

SHORT SHOTS

Failure to satisfy requirements to substitute insurer

Mrdajl v Southern Cross Constructions (NSW) Pty Ltd (in liq)

[LINK TO DECISION](#)

The *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) allows claimants to substitute an insurer for a party in proceedings so as to recover directly from them in certain circumstances.

A claimant must show that the insurer was on risk under the relevant liability policy to obtain leave of the court.

The plaintiff sought leave to amend the pleadings to bring proceedings against the defendant's liability insurer (the defendant company having gone into liquidation). The plaintiff relied upon certain affidavit evidence that deposed to the existence of a policy with the insurer although the number and the nature of the policy was not disclosed. There was also a discrepancy in the names of the defendant and insured entity.

The court determined that the evidence did not establish the existence of a policy per se. 'A determination as to whether or not the policy covered the risk and was in place at the time of this risk can only be established by reference to the insurance contract or some documentary evidence bearing more closely upon it.'

As such the court found there was no proper basis upon which to grant leave pursuant to section 5(3) of the Act. Application refused with costs.

Decision Number: [2018] NSWSC 161
Decision Date: 21 February 2018
Matter Number: 2014/148359
Decision maker: Walton J, Supreme Court NSW

Judicial review - appeal against MAP

Parker v Select Civil Pty Ltd

[LINK TO DECISION](#)

Judicial review by Supreme Court of NSW from a decision by a Medical Appeal Panel of the Workers Compensation Commission.

The plaintiff suffered psychological injury when an excavator that he was operating on a river bank began sinking into the river. The cabin filled with water and he thought that he would die. Plaintiff brought a claim for whole person impairment pursuant to section 66 that was referred to an AMS (22% WPI) from which the respondent employer appealed. The Appeal Panel determined to revoke the MAC and issue a new certificate for 9% WPI (below the 15% WPI threshold required to establish a lump sum entitlement for psychological injury).

The Appeal Panel conducted a preliminary review and determined that it was not necessary for the worker to undergo a further medical examination as there was sufficient evidence before it to make a determination.

The Court reviewed the MAP determination and found that the Appeal Panel had substituted its own opinion for that of the AMS as to which Class rating of impairment was most appropriate. There was no indication that the AMS had applied incorrect criteria or that his reasons disclosed a demonstrable error. As such there was an error of law on the face of the record.

Appeal Panel MAC and statement of reasons set aside and matter remitted to WCC to be determined according to law.

Decision Number: [2018] NSWSC 140
Decision Date: 21 February 2018
Matter Number: 2017/42928
Decision maker: Harrison AsJ, Supreme Court NSW

Messenger appeal

Hunter Quarries Pty Limited v Alexandra Mexon as Administrator for the Estate of Ryan Messenger

[LINK TO DECISION](#)

The NSW government is considering an appeal from the judgment handed down by the Supreme Court on judicial review from the decision of a Medical Appeal Panel – finding the relevant test for a successful claim under section 66 is not the duration of survival of a worker, but the permanence of the impairment.

The worker was a machine operator who suffered extensive crush injuries to his chest when a 40 tonne excavator that he was operating tipped over and crushed the cabin in which he was working. Co-workers who went to his aid could find no pulse and when police and ambulance attended he was pronounced life extinct.

An AMS found the worker suffered no permanent impairment while the Appeal Panel found that the evidence established that when he was injured, the worker suffered permanent impairment that gave rise to an entitlement to compensation under sections 9 and 66 of the Act. The Court considered the meaning of permanent impairment in the legislative context and affirmed the Appeal Panel's determination so that the deceased worker's estate was entitled to permanent impairment compensation pursuant to section 66 (100% WPI) in addition to the statutory lump sum death benefit under s25.

Decision Number: [2017] NSWSC 1587
Decision Date: 22 November 2017
Matter Number: 2017/153929
Decision maker: Schmidt J, Supreme Court NSW

Leave to proceed out of time

Crim v Vodafone Hutchison Australia Pty Ltd

[LINK TO DECISION](#)

Application to extend 3 year limitation period to bring a claim for work injury damages 6.5 years after plaintiff stopped working. Initially experienced somatic symptom later diagnosed to be psychologically determined - only realised cause of his symptoms nearly 4 years after stopping work. Plaintiff then makes workers comp claim and needs to pursue two sets of proceedings in WCC before making a claim for work injury damages. No actual prejudice suffered by defendant by virtue of delay. Plaintiff did not deliberately allow limitation period to expire.

Leave granted to commence a claim for work injury damages against the defendant pursuant to s151D(2) of the Act.

Decision Number: [2017] NSWDC 404
Decision Date: 12 December 2017
Matter Number: 2017/186952
Decision maker: Neilson J, District Court NSW