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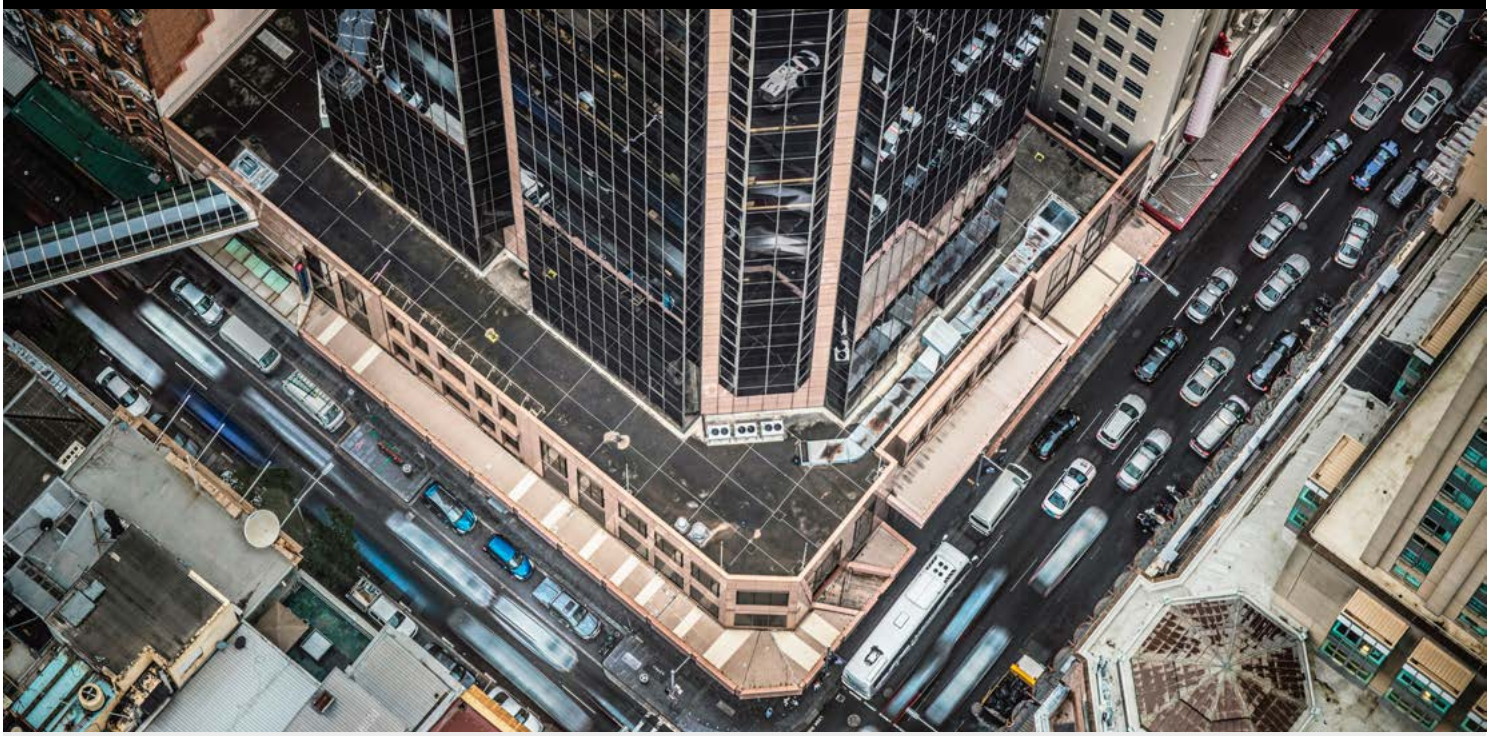

LEGISLATIVE DEVELOPMENTS

There are no legislative developments to report this month.

RECENT DECISIONS

- **Time to appeal or just leave it?**
  Bindaree Beef Pty Limited v Parkes [2017] NSWWCCPD 31 (18 July 2017)
- **Guarding against machine operator injuries**
  SafeWork NSW v Thermal Electric Elements Pty Ltd [2017] NSWDC 62 (24 March 2017)
- **Section 151Z: Closing the book on liability**
  Dailhou v Kelly; State of NSW v Kelly (No 2) [2014] NSWSC 1207 (2 September 2017)

RECENT DECISIONS

Time to appeal or just leave it?

Bindaree Beef Pty Limited v Parkes [2017] NSWWCCPD 31 (18 July 2017)

Link to decision

Summary

A recent decision by Acting Deputy President Larry King SC of the Workers Compensation Commission reaffirms the need to distinguish between interlocutory and final determinations when seeking to appeal from an arbitrator's decision.

Background

The worker commenced proceedings in the Workers Compensation Commission claiming lump sum compensation ($66,000) in respect of a 33% whole person impairment. The impairment was alleged to result from injuries to his right shoulder, left shoulder and cervical spine suffered while working at the employer's abattoir at Inverell.

The proceedings were heard by Arbitrator Egan who delivered what was described as '*a very comprehensive statement of reasons*' on 20 February 2017, in which he found that the worker suffered injury to his right shoulder, left shoulder and cervical spine as alleged.

He also found that the worker did not suffer any '*consequential injury*' to either his left shoulder (allegedly by favouring his right shoulder due to the right shoulder injury) or cervical spine (due to the effects of the left or right shoulder injury).

The Arbitrator entered an award in favour of the employer in respect of the alleged consequential injuries but in respect of the other injuries, decided that the nature of the referral to an AMS (to assess the degree of permanent impairment) would need to be agreed by the parties at a teleconference or failing agreement, by his determination.

The employer appealed from the Arbitrator's decision challenging the findings of injury and the foundation of the proposed referral to an AMS.

The employer put on submissions suggesting that the Arbitrator's *firm* findings on injury although arguably interlocutory could be seen as final as to which, ADP King observed that the submission was *hardly a robust or confident one*.

The employer further submitted that even if the Arbitrator's decision was regarded as interlocutory, it was still open to the Commission to give leave to appeal pursuant to section 352(3A) of the *Workplace Injury Management and Workers Compensation Act 1998*.

The employer contended that the case was a proper one for leave because if the appeal went forward and was successful, the time, trouble and expense involved in the further disposition of the claim by way of a medical assessment, certificate of an AMS and consequential final orders would be avoided.

The employer also submitted that it was in a quandary or dilemma, because there was a likelihood that if it did not appeal against the findings of injury now, it would be out of time to do so if it waited until a relevant final order was made.

The worker challenged the employer's entitlement to appeal from the Arbitrator's decision arguing that the decision did not constitute a final judgment or order finally determining the rights and liabilities of the parties.

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The worker maintained that the appeal could only proceed with leave of the Commission which should not be granted and the matter should proceed by determining the nature of the referral to an AMS as contemplated by the Arbitrator should take place.

Decision

ADP King felt that it was quite clear 'that the decision of the learned Arbitrator is interlocutory', that conclusion being supported by a number of decisions in the Commission and consistent with the well-established approach taken in the Supreme and District Courts.

He referred to the decision in *Licul v Corney* [1976] HCA 6; (1994) 180 CLR 213 at [11] where Gibbs J stated: '…the test is: Does the judgment or order, as made, finally dispose of the rights of the parties?'

The employer would then require leave to appeal as section 352(3A) provides that:

'There is no appeal under this section against an interlocutory appeal except with leave of the Commission. The Commission is not to grant leave unless of the opinion that determining the appeal is necessary or desirable for the proper and effective determination of the dispute'.

ADP King observed that this provision gives the Commission a discretion depending on a finding of *necessity or desirability*.

While there was much to be said for the employer's application for leave, ADP King thought this was overborne by a number of countervailing considerations, namely:

1. The learned Arbitrator's decision was plainly interlocutory and a 'step along the way' so that there was no certainty that an appeal against it, even if successful, would result in an overall award for the employer rather than a remitter or a variation of the Arbitrator's decision which nonetheless requires referral to an AMS.

2. Based on a reading of the comprehensive and careful reasons of the learned Arbitrator and the evidence, it was by no means clear that the employer's appeal would be a strong one.

3. The employer's fear that it would be out of time to appeal against any actual final judgment or order that might ultimately be made in the worker's favour was unfounded. If an interlocutory decision was essential to a later final decision, then it is well established that it may be appealed against when an appeal is brought within time following the final judgment or order.

4. Even if the Arbitrator's decision as to injury were to stand, referral to an AMS may not necessarily result in any lump sum compensation being payable to the worker, so it was difficult to see that the hearing of an appeal at that stage was either necessary or desirable.

It was noted that there remained a possibility that the employer could effectively win the case on referral to an AMS (presumably if the degree of permanent impairment failed to meet the threshold required to award lump sum compensation).

ADP King determined that leave to appeal should be refused and that the matter should be remitted to the Arbitrator to continue the hearing in accordance with his directions.

Implications

The decision by ADP King is instructive when considering whether to appeal from an Arbitrator's decision and in particular, those matters which parties need to consider when seeking leave of the Commission to appeal from an interlocutory decision.

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RECENT DECISIONS

Guarding against machine operator injuries

SafeWork NSW v Thermal Electric Elements Pty Ltd [2017] NSWDC 62 (24 March 2017)

Link to decision

Summary

The decision in *SafeWork NSW v Thermal Electric Elements Pty Ltd* [2017] NSWDC 62 highlights the importance for employers to ensure that machinery is set up in accordance with the manufacturer's operational manual, and that employees are properly trained regarding how to operate the machinery.

An employer may face criminal prosecution, large fines, and a huge increase in workers compensation premiums if a worker suffers a serious injury when using an unguarded or defective machine.

Obligations of an employer

An employer has a non-delegable duty of care under the general law to provide a safe system of work to its employees. If an employer breaches that duty of care, the employee can be awarded damages for personal injury.

An employer is also required to comply with its obligations under the *Work, Health and Safety Act 2011* (WHS Act). Breaches of the WHS Act can have serious ramifications for an employer.

If the employee has died or sustained a serious injury, the employer is required to notify SafeWork NSW of the injury. SafeWork NSW will conduct an investigation, and if SafeWork NSW considers that the employer has breached the WHS Act, SafeWork NSW will prosecute the employer.

Facts

In *SafeWork NSW v Thermal Electric Elements*, the employer designed and manufactured electric heating elements and systems. The injured worker was participating in a work placement for his Certificate II in Construction. He was using the employer's CNC brake press machine (the machine) during the work placement.

The machine was used to bend or fold thin-gauge metal sheets or strips. A standard knife was fixed to an upper beam which was powered by a pair of hydraulic rams. The standard knife was lowered by pressing the right foot pedal, and lifted by pushing on the left foot pedal. The folded metal sheets/strips would then be removed by the operator by hand (from the crush zone).

On 6 August 2014, the injured worker was removing one of the metal strips he had just folded when he inadvertently stepped on the right foot pedal. This caused the standard knife to come down and the injured worker's left hand was caught in the crush zone. The injured worker suffered serious injuries to his left index and middle fingers, which had to be amputated.

Safety features of the machine

The machine was fitted with an *EasyGuard* light curtain, a sensing device which was designed to stop the machine being used when an operator's hands were in the crush zone. The machine came with an operation manual, which

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directed employers on how to ensure that the *EasyGuard* light curtain worked effectively.

The employer in this case, however, failed to undertake two important safety measures when setting up the machine, contrary to what was recommended in the operation manual:

- The 'mute point' on the *EasyGuard* light curtain had been manually set at 15mm above the base where the metal sheets/strips were placed, whereas the standard setting was 6mm. At 6mm, it would not have been possible for the injured worker to insert his fingers into the crush zone. At 15mm, that was possible.
- The *EasyGuard* light curtain had three settings – OFF, PULSE and SLOW. In the OFF position, the machine would not operate when the light curtain was obstructed. In the other modes, it would operate. The employer had this setting at SLOW, instead of OFF, and that allowed the machine to operate even when obstructed by an operator's hand.

Consequences for the employer

Allowing a worker to use dangerous machinery without an effective guard was contrary to the employer's obligations under the WHS Act. In this case, the employer was convicted and a penalty of $250,000 imposed.

The injured worker would also be able to claim personal injury damages as a result of the employer's breach of its general law duty of care. While such damages would be covered by the employer's workers compensation insurance, the payment of damages would have a substantial impact on the calculation of the employer's insurance premiums.

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RECENT DECISIONS

Section 151Z: Closing the book on liability

Dailhou v Kelly; State of NSW v Kelly (No 2) [2014] NSWSC 1207 (2 September 2017)

Link to decision

Summary

The Court heard and determined a civil action brought by an injured worker claiming damages arising from a slip and fall at the premises of Kelly's Bookstore at Glebe.

The worker suffered a fall in the course of his employment while attending the bookstore.

The court entered verdicts in favour of the defendants in both the worker's proceedings and the related 151Z proceedings due to credibility issues on the part of the worker.

Background

On 25 June 2007, the worker was injured while browsing through Kelly's Bookstore, during a work conference being held at the University of Sydney. The worker claimed that he had fallen down a flight of hidden stairs sustaining injuries to his knee and shoulder.

The worker commenced proceedings against the owner of the bookstore, Mr Kelly and his company, Topmill Pty Limited, claiming damages. The worker's employer also commenced proceedings to recover compensation paid to and on behalf of the worker that ran concurrently with the worker's proceedings.

The worker pleaded that the defendants were negligent by failing in their duty to take reasonable care for his safety by taking steps to:

1. Rope off the landing above the staircase so that customers were not at risk of falling downstairs; and
2. Displaying books and videos in the area surrounding the stairwell as to lead the worker to believe that it was safe to enter the landing proximate to the stairs.

The manner in which the worker fell and the place from which he fell were disputed by the defendants. There were no witnesses to the fall, so that the determination of these questions depended mainly upon the worker's own evidence.

Issues with Credibility

His Honour, Adamson J, found the worker was an unreliable and dishonest witness. In his examination-in-chief, the worker had presented as a "seriously debilitated man whose physical capacity had been substantially compromised by the fall in June 2007 and subsequent traumas, which he related to the original fall", complaining of a wrist fracture and requiring the use of crutches for six to eight weeks.

However, in cross-examination, it emerged that about six months after the fall, the worker had travelled extensively abroad to promote his own businesses, and had not fractured his wrist or used crutches at any time as he had claimed. It also transpired that the worker had attended a gym on a daily basis to exercise, purely for fitness purposes undertaking aqua aerobics or riding a stationary bike.

Critically, the worker continued to change his version of events during his cross-examination, with Adamson J remarking that he "was anxious to resist any possible criticism and to justify every aspect of his conduct."

Based on the worker's poor presentation his Honour ultimately found that he did not prove how, or why he had fallen.

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Liability: Duty and Standard of Care

Based on the findings regarding the worker's credibility, his Honour disposed of the liability issue and entered a verdict and judgment for the defendants.

However, Adamson J also remarked upon the pleadings of negligence against Kelly's, specifically regarding the requirement to rope off the landing above the staircase and displaying books and videos so as to lead patrons to believe that it was safe to enter the landing proximate to the stairs.

Ultimately, his Honour did not accept that a reasonable person in the defendants' position was required to curtail entry to the landing area, as the stairwell was an "obviously open area" and was not concealed in any material way. Furthermore, Adamson J held that anyone taking reasonable care for his or her own safety would have been well aware of the presence of the downwards stairs.

Implications

This judgment confirms that patrons who enter retail premises must take reasonable care for their own safety, even in instances where customers "will be so mesmerised by the merchandise".

The case also serves as a timely reminder of the importance of checking the evidence and strength of your case prior to commencing an action, especially in circumstances where the fate of a separate recovery action is intimately connected with the outcome of worker's own proceedings. In this case, the fact that the worker went travelling soon after the accident, inconsistent income information and his daily exercise routines, painted a picture that was clearly contrary to that of serious debilitation as described by the worker to the Court.

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