

RECENT DECISIONS

Presidential decision confirming principles to be applied to appeals against arbitral determinations

Marshall v Skilled Group Ltd [2018] NSWCCPD 44

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Background

The worker commenced proceedings in the Workers Compensation Commission (WCC) claiming weekly payments and medical expenses as a result of an alleged injury on 9 January 2015.

Injury had been disputed outright.

The matter was fully contested before Senior Arbitrator Capel who accepted the worker's claim that there was an incident at work on 9 January 2015 but was not convinced the worker was injured as a result of that incident. Arbitrator Capel entered an award in favour of the employer on the basis that the worker had not discharged the onus of proving that he had suffered an injury arising out of or in the course of his employment on 9 January 2015.

Decision

Below is a summary of some of the legislation, case law and principles referred to and applied by DP Wood in her 224 paragraph decision:

- Time can be extended to appeal a WCC decision 'if a party satisfies the Presidential member, in exceptional circumstances, that to lose the right to appeal would work demonstrable and substantial injustice' (Rule 16.2(12) of the 2011 Rules).
- On the above issue, DP Wood found the worker's circumstances to be exceptional (paragraph 28), however, she then had to determine whether a failure to extend time would result in a substantial injustice, which means I must assess the merits of the appeal. To do so, it is necessary to consider whether the new evidence sought to be relied on in the appeal by Mr Marshall ought to be admitted' (paragraph 29).
- 'The Commission is not to grant leave unless the [new] evidence was not available to and could not have been reasonably obtained by the party seeking to adduce the evidence, or that a failure to grant leave would cause a substantial injustice in the case' (section 352(6) of the 1998 Act).
- An appeal brought pursuant to section 352 of the 1998 Act is not a re-hearing. It is limited to the identification of error of fact, law or discretion on the part of the arbitrator.
- 'Arbitrations are not a trial run, and the parties must live with the consequences of the forensic choices they make at first instance, including those of their legal representatives' (paragraph 207 and *Super Retail Group Services Pty Ltd v Uelese* [2016] NSWCCPD 4 at 92).
- DP Wood approved Arbitrator Capel's conclusion 'that he must feel an actual persuasion that Mr Marshall was involved in an accident on 9 January 2015 and that he suffered an injury as a result of that accident' (paragraph 157).
- DP Wood quoted the plurality in the High Court of Australia matter of *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12 that 'A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances. ... it is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial' (paragraph 208).
- 'The restriction in s352(6) on the admission of new evidence on the appeal distinguishes a presidential appeal from a review or re-hearing. The legislative intention of the provision was to limit the scope of such an appeal' (paragraph 209 and per Basten JA in *Inghams Enterprises Pty Ltd v Sok* [2014] NSWCA 217).
- 'Mr Marshall seeks to have the Senior Arbitrator's decision revoked and the matter remitted to the same Senior Arbitrator for reconsideration. This is not the role of the Presidential member. If the requirement to establish error is satisfied, I may revoke the determination and either re-determine the matter or remit the matter for re-determination by an Arbitrator' (paragraph 210).

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- 'The onus is on the person who seeks to overturn the decision to establish that there are sufficient grounds to do so (paragraph 21 and *Singh v Ginelle Pty Ltd* [2010] NSWCA 310 at 45).
- 'It is not sufficient that a different result might have been preferred' (paragraph 211 and Basten JA in *Northern New South Wales Local Health Network v Heggie* [2013] NSWCA 255).
- 'In order to establish error on the part of the Senior Arbitrator in respect of his factual findings, what is required to be shown is that the Arbitrator either:
 - Ignored material facts;
 - Made a critical finding of fact which has no basis on the evidence;
 - Showed a demonstrable misunderstanding of relevant evidence; or
 - Demonstrably failed to consider relevant evidence' (paragraph 212).
- As described by Barwick CJ in *Whiteley Muir & Zwanenburg Ltd v Kerr* [(1966) 39 ALJR 505], what is required to demonstrate error on the part of the Arbitrator, is to establish that other probabilities so outweigh the Arbitrator's conclusion that it can be said his conclusion was wrong' (paragraph 213).

Ultimately, DP Wood concluded that the worker had failed to establish any error on the part of Arbitrator Capel. On that basis, even if leave to extend time to appeal was granted (it was not), DP Wood would have arrived at the same conclusion as the arbitrator i.e. that the worker had failed to show a substantial injustice.

Perhaps the main point to be extracted from DP Wood's well-reasoned decision is the 'finality of a decision' concept. The decision is a timely reminder for workers to ensure that, when they elect to fully contest a matter in the WCC, they have all the evidence available to support their claim.

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