, ultimately declining to exercise his discretion to reduce the period during which the interest runs and awarded interest to the WCNI.

Implications

A third party is not entitled to reap the benefit of an insurer compensating an injured worker and suffering loss as a consequence of the third party's negligence in causing that worker's injury.

The decision clarifies the position that the WCNI is entitled to interest on its compensation payments made to a worker when liability is found against a third party, even when the repayment of the compensation payments is said to not be made in the insurer's recovery proceedings.

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RECENT DECISIONS

Challenges to Indemnity Costs Orders in the Dust Diseases Tribunal

Piatti v ACN 000 246 542 Pty Ltd & Anor (No. 2) [2019] NSWDDT 8 (6 September 2019)

Link to decision

Summary

This case considers the instances in which an indemnity cost order can be challenged pursuant to Clause 90 of the *Dust Diseases Tribunal Regulation*.

Background

A Statement of Claim was filed by the plaintiff against Granosite Pty Ltd as the first defendant and Amaca Pty Ltd as the second defendant for damages, including past and future "lost years" damages under section 15B of the *Civil Liability Act*. Upon the original plaintiff's death the current plaintiff was substituted to represent the estate of the original plaintiff.

At trial, Counsel for the second defendant made submissions that, for legal reasons (including that section 15B damages did not survive for the benefit of the estate), damages should not be awarded, or in the alternative, should be awarded under limited conditions. On 23 August 2019, judgment was entered for the plaintiff against the first and second defendants for the sum of $1,057,748.84 with an order that the defendants pay the plaintiff's costs. Leave was granted for parties to seek alternative cost orders.

The plaintiff subsequently sought an indemnity costs order from 3 July 2019 on the basis of an Offer of Compromise served on 3 July 2019 in which the plaintiff offered to accept judgment in the sum of $1,050,000.

Clause 90 of *Dust Diseases Tribunal Regulation* mandates that a plaintiff is entitled to an indemnity costs order unless the Tribunal orders otherwise in an exceptional case or for the avoidance of substantial injustice. Both defendants opposed the application for an indemnity costs order.

Decision

The plaintiff served an affidavit evidence in support of the s 15B claim on 26 July 2019 after serving the Offer of Compromise. Counsel for the second defendant submitted that the plaintiff's claim was substantially reliant on this evidence, which led to a material change in the plaintiff's case. The late service of the evidence in this circumstance prejudiced the second defendant, triggering an exceptional circumstance.

The Tribunal held that the late service of evidence could not constitute an exceptional circumstance where the defendants were disputing the plaintiff's entitlement to section 15B damages. The service of evidence prior to the Offer of Compromise would not have made a substantial difference to the way the offer was considered in this circumstance. The Tribunal reasoned that there would be a strong argument that a case was one of exceptional circumstance if the issue was the assessment of damages, not entitlement, and the plaintiff's success depended on evidence served after the expiry of an Offer of Compromise.

Counsel for the first defendant argued that the Offer of Compromise did not involve a genuine compromise, as the offer was a mere $7,748.84 less than the judgment

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amount. The Tribunal rejected this submission noting the plaintiff had significantly compromised on the conditions upon which damages were to be assessed. Furthermore, clause 90 required the plaintiff to achieve a result of "no less favourable", and not one that was "substantially better". The plaintiff had achieved this.

The Tribunal ordered that the costs payable by the defendants to the plaintiff were to be assessed on an indemnity basis after 3 July 2019.

Implications

The instances in which a defendant can argue against an indemnity costs order are limited. A defendant is required to show that a material change in a plaintiff's case occurring after the expiry of an Offer of Compromise would have caused a substantially different consideration of the offer, and has now resulted in substantial injustice.

Furthermore, the Tribunal confirmed that the plaintiff is not required to substantially beat an offer for an entitlement for an indemnity cost order to arise. A plaintiff's compromise does not have to be in the form of a monetary compromise, but can be a genuine compromise on the conditions on which their claim is made.

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