WIRO WIRE – Court of Appeal publishes its decisions in *Hochbaum* and *Whitton*

17 June 2020

The Court of Appeal (Brereton & White JJA & Simpson AJA) today handed down its decision in the matters of ***Hochbaum v RSM Building Services Pty Ltd; Whitton v Technical and Further Education Commission t/as TAFE NSW*** [2020] NSWCA 113.

In each matter, the Court allowed the appeal, set aside the decisions made by President Judge Phillips and ordered that the decision of the Arbitrator be reinstated. In *Hochbaum*, the parties agreed to bear their own costs, but in *Whitton*, a costs order was made against the respondent.

The **Headnote** to the decision is set out below, but practitioners are strongly encouraged to read the full text of the decision.

> The appellants were two workers who were injured in the course of their respective employment. Each made a claim for compensation, and was in receipt of weekly compensation payments, prior to the introduction of the new workers compensation regime introduced in 2012. The 2012 amendments replaced s 39 (1) of the *(NSW) Workers Compensation Act 1987 ("the 1987 Act"),* which now provides that a worker has no entitlement to weekly payments of compensation after an aggregate period of 260 weeks, whether or not consecutive, in respect of which a weekly payment has been paid or is payable. However, s 39 (2) provides that the section does not apply to an injured worker whose injury results in permanent impairment if the degree of permanent impairment resulting from the injury is more than 20%.
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> Pursuant to the commencement of the legislative regime, the respondents' insurers ceased paying weekly payments to the appellants with effect from 26 December 2017, being 260 weeks after 1 January 2013. Subsequently, the appellants were assessed as having a degree of permanent impairment resulting from their relevant work injury in excess of 20%. Weekly payments were resumed with effect from the date of the assessment; however, liability to make payments in respect of the period between 26 December 2017 and the date of the assessment was disputed.
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> In each case, an arbitrator held that the worker was entitled to weekly payments for the disputed period, but both decisions were overturned on appeal by the President of the Workers Compensation Commission, who held that the effect of s 39 (2) was to displace s 39 (1) only from the date when the worker was assessed to have a degree of permanent impairment resulting from the injury of more than 20%. The applicants, being aggrieved by the decisions of the President of the Commission in point of law, appealed from that holding, as of right, to this Court. The Court found there were two main limbs underlying the President's decision (which formed the two primary issues considered on appeal); first, that assessment is a precondition to liability given the words of s 39 (3); and secondly, that s 39 (2) has a temporal aspect as it operates on the state of affairs that obtains at the relevant date.
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> **Held, allowing the appeal:**
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> **per Brereton JA (White JA agreeing)**
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> On the proper construction of s 39, the 260-week limit never applies to a worker whose degree of permanent impairment resulting from the relevant injury exceeds 20%, regardless of when that threshold is crossed, and regardless of whether or when it is formally assessed as having been crossed: at [1], [45].

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As to the first issue, per Brereton JA (White JA agreeing)

By incorporating Pt 7 of Ch 7 of the *(NSW) Workplace Injury Management and Workers Compensation Act 1998*, through s 65 of *the 1987 Act*, the words "*to be assessed*" in s 39 (3) provide the methodology and process by which impairment is to be measured and any dispute about its existence or extent resolved; the words do not mandate that there must have been an assessment before s 39 (2) is engaged: at [2], [3], [45], [46], [50], [82].

As to the second issue, per Brereton JA

The date on which an impairment threshold is crossed is not a relevant consideration in any question arising under s 39 of the 1987 Act, and the only relevant question is, what degree of permanent impairment has resulted from the worker's injury. For the purposes of s 39, while impairment may improve or deteriorate over time, or not be established until long after the injury, it is the final degree of permanent impairment that results from an injury that is determinative of whether the worker is in the exempt class. There can ultimately be only a single degree of permanent impairment that results from an injury; the contrary view is incongruous with the concept of permanency: at [53]-[56].

As to the second issue, per White JA

The degree of permanent impairment ultimately ascertained does not necessarily arise from the date of the worker's injury. In some cases the worker's degree of permanent impairment will date from the injury; but in others the ultimately assessed degree of permanent impairment would have been occasioned by later events, such as adverse results of surgery or psychological sequelae, that did not exist earlier: at [8], [9], [11], [12].

per Simpson AJA

It is necessary to go no further than the text of s 39 to resolve the present dispute. Nothing in any of the three subsections of s 39 states, explicitly or implicitly, that removal of the subs (1) bar is dependent upon the date of the assessment of the degree of permanent impairment as distinct from the existence of the degree of permanent impairment. The language of subs (2) points in the opposite direction: the foundation for the removal of the subs (1) bar lies in the existence of a degree of permanent impairment exceeding 20%. Subsection (3) does no more than specify the mechanism by which the degree of permanent impairment is to be assessed; nothing in subs (3) suggests that an assessment may only be prospective. If it were necessary to go beyond the text of s 39, resort to principles of statutory construction would support the same approach: at [90]-[91].

Note for Approved Lawyers

Lawyers for workers whose claims were adversely impacted by the Presidential decisions are encouraged to review their client's claims.

Lawyers are reminded that an opinion from Counsel may be funded by WIRO relating to the application of the decision to their client's claim.

Regards

Phil Jedlin

Acting Workers Compensation Independent Review Officer