

Audino v WA Country Health Service – Wheatbelt [2013] WADC 46 (5 April 2013)

Key Points

- Workers' compensation case update – Procedural Fairness.
- This recent decision involved an appeal from a decision of the WA Workers' Compensation Arbitration Service Arbitrator to the District Court of Western Australia.
- The decision deals with the issue of procedural fairness. In particular, an Arbitrator must give a worker the opportunity to respond before making serious adverse findings as to credibility.

Background

The claimant was a cleaner employed by the WA Country Health Service – Wheatbelt (WACHS). The claimant claimed workers' compensation from WACHS, alleging that she sustained a hernia in the course of her employment.

The Arbitrator dismissed the claim on the basis that he was not satisfied that the claimant had sustained an injury arising out of or in the course of her employment. The Arbitrator's decision turned on adverse findings he made in relation to the claimant's credibility.

The Law

The claimant appealed to the District Court on numerous grounds. The claimant succeeded on 3 grounds, which submitted that the Arbitrator had erred in law in failing to grant procedural fairness to the claimant.

The claimant submitted that she had been denied procedural fairness in that the Arbitrator made adverse findings in relation to her credibility, but had failed to give her the opportunity to respond to the relevant evidence. The relevant findings were the conflicts in the evidence of the witnesses, the finding that the worker was willing to deceive WACHS regarding the circumstances of the hernia, the finding that the hernia could have occurred at a different time and the absence of a prescribed workers' compensation medical certificate.

Stavrianou DCJ observed that the Arbitrator had made a specific finding that the claimant was "willing to deceive WACHS with respect to the circumstances of the hernia". His Honour observed that "allegations of dishonesty and fraudulent conduct must be clearly pleaded and with particularity" (*Oldfield Knott Architects Pty Ltd v Ortiz Investments Pty Ltd* [2000] WASCA 255 per Ipp J).

His Honour noted that proceedings before the Compensation Arbitration Service do not involve pleadings, but he considered nonetheless that the *Oldfield* decision was relevant and demonstrates "the importance of fairly and squarely raising and particularising allegations involving fraud or deceptive conduct. This did not occur in the proceedings before the Arbitrator."

His Honour noted that the issue of credibility was not pleaded in the Reply. The Arbitrator's findings as to deceit had not been put to the claimant in cross-examination, (the Rule in *Browne v Dunn* (1893) 6 R 67 (HL)).

Since the Arbitrator had made a finding that the claimant was willing to deceive WACHS as to the circumstances of the hernia, this should have been raised directly with the claimant. His Honour found that this adverse finding could not have reasonably been anticipated by the claimant given the conduct of the proceedings.

His Honour confirmed that while there is no duty to advise a witness that his or her case is not made out. However, where there is an allegation of deceit, this must be put to a worker in cross-examination.

His Honour concluded that the claimant ought to have been given the opportunity to comment on or make submissions or call evidence in relation to the adverse conclusion as to deceit.

Conclusion

The decision in Audino clearly demonstrates that the Courts will carefully scrutinise any adverse findings as to credibility to ensure that a worker has been granted procedural fairness. It has long been established that the rule in Browne v Dunn applies in proceedings before the Compensation Arbitration Service. If an employer intends to challenge a worker's testimony then this must be put to the worker in cross-examination to allow the worker the chance to explain his or her position.

The decision in Audino goes further and suggests that if an employer wishes to challenge the credibility of a worker then this should be explicitly set out in the employer's Reply and Submissions.