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CASE REVIEWS

Recent Cases

These case reviews are not intended to substitute for the headnotes or ratios of the cases. You are strongly encouraged to read the full decisions. Some decisions are linked to AustLii, where available.

Court of Appeal Decisions

Court refuses to grant leave to appeal against an award for hearing aids under s 60 WCA

Bluescope Steel (AIS) Pty Ltd v Sekulovski [2019] NSWCA 136 – Gleeson JA, White JA & Emmett AJA – 13 June 2019

On 10 May 2019, the Court dismissed the appellant's application for leave to appeal against a decision of Wood DP, which confirmed an award for the cost of hearing aids under s 60 *WCA, and* reserved its reasons. These are summarised below.

Background

The worker received several consent payments for hearing loss during his employment with the appellant and on 21 August 2002, the Compensation Court's Medical Panel certified under s 122 (5) *WIMA* that he had suffered 1.9% binaural loss of hearing due to boilermaker's deafness or deafness of a similar origin. On 22 June 2016, an audiologist recommended that the provision of bilateral digital hearing aids and on 31 January 2017, the worker made a claim for hearing aids under s 60 *WCA.* The appellant disputed that claim and argued it was not supported by a medical report from an ENT specialist.

On 6 July 2017, Dr Tamhane (ENT specialist) opined that the worker had suffered 7.1% binaural hearing loss and that his employment with the appellant had *"the tendencies, incidents and/or characteristics"* that gave rise to a real risk of boilermaker's deafness or deafness of similar origin. He recommended bilateral digital hearing aids. However, the appellant asserted that this report was invalid because the assessment of binaural hearing loss *"considerably exceeded"* the percentage certified in the 2002 Certificate. It argued that the hearing aids were not reasonably necessary for the work-related noise induced hearing loss.

At first instance, the **Senior Arbitrator** awarded the worker the cost of digital hearing aids under s 60 *WCA.*

Presidential Appeal

The appellant alleged that the Senior Arbitrator erred: (1) in finding that the worker had discharged his onus of proving that his need for hearing aids was "as a result" of injury, within the meaning of s 60 *WCA;* (2) in so far as she based her determination upon a medico legal assessment of 7.1% binaural hearing loss in the face of the 2002 Certificate, which assessed 1.9% binaural hearing loss due to industrial deafness; (3) she wrongly found that the worker's medico legal expert attributed the entirety of his hearing loss to industrial deafness; (4) she failed to address the meaning of the phrase "as a result of injury" as contained in s 60 *WCA;* and (5) she failed to address its submissions and failed to exercise jurisdiction.

Deputy President Elizabeth Wood held that no medical evidence displaced Dr Tamhane's evidence regarding the matters in dispute and his opinion was supported by evidence of the audiologist and the worker's unchallenged statement. There was no dispute that his hearing difficulties were noise-induced and she found that the hearing aids were reasonably necessary for the purposes of s 60 *WCA.*

Court of Appeal

The appellant applied for leave to appeal on 7 grounds and alleged that DP Wood: (1) failed to apply s 60 (1) (a) *WCA* correctly; (2) failed to consider and apply s 122 (6) *WCA* as to the "conclusive evidence" of the 2002 Certificate; (3) made crucial findings that were not open on the evidence; (4) made findings to the effect that the Worker's hearing loss, as assessed by Dr Tamhane, was in fact caused by his employment with Bluescope where the worker had not worked for Bluescope since 31 October 2000 and the she was not an expert; (5) erred in finding that the whole of the Worker's hearing loss as at the time of the examination by Dr Tamhane was work related, in circumstances where the Worker had ceased his employment on 31 October 2000 and there was no medical or other evidence to support such a finding and she was not an expert; (6) erred in finding that there were no other factors available, other than work related injury, that could or might explain the deterioration in the Worker's hearing between 31 October 2000 and the time of his examination by Dr Tamhane; and (7) failed to set out adequate or lawful reasons for her decision.

Emmett AJA (with whom Gleeson JA and White JA agreed), noted that it was common ground that the 2002 Certificate certified the percentage to total hearing loss and s 122 *WIMA* (then in force) required the Registrar of the Compensation Court to refer a medical dispute to a Medical Panel upon the application of the worker or employer. Under s 122 (6), that Certificate was conclusive evidence of the matters certified. He stated, relevantly:

> 23. The thrust of the appellant's complaint is that neither the Arbitrator nor the Deputy President applied s 122 or s 326 of the 1998 Act. Both s 122 and s 326 are clear in their terms. There has been no suggestion that there is any doubt as to their effect, or that there is any misapprehension on the part of the Commission and its members as to their effect. The complaint is simply that both the Arbitrator and the Deputy President failed to apply s 122.

However, a fair reading of DP Wood's reasons makes it clear that she did not ignore s 122 and she referred to the number of claims that the worker made under s 66 *WCA* for his hearing loss and noted that he received compensation for losses attributable to noisy employment. She also noted that he received compensation for a total binaural hearing loss of 8.38% and under s 122 (6) *WIMA*, that the Medical Panel's Certificate was conclusive as to the matters certified. He stated:

> 26. Had the Deputy President then made a finding that the worker's binaural hearing loss was something different from 1.9%, either the worker or Bluescope may have had a basis for a complaint. However, notwithstanding the contentions advanced on behalf of Bluescope, the Deputy President did no such thing.

However, DP Wood found that Dr Tamhane's report did not opine that the need for hearing aids depended upon the extent of the hearing loss. He stated, relevantly:

> 30. That reasoning and those findings were not inconsistent with the 2002 Certificate. The Deputy President expressly accepted that the Certificate was conclusive evidence as to the matters certified. That point, however, was that the evidence of Dr Tamhane supported the conclusion that, assuming the 2002 Certificate was correct, the need for hearing aids was the result of work-related hearing loss.

Accordingly, his Honour held that DP Wood did not err and there is no reason to suggest that the Commission or its officers or members will, in the future, ignore the clear terms of s 122 and, if relevant, s 326 *WIMA*. As the appeal would not raise any question of law or principle, leave to appeal was refused with costs.

Journey claim under s 10 (1) WCA –Deputy President incorrectly determined an issue that was not the subject of the Appeal – Award for the respondent entered.

Ballina Shire Council v Knapp [2019] NSWCA 146 – Basten JA, Macfarlan JA & Payne JA – 20 June 2019

The appellant employed the worker as a plant operator. He usually worked on weekdays and travelled from his home in Evans Head to his workplace at Alstonville. However, on 5 July 2014, he was to work overtime as a traffic controller with a different crew in Ballina and he left home at about 6am to travel to either the Works Depot or directly to the worksite. While on-route, he had a head-on collision and Police determined that he was 'at-fault' and charged him with dangerous driving causing death. They opined that the accident occurred because while driving, and just before the accident occurred, he was using his mobile telephone and lost control of his car. The worker has no memory of the accident, but he pleaded guilty and was sentenced in the District Court of NSW. He then claimed weekly payments and medical expenses for his injuries and the Insurer disputed liability, essentially relying upon ss 4 (a), 10 (1), 10 (1A) and 10 (3A) *WCA.*

Arbitrator Ross Bell awarded the worker s 60 expenses and gave the parties leave to apply if any issue about weekly payments could not be resolved. His reasons are summarised below.

> *Real and substantial connection – s 10 (3A) WCA*

- The employer gave the worker a mobile telephone to contact his work supervisor. As he had his gear with him and there was no need for him to go to the Depot, he found that the only explanation for that calls was that the worker was telling his supervisor that he was running late and would go straight to the work site and the logical inference was that these *"were about work".*
- It was not necessary to establish a direct causal connection to the employment (see: *Namoi Cotton Co-Operative Ltd v Easterman* [2015] NSWWCCPD 29; *Dewan Singh and Kim Singh t/as Krambach Service Station v Wickenden* 2014] NSWWCCPD 13; and *Field v Department of Education and Communities* [2014] NSWWCCPD 16. As a result, the 'relatively broad' test of 'real and substantial connection' in *Field* was satisfied.

Serious and wilful misconduct – s 10 (1A) WCA

- The appellant argued that the use of a mobile telephone while driving, speeding and having alcohol in his bloodstream established serious and wilful misconduct under s 10 (1A) *WCA*. However, it had not raised the alcohol issue in its dispute notice and required leave to do so.
- The Arbitrator noted that s 289A (4) *WIMA* allows a new issue to be referred if it is in the interests of justice to do so, he did not need to consider this matter because the Police and the District Court formed the view that alcohol was not a causative factor. There was no evidence that the worker knew that he had alcohol in his system and the authorities require knowledge of the risk of injury. He cited the decision of Roche DP in *Karim v Poche Engineering Services Pty Ltd* [2013] NSWWCCPD 24 ("*Karim"*) as authority that: (1) the onus on proving serious and wilful misconduct rests on the respondent; (2) 'serious and wilful misconduct' is more than carelessness, negligence or disregard for others; (3) where the risk of loss or injury is remote, or if probable, trivial, it will not ordinarily be serious misconduct, and (4) the gravity of the conduct is not to be judged by its consequences.
- Further, in *Sawle v Macadamia Processing Co Pty Ltd* [1999] NSWCC 26; 18 NSWCCR 109 (*Sawle*) O'Meally CCJ stated:

  > [24] Serious and willful misconduct is conduct beyond negligence, even beyond culpable or gross negligence. In order to establish serious and willful misconduct, it must be demonstrated that the person performing an act or suffering an omission knows it will cause risk of injury or acts in disregard of consideration whether it will cause injury. The word 'willful' connotes that the applicant must have acted deliberately. As it seems to me, in order to establish serious and willful misconduct, a person accused of it must be shown to have knowledge of the risk of injury and, in the light of that knowledge, proceeded without regard to the risk.

- He held that exceeding the speed limit by 11 kph and using a mobile telephone while driving *"did not reach the standard of serious and wilful misconduct and that the conduct must be beyond culpable or gross negligence"*.
- Further, based upon the decisions in *Hatzimanolis v ANI Corporation Ltd* [1992] HCA 21 and *Vinidex Pty Ltd v Campbell* 2012] NSWWCCPD 6 (*Campbell*), the worker's conduct was not sufficient to take him outside his employment because: (1) it was necessary for him to travel to the depot or worksite; (2) the telephone that he used was issued by the employer; and (3) contact with the supervisor was for work purposes.

Presidential Appeal

The Insurer alleged that the Arbitrator erred: (1) By failing to take account, or adequate account, of the totality of the worker's conduct that resulted in the accident; (2) By failing to allow it to raise alcohol consumption as an issue; (3) By misunderstanding the relevance of consumption of alcohol; (4) In the application of the relevant authorities to the facts in this case; (5) In finding the injury was not attributable to gross misconduct and in relying on the same grounds advanced in respect of serious and wilful misconduct to find that the injury was a personal injury within the meaning of s 4 (a) WCA; and (6) in making an award under s 60 WCA.

Deputy President Elizabeth Wood determined the appeal 'on the papers' and observed that grounds (1), (3), (4), (5) and (6) depended on the outcome of ground (2) - whether the insurer could raise the alcohol issue.

She rejected ground (2) and noted that in *Mateus* at [46], Roche DP set out the factors relevant to the exercise of the discretion under s 289A (4) WIMA, as follows:

> (a) the degree of difficulty or complexity to which the unnotified issues give rise;
>
> (b) when the insurer notified that it wished to contest any unnotified issue/s;
>
> (c) the degree to which the insurer has otherwise fulfilled its statutory obligation to notify the worker of its decision disputing liability;
>
> (d) any prejudice that may be occasioned to the worker, and
>
> (e) any other relevant matters arising from the particular circumstances.
>
> He also stated that the following matters should be considered:
>
> > (a) a decision by an insurer to dispute a claim for compensation should not be made lightly or without proper and careful consideration of the factual and legal issues involved;
> >
> > (b) any insurer seeking to dispute an unnotified matter is seeking to have a discretion exercised in its favour and, accordingly, must act promptly to bring the matter to the attention of the Commission and all other parties;
> >
> > (c) any unreasonable or unexplained delay in giving notice of an unnotified matter will be relevant to the exercise of the discretion;
> >
> > (d) in exercising its discretion, the Commission may have regard to the merit and substance of the issue that is sought to be raised;
> >
> > (e) in assessing prejudice to the worker, it will be significant to consider when and in what circumstances the worker was first made aware of the unnotified issue that is sought to be raised;
> >
> > (f) though it will be relevant to the exercise of the discretion to keep in mind that the Commission must act according to equity, good conscience and the substantial merits of the case, those matters will not be determinative, and
> >
> > (g) the general conduct of the parties in the proceedings will also be relevant to the exercise of the discretion. (emphasis in original)

DP Wood held that that the appellant failed to explain the delay in notifying the worker of the alcohol issue. The worker would be prejudiced if leave to raise it was granted and there was little evidence that alcohol was a contributing factor to the accident. However, the Arbitrator erred at law because he did not explain why he only considered the conduct of driving "slightly" above the speed limit and using a mobile telephone in making his findings about the conduct. He failed to consider facts that were in the evidence and put to him in submissions, that: (i) the worker was travelling at a relatively high speed on a two-way carriageway without barriers; and (ii) while making a telephone call he took one hand off the steering wheel: see *Northern NSW Local Health Network v Heggie* [2013] NSWCA 255; 12 DDCR 95, [171].

Based upon the decision in *Chubb Security Australia Pty Ltd v Trevarrow* [2004] NSWCA 344; 5 DDCR 1, DP Wood decided to re-determine the following issues:

(1) The identification of the actions constituting the conduct that resulted in the injury;

(2) Whether that conduct constituted serious and wilful misconduct pursuant to s 10 (1A) WCA, to disentitle the worker to benefits under s 10 (1) WCA;

(3) Alternatively, whether the worker suffered a personal injury arising out of or in the course of his employment; and

(4) If so, whether the conduct was gross misconduct, taking him out of the course of his employment. She held as follows:

In relation to issue (1), the evidence indicates that the accident most likely occurred because of driver distraction due to the use of a mobile telephone;

In relation to issue (2), the worker's actions constituted serious and wilful misconduct under s 10 (1A) *WCA* and he was not entitled to benefits under s 10 (1) *WCA*. She stated:

> 181. The serious nature of Mr Knapp's conduct is reflected in the description of the driving as "dangerous" driving in the criminal charges that were laid against him. While those charges encompass the consequences of the conduct (death or grievous bodily harm), which are not to be considered here, the legal descriptor is relevant to the way Mr Knapp was driving when the collision occurred. As Wells J said:
>
> > The driving in a manner dangerous element of the offence is due to the distraction and inattention that was caused by his use of the mobile phone in combination with the excessive speed …
>
> 183. The risk of injury flowing from Mr Knapp's conduct in those circumstances was at least probable and, on any view, likely to cause significant injury.

Also, the seriousness of the conduct should be considered according to contemporary social standards and using a hand-held mobile telephone while travelling at speed and over the speed limit is a serious matter. Because of Police advertising campaigns, the risk of injury from both speeding and from using a hand-held telephone is well publicised and must be regarded as "common knowledge" and must have been apparent to the worker, or he proceeded to act without regard as to whether it would cause injury. He did not challenge the deliberateness of his conduct in the District Court.

In relation to issue (3), there was a causal, rather than a temporal connection with employment, and the worker did not make the telephone calls in the course of his employment. However, his injuries arose out of his employment because he had no other reason to telephone his employer. She stated that the authorities indicate that if the injury arose out of employment, the misconduct is irrelevant, even when the misconduct is such that it takes the worker outside of the course of his employment.

Accordingly, she held that the injuries were compensable under s 4 (a) *WCA* and she remitted the matter to the Arbitrator to determine the weekly payments claim.

Court of Appeal

At the completion of oral arguments on 7 June 2019, ***Payne JA (with whom Basten JA and Macfarlan JA agreed) allowed the appeal***. The Court set aside DP Wood's orders, allowed the appeal against the Arbitrator's determination and entered an award for the respondent. It also dismissed the worker's cross-appeal and reserved its reasons, which are summarised below.

- The Court noted the appellant's argument that the only issue before DP Wood was whether, in determining that the worker was entitled to compensation by reason of his s 10 journey claim, the Arbitrator's decision was affected by any error of fact, law or discretion. It was common ground that it did not need to consider any other issues if it upheld this ground.

- The worker conceded that ground (3) was established and DP Wood erred by embarking upon a process of rehearing, which was prohibited to her by s 352 *WIMA.* His Honour stated that the language of s 352 (5) *WIMA* makes it clear that the dicta in *Chubb,* which DP Wood relied upon, had no role to play in the appeal before her. Having dismissed the claim under s 10 *WCA* she had no jurisdiction to determine whether the worker was entitled to compensation on some other basis.

- Regarding the cross-appeal, the Court's jurisdiction under s 353 *WIMA* is limited to correcting error "in point of law". However, the worker did not identify any such error and instead asserted that an error of fact finding can amount of an error of law, based on the decision of McColl JA in *Onesteel Reinforcing Pty Ltd v Sutton* [2012] NSWCA 282. He rejected that assertion and stated that all McColl JA was doing in the cited passages was explaining that the well-known principle that a *"no evidence ground"* may be characterised as *"a decision of a question with respect to a matter of law"*: *Kostas v HIA Insurance Services Pty Ltd t/as Home Owners Warranty* (2010) 241 CLR 390; [2010] HCA 32 at [59] (French CJ) and a *"question of law": Kostas* at [90] - [91] (Hayne, Heydon, Crennan and Kiefel JJ). He held, relevantly:

  > 38. The relevant question is whether there was evidence available from which the Deputy President could draw inferences and make findings. Whether the evidence was sufficient was a matter for the Deputy President to determine, so long as the evidence taken into account could be described as rationally probative of the existence of a fact in issue.

- The only grounds that the worker addressed orally related to the speed at which he was driving when the accident occurred (ground 1) and whether he was holding a mobile telephone near his ear at that time (grounds 1 and 6). He held:

  > 39. In relation to the speeding finding addressed by ground 1, the point of law was said to be that *"the document upon which the speed estimate was based, the expert report of Mr Parker, was based on an assumption that wasn't proved in the evidence".* Senior Counsel for the cross-appellant accepted that this issue was not raised before the Deputy President, which is itself a formidable hurdle to success on this point in this Court.

  However, ample evidence about speeding was available to the DP Wood and the fact that inconsistent observations were made by another eye witness is not to the point. Also, the challenge to her finding that he held his mobile telephone to his ear when the accident occurred does not raise any arguable error of law. The evidence indicated that he could only have made that call by taking the phone in his hand and putting it up to his ear. Whether or not that was *"in a sense, excusable or explicable in terms of him trying to contact his employer"*, it did not identify any error of law.

Basten JA stated that although it is clear that DP Wood exceeded her function in upholding the claim on a basis outside the scope of the appeal under s 352 (5) *WIMA,* her conclusions were wrong in law and the Arbitrator rightly dealt with the matter as a *"journey claim"* under s 10 *WCA.* He stated (citations excluded):

> 2. …If an injury in the course of travelling from home to work was an injury arising out of or in the course of employment for the purposes of s 4 of the *Workers Compensation Act*, s 10 would be otiose. That conclusion is not affected by the fact that he was making a telephone call to his supervisor, nor by the fact that he was using a mobile phone supplied by his employer. Even if the car had been supplied by his employer, the position would not be different.

3. The Deputy President noted that the phrase *"arising out of … employment"* invokes a causal connection. That is no doubt correct, but the connection must be more than travelling from home to work. The Deputy President recognised that difficulty and expressly relied upon reasoning of the High Court in *Hatzimanolis v ANI Corporation Ltd* and *Comcare v PVYW*. Each case involved an "interval" claim, that is, a claim for injuries sustained between two intervals of employment while the employee was at a place required in order to continue or complete the employment duties at a future time. This was not an interval case. The concept of the course of employment was not to be expanded in this case. Further, the activity had to be one induced or encouraged by the employer. As the joint reasons in *PVYW* stated:

> [35] Because the employer's inducement or encouragement of an employee, to be present at a particular place or to engage in a particular activity, is effectively the source of the employer's liability, the circumstances of the injury must correspond with what the employer induced or encouraged the employee to do. It is to be inferred from the factual conditions stated in *Hatzimanolis* that for an injury to be in the course of employment, the employee must be doing the very thing that the employer encouraged the employee to do, when the injury occurs.

His Honour concluded that if this was a legitimate subject of inquiry by DP Wood, her reasoning and conclusion were in error, but this conclusion was not necessary to support the Court's orders in view of the worker's concession that this finding was outside the scope of the appeal.

Nature of appellate review of an assessment of severity of non-economic loss under s 16 of the Civil Liability Act 2002 (NSW)

White v Redding [2019] NSWCA 152 – Macfarlan JA (Gleeson JA & White JA (agreeing) – 24 June 2019

Background

On 12 January 2014, the respondent was hit in her left eye by a tennis ball, which was struck by the appellant while he was paying an informal game of cricket in the Function Room at Manly Lifesaving Club. She suffered 97% loss of vision in that eye and claimed damages against the Club and the appellant. The proceedings against the Club resolved pre-trial, but the Primary Judge (Russell SC, DCJ) directed the entry of judgment for the respondent against the appellant in the sum of $692,806.30.

On appeal, the Court identified the following issues: (1) whether the trial judge erred in assessing the severity of the respondent's economic loss as 55% of a most extreme case; (2) whether the primary judge erred in assessing her loss of future earning capacity; and (3) whether the trial judge erred in making an allowance of $25,000 for the possible cost of contact lenses.

The Court dismissed the appeal and held, relevantly:

> ***Question (1) – Per Gleeson & White JJA (Macfarlan JA dissenting):***
>
> (i) The test for appellate review of an assessment of the severity of non-economic loss under s 16 of the *Civil Liability Act 2002* (NSW) is the *"deferential standard"* stated in *House v The King* (1936) 55 CLR 499.

Minister for Immigration and Border Protection v SZVFW [2018] HCA 30; *Costa v The Public Trustee of New South Wales* [2008] NSWCA 223; *Miller v Jennings* (1954) 92 CLR 190; *Hall v State of New South Wales* [2014] NSWCA 154; *Metaxoulis v McDonald's Australia Ltd* [2015] NSWCA 95; *Singer v Berghouse* (1994) 181 CLR 201; *Southgate v Waterford* (1990) 21 NSWLR 427; *Berkeley Challenge Pty Ltd v Howarth* [2013] NSWCA 370, considered.

House v The King (1936) 55 CLR 499; and *Hornsby Shire Council v Viscardi* [2015] NSWCA 417, applied.

(Per Macfarlan JA)

(ii) The test for appellate review of an assessment of the severity of non-economic loss under s 16 of the *Civil Liability Act 2002* (NSW) is the "correctness standard" of appellate review identified in *Warren v Coombes* (1979) 142 CLR 531.

Miller v Jennings (1954) 92 CLR 190; *House v The King* (1936) 55 CLR 499; *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30, considered.

Warren v Coombes (1979) 142 CLR 531 and *Hall v State of New South Wales* [2014] NSWCA 154, applied.

(Per Macfarlan JA, Gleeson and White JJA agreeing)

(iii) Taking into account the advantage the primary judge had over the Court, the Primary Judge's conclusion that the severity of the respondent's non-economic loss was 55 per cent of the most extreme case was not erroneous: [30], [78], [80].

Question (2) - (Per Macfarlan JA, Gleeson and White JJA agreeing)

(i) There was no error in the primary judge assessing the respondent's future economic loss in the way that he did, notwithstanding the absence of evidence of the earnings of persons in certain potentially relevant occupations: *State of New South Wales v Moss* (2000) 54 NSWLR 536 applied.

Question (3) - (Per Macfarlan JA, Gleeson and White JJA agreeing)

(ii)There was no error in the primary judge making a 50 per cent allowance for the cost of contact lenses to the respondent.