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RECENT DECISIONS

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  Travers v Caringa Enterprises Ltd [2017] NSWDC 143 (14 June 2017)
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  The Star Pty Ltd v Mitchison [2017] NSWCA 149 (23 June 2017)

PROPOSED CHANGES

- **How changes to the Motor Accidents Scheme affect workers compensation in NSW**

NEW PROMOTION IN EMPLOYERS LIABILITY TEAM

We would like to congratulate Angellina Psirakis on her recent promotion to Senior Associate. Angellina joined TurksLegal in July 2006 and over this time has specialised in workers compensation claims and disputes. She has a particular interest in industrial deafness and has written numerous papers dealing with this area of the law. Angellina is highly valued by her clients for her practical advice and ability to analyse and focus on the relevant issues in dispute to formulate the best strategy to achieve a resolution.

RECENT DECISIONS

Loss of opportunities when assessing damages for economic loss

Travers v Caringa Enterprises Ltd [2017] NSWDC 143 (14 June 2017)

Link to decision

Summary

An injured worker who has been assessed with at least 15% whole person impairment may bring a claim for work injury damages. The claim is limited to past and further economic loss.

The assessment of economic loss is determined on the basis of past loss of earnings up to the date of settlement or court hearing, and an estimate of future loss of earning capacity thereafter. There is little argument regarding the calculation of past loss. But future loss must include consideration of speculative matters—such as whether or not the worker would have been promoted, or changed jobs, or may have stopped work in any event because of some pre-existing condition.

In most cases, the vagaries of determining future loss of earning capacity are adjusted by allowing a 15% discount to the calculation for 'the vicissitudes of life'. But some cases require more attention to allegations regarding an anticipated change of job or promotion.

For example, a medical student whose goal was to become a doctor, but who is prevented from doing so because of an injury while performing casual work, will want to have future loss of earning capacity based on the high earnings of a doctor, not the earnings of a student in casual employment. Other examples would include:

- loss of concurrent, secondary or self-employment opportunities;
- loss of opportunity to increase working hours, such as from part time to full time.

Concurrent, secondary or self-employment

An injured worker may be performing concurrent or secondary employment at the time of his or her injury. If, because of an injury which occurred at work ,an injured worker cannot perform this role, any income from that concurrent employment should be taken into account when assessing an injured worker's economic loss.

If the concurrent employer is issuing pay slips and the injured worker is declaring his or her income, it is simple to calculate the value of that concurrent employment and factor it in when assessing pre-injury earnings and loss of income.

Sometimes, however, an injured worker was engaged in an activity or hobby outside his or her employment which, according to the injured worker, was producing an alternative income stream. It is more difficult to assess pre-injury earnings and loss of income in these circumstances because usually there is no concurrent employer and the

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injured worker has not declared any earnings from these other income streams.

In *Travers v Caringa Enterprises Ltd* [2017] NSWDC 143 (*Travers*), the injured worker alleged that before her injury she was performing massages and horse-related activities. The injured worker candidly admitted that she never declared earnings from these activities in her tax returns. The fact that an injured worker does not declare earnings on tax returns is not, in itself, enough to defeat an allegation of loss of income through a non-work related activity.

However, the Judge found that no allowance should be made for massaging and horse-related activities. The Judge relied on the fact that there was no evidence of what the injured worker was earning from those activities, and the burden to put forward that evidence rested with the injured worker.

The evidence which the injured worker could produce to establish that he or she was earning an income for non-work related activities might include:

- invoices or receipts issued by the injured worker to customers or clients;
- bank records showing the alternative income stream;
- letters or statements from the injured worker's customers; and/or
- social media records.

Part time workers

An injured worker, who was employed on a part time basis at the time of the accident, may allege that he or she would have either increased his or her hours, or found full time employment. The injured worker will need to persuade the court that it is more probable than not that he or she would have increased his or her hours if he or she was not injured.

This issue was also dealt with by the District Court in *Travers*. In that case, the injured worker has been either working in part time roles, or not at all, for most of her working life. She had an active family life, a home and property to manage, and a sick husband to care for, and it was not likely that she could have taken on full time work. Although the injured worker had taken on extra shifts for her pre-injury employer from time to time, these shifts were to cover staff shortages and were not evidence that her pre-injury employer had additional hours or full time work available. The Judge found that if the injured worker had continued to work for her pre-injury employer, the likelihood was that she would have remained in part time work.

From *Travers* and similar cases it is clear that the court when ascertaining whether or not an injured worker would have increased future earnings will consider are:

- Whether the injured worker applied to increase his or her hours before the injury.
- How long the injured worker had been working for her pre-injury employer.
- Whether his or her previous employment history was predominantly in part time roles.
- Whether or not there was some factor in the injured worker's personal life that would have prevented him or her increasing his or her hours (such as caring for a spouse or other family member).
- Whether full time employment opportunities existed with the pre-injury employer's organisation or on the open labour market in the injured worker's field.

Promotions/change of career

It is also common for an injured worker to allege that he or she would have been promoted, either by her pre-injury employer or by obtaining a promotion in his or her current field on the open labour market, or a change in career, if he or she were not injured.

When assessing such claims, a court will consider the loss of employment opportunity, and will take into account:

- Whether the injured worker applied for a promotion before the injury.
- Whether the injured worker had met any requirements for a promotion.
- Whether the pre-injury employer had an established organisation chart which allowed for easy and regular promotions.

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- How often and common promotions were within the pre-injury employer's organisation, as well as in the injured worker's industry.
- The worker's training and qualifications and any other requirements to be met with regard to the change of career.

Impact

An injured worker is entitled to damages for economic loss associated with a loss of opportunity for: concurrent, secondary or self-employment; full time work; and promotions.

It is the injured worker's responsibility to provide satisfactory evidence at trial to support the allegation that an opportunity has been lost because of the injury, and the amount that should be allowed for potential earnings lost.

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RECENT DECISIONS

The chips don't fall on issue of employment

The Star Pty Ltd v Mitchison [2017] NSWCA 149 (23 June 2017)

Link to decision

Summary

The Court of Appeal recently found that a hotel bellboy was not in the course of his employment when he attended a 'soft' opening of the Marquee Nightclub that was operated, managed and controlled by The Star, who was also his employer.

Background

The worker was employed by The Star as a hotel bellboy. In March 2012, The Star asked various department heads to invite their employees to a 'soft' opening of the Marquee Nightclub to test its operation prior to the official opening.

The worker was invited to the event by his Bell Captain and after finishing his shift at about 3pm on 27 March 2012, he attended the nightclub with his Bell Captain at approximately 6pm.

During the evening, at about 9pm, a mock fire drill was conducted during which there was some pushing and shoving by individuals attempting to reach the fire exit, causing the worker to lose his balance and fall down the stairs suffering serious injuries.

The worker received workers compensation payments and then commenced proceedings against The Star, as occupier of the premises, claiming civil damages.

The Star then applied to the court seeking orders that the worker's injury had occurred in the course of his employment. The decision on this issue was important in determining whether The Star should be properly characterised as an employer or as an occupier at the time of injury.

If the worker was held to be in the course of his employment with The Star then he would be required to satisfy a number of pre-conditions under section 315 and section 318 of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act) before commencing proceedings and the assessment of any damages payable would be based on the modified rights in accordance with the workers compensation legislation.

Decision

Mr Justice Payne delivered the leading judgment in the Court of Appeal noting that a determination of whether the worker was subject to the limitations of the workers compensation legislation depended upon whether he had sustained an injury arising out of or in the course of his employment as defined in section 4 of the *Workers Compensation Act 1987* and the 1998 Act.

Previously, the trial judge had held that the worker was not injured in the course of his employment and his injuries did not arise out of his employment. The judge relied upon the fact that the employer did not require the worker to attend the nightclub opening as part of his employment; the employer had no expectation that the worker would attend and the worker did not know that the nightclub was owned and operated by his employer.

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In the Court of Appeal, Justice Payne gave no weight to the fact that the worker had been paid workers compensation benefits, pointing out that if he was not a worker, there was a common law right to recover the payments made.

Justice Payne quoted in some detail from previous High Court decisions in *Hatzimanolis v ANI Corporation Limited* [1992] 173 CLR 473 and *Comcare v PVWY* [2013] 250 CLR 250 as well as the decision of the NSW Court of Appeal in *Pioneer Studios Pty Ltd v Hills* [2012] NSWCA 324.

His Honour considered that in the present case, the worker had attended the event during an interval between two discrete periods of work as distinct from this being within an overall period of employment such as occurred in the 'camp cases'.

Significant weight was given to the fact that the worker was not an employee of the nightclub and his employer did not provide any real inducement or encouragement for him to attend the opening. His Honour pointed out that only 400 of 4,000 staff members had attended the opening before finding that there was insufficient evidence to conclude that the worker's injury was suffered in the course of his employment in circumstances where he was injured in an interval between two discrete periods of work.

The Court of Appeal also considered the question of whether the injury was one that arose out of the worker's employment and in doing so, rejected the 'but for' test i.e. that the injury arose out of employment simply because the worker would not have been at the scene but for his employment. The court observed that it was relevant to note that the worker was not rostered to work at the time of the accident, that he was injured while he was away from the hotel where he worked as a bellboy and he was not required by the employer to be at the nightclub at the time of the accident.

Implications

In determining whether a worker suffers injury *arising out of or in the course of employment* it is important to consider the entire background and circumstances that led to the injury, including whether the worker received any inducement or encouragement from the employer to attend the particular event.

Different outcomes may result where a worker is injured in an interval between two discrete periods of employment and where the injury is suffered in an interval that forms part of an overall period of work.

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PROPOSED CHANGES

How changes to the Motor Accidents Scheme affect workers compensation in NSW

Summary

Significant reforms to the CTP scheme for those injured as a result of motor vehicle accidents were recently passed by the NSW parliament.

The *Motor Accident Injuries Act 2017* ('the Act') is set to commence on 1 December 2017 with a new CTP scheme to replace the *Motor Accidents Compensation Act 1999* ('MACA'). The new legislation will apply to motor accidents that occur after its commencement.

The question for workers compensation claims managers and employers is how will the new Act affect workers compensation rights and entitlements?

The Changes

The Act represents a substantial shift away from what was a purely fault-based scheme (i.e. the requirement to show fault on the part of an owner/driver in order to obtain damages), to a hybrid model that now provides access to statutory no-fault benefits and modified damages.

The nature of any entitlements will largely be determined by the definition of '*minor injury*'.

Minor Injury

Section 1.6(1) of the Act defines *'minor injury'* as being one or more of a soft tissue injury or a minor psychological or psychiatric injury.

Section 1.6(2) then defines '*soft tissue injury*' as:

'an injury to tissue that connects, supports or surrounds other structures or organs of the body …. but not an injury to nerves or a complete or partial rupture of tendons, ligaments, menisci or cartilage'

Section 1.6(3) defines "*minor psychological or psychiatric injury" as 'a psychological or psychiatric injury that is not a recognised psychiatric illness'.*

Claimants who suffer only a '*minor injury*' will be able to access statutory benefits but will not be entitled to pursue a CTP damages claim (section 4.4).

Statutory Benefits

The statutory benefits payable under the Act includes weekly payments, medical expenses and commercial care. The cost of gratuitous care is no longer covered under either statutory benefits (section 3.25) or CTP damages (section 4.3).

Importantly for workers compensation claims managers and employers, section 3.35(1) states:

'An injured person is not entitled to statutory benefits under this part if compensation under the Workers Compensation Act 1987 (workers compensation) is payable to the injured person in respect of the injury concerned (or would be payable if the liability for workers compensation had not been commuted)'.

However, the CTP insurer cannot refuse to pay statutory benefits on the basis that workers compensation is payable to the injured person unless they have made a '*successful*' claim for workers compensation, or the injured person has failed to comply with a request by the CTP

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insurer to make a claim for compensation in respect of the injury:

A claim for compensation is considered to have been successful if "liability for any workers compensation has been accepted by the insurer for the claim under the Workers Compensation Act 1987. Liability is considered to have been accepted until liability is wholly denied (and for that purpose a denial of liability does not count while it is the subject of a dispute under that Act)'.

Section 3.35 then goes on to make it abundantly clear that the entitlement to receive workers compensation will take first priority over the payment of statutory benefits under the Act by:

1. Requiring the injured person to make a claim for workers compensation if the CTP insurer considers, on reasonable grounds, that workers compensation is or may be payable: section 3.35(4);

2. Precluding the payment of statutory benefits in respect of any matter for which workers compensation was paid, before liability for workers compensation was denied: section 3.35(5);

3. Precluding the payment of statutory benefits for funeral expenses if workers compensation is paid or payable in respect of the death: section 3.35(6); and

4. Requiring the injured person who makes a claim for statutory benefits and workers compensation to inform both insurers that they have done so: section 3.35(7).

Section 3.35(7) also allows CTP insurers and workers compensation insurers to exchange information for the purpose of facilitating the proper operation of the section.

Weekly Benefits

Weekly benefits payable to an injured person who is *mostly at fault* or suffers only *minor injury* will cease after 26 weeks. A person is mostly at fault if their contributory negligence was *greater than* 61%: section 3.11(2).

Weekly benefits to other injured persons will cease after 104 weeks (2 years) unless the person's injury is the subject of a pending claim for damages: section 3.12. If it is the subject of a pending claim for damages the weekly benefits cease after 156 weeks (3 years) if the degree of any permanent impairment suffered as a result of the injury is not greater than 10% WPI or after 260 weeks (5 years) where the permanent impairment is greater than 10% WPI.

Medical Expenses

Most injured persons will be entitled to reasonable and necessary medical treatment payments (including commercial care) for life.

Section 3.28 again provides an exception in respect of those *mostly at-fault* or those with only *minor injuries*: section 3.28.

The liability for medical treatment expenses will be transferred from the CTP insurer to the Lifetime Care and Support Authority after 5 years.

CTP Damages

As was previously the case, CTP damages are only available where the injured person can establish that there was an 'at fault' driver who was responsible for the accident, however the entitlement to such damages is now significantly restricted.

There are no damages payable where the injured person suffers only *minor injury*: section 4.3.

The damages otherwise payable are for non-economic loss (subject to satisfying the *greater than* 10% WPI threshold) and for past and future economic loss (not including the cost of medical treatment and care): section 4.5.

A claim for CTP damages cannot be made before the expiration of 20 months after the motor accident unless the degree of permanent impairment is *greater than* 10% WPI: section 6.14.

Finally, a claim for CTP damages cannot be settled within

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2 years after the motor accident unless the degree of permanent impairment is *greater than* 10% WPI: section 6.23.

No-Fault Motor Accidents

Accidents that were previously referred to as "blameless motor accidents" are now "*no-fault motor accidents*": see section 5.1.

Implications for Workers Compensation Claims Managers and Employers

The new scheme will apply to claims for injuries suffered as a result of motor accidents that occur after 1 December 2017.

For those claims, it is advisable to:

1. Check whether the injured worker has lodged a claim for statutory benefits under the Act as well as a claim for workers compensation benefits;

2. Obtain any relevant evidence in order to make early liability decisions. While the Act directs that workers compensation benefits are to be payable before statutory benefits, if liability for a workers compensation claim is wholly denied and not disputed, or is disputed and subsequently upheld in the Workers Compensation Commission; then statutory benefits become payable under the Act. This means that injured workers may be prevented from later returning to claim workers compensation benefits;

3. Note that CTP damages claims are no longer available to injured workers who suffer only '*minor injury*'. This may also restrict the number of available section 151Z recovery claims taking account of the precondition that there must be a liability in the third party to "*pay damages to the worker*";

4. The quantum of CTP damages has been substantially reduced, leaving little incentive for a worker to pursue a CTP damages claim. Therefore, section 151Z recovery claims will need to be pursued directly against CTP insurers rather than waiting to obtain a payback as a result of a worker pursuing a CTP damages claim; and

5. Section 151Z will continue to apply to "*no-fault motor accidents*", as the definition mirrors the definition for "*blameless motor accidents*" under the MACA.

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