

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

An Employee Brings a Claim as an Independent Contractor. What About Your Liability Insurance Coverage For Defence Costs

The perennial problem of determining whether someone injured in an industrial accident is an employee or an independent contractor can have some unexpected twists for insurers. The recent case of *Wesfarmers v Wells* [2008] NSWCA 186 is a good example.

Hubbard was injured whilst operating a jackhammer on a construction site. At the time of injury Hubbard was working for Mr Wells, a plumbing contractor. Hubbard suffered serious burns and related injuries but recovered well and was left with a relatively minor degree of permanent impairment. Hubbard claimed damages from Wells and Wells joined his insurer as a party in the case. The insurer had issued Wells with a business liability policy covering liability with respect to independent contractors, but not employees.

Hubbard sued Wells on the basis that he was an independent contractor. Wells joined Wesfarmers seeking indemnity under the policy.

Hubbard did not allege that he was an employee of Wells, as the Workers Compensation Act, 1987 stipulates a threshold which must be satisfied before a work injury damages claim can be brought against the employer and presumably the injury would not satisfy the threshold. In addition, if Wells contracted with Hubbard to perform work rather than employed Hubbard to perform work, Hubbard's damages would be assessed under the Civil Liability Act and the damages awarded under that Act are more generous than the damages regime for employment related injuries.

The District Court determined that Hubbard was an independent contractor and awarded damages of around \$174,000. Wells in turn succeeded against Wesfarmers, the trial judge holding that the policy covered Wells' liability to Hubbard, so that it was required to indemnify Wells for the \$174,000 plus pay Wells' costs of defending Hubbard's claim.

Wesfarmers appealed the finding that they were obliged to indemnify under the policy; and Wells cross-appealed (in case Wesfarmers were successful) seeking to overturn the finding that he was liable to Hubbard.

The appeal proceedings essentially raised 2 issues: first, was the plaintiff an employee or an independent contractor; and, second, if the plaintiff was a worker, could Wells still recover from Wesfarmers his costs of defending the plaintiffs claim?

On the employee/ independent contractor issue, the Court of Appeal confirmed the well known general principle that a determination of work status involves balancing all the indicia or aspects of the relationship between the parties.

In this case there was no written contract nor even a clear oral agreement. The nature of the relationship needed to be inferred from such facts as could be objectively determined.

Relevant matters include arrangements for the deduction of income tax, provision of tools of

September 2008
Issue

Inside

Page 1
Employee or Contractor?

Page 3
No Disclosure No
Indemnity

Page 4
Calculating Loss Of
Superannuation

Page 5
Reinstatement Of Injured
Worker - Terminated For
Lack Of Suitable Duties

Page 6
Discrimination- Changing
Roles for OH&S
Reasons

Page 8
Security Of Payment
Claims - Service Of
Payment Claims And
Payment Schedules

Page 9
A Deterioration Of A
Medical Condition Whilst
Employed Is Not
Necessarily A Disease
Of Gradual Onset

Page 10
Are Employers Entitled
To Access Financial
Records Of A Claimant?

Page 11
AMS Can Overturn An
Arbitrator's Decision On
Medical Issues

Page 12
OH&S Roundup

We thank our contributors

David Newey dtn@gdlaw.com.au

Amanda Bond asb@gdlaw.com.au

Stephen Hodges sbh@gdlaw.com.au

Michael Hayter mkh@gdlaw.com.au

Michael Gillis mjg@gdlaw.com.au

Marcus McCarthy mwm@gdlaw.com.au

Naomi Tancred ndt@gdlaw.com.au

David Collinge dec@gdlaw.com.au

**Gillis Delaney
Lawyers**
Level 11,
179 Elizabeth Street,
Sydney 2000
Australia
T +61 2 9394 1144
F +61 2 9394 1100
www.gdlaw.com.au

trade, the right to control the work and the actual degree of control exercised.

The evidence included a statement prepared by an officer of the WorkCover Authority where Hubbard said that Wells “*controlled where and when he worked and he supervised his work and that he overlooked all of his work*”. Nevertheless, the Court of Appeal noted that Wells and Hubbard had different views on what level of control Wells had.

Interestingly the Court of Appeal placed special emphasis on the concept of ‘running a business’ as relevant to the test.

In the present case, the plaintiff had undertaken education and training as a plumber, but had never taken steps to obtain a licence, nor to obtain an ABN number from the Commissioner of Taxation.

The significance of being unlicensed was that Hubbard was not entitled to contract to do specialist work except on behalf of an individual, partnership or corporation that was the holder of a licence authorising its holder to contract to do that work. On that basis, Hubbard was not able to operate a plumbing business without a licence although there remained the possibility that he operated a labour hire business as an unlicensed worker with training experience in plumbing. The Court of Appeal noted “for a person seeking to carry on his or her own business, there are particular requirements imposed by taxation legislation”. These obligations included the GST regime and before that the prescribed payments scheme and pay-as-you-earn schemes. Hubbard did not have an ABN but he did have a tax file number.

These factors, coupled with Hubbard's failure to tender invoices for work done, and that Hubbard was given directions not only as to the identification of the work to be done, but also as to the manner in which it should be undertaken, tilted the balance in favour of a finding that he was an employee.

Hubbard was not a contractor, rather he was an employee albeit on a job-by-job basis and without permanency.

On the policy indemnity issue, a large part of the outcome was dictated by the finding that Hubbard was an employee - in those circumstances, he did not meet the thresholds for common law damages against his employer for work injury damages, so that the judgment in his favour was set aside.

The real issue was whether Wesfarmers was obliged to reimburse Wells for the costs he incurred in defending the claim brought by Hubbard (after Wesfarmers had denied indemnity under the policy). Wesfarmers argued that because there was no liability to Hubbard for which they were required to indemnify Wells, there could be no liability to indemnify him for the legal costs he expended in defending the claim.

The liability insurance of Wells was subject to an exclusion clause for claims for “*personal injury to.... a person employed by you under a contract of service*”. This is a common exclusion clause in liability policies.

The claim was brought by an employee but he alleged he was an independent contractor and that allegation failed. Would the finding of employment mean that the insurer was not liable for any aspect of the claim including Well's costs of defending the claim?

In this case the employee did not bring the claim as an employee but brought a claim alleging he was an independent contractor. In those circumstances was the insurer liable to indemnify Wells for the claim? The question in reality was whether it is the nature of the claim that is made against the insurer that triggers the entitlement or the actual liability for the claim? This policy was held to extend to costs incurred in defending a claim - even if ultimately there was no liability to indemnify for any damages.

The Court of Appeal noted the claim was formulated in terms which fell within the policy, both within the primary liability clause and outside the exclusion clause.

The policy also contained a provision that stated “*If you are entitled to be indemnified under this policy for a claim made against you, we pay the reasonable legal costs incurred with our prior written consent in defending or settling the claim.*”

As the claim was framed to fall within the policy provided there was written consent from the insurer to incur the costs, then the insurer would be obliged to pay for Wells' costs.

The insurer had initially filed a defence to the claim and then denied liability under the policy. A letter from the insurer's

solicitors to Wells after the insurer denied liability recommended that Wells immediately take steps to protect his interests in the proceedings including obtaining legal representation.

The Court of Appeal noted the letter from the insurer's lawyers did not constitute an acceptance of liability for legal costs incurred by Wells, but the recommendation to obtain legal representation should be treated as consent to the incurring of such costs, to the extent that the consent of the insurer was material. The Court of Appeal accepted this letter had provided consent for costs.

The upshot was that Wesfarmers were liable to indemnify Wells for his costs of defending the Hubbard's claim.

The significance of the case is twofold.

Will we see courts generally adopt the shorthand of "running a business" as the test for determining whether someone is an employee?

Possibly more importantly though, for underwriters and claims handlers there are important lessons in the case for how to successfully draft legal costs clauses, and the approach that an insurer should take when denying liability if an insurer is to avoid providing consent to an insured incurring legal costs in defending the claim after indemnity is declined.

No Disclosure No Indemnity

The High Court has recently determined that a barrister was not entitled to indemnity pursuant to a policy of professional indemnity insurance as he failed to disclose a potential claim (*CGU Insurance Limited v Anthony Porthouse*).

James Bahmad was injured in 1999 whilst performing work pursuant to a community service order. Bahmad subsequently consulted solicitors in relation to a potential claim as a consequence of his injuries. In 2001, the solicitors briefed the barrister Anthony Porthouse to advise whether or not Bahmad had a claim either in negligence or under the Worker's Compensation Act 1987 ("WCA 1987") against the Department of Corrective Services.

On 12 June 2001 Bahmad was wrongly advised that he had no entitlement under the WCA 1987 as he was not in paid employment. Around the same time, the NSW government foreshadowed that as part of tort reform there would be restrictions on common law damages governed by the WCA 1987. Proceedings commenced prior to the commencement date of the amending legislation (27 November 2001) would not be affected. The amending legislation prohibited the commencement of a claim for work injury damages unless the worker sustained at least a 15% whole person impairment. Bahmad's injuries were such that he did not reach this threshold.

On 26 November 2001 Porthouse was instructed to draft a Statement of Claim against the State of NSW however the Statement of Claim was not filed until 11 December 2001. The matter proceeded to arbitration in the District Court where Bahmad obtained an award of \$120,687.15. An application for re-hearing was filed by the State of NSW and the matter was listed for re-hearing in the District Court on 15 May 2003. On 15 May 2003 Porthouse became aware that the State of NSW would argue that the 2001 amendments applied to Bahmad's claim and therefore precluded Bahmad from bringing an action. Porthouse applied for and obtained an adjournment. The matter ultimately proceeded to hearing before the District Court on 29 August 2003. At this time it was common ground between the parties that if the 2001 amendments applied Bahmad would not recover any damages. The trial judge determined that Bahmad's claim was covered by the WCA 1987 as it existed prior to the November 2001 amendments. The State appealed and the Court of Appeal allowed the appeal.

In May 2004, Porthouse completed a CGU professional indemnity insurance form for 2004-5. The form included the question: "Are you aware of any circumstances, which could result in any Claim or Disciplinary Proceedings being made against you?". Porthouse's answer to this question was "No." Significantly, section 6 of the policy stated that it did not cover known claims and known circumstances. "Known Circumstance" was defined in section 11.12 as: "Any fact, situation or circumstance which: (a) an Insured knew before this Policy began; or (b) a reasonable person in the Insured's professional position would have thought, before this Policy began, might result in someone making an allegation against an Insured in respect of a liability, that might be covered by this Policy."

In March 2005, Bahmad commenced proceedings against the solicitors retained in his personal injury claim and against Porthouse contending that his lawyers ought to have commenced proceedings prior to the 2001 amendments. Porthouse

joined CGU, who refused to indemnify him pursuant to the professional indemnity policy to the proceedings. The trial judge in the District Court found that both the solicitors and Porthouse had been negligent and ordered that CGU indemnify Porthouse. CGU appealed to the Court of Appeal arguing that the trial judge had not properly considered the subjective state of mind of Porthouse when considering the exclusion clause. The Court of Appeal dismissed the appeal and CGU appealed to the High Court.

So what did the High Court decide? The High Court unanimously allowed CGU's appeal. The judges stated:

"Section 11.12(b) sets an objective standard, with the modification that the insured's professional experience and the insured's knowledge of facts and circumstances are imputed to "a reasonable person in the Insured's professional position." An enquiry about what a reasonable person "would have thought" enquires about real (not remote or fanciful) possibilities; it does not enquire about certainties. When applying Section 11.12 it is not wrong to take into account what an insured thought, as a piece of possibly relevant evidence, but the standard described in Section 11.12(b) is an objective standard, and a question of fact to be determined independently of the insured's state of mind."

So in the end Porthouse was left with no insurance and must personally meet his liability. The evidence of the insured in rights case as to the state of his belief about prior circumstances will not stack up against exclusion clauses and disclosure requirements that impose an objective test based on *"what a reasonable person in the Insured's professional position would have thought, before the Policy began"*.

Calculating Loss Of Superannuation

You are injured and bring a personal injury claim. The Court finds when assessing damages that you have suffered economic loss in the past and future. This means that you are also entitled to damages for past and future loss of superannuation - so how is this calculated? The NSW Court of Appeal has recently considered this issue in the decision of *Najdovski v Crnojlovic*.

In NSW (unless an accident is a work accident or motor vehicle accident) damages are assessed pursuant to the *Civil Liability Act 2002*.

Section 15C of the *CLA 2002* relates to damages for loss of superannuation. Section 15C provides:

- (1) The maximum amount of damages that may be awarded for economic loss due to the loss of employer superannuation contributions is the relevant percentage of damages payable (in accordance with this Part) for the deprivation or impairment of the earning capacity on which the entitlement to those contributions is based.
- (2) The relevant percentage is the percentage of earnings that is the minimum percentage required by law to be paid as employer superannuation contributions."

The general approach in calculating loss of superannuation has been to apply the figure in the *Superannuation Guarantee (Administration) Act 1992 (Cth)*, which since the 2002/3 tax year has been 9% of gross earnings. As economic loss is calculated on a net basis damages for loss of superannuation are sometimes calculated for sake of ease on the basis of either 9% of net loss of earnings or 11% of net loss of earnings (which is closer to the calculation of 9% of gross earnings).

In *Najdovski*, the defendant argued that in fact the correct approach to calculating loss of superannuation was to calculate 9% of the net earnings. As mentioned above this approach has in the past often been taken by parties and by the Court.

The Court of Appeal disagreed with the defendant. Justice Basten and Justice Allsop determined that in fact the correct approach is to calculate 9% of loss of gross earnings, or 11% of loss of nett earnings. However in Justice Windeyer's opinion it was appropriate to calculate loss of superannuation on 9% of net loss of earnings. But majority rules and it is the greater figure that will be awarded for loss of superannuation.

A win for plaintiffs who will now be awarded an additional 2% in claims for loss of superannuation - a substantial difference in large economic loss claims.

Reinstatement Of Injured Worker After Terminated For Lack Of Suitable Duties

The NSW Industrial Relations Commission in the *Transport Workers Union of NSW -v- Lindsay Brothers Management Pty Limited* has recently considered the issues which arise in a claim for reinstatement by a worker who suffered an injury during his employment, was provided suitable modified duties and then was terminated as those duties were only temporary duties.

The *Workers Compensation Act 1987* provides that if an injured worker is dismissed because he or she is not fit for employment as a result of an injury received at work, the worker may apply for reinstatement to employment not more advantageous to the worker than that in which the worker was engaged when he or she first became unfit for employment because of the injury.

The worker must produce a certificate to the effect the worker is fit for employment of a kind for which the worker applies for reinstatement and an order for reinstatement must be made within 2 years after the injured worker was dismissed

In this case Lawson was employed in a local pick-up and delivery role in which he performed driving duties including occasional interstate change-over trips. In addition to driving, local drivers were responsible for the loading and unloading of line haul vehicles outside the depot which involved the manual handling of pallets weighing between 800k and 1,200 kilograms using a forklift. There was also a requirement to put load and restraint bars on the vans. About 20% of the loads were full pallets, which could be transferred by forklift out of one truck and into another. All other loads involved some manual handling.

On 1 March 2001 while securing a load Lawson felt a sharp, intense pain in his right arm. Eventually he came to a shoulder reconstruction in April 2006. After the successful right shoulder operation in April 2006, Lawson was off work for four weeks and was told to come back in a driver training role and the employer was informed of Lawson's restrictions. The driver training position was said to be a temporary position. Lawson subsequently obtained medical clearance, and on the condition that he performed no lifting or driving, he returned to work.

Lawson when he was not performing driver trainer duties, that is, when there were no new employees and all other employees had been trained, undertook general yard duties, loaded and unloaded vehicles, and performed driving duties. This was despite him not having medical clearance to drive until July 2007, and even then the relevant medical certificates permitted only 'occasional driving' and no lifting.

The employer in the case maintained that the position of driver trainer was a job that was 'made up' or 'manufactured' specifically for Lawson to enable him to return to work.

Because of the burden his shoulder injury placed on his other arm, it came to an operation to repair a tendon in that arm. On 24 October 2007 Lawson had surgery on his left shoulder to repair tendon damage. It was the evidence of Lawson, and uncontested by the employer, that six weeks after his surgery Lawson was contacted by management who said words to the effect: ".we've got a new bloke who has started. We need you to come in and train him. You'll be doing no lifting or driving yourself, we need you back cause you're our driver trainer."

Lawson obtained medical clearance to return to work on 30 November 2007, provided he performed 'limited driving on an occasional basis' and no lifting. He then returned to work on 3 December 2007 to train the new driver and continued to attend work to train the driver on 4 and 5 December 2007. On 6 December 2007, Lawson arrived at work, but was unable to "log on to the system". He was handed a letter advising that his employment had been terminated effective the previous day. The reason given by the respondent to Mr Lawson for the termination was that::

"We no longer have suitable duties to offer within your medical restrictions, and since it is unlikely that you will be able to return to your pre-injury duties, we consider that it is in your best interest to pursue more appropriate employment."

Several issues confronted the Commission. Firstly, the medical evidence produced in the case was limited to medical certificates. The Commission noted that the workers compensation legislation does not state how it is that the Commission is to be satisfied that a worker is fit for the kind of employment he or she seeks in a reinstatement application, although it may be accepted that fitness would need to be determined on a proper basis. The Commission however noted that does not necessarily exclude medical certificates as evidence of fitness and whilst medical certificates are not the best evidence in this case it was the only evidence before the Commission. The Commission had no basis for questioning the veracity of the certificates. The Commission also noted that it had accepted the certifications of the workers' GP in the past, in fact over a period of almost eight years and it was somewhat inconsistent with that acceptance for the employer to now contend the

medical practitioner's opinion should not be regarded as proof of Lawson's capacity to perform certain work. The Commission effectively accepted the opinion in the medical certificates as evidence of the worker's capacity that he was fit for suitable duties which may include instruction/supervision of drivers and limited driving but no lifting.

The Commission also noted a reinstatement application does not mean that the worker needs to be reinstated to a pre-existing specified position designated by the employer which is vacant. So what does available mean? The Commission found that "available", is taken to mean another position was of avail to, capable of being used by, or at the disposal or within reach of, the employer - whether or not it was vacant.

Lawson contended that the position of driver trainer as performed was a real position and a position that he was fit for. It was for that position for which he sought reinstatement. The employer argued the position was temporary. Lawson accepted that there were times when no training duties were required to be performed.

The Commission concluded that whether or not full-time employment was available to Lawson in the role of driver trainer/pick-up and delivery work, the employer had not demonstrated that no work was available for Lawson. The Commission considered that the employer could reasonably make available for Lawson part-time employment as a driver trainer/pick-up and delivery driver that may involve the training of drivers, the dropping off and picking up of trailers that require no lifting, deliveries to sites where no lifting is required and other work that requires no lifting.

The Commission noted there was a difficulty in making a final determination in the case arising from the fact that there was no evidence on whether full-time work was available and if it is not, the extent to which part-time work was available and further the medical certificates provided no guidance on what Lawson's general practitioner meant by "limited driving". The Commission ordered the parties to confer to discuss these issues and report back to the Commission for a final determination.

The Commission indicated that it was satisfied that Lawson was fit for employment as a driver trainer/pick-up and delivery driver and that subject to medical limitations imposed by the GP. The Commission was also satisfied that the employer had that kind of employment for which Lawson sought available but was unsure whether that was full-time or part-time work. The Commission ordered the parties to confer with a view to reaching an agreement on the availability of either part-time or full-time work.

It appears a resolution of the reinstatement claim is likely as a result of the clear message provided to the parties by the Commission that reinstatement to some role was likely to be ordered.

This decision sends a clear message to employers that injured persons who are terminated after being placed on suitable duties can face reinstatement applications by workers not only to the suitable duties position that has been provided to them but also to part time positions consistent with the suitable duties.

The employment risks of returning a worker to suitable duties cannot be discounted however employers must remember the obligations imposed by the *Workers Compensation Act 1987* that provide that an employer must at the request of the worker provide suitable employment for the worker (that is both suitable employment and so far as reasonably practicable the same as, or equivalent to, the employment in which the worker was at the time of the injury) unless it is not reasonably practicable to provide that employment .

Employers Should Be Careful Changing Employees Roles And Duties On The Grounds Of OH&S Concerns

Employers have a defence under the *Anti-Discrimination Act, 1997* to a complaint of discrimination by an employee if it was necessary for an employer to treat an employee in a certain way to enable the employer to comply with health and safety obligations. The onus of proving the defence is on an employer.

In the matter of *Tanevski -v- Fluor Australia Pty Limited*, the Administrative Decisions Tribunal found on 7 August 2008 that whilst the employer Fluor Australia Pty Ltd ("Fluor") did not directly discriminate on the basis of age or race against their employee, Tanevski, it had indirectly discriminated against Tanevski on the basis of race by failing to implement a practical, low cost option of improving Tanevski's literacy skills.

Tanevski migrated to Australia from Macedonia in 1967. At the time he arrived he was 20 years of age. He did not speak any English when he arrived.

Tanevski developed sufficient English to work in rail maintenance for the next 40 years. By 1976 Tanevski had reached the position of supervisor at the Port Kembla Steel Works. He supervised approximately 20 people who were maintaining the rail tracks used by Blue Scope Steel Limited.

Fluor took over the Port Kembla contract in 2001. Fluor continued to employ Tanevski in his supervisory role.

At the end of 2006, Fluor removed Tanevski from his supervisory role on the basis of his inability to properly read and write English had serious safety implications. Tanevski was 60 years old at the time. He only intended to work for a further 12 to 15 months before retiring.

Tanevski was allocated a project assisting another supervisor and given a smaller vehicle. A few days later Tanevski became stressed and anxious and could not continue working. He said he was sick and left work to see a doctor. He did not return to work.

Tanevski had always been regarded as a good worker and had a good safety record. He had never been counselled about safety issues connected with his English language ability. He denied his limited ability to read and write English meant he could not fulfil his job requirements.

Tanevski commenced proceedings against Fluor alleging Fluor had discriminated against him on a ground of his race and age in breach of the Anti-Discrimination Act, 1997 (NSW). In addition Tanevski claimed that by failing to provide him with English language training, Fluor had indirectly discriminated against him on the ground of his age as he was too old and close to retirement to train in English. He sought reinstatement to his previous position as a supervisor and compensation.

Fluor denied it was in breach of the Anti-Discrimination Act. It argued it had a valid defence under Section 54 of the Act that states:

"Nothing in this Act renders unlawful anything done by a person if it was necessary for the person to do it in order to comply with a requirement of any other Act".

Fluor alleged it was necessary for them to remove Tanevski from his position in order to comply with Section 8(1) of the Occupational Health & Safety Act which requires an employer to ensure the health, safety and welfare at work of all employees of the employer."

The Tribunal found that Fluor's reason for removing Tanevski from his position as a supervisor was that Fluor had come to the view that his literacy level posed a safety risk in the workplace. Consequently it followed that Tanevski was not removed from his position because of his age or race in that he spoke English as a second language. As a result of these findings, Tanevski's complaints of direct race and age discrimination were dismissed.

However, the Tribunal considered that Tanevski had been indirectly discriminated against in that Fluor could have provided Tanevski with sufficient training to have allowed him to continue in his position as a supervisor until his imminent retirement. Fluor's decision not to do this could only be attributed to its lack of desire to provide training for an ageing employee.

Section 53 of the Act deals with indirect race discrimination. Indirect race discrimination focuses on the effect on a person of a particular practices or policy that disadvantages them. If those practices or policies are not reasonable they will be unlawful.

The Tribunal determined that for there to be indirect discrimination, Tanevski had to prove:

- Fluor required him to comply with a requirement or condition;
- Tanevski could not comply with the requirement or condition;
- a substantially high proportion of employees not of his race could comply with that requirement or condition; and
- the requirement was not reasonable in all the circumstances.

Tanevski was 60 years of age and intended to retire in the next 12 to 15 months. He had successfully worked in rail maintenance for 40 years. His literacy level had been accommodated by Fluor for the entire period.

The Tribunal concluded the imposing of a requirement of more fluent English on Tanevski was not reasonable having regard to the circumstances of the case. While the requirement to have a command of the English language was a logical and understandable basis, it had a significant impact on Tanevski. The Tribunal found there was a feasible, low cost alternative

which did not involve any increased risk to safety by training Tanevski in English. This would have enabled Tanevski and others to continue working safely for the 12 to 15 months before Tanevski retired.

Consequently, the Tribunal, whilst dismissing the complaint of direct age and race discrimination, found the complaint of indirect discrimination was substantiated.

The matter has been listed for further directions for a determination of the orders to be made to remedy the discrimination.

Employers should be aware in all matters where an employee's status is to change because of a concern for health and safety of not only the employee but other employees, that care is taken to ensure all other avenues are examined to ascertain whether training or other alterations to the employee's duties can be implemented to maintain the status quo for the employee. The decision in Tanevski's matter confirms the Tribunal's concern that an employer must consider all options and alternatives available to the employer prior to making decisions which affect an employee's position, duties or salary.

Security Of Payment Claims - Service Of Payment Claims And Payment Schedules

The requirements of service of payment claims and payment schedules under the *Building and Construction Industry Security of Payments Act 1999* ("the Act") is unique. Unlike the requirements for service generally, the Act requires receipt of a payment claim or payment schedule. The same rule applies in all jurisdictions around Australia in which Security of Payment legislation exists.

In NSW section 31 of the Security of Payment Act dictates what constitutes valid service for the purpose of the Act, which includes;

- Delivering it personally;
 - Lodging it normal office hours at the persons ordinary place of business;
 - Sending by post or facsimile to the ordinary place of business...; or
 - in such other manner as may be provided under the construction contract concerned.
- Section 31(2) states that, "service of the notice ... is taken to have been effected when the notice is received".

The Courts are particularly harsh in relation to the issue of service under the Security of Payment Act. The reason for this is because of the significant consequences that flow from the Act in the event a payment claim or a payment schedule is not challenged. This additional requirement is arguably reasonable because of the fact that statutory debts are potentially created the moment a payment claim or payment schedule is received (or not, as the case may be).

Therefore, it is imperative that a contractor be able to prove receipt of a payment claim or payment schedule in order to ensure it creates the event from which rights to payment (or to avoid it) flow. Without proof of receipt, no statutory debt is created and the harsh provisions of the Act may apply to the benefit or detriment of the Contractor depending on what side of the fence they sit.

In our experience, Respondent's regularly argue that the payment claim was not received as a reason for not providing a payment schedule within the statutory timeframe of ten days. If a Claimant wishes to pursue a statutory debt for non receipt of a payment schedule (or non-payment of a scheduled amount) it must be ready to prove that the payment claim was received by way of evidence to the standard required by a Court. If there is insufficient documentary evidence, then in the case of a payment claim the process should be recommenced (re-issue of payment claim).

In the case of a payment schedule with no proof of receipt, be prepared to pay the progress payment if the Claimant seeks a summary judgement. Although, seek legal advice first in case there are other available avenues to challenge the validity of the payment claim.

The Courts have now largely settled what constitutes valid service (ie, receipt) for the purposes of the Act. The cases now cited by all lower Courts when parties are trying to enforce a statutory debt arising from non-receipt or service of a payment claim or payment schedule are *Firedam Civil Engineering Pty Ltd v KGP Construction Pty Ltd [2007]NSWSC116*. and *Falcat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd [2006] NSWCA 259*, which confirm the following in respect of the service under the Act.

- Service on the registered office or principle place of business of a party is valid service for the purposes of Section 31(1)(c) of the Act by the operation of Section 109X of the Corporations Act and section 29 of the Acts Interpretation

Act (deemed service two days after postage).

- Email is not valid service for the purpose of the Act; and
- Facsimile is valid service (but proof of receipt must be obtained - ie. fax transmission confirmation slip).

For service on the registered office or principle place of business, a Contractor must do a company search to obtain the current registered office or principle place of business of the company if it wishes to serve a payment claim or payment schedule by post. A Contractor must ensure that the payment schedule is received prior to the conclusion of a ten day statutory timeframe. Therefore, if posting it should be posted at least two to three days prior to the end of the relevant period in order to avoid potential difficulty.

The case of *Firedam* confirms that contractors take a real and material risk if they attempt service on site as opposed to service at the registered office or ordinary place of business of the party with whom they are contracting. We recommend that payment claims and payment schedules are only ever served on the other party at either the registered office; or principal place of business as disclosed by the company search.

We also recommend that every payment claim or payment schedule is faxed to the above and a record of the facsimile transmission record be kept as conclusive evidence of proper service of the payment claim in accordance with the Act.

A recent decision of Her Honour Judge Sidis in *Ontrac Constructions Pty Ltd v Broken Head Coastal Foundation Pty Ltd* confirms that verbal evidence alone of a facsimile transmission is insufficient to prove receipt of a payment claim.

In that case, the Plaintiff sought to recover the statutory debt created by section 15 of the Act as a result of non-receipt of the payment schedule. The Defendant argued that he had never received the payment claim. The Plaintiff maintained by way of Affidavit evidence that its Director had stood by the fax machine and watched the document proceed through the fax machine and a positive clearance report indicated on screen at the conclusion of the facsimile. The evidence was that the Director had turned off the facsimile transmission record printouts in order to save paper.

Her Honour held that this was insufficient evidence of receipt of the payment claim and set aside the default judgment, forcing the Contractor to pay back the amount gained by way of a garnishee order on the judgment debt. This proved to be a significant impost on the Contractor, given that the progress claim formed part of much greater claims against the principal, which remained unpaid. The Contractor was ordered to pay back an arguably legitimate progress claim and therefore sue (again) for its recovery along with the remainder of its claims against the defaulting Principal.

Most significantly, Her Honour made this Order despite the fact that the Plaintiff had obtained evidence from Telstra of a transmission from his fax machine number (obtained under Subpoena subsequent to the Affidavit evidence) confirming transmission from its fax machine to the number of the Defendant at or about the time disclosed in the Affidavit evidence. Her Honour held that this was not sufficient to prove service of the payment claim because it was not clear what document, if any, was faxed at that time. Her Honour indicated that had a printout of the transmission report been kept then her decision may have been different.

This is a glaring example of why it is so important to have proof of service of a payment claim or payment schedule. Mere assertion and even telephone records will not be sufficient.

In the case of a facsimile, it is absolutely imperative Contractors keep the facsimile transmission report. In the case of posting, only posting on the registered office or principal place of business disclosed in a search is likely to be considered effective and therefore we would recommend delivery by registered post or courier to the same. In those circumstances a record of the delivery, being the delivery receipt, can be used as conclusive evidence of proper service under the Act.

Do not email a payment claim or payment schedule and do not deliver it to a site office unless that is the address stipulated for service in a contract. Do not deliver it to any other address suggested by the other party verbally. Always fax it as well and keep the transmission report.

Deterioration Of A Medical Condition Whilst Employed Is Not Necessarily A Disease Of Gradual Onset

The recent Court of Appeal decision of *Cook - v - Midpart Pty Limited* examined the requirements for a finding to be made in favour of the worker in order for the worker to demonstrate injury within the auspices of the disease provisions of the NSW Workers Compensation legislation.

In this case the worker initially suffered an injury with his first employer including an aggravation and exacerbation of a disease of gradual onset, namely an osteoarthritic condition. Whilst he remained partially incapacitated, he secured a second job as a cleaner carrying out largely similar duties to his first employment. The worker's condition deteriorated to the point where he became totally incapacitated. Following a successful determination in the Workers Compensation Commission by an Arbitrator that the second job constituted an aggravation, acceleration, exacerbation or deterioration of a disease, the decision was subject to an appeal and the conclusion with regards to disease per se was also supported by the Presidential Member. This decision was subsequently challenged in the Court of Appeal.

The Court of Appeal examined in detail the concepts of disease and substantial contributing factor. In particular they highlighted the decision of *Federal Broom Co. Pty Ltd - v - Semlitch* wherein the High Court noted:

"The disease which is progressing according to its nature, may by reason of external stimuli, have its process accelerated. Before such acceleration can be found to have caused incapacity, there must be more severe or additional symptoms arising from the acceleration which have produced an incapacity which would not have otherwise existed."

In other words, if a condition would have progressed in any event, without the external stimulus of employment duties, then the injury would not fall within the disease provisions.

Both with a normal frank injury and with a disease, the question of substantial contributing factor must be examined. It has often been quoted in decisions with regards to section 9A of the Workers Compensation Act that the employment must be considered to be a "weighty" factor for it sufficient to be considered substantial. In this matter, the evidence was that the worker's condition was a deterioration, exacerbating over time but without interruption from the time of the first injury. Whilst there may have been a further incapacity at the time of the second employment, the medical evidence suggested this employment was not an aggravation sufficient to be considered a substantial contributing factor to the deteriorated condition.

This question of the progression of a disease and the contribution of employment to the progression often turns on the nuances of the medical evidence. The evidence must be such that a deterioration or aggravation of a disease (such as arthritis) must encompass the worsening of the condition by external stimuli. If there is simply a general uninterrupted or unaccelerated progression of the disease, then the disease provisions will not be invoked in favour of the worker. Even if the external stimuli can be shown, the worker must demonstrate on the balance of probabilities that his employment was a substantial contributing factor to that stimuli.

Are Employers Entitled To Access Financial Records Of A Claimant?

The recent Court of Appeal decision of *Toll Pty Limited -v- Craig Morrissey* examined the right of employer to access financial information of an injured worker in Workers Compensation Commission proceedings. In this matter the employer sought at the initial teleconference to issue a Direction for Production (Subpoena) on the injured worker for his financial records including bank documents of a company the worker had set up following his initial injury. This request was refused by the Arbitrator and the matter listed for Arbitration.

Prior to the Arbitration the worker served a schedule of wages purporting to record his earnings from that company. The wages schedule was prepared by the injured worker's wife. At the Arbitration the employer renewed their application to issue a Direction for Production, this time on the grounds to examine the source documentation used to prepare the wages schedule. This was declined by the Arbitrator and ultimately entered an award in favour of the worker. The employer subsequently appealed the Arbitrator's award.

The Court of Appeal determined that the Arbitrator erred in refusing the employer leave to issue a Direction for Production to the worker for the documents. The Court of Appeal was of the view that if a worker was bringing a claim for weekly compensation for a short fall of earnings, the employer was entitled to have access to the primary source material evidencing the worker's earnings post-injury. A simple wages schedule attached to the worker's statement of evidence, whilst helpful in the proceedings, still only represented an extract from the primary wage records.

The decision is a reminder that although the rules of evidence are relatively "relaxed" in the Workers Compensation Commission, parties are still entitled to exercise due diligence by issuing Directions for Production to verify any source documentation. This obviously includes documentation used in the preparation of wages schedules and will also include treating notes of Doctors used to produce treatment history reports and even diaries used to produce chronologies.

Workers Compensation In NSW - AMS Can Overturn An Arbitrator's Decision On Medical Issues

The arbitration process can be unpredictable. However in order to be successful one must be familiar with the roles and functions of the various entities involved in this process. So what is the role of the arbitrator? What is the role of the Approved Medical Specialist ("AMS")? What is their relationship to one another? Is the arbitrator's ruling always binding? What does the Appeal Panel need to consider? The NSW Court of Appeal in *Haroun v Rail Corporation New South Wales & Ors* has handed down a decision that helps answer many of these questions.

Ms. Haroun ("Haroun") was employed by Rail Corporation NSW ("Rail") and was injured on 24 June 2005 and 14 July 2005 in the course of her employment. The first injury involved her knees, back and neck. The second injury involved her forearm, right wrist and right knee.

On 22 October 2006 Haroun's claim for lump sum compensation came before the Arbitrator. The Arbitrator made a number of findings by consent, however referred to an Approved Medical Specialist ("AMS") an assessment of permanent impairment.

The Arbitrator, in his consent findings included a brief reference to the accidents and noted that:

"The effects of those injuries continue to contribute to any impairment suffered by the Applicant"

On 25 October 2006 the AMS, Dr Schutz, examined the worker and issued his Medical Assessment Certificate ("MAC") on 22 November 2006. The doctor assessed Haroun's whole person impairment ("WPI") for her right and left lower extremities at 2% and 4% respectively. However the doctor found, under Section 323 of the Act, that these impairments were a result of a pre-existing condition. The doctor assessed Haroun's right upper extremity WPI to be 1%. Therefore Haroun's total WPI as a direct result of the work injuries was assessed to be 1%.

Haroun then appealed the decision on the grounds that the assessment was made using incorrect criteria and that a demonstrable error was made by the AMS.

Haroun argued that the Panel must take into consideration the consent findings made by the arbitrator regarding permanent impairment.

On 22 May 2007 the Appeal Panel (the "Panel") confirmed the MAC of the AMS and made the following observations:

- the AMS had found there was no evidence of an injury to the worker's right or left lower extremity as a result of her work injury on 24 June 2005. The Panel stated that this comment was "inconsistent with the [Arbitrator's] referral and the Arbitrator's findings as to inquiry."
- The Panel confirmed that it was the Arbitrator's function to determine whether there had been an injury as claimed and that the task of the AMS was to determine whether this injury gave rise to any permanent impairment.
- The Panel noted that the Arbitrator had also made comments regarding permanent impairment (above). The Panel confirmed that "it is clearly the function of the AMS to assess the degree of permanent impairment resulting from an injury. It is not for the Arbitrator to make such a finding".

The Panel went on to state that even though Dr Schutz made comments that offended his jurisdiction as an AMS, the Panel agreed with the assessment made.

The NSW Court of Appeal (the "Court") agreed with the decision of the Panel. Handley AJA stated that the Act was intended for the purposes of having the:

"Factual and legal issues resolved by an Arbitrator subject to an appeal... and to have certain medical issues decided by an AMS".

The Court stated that under Section 326(1) the Arbitrator has no jurisdiction to decide a medical dispute, but "may refer it for assessment" by an AMS.

The Court went on to confirm that since the Arbitrator had no jurisdiction to decide a medical dispute, the consent findings of the Arbitrator were not binding on the AMS or the Panel and cannot even be persuasive. The Court stated that a MAC, which is presumed to be correct under Section 326(1) of the Act overrides any inconsistent finding by the Arbitrator.

This decision has aided in the understanding of the varying roles of the Arbitrator, AMS and the Panel. It is clear from this decision that the jurisdictional role of the Arbitrator exclusively relates to factual and legal issues and the role of the AMS to medical disputes. It is also clear that while the Arbitrator's decision is always presumed to be correct under the Act, the Arbitrator must act within jurisdictional limits as described by the Act.

OH&S Roundup

Approximately \$400,000 In Fines For Fatality

The NSW Industrial Commission has recently fined Sacco Builders Pty Limited and Kaydee Engineering Pty Limited \$180,000 each and Mr Cunningham, (a director of a company that was placed in external administration following the incident) \$18,000 following a fatality at a worksite on 3 June 2005.

The fines arose as a consequence of prosecutions under the Occupational Health & Safety Act.

Sacco were the project managers at a site and had contracted with a person to be responsible for safety at the site. That person was responsible for the preparation of site safety plans, review of work methods of sub-contractors and the carrying out of safety inspections during construction. The safety manager and Sacco were responsible for implementing the safety plan at the site

Sacco contracted with Kaydee to supply and erect structural steel beams. Kaydee contracted with Sydney Metro Cranes Pty Limited ("SMC") which was Cunningham's company, to erect the structural steel beams at the site and operate a boom lift also known as an elevating work platform. Cunningham was SMC's supervisor at the site, which also had a rigger on site. SMC hired the boom lift.

The rigger's normal duties involved assisting the crane driver swinging and directing the movement of the crane and tying the nuts and bolts for fixing steel beams at the site. The rigger was a trainee in the use of and operation of the elevated work platform. SMC were craning materials and fixing steel purlins into position at the site. The rigger was ultimately found stuck between one of the purlins and the boom lift platform hand safety rail. The purlin was pressed against his chest and his body was bent backwards over the basket of the boom lift. When the boom lift was lowered the rigger fell out of the basket. It was noted that the rigger's lanyard which was attached to the back of his harness had not been clipped to the boom lift platform. The rigger was fatally injured due to a combined effect of a head injury and asphyxia.

The Commission heard evidence that there was a fault in the safety drive speed over-ride system which may have resulted in the machine not operating at slow speed. It was noted the work the rigger was undertaking was dangerous as it involved operating the controls of the boom lift while adjusting bolts at roof level on the metal roof steel purlins. The Commission noted there was a failure to properly instruct the rigger. In addition as the rigger was a trainee, the designated supervisor was required to directly supervise him at all times, which Cunningham did not do. There was a failure to train, instruct and supervise on the part of Cunningham.

The Commission was critical of the fact that the rigger was a trainee working alone operating a machine which he had little or no familiarity with at a height in excess of seven metres and in those circumstances there was an obvious and foreseeable risk. The Commission ultimately determined that the respective culpability of each of the defendants was equal. Each defendant had some direct involvement in the construction work and each defendant failed to ensure that the safe work methods were designed and implemented with regard to the work undertaken by the rigger at the time of the accident.

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.

*******UPCOMING BREAKFAST SEMINARS*******

Why not join us at our offices for one of our upcoming breakfast events as we examine developments in Occupational Health and Safety, Insurance Law , Workers Compensation and Employment Law. Light refreshments provided.

OH&S Trends Presentation - 17 September 2008 - 7.45am to 9.00 am

Join us for a talk on trends in OH&S.

- ◆ Are penalties on the rise?
- ◆ Directors and managers obligations
- ◆ What happens when a prosecution is brought

Employment Issues Workshop - 23 September 2008 - 7.45am to 10.00 am

Join us in a workshop environment as we work through practical examples dealing with strategies to manage the the termination of injured workers. We will work through:

- ◆ Injured workers reinstatement rights
- ◆ The risks of terminating injured workers
- ◆ Identifying Inherent Duties
- ◆ Exploring Options For Injured Workers

Workers Compensation Issues - 24 September 2008 - 7.45am to 9.00 am

Join us for a talk on trends in Workers Compensation.

- ◆ Outside work activities – Is there a liability to pay compensation
- ◆ What's happening with Comcare
- ◆ Vocational capacity reports –do they help to reduce weekly payment claims

Reserve your place now and contact

Angie Byrne

T: 9394 1130

E: aeb@gdlaw.com.au

Gillis Delaney Lawyers specialise in the provision of advice and legal services to businesses that operate in Australia. We can trace our roots back to 1950. The name Gillis Delaney has been known in the legal industry for over 40 years. We deliver business solutions to individuals, small, medium and large enterprises, private and publicly listed companies and Government agencies.

Our clients tell us that we provide practical commercial advice. For them, prevention is better than cure, and we strive to identify issues before they become problems. Early intervention, proactive management and negotiated outcomes form the cornerstones of our service. The changing needs of our clients are met through creative and innovative solutions - all delivered cost effectively. We make it easier for our clients to face challenges and to ensure they are 'fit for business'.

We look at issues from your point of view. Your input is fundamental to us delivering an efficient, reliable and ethical legal service. We like to know your business, and take the time to visit your operation and develop an in depth understanding of your needs. Gillis Delaney is led by partners who are recognised by clients and other lawyers as experts in their fields. Our service is personal and 'hands on'.

Our clients receive the full benefit of our ability, knowledge and effort in our specialist areas of expertise. We provide superior and distinctive services through a team approach, drawing the necessary expertise from our specialists. Our mix of professionals ensures that clients enjoy high level partner contact at all times.

We are committed to delivering a quality legal service in a manner which will exceed your expectations and we maintain a focus on business and commercial awareness whilst delivering excellence in legal advice.

We have a proven track record of delivering commercially focused advice. Whether it is advisory services, dispute resolution, commercial documentation or education and training, a partnership with Gillis Delaney offers:

- practical innovative advice
- timely services
- expert insight
- accessibility
- cost effective solutions

You can contact Gillis Delaney Lawyers on 9394 1144 and speak to David Newey or email to dtn@gdlaw.com.au. Why not visit our website at www.gdlaw.com.au.