GD News

Gillis Delaney Lawyers

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.

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Council Liability for Potholes

Is a Council liable for negligence in failing to repair a pothole? Not always! In NSW the question of liability turns on the knowledge of the Council. Without knowledge of the risk there can be no liability. But what knowledge is sufficient to impose liability?

The New South Wales Court of Appeal in a recent decision in North Sydney Council v Roman overturned a District Court award of damages of $475,485.00 against North Sydney Council. A woman was injured one night when she fell in a pothole half a metre wide and about 4 to 5 inches deep in Princess Street, McMahons Point. She had successfully argued in the District Court that the Council had been negligent in failing to maintain the road by repairing the pothole. The claim was defended by the Council on the basis that it did not have actual knowledge of the pothole as required by Section 45 of the Civil Liability 2002 and should have no liability.

Council street sweepers regularly swept the gutters in Princess Street in the vicinity of the pothole but no street sweepers were called to give evidence. The street sweepers were instructed as part of their induction to identify hazards which needed attention and to report them to their supervisor. It was argued that the street sweepers' actual knowledge of the pothole could be inferred from the regularity of their duties and their obligation to identify hazards. The Council called a supervisor responsible for repairing potholes and a number of other people responsible for repairing potholes and they all gave evidence that they did not know of the pothole. The witnesses conceded if they did know of the pothole they would have regarded it as a hazard and would have repaired it.

In NSW the Civil Liability Act provides that:

> *"A roads authority is not liable in proceedings for civil liability for harm arising from a failure of the authority to carry out roadwork, or to consider carrying out roadwork, unless at the time of the alleged failure the authority had actual knowledge of the particular risk the materialisation which resulted in the harm".*

The Court of Appeal concluded that no Council officer at a decision making level had actual knowledge of the particular pothole and therefore the Council did not have such knowledge. Accordingly the statutory immunity provided Section 45 prevailed. The Council was not liable.

Nevertheless this view was not unanimously accepted by the Court of Appeal with one of the Judges concluding that the knowledge of the street sweepers demonstrated knowledge of the risk attributable to the authority as the street sweepers when acting within the scope of their duties had learnt of the particular risk and were under an obligation to report it.

The majority of the Court of Appeal accepted that the Council had been negligent in failing to observe the existence of the pothole and failing to act on the observation of the pothole which it is probable that sweepers made, and in failing to make the simple repair which was called for. Notwithstanding that negligence the majority of the Court of Appeal accepted that the Council was a road authority and was entitled to the protection afforded by Section 45 of the Civil Liability Act which exempted the Council from liability where it did not have actual knowledge of the risk. The Court of Appeal concluded that actual knowledge of the particular risk requires that the relevant knowledge exist in an officer responsible for exercising the power of the authority to mitigate the

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harm. The knowledge of others without such responsibility will not constitute actual knowledge for the purposes of Section 45 of the Civil Liability Act. The lack of knowledge of a Council officer at a decision making level resulted in the Council escaping liability for the claim.

Hoteliers Liability

A fracas at a hotel! An intoxicated patron involved in the altercation! A significant injury during a fight! Common problems for a hotelier perhaps but are they liable for the actions of their patrons?

The NSW Court of Appeal has recently delivered two judgments which provide guidance on the vexing issue of the extent of responsibility of a hotelier for its patrons.

In *Spedding -v- Nobles* and *Spedding -v- McNally* the Court of Appeal considered claims by two hotel patrons who were injured as a result of a fracas at the hotel. One patron was assaulted and robbed of her watch just outside the hotel by a patron and sought assistance from one of the hotel employees who declined to become involved in the fracas when the victim confronted hotel patrons who had assaulted her. The Court of Appeal was called on to determine whether or not the hotelier owed a duty of care to protect patrons from the criminal assault of third parties and whether the risk of the vicious attack which ensued was reasonably foreseeable.

The Court of Appeal in Spedding's case concluded that a duty of care was owed to her by a licensee to patrons of a hotel to protect patrons from risk of attack by other patrons. The Court held that the existence of the duty of care owed by a licensee to patrons depends on the element of control over the premises. Although the Liquor Act in NSW does impose a statutory duty of care on licensees, it does confer a power of control and an obligation to exercise that power. The Liquor Act provides the basis of finding that the licensee had control over patrons which inturn resulted in a common law duty.

The Court of Appeal noted that it is exceptional for the law to impose a duty to exercise care in controlling a third party to prevent the third party doing damage to another, but a duty to exercise reasonable care to protect patrons has been imposed upon the manager of a hotel as regards intoxicated or dangerous customers. It was also noted that this includes the protection of a patron while he or she is on or departing the licensed premises.

As a result of the judgment Nicole Nobles was entitled to retain the damages of $430,362.00 which was originally awarded in a District Court hearing.

In *Wagstaff -v- Haslam* the NSW Court of Appeal considered a claim where there was an altercation between two patrons at a hotel with the wife of one of those involved in the fracas intervening to assist her husband and as a consequence she suffered injuries. The injured wife sued the licensee and occupier of the premises. Once again in this case the Court determined that the level of control exercised by the occupier over the premises and the occupier's knowledge or ability to know about the conditions of persons on the premises where liquor is being sold was sufficient to establish a duty of care.

The Court of Appeal noted that it is foreseeable that some people will become aggressive when drunk but it does not follow that a publican must, acting reasonably treat every intoxicated patron as a potential source of unprovoked violence.

It was accepted in Wagstaff's case that the mere degree of intoxication will not give rise to a duty to take immediate steps to remove the affected person in order to protect other patrons. An additional element was necessary, that is knowledge (either actual or constructive knowledge) of an aggressive character of the person when intoxicated. The knowledge based either on known characteristics or conduct on the occasion in question. The Court of Appeal held in Wagstaff's case there was no such knowledge and the conduct of the bar manager prior to the commencement of the altercation did not constitute a breach of a duty of care.

As can be seen hoteliers continue to face claims from patrons who are injured as a consequence of a fracas on their premises particularly where the fracas involves persons who are intoxicated.

It is clear that there is a duty of care imposed on hoteliers to protect patrons from action of other patrons however the true question is whether there is a foreseeable risk and what should done about that risk. The simple intoxication of patrons will not be insufficient for liability to attach to an hotelier, something more is needed, the hotelier needs to be aware of the propensity for something to go wrong. They need to be aware that the patron may become aggressive. Then the hotelier must act reasonably to eliminate that risk otherwise they may be liable to compensate patrons who suffer injuries in a fracas at the hotel.

Is The Tide Changing?

Is the personal responsibility of a claimant beginning to impact on the damages recovered in personal injury claims? Are damages being reduced by the Courts to reflect the true contribution of an injured person to their own demise?

Where a person is injured and they claim damages for their injuries, the damages recovered will be reduced by the extent that their own negligence has contributed to their loss.

In addition, it is sometimes argued that an injured person voluntarily assumed the risk and the person who has suffered harm is presumed to have been aware of the risk and chose to expose themselves to that risk and therefore is not entitled to damages.

Issues of contributory negligence and voluntary assumption of risk are regularly raised by defendants in personal injuries claims but do the Courts impose realistic reductions reflecting the personal responsibility of the claimant for the accident?

Voluntary assumption of risk and contributory negligence are not mutually exclusive principles. Evidence adduced by a defendant in an attempt to demonstrate voluntary assumption of risk is likely to support an argument of contributory negligence. It is important to remember that the notion of common law contributory negligence is generally more objective than a common law notion of negligence.

Contributory negligence looks at a claimant's duty to themselves and depends on the personal and other resources available to the claimant to take care for themselves. An example of this is the young child whom the Courts have held is only expected to exercise the degree of care one would expect of an average reasonable child of the same age and experience.

Allegations of contributory negligence will require the Courts to weigh up the actions of the claimant and determine a percentage of personal responsibility.

In our January edition we discussed two separate motor vehicle accidents where the Court reduced the claimants' damages by 75% as a consequence of their own negligence. A tough approach, which is also seen in the recent NSW Court of Appeal Judgment in Carey - v - Lake Macquarie Council.

Michael Carey, then aged 51, was riding his bike at about 5:20 am along a concrete pathway in a park at Caves Beach when he rode into a bollard in the middle of the path. Carey fell off his bike and was injured. Carey sued the Lake Macquarie City Council that was responsible for the management of the park including the pathway.

Carey often rode his bike but had never taken this particular path whilst riding his bike before. His bike had a halogen headlight which shone about 2 metres in front and the beam was about a metre wide. The path was not lit. At the time of the collision Carey was travelling at a speed of about 15 to 20 kilometres per hour. The park contained a number of bollards which were dark blue in colour. Some of the bollards had reflectors but on this particular bollard part of the reflector tape was missing. Carey had seen this particular bollard before when walking through the park.

The trial judge found in favour of the Council on the basis that there was no negligence on the part of the Council and Carey had not been keeping a proper lookout. Carey appealed.

The Court of Appeal disagreed with the trial judge and found in favour of Carey. In the Court of Appeal's opinion although the particular bollard was obvious during the daytime, putting it in the middle of the path created a real risk for cyclists, especially at night and especially when there was reflector tape missing. The Court also considered it important that the bollard had no real practical purpose.

The Council attempted to argue that Carey's claim should fail as he had voluntarily assumed the risk. The Court disagreed with this argument and found that Carey had not accepted the risk; he had simply not thought about it.

The Council also argued that Carey's claim should fail as a consequence of a section of the NSW Civil Liability Act 2002 (the legislation that applied to this claim) that provides there can be a deduction of 100% for contributory negligence, with the result that the claim for damages is entirely defeated. The Court rejected this argument as well.

All was not lost for the Council though, as Justice McClellan (who delivered the leading judgment) concluded that although the

Council had been negligent, Carey had been equally negligent. Carey had chosen to ride his bike in the dark at some speed and without sufficient lighting on his bike. In these circumstances the Court reduced Carey's damages by 50%.

Another interesting decision that demonstrates apportionment of blame is currently a real issue for the Courts. The case provides a real warning to claimants that if they have not been careful then their damages will be significantly reduced.

Judges Must State Their Reasons

You run a case to judgment and when you receive that judgment you find that all of the issues you raised are not addressed in the judgment. The absence of reasons can lead to a feeling that the evidence adduced may not have been properly considered. If the evidence was not considered, you would like to appeal. What do you do and where do you stand?

In two recent judgments the NSW Court of Appeal was critical of judgments from the District Court which failed to provide adequate reasons. These two judgments were handed down within a week of each other. The Court of Appeal, whilst ordering rehearings in each claim, noted that the following conclusion applied to both cases:

> *"The criticism of the Judge contained in this judgment may be thought to be severe, but the inadequacy of reasons is not an infrequent issue in this Court with respect to appeals from the District Court. The parties in the present case have been put to unnecessary expenses in litigating the appeal and will be put to further expense in conducting a new trial on the assessment of damages. Furthermore, in such cases, plaintiffs . . . may be kept out of a proper verdict over a lengthy period to which they would have had access had the Judgment complied with the basic principles of judicial reasoning."*

In both cases it was noted

> *"this is yet another appeal from the District Court that must succeed by reason of the manifest inadequacy of the Trial Judges' reasons. The authorities that govern judges' duties to give reasons are, or should be, permanently engraved in the minds of all judicial officers. These duties are designed to ensure that a judge wrestles adequately with the issues in the case, to enable appellate accountability and to provide basic fairness to the losing party. Judges should be as familiar with these duties as they are with the route they travel each day to work. Unhappily, however, some still get lost."*

The determination of a judge and detailed reasons are important to demonstrate there has been no miscarriage of justice. Reference to the evidence is an important and critical to the proper determination of a matter. The absence of reasons can give rise to an inference that evidence has been overlooked or a judge has failed to give consideration to it.

Judges must provide detailed reasons in their judgment.

It is not appropriate for a Trial Judge to merely set out the evidence adduced by one side then the evidence adduced by the other and then asserts that having seen and heard the witnesses he or she prefers to believe the evidence of one and not the other. Although there is no need to refer to the evidence in detail, especially where it is clear that the evidence has been considered, where certain evidence is important or critical to the proper determination of the matter, conflicts in the evidence need to be resolved. If evidence is not referred to by a Trial Judge, an Appellate Court may infer that the judge overlooked the evidence and failed to give consideration to it.

Judges need to set out the material findings of fact and any conclusions or ultimate findings that they reach. Where one set of evidence conflicts with another, the Trial Judge should set out his or her findings as to how he or she comes to accept one version over the other.

The Court noted:

> *"Often important issues of credibility involve sub-issues. Often, objective facts, or facts that are probable, are capable of having significant bearing on the sub-issues. In cases of this kind, it is incumbent upon Trial Judges to resolve the sub-issues and to explain, by reference to the relevant facts, the conclusions to which they have come. This having been done, they should then turn to the ultimate facts in issue and explain how their decisions on these sub-issues have assisted them in forming a conclusion. It is only when adequate reasons of this kind are given that an unsuccessful party will be able to understand why the Judge has believed his or her successful opponent."*

In both cases the Court of Appeal was critical of the inadequacy of the reasons. Unfortunately, the parties in the cases will now face expensive retrials. In one of the cases the original trial was a 7 day hearing. The parties are faced with rehearings of the claims and no doubt the legal costs involved will present substantial impediments to the resolution of the claims without further prolonged hearings.

When a party loses a case they deserve to know why and detailed reasons in a judgment will explain the reasons for the loss and reduce the likelihood of an appeal in some cases.

Labour Hire Agencies

WorkCover NSW has recently issued two fact sheets relating to labour hire. The fact sheets are designed to assist host employers prepare for and manage labour hire personnel and to provide an overview of the OHS responsibilities of labour hire agencies and group training companies.

A labour hire company, as the employer, has specific obligations to its employees who are placed with a client. Effective consultation between labour hire agencies, their workers and their clients is fundamental to securing safe work placement.

WorkCover has made it clear that along with general OHS duties of an employer, labour hire agencies should also ensure that in respect to every placement of a candidate:

- an induction is provided.
- there is an assessment of the placement; and
- the workplace is continually monitored.

It is important for the labour hire employee to receive not only a general induction but a site specific induction as well as site specific OHS training. Information needs to be provided to the employee about the host work place, the work tasks and work place hazards and their control.

It is imperative that a labour hire agency attend the proposed work place prior to any placement to assess the work site. The labour hire agency needs to adequately and competently assess the client's work site, the risks on the work site, and identify all plant, machinery and hazardous substances to which the employee will be exposed. Training registers to demonstrate that labour hire agency employees have the required knowledge, skills and capabilities to safely carry out the roles assigned to them must be maintained by the labour hire agency.

It is imperative that the labour hire agency gathers adequate information about the OHS systems in place at the host site and the OHS risks and the information, training and supervision for employees provided by the host to whom employees are lent on hire. In addition continual monitoring of the work site and the worker through continual visits to the site is necessary to identify any new risks.
Fundamental to a labour hire placement is that the worker is the right person for the job with the right skills and qualifications.

Adequate induction and training, including site specific training, must be provided.

A proper risk assessment of the work site must have been carried out by the host employer and in the absence of any risk assessment the labour hire agency will need to carry out its own assessment or ensure the host carries out a proper assessment. If there has been no risk assessment then there should be no placement.

It is fundamental for a labour hire agency to ensure that a competent person is employed who can make an informed OHS assessment of the work site and the assessment will require knowledge and understanding of the client's operations, work place hazards and OHS management systems. The host's OHS documentation will need to be reviewed by the labour hire agency and should reflect safe operating procedures relevant to the work. WorkCover also believes that a job safety assessment should be carried out and documented by a labour hire agency in respect to all placements.

Labour hire agencies and those who utilise labour hire have onerous obligations to ensure the safety of those lent on hire. Without a full knowledge of the worksite and the risks, proper site-specific induction and instruction and adequate supervision by the host, the labour hire agency will risk potential prosecution under OHS legislation. Inevitably that prosecution comes when a person lent on hire is injured at a host employer's place of work.

Bias And Evidence In The Workers Compensation Commission

In South Western Sydney Area Health Service - v - Edmonds the NSW Court of Appeal heard on appeal a decision of the Workers Compensation Commission. Although there were a number of points of appeal, the appeal grounds of bias and the no evidence rule were of the most interest.

The employer contended the Arbitrator who had originally determined the matter had demonstrated actual bias. The worker had originally suffered a frank injury in 1993 but had continued working for the employer until 23 March 2002 performing relatively sedentary duties. The matter had initially been pleaded solely as the 1993 frank injury but the Arbitrator had "suggested" at the teleconference the worker amend the claim to include a disease with a deemed date of injury being her last day of employment. The worker was ultimately successful in her claim on the basis of the disease amendment. The Arbitrator, at the commencement of the initial teleconference, commented "I think I've indicated from the outset that I've got a certain view". The Court of Appeal rejected this appeal point as it was not actual bias. They commented a judicial officer (and this included Arbitrators of the Workers Compensation Commission) was never required to approach a case with a blank mind. The Arbitrator was required to consider the substantial merits of the case and in the nature of the jurisdiction of the Commission, the Arbitrator would not be exercising his function if he did not form a view about the issues. The fact the worker amended her case in line with the Arbitrator's comments did not result in actual bias being demonstrated. The Court of Appeal made it clear that the critical question is whether an Arbitrator had so pre-judged the matter so as to be incapable of altering their view, when evidence or arguments were subsequently presented. The Court of Appeal also reinforced that the party contending there was actual bias had a very heavy onus in satisfying the Court of that actual bias.

The second point of appeal was in relation to the medical evidence filed in the matter. The Arbitrator in his original decision (and this was supported by the Deputy President) relied upon a report from Dr Rivett. Whilst Dr Rivett made a conclusion that the worker suffered from an aggravation of disease, this was not supported in any logical or probative way. Dr Rivett had failed to provide any detail in his report as to what duties the worker was carrying out and how these duties had resulted in an aggravation, acceleration, exacerbation, or deterioration of a disease. The Court of Appeal commented the Workers Compensation Commission was to only use evidence that was logical and probative, relevant to the facts and the issues in dispute. That evidence should not be based on speculation or unsubstantiated assumptions including unqualified opinions. Whilst Dr Rivett was certainly qualified to provide an opinion, he failed to substantiate his opinion in relation to a disease. The Court of Appeal commented that any expert reports used in the Commission should conform to the Common Law standards of admissibility to ensure they have probative value.

This decision highlights the difficulty in proving bias. It is our experience that Arbitrators in the Workers Compensation Commission often present opinions prior to a matter being heard. The Court of Appeal has considered these opinions are essential to the Teleconference/Arbitration process and facilitate meaningful discussions between the parties. The comments often narrow the issues between the parties and should not be considered by the parties as an expression of a formed view incapable of alteration.

The successful "no evidence" ground of appeal highlights the necessity to evaluate thoroughly any evidence presented in the Commission proceedings. Whilst the Commission has stressed throughout its five year operation that it is an informal tribunal and the normal rules of evidence do not apply, the Court of Appeal made it clear that the evidence presented in the proceedings should be both probative and logical. Despite the purported qualification of experts presenting evidence to the Commission, careful examination of the evidence should be undertaken to ensure the opinions presented by the experts are supported by both relevant observations and a factual basis.

Employees Should Be Warned Of Personal Liability For Misleading And Deceptive Conduct

On 13 December 2006 the High Court of Australia confirmed two employees were personally liable for damages because of incorrect representations made by them to a client. As the client relied upon the representation of the employees, the High Court found that the employees had engaged in misleading and deceptive conduct which caused the client to suffer losses. The representations related to the operation of the business.

At first instance in the Federal Court of Australia, Justice Ryan found the client had relied on the representations made by the employees' employer which the employer knew or ought to have known was not correct. However, he found that the employees were not personally liable because he concluded they had not engaged in "trade or commerce" pursuant to Section 9 of the Fair Trading Act, 1999 (Victoria).

However, the Full Court of the Federal Court, with whom the High Court agreed, found that employees acting within the scope of their actual authority could be liable for misleading or deceptive conduct. The High Court found the employees were engaged in conduct in the course of "trade or commerce". The High Court found that the status of an individual as an employee does not deprive that person of personal liability for wrongful acts committed whilst an employee.

The employees were found to be jointly liable with their employer.

Latest Statistics From The NSW Workers Compensation Commission

The NSW Workers Compensation Commission has recently published their quarterly review of the period October to December 2006. The statistics highlight the decreasing trend in litigated disputes with a 37.2% decrease over the September 2006 quarter. However, it should be remembered that the November 2006 amendments in the Workers Compensation legislation included a complete review of the documentation required to be provided to the Workers Compensation Commission for the commencement of proceedings. The documentation now requires the annexure of the dispute notice provided by the insurer and also the referral number from the Claims Advisory Service. The Claims Advisory Service has been set up by WorkCover to initially deal with disputes between insurers and injured workers. No matters can be referred to the Workers Compensation Commission without either the Claims Advisory Service ("CAS") attempting resolution between the insurer and worker or allocating a CAS number if this does not occur. The strict documentary requirements resulted in only 67% of all applications lodged being accepted by the Commission.

However, the statistics revealed that the type of issues in dispute have remained relatively stable. Disputes for permanent impairment remain the most significant area of dispute. Whilst there may be more than one issue in dispute when an application is lodged with the Commission, disputes about permanent impairment comprise almost 80% of all matters lodged with the Commission.

What has also remained consistent is the break up of the resolution of disputes. Whilst over 40% of disputes were settled by agreement between the parties, only 11% were determined by an Arbitrator. The balance of the disputes were discontinued by the parties to the dispute. The average time taken to resolve disputes (without appeal) is now less than 100 days from the date of registration. 99% of matters are now finalised within 39 weeks.

It would appear the legal profession has fined tuned their appeal skills with 13% of appeals from Arbitrator decisions and 15% of appeals from medical assessments being successful. We note this is an increase from 2% and 9% respectively from the same period in 2005.

With respect to common law matters, the rate of applications for mediation (indicative of the common law matters being pursued) has remained relatively stable at approximately 100 for the December quarter. It would appear that virtually all of the applications for mediation were finalised in the Commission process without the necessity for further District Court/Supreme Court proceedings.

We expect the statistics for the first quarter of 2007 will reveal a further decrease in the role of the Arbitrator. The requirement for Arbitrators to deal with disputes solely related to permanent impairment has now been removed. These matters are now referred to an Approved Medical Specialist without any reference to the teleconference/arbitration process unless there are issues relating to injury or pain and suffering. One can certainly conclude the five year operation of the Workers Compensation Commission has certainly been successful in furthering the ideals of decreasing the number of disputes and decreasing the time taken for disputes to be concluded. Although statistics relating to the legal costs of proceedings are not published by the Commission, the recent amendments to Schedule 6 of the Cost Regulations and the decreased number of disputes should result in further savings to the workers compensation scheme.

Is Employment A Substantial Contributing Factor?

In New South Wales an injured worker must satisfy the Workers Compensation Commission that employment has been a substantial contributing factor to the injury in order to recover workers compensation benefits. Whether or not employment is a substantial contributing factor is quite often the subject of intense debate. Sometimes what appears to be a broad approach to interpretation results in acceptance of claims for compensation where, to the uninformed observer, it would appear that the employment could have little or no contribution to the injury.

An interesting application of the test was seen in the New South Wales Court of Appeal's decision in Murray - v -

Shillingsworth. Shillingsworth suffered a cerebral haemorrhage in the course of his work as a cotton shipper. He had drunk a number of beers the night before. On the day he was simply picking up something from a table when he suffered the haemorrhage. Was Shillingsworth's employment a substantial contributing factor to the cerebral haemorrhage? The Court of Appeal thought it was.

As dehydration was a contributing factor to the haemorrhage, and as the dehydration was contributed to by Shillingsworth's duties, (as well as the previous night's drinking) his employment was found to be a substantial contributing factor. Despite medical evidence which propounded a number of opinions attributing the haemorrhage to non-work related factors, the Court of Appeal held that it was open to the original Trial Judge to accept one piece of medical evidence over another. The Trial Judge preferred the evidence of the treating neurosurgeon which effectively linked the employment duties, the dehydration and the stroke.

Shillingsworth's case provides a reminder that it is open to a Trial Judge to accept one medical opinion over another and it is not uncommon for a treating doctor's reports to be preferred over those of experts qualified solely to give expert opinion. This was the result in Shillingsworth's case. The case also demonstrates that the term "substantial contributing factor" has quite a deal of elasticity when it comes to determining whether or not a worker is entitled to compensation.

NSW Workers Compensation Impairment Claims

A worker is entitled to compensation for permanent impairment if they suffer a work injury. If a claim is disputed the assessment of permanent impairment can be referred to an Approved Medical Specialist ("AMS") who will issue a medical assessment certificate with the assessment, which is conclusively presumed to be correct. The certificate is appealable by way of application to the Registrar.

Grounds for appeal include:

- deterioration of the worker's condition that results in an increase in the degree of permanent impairment,
- availability of additional relevant information which was not available or could not reasonably have been obtained before the medical assessment,
- the assessment was made on the basis of incorrect criteria,
- the medical assessment certificate contains a demonstrable error.

Prior to 1 November 2006, as a threshold test the Registrar needed to be satisfied was that one of the grounds appeared to "exist", to allow an appeal to proceed. From 1 November 2006 onwards, the threshold test is more stringent. Section 327(4) of the Workplace Injury Management and Workers Compensation Act 1998 has been amended and now reads:

> " ……. The appeal is not to proceed unless the Registrar is satisfied that, on the face of the application and any submissions made to the Registrar, at least one of the grounds for appeal specified in subsection (3) has been made out.

But what happens if you think the Registrar gets it wrong?
Even though the legislation does not provide an avenue to appeal a Registrar's decision, a party who is dissatisfied with the decision has the option to seek judicial review of the Registrar's decision. A judicial review involves a court assessing legal error in the Registrar's decision which is considered an administrative decision. The Supreme Court has inherent supervisory jurisdiction over tribunals including the Workers Compensation Commission.

A recent Supreme Court decision of Mahenthirarasa which was decided on 9 February 2007 is an illustration of the judicial review of a Registrar's decision in not allowing the appeal against the medical assessment certificate to proceed.

At the time of this application the old threshold test was applicable. Mr. Mahenthirarasa was injured at work, and was not happy with the medical assessment issued by the AMS. He alleged that the AMS's deduction for pre-existing condition was made on incorrect criteria and constituted a demonstrable error. He filed an application to the Registrar for an appeal against the AMS's assessment. His application was refused by the Registrar. Mr. Mahenthirarasa was again not happy, and further sought judicial review on the Registrar's decision in not allowing his appeal to proceed. In the judicial review, Associate Justice Malpass of the Supreme Court ruled that Mahenthirarasa failed to develop and make out his argument that the medical assessment certificate contained a "demonstrable error" and was not successful in the judicial review proceedings.

The Associate Justice found that the Mahenthirarasa had failed to demonstrate to the Court that the wrong test was applied by the Registrar in deciding no error existed. The Associate Judge went further to say that even if that was not the case, there

was no evidence to sustain the argument that a demonstrable error existed in the medical assessment certificate and hence the appeal would be futile if it was allowed to proceed.

The recent amendments to give more responsibility to the Registrar for deciding whether an appeal should proceed changes the role from a "gatekeeper" to an assessor of the information presented. The Registrar now needs to go further and be satisfied that the ground for an appeal has been made out. Whilst the amendments should result in a reduction in the number of appeals that proceed, it remains to be seen whether the new test would result in an increase of judicial review of the registrar's decision. It is important to remember that on a judicial review the issue reviewed is whether the correct test was applied by the Registrar and not whether the Registrar was correct in the assessment. The legislation provides power to the Registrar to make the decision without appeal rights and therefore provided the power is exercised the ultimate decision rests with the Registrar, judicial review will only assist when the powers are not properly exercised.

NSW OH&S Roundup

Financial Circumstances Impact on the Ultimate Penalty Imposed

Barry Anstee was the sole director of Velowing Pty Limited. The company owned a property as well as control over the site and work practises at the site. Anstee and the company were conducting demolition and construction work at the site which was a place of work. Internal walls of a building, its ceilings and timber columns were all lime washed and following an inspection by WorkCover, paint samples were taken and an analysis of asbestos risks was also conducted. The WorkCover inspection revealed that base paint flakes were chipped and debris had not been removed from the site and had not been bagged and or sealed and disposed of in accordance with industry standards and guidelines. Asbestos roofing had also been broken. The company did not have a suitably qualified person to decontaminate the site and there was no sealing of the asbestos evident.

The company went into liquidation in December 2003 and Anstee was declared bankrupt in December 2005. Notwithstanding the liquidation of the company and the bankruptcy of the director, WorkCover proceeded with the prosecution against Anstee who was 57 years of age and argued that the project had cost him and his family dearly and impacted on his ability to pay any fine. He had no previous convictions.

After considering the financial circumstances the Industrial Relations Commission determined that the appropriate fine in the circumstances was $1,200.00. Little comfort to a person who is a bankrupt particularly as the Commission concluded that the fine imposed could not be provable in the bankruptcy and actually attached to the bankrupt who must pay the fine despite his bankruptcy. Accordingly, a large fine would have a significantly adverse impact on Anstee. The offence was a serious one however the fine was significantly reduced due to the financial circumstances of the defendant.

In addition, WorkCover sought orders that the Commission notify the offence pursuant to Section 115 of the OH&S Act and suggested that a publication should take in the local newspaper.

In addition, the Commission has a capacity, pursuant to Section 116 of the OH&S Act, to order a person to undertake OHS projects in the form of a specified project for general improvement of occupational health safety and welfare. The Commission noted that such an order was designed to improve occupational health and safety and is in addition to any penalty that is imposed and is for an entirely different purpose to punishment, namely the improvement of occupational health and safety. The Commission noted that the power to make such an order was discretionary, and usually an order would only be made when the defendant consents to such an order. An order of that type will only be made where the defendant has been given notice of the proposed order so they can argue why such an order should not be made. In this case no notice was given to the defendant prior to the application.

At the end of the day the Commission declined to make an order under either Section 115 or 116.

In this case the bankrupt has not escaped a fine by reason of his bankruptcy, however, the fine no doubt was significantly reduced due to a real incapacity to pay.

Don’t Argue Too Much

Sok Ngauv, an employee of Visionstream Pty Limited, suffered a fractured pelvis and chest injuries and was unable to work for a period of 7 days following an incident when a trench collapsed on him whilst he was working. Ngauv accessed an

excavation trench at a site to carry out removing of asbestos pipes from the bottom of the trench and whilst he was doing so the trench collapsed inwards and pinned him against the inward wall. He was employed by Visionstream who had contracted part of the works to RMA Demolitions Pty Limited.

The principal contractor that engaged Visionstream required excavations greater than 1.5 metres to be properly shored. The trench was not properly shored.

Both companies pleaded guilty to OH&S offences. However, Visionstream was unable to reach agreement with WorkCover on the factual matrix which comprised the offence. Because of the factual dispute between the prosecutor and Visionstream, four witnesses were required for cross-examination. A great deal of time was spent hearing the dispute on the facts.

Ultimately both companies had no prior convictions and faced a maximum penalty of $550,000.00. The Commission noted that both defendants had an obligation to ensure that a safe system of work existed and was communicated to the workers undertaking the removal of cement asbestos pipes from the trench in question. Visionstream and RMA had some history of performing similar work. The Industrial Commission of NSW noted: "Taken together, the failure of RMA to ensure that employees were properly supervised in the work being undertaken created a risk to safety. The failure on the part of Visionstream to ensure that the method of work adopted, that is, that the worker was to work only in a shored area of the trench, heightened the risk which was already created by RMA's omission. Together their failings rendered the risk of injury foreseeable." The Commission determined that the respective culpability of each of the companies was equal. Nevertheless a fine of $78,000.00 was imposed on RMA Demolitions and $90,000.00 on Visionstream. The reason for the difference was the discount that the Commission applied to the penalty. The Commission will apply a discount to a penalty for an early plea of guilty, however, where a hearing takes place, in this case two days of hearings in an attempt to resolve factual matters in dispute, the benefit of an early plea is reduced. Whereas RMA Demolitions received a 25% discount on the ultimate penalty, Visionstream received a 15% discount only.

This presents difficulties for defendants where WorkCover and its lawyers take an aggressive and perhaps confrontational approach to attempts to negotiate changes to the facts which WorkCover contend are established by their investigations. It must seem unfair but this is the reality which defendants face in prosecutions.

Traffic Control is a Significant Issue

Tumut Shire Council was recently fined $160,000.00 by the Industrial Relations Commission following an accident whilst the Council was carrying out an upgrade of works on the Gocup Road between Tumut and Gundagai.

Robert Turner, an employee of the Council, was employed as a traffic controller and towards the end of the day, with two other employees, he was engaged in turning a number of traffic signs on the road so the signs faced away from oncoming traffic and covering other signs so they could not be observed by oncoming traffic. One of the employees was having trouble turning a sign situated on the opposite side of the road to where Turner was standing and Turner stepped on the road in order to cross to the right hand side when a car travelling in the direction of Gundagai struck him. Turner was fatally injured.
Evidence was given that all three workers had received general training, task specific training in the form of an RTA Traffic Controller Ticket and site specific training. The system of work which was seen to be at fault was a system where one of the workers was required to cross the road on several occasions. The Commission noted there were generic traffic control procedures in place and warnings about the dangers of traffic. The defendant did not have in place a specific documented work procedure for the task of covering and uncovering signs nor had the Council, up to and including the day of the accident, undertaken any risk assessment in relation to the task of removing or covering or turning of traffic control signs.

The Commission noted that whilst individual workers carry a responsibility for their own safety especially in crossing roads where the speed limit may be 100 kilometres an hour, that does relieve the employer of the responsibility of anticipating the possibility that inattention or carelessness may set in and doing all that is reasonably practicable to ensure the risk of collision is avoided. Risk assessment would be an essential step in that process covering every aspect of the worker's routine. Here the crucial assessment was not undertaken.

The Commission accepted the defendant did have a system of work in place in relation to safety. It was apparent that safety was a high priority. Considerable effort had been directed towards assessing many of the risks associated with traffic control. However, the assessment contained a critical flaw to the extent that it did not adequately address the risks associated with workers crossing the road to change traffic control signs. It was noted that the Council's obligations were not diminished because of the error or negligence of an employee. However, the error or negligence may reflect on the degree of culpability

of the employer for the purposes of sentencing.

Generally speaking, the Commission accepted that the Council had a good system for providing information, instruction, training and supervision. The problem was a failure to adequately address risks associated with a particular task, namely, crossing the road.

The Commission noted the risk was obvious, there was a risk of injury or death from being struck by a motor vehicle. A failure to adequately warn motorists of the presence of workers on the roadway increased the seriousness of the risk. The Commission was critical of a failure to either engage a spotter to watch for traffic while someone removed signs or to employ a procedure to avoid criss-crossing the road by removing signs from one side of the road at a time.

The Commission was also quite critical of a delay by the Council in implementing revised traffic control procedures as revised written traffic control procedures were not implemented until 18 months after the accident and formal training of employees on those procedures did not take place until some three years after the accident. No doubt this weighed heavily on the Commission's determination of the fine as the delay demonstrated that the Council required a penalty which reflected an element of not only general deterrence but specific deterrence.

A substantial fine, yes, and a tragic accident.

Employers need to be well aware of the risk of injury to workers who are required to work close to roads and the need to assess and control those risks.

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