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.

Warning- Terminated Injured Workers Are Entitled to Reinstatement and Compensation

Can you terminate an injured worker in NSW and if you do what are the consequences? Can an injured worker who is terminated seek reinstatement to their former position if they are terminated? The news is not good for employers who have terminated injured workers!

Prior to the introduction of WorkChoices the NSW *Industrial Relations Act, 1996* contained provisions protecting the employment of employees who had suffered a work-related injury. Following the introduction of WorkChoices the NSW Government acted to move the provisions providing that protection under Part 7 of the *Industrial Relations Act, 1996* to Part 8 of the *Workers Compensation Act, 1987* (the "Act"). Part 8 of the Act came into operation on 1 December 2006. By moving the provisions to the Act the NSW Government sought to ensure that the reinstatement provisions in NSW legislation were not defeated by the introduction of WorkChoices.

The NSW Industrial Commission has now had the opportunity to consider the first claim for reinstatement under the Act by a terminated injured worker and in the matter of *Hofman - v - Penford Australia Limited (2008) NSWIRCOMM 1026* ordered the reinstatement of Hofman and also awarded compensation to Hofman in an amount which equates to the remuneration which Hofman would, but for the dismissal, have received in the intervening period between the dismissal and reinstatement less any amounts received as payment in respect of workers compensation or derived from alternate employment.

The warning bells are ringing loud and clear! Employers be warned!

So what are the obligations imposed on employers?

Section 241(1) of the Act 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 the Industrial Relations Commission to employment of a kind specified in the application. The kind of employment to which the worker applies for reinstatement cannot be 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.

To be entitled to reinstatement, a worker must produce to the employer a certificate by a medical practitioner to the effect the worker is fit for employment of a kind for which the worker applies for reinstatement.

An order for reinstatement must be made within 2 years after the injured worker was dismissed.

Section 244 of the Act provides that in proceedings for reinstatement, it is to be presumed the worker was dismissed because he or she was not fit for employment as a result of the injury received. The presumption is rebutted if the employer satisfies the Industrial Relations Commission that the injury was not a substantial and operative cause of the dismissal of the worker.

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If there is a dispute as to whether or not the worker is fit for the work for which the worker applies for reinstatement, the Industrial Relations Commission may refer that dispute to an Approved Medical Specialist who will submit a report to the Commission.

It should be noted that if an injured worker is reinstated by the Industrial Relations Commission, the Commission may order that the period of employment of the worker with the employer is taken not to have been broken by the dismissal. However, the period between the dismissal and the date of the application for reinstatement should not be taken into account in calculating the period of service of the worker with the employer.

Employers should be aware that if they employ a person within 2 years after dismissing an injured worker, the employer must inform the person that the dismissed worker may be entitled under this Part to apply for reinstatement to carry out the work for which the new person is to be employed.

Employers should also be aware that it is an offence under the Act to dismiss an injured worker which carries a fine up to $10,000.00 if:
A worker is dismissed because the worker is not fit for employment as a result of the injury; and
The worker is dismissed within 6 months after the worker first became unfit for employment. An extension of the 6 months may be available if the worker was entitled to accident pay under a State or Commonwealth industrial instrument.

And what was Hofman's case all about?

Hofman suffered an injury during the course of his employment as a plant operator on 1 January 2005. As a result of this injury he could not perform all the duties of his position. His employer provided the worker with suitable duties. He continued to perform the suitable duties until July 2007. The worker had not fully recovered from his injuries and was still restricted to only performing the suitable duties when the employer terminated his employment alleging the worker was no longer fit to perform the duties for which he was employed. The employer claimed that it needed plant operators to work across a wide range of areas and functions in the plant. The worker was not fit for those duties.

The worker brought a claim under Part 8 of the Act.

The NSW Industrial Relations Commission noted the worker's dismissal had been carried out without consultation with the worker. It also noted the worker's medical condition had improved since his dismissal. The letter of dismissal to the worker stated:

"In order to operate the plant efficiently, we regret that we can not continue to provide the suitable duties and, therefore, it has become necessary to terminate your service with the company."

At the time of his termination, the worker had been employed by the employer for 11 years and 5 months.

The worker wrote to the employer on 26 July 2007 seeking reinstatement to his previous position as a plant operator for which he believed he was fit. The worker provided a medical certificate that continued to provide lifting restrictions of 10 kg and no greater weight than 5 kg above shoulder height.

The Commission was of the view the circumstances of the worker's dismissal could be described as exactly the sort of dismissal that Part 8 of the Act was designed to avoid and/or remedy and/or penalise. The Commission accepted there was an understandable frustration for the employer associated with a prolonged rehabilitation progress over a period of 2-1/2 years. However, the frustration needed to be carefully handled and moderated against two important countervailing factors.

Firstly, the frustration felt by the employer would also be felt by the worker. Secondly, the worker was injured in the course of his employment and the ongoing incapacities that were continuing were from the injury he sustained performing work for his employer.

The Commission was satisfied the employer did have available employment of a kind for which the worker was fit, that is the full-time restricted duties the worker was performing at the time of his dismissal. The worker's ongoing medical restrictions were in the form of lifting limits. The evidence disclosed the employer had employment available at its Tamworth production facility that complied with these requirements. The Commission was also satisfied the employer could facilitate employment of a kind for which the worker was fit and without unreasonable cost, impost or operational difficulties.

The Commission ordered:

- The employer reinstate the worker to employment in connection with its Tamworth production facility.
- The worker is to be reinstated as soon as practical and within 21 days from the date of the decision.
- The employer pay the worker an amount which equates to the remuneration which the worker would, but for the dismissal, have received in the intervening period between the dismissal and reinstatement less any amounts received as payment in respect of workers compensation or derived from alternate employment.
- Pursuant to Section 246(1) of the Act, the period of employment of the worker with the employer shall be taken not to have been broken by the dismissal.

Well, will the flood gates open? Will there be a rash of reinstatement applications? Will the possibility of compensation to top up workers compensation payments motivate workers to seek reinstatement? Interesting times are ahead for all employers in NSW.

How To Calculate Economic Loss

So how do the Courts calculate economic loss in a personal injury claim? What happens to a claim for superannuation when the injured person was self-employed?

The NSW Court of Appeal in *Kallouf - v - Middis* has recently confirmed the principles which are applied by the Court in NSW when determining claims for economic loss.

Of primary interest, the Court of Appeal concluded that where economic loss is calculated for a person who is self-employed and future economic loss is calculated on the basis of earnings in a self-employed capacity, then it is not appropriate to compensate the injured person for loss of superannuation as self-employed persons would have had to cover themselves for superannuation out of their income.

The Court of Appeal also confirmed the damages for loss of an employer's contribution to future superannuation are an aspect of damage for loss of earning capacity.

Justice McColl and Justice Hall, in a joint judgment, noted:

> *"Damages for both past and future loss are allowed to an injured plaintiff because the diminution of his earning capacity is or may be productive of financial loss . . ."*
>
> *Although it is loss of earning capacity and not loss of earnings that is the subject of compensation, the rate of wages being earned and the rate of wage likely to be earned in the future afford a basis for assessing compensation for the loss of earning capacity. Expectation of working life is also an element of that assessment . . .*
>
> *It is necessary to identify both what capacity has been lost and what economic consequence will probably flow from that loss. Only then will it be possible to assess what sum will put the plaintiff in the same position he or she would have been in if the injury had not been sustained. What a worker earned in the past may provide a very useful guidance about what would have been earned if that worker had not been injured. But the inquiry is one about the likely course of future events and evidence of past events does not always provide certain guidance about the future . . .*
>
> *Any assessment in respect of the impairment of future earning capacity necessarily involves a consideration of possibilities. . . .*
>
> *Where incapacity is established as at the date of trial, what is to be evaluated will be the extent of the possibility that the plaintiff may not work in the future or may lose time from work and determine the allowance for proper compensation in respect of that possibility. That evaluation will depend upon the evidence . . .*
>
> *At common law the onus rests on the plaintiff to prove he is incapable of undertaking employment which medical evidence demonstrated he was capable of undertaking."*

The Court of Appeal noted that it is incumbent on a plaintiff in the first place to demonstrate lost earning capacity and it is then open to a defendant to adduce evidence of what, if any, residual earning capacity exists.

The Court of Appeal noted that:

> *"A Court must do its best, with the available evidence and the necessarily impressionistic task of assessing damages for lost earning capacity and that absence of evidence about wage rates or working conditions in a particular vocation does not necessarily or usually deprive a Tribunal of fact of the capacity to make a proper assessment."*

Clearly, however, any available evidence produced by both the plaintiff and defendant on the probable earnings available to a person with reduced capacity will make the task of the Court an easier one when determining economic loss.

Awards of economic loss are regulated in NSW by Section 126 of the *Civil Liability Act 2002*.

The Court confirmed that the Civil Liability Act was effectively inserted in legislation to require Courts to make clear the basis on which awards for future economic loss are foundered rather than formulate any new method of calculation for economic loss.

Accordingly it is incumbent on a Court in NSW, in a judgment dealing with economic loss, to assess the most likely of the possible future economic circumstances facing the claimant but for the accident, the claimant's economic prospects as a consequence of the accident and to compensate the claimant for the difference including where appropriate through the use of buffer and adjust the amount by an appropriate percentage for vicissitudes to reflect the possibility that the claimant may not have achieved the future economic circumstances even had the accident not occurred. In the judgment a Judge must include a statement of the assumptions made as to the claimant's most likely future circumstances and appropriate percentage adjustment.

So, has the *Civil Liability Act* altered the way a claim for future economic loss is calculated? Probably not! The tried and true method of calculating economic loss continues - the plaintiff must be put back in the position they would have been in but for the injury, subject of course to any limitation on damages in the *Civil Liability Act.*

A Motor Vehicle Rolls Whilst Navigating a Corner- Who is to Blame

There is usually more than one factor that contributes to an accident and quite often more than one person is to blame. The Courts regularly deal with scenarios where it is necessary to assess how much blame should be attributed to persons involved in an accident, even the injured person. Generally the cause of the accident will turn on an analysis of the facts. Different people may interpret the facts leading up to an accident in different ways. One persons view of what caused an accident is not always the same as another persons. When a judge makes a finding in a case and the case is examined by an Appeal Court as a consequence of an appeal the Appeal Judges may well conclude that the assessment of the trial judge as to what caused the accident should be reviewed and a different conclusion should result.

In a motor vehicle accident who is to blame- was it the driver of a vehicle, the person actually injured, the condition of the road, the condition of the car that was not maintained or perhaps the horse that strays onto the road. There always seems to be someone to blame. So what happens when a vehicle fails to negotiate a bend and rolls. Lets see who is to blame.

The Court of Appeal has recently handed down a judgment in a claim brought by Terry Turner who was injured when a car he was driving rolled causing injurious to himself and his partner. The Court of Appeal had to determine to what extent the RTA, the owner of the vehicle and Turner were to blame for the accident.

Terry Turner was driving his partner's motor vehicle on the Princes Highway north of Ulladulla at 5:45pm on 5 January 2001. The conditions were wet and Turner was driving the vehicle on a tight uphill curve known as Heggo's corner when it fishtailed onto the wrong side of the road and crashed into an oncoming vehicle. Turner was seriously injured and tragically his partner sustained fatal injuries.

Turner sued AAMI (the third party insurer of the deceased) and the Roads and Traffic Authority ("RTA") to recover damages as a consequence of his injuries. Turner alleged that the deceased had been negligent in leaving bald rear tyres on her vehicle and in allowing her vehicle to be driven in that condition. Turner alleged that the RTA were negligent in failing to adequately warn northbound drivers of the dangers of driving into Heggo's corner at an excessive speed in wet conditions, and leaving the speed limit at 100 kilometres per hour and in failing to have sufficient friction on the road surface.

At trial in the Supreme Court the trial judge found for Turner against the RTA but not AAMI and awarded substantial damages

totalling $1,211,287.87. Whilst the trial judge had found that the deceased had been negligent in failing to inspect the tyres and to ensure that her vehicle was in a roadworthy condition, in the trial judge's opinion the bald tyres did not make a material contribution to the accident.

The RTA appealed arguing that there should be some liability on the part of AAMI and also that there should have been some deduction from Turner's damages due to Turner's negligence in taking the corner too quickly.

The Court of Appeal agreed with the RTA. Turner had taken the corner too quickly and in excess of the advisory speed and the deceased was negligent as she either knew or ought to have known that the tyres were bald (for which AAMI were now responsible). All three factors - the slipperiness of the road, the bald tyres, and the speed at which Turner was travelling - had contributed to the accident.

The Court of Appeal deducted 20% from Turner's damages for his contributory negligence and apportioned the blame 75% to the RTA and 25% to AAMI.

A win for the RTA in proving that there were multiple causes. Even though the Court of Appeal still found that the majority of the blame rested with the RTA, damages payable by the RTA to Turner were considerably reduced.

Judges can reach different conclusions when they examine the same facts and in an appeal a different conclusion as to what was the cause of an accident can result in a significant adjustment to the compensation payable by a person where it can be shown that others are to blame.

No Contributory Negligence Where Driver Not Obviously Drunk

What happens if you are injured when you are a passenger in a motor vehicle accident and the driver was drunk? Does this have any impact on the damages you can recover, or are you prevented from recovering any damages at all?

In New South Wales claims arising out of motor vehicle accidents are governed by the Motor Accidents Compensation Act 1999. Section 138(2)(b) of this Act provides that a finding of contributory negligence on the part of the injured person must be made where the injured person was a voluntary passenger in a motor vehicle and "the driver's ability to drive the motor vehicle was impaired as a consequence of the consumption of alcohol or any other drug and the injured person or the deceased person was aware, or ought to have been aware, of the impairment."

The Court of Appeal has recently handed down the decision of AAMI Limited v Hain in which the issue was whether the injured claimant was aware, or ought to have been aware of the driver's intoxication.

Sean Hain was seriously injured in a motor vehicle accident in Wagga Wagga on 17 May 2002. Hain was a passenger in the back seat of a motor vehicle being driven by Brett Wilson. The accident occurred at 3:30am after Hain had accepted a lift home from Wilson. The vehicle left the road at high speed, traversed a paddock and collided with a tree. Shortly after impact the vehicle burst into flames. Hain was severely injured as a consequence and Wilson sustained fatal injuries.

Hain therefore brought a claim against AAMI the CTP insurer of Wilson's vehicle. There was no issue that Wilson was negligent. The issue was whether Hain's damages should be reduced for his contributory negligence in getting into the car with Wilson who was intoxicated at the time.

At trial in the District Court the trial judge found that Hain was not, and ought not to have been aware that Wilson was intoxicated (despite Wilson's blood alcohol level being around 0.15, three times the legal limit, at the time of the accident) and therefore made no deduction for Hain's contributory negligence. AAMI appealed.

The evidence that was accepted by the trial judge was that Hain and Wilson played about five games of pool together. Hain only saw Wilson drink one middy and one schooner of beer on the night of the accident. Hain had been drinking with Wilson on previous occasions and Wilson "did not drink much", and had told Hain that this was because he suffered from diabetes. Hain had never seen Wilson drunk, and on this night there was nothing to suggest to Hain that Wilson was affected by alcohol. Hain's evidence was supported by two fellow passengers David Chapman and Allan Riach, neither of whom thought that Wilson was affected by alcohol.

AAMI relied on Helen Dauncey pharmacologist who gave evidence that it was "most likely" Wilson would have shown signs of

intoxication prior to getting in the car and would have been significantly intoxicated. In Dr Dauncey's opinion Wilson must have consumed about 10 to 18 middies on the night.

The Court of Appeal dismissed the appeal. Justice McClellan who delivered the leading judgment stated:

> *"In the present case His Honour was correct to consider the evidence of the respondent and other witnesses to the behaviour of Mr Wilson after he arrived at the hotel. Although the respondent knew that Mr Wilson had been there some hours, he had personally seen him consume only a relatively small amount of alcohol. He believed that Mr Wilson was a diabetic and reasonably believed that this imposed a discipline on his drinking habits. Although he had not been able to observe Mr Wilson during significant portions of the evening, there was nothing which ought to have alerted him to the fact that Mr Wilson had been drinking to excess. Of course this was also the judgment of Messrs Chapman and Riach. They did not react to Mr Wilson's behaviour or say anything which should have alerted the respondent to any impairment of Mr Wilson's ability to drive."*

Hain therefore retains the totality of his damages. There was no contributory negligence on the part of Hain as he did not - and ought not to have - observed that Wilson was drunk.

Witness observations of an intoxicated person, particularly independent witnesses, are critical facts examined by the Court when determining whether a person ought to know that someone was intoxicated. Expert opinion as to how a person would be behaving when intoxicated provides some assistance to the Courts but may not be enough to overcome the weight of the evidence presented by actual witnesses.

Worker's Compensation Insurer Must Get A Full Refund

In NSW when an injured worker receives worker's compensation payments from the employer and then sues a person other than the employer for damages for injuries sustained in an accident, the worker's compensation insurer is entitled to recover the compensation payments made. However, the Law Reform (Miscellaneous Provisions) Act 1965 provides that the sum that may be recovered is to be reduced to the same extent that the damages recoverable by the claimant against the other party were reduced for contributory negligence.

So what happens where there is a settlement of a claim against a third party and no finding by the Court on the extent of contributory negligence? Does the employer recover the totality of compensation payments made or will there be an adjustment for contributory negligence notwithstanding that a Court has not determined the extent of contributory negligence or can there be another trial this time between the worker and the employer to determine the contributory negligence.

These issues were recently determined by the Court of Appeal of NSW in Goodman Fielder Limited - v - Hickson.

The Court of Appeal noted:

> *"A settlement is ordinarily a compromise between the parties according to their assessments of the likely outcome of the worker's claim. In these assessments, perceived factual and legal difficulties for one or the other of the parties, or for both, play a part although with different perceptions. The perceived difficulties will commonly go beyond any question of contributory negligence, to core questions of liability and the extent of damages recoverable; a compromise will not often turn on contributory negligence, but will involve other considerations also, and there will be a compromise because the parties come to divergent global assessments of all considerations."*

The Court of Appeal noted, a purported agreement between an injured person and a third party on the extent of contributory negligence would be viewed with some suspicion as it would be in the interests of the claimant to have that contributory negligence as high as possible and the findings of contributory negligence would not affect the third party. Consequently an agreement between a claimant and a third party should not be binding on an employer.

The Court of Appeal determined that the Law Reform (Miscellaneous Provisions) Act has the effect that the totality of payments must be refunded where there is a settlement of the claim against the third party.

The worker's compensation insurer argued and the Court of Appeal in the majority judgments accepted that there was obligation to repay the totality of compensation paid where there is settlement and there could be no further trial to determine the extent of contributory negligence.

Justice Hislop in his judgment noted the arguments of the employer should prevail which were that there must be an obligation to repay the totality of compensation paid where there is a settlement against a third party as:

> *"An obligation to repay the entire amount would not prevent settlement of a claim against a third party with agreement from the employer as to the deduction for contributory negligence from the payback figure. In fact tri-partite agreements between the injured worker, the third party and the employer are common place and appropriate. If the employer was not a party to a settlement between the worker and the third party the worker would need to take into account in settling the claim the position in relation to the repayment, namely that the full amount was repayable." and*
>
> *"Leads to certainty and the elimination of further proceedings in that the apportionment for contributory negligence is either determined by the Court in the damages proceedings or settled by tri-partite agreement."*
>
> At the end of the day workers need to be aware that should they settle their claims against third parties they will be forced to repay the totality of workers compensation payments received without any reduction for contributory negligence unless they also reach agreement with the employer as to the amount of repayment and the deduction for contributory negligence that applies to the repayment.

In this case discussions between the claimant's solicitors and the worker's compensation insurers, culminating in an agreement between the worker's compensation insurer and the claimant as to the amount of contributory negligence would have avoided the need to ventilate the issue determined by the Court of Appeal.

The case serves as a reminder that once a claim is settled it is not open to the injured worker to turn around and argue with the worker's compensation insurer about the extent of contributory negligence which should be applied to the calculation of the repayment of compensation. Rather, the claimant must ensure that they reach a settlement with the worker's compensation insurer at the same time as they reach the settlement with third party otherwise the full amount of compensation paid will be recoverable by the employer.

Put it in writing!

How many times have you heard a lawyer say this? How important is it to reduce an oral agreement to a written document?

The parties in *Vero Insurance Ltd v Tran [2008] NSWSC 363* recently found out.

Proceedings were brought in the District Court in relation to a building contract. A builder sued owners of a residential property for the balance due under a residential building contract. The owners cross-claimed against the builder (and its directors) for alleged defective building work. They also brought a claim against Vero for its alleged breaches of its indemnities to the owners under the *Home Building Act 1989*.

The proceedings were the subject of a mediation. The mediation lasted all day. No written agreement was entered into for the settlement of the District Court proceedings. But Vero claimed that the parties had entered into a firm and binding oral settlement agreement. Was that claim right?

The evidence before the Court was that the parties had detailed discussions and negotiations. The terms discussed were complex and detailed since they involved, in precise detail, works to be done to the dwelling.

At about 5. p.m. the mediator gathered the parties together. He made an announcement - according to Vero congratulating the parties on reaching settlement; according to other parties simply recording what had been agreed so far. The parties then left the mediation.

The next day, the mediator forwarded the parties a typed copy of the 'Interim Terms of Settlement'. His covering letter indicated that "The matters which were not the subject of express agreement at the conclusion of the mediation are underlined or separately noted."

Also relevant were the terms of the Mediation Agreement which provided that "*The Mediation may be terminated … upon execution of a Settlement Agreement…*"

Perhaps not surprisingly, the Court found that no settlement of the proceedings had been reached. Essentially, this was a result of the commonsense and commercially sound meaning to be put upon the language of the Mediation Agreement. It was held, effectively that it was the intention of the parties that any resolution of the proceedings could only be achieved by

execution of a written agreement.

Most mediation agreements have similar terms, and take place in similar circumstances. The lesson is clear - no matter how detailed, and no matter how late, it is vital that everything you believe you have bargained for be recorded in a written and executed document. Otherwise you are likely to be disappointed.

Security of Payments in the Building Industry

The Building and Construction Security of Payment Act 1999 (the Act) provides a mechanism for builders and subcontractors to obtain an interim determination on amounts payable for building works and an enforceable judgement to secure payment where disputes on amounts claimed under a building contract arise. A dispute under the Act is referred to an Adjudicator. So what does the Adjudicator have to consider and can you challenge an Adjudicators decision in the Supreme Court?

The Act was recently considered by the Supreme Court of New South Wales in David Hurst Constructions Pty Limited (Hurst) v Helen Durham. The decision goes some way to defining the requirements imposed on a Adjudicator when making a decision and the scope of legal errors made by an Adjudicator which might allow the original decision to be set aside.

Helen Durham was the owner of a block of land in Wagga Wagga. She entered into a contract with Hurst for the construction of a building. On 21 September 2007 Hurst made a payment claim under the Act in the amount of a little over $461,000 exclusive of GST. Durham responded with a payment schedule on 5 October 2007 offering approximately $96,500 including GST. The dispute was referred to the Adjudicator who made a determination that the amount payable was the same as the amount in the payment schedule, approximately $96,500.

Consequently, Hurst filed proceedings in the Supreme Court claiming that the determination made by the Adjudicator was void due to jurisdictional error.

Essentially Hurst argued that the Adjudicator made a jurisdictional error by not requesting further details of the dispute from either party and erroneously placing the onus of proof onto Hurst. Hurst argued that the Adjudicator's decision was wrong because she had failed to call for additional evidence to resolve issues which is permitted by section 21(4) of the Act. Hurst also argued that the Adjudicator failed to properly consider the contract put before her.

Justice McDougall found that section 21(4) is a discretionary provision of the Act, not a mandatory one. The provisions of this section only become mandatory if the Adjudicator cannot come to a decision based on the evidence before them. The Adjudicator had considered the relevant clauses in the contract to determine any issues where she did not have sufficient information. The fact that the Adjudicator did not request further submissions on any matter in dispute did not constitute an error in jurisdiction.

In respect of the alleged failure to properly consider the contract, the Act requires an Adjudicator to turn their mind to the contract under which the claim arises. Justice McDougall referred to the decision of the Adjudicator and found that she had come to her determination based on the relevant provisions of the contract. He went on to state that even if the Adjudicator misunderstood those terms or their application, any error in that regard does not render a determination void. The review by the Court is not a review of the correctness of the Adjudicator's decision it is a challenge on its validity.

Justice McDougall found that the Adjudicator's decision met with the requirements of the Act and there is no provision under the Act for the Adjudicator to be compelled to seek further submissions or evidence. In addition, the Adjudicator is not required to consider any materials that are not put before them. If the Adjudicator fails to consider any evidence that is not put before them and turns to the contract to determine any grey areas, there is no error in the decision.

Justice McDougall also noted that it is the responsibility of the Adjudicator to determine the amount of a progress payment (if any), the date of payment and the rate of interest. In order to do this the Adjudicator must evaluate the materials put before them and there is no presumption in the Act which places the onus of proof with either of the parties to the adjudication, nor is there a presumption in favour of the person that brings the claim.

In making her decision in this case, the Adjudicator considered an amount claimed for liquidated damages associated with a delay in completion. Hurst had denied liability for the delay due to lack of a date for practical completion in the written contract. The date for practical completion was not entered in the appropriate space on the contract. However, in the adjudication application itself Hurst implied that there was in fact a date for practical completion by providing a certificate from the

Superintendent under the contract which was annexed to the payment claim subject of the adjudication application. The certificate clearly stated that the date for practical completion was 21 August 2007. Justice McDougall reasoned that the date represented in the certificate may or may not have been the date for practical completion, however, it was presented to the Adjudicator as evidence of the payment claim and she was left to deduce that it was the date for practical completion rather than read the blank space in the contract as being decisive.

Justice McDougall found that there was no error by the Adjudicator adopting this stance as the Adjudicator must consider the material put before them in the application.

The Adjudicator had also made a decision to disallow Hurst's claim for the cost of extra materials which had never been delivered to the site or installed. This was found to be correct by Justice McDougall as the Adjudicator had made this assessment in accordance with the provisions of the contract.

Ultimately, Justice McDougall upheld the original decision of the Adjudicator stating that there was no error in jurisdiction and awarded costs against Hurst.

The Take Home Message

It is important to note that the Act provides a mechanism for builders and subcontractors to obtain an interim determination on amounts payable for building works. The interim nature of the determination requires a somewhat less formal approach to a dispute when compared to any dispute in the Courts. The Act provides a relatively quick and cheap mechanism to resolve a dispute on an interim payment on an interim basis. Rights to review or challenge an Adjudicators decisions are restricted. On review the issue is not the correctness of the decision, rather it is whether the decision was made according to the requirements of the Act. However the Adjudicators determination will not prevent the parties from bringing disputes under the contract before the Courts as it is only the issue of the amount of an interim payment that is determined not the ultimate final rights under the contract.

However there are rules for Adjudicators and when exercising their power under the Act:

- an Adjudicator is entitled to consider any evidence put before them in making the decision and is not limited to referring to the contract alone. In addition an Adjudicator is not required to consider any evidence that is not put before them. Therefore it is imperative to ensure that everything relevant to the decision and allowable under the Act is put before the Adjudicator in the adjudication application;
- an Adjudicator is not required to call on submissions or additional evidence from the parties if a question is raised by the evidence presented in the adjudication application, but may do so at their discretion. It is sufficient for the Adjudicator to refer to the construction contract to answer any such questions;
- an Adjudicator is entitled to consider any evidence put before them in making the decision and is not limited to referring to the contract alone. In addition an Adjudicator is not required to consider any evidence that is not put before them. Therefore it is imperative to ensure that everything relevant to the decision and allowable under the Act is put before the Adjudicator in the adjudication application;
- in a challenge to an Adjudicator's decision a Court will not consider whether the decision of an Adjudicator is right or wrong, it will only review the decision to determine whether it was within the Adjudicators jurisdiction provided by the Act to make the decision and whether there was an error of law in the Adjudicators processes; and
- there is no presumption in favour of the claimant built into the Act. The claimant is required to put before the Adjudicator any and all information which supports and proves its claim for payment.

Misconduct Out Of Work Hours In Company Uniform May Be Grounds For Dismissal

Once an employee leaves the employer's workplace at the end of the working day, he is no longer acting in the course of his employment. His actions and behaviour away from the workplace should not have any impact on his employer. An employer does not have the relevant element of control to connect the employee's behaviour and actions to his employment. However, the NSW Industrial Relations Commission has found that an employee's misconduct outside of his work hours and away from the employer's workplace constituted misconduct against his employer as he was identified in his employer's uniform when the alleged misconduct occurred.

In the matter of *Bitar - v - Sydney Water Corporation* the employee, during his lunch break, delivered a gas stove to his brother's tenant. He used the company car without the authority from his supervisor. The employee was not required to be at his workplace during his lunch break.

It was claimed by his brother's tenant that when the employee arrived to deliver the gas stove, the employee became aggressive and used abusive and threatening language towards the tenant. This was allegedly in response to the tenant's request to see the employee's licence for him to install the stove. The tenant also claimed the employee intimidated her by standing over her and grabbing a telephone out of her hand and throwing it on the ground.

The tenant lodged a complaint with Sydney Water. Sydney Water investigated the matter and ultimately dismissed the employee. Sydney Water determined that the employee's behaviour occurred during ordinary work hours for that day. He visited the tenant using a company car and was dressed in the company's uniform that clearly associated him with his employer.

The employee brought a claim for unfair dismissal. He disputed the tenant's claims. He also claimed the delivery of the stove was unrelated to his employment as it occurred during an authorised lunch break and was not done for his employer.

The Commission accepted the tenant's evidence that the employee subjected the tenant to a "hostile and inappropriate verbal assault without cause." There was no evidence to justify the employee's abusive behaviour.

The fact the employee was wearing his employer's uniform clearly associated him with his employer.

Employees should be made aware that even though they have left their employer's premises, the wearing of their uniform associates them with their employer and their behaviour whilst remaining in their employer's uniform continues to associate the employee with their employer. As such, whilst an employee is wearing their employer's uniform there is the necessary connection to the employment for the purposes of disciplining the worker if the worker engages in any misconduct.

OH & S Roundup

A Low Fine Is Not Always Good News

The NSW Industrial Court has recently delivered a judgment in *Inspector Lai - v - Rexma Pty Limited and Chung Man* substantially increasing fines which were originally imposed by the Chief Industrial Magistrate for breaches of the Occupational Health and Safety Act and the Workers Compensation Act.

Rexma was a plastic recycling business and employed workers in a factory at Revesby. Man was the sole director of the company and actively involved in all aspects of its operations. A process worker, working alone in a plastic recycling area feeding plastic into a feed chute, was injured when he attempted to cut plastic being fed into the chute with a knife whilst the plastic was fed into the chute of the single extrusion machine. His left hand was drawn into the feed chute and came into contact with an auger which amputated all of the fingers of his hand.

Rexma did not notify WorkCover of the incident within the required period of time of 7 days after it became aware of the incident. Accordingly Rexma was prosecuted for Occupational Health and Safety Act for failing to notify which was in breach of Section 86 of the Act.

In addition, Rexma was prosecuted for failing to ensure a safe workplace for its employees. Chan as a director was prosecuted under the deeming provisions which deemed the director to have committed the same offence as Rexma.

In addition, the company did not have in place workers compensation insurance in breach of the Workers Compensation Act, 1987. Apparently a quote was obtained but insurance was not arranged.

Rexma and Chan each pleaded guilty to three offences., the first for failing to ensure the safety of employees in breach of the Occupational Health and Safety Act, secondly for failing to notify Work Cover of a work accident and thirdly for failing to maintain workers compensation insurance. The original penalty for each of these offences were for the company $10,500.00, $5,500.00 and $5,500.00 respectively; and for the director $5,000.00, $3,000.00 and $3,000.00 respectively.

The Full Bench of the Industrial Court determined these fines were too low and increased the fines for Rexma to $27,000.00, $10,000.00 and $8,000.00 respectively; and for Chan $8,800.00, $5,000.00 and $8,000.00 respectively.

The maximum fine which was applicable under the Workers Compensation Act was $22,000.00 for both Rexma and Chan so substantial penalties were delivered in regards to that offence.

In relation to the offence for failing to notify WorkCover of the incident, the Court noted that the maximum penalty for failing to

notify was $55,000.00 for Rexma and $27,500.00 for the Chan. The Court noted that the provisions do not merely impose formal requirements for the notification of accidents in the nature of registration of an incident but rather requires the notification of accidents so that WorkCover may carry out the necessary investigations to identify and remedy hazards to safety. In this case notification of the incident was provided by a third party to WorkCover some 10 days after the incident and Chan was unaware of his responsibility to report the incident

This case serves as a reminder that failure to report an incident to the WorkCover Authority can result in substantial fines as can a failure to maintain workers compensation insurance. As the employer failed to maintain workers compensation insurance, the worker will now receive compensation from the Uninsured Liability Scheme which will subsequently look to the employer to reimburse it for any compensation paid. An expensive exercise for the employer and the director.

Transportation of Gas Cylinders in a Van Leads to Substantial Fine

Carrier Air Conditioning Pty Limited were recently fined $120,000.00 for a breach of the *Occupational Health & Safety Act* when an employee driving a vehicle was injured when a gas cylinder in the rear of the vehicle ignited.

Carrier Air Conditioning were charged with a breach of the *Occupational Health & Safety Act* for failing to undertake adequate risk assessments and implement controls in relation to the storage and handling of dangerous goods and in particular flammable goods such as butane gas and acetylene and other equipment which were carried in motor vehicles provided to service technicians and for failing to train and instruct the service technicians in relation to the storage and handling of the goods.

A worker was rendered unconscious when he felt a large jolt accompanied by a loud bang as he was driving a vehicle. He was rendered temporarily unconscious and when he regained consciousness and stumbled from the vehicle he saw a fire in the rear of the vehicle. It transpired that there was an explosion in the vehicle and debris from the explosion had scattered over a large area and shatter-proof glass was subsequently found in gutters, on roofs and in backyards. Windows in homes in the area were also shattered and there was damage to window fittings, cornices and internal ceilings. Vehicles in the street also sustained shattered windscreens.

It was apparent that the explosion and ensuing fire was most likely caused by the ignition of flammable gas in the rear of the utility which was enclosed by a canopy. The explosion was probably caused by an electrical spark generated when the brake of the car was pressed and the electrical current was sent to the brake lights at the rear of the vehicle. The fixed canopy restricted air flow into the area and there was inadequate ventilation, even though it was not airtight.

A considerable time after the accident Carrier Air Conditioning implemented measures to reduce the risk by installing ventilation in the rear of the utility and a whirly bird device on the top of the fibreglass canopy of vehicles. In addition the company commenced utilising caps to seal each of the cylinders against leakage.

WorkCover were critical of the delay in implementing these improvements and complying with WorkCover notices to improve the situation.

The Court noted that there was evidence that the company in a general sense had a commitment to occupational health and safety albeit that the commitment did not apply to transportation of flammable materials. Consequently a fine of $120,000.00 was imposed.

Supplier of Equipment Receives Substantial Fine

Hastings Equipment Hire Pty Limited was a company that dry hired equipment including a scissor and boom lift. As a dry hire operation the equipment was hired without an operator, usually for use by a variety of trades such as painters, plumbers and others involved in the construction industry, although at times the equipment would be used for tree lopping and a variety of other purposes. The usual practice in this hiring arrangement was that the director of the company would give instructions to those hiring the equipment and those instructions would be given at the premises of Hastings. When instruction was completed the hirer would take the equipment and return it at the completion of the hire period.

An elevated work platform was hired out by Hastings in circumstances that were a little out of the ordinary to what the company's usual hire arrangements. The elevated work platform was hired by a director of a company proposing a development. Photographs were to be taken of the development from the platform at a height representing the first, second and third levels of the proposed development. A director of the developer, an architect and a draftsman attended the site. Because the hirers did not possess a vehicle suitable for towing the platform to the site an arrangement was made for the

director of Hastings to bring the platform to the site and to instruct the hirers at site. The director of Hastings attended the site and whilst waiting for the group of people to arrive set up the platform and ensured its stability although that was not part of his duties or the requirements of the hiring agreement.

In the course of using the platform the director of Hastings and the architect came to be in the enclosed bucket of the platform when it was a considerable height from the ground. The architect had been using a metal tape measure to check the height from the ground to the platform bucket and to approximate various floor levels when windy conditions caused the tape to fly around and come into contact with live electric power lines. Both the director of Hastings and the architect received an electric shock and the architect fell from the work platform to the ground, suffering serious head injuries. The architect ultimately died.

It was argued that there was a failure to carry out an adequate risk assessment and that there was an absence of safety belts and safety harnesses supplied with the platform. When the director of Hastings and the architect were in the platform and it was raised to a height of approximately two metres or a little higher the director requested that the architect stop the platform as he realised there were no safety harnesses in the machine. As the director was asking the architect to return to the ground he received a call on his mobile and decided to take what was a work related call. He became focussed on the call and by the time he finished the call he noticed the architect had continued to raise the platform some seven to eight metres or even higher. It was when the director turned to the architect after he realised they had ascended to the height that the tape that the architect was holding was caught by the wind, fluttered and came into contact with the live electrical wires.

The director of Hastings accepted he was to blame for the failure to provide the safety harnesses

Ultimately the court imposed a fine of $95,000.00 on Hastings Hire and $9,500.00 on its director fro a breach of the *Occupational Health & Safety Act* for failing to supply safe plant and equipment.

Collapse of a Wall Leads to Substantial Penalty

Infinity Constructions Pty Limited engaged M & H Bricklaying Services to perform masonry work at a building site where a single storey community centre was being constructed. A masonry wall collapsed at the building site injuring a number of sub-contractors working for M & H . M & H were prosecuted for a breach of the OH&S Act however the company was placed in liquidation and deregistered before any judgment had been handed down and the prosecutor withdrew the proceedings against M & H. A prosecution was then pursued against Infinity and the two directors of Infinity.

The directors were prosecuted under Section 26 of the OH&S Act which deems directors and persons concerned in the management of the Corporation to have committed the same offence as the corporation.

Infinity and the directors argued they had relied on the competence and experience of its sub-contractors.

The evidence revealed that there were numerous factors contributing to the walls instability including the speed with which it was built, the height to which it was taken, heavy lintels were placed on the brickwork and the lintels and walls were not braced. The day the wall collapsed it was not windy and the wall was 16 to 17 courses high when it fell. The wall that collapsed had not been tied or braced when it collapsed. The two walls comprised a cavity wall were built together rather than separately which also contributed to the incident. The risk of collapse of an unstable brick wall was seen by the Court as an obvious one.

Infinity had a pro forma safety plan, it had two foremen and a safety officer and they each had responsibility for safety but none of the employees of Infinity identified the problem with the erection method. Ultimately Infinity relied on the expertise of M & H and M & H did not pay proper attention to its safety obligations. While Infinity could not have not known this before hand the OH&S Act does not permit a company to delegate its safety obligations in relation to bricklaying work. While the documented safety system of Infinity recognised this the practical operation of the system did not.

The employees and directors of Infinity in their evidence noted “we rely on the competence and experience of the sub-contractors undertaking the works. We rely on the safe work method statements provided by the sub-contractors and the company safety manual." These statements in the Court's opinion put the inadequacy of Infinity’s approach beyond question. The end result was a conviction under the OH&S Act for Infinity and the two directors with the penalty to be determined sometime in the near future.

The two directors and Infinity were fined more than $200,000.00 in total.

The main failures were:

- a failure to undertake an adequate risk assessment;
- a failure to provide adequate lateral support or adequate bracing;
- a failure to supply a safe work method statement.

Infinity were fined $185,000.00, Mr Moussalli, a director of M & H Bricklaying was fined $27,500.00 and Mr Yazbeck, a director of Infinity, was fined $20,000.00.

Striking Out Pre-Filing Statements

The provisions of the *Workers Compensation Act 1987* require that a claim for work injury damages is brought within 3 years. A precursor to bringing a claim for work injury damages is that a Worker reaches 15% whole person impairment. Two years often pass from the date of injury until a Worker reaches maximum medical improvement and the 15% whole person impairment threshold is met. Coupled with the 3 year time limit prescribed by the Act it often means Workers have very little time in which to formulate and make their claim for work injury damages.

Consequently Workers often commence proceedings at an early stage serving the Pre-Filing Statement (PFS) and delay those proceedings whilst further evidence is obtained. Although the system prescribes the service of all evidence at the commencement of the claim (when the PFS is filed), provided the Worker foreshadows additional evidence is to be obtained, there is no difficulty in that evidence being admitted into the proceedings once it is obtained.

However the delay between the service of the PFS and the active pursuit of the claim has resulted in Defendants seeking to strike out the PFS for want of prosecution. This was recently addressed in Fairmont Aged Care Centre - v - McFarlane (2008) NSWWCCPD 30.

The President of the Workers Compensation Commission examined whether a delay of over 12 months from the time of the service of the PFS to the prosecution of the claim was a sufficient delay for it to be appropriate to strike out the PFS.

The facts of the matter were that shortly before the expiration of the three year limitation period the Worker's solicitors received instructions to pursue a work injury damages claim. The PFS was filed 1 day prior to the expiration of the 3 year limitation period. Over the next 12 months the Worker then made some attempts to progress the matter through determination of a lump sum compensation claim, conferences being organised with counsel and requesting further medical evidence by way of treating specialist reports and other medical reports.

The President noted the Defendant's submissions that they were prejudiced by the failure of the Worker to move forward with her claim. The President determined that the Defendant had not been prejudiced by the delay and noted an explanation for the delay had been proffered by the Worker including the time taken to obtain further medical investigations, changes in instructing solicitors and the contemplation of further surgery. There was also a regular stream of communication between the solicitors for both parties. In the circumstances the President declined to strike out the PFS.

The President highlighted the strike out application is subject to the exercise of discretion by the President of the Workers Compensation Commission. Whilst some other strikeout Applications had resulted in the President exercising his discretion in favour of the Defendant successful, this was often the result of the Worker failing to make submissions opposing the Defendant's strikeout application.

His Honour's decision is consistent with previous decisions such as Pasminco Cockrell Creek Smelter - v - Gardiner (2006). In this matter it was determined that whilst it was not the intention of the legislature for the time limit for the Worker to bring a claim for work injury damages to be extended indefinitely, provided Workers actively pursue the required steps throughout the pre-litigation process , a PFS will continue to remain current.

Provided Workers continue make active, although on some occasions protracted, efforts to pursue their matter it is unlikely that Defendants will have much success in striking out the PFS.

Consent Agreements Do Not Satisfy Common Law Threshold

The recent Court of Appeal decision of *JC Equipment Hire Pty Limited -v- Registrar WCC & Anor (2008)* has determined that a consent agreement to compensate a worker for 15% or greater whole person impairment does not in itself establish that the worker has a 15% or greater whole person impairment for the purpose of the threshold entitlement required for work injury damages.

The circumstances of the matter were that the parties agreed at a telephone conference on 9 March 2006 to compensate the worker for a 16% whole person impairment with a further consent award for pain and suffering. The claimant's solicitor then served a work injury damages claim on the belief he had satisfied the work injury damages WPI threshold of 15% pursuant to Section 151H. The defendant disputed the worker had reached the 15% whole person impairment threshold.

Tobias JA, with short agreement of Campbell and Bell JA, allowed the appeal. His Honour stated that:

> *"A Medical Assessment Certificate pursuant to an assessment under Part 7 of Chapter 7 is only conclusively presumed to be correct in any proceedings before a court or commission with which that certificate is concerned. Where such a certificate is given with respect to proceedings in the Commission for the determination of lump sum compensation under Section 66, it cannot be conclusively presumed to be correct with respect to proceedings for work injury damages in the District Court as the proceedings are clearly different."*

The claimant sought to rely on the principles of estoppel, but this argument also failed. Tobias JA accepted the defendant's submission:

"That the mutual assumption of fact adopted by the parties of a 16% degree of permanent impairment was adopted only as the conventional basis of their relationship for the purpose of calculating the entitlement of the respondent to permanent impairment compensation under Section 66… and for no other purpose."

Whilst this decision is significant in that insurers/defendants will not be bound by previous consent agreements of 15% WPI or above with respect to the work injury damages threshold, the ramifications of the decision are likely to be short lived as the Government has foreshadowed legislation to address the issue and scheme agents in reality will not dispute an assessment of impairment that have been correctly determined.

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