Review of Supreme Court Decisions

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REVIEW OF SUPREME COURT DECISIONS

1. The God of Impairment

In the civilised and rational world it would normally be reasonable to anticipate that having less, rather than more impairment would be a good thing but this does not necessarily apply in the world of workplace injury. In that world a 1% increase in impairment can result in a very substantial increase in the benefits that an injured worker is able to access.

In summary, the respective impairment threshold and their implications are as follows:-

a. 0% to 10% (or is it 1% to 10%) medical expenses limited to payment within a period of two years after the date of claim or the date on which weekly compensation ceases (Section 59A(2)(a).
b. Greater than 10% - entitlement to receive lump sum compensation for permanent impairment (Section 66(1).
c. More than 10% but not more than 20% - entitled to medical expenses for five years from the date of claim or the date weekly compensation ceased (Section 59A(2)(b).
d. At least 15% - possible entitlement to the payment of work injury damages (Section 151H(1) of the WCA) and one pre-condition to commutation satisfied (Section 87EA(1)(a) of the WCA).
e. More than 20% - worker with high needs (Section 32A of the WCA), entitled to weekly compensation after five years (Section 39(2) of the WCA) and period of entitlement to medical and treatment expenses not restricted (Section 59A(5).
f. More than 30% - worker with highest needs (Section 32A) and "special" entitlements to weekly compensation.

It will be evident from what is set out above that the most important focus for an injured worker is not to be restored to health or to achieve a durable and safe return to work but rather to ensure that the level of Whole Person Impairment assessed is maximised by whatever means possible.

It should however be noted that this may be a difficult (and certainly protracted) process in circumstances where it is likely that the injured worker will be entitled to one claim for and assessment of Whole Person Impairment only.

This brings me to an element of the decision of the Court of Appeal in *Cram Fluid Power Pty Ltd. -v- Green* [2015] NSWCA 250.

Here the Court was dealing with the provisions of Section 66 (1A) which provides that only one claim can be made under the Act for permanent impairment compensation that results from an injury for claims after 19 June 2012. The decision led to regulatory change not presently relevant for my purposes.

One argument put on behalf of Mr Green was that he could make a further claim for lump sum compensation despite having entered into a Complying Agreement in 2010 because Section 66A(3) allowed the Commission to award additional compensation payable by virtue of a Complying Agreement in certain circumstances including, in Mr Green's case, where there had been an increase in the degree of permanent impairment beyond that so agreed (Section 66A(3)(c).

The Court held, in its wisdom, that the inconsistency between Section 66(1A) and Section 66A(3) was capable of being resolved by determining that the former provision was the "leading provision" so that Section 66A(3) must give way to it.

It should be noted, however, that one of the provisions that needs to give way to the one claim rule is Section 66A(3)(b) which had, until this Court of Appeal decision, allowed the Commission to award additional permanent impairment compensation notwithstanding the existence of a Complying Agreement in circumstances where "the worker has been induced to enter into the agreement as a result of fraud or misrepresentation'.

We therefore now have a situation in New South Wales where a worker can be induced into entering into an agreement as to the level of their permanent impairment (the significance of which I have already referred to) by fraud and yet they will have no redress because it is apparently more important that they and all other workers be constrained to only one claim.

Of course limiting injured workers to one claim for impairment while at the same time giving impairment its God like status in determining the entitlements of injured workers is (predictably) now causing problems of its own not the least of which are issues arising under Section 39 of the *Workers Compensation Act 1987* (about which I will not speak). This includes issues such as whether the Workers Compensation Commission has any jurisdiction to refer a Claimant for assessment of impairment by an Approved Medical Specialist in circumstances where there is no "dispute".

If this was not difficult enough another more recent decision of the *Supreme Court by Justice Bellew in Favetti Bricklaying Pty Limited -v- Benedek Anor* [2017] NSWSC417(24 April 2017) has the potential to give rise to complications of its own.

Briefly, in that case, an injured worker who had entered into a Complying Agreement for 14% Whole Person Impairment in 2008 for a lower back injury sought a concession by the scheme agent that his impairment now exceeded the 15% Work Injury Damages threshold based on a report which in part ascribed the additional impairment to impairment of the thoracic spine.

The insured disputed liability for any injury to the thoracic spine and the worker proceeded to the Commission seeking to have the matter referred to an Approved Medical Specialist as a threshold Work Injury Damages dispute only.

Despite initial protestation on behalf of the scheme agent the Commission agreed to refer the worker direct to an Approved Medical Specialist in respect of this threshold dispute on the basis that the Commission did not have any jurisdiction to determine what constitutes an injury for the purpose of a Work Injury Damages claim.

The employer proceeded by way of Summons to seek administrative review of this decision of the Workers Compensation Commission.

Justice Bellew determined that the Workers Compensation Commission could not refer a matter to an Approved Medical Specialist for the assessment of permanent impairment in respect of an injury which was the subject of a dispute (Section 321(4)(a) of the *Workplace Injury Management and Workers Compensation Act 1998*).

One possible consequence of this decision at the present time could arise where a worker is seeking a threshold determination of impairment for the purposes of Section 39 in circumstances where part of the impairment is assessed by reference to an injury for which liability is not accepted. It will first be necessary for the matter to be determined by the Workers Compensation Commission (an Arbitrator) and then, subject to any rights of appeal to a Presidential member, referred to an Approved Medical Specialist.

One would hope that in these circumstances there wasa not any particular time constraints within which all of this needed to occur.

2. The Conciliation/Settlement Myth

It is, in my view, ironic that when a dispute comes before the Workers Compensation Commission the first task that falls to an Arbitrator in the Commission is to use best endeavours to bring the parties to the dispute to a settlement (Section 355 of the WIM).

In the past the concept of settlement in a statutory benefit scheme had some meaning because there was a realistic option available to the injured worker to redeem and (subsequently) commute any entitlements to statutory compensation benefits to a lump sum.

Unfortunately at precisely the same time Arbitrators were compelled to persuade parties to settle the ability to commute an entitlement to statutory compensation benefits was constrained by so many pre-conditions as to rendering it essentially impossible (Section 87EA of the Workers Compensation Act 1987).

In these circumstances, absent some tinkering with the level of statutory payments, settlement required one of two things. Either the insurer had to agree to make payments in circumstances where they had disputed that such payments needed to be made or alternatively an injured worker had to agree not to receive payments (this latter eventuality never having occurred in my 30 years of practice in this area).

Some may say that precluding an injured person from reaching a mutually acceptable agreement as to the quantification of those entitlements and making a dignified exit from the scheme in a way which enables the injured worker to once again become master of their own destiny constitutes cruel and unusual punishment. Some would be right.

This brings me to another recent decision of the Court of Appeal in the matter of *Trustees for the Roman Catholic Church for the Diocese of Bathurst -v- Hine* [2016]NSWCA213.

First a little background, the legal profession has, for many years, been finding creative ways to restore some meaning and purpose to Section 355 of the WIM. This has been done by the creative use of compromise, Consent Orders, Admissions, Agreed Facts and Findings.

Not surprisingly the Hine case involved a worker who alleged psychological injury about which there was (as usual) a substantial dispute about entitlements to compensation on a number of grounds.

Consistent with Section 355 that dispute was thought to have been resolved in August 2013 and as part of that resolution the Commission made findings by consent that the Claimant had fully recovered from the effects of any work related psychological injury or condition as at August 2013 and that, following payment of the agreed compensation, the Claimant had received all compensation entitlements.

Nearly six months later the Claimant then sought lump sum compensation for permanent impairment in respect of the same injury which had been the subject of the settlement and the insurer disputed liability relying, in large part, on the earlier agreement and the consent findings.

In November 2014 an Arbitrator determined the dispute in favour of the Respondent employer (as most sane people would expect).

The Claimant appealed and a Deputy President overturned the decision of the Arbitrator and the Court of Appeal upheld the Deputy President's decision. In essence the Court of Appeal decided that the findings of the Commission did not prevent the further claim for lump sum compensation because the assessment of that claim for lump sum compensation fell outside the jurisdiction of the Commission.

Of course the inevitable consequence of this decision has been that the already extremely limited avenues by which disputes in workers compensation could be resolved on a final basis has been constrained even further.

3. The Disputes, Highways (and By-ways)

I would defy anyone to map out, in any coherent or meaningful way, the various processes and pathways which apply to the notification and resolution of disputes for various categories of workers and entitlements following a workplace injury in NSW.

The starting point would be to exclude, from present consideration, those lucky enough to sustain an injury in the nature of a dust disease (I am kidding).

Next we also have to exclude coal miners (who are fortunate enough to be trapped in the last century).

Even in the more recent iteration of Workers Compensation Legislation special consideration and exemptions apply to those engaged in emergency services. If by now you are looking for a pattern in this hierarchy of disability discrimination you need look no further than the relative degree of political influence and power.

For the remainder who are not part of a powerful union or lobby group the path to "peace" starts with consideration of what type of dispute is under consideration. A dispute as to what could be described as primary liability is dealt with by means of a notice under Section 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the WIM). It is worth noting however that a dispute in the nature of which a Section 74 Notice can be given can be under the guise of a notice under Section 54 of the *Workers Compensation Act 1987* (the WCA).

If the dispute relates to a work capacity decision then the notice of that dispute must be given in accordance with Section 54 of the WCA only.

Of course nothing in the legislation prevents notices being issued concurrently under Section 74 of the WIM and Section 54 of the WCA and there is yet another form of notice that applies where the dispute is limited to the extent of a Claimant's Whole Person Impairment.

Disputes notified by reference to a Section 74 Notice are dealt with by the Workers Compensation Commission.

Disputes as to the extent of Whole Person Impairment only are dealt with administratively by the Workers Compensation Commission by referral to an Approved Medical Specialist.

Disputes as to a work capacity decision are dealt with by the most cumbersome and convoluted administrative process in the history of history itself the short form of which is internal review, external review as to merit and external review as to procedure. There is also access to administrative review by the Supreme Court for all those of sufficient means and/or courage.

If the above summary is of some comfort I would caution that it constitutes a significant over simplification of the processes which processes are, in my respectful opinion, pathologically stupid and in urgent need of reform.

This brings me to the last of the Supreme Court decisions which I wish to revisit today being the matter of *Sabanayagam -v- St George Bank Ltd* [2016] NSWCA145. A decision with which I expect you are all familiar.

In that case the insurer had issued what was described as a "Section 74 Notice" declining liability for the payment of compensation benefits on several grounds including that the Claimant was fit for pre-injury duties with St George Bank, that the effects of her injury had resolved and that the injury was no longer causing any incapacity for work. The critical question was whether the Workers Compensation Commission had jurisdiction to determine the claim for weekly compensation and this depended on whether a work capacity decision had been made.

A Senior Arbitrator determined that the Commission did not have jurisdiction as a work capacity decision had been made and this decision was affirmed by Deputy President not on the basis that the notice constituted a work capacity decision but rather that it could be inferred that a work capacity decision (consistent with what was set out in the notice) had been made prior to that notice being sent.

The Court of Appeal overturned the decision of the Deputy President however it is important to note that the only basis on which the Court of Appeal overturned that decision came down to the fact that there was no evidence by which the Deputy President could find (as he did) that a work capacity decision had been made prior to the notice being issued.

Importantly the Court of Appeal also determined that if the insurer's decision had properly been categorised as a work capacity decision it would then have operated in the way suggested by the senior Arbitrator and the Deputy President.

The decision of the Court of Appeal is considered by many to have gone at least some way to resolving some of the many issues which arise under what has been described as the bifurcated dispute resolution system. I do not share that optimism.

Firstly, one must wonder whether the decision of the Court of Appeal would have been entirely different if the Section 74 Notice had contained a Statement to the following effect:-

> "As you are aware a work capacity decision was made last week in regard to your claim to the effect that you have no entitlement to weekly compensation".

Indeed any evidence of the kind found to be lacking by the Court of Appeal would apparently have been capable of supporting the jurisdictional determinations made by the senior Arbitrator and the Deputy President.

Further much has been said to turn on the description of the notification of the liability dispute as being a notification under Section 74 (of the WIM) however no consideration has been directed to the provisions of Section 74(5) of the Act which provides that "notice is not required to be given under this Section with respect to a dispute if notice has been given under Section 54 of the WCA with respect to the dispute and that notice contained the Statements and information that a notice under this Section is required to contain".

In short there is nothing to stop an insurer giving notice of a work capacity decision under Section 54 of the WCA whilst at the same time including in that notice a denial of liability (together with the necessary Statements and evidence) as required under Section 74 of the Act. The result of this would be a denial of liability for the payment of compensation benefits which in itself deprived the Workers Compensation Commission of any jurisdiction so far as weekly compensation is concerned and a concurrent work capacity decision which would arguably not be capable of being remedied by processes of internal review, merit review or procedural review.

I repeat without any reluctance at all my statement to the effect that the current dispute resolution system is pathologically stupid and in urgent need of reform and I thank you for your attention.