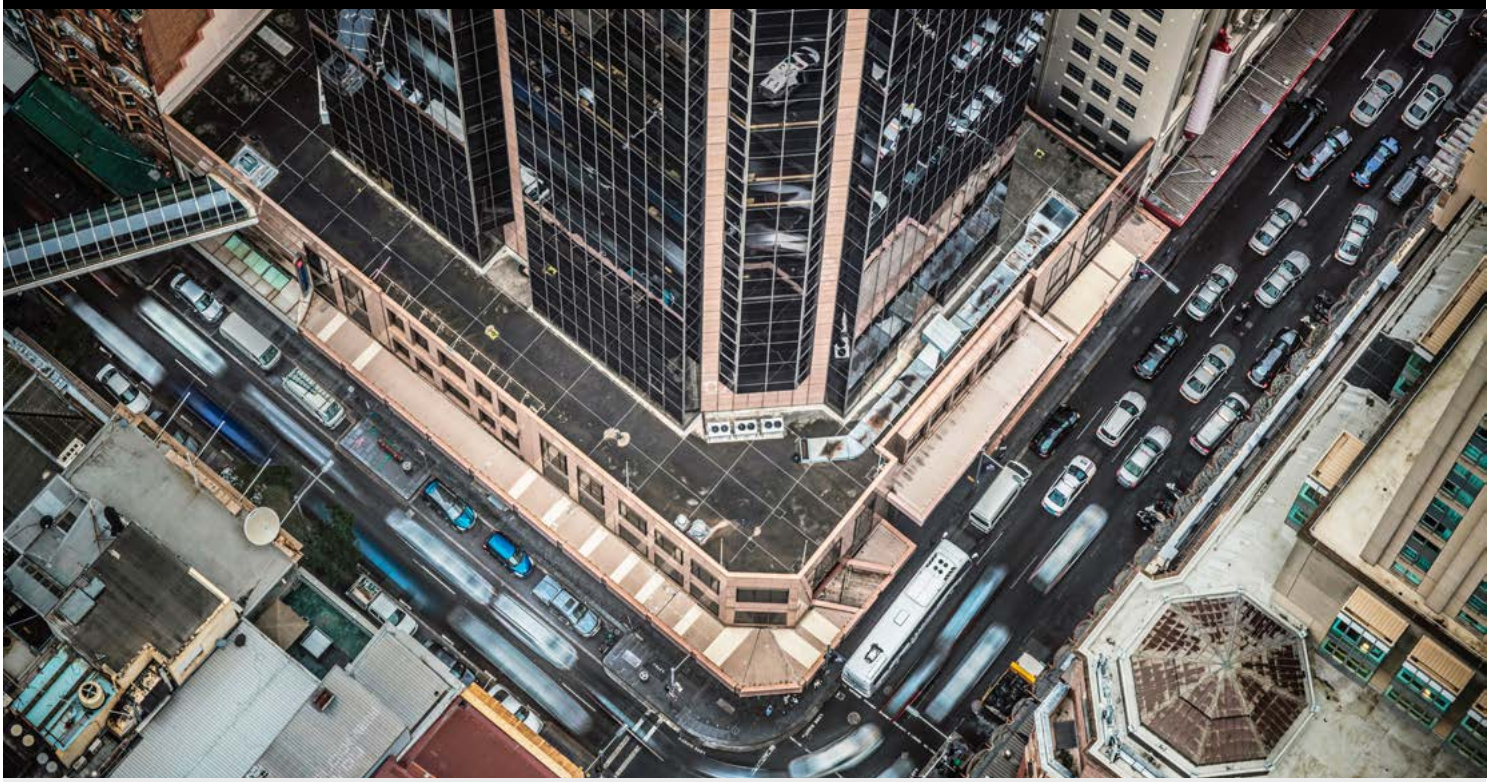
Turks LEGAL

INSURANCE ▪ COMMERCIAL ▪ BANKING



RECENT LEGISLATIVE DEVELOPMENTS

There are no recent legislative changes to report.

RECENT DECISIONS

- **Injury on journey to obtain medical treatment establishes real and substantial connection**
  Khullar v ANZ Banking Group Limited [2019] NSWWCC 230 (1 July 2019)
- **Dispute on Work Capacity Decision determined by the Workers Compensation Commission**
  Jennifer Stefanac v Department of Family and Community Services [2019] NSWWCCR 4 (11 July 2019)
- **Notional assessment of damages in recovery proceedings does not bind worker in damages claim**
  IAG Limited trading as NRMA Insurance v Lucic [2019] NSWSC (28 May 2019)
- **Stop press**
  Hee v State Transit Authority of New South Wales [2019] NSWCA 175 (17 July 2019)

RECENT DECISIONS

Injury on journey to obtain medical treatment establishes real and substantial connection

Khullar v ANZ Banking Group Limited [2019] NSWWCC 230 (1 July 2019)

Link to decision

Summary

The employer was found liable for an aggravation of a prior work injury where the aggravation resulted from a motor vehicle accident that occurred when the worker was returning from a medical appointment.

The worker had attended the appointment to receive treatment for the earlier injury. The arbitrator found that the worker had established a journey claim in accordance with sections 10(3)(c) and met the real and substantial connection test under 10(3A) of the *Workers Compensation Act* 1987 (the '1987 Act').

Background

The worker was a personal banker who resided at Mount Annan but worked at the Sydney Airport Branch. On 21 May 2018, the worker suffered an injury to her right eye while using a cash counting machine. As the worker was handling the notes, a rubber band broke and flicked up into her right eye. This caused her to reel backwards and hyperextend her neck. The worker claimed that she suffered neck and shoulder pain as a result of the incident.

On 7 June 2018, the worker attended an early morning appointment with her ophthalmologist at Camden to receive treatment for her right eye injury. After leaving the appointment, at approximately 7.20am, the worker was involved in a motor vehicle accident when she was struck from behind by another vehicle at a roundabout.

There were a number of issues that arose to be determined by Arbitrator Wynard, including whether the injuries sustained in the motor vehicle injury were an exacerbation of the original injury at work and the extent of any incapacity for employment suffered as a result. Most notably, the arbitrator was required to consider whether the journey on which the motor accident occurred was one to which section 10(3)(c) applied.

If the worker was injured in the course of a journey the arbitrator then had to decide whether the provisions of section 10(3A), were satisfied. This would require the worker to establish that there was a *real and substantial connection* between her employment and the motor vehicle accident.

Decision

Arbitrator Wynyard referred to a number of decisions of President Judge Keating in his determination of the matter. In the case of *Bina v ISS Properties Pty Ltd* [2013] NSWWCCPD 72, Keating J stated that the mere fact that a worker must travel to or from work does not establish a causal connection between an injury sustained on that journey and the worker's employment.

In *State Super Financial Services Australia Limited v McCoy* [2018] NSWWCCPD 26 Keating J stated at [69]:

> *…The test under s 10(3A) of a "'real and substantial connection" may, but does not necessarily, convey the notion of a causal connection. It requires an association or relationship between the employment and the accident or incident, which may be provided by establishing that the employment caused the accident or incident. However, employment does not have to be the only, or even the main cause.*

In the present case, the worker claimed that she was injured at work which required treatment, so that it was reasonably necessary for her to travel to Camden to attend her ophthalmologist appointment. The worker also argued that she would not have been on the road in that location at the time of the accident if it weren't for the need for her to travel in the opposite direction to her place of employment.

The Arbitrator found for the worker, holding that there was a 'real and substantial' connection between the worker's employment and her injury from the motor vehicle accident, as her original eye injury required her to travel to Camden to obtain treatment on a journey that she would not otherwise have made. He did not specifically determine that there were two separate injuries as Keating J had in *Warwar v Speedy Courier (Australia) Pty Ltd* (2010) NSWWWCPD 92.

back to top

Implications

Although the decision does not create any precedent in relation to journey claims under the 1987 Act, it does recognise the broader measure by which any relationship between a journey and injury under section 10(3A) can be established.

Unlike section 4 of the 1987 Act, for a journey claim under section 10(3), it is not necessary to show that the employment is a *substantial contributing factor* or the main cause of the injury. It is sufficient to establish that there is an 'association or relationship' to the employment in order for a finding of a *real and substantial connection* under the section.

For more information, please contact:

Jayden Krieg
Lawyer
jayden.krieg@turkslegal.com.au

Graham White
Special Counsel
graham.white@turkslegal.com.au
02 8257 5712

RECENT DECISIONS

Dispute on Work Capacity Decision determined by the Workers Compensation Commission

Jennifer Stefanac v Department of Family and Community Services [2019] NSWWCCR 4 (11 July 2019)

Link to decision

Summary

The Workers Compensation Commission has made a determination concerning a work capacity decision in dispute as an Expedited Assessment under Chapter 7 Part 5 of the *Workplace Injury Management and Workers Compensation Act* 1998 (the '1998 Act').

Section 43 of the *Workers Compensation Act* 1987 (the '1987 Act') provides that decisions by an insurer about an injured workers current work capacity and ability to earn in *suitable employment* or to discontinue or reduce weekly compensation payments is a work capacity decision ('WCD').

An Arbitrator, acting in the capacity of the Registrar's Delegate declined to make an interim payment direction as he found that the worker had capacity to earn in suitable employment having regard to the definition under section 32A that was most likely to be at or near her pre-injury average weekly earnings. The onus is on the worker to provide evidence by which to properly challenge the decision.

Background

The worker suffered psychological injury in the course of her employment as an Aboriginal case worker with FACS. She was certified as medically fit for her role in any location other than at Blacktown or Mt Druitt.

The insurer provided vocational rehabilitation assistance to the worker who told her treatment providers that she wished to be placed at another location ideally closer to where she lived in the Hunter region.

The insurer made a WCD on the basis that the worker had an ability to work eight hours a day, five days per week as an Administrative Officer. The WCD was supported by a vocational assessment, the GP's sign off on suitable roles and various WorkCover Certificates of Capacity. The worker's entitlement to weekly compensation was reduced to $132.

The WCD was subject to review by the insurer, SIRA and WIRO. Each review maintained the decision until WIRO revoked the WCD based on a procedural error and recommended that a new WCD be issued.

The SIRA's merit review found that the worker had an ability to earn as an Aboriginal case worker referring to a job advertisement for such a position. It is not known whether the advertisement was for a role with FACS or another employer. In any event, the advertisement showed that the role met the definition of suitable employment, by which the worker had an ability to earn more than her PIAWE. The insurer made a new WCD based on SIRA's merit review by which the worker's weekly benefits would cease from 24 June 2019.

The worker filed an Application for an Expedited Assessment ('AEA') with the Commission on 24 June 2019.

The AEA enables workers to challenge the cessation of weekly benefits under a WCD with a teleconference appointed within a few weeks to enable the parties to make submissions and present evidence in support of their positions.

Determination by WCC

The AEA was referred to a Registrar's Delegate for determination and the matter listed for teleconference on 10 July 2019.

back to top

The issues were effectively reduced to whether the worker's capacity to earn in suitable employment provided her with any entitlements to weekly compensation on applying section 37 of the 1987 Act.

The Registrar's Delegate noted the definitions of 'current work capacity' and 'suitable employment' under section 32A of the Act meaning work for which the worker is currently suited, having regard to subsections (a)(i)-(v), being regardless of 'the worker's place of residence' - subsection (b)(iv).

The insurer submitted that the worker's evidence did not provide any basis upon which to dispute the WCD. Significantly, the worker did not advance any evidence that challenged any aspect of the WCD, i.e. to challenge her work capacity, or that the role was outside the scope of the definition under section 32A.

The worker's solicitor submitted that the Insurer had failed to provide suitable duties in a position nearer to the worker's place of residence. However, no further submissions were made as to how that would affect the outcome of the proceedings.

The Registrar's Delegate noted an option for the worker to discontinue the AEA, however, this was not adopted.

Following submissions, the Registrar's Delegate indicated that he was not satisfied that the worker had any entitlement to weekly compensation.

On 11 July 2019, the Registrar's Delegate issued a determination declining to make an interim payment direction and dismissing the application. Having regard to all of the evidence, and the absence of challenge to various other assessments related to earnings, the Registrar's Delegate found:

1. That the worker had a capacity to undertake suitable employment.
2. That he was not to have regard to the worker's place of residence or whether suitable employment is generally available in the employment market (section 32A of the Act); He found that the worker had the capacity to work as an Aboriginal case worker in any place other than Blacktown or Mt Druitt. The fact that her wishes were to be closer to her family did not alter the application of section 32A.
3. There was no suggestion that the employer had provided any undertakings that the worker would be provided with alternative roles more suitable to her personal circumstances, nor were there any issues under section 48 or section 48A of the 1987 Act raised.
4. The worker's capacity to earn in suitable employment was $1,640 per week.
5. On applying section 37, the worker had no entitlements to weekly compensation.
6. Accordingly, the presumption that an interim payment direction for weekly payments of compensation is warranted is displaced because the worker's claim has minimal prospects of success: section 297(3)(a) of the 1998 Act

The Registrar's Delegate declined to make an interim payment direction and the application was dismissed.

Implications

The decision emphasises the importance of ensuring that steps are taken to formulate an appropriate return to work plan and to notify injured workers of their obligations in terms of injury management to facilitate the return to work outcome.

The Registrar's Delegate will pay close attention to the medical evidence available and whether the WCD notice is adequately supported. In this case, the various vocational assessments, case conferences, and the GP's sign off for suitable roles were all relevant to the final determination.

The decision underscores the need to properly consider the definition of suitable employment and the factors to be brought into account in accordance with the definitions under section 32A.

For more information, please contact:

Nina Israil
Lawyer
nina.israil@turkslegal.com.au

Graham White
Special Counsel
graham.white@turkslegal.com.au
02 8257 5712

back to top

RECENT DECISIONS

Notional assessment of damages in recovery proceedings does not bind worker in damages claim

IAG Limited trading as NRMA Insurance v Lucic [2019] NSWSC 620 (28 May 2019)

Link to decision

Summary

The NSW Supreme Court has held that a worker will not be bound by the formulation of notional damages for the purpose of recovery proceedings under section 151Z of the *Workers Compensation Act* 1987 (the '1987 Act') if the worker subsequently brings a separate action against the third party claiming damages.

Background

The worker suffered injury as the result of a motor vehicle accident that occurred in the course of his employment on 31 August 2005 for which he received workers compensation payments.

In 2007, the workers compensation insurer brought recovery proceedings against the third party driver claiming the statutory indemnity (recovery) under section 151Z of the 1987 Act.

The proceedings were heard and determined by Judge Truss of the District Court who gave judgment on 3 October 2007 in which she notionally assessed the damages that would have been payable to the worker in the sum of $196,800 setting the limit of any right of recovery. Judgment was entered for the amount of compensation paid to the date of judgment ($91,096.79).

The worker then made a claim against the third party driver claiming CTP damages under the *Motor Accidents Compensation Act* 1999 and the CTP insurer applied for an exemption from CARS on the basis that the claim was not suitable for CARS assessment.

The CARS Assessor refused the application finding that there was no issue estoppel or abuse of process as the worker could not be regarded as 'privy' with respect to the recovery proceedings. The CARS Assessor assessed the worker's damages in the sum of $1,548,026.45 (31 August 2018).

Application for Review

The CTP insurer applied to the Supreme Court for an administrative review of the decision of the CARS Assessor that was heard by Justice Adamson who reviewed a number of case authorities in which there had not been found to be an issue estoppel or res judicata on the basis of sufficient privity of interest between the worker and employer.

Notably, in this case, the worker was not a party to the recovery proceedings and the workers compensation insurer did not represent the legal interests of the worker in enforcing the statutory indemnity in its favour so as to give rise to an estoppel.

Her Honour summarised the relevant principles as follows:

1. Parties to proceedings are bound by judgments between them and essential issues decided in proceedings to which they are parties;
2. Where a party could have made a claim against the other party to proceedings but did not, that party will not be permitted, in further proceedings, to raise the claim as this would amount to an abuse of process;
3. As between the same parties, an issue estoppel will arise in subsequent proceedings on a different cause of action to prevent re-litigation of an issue already determined between them in previous proceedings; and
4. Persons who were not parties to such proceedings are not affected except to the extent that they are estopped from re-litigating in new proceedings against a different party, an issue on which it was unsuccessful in previous proceedings, as this would amount to an abuse of process.

Her Honour held that the worker was not bound by the notional assessment of damages in the recovery proceedings as he was neither a party nor privy to a party and dismissed the summons.

back to top

Conclusion

The decision clarifies the position such that workers compensation insurers may pursue recovery actions without raising concerns that a notional assessment of damages might otherwise prejudice a worker's subsequent claim for damages against the third party.

The interests of the parties are distinct and although both matters involve consideration of the damages payable, the recovery proceedings are materially different to the extent that the assessment is notional being assessed at the date of judgement and based on the evidence available to the workers compensation insurer.

For more information, please contact:

John Hick
Partner
john.hick@turkslegal.com.au
02 8257 5720

RECENT DECISIONS

Stop press:

Hee v State Transit Authority of New South Wales [2019] NSWCA 175 (17 July 2019)

Link to decision

The NSW Court of Appeal has found that the WCC President erred in his determination of the worker's entitlement to benefits under section 38 (as a worker with highest needs); proceedings remitted to the WCC for rehearing or redetermination of the worker's claim.

back to top