SRB Legal

INSURANCE LAWYERS

WORKERS' COMPENSATION CLAIMS WA NEWSLETTER

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LEGISLATIVE AMENDMENTS

1. Certificates of Capacity

1.1. New Certificates of Capacity are due to take effect from 1 July 2014. These Certificates replace existing medical Certificates. WorkCover are currently undertaking training with General Practitioners.

2. WorkCover WA: Non-Compliance with Rules relating to Witness Statements

2.1. The Registrar has made it clear that Applications for Arbitration and Replies will be carefully reviewed to ensure that, when filed they comply with the Rules insofar as they are accompanied by the materials required under the Rules. In particular he has singled out a regular non-compliance on the filing of witness statements.

2.2. The Registrar has alerted parties that Applications and Replies will be rejected if they do not include:

2.2.1. Witness Statements containing "a detailed statement" of the evidence to be given by the witness; or alternatively

2.2.2. a Statement that fully and properly specifies the substance of the evidence the party calling the witness believes on reasonable grounds the witness will give, the reliance the parties intend to place on the evidence, the reason why the witness statement has not been included and the time by which the evidence is expected to be included.

2.3. The Registrar considers that strict enforcement of the Rules will result in better preparation of the filing parties case; a better understanding by both the filing parties of the opponents case; the prospects of earlier settlement of disputes prior to Arbitration hearings; that more clearly defined issues will reduce preparation costs; that there will be less scope for surprise and resulting adjournments which will save costs and time and will result in reduced Arbitration hearing times.

Comment: It is frustrating to receive applications which are not accompanied by a witness statement. It is too often the case that the witness statements are supplied late in the proceedings. Requiring the Applicants to put forward detailed statements should assist in investigation of the claim; and consequently your ability to reach conclusions as to whether the claim ought to be accepted, rejected or compromised at an earlier juncture.

On the other hand, when filing Applications and Replies, you should carefully consider the evidence to ensure that all documents including witness statements comply with the Rules.

Workers' Compensation (Legal Practitioners & Registered Agents Costs Determination 2014.

Effective from 28 February 2014 is the Workers' Compensation (Legal Practitioners & Registered Agents Costs Determination 2014.

The practical effect of the determination is to allow an additional 1 hour for each additional Directions Hearing or Interlocutory Application. The reason behind it being that the additional allowance should apply having regard to the significant number of Directions Hearings and Interlocutory Applications that take place.

RECENT JUDGMENTS

THE STATE OF WESTERN AUSTRALIA (DEPARTMENT OF EDUCATION) v LEEK [2014] WADC 10

A Genuine Dispute as to Liability to Pay Compensation – The Application of Section 60

The State of Western Australia (Department of Education) v Leek [2014] WADC 10

On 3 February 2014 the District Court of Western Australia (Staude DCJ) upheld an appeal by the Department of Education represented by SRB Legal, by finding that a genuine dispute as to the employer's liability to pay compensation was established. In quashing the decision of Arbitrator Melville, His Honour made orders suspending weekly payments from the date on which the order ought to have been made.

This is a very important decision involving the application of s60 of the *Workers' Compensation and Injury Management Act* 1981 ("the Act"), particularly in relation to circumstances where a worker is failing to mitigate his/her loss.

The Facts

The worker sustained an injury to her back whilst working as a school cleaner on 17 June 2011. Liability was admitted and weekly payments commenced.

In November 2011, the worker's General Practitioner approved referral of the worker to a rehabilitation provider, which was also supported by the worker's neurosurgeon, Mr Liddell.

The worker participated in an initial interview with the rehabilitation provider on 29 November 2011 but failed to respond to numerous subsequent attempts to contact her to implement a programme. An application by the employer for orders under s156B to direct the worker to participate in rehabilitation did not succeed despite the Arbitrator finding the worker had failed to participate in a return to work programme.

The worker also failed to attend a medical examination with Dr Lai on 6 December 2012 arranged by the employer's insurer, RiskCover.

The worker told an investigator appointed by RiskCover that she had not been in contact with anyone as she was too stressed by matters unrelated to her injury (her son having been committed to a mental ward and the recent murder of a nephew) and would be willing to participate in the rehabilitation process when she was feeling better mentally.

The employer sought orders pursuant to s60 for suspension of weekly payments on the grounds that it genuinely disputed liability to continue to make weekly payments.

The employer firstly contended that the worker had continually refused to participate in rehabilitation and/or a return to work programme in which case the worker was failing to mitigate her loss as lawfully

required to do. In the circumstances, the nature and extent of the worker's capacity was unable to be distilled.

Secondly, the worker's failure to attend a medical appointment with Dr Lai meant the employer was unable to ascertain the worker's current medical capacity for work.

Thirdly, the worker was incapacitated for work due to being too stressed by issues unrelated to her injury, in the absence of which she would be fit at least for rehabilitation.

On the basis of these 3 factors, the employer contended that there were grounds to dispute the worker's incapacity and put in issue its liability to pay compensation. The employer contended that the worker had failed to mitigate her loss and that her conduct prevented a proper assessment being made of her capacity for work.

At first instance, the Arbitrator held that the dispute raised by the employer was not genuine and found that:

(a) the employer's proposition that the chain of causation of injury may have been broken by the intervention of other factors contributing to incapacity was speculative and did not, in any event, eliminate the injury as a cause of incapacity;

(b) it was not open to the employer to dispute liability to make weekly payments on the basis of a failure to submit to medical examination as s72A provided a discrete remedy for failure of a worker to submit to medical examination and such failure could not ground a s60 application;

(c) the employer fundamentally misconceived the relationship between failure to mitigate and causation and that the failure to mitigate did not sever the chain of causation between injury and incapacity.

The Appeal Decision

His Honour stated that the question of whether there is a genuine dispute is to be determined having regard to all of the materials filed in support of the application as a whole. The Arbitrator was required to give consideration to the combined effect of the employer's contentions. The Arbitrator had purported to determine not whether the employer's contentions grounded a genuine dispute but whether they were likely to be made out as facts which would disentitle the worker to compensation. Such threshold was too high and not in accordance with established authorities on the construction and application of s60 (see *Taylor v. Star Broken Meats)*.

ST JOHN OF GOD HEALTH INC v AUSTIN (2014) WASCA 11

Decision delivered 14 January 2014

Subject of the Appeal

A worker issued proceedings in the District Court prior to an election being registered by the Director.

The employer applied to a Registrar for summary judgement on the basis that s93K (as it then was) required a Writ to be issued within thirty days of the election being registered. As the Writ was issued prior to the election being registered the Writ was, according to the employer, invalid.

The application for summary judgment was dismissed.

The employer appealed and Judge Bowden found that the employer was correct in its argument but that he could still grant leave to validate the writ issued on a retrospective basis.

The employer appealed against His Honour's decision.

The Decision of the Court of Appeal

In a two one split decision, the Court of Appeal dismissed the Appeal.

It was found by majority that the terms within "*thirty days*" meant that proceedings could be issued no later than thirty days after the election was registered.

By majority therefore, it was found that the writ issued by the worker was a valid writ.

Although s93K has now been amended, by removing the necessity to issue proceedings within thirty days and therefore dealt with a different time limit issue, the decision arguably could mean that provided proceedings are issued within three years of the date of injury (to satisfy the *Limitation Act*) then they can be issued before the election is registered by the Director.

The election may therefore not be a pre-requisite, according to the Court of Appeal, to proceedings being issued.

This is different to the interpretation generally adopted that proceedings can only be issued after an election is registered.

O'DONOVAN v WESTERN AUSTRALIAN ALCOHOL & DRUG AUTHORITY [2014] WASCA 4

This was a common law claim for damages as a result of an alleged psychiatric injury to an employee which the employee alleged was reasonably foreseeable.

The case largely turns on its own facts but it reiterates the following relevant principles when considering whether an employee is entitled to damages at common law by reason of a breach of the duty of care the employer owed to the employee with respect to psychiatric injury.

The following principles were considered and affirmed in the Court of Appeal in concluding that the claimant was not entitled to an award of common law damages:

1. The employer engaging an employee to perform duties is entitled to assume, in the absence of evident signs warning of the possibility of a psychiatric injury, that the employee considers that he or she is able to do the job.

2. The central enquiry remains whether, in all the circumstances, the risk of a Plaintiff sustaining a recognisable psychiatric illness was reasonably foreseeable, in the sense that the risk was not farfetched or fanciful.

3. The obligations of the parties are fixed at the time of the employment contract.

4. The fact that a complaint may suggest an industrial relations problem does not necessarily also suggest a danger to the workers' psychiatric health.

5. In any organisation, including in employer/employee relationships, situations creating stress will arise. Indeed, some form of tension may be endemic in any form of hierarchy. There is no

breach of duty unless a situation can be seen to arise which requires intervention on a test of unreasonableness.

6. In the absence of any indication (explicit or implicit) of any particular vulnerability to a worker there is no reason for an employer to suspect the worker is at risk of psychiatric injury.

7. Signs of vulnerability may take many forms including express warnings or implicit warnings.

8. An employer owes a duty of care if psychiatric injury to the particular employee is reasonably foreseeable. This requires attention to the nature and extent of the work being done by the particular employee and signs given by the employee concerned.

WAINWRIGHT v BARRICK GOLD OF AUSTRALIA LIMITED [2014] WASCA

The points of interest arising out of this case relate to the Court's detailed summary of the relevant principles for the assessment of damages for economic loss in personal injury common law claims.

The relevant principles discussed in this case are as follows:

1. Where an appeal is from an assessment of damages by a Judge sitting alone, and because it is recognised that a new trial is an oppressive burden on a successful party, an appellate court will normally seek to undertake the task of reassessment of damages for itself.

2. When addressing economic loss, the correct question is whether, as a result of the accident, the Plaintiff has been rendered less capable of earning income.

3. In determining that question, the Court looks at the Plaintiff's capacity for work beyond the particular employment in which he or she was engaged at the time of the accident.

4. Earning capacity is, however, an intangible asset which only has a value to the extent to which it may be exploited financially. Consequently, no compensation is payable for loss of earning capacity unless the loss is or may be productive of financial loss.

5. A Plaintiff must prove that his or her loss which includes the quantification in money that should be adopted in the sum awarded.

6. Where a question arises as to whether a Plaintiff could have obtained employment within their post-accident capacity, the question is not really one of mitigation of damages as the Plaintiff must prove that such employment is beyond his or her capacity.

7. In general, it is desirable for a Plaintiff to call precise evidence of what he or she would have been likely to earn but for the injury and what the Plaintiff actually did earn (past loss) and was likely to earn after the injury (future loss).

8. Nevertheless, the failure to call such evidence by a Plaintiff does not necessarily result in nominal damages, although, if the Plaintiff calls incomplete evidence, it may be difficult to complain of a lower award for lost earning capacity.

9. Similarly, a Defendant who fails to adduce evidence with respect to a Plaintiff's retained to earning capacity, in the discharge of any evidential onus that might arise, runs the risk that the Court may find a retained earning capacity which is lower than would apply if proper evidence had been adduced by the Defendant and accepted.

10. Evidence as to the possible earning capacity post-accident should ordinarily be directed to the kind of work which, after the accident, the Plaintiff would be in a position to undertake; the likelihood that he or she would be able to obtain such work; and the remuneration which he or she might expect to derive from it.

11. A decision by a Plaintiff to leave their employment does not automatically mean that the Plaintiff has not suffered a compensable loss of earning capacity for the period after the departure from that position. Thus for example:

    11.1 a Plaintiff is not precluded from recovering lost earning capacity in that period if the Plaintiff's decision was a natural step in a chain of causation in the context of what is reasonable between the Plaintiff and the Defendant in determining the Defendant's liability for damages in tort.

    11.2 a Plaintiff is not precluded from recovering damages for loss of earning capacity which is a result of voluntarily leaving employment which was unsuitable.

12. The burden of proving a Plaintiff has failed to mitigate his or her damages rests on the Defendant. In discharging that burden, the Defendant must not only show how a Plaintiff's claim ought to be mitigated, but also to what extent it ought to be mitigated.

13. If a Defendant establishes that the Plaintiff has failed to mitigate their loss, the Court is required to assess the Plaintiff's damages on the footing that he or she had taken the established hypothetical action and received the hypothetical benefits.

Comment: The principles outlined by his Honour Murphy J A demonstrate that defending common law claims and ensuring that the insured is placed in the best potential position in the event of a finding of negligence and an awarding of damages against it, requires a considerable amount of careful thought and work on the part of the claims team. The right evidence needs to be obtained and adduced. This is often a complex process and reliant upon ensuring that credible evidence which will be accepted by a Court is obtained.

TRANSFIELD SERVICES (AUSTRALIA) PTY LTD v WIELAND [2014] WASCA 41

The legal principles to take from this case relate to the principles of reasonable care which an employer needs to take for the safety of its employees at common law.

The case reiterates that the obligation is to take reasonable steps to provide a safe place of work. The duty is that of a reasonably prudent employer and the duty is not to safeguard a worker completely from all perils. The response to a foreseeable risk is to be judged by the criterion of reasonableness, and not some more stringent requirement of prevention.

Comment: Accordingly, whilst there is no doubt that an employer owes a non-delegable duty of care and has a high onus of proof, it is still the case that the employer is only required to take the reasonable care of a reasonably prudent employer and not a more stringent requirement of total prevention/safeguarded which, would be an impossible standard to maintain.

SMITH v RANGER CAMPING OUTDOORS PTY LTD [2014] WADC 40

This was an appeal to the District Court against the decision of a WorkCover Arbitrator.

The relevance of the decision is to determine when an injury is suffered in the course of the employment. The case discussed the principles in H*atzimanolis v ANI Corporation Ltd (1992) 173 CLR473* as further explained in the High Court decision of *Comcare v PVYW [2013] HCA41*.

This case involved a worker who was on a car journey on behalf of her employer to collect some equipment.

During the journey, the vehicle travelling immediately in front of her collided violently with another vehicle. The Plaintiff stopped her vehicle and, together with other passers-by, sought to assist those persons injured in the collision. The Plaintiff observed that the driver of one vehicle had suffered severe head injuries. She stayed with that person, offering such assistance as she could until he died from his injuries approximately half an hour later. The Plaintiff remained at the scene for some time and provided a statement to the attending Police Officers who witnessed the event.

The Plaintiff later claimed workers' compensation on the basis that she had suffered a post-traumatic stress disorder with reactive depression and anxiety.

Both at first instance and on appeal the Plaintiff's claim was unsuccessful.

The employer successfully argued that the Plaintiff's injuries did not occur by accident arising out of or in the course of her employment with the employer.

The central issue was whether the factual material placed before the Arbitrator compelled a finding that the Plaintiff's injury was in fact suffered in the course of her employment.

There was no dispute that the Plaintiff was driving the vehicle in the course of her employment. There was also no dispute that she suffered a post-traumatic stress disorder with an associated major depressive disorder as a result of witnessing the accident and the subsequent death of the driver.

Applying the *Hatzimanolis* principles as further explained in *Comcare v PVYW*, the Court said that the critical question to be addressed was whether the evidence satisfied the Arbitrator that the Plaintiff's activity of remaining at the scene and providing assistance was an act that was reasonably required, expected or authorised to be done in order to carry out her usual work duties or necessarily incidental thereto.

Notwithstanding that the journey was being undertaken pursuant to her employers instruction, it was held that the activity that caused the Plaintiff's injury was her conduct in remaining at the scene to provide assistance to the injured truck driver and witnessing his death some time later which occurred during an interruption to that journey.

The Court concluded that the employer did not engage or encourage the Plaintiff to provide assistance to the victim of a motor vehicle accident. Further, there was no basis to infer that the employer would expect the Plaintiff to assist the victim of a motor vehicle accident that had no connection whatsoever with the employment or where the employee was not personally involved in the accident.

The Court concluded that as properly identified by the Arbitrator, there was no legal obligation on any person who was not directly involved as a driver of a vehicle involved in an accident to stop and render assistance. The only duty upon the worker as a witness was to provide her name and address to a Police Officer attending the scene if requested to do so.

Comment: The case is a reminder that careful consideration needs to be given to the facts and circumstances surrounding the cause of a worker's injury. When properly put in legal framework, it may be that the insured does not have a legal liability to pay compensation.

Date: 5 May 2014

Should you require any further information relating to the above decision, please contact one of the following partners on telephone (08) 9221 3110.

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