Workers Compensation independent review office

WORKERS COMPENSATION COMMISSION DECISIONS

BELINDA GAMBLE
A/PRINCIPAL LAWYER
ALBURY, 21 JULY 2017

GAJKOWSKI V THE CAMDEN SHOW INC [2017] NSWWCC 124

- Recent decision involving the issue of “worker”.
- Involved a young rodeo rider who sustained a severe brain injury.
- As a result, he is severely disabled and will require constant care.
- The issue in this case was whether he was a worker pursuant to Schedule 1?
- The Arbitrator held that he was a worker and entitled to weekly compensation and medical expenses.

GAJKOWSKI V THE CAMDEN SHOW INC [2017] NSWWCC 124

- Held that under cl 15(1) the rodeo rider was engaged for a fee or reward:

  - the opportunity to win substantial prize money and further his career from the exposure at the rodeo gave substance to a reward of a higher level than a mere trophy.

  - evidence that substantial amounts were earnt and the opportunity of advancing his career constituted a “reward”.

- Held that under cl15(1)(c) the rodeo rider was an entertainer:

  - the rodeo rider was engaged to ride bulls *“affording diversion or amusement”*

WORK CAPACITY DECISIONS AND JURISDICTION OF THE WCC

WORKERS COMPENSATION NOMINAL INSURER v DEMASI [2017] NSWWCCPD9

- Appeal - challenge to the Arbitrator's decision declining to exercise his discretion to reconsider his earlier decision under s350(3) of the WIM Act 1998.

- No jurisdiction under s43(1)(d) of the 1987 Act.

- Background: - injuries sustained on 11/11/14
  - no policy of insurance – Workers Compensation Nominal Insurer
  - s74 notice issued on 20/5/15 – s33 and "worker" in issue
  - found to be a "worker" and Orders made for weekly compensation

- s350 WIM Act – application for reconsideration to amend award on the basis that a work capacity decision issued.

- In evidence - email dated 10 March 2015 referring to an attached “provisional acceptance letter” dated 9 March 2015 and confirming PIAWE calculated.

- Held that it was arguable constituted a work capacity decision, however, noted that arbitrator’s determination was more reliable.

- Even if constrained, only during period provisional liability applied.

- Declined to exercise discretion.

- Keating P
  - Arbitrator failed to reach a concluded view as to whether letter was a work capacity decision
  - did not consider jurisdictional issues
  - did not consider binding nature of such a decision

- S43(1)(d) and s43(3) *Workers Compensation Act* 1987.

- Concluded letter of 9/3/15 was a work capacity decision.

- Held that whilst the Respondent had failed to act diligently in placing the work capacity decision before the Commission at first instance, this decision was fundamental to the exercise of Commission's jurisdiction.

- Mr Demasi could and should have taken steps to draw it to the Commission’s attention.
- Did not accept that the description of the letter as a provisional liability letter rendered the decision of no force or effect at the end of the provisional liability period.
- Matter was remitted back for the calculation of the current weekly compensation.

SECTION 261 OF THE WIM ACT 1998

JONES v QANTAS AIRWAYS LTD [2017] NSWWCCPD 11

- Background:
  - Employed by Qantas Airways, voluntary redundant in 1991
  - Completed a Bachelor of Law and practised as a Barrister
  - On 4/4/16 Mr Jones lodged a claim for lump sum compensation and hearing aids
  - s74 notice declined liability on the basis of s254 and s261

- Aware hearing loss suffered by colleagues due to employment

- Admitted claim not made because:
    1. Did not wish to claim against employer; and
    2. Had mistaken belief that hearing aids would be detrimental

- s261(1) WIM Act – 6 months limitation.

- Reliance placed on s261(4) – no bar if failure was occasioned by ignorance, mistake, absence from State or other reasonable cause.

- The Arbitrator held that the opening words of s261(4) require the Commission to determine the reasons for the failure to make a claim.

- No evidence that Mr Jones was ignorant of his rights and obligation.

- Claim was delayed due to subjective belief about the way hearing aids worked. Mr Jones was working as a lawyer:

> "*he is therefore presumed to understand the need to seek professional advice to answer technical questions. It was not reasonable, in all circumstances for him to delay making a claim based on an erroneous belief without taking steps to seek professional advice.*"

- Appeal focused on the Arbitrator's findings as to what constituted "reasonable cause".

- Test of reasonableness – not measured by an objective view of Mr Jones's mindset but objectively in light of every circumstance in the case.

- Held - open to the Arbitrator to find that not only did Mr Jones have an erroneous belief as to the effects of hearing aids but he:

    - Knew he had hearing loss;
    - Believed it was a consequence of noisy employment;
    - Was aware that others had successfully claimed compensation;
    - Elected not to pursue compensation - did not want to claim against his employer;
    - Was qualified in law -would have been aware of time limitations generally;
    - Could have acted on that knowledge without undue delay.

- The Arbitrator's decision was confirmed.

SECTION 32A *WORKERS COMPENSATION ACT* 1987

ROBIN-TRUE v STELLA MARIS COLLEGE [2017] NSWWCC 48

- Determination: whether precluded from a medical assessment as to whether she was a worker of 'highest needs'.

- Background
  - Injured right knee at work on 17/8/09
  - Complying agreement – on 17/1/13 – 12% WPI
  - Right knee replacement
  - Subsequently obtained a report – 32% WPI
  - Insurer's IME – 21% WPI

- Respondent – definition of s32A and "for the purposes of Div 4" required claim for compensation and certificate which exceeded the threshold.

- No prior assessment by an AMS.

- s66(1A) – provides for only one claim
  - does not place any general embargo on number of assessments.

- Held: s66(1A) could not be utilised to restrict an assessment of permanent impairment for a purpose other than a further s66 lump sum claim.

SECTION 67 *WORKERS COMPENSATION ACT* 1987

BARNES v SANDVIK AUSTRALIA PTY LTD [2017] NSWWCC 94

- Background
  - hearing assessments conducted sporadically
  - in 2005, the insurer made a pro-active offer of settlement
  - acceptance of the enclosed cheque
- Agreed
  - offer represented a claim for compensation
  - claim was not finalised by complying agreement
- No legal advice nor medical expert report obtained.

- Applicant argued - entitlement to s67 preserved by the transitional provisions
  - claim made prior 19/6/12 – the provisions of the 2012 amendments do not apply

- Respondent argued
  - acceptance of the claim = resolution
  - claim made 10/2/15 – repeal of s67

- Held
  - complying agreement works to finalise s66 entitlement
  - requires the provision of legal advice
  - given this protection, Mr Barnes could not be considered to have finalised his claim

- Held - clear words of cl 11 , amending legislation will not apply to an applicant who specifically sought compensation under s66 **or** s67 prior to 19/6/12

SECTION 53 *WORKERS COMPENSATION ACT* 1987

THADSANAMOORTHY V TEYS AUSTRALIA SOUTHERN PTY LIMITED [2017] NSW WCC 73

- Background:
  - sustained injury on 11/11/14
  - returned to work on restricted duties
  - deported to country of origin on 2/8/16
  - 4/8/16 – insurer advised and compensation sought under s53
  - s74 notice issued on 22/9/16 – s53 did not apply as no award

- The Applicant no award as no prior dispute

- The Respondent argued had he continued in Australia, he would have remained in employment on restricted duties and s37 may have applied to reduce weekly compensation

- The Commission formed the view that it needed to apply s37 and s32 in order to determine whether or not an award under s53 could be made for continuing weekly payments.
- The Arbitrator noted that s53 required a determination of whether the incapacity for work was likely to be of a permanent nature.
- Evidence was that the condition was prone to deterioration.
- Further noted prior to the Applicant's deportation, the insurer did not have the Applicant Medically examined and did not advance evidence to contradict the Applicant's evidence.
- Award was made pursuant to s53 and s37.

SECTION 32A *WORKERS COMPENSATION ACT* 1987

ABU-ALI v MARTIN-BROWER AUST PTY LTD [2016] NSWWCC 276

- Whether an assessment of the degree of permanent impairment could include a secondary psychological injury for the purposes of determining if Mr Abu-Ali was a worker of high or highest needs

- Facts: - sustained injuries to upper extremities on 5/12/06
  - complying agreement for 2% WPI on 8/9/08
  - accepted secondary psychological injury

- Respondent
  - disputed entitlement to seek an assessment of permanent impairment in respect of his secondary psychological condition
  - relied upon s65A
  - no medical dispute – s319 WIM Act

- Applicant
  - relied on s65A(1)
  - not entitled to compensation under Div 4 of Pt 3
  - no disentitlement to WPI assessment

- s65A(2) - *In assessing the degree of permanent impairment that results from a physical injury or primary psychological injury, no regard is to be had to any impairment or symptoms resulting from a secondary psychological injury*

- Held: -omission of *"under this Division"* from s65A(2) meant no regard could be had to a secondary psychological condition

- Purpose of s32A definition – provide a higher level of benefits if assessed more than 20% or 30%

- No provision for a worker not entitled to be assessed for non economic loss compensation

CONTACT US

wiro.nsw.gov.au or 13 9476

Subscribe to our WIRO Bulletin:

editor@wiro.nsw.gov.au