

RECENT DECISIONS

Back to basics: Trial judge's obligation to make findings of fact before determining negligence

Bauer Media Pty Ltd t/as Network Services Company v Khedrlarian [2018] NSWCA 208 (20 September 2018)

[Link to decision](#)

Summary

In a recent decision of the Court of Appeal a retrial was ordered where an employer and host employer persuaded the court that the trial judge did not adequately address how the worker's injury occurred, and whether any negligence caused or contributed to that injury.

Background

The worker was employed by a labour hire company and contracted to work for a host employer as a process worker. The worker alleged that her duties involved two main tasks:

- manoeuvring bundles of magazines or books which weighed more than 15kgs from a shelf to a conveyor belt; and
- using a hook knife to cut the straps or tapes that secured the bundles;
- picking the number of books or magazines required; and
- re-strapping the magazines or books into new bundles.

The worker allegedly injured her neck and right arm when lifting a bundle of magazines which weighed more than 15kgs on 27 February 2011. The worker stated that she first noticed pain in her wrist while using a hook knife a few months before her injury occurred.

The worker sued both her employer and host employer, alleging negligence in the system of work.

The trial judge found that the employer and host employer breached their respective duties of care to the worker relating to rotation of tasks, supervision, training and risk assessment.

The trial judge awarded the worker damages. Both the employer and host employer appealed the trial judge's decision.

How did the injury occur?

The employer and host employer contested the weight of the bundles of magazines, the date when the worker first noticed her symptoms, and the height to which the worker was required to lift the bundles. Evidence from a witness for the host employer had confirmed that there was a computerised system in place so that it was impossible for a bundle weighing more than 11.5kg to be assembled. This evidence was not dealt with by the trial judge.

Ultimately, the Appeal Court noted that the trial judge made no findings regarding how the worker's injury occurred. The Appeal Court found that he could not determine the employer's or host employer's challenges to apportionment of liability and quantification of damages in the absence of a primary finding of how the worker's injury occurred.

Was the duty of care breached?

The trial judge accepted that the host employer had in place a system of rotating employees' duties but ultimately concluded that there was no evidence to suggest that the system of rotation was implemented by the host employer. The Appeal Court pointed to the transcript of evidence which specifically dealt with the rotation of the worker's duties and contradicted the trial judge's conclusion.

The trial judge found that there was no supervision of the worker at any stage in her work. However, the Appeal Court again referred to the transcript of evidence to contradict that finding.

[back to top](#)

The trial judge decided that limited initial training was provided and that neither the employer nor host employer provided the worker with training in how to use a hook knife, despite the transcript of evidence including evidence of training courses provided to the worker, and the worker's own evidence that she was shown how to use a hook knife.

The trial judge concluded that no risk assessments were carried out by the employer or host employer. However, evidence was adduced that an OH&S Committee and safety checklists were implemented by the employer and host employer.

The Appeal Court concluded that the trial judge did not adequately explain his conclusion that the safety checklists were disregarded, and that the OH&S Committee was ineffectual.

The Appeal Court was most critical of the trial judge's failure to provide reasons regarding whether the individual breaches discussed above **caused** the worker's injury. This defect, together with the absence of findings regarding how the injury occurred, could not be rectified by the Appeal Court and a retrial was ordered.

Implications

This case is a reminder that the negligence of an employer or host employer must be established by the injured worker on the basis of evidence presented at trial, showing precisely how the injury occurred and how the employer or host employer's negligence (if any) caused that injury.

It is just as important for judges to consider the evidence presented and make findings of fact that are consistent with the evidence.

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