

Welcome to our latest edition of **GD NEWS** that brings to you information on new trends and issues that impact on the employment and insurance market in Australia. We can be contacted at any time for more information on any of our articles.

## Labour Hire - sharing the risk

In recent times industry has wholeheartedly embraced the notion of outsourcing some or all of its labour force. A major driving factor in this move has been the apparent cost savings which can be achieved. Where injury to a worker occurs, however, the legal result can sometimes displace the commercial intent of labour hire arrangements.

A recent decision of the NSW Court of Appeal shows some of the hidden ramifications which 'labour hire' can give rise to.

The case - *Glynn v Challenge Recruitment Australia Pty Limited* [2006] NSWCA 203 - is important for 2 reasons: first it settles a recent controversy over the effect of s151Z(2) of the Workers Compensation Act 1987 (the Act) on judgments against joint tortfeasors.

Second, it makes it clear that labour hire companies face a stiff test in seeking to absolve themselves from liability to workers for injury suffered whilst at work.

The facts were extremely common. The plaintiff, Glynn, was employed by the labour hire company (LHC). He was sent by it to work at the premises of a third party (the host).

His employer, the LHC, gave him some instruction in OH&S and some documentation indicating how important such matters were to it. No-one from the LHC, however, ever visited the site where the plaintiff was working.

One day whilst on the host's site the plaintiff was required to climb a 6 metre extension ladder. A supervisor of the host was nearby and, thought the plaintiff was securing the base of the ladder. He wasn't, the ladder slipped, and the plaintiff fell, suffering significant injuries.

Proceedings were commenced against both the LHC and the host. After a time, the plaintiff discontinued against the host.

At hearing, the trial judge found that both the LHC employer and the host had breached the duty of care they each owed the plaintiff. Because of the provisions of s151Z of the Act, the judge was obliged to determine respective 'proportions' of liability or blame among the 2 defendants. He felt this was in the ratio 35% LHC / 65% host.

The judge then thought that he was required to give judgment against the LHC only for its 'share' of the liability - that is, 35% of the damages found to be payable. Because the plaintiff had not continued his proceedings against the host, this effectively meant that he received a judgment for only 35% of his damages.

The Court of Appeal held this was wrong. The plaintiff was entitled to a judgment for the whole of his damages against the LHC - over \$500,000. It was up to the LHC to try and recover from the host the host's 65% 'share' of liability.

Also, the LHC argued that there was nothing it could have done to prevent the incident. It said the cause of the plaintiff's injury was a chance act of negligence by the host.

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This argument was rejected. The Court said that the employer's duty to provide a safe system of work is not negated when the employee is sent to work for a customer - it could not be delegated. The duty extends to requiring a LHC to ensure that its employees are not instructed to, and do not, carry out work in a manner which is unsafe.

Here, the LHC did nothing towards safe working conditions at the host's premises, not even visiting the site to see what the working conditions were. In those circumstances it had clearly been negligent.

Some potential issues arising from the decision are:

- the LHC - if it does not want to pay the whole \$500,000 - must sue its customer for contribution. This may well be commercially unattractive or impossible.
- if the LHC does sue the host, the host will need to look to its public liability policy to cover the claim - and meet a significant deductible. Yes, it has avoided paying workers compensation premium by outsourcing, but may now have an even greater expense on its hands.
- if the plaintiff had not sued the LHC, but only the host, the host would have to pay the whole \$500,000 to the plaintiff and then look to the LHC to recover its 'share'

In all, from a risk point of view, outsourcing does not always produce an ideal result. Management - of both labour hirers and hosts - should consider carefully their respective risk potential as a significant factor in commercial outsourcing arrangements.

## **No Liability For Criminal Conduct Of A Third Party**

Is an employer liable for the criminal actions of a third party? In some situations employees may be assaulted at the workplace in connection with their work activities. The Courts are then faced with claims where injured employees seek to blame their employers for the criminal activities of a third party. The New South Wales Court of Appeal has recently had an opportunity to consider such a type of claim, in *Berkeley Development Association Inc v Gralton* and *Berkeley Development Association Inc v Crawford*.

The claims involved an incident at Berkeley Neighbourhood Youth Centre. The Berkeley Neighbourhood Youth Centre had been established in Wollongong in an attempt to address problems in the area resulting from anti-social and criminal activities of unemployed teenagers. The Centre was supported by grants from the Premier's Department, the Department of Community Services and the Council and also received modest amounts from donations and membership fees. In February 1999 the Centre had one full-time employee and between 30 and 40 part-time employees. There were also a group of volunteers, some of whom were also part-time employees.

On 3 February 1999 two of the clients of the Youth Centre, wanting to play pool in the early afternoon, brandished a replica gun and terrorised three women in the Centre including a volunteer, an employee and an employee of the Illawarra Health Service who was seconded to the Association. The women claimed as a consequence of the clients' activities they suffered nervous shock. Shelley Gralton, who was employed and paid by the Illawarra Area Health Service commenced proceedings against the Association and the Health Service based on their alleged failures to exercise reasonable care for her safety. Similar claims were made by Beth Crawford who was the volunteer and Christine Humphreys, an employee. Humphreys' claim resolved prior to hearing. The other two claims proceeded to hearing before Judge Geraghty in the District Court who found in favour of the claims of both women and awarded substantial damages.

The Association appealed. There was also a cross-appeal by the Health Service.

The main issues before the Court of Appeal were the issues of breach of duty of care and causation. At trial the claimants had relied on the report from Mr Jennings, a security expert, who had also provided oral evidence. The Trial Judge despite finding for the claimants did not accept his evidence. The Trial Judge found that steps recommended by Jennings, including back-to-base cameras, metal detectors and static guards would have been very expensive and may have deterred young people from attending the Centre. The claimants also sought to rely on a Council safety audit and safety program and notices from WorkCover that were issued in March 1999 which included directions to develop systems of work which would "control the risks of injury to employees from clients exhibiting challenging or aggressive/assaultive behaviours." The Trial Judge concluded that there had been a breach of duty based on what the Judge concluded were measures that should have been taken. Those measures were not referred to in the expert evidence.

The appeals were dismissed by the Court of Appeal. In essence the Court of Appeal determined that it was not open to the Trial Judge to make a finding that a number of simple and inexpensive measures could have been taken to protect staff when

the Trial Judge's findings were inconsistent with the expert evidence. The Trial Judge had also not considered the issue of causation. The onus was on Gralton and Crawford to establish that adoption of steps by the Association would have minimised the traumatising events and this had not been done.

The decision again demonstrates how difficult it is for a person injured as a consequence of criminal activities of a third party to succeed in a claim against their employer. An injured person must be able to establish not only that there were measures that could have been taken by the employer which were not taken but also that the failure to implement these measures caused the injury. Cost implications will also factor into the determination of what are reasonable measures to take.

### **Are Rehabilitation Expenses Recoverable?**

In NSW, if an employee is injured whilst travelling to or from their place of employment then (unless the circumstances of their injury fall within particular exceptions) the injured person will be entitled to payments of workers compensation. It is often the case with so-called journey claims that a negligent third party will be involved. If the injured person recovers damages against this negligent third party then the negligent third party will be liable to repay to the workers compensation insurer the workers compensation payments made to or on behalf of the injured worker. This is usually a relatively straightforward exercise. However, sometimes the payments made by the workers compensation insurer should not have been paid. It may be argued that the compensation claim was not properly managed by the workers compensation insurer and the payments were not properly payable or that the payments were not necessary in the circumstances. Where does this leave the injured worker's damages claim? Payment of rehabilitation expenses by a workers' compensation insurer is a particularly contentious issue.

In *State Rail Authority of New South Wales & Anor - v - Brown* the Court of Appeal considered this issue.

Ian Brown was a passenger who suffered injuries when the train in which he was travelling to work collided with a derailed coal train in the Hexham area. Brown alleged that he sustained injuries to his neck, shoulder, back and psychological injury as a consequence of the accident. At the time of the trial Brown was in receipt of weekly payments of compensation and substantial out-of-pocket expenses and rehabilitation expenses had also been paid by the workers compensation insurer of his employer. More than \$28,000 had been paid in rehabilitation expenses.

At trial the defendants sought to argue that the out-of-pocket expenses, in particular the rehabilitation expenses, were not recoverable in their totality. The defendants argued that Brown (who had pre-existing neck, back and shoulder problems) had not sustained significant injury as a consequence of the train accident and therefore should not be entitled to recover all of the out of pocket expenses and rehabilitation expenses paid by the workers compensation insurer. Another issue that loomed at trial that affected this issue was whether the opinion of Brown's treating neurosurgeon, Dr Spittaler, should be preferred over the opinion of Dr Millons, the orthopaedic surgeon retained on behalf of the defendants. At trial, Dr Spittaler gave evidence and Dr Millons did not.

The Trial Judge preferred the evidence of Dr Spittaler. Substantial damages were awarded to Brown including the out-of-pocket expenses and rehabilitation expenses paid by the workers compensation insurer of Brown's employer.

The defendants appealed. In essence the main issues for determination by the Court of Appeal were:

- Whether the Trial Judge erred in preferring the evidence of Dr Spittaler over that of Dr Millons;
- Whether the Trial Judge erred in stopping cross-examination in relation to a claim for damage to the teeth which was withdrawn on the morning of the hearing which could have affected Brown's credit;
- Whether Brown was entitled to recover rehabilitation expenses.

In relation to the first two issues, the Court of Appeal determined that the Trial Judge had not erred in accepting the opinion of Dr Spittaler over Dr Millons (a finding which supports a conclusion that where there is a dispute in the medical evidence it is preferable that doctors should be called to give evidence as soon as a doctor is called by the other party). The Court of Appeal did consider that the Trial Judge erred in not permitting a line of questioning in relation to the teeth but this did not cause a miscarriage of justice.

The Court of Appeal also determined that the rehabilitation expenses were recoverable by Brown in their entirety. In essence the Court of Appeal determined that as it was the train accident that had caused Brown's neck injury, the only question that remained was whether or not the rehabilitation was rendered reasonable and necessary by the injury. The Court of Appeal

determined that there was a statutory scheme and the treatment was undertaken by Brown in compliance with a scheme mandated by Parliament and so Brown should be entitled to recover the rehabilitation expenses.

Justice Basten concluded the claimant should recover the rehabilitation expenses paid:

"in circumstances where the treatment has been undertaken at the behest of his employer and the employer's insurer, and pursuant to a statutory scheme which requires such steps to be taken for the ostensible purpose, as noted above, of "the timely, safe and durable return" of workers to the workplace. This was not the choice of some speculative or unproven remedy by an idiosyncratic plaintiff: It was treatment undertaken in compliance with a scheme mandated by the Parliament."

It was however noted that where causation was at issue, a different result would follow. If the treatment cost was not caused by the injury but paid by the workers compensation insurer then the plaintiff would not be entitled to recover the payment, and will effectively repay the payment to the workers compensation insurer as the negligent party would refund the workers compensation insurer all compensation payments (including the medical expenses paid but not related to the injury) deducting such payments from the damages award.

Justice Basten stated

"If, for example, the insurer had paid dental bills, in circumstances where the trial judge later determined no injury attributable to the accident had required such services, the result would be that the insurer would be repaid and the expense would fall on the plaintiff, being the person who should have borne the expense in the first place."

This is a significant win for workers compensation insurers seeking to recover payments made and presents problems for defendants who are involved in a claim where workers compensation is involved and the management of medical and rehabilitation expenses is an issue. It is likely that workers compensation insurers will find that their actions are viewed more closely by defendants involved in a claim which involves a workers compensation element and workers compensation insurers will not be left to manage a claim without input from those defendants.

## **Are You Vicariously Liable For Your Employees Wrongful Acts**

Is an employer vicariously liable for their employees/sub-contractors negligence? What about a bouncer in a nightclub? What happens if the actions of the employee are unauthorised or arguably not connected with acts authorised by the employer?

Mr Eurkel was employed by Sandstone DMC Pty Limited ("Sandstone") as a bouncer working at Rusty's Nightclub in Wollongong. Eurkel assaulted Trajkovski a patron attending the club after removing him from the nightclub. Trajkovski was injured and sued the nightclub and the bouncer. The real issue was whether the employer was vicariously liable for damages for injury inflicted on Trajkovski by Eurkel and whether Eurkel acted in the course and scope of his employment with Sandstone.

Was the punching and kicking of Trajkovski an action by Eurkel acting within the scope of his employment? Trajkovski had been thrown out of the nightclub and thereafter following an altercation Eurkel further assaulted Trajkovski inflicting significant injury.

The Court of Appeal found the assault was committed to ensure a troublesome patron would go on his way and leave the club's vicinity suggesting an element of vicarious liability on behalf of Sandstone. The ejection from the club was in pursuit of his employer's interests or in intended performance of the contract of employment. There was a close causal connection between the act which caused the injury and the employment and there was a close temporal connection between the completion of the physical removal and the assault. The Court found the assault was to persuade Trajkovski not to return and it was performed at a time when Eurkel was carrying out his duties as an employee.

Employers must remember that where employees are exposed to situations where conflict with patrons is a possibility, any conflict that ensues and the results of that conflict including claims for damages may flow to the employer even though the employer may think that their employee has overstepped the mark.

## **Dolphin Watching Is Not Supposed To Be Dangerous**

Is dolphin watching a dangerous recreational activity? Does travelling on a foredeck whilst dolphin watching constitute an obvious risk? These are questions that the NSW Court of Appeal recently considered in *Lormine Pty & Anor v Xuereb*. Since the introduction of the *Civil Liability Act, 2002* in New South Wales the Court has had to contend with interpretation of a

number of terms contained within the legislation including obvious risk and dangerous recreational activity. The entitlement to recover damages is effected where the injured person is involved in a dangerous recreational activity.

Lormine Pty Ltd owned and operated a 10 metre power driven catamaran, the "Avanti" that was skippered by Ronald Hunter. Juliet Xuereb had joined a group of approximately 20 adults and children on a dolphin watching cruise on the "Avanti", just north of Forster. Once the vessel had got out to sea, the captain advised the passengers that passengers were permitted to sit on the bow so long as any children were accompanied by an adult. Xuereb chose to do so and took up a position on the starboard side looking out to sea. Unfortunately, during the course of the sightseeing tour, a large wave struck the catamaran and the force of the wave dislodged Xuereb although she was holding onto her daughter and the bow rail. Xuereb was swept astern and she slammed her back into the rear of the bow area. She ended up wedged in the hatchway and was quite severely injured.

At trial, the Trial Judge held that the captain was negligent in failing to keep a proper lookout. Lormine were vicariously liable for the negligence of the Captain.

Lormine and the captain appealed.

The captain and Lormine argued on appeal that participation in a dolphin watching cruise was a dangerous recreational activity engaged in by Xuereb and the harm that she suffered was as a consequence of the materialization of an obvious risk of that activity. Travelling on the foredeck was said to constitute an obvious risk. It was also argued that the risk of a wave was an inherent risk. Pursuant to the legislation there is no liability for inherent risks.

The Court of Appeal determined that this was not the case and the statutory defences did not apply here. The Court commented:

*"There was nothing to suggest to the reasonable reader that the particular vessel would go so close to the wave zone or generally into conditions where getting swamped was one of the expected thrills of the cruise. The plaintiff said that she did not even expect to get wet when she went up to the bow."*

A predictable decision from the Court of Appeal. It is difficult to see how dolphin watching could fall within the definition of a dangerous recreational activity when dangerous recreational activity is defined in the Act as "a recreational activity that involves a significant risk of physical harm." But what about sharks?

## **Premature Commencement Of Proceedings Is Not Fatal**

Section 151C of the *Workers Compensation Act, 1987* (the "Act") provides that a person who is injured as a consequence of the negligence of the employer cannot commence court proceedings against the employer for damages in respect of the injury until six months has elapsed since notice of the injury was given to the employer.

The Court of Appeal had found, in its decision in *Gordon - v - Berowra Holdings Pty Limited [2005] NSWCA*, that proceedings commenced in breach of Section 151C(1) are not a nullity and an employer is able to waive compliance with the section. This decision has been recently confirmed by the High Court.

Gordon had not complied with Section 151C and commenced proceedings prematurely. What was of significance in the claim was that the employer did not challenge the commencement of proceedings until one day prior to the matter being heard in the District Court. The employer had prepared the case for hearing, served a defence responding to the claim and even sought leave to file an amended grounds of defence. It was only the night before the hearing when the employer served notice that they would argue the claim should be declared a nullity due to the premature commencement.

What triggered the employer's application? The employer had served an Offer of Compromise of \$50,000.00 plus costs. The offer had not lapsed by the time the matter was listed for hearing and the plaintiff accepted the offer. We speculate that the employer was unhappy the offer was accepted position as the offer was made to protect their position on costs believing the worker would not accept the offer. The employer attempted to argue the proceedings and their own offer were null and void.

It was all too late for the employer.

The High Court concluded that there was no doubt the section imposed a bar upon the commencement of Court proceedings

but the plaintiff's non compliance with the section did not result in the proceedings being a nullity. The section is not aimed at extinguishing rights, rather it postpones the right to initiate proceedings in a Court to provide an opportunity for investigations and to allow time for settlement negotiations before Court proceedings are commenced. Once proceedings are commenced costs escalate and it becomes more difficult to resolve claims.

The section was implemented to remove entitlements of workers to commence proceedings immediately. A worker could commence proceedings immediately if the employer wholly disputes liability or admits partial liability in respect of the injury (and the injured worker is dissatisfied with the extent liability is admitted).

The decision demonstrates that an employer must challenge the premature commencement of proceedings immediately and not at the last moment otherwise the avenue of challenge will be lost. Had the employer immediately challenged the proceedings in all likelihood the Court would have dismissed the proceedings. Nevertheless if the proceedings had been dismissed the worker would simply commence proceedings after the 6 month period had passed.

Gordon is now the beneficiary of \$50,000 in compensation that his employer's insurer did not want to pay. The legal costs of the battle to the High Court will substantially exceed the damages paid and these costs will be paid by the employer's insurer. What appears to have been a tactical call in making an offer of compromise proved fatal. The offer should not have been made if the employer was not prepared to pay the offer when it was accepted.

The case has ramification for bodily injury legislation in all States and Territories that have provisions that prevent the early commencement of proceedings. If defendants and insurers want to use the time they must immediately challenge any early commencement of proceedings otherwise the opportunity will be lost.

### **Are Factual Investigation Costs Chargeable In The Workers Compensation Commission?**

The Workers Compensation Commission has recently determined, pursuant to a Presidential Appeal, the issue of costs with regards to factual investigations. In the matter of *Taylor - v - Burrangong Pet Foods Pty Limited (2006)* Deputy President Handley determined that the worker's solicitor's claim for \$100.00 in respect of briefing St George Registration Investigation Services to prepare a factual investigation was not necessary. The Deputy President agreed with the solicitors acting for the employer in that, as the matter was confined to a simple medical issue with liability not in dispute, it was not reasonably necessary for an investigator to be instructed to carry out a factual investigation. The investigators had carried out an investigation by way of photographing the scene and obtaining statements from other witnesses. Similarly, the actual disbursement of over \$1,000.00 in relation to the investigators was not allowed as a claimable item.

This decision also highlighted the use of agents by workers' solicitors in filing documents. The worker's solicitors had claimed the costs of instructing agents to file documents in the Workers Compensation Commission. The rules of the Commission allow for documents to be filed by either mail or DX and it is not reasonable to employ agents for the personal filing of documentation. Deputy President Handley agreed with the employer's submission in this regard.

Finally, the worker's solicitors sought a claim for the maximum allowable costs (\$500.00) in relation to the request for a review of the claim by the insurer. Once again, Deputy President Handley focused on the simple nature of the case and believed the maximum claim of \$500.00 was not reasonable. The Deputy President allowed the worker only \$250.00.

This decision highlights the practical and pragmatic approach the Presidential Appeals Section is adopting in relation to costs. At the commencement of the Costs Regulations in 2003 the Commission was prepared to grant a fair degree of latitude to workers' solicitors in relation to their costs for acting in the Workers Compensation Commission proceedings. This trend appears to have been reversed through the most recent decisions where the Commission has focused on the reasonableness of various actions being carried out by workers' solicitors in determining costs rather than the simple fact the activities had been carried out.

The legal cost of claims remains a focus for the Government and the Commission.

### **NSW OH&S Snapshot**

#### **Unguarded Machinery and Young Workers are a Dangerous Mix**

Justin Lowes, a 16 year old man, performing general cleaning and associated duties as a casual employee of Conditionaire

International Pty Ltd at its Miranda factory, was injured when his fingers were caught in a 42mm gap in the guards of a die of a press. The guarding was inadequate to prevent access to the die area. It allowed access to the die area when the press was in operation. A foot pedal of the press was not shrouded. The interlock device which was designed to prevent operation of the press unless the front rise and fall guard were closed could be easily overridden.

Lowes had only been employed for 4 months. His usual duties involved cleaning.

There was a documented occupational health and safety policy. There were material safety data sheets made available to all employees. There was a documented job safety analysis and safe work method statements provided.

The court noted that from photographs it appeared fairly obvious there were gaps in the guarding, perhaps because the guarding could be moved and without a great deal of difficulty there were fairly simple steps that could have been taken to effectively guard the machine.

The Court concluded the offence was a serious one and although it noted the defendant was a good corporate citizen and looked after the welfare of employees and occupational health and safety and had community participation, a fine of \$65,000.00 was appropriate. In addition the company was required to meet its own costs and the costs of WorkCover in the prosecution.

## **\$300,000.00 Fine**

Ove Arup Pty Limited has recently been fined \$300,000.00 by the New South Wales Industrial Relations Commission as a consequence of the Kogarah gas explosion that occurred on 12 October 1999. Ove Arup was a participant in an unincorporated joint venture known as Stations Upgrade Joint Venture carrying out works for the State Rail Authority ("SRA") at Kogarah Station. Abigroup Contractors were engaged to perform construction work and they engaged Joseph & Sons Contracting Pty Limited to perform demolition of a number of shops. Safety was an acute problem in light of the proximity of the works to passenger trains and the Kogarah shopping centre.

In November 1995 an employee of AGL Gas Networks Limited attended the site and capped the gas supply line to one of the shops. The gas line was cut and capped with a charged line left where construction was designed to occur. A gas explosion ultimately occurred and prosecutions were brought against the participants in the project.

Prior to the imposition of the fine on Ove Arup, the Industrial Relations Commission had fined Abigroup for four offences under the OH&S Act and imposed fines totalling \$800,000.00, AGL was fined a total of \$325,000.00 and Joseph & Sons was fined a total of \$810,000.00.

Ove Arup's focus in the prosecution was the extent of its control over the project. It was argued that Ove Arup was responsible for just one aspect of the project in line with its project management expertise. The Court concluded that this view was ill defined at best.

The Court concluded the whole structure of the joint venture and its contract with SRA was a presentation of one entity dealing with the SRA and not four entities dealing with SRA. It was a much touted benefit held out to SRA. The Court noted that the joint venture was to work out its own internal operation so that it presented a single point of reference and a single face to SRA. This approach placed considerable authority in the hands of the joint venture to supervise occupational health and safety on sites at the Kogarah Station upgrade and conferred authority upon the joint venture to give directions as were necessary to ensure occupational health and safety.

The Court accepted that the joint venture allocated nominated participants, because of a particular expertise, particular roles. This did not isolate the participants from acts or omissions relating to occupational health and safety. Under the contract with SRA the duties and responsibilities of the participants were not divided. In the circumstances the Court held that all of the participants in the joint venture were liable for acts and/or omissions in relation to safety.

The Court rejected an argument that it was appropriate for the Court to determine one fine for the joint venture and then apportion that amount between the particular participants. The Court determined that it was necessary to look at the culpability of each participant.

The Court also commented that it was difficult to accept an argument that a head contractor with overall responsibility for a site would be less culpable than a sub-contractor actually involved in performing the tasks that led to the risk but noted situations may well arise where the culpability of both the head contractor and the sub-contractor would be equal.

Participants in joint ventures need to take note that each participant in a joint venture will face an OH&S prosecution arising out of an incident notwithstanding any attempt to partition particular responsibilities in a project to particular participants. Beware Business partners' omissions may cause problems.

## **A Small Fine Is Not Always Good News**

South Pacific Seeds Pty Limited was convicted of a breach of Section 8 of the Occupational Health and Safety Act and fined \$1,750.00 by the Chief Industrial Magistrate following an incident on 26 September 2004 when, in a paddock on the company's rural farm an employee was injured whilst operating machinery.

A casual farmhand was assisting in the laying of irrigation tape in the field. The company had designed and manufactured a machine which was dragged behind a tractor and tape was fed from rolls into the paddock by the machine. The tape was non-rigid polyurethane tape. The tape was fed off and over spindles through tines into the ground and the worker's duties involved feeding it freely with no kinks or breakages. The machine had a shaft which rotated. Whilst the shaft was rotating the worker's clothing became caught and began wrapping around the rotator shaft and she suffered injuries when she was jammed tightly onto the rotating shaft.

WorkCover was not satisfied with the level of penalty and appealed to the Industrial Relations Commission. The Industrial Relations Commission concluded that the fine was inadequate. The risk of injury arose when the worker was exposed to the rotating shaft of an unguarded machine as she was holding onto the shaft with her hands.

The Court noted an offence will be a serious one where there is an obvious or foreseeable risk to safety against which appropriate measures were not taken even though available and feasible. The Magistrate found that the offence was objectively at the relatively bottom end of the scale of offences, however, the Full Court disagreed.

The Full Court concluded the penalty was not just a low one but was so low that a greater penalty should be imposed. It held that the fine was so manifestly inadequate so as to warrant the Court to grant leave to appeal and substitute a penalty of \$9,000.00. In addition, the Court ordered that the company pay WorkCover's costs of the proceedings. As a consequence, not only was the fine increased from \$1,750.00 to \$9,000.00, the costs which would have been incurred by the company in the defence of the appeal and the costs payable to WorkCover will be substantially more than the new fine.

The company did argue that no cost order should be made against it as the appeal resulted from no failure on its part. It had entered a plea at the first available opportunity and merely presented the best case it could to the Chief Industrial Magistrate. The company argued that the appeal was successful because of an alleged manifest sentencing error by the Magistrate.

The Court noted that the company was entitled to resist the appeal although it could not be overlooked that the company elected to defend the appeal on all grounds, notwithstanding the serious nature of the offence and the manifest inadequacy of the penalty and there were other options available to it on appeal which it elected not to pursue (including a concession that the appeal should be allowed and a reassessment of penalty determined). Failure to adopt a more prudent course resulted in a cost order against the company.

Where companies are convicted and there is an appeal by WorkCover on the level of fine, it is necessary for a company to carefully consider the stance that it adopts on appeal. If the fine is inadequate it may well be better to accept that the fine is inadequate, advise the Full Court accordingly and then invite the Court to reassess the fine rather than argue the appeal. This approach could result in the avoidance of a cost order against the company.

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*Warning. The summaries in this review do not seek to express a view on the correctness or otherwise of any court judgment. This publication should not be treated as providing any definitive advice on the law. It is recommended that readers seek specific advice in relation to any legal matter they are handling.*

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