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Employers Liability Newsletter

March 2020

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LEGISLATIVE DEVELOPMENTS

The Personal Injury Commission – Proposed legislation

In what has been a long anticipated move, the Minister for Customer Service Victor Dominello has announced that legislation will be introduced to establish a Personal Injury Commission to take the operations of the Workers Compensation Commission and the NSW Motor Accidents Authority into one body.

We will watch with curiosity to see if the proposed legislation seeks to expand the current role of those bodies.

The link to the media release is here.

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CORONAVIRUS (COVID-19) UPDATES

Courts and Tribunals - COVID-19

The following arrangements have been entered into in response to COVID-19:

Workers Compensation Commission

The WCC has today directed that from Monday 23 March 2020 all conciliation/arbitration proceedings, mediation conferences and presidential hearings will be conducted by telephone.

A link to the WCC announcement can be found here.

District Court of NSW and Supreme Court of NSW

As of 18 March 2020 there are special arrangements for the conduct of personal appearances of legal practitioners.

Directions hearings in the general list in the District Court can now be attended telephonically.

The Supreme Court has taken similar steps to limit the personal attendances required at court and the general directions list will be conducted by telephone as much as possible.

The link to the District Court bulletin can be found here.

The link to the Supreme Court bulletin can be found here.

At this stage, all scheduled hearings will proceed. However, both courts have reiterated the usual concerns regarding self exclusion if you are experiencing symptoms or having recently returned from overseas travel.

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CORONAVIRUS (COVID-19) UPDATES

What Happens When an Employee is Injured Whilst Working at Home?

Miriam Browne and Corinna Cook | March 2020 | Employers Liability

This TurkAlert looks at how NSW workers compensation legislation applies in such situations.

What does the law say?

Workers compensation is not payable unless:

1. The worker has sustained a personal injury **arising out of or in the course of employment** (Section 4 of the *Workers Compensation Act 1987*);

AND

2. Employment is a **substantial contributing factor** to the injury (Section 9A) or in the case of a disease, the main contributing factor to the development of the disease, or to an aggravation of an existing disease (Section 4(b)).

What is "arising out of employment"?

The test for "arising out of employment" is: **did the particular job in which the worker was employed cause or contribute to the injury?** (*Nunan v Cockatoo Docks & Engineering Co Pty Ltd* (1941) 41 SR (NSW) 119).

What is "arising in the course of employment"?

The words "in the course of employment" were considered by the *High Court in Comcare v PVYW* [2013] HCA 41. This case indicates that the tests to be applied are:

1. If the worker is injured by an **activity**: Did the employer induce or encourage the activity?

2. If the worker was injured by reference to a **place**: Did the employer induce or encourage the worker to be there?

What constitutes a "substantial contributing factor"?

If the worker proves that the injury "arose out of employment", the worker will likely establish substantial contributing factor.

However, a worker will have more difficulty proving substantial contributing factor if the worker can only prove "in the course of employment"

This is best explained by examples, set out below.

Real life examples of what is, and what is not, compensable

Crawford v American Express Australia Ltd (2012)NSWWCC367

- The worker worked from home full-time. She had a log-on time. The worker made an iced coffee in her kitchen before starting work. She then rushed downstairs from her kitchen so as to not miss her log-on time. In doing so, she fell and injured herself.
- OUTCOME: Her injury was compensable. Crucial to this finding was the fact that the worker was rushing to log on, meaning that her employment was a substantial contributing factor to her fall.

Vaughan v Symbion Laverty Pathology WCC 1443/2011

- The worker answered sick leave calls from other staff members at her house between 6:30am and 7:30am, and then would leave to attend her normal workplace.
- The worker received a call at 6:50am to attend her normal workplace by 7:30am. She rushed down the stairs from her home office carrying her mobile phone, and fell.

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- OUTCOME: It was held that the worker was in course of employment and her employment was a substantial contributing factor to her injury. She was still on her 'sick leave call shift' when injured, had mobile with her and had to rush.

Van Wessem v Entertainment Outlet P/L (2011) NSWCA 214

- The worker was a mortgage broker. He was 'on call' to respond to enquiries via phone and email 9am-5pm Saturdays and Sundays. The worker went for a bike ride on a Sunday and took his phone. He often took work calls during breaks on his ride. During the course of his ride he lost control of his bike and tragically died.
- OUTCOME: The worker was in the course of his employment, however his employment was not a substantial contributing factor to his accident. This is because the nature of his work 'played no role in the accident. It did not require him to go bike riding.

Palucci v Best Excavation & Drilling Pty Ltd (2011) NSWWCC4010/11

- The worker was a working director of a company. His daughter lived at home and did the accounts. One evening he spoke about the company's accounts with his daughter, and then had an unrelated conversation for 45 minutes. During this time the worker drank alcohol. The worker then left the house to obtain a work diary from his ute for his daughter. He fell whilst on his verandah. At the time, is blood alcohol level was 0.22
- OUTCOME: It was held that the worker was in the course of employment and employment was a substantial contributing factor – retrieving his work diary was a work activity. In this regard, it was important that it was found that his blood alcohol level not causative of the fall.

Conclusion

The practical effect of the above cases is that where a worker can show that the nature or requirements of their work played a substantial role in an injury that occurred whilst they were either at home or at any other location where they worked remotely, then their injury will be compensable.

Accordingly, employers need to, as far as practicable, encourage workers to create a safe work environment whilst working remotely. Where workers are working from their home, this includes (but is not limited to) ensuring as much as possible that workers have an ergonomically appropriate workspace, in an area which is free of trip hazards with adequate lighting. Workers should also ensure that they have adequate power outlets / power boards to safely run their computer and other necessary equipment without overloading.

Employers also need to encourage workers to take extra care for their personal safety whilst at home, including not rushing or running, and to keep a proper lookout for any general hazards just as they would in a more formal work environment.

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CORONAVIRUS (COVID-19) UPDATES

Coronavirus (COVID-19) Pandemic – Considerations for Your Workplace

Ratnadeep Hor and Sam Kennedy | March 2020

The Coronavirus (COVID-19) Pandemic is seeing the workplace landscape change day by day.

Here are a few things to consider for your workplace.

1. WHS Obligations

(a) Employers have a duty under WHS legislation to provide information to employees about health and safety in the workplace.

(b) Employers have a duty to eliminate or reduce risks and hazards at work, monitor the health of employees and monitor the conditions at any workplace under their management and control.

(c) Some suggestions:

(i) Ideally, regular updates should be provided to employees about the status of actions taken or proposed as part of the organisation's response to the Coronavirus emergency that are consistent with information provided by the Department of Health and WHO. Updates in our view should include:

(A) recent information and data received regarding the increase or decrease in people diagnosed with the condition and the geographical location (by State, or local region if the data is available) of the affected people;

(B) recommendations from government health services regarding good hygiene and harm minimisation practices; and

(C) messages relating to working from home, videoconferencing, keeping in touch.

(ii) Information and updates should be designed to minimise fear and anxiety.

(iii) Display signage reminding people to wash their hands regularly and thoroughly.

(iv) Consider installing hand sanitiser dispensers in bathrooms, meeting rooms and high pedestrian traffic areas such as reception areas.

(v) Remind employees that they should not present at work if they are unwell, and they should sneeze or cough into their elbows and not their hands.

(vi) Employees who share equipment such as phones or laptops should wipe down this equipment with a sanitising wipe after use.

(vii) Ensure cleaners are also appropriately cleaning hard surface areas, kitchens, bathrooms and common areas.

(viii) Consider remote working options and alternative working options, e.g. 50% of staff on a week on week off rotation.

(ix) Key personnel risk minimisation – consider working in separate offices, not being in the same room together and requiring separate travel arrangements.

(x) Maintain a list of employees:

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(A) who have travelled to an affected area since the beginning of 2020; and

(B) who have suffered or are suffering flu like symptoms since the virus was first detected.

(xi) Ensure that there is no discrimination. Employers cannot discriminate based on health grounds or race.

2. Sick Leave/Annual Leave

(a) *What if employees cannot attend work because they have or are suspected of having Coronavirus or they are caring for someone in this situation?*

(i) Full-time and part-time employees who cannot come to work because they are sick with Coronavirus can take paid sick leave.

(ii) In the first instance, employees should use their paid personal/carer's leave entitlements. If sick/carer's leave is exhausted, employees may take annual leave or long service leave, or leave without pay.

(iii) Employers can direct employees who are sick with the Coronavirus not to come to work and to get medical clearance from a doctor before returning to work (it should be noted that given the increased pressure on health services, ideally medical clearances should only be sought from those who have had Coronavirus or been in close contact with someone who has had Coronavirus).

(iv) Employers cannot require an employee to take sick or carer's leave. However, the employee is not entitled to be paid during a forced leave period, unless they use their accrued leave entitlements.

(v) Independent contractors are not employees and do not have any paid leave entitlements under the *Fair Work Act 2009* (Cth).

(b) *What if an employee needs to look after a family member or a member of their household who is sick with Coronavirus or a related circumstance?*

(i) In these circumstances, employees are entitled to take paid carer's leave to the extent that it has not been exhausted.

(ii) Employers should consider whether the employee can access their paid personal/carer's leave entitlements or annual leave.

(iii) Under the *Fair Work Act 2009* (Cth), casual employees are entitled to 2 days of unpaid carer's leave per occasion.

(iv) Full-time and part-time employees can take unpaid carer's leave if they have no paid sick or carer's leave left.

(c) *What if an employee is quarantined or a person is required to be in self-isolation?*

(i) If an employer cannot offer an employee work because of a shutdown required in an emergency situation, or the employee cannot attend work because of being in self-isolation, the employee is not entitled to be paid, unless they use their accrued annual leave, sick leave, or long service leave.

(ii) However, the employer may consider a working from home arrangement for those who are in quarantine/self-isolation, in which case the employees would be paid for their working from home days.

(iii) Where an employer directs a full-time or part-time employee not to work due to workplace health and safety risks, the employee could be entitled to be paid while the direction applies subject any applicable enterprise agreement, award, or employment contract that contains provisions regarding such situations.

(d) *What if an employee wants to stay at home as a precaution?*

(i) Working from home arrangements are usually agreed between an employer and employee

(ii) Employees will need to request to work from home or to take some form of paid or unpaid leave.

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(iii) Employers should treat these requests as you would treat other applications for this type of leave.

(e) The Coronavirus (COVID-19) Pandemic poses complex issues for employers who have to balance their obligations to employees with business and commercial outcomes. **We recommend that you seek specific legal advice before taking any actions or making policies around matters like quarantining and isolation leave.**

3. Travel

(a) Employers should consider whether any scheduled international business travel (or interstate travel given the current conditions) is necessary in the current environment. It may be that other communication options will suffice.

(b) You should also review your insurance coverage for upcoming travel

(c) Employers can direct employees not to undertake work-related travel if this is necessary to meet workplace health and safety obligations or is otherwise a lawful and reasonable direction.

(d) Employers are unlikely to be able to direct an employee not to undertake private travel.

(e) **However, it is noted that presently the government has imposed a level 4 travel ban.**

4. What are you asking visitors to do?

(a) Consider limiting any non-essential visitors.

(b) Prior to the arrival of any visitors, consider requiring visitors to confirm in writing that:

(i) they have not been to a country considered to be at higher risk in the past 14 days;

(ii) they have not been exposed to a person who has been diagnosed with Coronavirus in the past 14 days;

(iii) they have not been exposed to a person who has been in contact with a person who has been diagnosed with Coronavirus in the past 14 days; or

(iv) they are not feeling unwell.

(c) Keep a register of visitors.

(d) Displaying Coronavirus information material in reception areas, and/or in email footers that is consistent with guidance coming from the WHO. We suggest you consider this approach to indicate to customers/stakeholders that you have expectations about what they should do while in your workplace.

5. Meetings

(a) Consider how meetings are conducted - can they be conducted other than face-to-face.

(b) Formal meetings/gatherings – consider allocated seating, one seat spacing and etc.

6. External Events

(a) You should consider advising staff not attend events if they:

(i) have been to a country considered to be at higher risk in the past 14 days;

(ii) have been exposed to a person who has been diagnosed with Coronavirus in the past 14 days;

(iii) have been exposed to a person who has been in contact with a person who has been diagnosed with Coronavirus in the past 14 days; or

(iiii)are feeling unwell.

7. Privacy issues

(a) Employers may wish to request information about their employees' health, and they may intend to disclose the identity of affected employees to others in the workplace.

(b) Private health information is strictly regulated in Australia, and breaches may undermine trust within the employment relationship as well as result in penalties.

(c) Specific privacy laws will depend on the jurisdiction

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in which the employer is based.

(d) Employers should consider its privacy obligations before identifying any employees that may be affected.

8. Some helpful websites

(a) https://www.fairwork.gov.au/about-us/news-and-media-releases/website-news/coronavirus-and-australian-workplace-laws

(b) https://www.safework.nsw.gov.au/news/safework-public-notice/coronavirus

(c) https://www.safework.nsw.gov.au/hazards-a-z/diseases/coronavirus-covid-19-advice-and-guidance-for-nsw-workplaces

(d) https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert

(e) https://www.who.int/health-topics/coronavirus

(f) https://www.fairwork.gov.au/factsheets/FWO-Fact-sheet-Emergencies-and-Natural-Disasters.pdf

If you would like to discuss any of the above or require any further information or advice, please do not hesitate to contact TurksLegal.

The information contained on this note is for general guidance only and does not constitute legal advice. You should not act or refrain from acting on the basis of such information. Appropriate legal and professional advice should be sought based upon your particular circumstances.

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CORONAVIRUS (COVID-19) UPDATES

Coronavirus in the workplace – is the employer liable?

Craig Bell & Sean Patterson | March 2020 | Employers Liability

Summary

Given the recent outbreak of Coronavirus (COVID-19), it is worth noting that the contraction of an infectious disease due to a virus entering the body during the course of employment may constitute a compensable injury. Whether or not the injury will be compensable will depend to a large extent on the expert medical evidence.

Case law

The contraction of an infectious disease due to a virus entering the body during the course of employment has been held to constitute an injury: *Favelle Mort Ltd v Murray* [1976] HCA 13. The relevant issue will be whether, on the balance of probabilities, the virus occurred during the course of employment.

In the NSW Workers Compensation Commission there have been some related cases, which provide a guide in relation to the current Coronavirus outbreak.

In *Bee v NSW Department of Community Services* [2014] NSWWCC 191, Ms Bee contracted swine flu which she alleged was transmitted from one or both of two foster children who were in her care as a registered foster carer, having been so appointed by the employer.

Arbitrator Foggo indicated that '*all the applicant has to prove on the balance of probabilities is that the children (or one of them) were infected and that such infection was passed on to the applicant*'. In this respect, the only expert opinion was in favour of the worker and so Ms Bee was (at first instance) successful with her claim. Ms Bee lost on appeal but only on the issue of whether she was a worker.

In *Zalfelds v NSW Department of Education and Communities* [2015] NSWWCC 255, Ms Zalfelds contracted whooping cough which she alleged was as a result of exposure to the Bordetella pertussis bacterium in her workplace and the consequences of the infection resulted in an aggravation of pre-existing chronic obstructive pulmonary disease.

Arbitrator Brown adopted a similar test to that in Bee. He was not satisfied the evidence was of sufficient weight or the inferences were strong enough for him to be satisfied that Ms Zalfelds was suffering the effects of whooping cough as a result of an exposure to Bordetella pertussis bacterium received in her workplace. In that context, he noted the lack of reference to whooping cough in the contemporaneous records of the treating doctors. An Award was made in favour of the respondent.

Application to the workplace

The practical effect of the above authorities is that workers will most likely require direct factual and medical evidence that they have contracted a virus in the course of their employment. To satisfy the "balance of probabilities test" it would seem they need to identify the carrier of the virus and that they were infected in the workplace.

Employers and insurers accordingly need to consider each claim on a case by case basis, with close consideration of the factual and medical evidence.

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RECENT DECISIONS

Pursuing recoveries against negligent third parties: a success story

Charter Hall Real Estate Management Services (NSW) Pty Limited v State of New South Wales [2020] NSWCA 26 (25 February 2020)

Link to decision

Summary

An insurer's claim for indemnity in respect of workers payments paid to an injured firefighter has been upheld on appeal.

Legislation

Section 151Z of the ***Workers Compensation Act*** 1987.

Section 151Z provides that an employer's insurer can claim indemnity in respect of compensation paid to a worker in circumstances where a third party has been negligent.

An insurer can commence recovery proceedings against a third party claiming indemnity in respect of compensation paid under section 151Z(1)(d).

Background

On 22 January 2007, a firefighter responded to an alarm that had been triggered by an air conditioning unit on the roof of a shopping centre. Access to the roof was obtained through a door at the top of a ladder. The door had a metal locking bar in front of it which had to be raised to access the roof. When the firefighter descended the ladder, he knocked the metal bar with his elbow and was injured as a result of it falling.

The employer brought proceedings in the District Court against the occupier of the shopping centre, seeking indemnity for workers compensation payments made to the firefighter. The firefighter did not sue the occupier.

The primary judge found that the occupier had breached its duty of care to the firefighter, and would be liable to pay the firefighter damages had he sued the occupier. The employer was not found to be negligent, and a claim for contributory negligence was rejected.

The amount of damages that would have been payable by the occupier had it been sued by the firefighter was well in excess of the amount of workers compensation that had been paid. The primary judge therefore determined that the employer was entitled to be indemnified for the workers compensation payments that had been made.

The occupier appealed the primary judge's decision.

Decision

The Court of Appeal agreed with the primary judge's findings that the occupier breached its duty of care to the firefighter, stating:

- The occupier had actual knowledge of the risk of injury posed by the absence of any restraint to prevent the metal bar from falling onto a person. It was determined that an employee of the occupier was aware that the locking bar had fallen on a security guard on two occasions prior to the firefighter's injury.
- The risk of harm was not insignificant. The risk involved a risk of death or serious injury.

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- The occupier owed a duty to take reasonable care to avoid risk of injury to people entering the shopping centre. It was reasonably foreseeable that the locking bar could be disturbed by someone dislodging it from its resting place. Simple and inexpensive precautions were available to the occupier to avoid the risk of harm. A hook could have been affixed to the wall where the locking bar rested.

The Court of Appeal agreed that the employer had not breached its duty of care to the firefighter. There was no evidence that the employer knew the locking bar had fallen previously and represented a danger.

The Court of Appeal also agreed that the firefighter did not contribute to his injury. His accidentally knocking the locking bar was accidental inadvertence not amounting to contributory negligence.

The appeal was dismissed, with the occupier ordered to pay the employer's costs of the appeal.

Conclusion

This case serves as a reminder for insurers to consider recoveries of workers compensation payments made when a worker's injury was caused by the negligence of a third party. It is not necessary for the worker to sue the third party to pursue a recovery action.

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RECENT DECISIONS

Cannabis trial falls within definition of Medical Treatment

Longworth v Secretary, Department of Transport [2020] NSWWCC 52 (26 February 2020)

Link to decision

Summary

The Workers Compensation Commission has determined that the prescription of medicinal cannabis can fall within the definition of medical and related treatment for the purposes of section 59 of the ***Workers Compensation Act*** 1987 ('the 1987 Act').

The employer was ordered to pay the costs of the medicinal cannabis treatment to alleviate the pain associated with the worker's injury.

Background

The worker sustained a back injury on 28 March 2018 in the course of her employment as a driver trainer. The worker was injured whilst performing a driving test in which the learner driver applied the brake forcefully, causing the worker to be jolted suddenly in her seat. The worker sustained lower back pain as a result.

The worker claimed weekly compensation, which was approved by the insurer. The worker further claimed compensation in respect of lumbar fusion surgery and the prescription of medicinal cannabis under section 60 of the Act.

The insurer disputed the medical and related treatment claim on the basis that the surgery was not reasonably necessary as a result of injury, and that the prescription for medicinal cannabis did not fall within the definition of section 59.

Decision

The worker submitted that the prescription of medicinal cannabis fell within both subsections (a) and (b) of section 59 in that it was treatment provided by a medical practitioner, and was therapeutic treatment.

Arbitrator McDonald noted that the prescription for medicinal cannabis was provided by Dr Ferris, a medical practitioner, for the purpose of avoiding the side effects caused by other medication and to alleviate the worker's pain.

In relation to the definition of 'therapeutic', the arbitrator turned to the ***Therapeutic Goods Act*** 1989 (Cth) which sets out that therapeutic use includes use in connection with alleviating the effects of injury. The medical evidence before the arbitrator specified that the treatment was prescribed to take the edge off the worker's pain and allow her to sleep.

The basis of the employer's submissions in relation to the medicinal cannabis was that the treatment was experimental, it was not registered, and the treatment was undergoing clinical trials. The employer submitted that the treatment could therefore not fall within the scope of the definition set out by section 59.

The arbitrator stated that a reading of the plain words of section 59 did not prevent a relatively new treatment from falling within its terms, noting that any new treatment might be described as experimental, yet later become widely used.

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The arbitrator also pointed out that whilst the treatment was not registered; it was approved by both Commonwealth and NSW organisations specifically for the applicant's treatment. She stated that the lack of registration was irrelevant given the fact that approval had been granted.

As to the issue of the treatment undergoing clinical trials, the arbitrator stated that this was not, of itself, reason to exclude the treatment from the definitions.

The arbitrator held that the prescription of medicinal cannabis was medical and related treatment and the employer was ordered to pay the costs of the treatment.

An order was also made that the proposed surgery was reasonably necessary.

Implications

The fact of a treatment being relatively new, or undergoing clinical trials, does not preclude that treatment from falling within the definition of section 59 of the 1987 Act.

Based on the decision of Arbitrator McDonald in this case, the prescription of medicinal cannabis will not necessarily be found to be outside the definition of section 59 of the Act. If prescribed by a medical practitioner for the purposes of providing therapeutic treatment, the Commission may find that the prescription falls within the definition of medical and related treatment.

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