Turks LEGAL

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LEGISLATIVE DEVELOPMENTS

There are no legislative developments to report this month.

RECENT DECISIONS

- **When the failure to record leads to another Hearing**
  ISS Property Services Pty Ltd v Abdou [2017] NSWWCCPD (4 July 2017)
- **Safety is always the employer's responsibility**
  Williams v Metcash Trading Limited [2017] NSWDC 154 (23 June 2017)
- **The young and the old, the attentive and inattentive, the hurried and unhurried**
  Abdul Raad v V M & KTP Holdings Pty Limited as Trustee for VM & KTP Nguyen Family Trust [2017] NSWCA 190 (1 August 2017)

SEMINAR

Workers Compensation in NSW - An update on topical issues

TurksLegal presents

Workers Compensation in NSW

An update on topical issues

The management of workers compensation claims often requires consideration of a range of external factors that may impact decisions and rights.

Our panel of speakers will provide a snapshot commentary on some of the issues that claims managers and employers are required to consider, including:

- Applications for reinstatement by injured workers
  (Sam Kennedy, Partner)
- Medical Negligence in Compensation Claims – Who pays?
  (Dominic Maait, Partner)
- Changes to the CTP scheme and impact on workers compensation
  (Michael Lamproglou, Partner)
- Proactive management of work injury damages claims
  (Eliza Hannon, Senior Associate)

SEMINAR DETAILS

Date	**Thursday, 14 September 2017**
Time	4.00pm - 5.00pm
Venue	TurksLegal Level 44, 2 Park Street Sydney NSW 2000
Cost	Free
RSVP	Monday, 4 September 2017 seminars@turkslegal.com.au or 02 8257 5785

Register Now

Seats are limited so register early to avoid disappointment.

INSURANCE ▪ COMMERCIAL ▪ BANKING

RECENT DECISIONS

When the failure to record leads to another Hearing

ISS Property Services Pty Ltd v Abdou [2017] NSWWCCPD (4 July 2017)

Link to decision

Summary

An arbitrator of the Workers Compensation Commission handed down an ex tempore (oral)decision in which a finding of injury, payment of weekly benefits and section 60 expenses was made. The orders included a term that the injured worker be referred to an Approved Medical Specialist. No recording of the arbitrator's decision was made. Despite the fact that this related to an interlocutory decision, namely, the referral to an Approved Medical Specialist, President Keating granted leave for the appeal to proceed.

President Keating then found that the absence of any recorded reasons for the decision amounted to a constructive failure to give reasons as required by section 294 of the *Workers Compensation Act 1987* ('the Act'). The matter was remitted to another arbitrator for determination.

Background

The worker was employed as a cleaner. The worker alleged injury to his back on 29 November 2013, while emptying garbage bins into a trolley. He also alleged injury as a result of the general nature and conditions of his employment. The employer disputed liability for the injury on the basis that the worker suffered a pre-existing injury and that he did not suffer an injury in the course of employment.

The worker brought proceedings in the Commission in which he sought payment of weekly benefits and medical expenses including payment for a laminectomy and spinal fusion.

The matter proceeded to hearing on 8 May 2017 before the arbitrator. The arbitrator reserved her decision. The matter was listed for teleconference on 10 May 2017 when the arbitrator delivered her reasons orally. A certificate of determination issued on the same day in which a finding of injury, payment of weekly benefits and section 60 expenses was made. The orders made by the arbitrator included a term that the injured worker was to be referred to an Approved Medical Specialist.

The employer requested a transcript of the reasons for the arbitrator's determination. The Commission advised that a transcript was unavailable as the conference had not been recorded.

The employer appealed the arbitrator's decision.

The employer argued that the absence of recorded reasons meant that it was unable to properly determine whether there had been proper compliance with the obligation to provide reasons and, the adequacy or otherwise of those reasons. The absence of the recorded reasons amounted to a constructive failure to give reasons which was an error of law.

The worker agreed with the employer's submissions.

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Decision

President Keating noted the requirements of section 352(3A) of the Act, namely, that there was no right of appeal from an interlocutory decision except with leave of the Commission. The section provides that the Commission was not to grant leave unless it was of the opinion that determining the appeal was necessary or desirable for the proper and effective determination of the dispute. President Keating stated that whilst the order remitting the claim to the Registrar was interlocutory, the arbitrator's orders with respect to the findings on injury and entitlement to weekly compensation and medical expenses were final. Leave was granted for the appeal to proceed.

Section 294 of the Act contains the statutory requirement to provide reasons when a dispute is determined by the commission. Subsection 2 provides that the reasons are to be stated sufficiently (in the opinion of the Commission) to make the parties aware of the Commission's view of the case made by each of them.

President Keating cited his previous decision in *Recyclit Enviro Chutes Pty Ltd v Axisa* [2016] MSWCCPD 41 where he held that the absence of the recorded reasons for the decision amounted to a constructive failure to give reasons as required by section 294. He accepted the submissions of both parties and reluctantly held that the arbitrator erred by failing to provide adequate reasons for the decision. The arbitrator's decision was revoked and the matter was remitted to another arbitrator for a fresh hearing and determination.

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RECENT DECISIONS

Safety is always the employer's responsibility

Williams v Metcash Trading Limited [2017] NSWDC 154 (23 June 2017)

Link to decision

Summary

The worker was employed by a labour hire company. That company provided the worker's services to a third party, Metcash Trading Limited ('Metcash').

The worker was injured whilst working at Metcash's premises. The worker made a claim against Metcash, alleging that Metcash was responsible for his injury.

Metcash denied that it was liable for the worker's injury. Metcash further argued that the worker's employer was liable for the worker's injury.

The District Court held that Metcash was partially responsible for the worker's injury. However, the Court also held that both the worker's employer and the worker himself contributed to the injury.

Background

The worker was employed by 'JW'. That company provided the services of the worker to a third party, Metcash.

The worker performed picker/packer duties at Metcash's distribution centre. The distribution centre stored goods that would eventually be collected and delivered to retail outlets, such as grocery stores. The goods were stored in areas referred to as 'pick slots' and would be 'picked' from slots within the distribution centre and placed on a pallet. The pallet would then be wrapped in plastic before being delivered to the relevant store.

As a 'picker/packer', the worker would receive instructions via a headset to collect goods from various pick slots in the distribution centre and place them on a pallet. On 1 June 2012 the worker lifted two 16kg boxes of dog food that were located in a pick slot that had a height clearance of 1.4 metres. The worker was over 1.8 metres tall. This meant that the worker had to bend down and stretch to reach the boxes within the pick slot so that he could transfer them to his pallet. In doing so, he sustained an injury to his back.

The worker alleged that Metcash was responsible for his injury. This was on the basis that Metcash directed the system of picking/packing (including what items were to be picked) and was responsible for determining where the boxes of dog food were stored. The worker argued that, amongst other things, Metcash should have ensured that the boxes of dog food were not located in a 'cramped' space.

Metcash argued that it was not responsible for the worker's injury. In the alternative, Metcash argued that the worker's employer was responsible for the worker's injury, and that the worker's own negligence in lifting two boxes at once contributed to his injury.

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Decision

In determining who (if anyone) was responsible for the worker's injury, the District Court had to consider the liability of 3 different parties: Metcash, JW, and the worker.

In considering Metcash's liability, the District Court noted that although Metcash was not the worker's *actual* employer, it acted as a 'host employer'. This was because Metcash controlled the type of work the worker was to perform; where it was to be performed, and how it was to be performed. In those circumstances, it was held that Metcash 'owed a duty of care to the [worker] either corresponding with, or very similar to, an employer's duty of care.' The District Court held that this meant that Metcash owed a duty to:

> ...take reasonable care to avoid the risk [of injury] by devising a method of operation for the performance of the task that eliminates the risk, or provides adequate safeguards.

The District Court held that a reasonable person in Metcash's position would have made simple changes, such as locating dog food in a 'pick slot' where there was at least a 1.8 metre clearance, as a safeguard to the risk of injury.

The District Court then considered if the worker's actual employer, JW, was in any way liable for the worker's injury. It held that it was. This was because, amongst other things, it was considered that:

> …the risk to workers from picking boxes of heavy dog food from the confined slot underneath a 1.4 metre shelf was apparent…A reasonable person in the position of the [worker's] employer would have raised the issue with [Metcash].

It was further held that a reasonable employer:

> …would have not made its employees available [to Metcash] until steps were taken to remedy the placement of the dog food in either a 1.8 or 2 metre pick slot or in an open area to allow easy access to the heavier goods and clear supervision in relation to the number of boxes picked at any one time.

Accordingly, even though Metcash had day-to-day control over the worker's duties (including how those duties were performed) it was held that the worker's employer was still 20% liable for the worker's injury by allowing him to work within a system that was unsafe. This was despite the fact that the employer was not responsible for that system.

It was further held that the worker's own negligence contributed to his injury, because he lifted two boxes of dog food at a time, rather than just one. The District Court considered the worker's contributory negligence to be in the order of 20%.

Implications

Employers need to be aware that in situations where they provide the services of their workers to third parties, they must ensure that they regularly review the system of work that is put in place by those third parties. If the employer has any safety concerns, it is essential that these be raised with the third party. In this case, the District Court held that the safety issues should have been of such concern to the employer that the employer should have declined to provide the services of its employees to the third party until the issues were fixed.

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RECENT DECISIONS

The young and the old, the attentive and inattentive, the hurried and unhurried

Abdul Raad v V M & KTP Holdings Pty Limited as Trustee for VM & KTP Nguyen Family Trust [2017] NSWCA 190 (1 August 2017)

Link to decision

Summary

A recent decision by the NSW Court of Appeal, the Court describes a wide range of people to whom an occupier of premises owes a duty to exercise reasonable care to ensure their safety.

It is clear that while people who enter or are on the premises of a third party must exercise reasonable care for their own safety, the occupier will need to anticipate their circumstances in order to assess what actions might be required to ensure that the premises are safe for their use.

Background

Abdul Raad was injured when he slipped and fell on a wet tiled outdoor area at a shopping village that was occupied by the defendant on 13 June 2011.

He subsequently brought a claim seeking damages in respect of his injury on the basis that the defendant as the occupier had failed to take reasonable care for his safety.

At trial, Mr Raad received an award of damages ($75,547) that was then reduced by 10% on account of his contributory negligence.

Mr Raad brought an appeal against the decision on the basis that the award was inadequate in several respects and the defendant filed a cross-appeal contending that the primary judge had erred by finding that it had breached its duty as the occupier of the premises.

The area where Mr Raad slipped and fell was an uncovered tiled area in the shopping centre that provided access from a car park to the shops.

Decision

On the day in question, the area was wet because it had been raining and on Mr Raad's evidence it was still raining when he slipped and fell.

The expert evidence that was called at the hearing indicated that water tended to accumulate on the tiles in patches as the area had little camber to allow the water to run off. The trial judge found that Mr Raad was running at the time when he slipped, having already taken a number of steps on the wet tiles.

The expert evidence led the Court to infer that there were a number of tiles on which the non-slip coating had worn so as to be non-existent.

The trial judge found that the occupier breached its duty of care as occupier by failing to ensure that the tiles were treated with a slip resistant surface that was renewed from time to time or in the alternative, by not ensuring that the tiles were replaced with tiles with a pronounced surface texture given that there was no adequate cross-fall to enable water run off to occur.

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The trial judge was satisfied that the area was not so large that the cost of replacing the tiles would be unreasonably high in order to take such steps in response to the risk.

The fact that an individual was running across a tiled area while it was raining will immediately raise a question as to the liability of the occupier in circumstances where there was a slip and fall.

In the present case, the Court of Appeal observed that an occupier's duty of care is appropriately framed by reference to 'users exercising reasonable care for their own safety', however, this does not foreclose the possibility of a breach of duty occurring where there is a finding of contributory negligence on the part of the user.

The expert evidence established that there was a not insignificant risk that a person proceeding hurriedly over the untreated tiles in wet conditions might slip and fall. The Court determined that the risk was of such magnitude that a reasonable person in the occupier's position would have responded to it by significantly reducing the risk of slippage by, for example, applying a non-slip product to the tiles.

The Court considered that in the circumstances, the occupier should have anticipated that all manner of people would be using the tiled area and that some might traverse the area at above a normal walking pace at times when it was raining.

The Court observed that the tile area provided access between the shopping village and the car park, so that it could be expected that all manner of people would be using it including 'the young and the old, the attentive and inattentive and hurried and unhurried'.

In a similar case recently decided by the Court it was held that: "it was reasonably to be expected that users of [the] means of access would include those who were distracted or inattentive or even less than careful" *Ratewave Pty Ltd v B J Billing* [2017] NSWCA 103.

The court readily distinguished the present case from other cases involving pedestrians who had tripped and fallen as a result of imperfections in a footpath or driveway because the imperfection was readily foreseeable or discernible.

In the present case, the position was different because the slipperiness of the tiles that resulted from the lack of a non-slip coating (as distinct from their wetness) would not have been obvious to Mr Raad or to a reasonable person in his position before he attempted to traverse them.

On the question of contributory negligence, the court observed that the obligation of the occupier is to be measured against the duty on the part of the user to exercise reasonable care themselves. The weight to be given to an expectation that the other will exercise reasonable care for his or her own safety is a matter of factual judgment.

Mr Raad's contributory negligence was because he ran over a tiled area upon which water was pooling from the rain when a more cautious approach was required to properly take care for his own safety. The assessment of the percentage deduction for contributory negligence involves apportioning responsibility for the accident and making an evaluative judgment. In the present case, the percentage as determined by the primary judge was considered to fall within the range of percentages that were open to him.

The court rejected Mr Raad's appeal (in respect of the matters for which he claimed that the damages were inadequate) and dismissed the cross-appeal relating to the occupier's breach of duty of care owed to Mr Raad.

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Implications

The class of people to whom an occupier owes a duty of care must be carefully considered in each case to determine who might reasonably be expected to use the area or premises and whether a breach of duty then follows.

This will be particularly relevant in considering claims by workers against third parties where they enter upon third party premises and suffer injury by trip, slip or fall possibly by being distracted by pressing business or hurrying about and not exercising reasonable care for their own safety.

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