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"WHEN YOU DO THINGS RIGHT, PEOPLE WON'T BE SURE YOU'VE DONE ANYTHING AT ALL": EMPLOYER ESCAPES LIABILITY TO INJURED WORKER FOR FALL

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If an employer modifies a system of work, and in doing so creates a risk for its workers, will the employer be liable if it fails to take further precautions concerning that risk? Not necessarily, according to the New South Wales Supreme Court.

IN ISSUE

- Whether the defendant breached its duty of care to the plaintiff by exposing him to a risk of slipping and falling without taking any extra precautions.

THE BACKGROUND

Mr Davies (the plaintiff) was employed by Whitehaven Coal Mining Ltd (the defendant) as an underground miner and equipment operator at its coal mine. On 2 June 2011, the plaintiff drove a load hall dump machine (LHD) to an underground diesel bay to refuel and rewater it. The bay was wet with groundwater and diesel spillage. The plaintiff ascended the LHD via the rear ladder to lift the engine cover. It was necessary to do this because the defendant had modified the engine covers of its LHDs to make them more durable. As the plaintiff descended the ladder, his left foot slipped. He swung around, lost grip with his right hand, then fell approximately 1.54 metres and injured his shoulder.

The plaintiff alleged the defendant's failure to take precautions after modifying the LHD was negligent, as the nature of the modifications, combined with the slippery conditions in diesel bays, created a risk of a fall. He asserted the defendant could have fitted steps at the rear of the LHD, upgraded the ladder and hand holds or provided a work platform for use in the diesel bays. Both the plaintiff and the defendant led expert evidence at trial. The plaintiff relied on an occupational health and safety expert, Mr Cockbain, while the defendant relied on a mining engineer, Professor Hebblewhite.

THE DECISION

Before dealing with findings of fact, the Court evaluated the expert evidence. The Court considered Mr Cockbain had a tendency to argue the plaintiff's case rather than behave as an independent expert. Professor Hebblewhite was more measured in his approach and had more thorough and relevant knowledge of mining. Therefore, whenever there was an inconsistency between the experts, the Court preferred Professor Hebblewhite's evidence. This preference proved highly influential.

The Court held the defendant's modification to the LHDs created a foreseeable and not insignificant risk of

injury to an employee falling off the LHD's rear ladder. The Court considered, however, that a reasonable employer in the defendant's position would not have done anything further to eliminate the risk.

The plaintiff accepted he was trained on how to safely ascend and descend ladders (by maintaining '3 points of contact' with the ladder) and to conduct 'Take 5' risk assessments before starting tasks. The Court found that although the plaintiff completed a 'Take 5', he did not maintain 3 points of contact as required.

The Court concluded the existing ladder and handholds at the rear of the LHD were an adequate safety measure, provided employees were appropriately trained (as the plaintiff was). The additional safety measures the plaintiff proposed were impractical on a mine site and, in any event, did not eliminate the risk of falling or slipping. Therefore, the Court gave judgment for the defendant.

IMPLICATIONS FOR YOU

This case illustrates that an employer will not necessarily be found liable for creating a risk to workers and failing to take further precautions. However, to escape liability, the employer's existing safety framework (including staff training) must be adequate.

At a practical level, the decision highlights that parties should select experts carefully. The Court's decision to prefer the evidence of the expert called by the defendant was influenced by their measured demeanour and specialist expertise.

Davies v Whitehaven Coal Mining Ltd [2019] NSWSC 1125

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