LEGISLATIVE DEVELOPMENTS

There are no legislative developments to report this month.

RECENT DECISIONS

- **Section 59A(3) - When is weekly compensation 'payable'?**
  C Hedges v Dr Dan White, Executive Director of Catholic Schools and Legal Representative for Sydney Catholic Schools [2017] NSWWCCPD 34 (9 August 2017)
- **Worker obtains leave to pursue claim eight years after injury**
  Bright v State of New South Wales [2017] NSWDC 257 (15 September 2017)
- **So whose fault is it? Stacking up the facts**
  Steven George Villanti v Coles Group Supply Chain Pty Limited; Steven George Villanti v All Staff Australia NSW Pty Ltd t/as Allstaff Australia [2017] NSWSC 1231 (29 September 2017)

RECENT DECISIONS

Section 59A(3) - When is weekly compensation 'payable'?

Hedges v Dr Dan White, Executive Director of Catholic Schools and Legal Representative for Sydney Catholic Schools [2017] NSWWCCPD 34 (9 August 2017)

Link to decision

Summary

On 3 April 2017, an Arbitrator of the Workers Compensation Commission (WCC) made a determination that section 59A(2)(a)(i) of the *Workers Compensation Act 1987* (the 1987 Act) applied so as to disentitle a worker to compensation for medical expenses, as a period of more than two years had elapsed since she first claimed compensation. The worker argued that under section 59A(3) of the 1987 Act, weekly benefits were 'payable' in respect of her injury as she would need to seek further treatment that would result in her taking time away from work.

The worker appealed from the decision; however, the Arbitrator's determination was upheld. The worker was disentitled under section 59A(2)(a)(i) of the 1987 Act, based on findings that:

- The treatment which the worker was to undergo did not incapacitate her for work (e.g. she did not need to undergo surgery or any other form of treatment from which she would need to convalesce while being unable to work).
- The restrictions that would result from the treatment did not prevent the worker from performing suitable duties with her employer, and the employer was able to offer suitable duties.
- There was no evidence that the worker could only attend to undergo the treatment during work hours.

The worker failed to satisfy the onus to prove that as a consequence of undergoing treatment, weekly benefits would be 'payable'. The worker gave evidence of suffering a partial incapacity for work, and the treatment was found to be reasonably necessary. However, as suitable duties were able to be provided by the employer and there was insufficient evidence that the worker would be required to be absent from work for treatment, she could not satisfy the arbitrator that weekly compensation was 'payable'.

back to top

Background

The worker suffered an acoustic shock injury causing tinnitus in her left ear on 20 October 2014 when a walkie talkie clipped to her clothing suddenly omitted two loud noises.

Liability for medical expenses incurred for the left ear injury was initially accepted, however, liability for neuromonics treatment was disputed on 8 December 2015. The worker did not commence proceedings in the Commission until November 2016.

The matter was referred to an Arbitrator who heard and determined the claim for proposed treatment on 3 April 2017 accepting that neuromonics was reasonably necessary and related to the accepted injury. However as more than two years had elapsed since the claim for compensation was first made, the worker was excluded from receiving medical compensation under section 59A(2)(a)(i) of the 1987 Act.

The Arbitrator then considered the operation of section 59A(3) of the 1987 Act, which could potentially extend the worker's entitlement to receive medical expenses, if weekly benefits were 'payable'. The arbitrator held that the worker had failed to discharge the onus of establishing that she would be incapacitated and entitled to receive weekly compensation while undertaking treatment, and as such weekly benefits were not 'payable'.

The applicant lodged an appeal, arguing the Arbitrator had erred in her interpretation of the section.

On appeal the decision of the arbitrator was confirmed.

Decision on Appeal

President Keating considered the legal requirements required to be met in order to characterise weekly benefits as being 'payable' for the purposes of section 59A(3) of the 1987 Act and confirmed the arbitral decision that there was insufficient evidence to demonstrate that the worker would be entitled to receive weekly compensation during the time in which the treatment was to be provided.

Based on medical evidence provided by the worker's treating doctors, it was made apparent that the neuromonics treatment would not incapacitate the worker for work, despite being required to wear a listening device for two hours per day while at work. The employer gave evidence that suitable duties would be made available to the worker while she was wearing a listening device and as such, there would be no absence from work resulting from the incapacity caused by the treatment.

The circumstances of the present case were distinguished from the decision in *Flying Solo Properties Pty Ltd t/as Artee Signs v Collet* [2015] NSW WCCPD 14 where the worker was undergoing surgery that would require hospitalisation and a period of time off work. In the present case, the worker was able to undergo neuromonics treatment at an audiology clinic and then return to work.

The worker would be required to travel to attend St Vincent's Hospital to receive neuromonics treatment, however, the arbitrator held that there was no evidence the worker would be required to undertake this treatment during work hours, or that the employer could not facilitate time away from work without the worker suffering a wage loss to attend the appointments.

The arbitrator also found that there was insufficient evidence demonstrating the hours of operation of the audiology clinic and the periods for which the worker would be absent from work so the mere requirement to attend for treatment was not sufficient to establish an entitlement to weekly benefits.

Outcome

This decision demonstrates that in order for weekly benefits to be 'payable' under section 59A(3), a worker must demonstrate that they will suffer an incapacity that entitles them to weekly benefits and not simply a general incapacity for work or absence from work at a particular time for treatment during work hours.

The evidentiary burden that a worker must satisfy to establish that weekly compensation will be 'payable' is significant. In circumstances where an employer can provide suitable duties and accommodate time away from work without the worker suffering any wage loss then weekly benefits are not 'payable'.

The ability of employers to provide suitable duties and to offer flexible work hours for workers seeking treatment, will reduce any potential liability for weekly benefits. This will also be relevant to whether an entitlement to medical expenses can be extended beyond the entitlement periods imposed under section 59A of the 1987 Act, as

back to top

if weekly benefits are payable, then section 59A(3) may apply to entitle the worker to compensation for further medical treatment.

Legislation

Section 59A limit on payment of compensation

(1) Compensation is not payable to an injured worker under this Division in respect of any treatment, service or assistance given or provided after the expiry of the compensation period in respect of the injured worker.

(2) The compensation period in respect of an injured worker is:

(a) if the injury has resulted in a degree of permanent impairment assessed as provided by section 65 to be 10% or less, or the degree of permanent impairment has not been assessed as provided by that section, the period of 2 years commencing on:

(i) the day on which the claim for compensation in respect of the injury was first made (if weekly payments of compensation are not or have not been paid or payable to the worker), or

(ii) the day on which weekly payments of compensation cease to be payable to the worker (if weekly payments of compensation are or have been paid or payable to the worker), or

(b) if the injury has resulted in a degree of permanent impairment assessed as provided by section 65 to be more than 10% but not more than 20%, the period of 5 years commencing on:

(i) the day on which the claim for compensation in respect of the injury was first made (if weekly payments of compensation are not or have not been paid or payable to the worker), or

(ii) the day on which weekly payments of compensation cease to be payable to the worker (if weekly payments of compensation are or have been paid or payable to the worker).

(3) If weekly payments of compensation become payable to a worker after compensation under this Division ceases to be payable to the worker, compensation under this Division is once again payable to the worker but only in respect of any treatment, service or assistance given or provided during a period in respect of which weekly payments are payable to the worker.

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back to top

RECENT DECISIONS

Worker obtains leave to pursue claim eight years after injury

Bright v State of New South Wales [2017] NSWDC 257 (15 September 2017)

Link to decision

Summary

In a recent decision of the District Court of NSW, a worker has been given leave to pursue her work injury damages claim arising from a workplace injury that occurred in September 2009.

Background

The worker injured her left wrist and neck on 23 September 2009 when she fell down some stairs at a police station. The worker alleged that a sensor light near the stairway was faulty and inadequate. A contemporaneous report confirmed that the light was not functioning at the time of the worker's fall.

The worker consulted a solicitor in about July 2010. She was advised that she would not be able to recover work injury damages unless it was accepted that she had at least 15% whole person impairment ('WPI').

Unfortunately, the worker experienced complications with her injury and by December 2013, had undergone 10 surgeries to her wrist and neck. The worker served the employer with a statement in November 2014 in which she asserted that she had complained about the light near the stairway not working prior to her fall.

There was initially a question as to whether the worker's neck condition was causally related to her initial left wrist injury, however, once this was accepted in February 2015, the worker's WPI exceeded 15%. She then served her first notice of claim for work injury damages two weeks later and an amended notice of claim was served on 1 December 2016.

Decision

The worker sought the court's leave to maintain proceedings that were commenced following expiry of the three year limitation period. The application was heard by his Honour Judge Neilson who noted that the three year limitation period under section 151D of the *Workers Compensation Act 1987* (the 1987 Act) had expired before the worker could bring her damages claim. In light of the worker's extensive medical history, he considered the relevant delay to be the period from 13 May 2015 (when agreement was reached regarding the worker's whole person impairment) to 1 December 2016.

Judge Neilson observed that 'one must consider what was going on in the plaintiff's life' during that period. He referred to her ongoing physical and psychological problems, together with family stressors. Overall, Judge Neilson was satisfied that the worker had provided a sufficient explanation for the delay in pursuing her claim.

The next question to be considered was whether the employer had suffered any prejudice as a result of the delay, and if the matter could proceed to a fair trial.

The employer submitted that it did not receive proper notification of the case for the worker until August 2016, when particulars of the initial work injury damages claim were provided. Judge Neilson did not accept that submission. He referenced the contemporaneous reports

back to top

of the faulty light in evidence, and the worker's statement served in November 2014.

Judge Neilson also noted that the employer had obtained statements from three police officers who were working at the police station in question at the time of the worker's injury. One officer confirmed that another sensor light was installed following the worker's fall. The employer also had access to emails from 2009 which confirmed that the light had been 'fixed'.

The employer made submissions regarding the potential loss of a right of recovery under section 151Z of the 1987 Act from the companies who repaired the light that were dismissed by his Honour given that the maintenance request to repair the light was only generated after the worker's fall.

Overall, Judge Neilson was persuaded that a fair trial could still be held. The worker was granted leave to maintain her proceedings.

The case confirms that a worker will be able to obtain an extension of the time limit under section 151D of the 1987 Act in circumstances where:

- a reasonable explanation is provided for the delay (such as multiple surgeries and/or family stressors);
- an employer receives early notification of any alleged defects at the workplace or in their system of work and;
- a fair trial can still be held.

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back to top

RECENT DECISIONS

So whose fault is it? Stacking up the facts

Steven George Villanti v Coles Group Supply Chain Pty Limited; Steven George Villanti v All Staff Australia NSW Pty Ltd t/as Allstaff Australia [2017] NSWSC 1231 (29 September 2017)

Link to decision

Summary

The NSW Supreme Court recently considered the application of sections 3B and 112 of the *Motor Accidents Compensation Act 1999* ('the Act') in circumstances where a labour hire worker was injured when he was struck by an uninsured motor vehicle. The vehicle was owned by the host employer but was being driven by another employee of the same labour hire company.

Associate Justice Harrison excluded any liability of the host employer on the basis that the labour hire company was vicariously liable for the actions of its employee and the host employer could not bear a dual vicarious liability.

Background

The worker suffered a crush injury to his lower right leg when a pallet mover machine collided with him while he was working at a warehouse owned by a host employer. The host employer was the owner of the pallet mover that was being driven by another worker who was employed by the same labour hire company that employed the worker.

The worker commenced separate proceedings against both his employer and the host employer claiming damages in respect of his injury.

The worker alleged that his employer owed a non-delegable duty of care to provide a reasonably safe system of work and was vicariously liable for the actions of his co-worker being a fellow employee.

The worker claimed that the host employer owed him a duty of care that was 'commensurate with that of an employer'. However, after considering the evidence, the Court found that the relevant provisions of the *Civil Liability Act 2002* had not been satisfied so that the host employer was not liable in negligence for the worker's injury.

The Court found that the worker's injury was wholly caused by the negligence of the driver of the pallet mover for which the labour hire company was vicariously liable as his employer.

The employer then raised a legal argument asserting that by virtue of the interaction between the Act and the *Workers Compensation Act 1897*, the host employer was liable for the negligence of the driver of the pallet mover.

This involved some consideration of the mechanism for establishing a statutory agency under the Act and thereby a vicarious liability as between the driver and the owner of the pallet mover.

Presumption of Agency

Section 112 of the Act sets out the conditions that must be satisfied in order for a presumption of agency to arise between the driver of a vehicle and its owner.

back to top

The threshold provisions of sections 3A and 3B of the Act must first be satisfied in order for section 112 to be engaged. The Court in this case found that section 3B did not apply so that section 112 could not apply to create a relationship of statutory agency where the host employer was not independently liable in negligence as the employer.

In short, the Court found that the driver of the pallet mover was not an agent of the host employer by virtue of the Act and so the host employer was not liable for the worker's injuries.

In the alternative, the Court went on to consider the position if the host employer could be regarded as the worker's employer so that section 112 then applied and the position where the labour hire company was already vicariously liable for the worker's injury as his employer. The Court confirmed the position in Australia that there is no principle of dual vicarious liability' where more than one entity is vicariously liable for the actions of one entity.

The Court ultimately determined that the labour hire employer was entirely liable for any damages payable to the worker.

Implications

Subject to final orders being entered, there remains a possibility that an appeal may be filed.

The case serves as a reminder of the complexities that may often arise in recovery claims involving co-employees of labour hire companies. In considering the potential liability of a host employer, the involvement of any other employees of the labour hire company in the occurrence of the injury must bear close consideration.

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back to top