GD News

Gillis Delaney Lawyers

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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.

If A Company Is In Liquidation, Can You Sue The Insurer Instead?

What happens in NSW if a person has a claim against a negligent party that is in liquidation? Can the claimant access the insurance cover that the company in liquidation had arranged? Can they sue the insurer direct?

The Law Reform (Miscellaneous Provisions) Act (NSW) provides that:

- if a person has entered into a contract of insurance by which the person is indemnified against a liability to pay any damages or compensation, then
- a charge on all insurance monies that are or may become payable in respect of that liability is created on the happening of the event that gives rise to the claim for damages or compensation,
- the charge operates in favour of the person who has the claim against the person with insurance
- the charge has priority over all other charges on the insurance money
- the charge is enforceable against the insurer direct in the same way and in the same Court as if the action were an action to recover damages or compensation from the insured.

Certainly a complicated concept! So what does it actually mean?

Effectively a claim can be bought against an insurer direct rather than pursue a company in liquidation. Essentially the Act provides that a claim can be made against an insurer and is enforceable against the insurer in the same way and in the same Court as any action to recover damages or compensation from the insured However the legislation has its limitations and the Court of Appeal has recently highlighted one of the limitations in relation to a claims made policy effected by QBE that was arranged after the event that gave rise to the claim on the policy.

The NSW Court of Appeal in *The Owners - Strata Plan No. 50530 - v - Walter Construction Group Limited (In Liquidation) & QBE & Ors*, recently considered the effect of the Law Reform (Miscellaneous Provisions) Act and its impact on claims made and claims made and notified policies. The Court considered a claim by the owners of the strata plan against QBE which was brought pursuant to the Law Reform (Miscellaneous Provisions) Act.

The owner of the strata plan sued Walter Construction Group Limited (in liquidation) over design and construction work, alleging that it was done in a manner that was both in breach of contract and negligently. Walter Construction is in liquidation.

Walter Construction had an insurance policy with QBE which contained an unlimited retroactive cover provision which extended cover to claims made during the period of insurance, irrespective of when the acts from which the claims arose were committed. However, this policy was entered into after the alleged cause of action which gave rise to the claim by the owners of the strata plan.

The owners of the strata plan sought to join QBE as a defendant in the proceedings seeking to enforce a charge over the insurance proceeds. The original Trial Judge rejected the application holding that the case did not fall within the relevant provisions of the Law Reform (Miscellaneous Provisions) Act, namely Section 6 of the Act. Leave to appeal to the Court of Appeal was sought

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by the owners of the strata plan. The issue came to the Court of Appeal for determination.

The relevant provisions in the QBE policy provided:

> *"QBE agrees to indemnify the insured against legal liability for any claim for compensation first made against the insured during the period of cover and which is notified to QBE during the period of cover, in respect of any civil liability whatsoever and howsoever incurred in the conduct of the Professional Business Practice and arising out of the performance of the insured's professional activities and duties."*

The policy also provided:

> *"1.4a Unlimited retroactive cover - Unless a retroactive date is specified in the Schedule, this policy shall provide cover in respect of acts, errors or omissions, committed (or alleged to have been committed) irrespective of when such acts, errors or omissions were committed (or were alleged to have been committed)."*

The schedule to the QBE policy made it plain that the retroactive date was unlimited.

The Court of Appeal held that Section 6 of the Law Reform (Miscellaneous Provisions) Act and the charge created by virtue of the Act is triggered on the happening of the event that gives rise to a claim against the insured. The charge created by the Act is not an equitable or legal right but a statutory one.

Where an insurance contract does not exist at the time of the happening of the event a charge is not created by the Act even if the insurance policy is a claims made or claims made and notified type. Thus, in this case, no charge was created under the Act that would give the owners of the strata corporation sufficient legal interest to join QBE as a party against whom it could claim directly.

The Court of Appeal did not dismiss the application of Section 6 of the Act to claims made and claims made and notified insurance policies, rather, it dismissed the application of the Act to these types of policies which were entered after the happening of the event which gives rise to the claim.

This was a result which did not necessarily sit comfortably with the Judges that comprised the Court of Appeal.

Acting Justice Giles in his Judgment noted:

> *"Some years ago I had occasion to suggest, writing extra-judicially, that Section 6 is an unsatisfactory provision and should be reconsidered. Many others have expressed similar views. This is one respect in which it is unsatisfactory. The attention of the legislature, preferably in a wide ranging reconsideration and with regard to the availability of direct enforcement against an insurer under other legislation, is highly desirable."*

Acting Justice Hodgson in his Judgment referred to a possible approach that might be available to the owners corporation to recover monies from the insurer. In the Judgment, Acting Justice Hodgson noted:

> *"I note that no application was made to join QBE pursuant to Section 562 of the Corporations Act 2001 (Commonwealth) which is in the following terms:*
>
> > *(1) Where a company is, under a contract of insurance (not being a contract of reinsurance) entered into before the relevant date, insured against liability to third parties, then, if such a liability is incurred by the company (whether before or after the relevant date) and an amount in respect of that liability has been or is received by the company or the liquidator from the insurer, the amount must, after deducting any expenses of or incidental to getting in that amount, be paid by the liquidator to the third party in respect of whom the liability was incurred to the extent necessary to discharge that liability, or any part of that liability remaining undischarged, in priority to all payments in respect of the debts mentioned in section 556.*
> > *(2) If the liability of the insurer to the company is less than the liability of the company to the third party, subsection (1) does not limit the rights of the third party in respect of the balance.*
> > *(3) This section has effect notwithstanding any agreement to the contrary.*
>
> *It is possible that if the application to this Court fails, the owners corporation could bring an application in these proceedings seeking to join QBE to seek a declaration that Walter has incurred a liability against which it is insured with QBE and that QBE is liable to pay to Walter or its liquidator an amount in respect of that liability, within the meaning of*

Section 562, and possibly an order that such amount be paid to Walter or its liquidator. I express no view as to whether such an application would succeed."

Was Acting Justice Hodgson trying to point the owners of the strata plan in a direction which could see a viable claim against QBE?

The end result for the moment is that the owners of the strata plan are not entitled to join QBE to the proceedings pursuant to Section 6 of the Law Reform (Miscellaneous Provisions) Act (NSW). There has been no charge created in favour of the owner of the strata plan pursuant to that Act. The claim against QBE has been dismissed. The reason was that the policy was not in place at the time the incidents that gave rise to the claims.

Direct actions against a company's insurer when a company is placed in liquidation will continue to trouble insurers and liquidators. The effect and application of the Law Reform (Miscellaneous Provisions) Act has been debated over a number of years and has been subject to much commentary in the legal profession.

Insurers will now be able to resist claims made against them where the policies of insurance which they have effected were entered into after the happening of an event which gives rise to a claim. But what next?

Will there be an attempt by the owners of the strata plan to join QBE as a party to a claim pursuant to Section 562 of the Corporations Law?

Will the NSW Government act upon the suggestions of Acting Justice Giles and consider a possible overhaul of Law Reform (Miscellaneous Provisions) Act 1946?

One thing for sure, despite the definitive opinion of the Court of Appeal in this case, the impact of the Law Reform (Miscellaneous Provisions) Act on insurers will continue. With time it appears that there is likely to be amendments to the legislation that gives access to claimants to insurance proceeds from insurers of companies that are placed in liquidation. Claimants are likely to gain more extensive rights against an insurer of a company in liquidation, where the company arranged insurance for the company in liquidation. The rights may come from amendments to the Law Reform (Miscellaneous Provisions) Act or perhaps new legislation, possibly even through amendments to the Insurance Contracts Act (NSW).

Claimants will continue to argue that where an insurer has received a premium for the risk, a viable claim should be available directly against the insurer where a company that is insured is placed in liquidation. For now that is not the position where a claims made or claims made and notified policy is entered into after the happening of an event that gives rise to a claim. But a change is in the wind. When will it occur? Only time will tell.

WorkChoices-Dismissal Of Injured Employees In Receipt Of Workers Compensation Benefits Is Unlawful

Are you a corporation and is the employment of your employees subject to the WorkChoices legislation? Do you have an employee in receipt of workers compensation payments who is absent from work and has been for some time? Can you terminate the employee due to his absence from work? Not whilst he is receiving workers compensation payments for his absence according to the decision of the Federal Magistrate in *Lee - v - Hills Before And After School Care Pty Limited*.

Employers of injured employees should be aware of the potential for injured employees to bring a claim for unlawful termination of their employment if they are dismissed during a temporary absence from their work because of illness or injury. The claim can include a claim for reinstatement and compensation. Section 659 of the Workplace Relations Act, 1996 prohibits employers from dismissing an employee for a number of prescribed reasons. One of those reasons is where an employee is temporarily absent from work because of illness of injury. The Regulations provide that employees are entitled to the benefit of Section 659 if:

- They have provided a medical certificate for the illness or injury within 24 hours of the commencement of the absence; or
- within a reasonable period after the injury or illness occurs depending on the circumstances; or
- Where an employee is required by the terms of an industrial agreement to notify the employer of his absence and substantiate the reasons for his absence; or
- When the employee has provided a document in accordance with the sick leave requirements Section 254 of the Act.

Section 254 provides that an employee, if required by the employer, is to provide documentary evidence in relation to a period of sick leave taken or to be taken by the employee. This would include a medical certificate or if it is not reasonably practical to obtain a medical certificate a statutory declaration made by the employee. The employee is not required to comply with the sick leave document requirements if circumstances are beyond the employee's control.

An absence from employment by an injured worker will not be considered a temporary absence for the purposes of protection offered by Section 659 if:

- The employee's absence extends for more than 3 months unless the employee is on paid sick leave for the duration of the absence; or
- The total absences of the employee within a 12 month period extends for more than 3 months unless the employee is on paid sick leave for the duration of the absences. The extension applies whether or not the absences in the 12 month period is caused by single or separate illnesses or injuries.

Employers should be aware that the periods prescribed for temporary absences will be extended if the employee is on paid sick leave.

Effectively a temporary absence will be:

- an absence for a period of less than 3 months
- an absence for a period of more than 3 months whilst the employees is paid sick leave

The interpretation of the extensions to the definition of temporary absence by way of sick leave payments has been extended following a decision in the Federal Magistrates Court of Australia where an absence on paid workers compensation counted as "paid sick leave" for the purposes of the exception. The Magistrate found in *Lee - v - Hills Before And After School Care Pty Limited* that a child care employee's absence as a result of a work related injury, where she was paid workers compensation benefits, fell within the extension provided to temporary absences on the same basis as sick leave.

Employers must be aware that the *Workplace Relations Act* prohibits employers from terminating injured employees where the injured employee's absence is for less than 3 months or for a longer period when they are entitled to and receive sick pay. If the employee is receiving workers compensation payments the consequence of Lee's decision is that the employee is still on a temporary absence and cannot be terminated.

However, if the employee has returned to selected duties and is paid "make-up" pay under the Workers Compensation Act, the time the employee is performing light duties will not provide an extension to the temporary absence as the employee will not be absent. A termination of the employee whilst performing selected duties will not amount to unlawful conduct under section 659 provided the reason for the termination is not the temporary absence when the employee was receiving workers compensation benefits or any other prescribed provisions which include race, colour, age, physical or mental disability, sexual preference, religion, political opinion, national extraction or social origin.

A Scheme Agent's acceptance of an employers' ongoing obligation to pay weekly benefits to an employee whilst the employee is not performing duties for the employer will have a significant impact on an employer as any decision to terminate the employee whilst payments are being made will be unlawful.

Perhaps employers looking to exit long term injured employees will look to a return to selected duties as a step in the path to ending a temporary absence and the obligations imposed under section 659. However this is will not be effective in all circumstances. Whether or not a termination will be unlawful under section 659 will be decided by a consideration of the reason for the termination. Was the reason for the termination the temporary absence or some other reason?

Will the Federal Magistrate's decision lead to a surge in claims by employees for reinstatement and compensation for unlawful termination where the employee was terminated whilst receiving workers compensation payments? Perhaps! However the prospect of further judicial interpretation remains as more cases come before the Courts. Will the Magistrate's decision stand the test of time?

The decision in *Lee's* case highlights further issues that must be considered by employers that intend to terminate injured employees. Discrimination issues will also impact on an employer's considerations.

The navigation of a safe path through the complex legislative regime that governs employment law and workers compensation

will continue to be an issue for employers as the termination of injured employees will continue to expose employers to reinstatement and compensation claims under WorkChoices in addition to claims for workers compensation benefits.

Who was the Employer?

In New South Wales claimants injured during the course of their employment are subject to a strict damages regime if a claim is brought against their employer. In order to bring a claim for work injury damages, a claimant must have sustained at least a 15% whole person impairment. This is a far higher threshold than in a claim for negligence against a party other than an employer. In these circumstances a claimant need only satisfy a threshold of 15% of a most extreme case, a far lower threshold. Occasionally circumstances arise where the question of who is the employer becomes crucial as it can mean the difference between substantial damages or no damages at all.

The New South Wales Court of Appeal has recently handed down a decision where the question of who was the employer was a crucial issue.
On 11 July 2002 Jason Shaw was injured whilst working in the meat processing plant of Bindaree Beef Pty Ltd ("Bindaree Beef.") Shaw claimed that whilst he was trimming carcasses prior to loading them onto trucks he was pulled from behind by his supervisor, as a consequence of which he sustained injury to the left shoulder and neck. Shaw alleged that his injuries were caused by the negligence of both the supervisor who had pulled him and also the negligence of Bindaree Beef, alleging that Bindaree Beef did not have a proper system to control the activities of the supervisor. The claim against Bindaree Beef was brought pursuant to the Civil Liability Act 2002, as Shaw alleged that he was not employed by Bindaree Beef, but Yolarno Pty Ltd ("Yolarno"). Shaw contended that he was employed by Yolarno as a trainee directed to work in Bindaree's meat processing plant.

Whether it was Bindaree Beef or Yolarno who employed Shaw was significant. If Bindaree Beef was found to be the employer then a claim for work injury damages would not be open to Shaw as he had not reached the requisite threshold (there were also a number of procedural requirements that Shaw had not complied with). If, however, Yolarno was Shaw's employer and Bindaree Beef had been negligent then Shaw's damages would be assessed pursuant to the Civil Liability Act 2002.

There was no issue that Bindaree Beef and Yolarno were associated entities with common directors and shareholders. The companies were involved in the running of an abattoir at Inverell. Yolarno undertook administration and stock buying, whilst Bindaree Beef was engaged in the boning, packing and load-out operations at the abattoir in addition to maintenance.

Shaw had been employed by Yolarno from May 1997 to June 1999 as a storeman. After working elsewhere for a period of time, in February 2002 Shaw commenced employment with Bindaree Beef as a labourer. One of the conditions of his employment with Bindaree Beef was that he may be required to enter into a traineeship. Shaw commenced work in February 2002 in the load out section of the abattoir.

In May 2002 Shaw was asked whether he would like to go onto a traineeship. Shaw was told that his position was being changed to a trainee's position and that was all the work that was available. Shaw signed a Training Contract Application form and continued to work in the load out area. This form was not available at the trial. Shaw had however signed a second form in May 2002 (after discussions as to whether or not he would remain in the load out area). Why the second form was signed was not clear but not important. On this form Shaw's employer was described as Yolarno with the trading name given as Bindaree Beef.

At trial, Shaw argued that on the signing of the form, he became employed by Yolarno. Shaw was unsuccessful in his argument and appealed.

The majority of the Court of Appeal disagreed with Shaw. The Court of Appeal found that it was Bindaree Beef rather than Yolarno who was the employer as:

- Shaw's February 2002 employment by Bindaree Beef referred to a possible requirement to enter a traineeship;
- When Shaw was approached to go onto a traineeship nothing was said about a different employer;
- Although Yolarno was named as the employer the trading name was given as Bindaree Beef;
- Yolarno was identified as the registered training organisation;
- After May 2002 Shaw continued to undertake the same work in the load out area;
- Shaw continued to be paid by Bindaree Beef.

Not the result that Shaw wanted. In addition to not being able to bring a claim for work injury damages as he does not satisfy the threshold Shaw has also been ordered to pay the costs of the trial and the Court of Appeal proceedings.

Bindaree Beef had before the accident embarked on a process to shift the employment relationship to Yolarno but when an insurer was faced with the defence of the claim the focus shifted to an argument by Bindaree Beef that it was the employer. The paperwork was not conclusive on the issue, the true nature of the relationship was the defining factor; the insurer's stance in arguing Bindaree Beef was the employer was correct.

School Bullying Leads To Substantial Damages Award.

Benjamin Cox who is now 18 years of age will receive substantial damages from the State of NSW as a result of an alleged breach of duty of care owed by the Woodbury Public School where he was exposed to an older school boy and over a number of months subjected to repeated harassment with various incidents of bullying. On at least two occasions these incidents included physical assaults of a relatively serious nature. The events were reported to the school authorities but the harassment and bullying continued.

Benjamin brought a claim alleging that the Woodbury School authorities had failed to take any reasonable steps to protect him from the repeated harassment and bullying.

One problem which confronted Benjamin in the claim was that he had no recollection of the events in question. He was young at the time and the only evidence available to him was the evidence of his mother who recounted what she had been told by her son.

Usually, a Court will not accept evidence from a person about what someone else has said. The rule which precludes the admission of such evidence is known as the Hearsay Rule.

Nevertheless the Evidence Act has provisions which allow for exceptions to the Hearsay Rule where a person is “unavailable” or “incompetent to give evidence”.

In this case, as Benjamin had no recollection of the bullying incidents, it was concluded that he was not capable of giving a rational reply to the questions about those facts and therefore was not competent to give evidence about the facts. Accordingly, as Benjamin could not give competent evidence, the evidence of his mother was accepted as an exception to the Hearsay Rule. Of course, the credibility and reliability of the mother’s testimony was still an issue for the Court, though her evidence was admissible.

A teacher is not required to prevent an injury to students but rather must take reasonable steps to protect students against risks of injury which should be reasonably foreseen.

A child of immature age may require protection against the conduct of others or indeed himself.

As the Court noted, “Children stand in need of care and supervision and this their parents cannot effectively provide when their children are attending school; instead it is those then in charge of them, their teachers, who must provide it.”

The Court also noted that a “school master was bound to take such care of his boys as a careful father would take of his boys, and there could not be a better definition of the duty of a school master.”

At the end of the day the Court concluded the school authorities responded inadequately to an escalating problem and failed to take steps to protect Benjamin from the conduct of a plainly behaviourally disturbed older pupil.

Benjamin suffered an anxiety disorder and a separation anxiety disorder.

Nevertheless, Benjamin was genetically vulnerable. The medical evidence suggested that Benjamin was a person who at the time of the assault upon him was very vulnerable to contracting some type of illness. The medical evidence suggested that he had a variant of borderline personality disorder. Notwithstanding, the Court confirmed that the negligence was a necessary condition for the occurrence of his psychiatric harm.

The Court accepted that Benjamin will not earn income in the future.

Benjamin was awarded damages of $213,500.00 for his pain and suffering and awarded compensation for past and future wage loss for the balance of his life based on the average weekly earnings of employees in NSW. The loss of earnings, however, was reduced by 25%. The reduction was applied for the vicissitudes of life. Usually a reduction of 15% is applied, however, where other factors impact on the claimant, the deduction for vicissitudes may increase. In this case the predisposition of Benjamin to psychiatric injury was sufficient to increase the reduction to 25%.

Substantial damages were awarded to an individual who could not recall the events which led to his harm. Nevertheless, this did not prevent the Court from determining that Benjamin was subject to bullying, the school authorities had failed to respond to a foreseeable risk of injury and that the State of NSW should pay for the loss which was caused.

Honesty In Settlement Negotiations

What can you hold back from the other party in a negotiation? Can you embark on a course that could mislead a person in negotiations without consequences? What can happen if you do mislead someone in negotiations?

Parties to any settlement negotiations must always act honestly in any negotiations or discussions. Concealing relevant facts which ought to have been disclosed in any negotiations can result in legal practitioners facing professional misconduct charges as well as exposing their clients to an application to the Courts that the settlement be set aside.

In a recent matter of the *Legal Services Commissioner - v - Mullins*, a plaintiff's barrister was found to be guilty of professional misconduct for concealing from the defendant's insurer the fact that the plaintiff was suffering from cancer. The barrister had entered into negotiations with the insurer and was relying on an expert report which indicated the plaintiff's injury had caused a life expectancy reduction of 20%. However the report was prepared prior to the plaintiff's cancer diagnosis. The barrister did not reveal to the insurer the fact that his client had been diagnosed with cancer after the expert report was prepared and served in the proceedings.

The Tribunal held the barrister intentionally deceived the insurer about the validity of the life expectancy report by failing to disclose the fact the plaintiff now had cancer. The barrister's fraudulent deception of the insurer involved such a substantial departure from the standard of conduct to be expected by legal practitioners so as to constitute professional misconduct.

The Tribunal ordered the barrister be publicly reprimanded as well as pay a fine of $20,000.00.

So what can an insurer do when it discovers the true position after the negotiations have concluded?

Throughout Australia the various States and Territories have legislation that permits Courts to review unjust and unconscionable contracts and set aside or vary the contracts. In NSW the legislation is the Contracts Review Act. A settlement deed can and will be reviewed by the Court pursuant to contract review legislation where there has been unconscionable conduct in negotiations. In addition the general rules of equity permit a deed of settlement to be set aside where one of the parties has engaged in unconscionable conduct.

As a result of the barrister's deception in failing to reveal the plaintiff's cancer diagnosis, the plaintiff may now face an application to the Court to have the settlement agreement set aside. The difficulty for the insurer may be that there is no money left to recover.

Perhaps there will be an action against the Barrister by the insurer to recover the loss suffered as a consequence of negligent misstatement or a breach of Fair Trading legislation that prohibits misleading and deceptive conduct in trade or commerce and provides a damages remedy for a person who has been misled or deceived.

Parties to negotiation should be aware of their duties of disclosure of relevant facts which ought to be known to the other side. Negotiations are not an honesty free zone and legal practitioners who rely on reports or allege facts which they know or should know, contain wrong information, will face the potential of disciplinary proceedings and possibly claims for damages as a result of their failure to disclose. Settlements that are unconscionable can be reviewed and will be set aside.

There are remedies available to parties who have been effected by dishonesty in negotiations however the legal cost of pursing those remedies and the recoverability of the loss will be significant issues to consider before embarking on a course to

put things right.

OH & S ROUNDUP

NSW Police Fined $100,000.00.

Between 3.20 pm on 15 February 2004 and 4.30 am on 16 February 2004 the NSW Police Service required police officers to attend an area known as The Block in Redfern in order to perform work described as "dealing with unplanned civil disorder", otherwise known as the Redfern Riots. 217 police officers attended the incident. Each officer spent varying amounts of time at the riots. Whilst attempting to contain the crowd and restore public order, some 42 employees sustained various injuries ranging from psychological damage to bruising, cuts, abrasions and at least one employee was rendered unconscious.

WorkCover prosecuted the NSW Police Service for a breach of the Occupational Health and Safety Act for failing to ensure that premises controlled by the employer were safe and without risk to health. A tough scenario one might believe.

Although dealing with incidents of public or civil disorder is obviously dangerous, even for police who are properly trained and equipped, the Court in this case held there was clearly a risk of very serious injuries to police officers from being hit by various missiles being thrown at them for a period of many hours. In essence, the Court found that inadequate equipment was provided which would best protect the police officers from injury and there was absent proper training in the use of such equipment in dealing with civil disorder incidents. There was simply not enough personal protective equipment. It was noted that some police officers were trained in the use of that personal protection equipment (PPE) whilst others were not. It is important to note that this was not a case where there were no police procedures and no policies, however, the policies and procedures were inadequate.

Some might say a harsh result for the NSW Police Service when they were responding to criminal behaviour. However, clearly the Court was of the view that the safety of employees was paramount and the failure to provide proper equipment and training to all officers involved resulted in a need to impose a substantial fine.

Fall From Balcony Leads To Substantial Fine.

Omar El Mahrbani, a self-employed cement renderer, whilst working at a residential development performing cement rendering work on an upstairs balcony of a unit, fell from the balcony after he lost his balance. He fell approximately 5 metres and suffered head injury, fractures of the left wrist and elbow, spinal and neck injuries and was off work for a number of months. The principal contractor was Forcon Pty Limited who was in the process of constructing nine townhouses. Jeffrey Forsythe was the managing director and sole shareholder of that company. Forcon subcontracted the cement rendering work to a partnership which had engaged El Mahrbani to conduct the cement rendering. Essentially there was no stable or securely fenced work platform in situ to enable the worker to perform the work safely. There was no adequate work method statement and there was no proper risk assessment carried out. In addition, there was inadequate information, instruction and training and supervision in the conduct of the work performed.

The partnership that employed El Mahbani is subject to a pending prosecution. However, at this stage, that prosecution has yet to be concluded.

The absence of fall protection in this case led to a fine of $73,125.00 for the principal contractor and an additional fine of $4,100.00 for the director for breaches of the Occupational Health and Safety Act.

Fall Through Safety Mesh.

James Denson, Garry Denson and JB Metal Roofing Pty Limited were recently convicted for breaches of the Occupational Health and Safety Act following a work accident on an Australand Holdings Limited site at Wallgrove Road, Eastern Creek. The defendants had pleaded guilty to offences under the OH&S Act.

Employees of JB Metal Roofing were laying metal roofing sheets which were to be secured to the metal roof purlins and would form part of the roof structure. The sheets were in packs wrapped in plastic. To lay the sheets, employees had to walk across metal roof purlins which were approximately 80 cm apart. At one point two employees were engaged in cutting the straps around a pack of roof sheets wrapped in plastic. Another employee was crouching down on a metal purlin attempting to retrieve the plastic wrapping that had come away from one of the sheets. In doing so the employee lost his balance and fell

through the safety mesh to the floor, some 12 metres below. The employee ultimately died from the extensive injuries he suffered. James Denson was a director of JB Metal Roofing. His father, Garry Denson, was a director of Garry Denson Metal Roofs Pty Limited. Garry Denson Metal Roofs was placed in liquidation before the hearing of the prosecution. As a consequence of the company being placed in liquidation the prosecution against Garry Denson Metal Roofs did not proceed but will be determined at a later time.

WorkCover prosecuted the defendants as it was alleged that the safety mesh on the roof was inadequately secured, the mesh was inadequately overlapped and there had been no proper training and instruction in the appropriate method for installing safety mesh. Other issues raised included the inadequate training of the workers who were required to walk along metal roof purlins and the failure of the company to require persons performing roofing work to wear appropriate footwear. Some six employees were required to work on the roof and two Australand employees were also required to perform work at the site.

The worker who was fatally injured was not wearing a safety harness as he was not working close to the edge of the roof and the safety mesh was the only form of fall protection available to him. Most significantly there were no inspections carried out by any persons to ensure that safety mesh was installed correctly prior to work on the roof commencing.

JB Metal Roofing was fined $200,000.00. James Denson, JB Metal Roofing's director, was fined $20,000.00 and Garry Denson, the director of Garry Denson Roofing, was fined $37,500.00.

James Denson received the lesser penalty as the Court determined the culpability of his father was greater. If anything, James Denson's culpability was characterised as that of an inexperienced young man who went into business under the mentorship of his father and his knowledge and understanding of many aspects of the responsibilities that his business venture involved, including work safety, were either unknown to him or he relied on his father to guide him. In other words, his culpability springs predominantly from ignorance and inexperience rather than a deliberate intention on his part to ignore his work safety obligations.

It was also noted that JB Metal Roofing was impecunious. No doubt this will ultimately mean that the substantial penalty imposed will not be paid as, in all likelihood, the company will be placed in liquidation.

Builder And Principal Contractor Receive Substantial Fines.

Holdmark Developers Pty Limited was a developer and principal contractor of a very large shopping arcade with business and residential accommodation. Amongst a variety of contractors engaged, Quality Formworks Pty Limited was engaged to provide formwork services. Mr Soliba was the sole director of Quality Formworks and a shareholder and also an employee of the company.

Kevin Fisher was on his way to work at the site when he stopped his truck in a laneway due to an obstruction and while he was waiting to proceed his truck was hit by a piece of formply board falling from the construction site and shortly thereafter by a piece of formwork timber approximately 5 metres in length. The length of timber struck the windscreen of the utility, entered the cabin of the vehicle and struck the steering wheel column before bouncing and striking the driver side door. Mr Fisher sustained numerous small lacerations and abrasions to both hands and his right arm.

The formworkers who had caused the formwork to fall were engaged in drop stripping the formwork and there was inadequate supervision to prevent employees from engaging in drop stripping.

Quality Formworks were prosecuted for two breaches of the Occupational Health and Safety Act, Soliba was also convicted for two offences and Holdmark Developers Pty Limited convicted of one offence. Holdmark was fined $95,000.00. Soliba received fines totalling $4,000.00 and Quality Formworks was fined $75,000.00.

The Court noted that Mr Soliba and his company had not obtained work in the last two and a half to three years and the company was unlikely to operate again. It was also noted that Quality Formworks had all but closed down and had only been prevented from doing so because of an outstanding taxation bill of $90,000.00. On that basis the Court determined that the fine could be reduced but there was little point significantly reducing the fine for Quality Formworks. Holdmark, unusually, did not call any evidence to elaborate on its system of work, the steps taken to address a risk exposed by the incident nor the steps taken to enforce a prohibition on drop stripping at the site.

In this case considerably different penalties were imposed on Holdmark and Quality Formworks. The Court noted that these

penalties essentially arose as a consequence of the operations of the Fines Act in favour of Quality Formwork as that Act provided the penalty for the company could be moderated where the company was impecunious.

In addition an element of specific deterrence was required in the fine for Holdmark in light of its attitude to the offence.

NSW Workers' Compensation - Dispute Notices

In NSW a Scheme Agent who disputes liability for a compensation claim must give notice of the dispute to the worker. All matters in dispute must be specified in the Notice. Any defect in the Notice must be corrected as soon as it comes to the Scheme Agent's attention.

The Notice must be in plain English and include the following:

- A statement of the matters in dispute.
- The reasons for the dispute.
- A statement identifying the reports and documents submitted by the worker in making a claim - not only do Scheme Agents have to consider their own medical evidence, they have must consider the evidence presented on behalf of the worker.
- A statement identifying all reports and documents relevant to the Scheme Agent's decision to dispute the claim including reports and documents considered even if they are not relied on by the Scheme Agent. Copies of the reports and documents must also be provided.
- Notice that the Workers Compensation Commission may only review matters notified in the dispute notice or in a dispute review notice.
- A summary of the Scheme Agent's consideration of the claim and the reports and documents relevant to the matter in dispute.
- Notice that the worker can request a review of the claim by the Scheme Agent. The Notice must describe the procedure for requesting a review and indicate the worker may raise further issues and introduce further supporting evidence when seeking the review.

It is important to note should a matter proceed to the Commission both parties are limited to relying on reports and documents identified in the dispute notice or any dispute review notice issued by the worker with the exception of those workers who are not represented by a solicitor.
The worker has the an opportunity to request that a Scheme Agent review the decision to dispute the claim or any aspect of the claim at any time before an application of dispute is lodged with the Workers Compensation Commission.

When a request for a review is received a Scheme Agent must review the claim and provide a response within 14 days. A request is deemed to have been made on the date it is first received by the Scheme Agent.

When the claim is reviewed the Scheme Agent may accept the claim or issue a new dispute review notice. Whilst the claim is being reviewed the Scheme Agent's original decision remains in force.

There was a transition period following the introduction of this regime where the Workers Compensation Commission would accept dispute notices that were not in the specified form however the transition period ended on 1 May 2007. If the Notice do not comply with the requirements set out above the Workers' Compensation Commission has the power to reject any Application to the Commission and can advise the worker to seek a review of the decision under the Workers Compensation Act. Scheme Agents would then have an opportunity to reconsider the claim and correct any deficiency in the dispute notice and even add further issues that were considered on review. Nevertheless the Application can be accepted despite any deficiency and if it is accepted the issues for the Commission are limited to the issues raised in the original dispute notice.

No doubt with time the number of Applications rejected by the Commission for dispute notice deficiencies will decrease and Scheme Agents will need to ensure that all matters in dispute are adequately identified in the original dispute notice and any response issued to a request for a review of a decision on a claim.

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