ANOTHER GATEWAY ENABLING ACCESS TO COMMON LAW DAMAGES - PARNELL v WORKCOVER QUEENSLAND [2006] QSC 303

WORKPLACE INJURY ALERT

OCTOBER 2006

On 20 October 2006 Justice White of the Supreme Court of Queensland handed down her decision in relation to the entitlement of a worker to seek damages under the *Workers Compensation & Rehabilitation Act 2003*.

Carmel Parnell applied for and received statutory workers compensation benefits in relation to physical injuries she sustained in the course of her employment as factory worker. She was issued with a notice of assessment by WorkCover Queensland identifying a work related impairment for her physical injuries . The impairment was less than 20% and she was made a lump sum offer of compensation for those physical injuries which she ultimately accepted. She then lodged a Notice of Claim for Damages form with WorkCover Queensland seeking damages against her employer for psychological/psychiatric injuries. The psychological/psychiatric injuries were alleged to have arisen as a consequence of the physical injuries for which she had accepted statutory compensation. At no time had she applied to WorkCover Queensland for statutory benefits on account of psychological/psychiatric injuries.

The court was asked to determine whether she was entitled to seek damages for a psychological/psychiatric injury which arose in consequence of an event for which she had accepted a statutory offer of compensation.

Section 237 of the *Worker's Compensation & Rehabilitation Act* identifies the circumstances in which a worker or a dependent of a deceased worker may seek damages at common law as a consequence of an employer's negligence. The provision is substantive law and if the claimant's circumstances does not fall squarely within the ambit of S 237 there is no entitlement to seek damages at all.

Eligibility to seek damages in negligence against the employer by a worker therefore requires the claim to fall within the 6 categories identified in s 237.

These categories are :-

1. a worker who has received a notice of assessment for the injury (s 237(1)(a)(i))
2. a worker who has not received a notice of assessment for the injury but has received a notice of assessment for any other injury in the event and the WRI is 20% or

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more, and has elected to seek damages under s 239 (s 237(1)(a)(ii))
3. a worker who has not been assessed for permanent impairment but has had their application for compensation allowed (s 237(1)(b))
4. a worker who has lodged an application for compensation but it is the subject of a review or appeal process that has not yet been determined concerning whether their statutory claim for workers compensation ought to be allowed (s 237(1)(c))
5. a worker who has not lodged an application for compensation for the injury (s 237(1)(d))
6. a dependent of a deceased worker where the injury results in the workers death (s 237(1)(e))

In respect to category 1 , S 237(3) further identifies that if the worker is required to make an election to seek damages for an injury under s 239 and has accepted an offer of lump sum compensation then the worker is not entitled to seek damages .

The issue that had to be determined by the Supreme Court was whether seeking damages for psychological/psychiatric injuries in this case fell within the category of worker who had not lodged an application for compensation for the injury. (category 5). The court determined that the other categories did not apply and then considered whether s 237(1)(d) was applicable.

Counsel for WorkCover Queensland argued that s 237(1)(d) should not be read in isolation and required the proviso in s 237(3) to apply to it. That is the worker must firstly not have applied for workers compensation benefits for the injury and secondly where the WRI is less than 20% not have accepted lump sum compensation. Counsel argued that "where the worker is required to make an election to seek damages for an injury under s 239 and has accepted an offer of lump sum compensation then the worker is not entitled to seek damages " and this section applied equally to s 237(1)(d) [category 5] as to s 237 (1)(a) [category 1] .

The court rejected that argument and determined that s 237(1)(d) when construed literally entitled the applicant to seek damages for her psychological/psychiatric injury. The Court considered the prohibition on seeking damages in s 237(3) relates only to an injury for which compensation had been offered by Workcover Queensland and accepted (s 237(1)(a), category 1) . The views expressed in *Kriz v King* [2006] QCA 351 that if parliaments intention had been to ameliorate the common law rights of a worker then it would have done so expressly were adopted by the court in interpreting s 237(1)(d).

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The effect of this decision is, a worker who has not lodged an application for workers compensation benefits for a particular injury may be able to seek damages for that injury notwithstanding that they have already accepted lump sum compensation for other injuries with a WRI of less than 20% arising from the same event. The question that remains is whether parliament will now amend the *Worker Compensation & Rehabilitation Act 2003* to prevent the right of workers to seek damages in this circumstance. If parliament is of the view that its intention has been properly effected by the wording of the existing legislation then the right to seek damages for an injury notwithstanding compensation has been paid for other injuries arising out of the same event will remain. WorkCover Queensland has a 28 day period in which to appeal the decision of the Supreme Court.

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