

Tribunal delivers harsh judgment on the use of the exclusionary provisions of the SRC Act

Wilson and K&S Freighters Pty Ltd [2018] AATA 464

Key Points

- The Tribunal considered the ‘voluntary and unreasonable submission to an abnormal risk of injury’, ‘wilful and false representation’ and/or ‘serious and wilful misconduct’ exclusions contained in sections 6(3), 7(7) or 14(3) of the SRC Act applied in the circumstances.
- These exclusions remain effective decision-making tools, however this case demonstrates that the bar for employers seeking to rely on them is high.

Background

On 12 June 2012, Mr Wilson was walking across a work yard when he was struck by a forklift, knocked to the ground, and rendered momentarily unconscious. On 13 June 2012, he lodged a claim for “*bruising over left elbow, left lateral foot and left hip*”, for which K&S accepted liability.

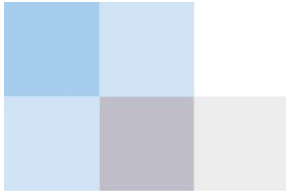
On 25 September 2015, K&S issued a reconsideration of own motion changing the accepted condition to “*pain and paraesthesia left elbow and forearm to ulnar border left hand side, left foot, left hip, lower back and lateral chest wall*” sustained on 12 June 2012. Mr Wilson later sought to include further injuries including depression and other physical injuries, however K&S denied liability for these injuries.

On 22 December 2016, K&S issued a further reconsideration of own motion denying liability for Mr Wilson’s claim pursuant to sections 7(7) and 14(3) of the SRC Act, which exclude liability for “*wilful and false representations*” and “*serious and wilful misconduct*”. The alleged serious and wilful misconduct was that Mr Wilson had walked through a loading and unloading exclusion zone in contravention of company and site rules, directly resulting in him being struck by the forklift. Further, K&S held that Mr Wilson had made a wilful and false representation on his workers’ compensation claim form by denying that he had not previously suffered from, or received medical treatment for, a similar injury when there was evidence that he had.

In its Statement of Facts, Issues and Contentions, K&S also contended that liability should be excluded pursuant to section 6(3) of the SRC Act because Mr Wilson had voluntarily and unreasonably submitted himself to an abnormal risk of injury.

The Decision

Deputy President Boyle noted that to rely on the ‘serious and wilful misconduct’ exclusion an employer must establish that the conduct itself, rather than the outcome of the conduct, was serious. Deputy President Boyle concluded that at the time of the accident there was no loading or unloading in operation, therefore the exclusion zones were not in use and Mr Wilson’s alleged failure to comply with this exclusion



zone was not the cause of his injuries, nor did it constitute serious and wilful misconduct for the purpose of section 14(3).

Deputy President Boyle noted that to rely on the ‘wilful and false representation’ exclusion an employer must establish that an employee has deliberately lied in stating that they have not suffered from a similar injury or illness, and that the misrepresentation was made knowingly and for a purpose. On balance, Deputy President Boyle concluded that Mr Wilson had truthfully answered the questions on his claim form as it was true for him to state that he had never suffered injuries as a result of being struck by a forklift before. Further, K&S were aware of Mr Wilson’s pre-existing medical history prior to issuing its reviewable decision, therefore it was not prejudiced by the alleged misrepresentation.

Deputy President Boyle noted that the requirements of the ‘voluntary and unreasonable submission to an abnormal risk of injury’ exclusion were, in this instance, the same as for the ‘serious and wilful misconduct’ exclusion. Therefore, it followed that because the Tribunal had already found that there had been no serious and wilful misconduct, Mr Wilson had not voluntarily and unreasonably submitted himself to an abnormal risk of injury.

Lessons Learnt

This decision highlights the high bar that must be met to engage the ‘serious and wilful misconduct’ and ‘wilful and false representation’ exclusions. However, we submit that where a policy is clear enough and, crucially, is enforced with significant adverse consequences, the exclusions remain an effective decision-making tool. However, in this case the high bar was simply not met.

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