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Shauna O'Carroll v Pacific Magazines Pty Limited [2018] NSWWCC 265

- **Criminal prosecution of employer**

SafeWork NSW v Williams Pressing and Packaging Services Pty Limited [2018] NSWDC 409

TurksLegal will be presenting an in-house seminar on the latest changes to the workers compensation scheme on Thursday, 7 February 2019.

Click here to register your interest

LEGISLATIVE DEVELOPMENTS

A big start to the New Year!

The balance of the changes made by the ***Workers Compensation Legislation Amendment Act 2018*** commenced on 1 January 2019. The amendments include:

- The Workers Compensation Commission will resume its role as the sole dispute resolution tribunal for workers compensation matters, with SIRA and WIRO losing their respective roles regarding merit and procedural reviews of work capacity decisions. The Commission will now have the power to determine disputes regarding work capacity decisions, which it had previously been prohibited from doing.
- The Commission will now have the power to determine claims for section 66 permanent impairment compensation without necessarily referring the claim to an Approved Medical Specialist, in circumstances to be prescribed by regulation. The Commission's determination will be treated as an assessment for the purposes of the one assessment permitted by section 322A of the 1998 Act.
- A single *decision notice* pursuant to section 78 of the 1998 Act will replace the previous requirement for dispute notices pursuant to section 54 of the 1987 Act or section 74 of the 1998 Act. A new form for the decision notice has been released by icare.
- Commutation of liability for medical expenses pursuant to section 87EAA of the 1987 Act is not permitted in relation to a catastrophic injury (as defined in the regulation).

Awaiting Proclamation

- The calculation of pre-injury average weekly earnings (PIAWE) in respect of injuries received on or after (date to be proclaimed) will be :

  The weekly average of the gross pre-injury earnings received by a worker during the period of 52 weeks before the injury for work in any employment in which the worker was engaged at the time of injury.

- There will no longer be any need to separate overtime and allowances from earnings when making the calculation, and no change to the PIAWE after the first 52 weeks of compensation payments to remove overtime and allowances. Adjustments will still be required for non-pecuniary benefits (NPB).
- A new Schedule 3 to the 1987 Act will include the definitions for PIAWE; earnings; PIAWE for short-term workers, apprentices, trainees and young people; current work capacity; current weekly earnings; and the value of NPB.
- Consequential changes have been made to the calculation of weekly payments pursuant to sections 36, 37 and 38 of the 1987 Act.

The **Workers Compensation Amendment Regulation 2018** also introduced changes on 1 January 2019, including the requirements for section 78 decision notices issued by insurers, and changes to Schedule 6 costs for lawyers advising workers on reviews of work capacity decisions.

New **Workers Compensation Guidelines** take effect from 1 January 2019 and include (at part 7.5 of the Guidelines) detailed requirements for independent medical examinations (IME) and reports, and the information to be provided to a worker regarding an IME examination. The guidelines include the criteria for catastrophic injuries (at Part 9 Commutation).

New **Workers Compensation Medical Dispute Assessment Guidelines** also take effect from 1 January 2019 and deal with the referral of disputes to the Commission for allocation to an Approved Medical Specialist, the medical assessment process, Medical Assessment Certificate, and appeals.

SIRA has issued an information fact sheet for workers regarding independent medical examinations, which can be downloaded at:

https://www.sira.nsw.gov.au/resources-library/workers-compensation-resources/publications/workers-and-claims/independent-medical-examinations

All of these changes are being incorporated into the TurksLegal Online *Guide to Workers Compensation in NSW*. If you have not yet registered for access to the Guide, please go to http://turkspublicationhub.turkslegal.com.au/workerscompensation/public.

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RECENT DECISIONS

Worker loses the race but wins the case

Shauna O'Carroll v Pacific Magazines Pty Limited [2018] NSWWCC 265

Link to decision

Summary

On 1 November 2018, Arbitrator Burge found that an editorial coordinator at a prominent magazine company suffered an injury to her right knee while running a half marathon in the course of her employment for the purposes of section 4 and 9A of the *Workers Compensation Act 1987* (NSW) ('1987 Act').

Background

The worker was employed by Pacific Magazines Pty Limited ('Pacific Magazines') as an editorial coordinator for Women's Health Magazine.

In April 2016, the worker was approached by an advertising agency enquiring whether anyone from Pacific Magazines would be interested in participating in the Nike Women's Half Marathon.

The worker discussed the proposition with her manager who agreed to the worker participating in the event. It was agreed that a series of online articles would be written and posts made about the event on the Pacific Magazines social media channels.

On 3 July 2016, following a 12-week training program, the worker took part in the marathon. The worker noticed pain particularly in her hips, knees and feet during the run but completed the race.

On 4 July 2016, the worker's right knee in particular was not improving. She consulted a physiotherapist who diagnosed 'runner's knee' and recommended some physiotherapy.

In November 2016, the worker was advised that she could return to playing basketball and commence light jogging. The worker returned to basketball, although her game time was restricted as her right knee would flare up.

On 19 September 2017, the worker consulted Dr Rimmer who recommended that she undergo surgery to file a chip on her knee cap and to drill small holes to allow blood flow and recovery. The worker underwent this procedure three days later.

The worker made a claim for weekly compensation and the costs of medical treatment in response to which the insurer of Pacific Magazines served a section 74 notice declining liability on the basis that the worker had not sustained a workplace injury (s4) and that her employment was not a substantial contributing factor to her injury (s9A).

The insurer admitted that the event was work-related and responsible for an ITB (iliotibial band) injury but contended that any lateral or medial ligament injuries that required surgery were not work-related and had been caused by the worker's sporting activities after the half-marathon.

Decision

Arbitrator Burge was satisfied that the worker had met her onus of proof that the half-marathon caused her knee injury that was later diagnosed and treated by Dr Rimmer by way of surgical intervention. Further, he formed the view that the worker's knee injury did not resolve between the half-marathon and her arthroscopy, nor was it superseded by any injury suffered between the race and her arthroscopy.

In reaching his decision, Arbitrator Burge reaffirmed the common sense evaluation of the causal chain approach as set out by Kirby P in *Kooragang Cement Pty Ltd v Bates* (1994) 10 NSWCCR 796 despite some scrutiny of its application in recent times (see *Comcare v Martin* [2016] HCA 43). Arbitrator Burge referred to *Crosland v Gregelle Michory Pty Limited* [2017] NSWWCC 17 as good authority to confirm the approach.

Arbitrator Burge was also satisfied that the worker's employment with Pacific Magazines was a substantial contributing factor to the injury which he found was suffered on 3 July 2016. He noted that the employer conceded the half-marathon was a work related event which required the

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worker to undergo a training regime. He also reiterated that employment must only be a substantial contributing factor to the injury, as distinct from any incapacity, need for treatment or loss (see *Rootsey v Tiger Nominees Pty Ltd* [2012] NSWCC 48 & *Mercer v ANZ Banking Corporation* [2000] NSWCA 138).

Arbitrator Burge ordered the employer to pay weekly compensation and reasonably necessary medical expenses.

For more information, please contact:

Sean Patterson
Associate
sean.patterson@turkslegal.com.au

Craig Bell
Partner
craig.bell@turkslegal.com.au

RECENT DECISIONS

Criminal prosecution of employer

SafeWork NSW v Williams Pressing and Packaging Services Pty Limited [2018] NSWDC 409

Link to decision

Summary

A NSW employer has pleaded guilty to a criminal offence under the *Work Health & Safety Act* 2011 and been ordered to pay a fine of $60,000 after failing to provide a safe system of work at its warehouse.

The case

Williams Pressing and Packaging Services Pty Limited ('Williams') provided warehouse distribution services for the fashion industry. Williams contracted Phong Warehouse & Distributor Pty Ltd ('Phong') to provide workers to pick stock in order to fulfil customer orders. The services provided by both Williams and Phong involved the use of forklifts to access stock in the warehouse.

In 2005, Williams contracted an occupational health and safety company to help develop safe systems of work. It also engaged the services of a safety consultant, who reviewed Williams' work systems.

On 19 July 2016 a worker employed by Phong was injured when a worker employed by Williams drove a forklift over her feet, causing significant injuries.

Prior to the accident, Williams and Phong had an undocumented system of work which included (amongst other things) that no-one was to go within a 3 metre 'exclusion zone' of a moving forklift. There were also a number of pedestrian walkways marked on the floor of the warehouse

Crucially, however, the 'exclusion zone' was not enforced. Workers were not adequately trained in respect of the exclusion zone. There was no physical separation (such as moveable barriers) to ensure the exclusion zone between workers and the moving forklifts was maintained. The pedestrian walkways which were to assist with enforcing the exclusion zone were worn and were no longer clearly visible in some areas, including the areas where workers were picking stock.

The failure to enforce the exclusion zones and to properly train all persons working in the warehouse led to the accident on 19 July 2016. In those circumstances, Williams pleaded guilty to failing to comply with its work health and safety duties.

Implications

This case highlights the need for anyone conducting a business to ensure that they continually review and enforce their systems of work and safety procedures. A 'set and forget' approach is not appropriate. Workplace safety must be the subject of continuous monitoring.

For more information, please contact:

Adele Fletcher
Partner
adele.fletcher@turkslegal.com.au

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