

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.

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.

**For more information,
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