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LAWYERS

Workers Rehabilitation & Compensation Tribunal

Case Commentary • January 2021

St Michael's Association Inc v T [2020] TASWRCT 35 (19 October 2020)

Link: Click Here

1 Summary of the Referral

1.1 The Worker made a claim for compensation for a spiral fracture of the left arm.

1.2 The Worker, in the course of their employment as an NDIS provider, was undertaking ten pin bowling with clients of the Employer when the Worker said they "*went to get a ball, slipped/tripped on strip, lost balance couldn't regain hit counter head first then shoulder/arm then elbow hit ground*".

1.3 The Employer disputed the Worker's claim and referred the matter to the Workers Rehabilitation and Compensation Tribunal under s81A of the *Workers Rehabilitation and Compensation Act 1988* (Act). The issue in question was whether there was a reasonably arguable case existing concerning the Worker's claim.

1.4 The Tribunal found that a reasonably arguable case existed, and the Worker was not entitled to payments of compensation under the Act.

2 The Dispute

2.1 The Employer disputed the Worker's claim on the following basis:

(a) The Worker's injury did not arise out of or in the course of employment with the Employer (s25(1)(a));

(b) The Worker's injury is attributable to serious and wilful misconduct (s25(2)(a)(i); and

(c) The Worker's injury was intentional and self-inflicted.

2.2 The Employer engaged Dr Gilbert as an independent medical examiner to review a number of documents, undertake a site inspection and provide an opinion from a biomechanical and occupational medicine perspective as to the plausibility of the Worker's injury being suffered in the circumstances alleged.

2.3 Factual evidence was adduced by the Employer. That evidence suggested the Worker, as captured on fixed camera, did not show her tripping but rather, the Worker was seen moving with arms becoming outstretched towards the counter and contacting the side of the counter with arms followed by head, before falling to the floor.

2.4 The factual evidence suggested the distance travelled following the trip (5.1 meters) at walking pace is implausible due to:

(a) not having the momentum required to travel that distance;

(b) there was no evidence of the Worker being pushed to gain momentum; and

(c) the bowling ball the Worker was getting was 80cm preceding the edging strip she alleges she tipped on.

2.5 Dr Gilbert reviewed this material and said "*the mechanism of injury is most unusual and is not consistent in my opinion with a simple trip*". The Employer said the evidence supports the

following:

(a) The mechanism of injury is not consistent with the Worker walking and tripping;

(b) The Worker made little effort to avoid contact with the desk;

(c) The claim is unusual and implausible;

(d) The Worker may have had motive to get time off work and staged the incident; and

(e) The inference can be drawn that the injury did not occur in the circumstances described and that equally plausible explanations for how this injury occurred could be a push, horseplay, a deliberate act or a lack of candour.

2.6 The Worker's case was that serious and wilful misconduct goes beyond negligence and beyond culpable or gross negligence and in order to establish serious and wilful misconduct it must be shown that the Worker knows it will cause injury.

2.7 The Worker said there was no evidence to show that they intended to injure themselves. The Worker said the Employer's referral must fail because the only evidence before the Tribunal was that the Worker may have been moving faster than a walking pace when she fell and suffered the injury.

3 Decision

3.1 The Tribunal said there is no doubt the Worker suffered an injury.

3.2 The Tribunal referenced Dr Gilbert's report saying he is of the opinion that the mechanism of injury is not consistent with a trip and the Worker could have taken evasive action to avoid contact with the desk.

3.3 The fact the Worker had made 9 previous workers compensation claims was noted and on the day prior to the incident the Worker was off work "*due to a bad night and anxiety she was trying to get in to see her doctor and counsellor*".

3.4 The Tribunal said at the time of hearing, there was factual dispute between the parties as to the circumstances giving rise to the injury. The Tribunal referenced *Vos Construction & Joinery Pty Ltd v Norton-Smith* [2016] TASSC 38 saying that the Act does not require the employer's case about liability to be strong or compelling but the case that the claim may ultimately be rejected must be reasonably arguable.

3.5 As such, the Employer is not required to prove exactly how the Worker suffered the injury and the Employer's evidence does leave it reasonably arguable that it cannot be determined how and why the Worker suffered the injury.

3.6 The Tribunal concluded that the evidence leaves open a reasonable possibility that following a contested hearing the Worker's claim may be rejected.

3.7 The Employer succeeded in the 81A referral and orders were made pursuant to s81A(3)(c) and (d).

4 Comment and Practical Implications

4.1 It is well known that the test under s81A is that an employer is only required to establish that there is some element of the claim, which is "reasonably arguable". It is not required to prove there is no liability under the Act. As can be appreciated, this is a low threshold for an Employer to meet for the purpose of s81A. However, the precedent attaches a greater duty on an employer when relying on an argument under "serious and wilful misconduct".

4.2 An employer must prove:

(a) For "serious" to have force, it needs to be shown that where the risk of loss or injury resulting to any person or thing from the doing of a particular act is remote, or where that loss even if probable, would be trivial in its nature and character.

(b) The word "wilful" imports that the misconduct was deliberate, not merely thoughtless.

4.3 The threshold for the employer in utilising this section was clearly at a high standard, having to

prove that there was serious and wilful misconduct, rather than proving there is a case to be argued. What this case does is step away from the high threshold of "serious and wilful misconduct" and removes the liability on the employer to prove those elements.

4.4 It draws the test for serious and wilful misconduct in an 81A referral in line with the other provisions under s25 for the purpose of s81A referrals; that is a reasonably arguable case.

4.5 As a result, I suspect we will see this argument run more freely in light of this recent decision in the Tribunal.

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