SRB Legal

INSURANCE LAWYERS

WORKERS' COMPENSATION CLAIMS WA NEWSLETTER

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1. LEGISLATIVE DEVELOPMENTS

There have been no relevant legislative developments since our November 2014 newsletter.

2. CASE SUMMARIES

GRIGGS –v- ELSEGOOD HOLDINGS PTY LTD [2014] WADC 165

SRB Legal represented the Defendant.

Initially the Plaintiff alleged injuring his left elbow whilst unloading a truck. Some 12 months later, the Plaintiff alleged that he had also suffered injuries to his neck and/or left shoulder.

Whilst based upon the facts of the case the Judge had little difficulty in establishing that the employer had been negligent, in order to be entitled to an award of damages the Plaintiff had to satisfy the trial judge that he had sustained a degree of permanent whole person impairment of at least 15%. To do so, the Plaintiff needed to establish the left elbow, left shoulder and neck symptoms resulted from the accident.

The Plaintiff has the burden of establishing what injury and disability they have suffered and that they are causally related to the accident in which they were involved.

The Judge embarked on a careful examination of all of the medical evidence. Whilst there was little doubt the Plaintiff suffered the left elbow injury, the question was whether the neck and/or left shoulder injury was causally related to the accident.

The Judge explained the law in relation to expert evidence:-

"Expressed very shortly, assuming expertise in the witness, the facts observed by a witness must be identified and proved and facts assumed or accepted by the witness must also be identified and proved and those facts must form a proper basis for the opinion to be given.

Absent those matters the opinion is, strictly speaking, not admissible or if admissible is of diminished weight": **Makita (Australia) Pty Ltd –v- Sproules** (2001) 52 MSWLR 707.

It was for the Plaintiff by his expert witnesses to prove on the balance of probabilities that the neck and/or left shoulder symptoms were causally related to the accident. If the evidence goes no higher than the Plaintiff's symptoms might be causally related, this is insufficient.

The Trial Judge said that he could not accept that just because the Plaintiff was asymptomatic prior to the accident and symptomatic sometime (undefined but perhaps up to a year) after that that is sufficient to satisfy the test of causation.

In this case after a careful analysis of all of the medical evidence the Judge concluded that there was an unexplained gap between the accident and the reporting of neck and left shoulder symptoms: unexplained by the Plaintiff and not adequately explained by the medical evidence. The Judge concluded that the doctors had been unable to establish to a clear link between the accident and the shoulder and/or neck symptoms.

The end result was that the Trial Judge did not accept that the Plaintiff had proven, on the balance of probabilities, the neck and/or shoulder injuries were causally related to the accident. As a consequence they could not be taken in to consideration when calculating permanent whole person impairment. The Plaintiff was not entitled to any award of common law damages as his whole person permanent impairment was less than 15%.

Comment:

This case is a good example of the need for very careful consideration to be given to the medical evidence in circumstances where the injured worker later alleges that they suffered additional injury to that originally reported and claimed. Unless they adduce medical evidence from experts that the subsequent symptoms were, on the balance of probabilities, caused by the work injury, they will fail to satisfy the test. It is therefore imperative where these matters arise that careful consideration be given to whether there is a sufficient causal connection between the accident and the alleged symptoms. The medical evidence must be carefully analysed to determine if it meets the criteria set out above.

BONNEY –v- COMPASS GROUP (AUSTRALIA) PTY LTD [2015] WASCA 6

This case turned on its own facts.

The relevance for our purposes is that the Court of Appeal re-stated what is required by way of giving reasons in a case.

The Court of Appeal said:

"What is required by way of reasons in a particular case will vary according to the nature of the case and the issues raised by the parties. Reasons do not need to be lengthy and elaborate, nor do they need to refer to all evidence led in the proceedings or every submission advanced by the parties. The function of reasons is to provide procedural fairness to a litigant who is entitled to know why he or she has been successful or unsuccessful, and to allow an appeal court to determine whether the decision was based on an appealable error. Reasons will be sufficient if they disclose the reasoning process which led to the result with sufficient certainty to achieve those ends: **Mount Lawley Pty Ltd v Western Australian Planning Commission** [2004] WASCA 149; (2004) 29 WAR 273 [27]; **SNF (Australia) Pty Ltd v Jones** [2008] WASCA 121 [32]. In cases where no fact-finding is involved, the reasons for decision may be sufficiently apparent from what was said by the judge in the course of argument; see **Deeks v Little Moreton Trading Pty Ltd** (1995) 14 WAR 58, 60 – 61, 66."

The Court added that even if the reasons of the primary judge had been inadequate it does not follow that the appeal must succeed. The Court of Appeal is entitled to consider the matter and, if it can do so, it may itself decide the matter: **Mount Lawley [29]**.

The Appeal in this case was dismissed on the basis that none of the grounds had any reasonable prospect of succeeding.

Date: 3 February 2015

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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