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**LEGISLATIVE DEVELOPMENTS**

# The latest changes and commencement dates

A number of the further changes made by the ***Workers Compensation Legislation Amendment Act 2018*** commenced on 1 January 2019. The amendments include:

- The Workers Compensation Commission will resume its role as the sole dispute resolution tribunal for workers compensation matters, with SIRA and WIRO losing their respective roles regarding merit and procedural reviews of work capacity decisions. The Commission will now have the power to determine disputes regarding work capacity decisions, which it had previously been prohibited from doing.
- The Commission will now have the power to determine claims for section 66 permanent impairment compensation without necessarily referring the claim to an Approved Medical Specialist, in circumstances to be prescribed by regulation. The Commission's determination will be treated as an assessment for the purposes of the one assessment permitted by section 322A of the 1998 Act.
- A single *decision notice* pursuant to section 78 of the 1998 Act will replace the previous requirement for dispute notices pursuant to section 54 of the 1987 Act or section 74 of the 1998 Act. A new form for the decision notice has been released by icare.
- Commutation of liability for medical expenses pursuant to section 87EAA of the 1987 Act is not permitted in relation to a catastrophic injury (as defined in the regulation).

The **Workers Compensation Amendment Regulation 2018** also introduced changes on 1 January 2019, including the requirements for section 78 decision notices issued by insurers, and changes to Schedule 6 costs for lawyers advising workers on reviews of work capacity decisions.

New **Workers Compensation Guidelines** take effect from 1 January 2019 and include (at part 7.5 of the Guidelines) detailed requirements for independent medical examinations (IME) and reports, and the information to be provided to a worker regarding an IME examination. The guidelines include the criteria for catastrophic injuries (at Part 9 Commutation).

New **Workers Compensation Medical Dispute Assessment Guidelines** also take effect from 1 January 2019 and deal with the referral of disputes to the Commission for allocation to an Approved Medical Specialist, the medical assessment process, Medical Assessment Certificate, and appeals.

SIRA has issued an information fact sheet for workers regarding independent medical examinations, which can be ***downloaded here***.

## Still awaiting Proclamation

- The calculation of pre-injury average weekly earnings (PIAWE) in respect of injuries received on or after (date to be proclaimed) will be :

  *The weekly average of the gross pre-injury earnings received by a worker during the period of 52 weeks before the injury for work in any employment in which the worker was engaged at the time of injury.*

- There will no longer be any need to separate overtime and allowances from earnings when making the calculation, and no change to the PIAWE after the first 52 weeks of compensation payments to remove overtime and allowances. Adjustments will still be required for non-pecuniary benefits (NPB).
- A new Schedule 3 to the 1987 Act will include the definitions for PIAWE; earnings; PIAWE for short-term workers, apprentices, trainees and young people; current work capacity; current weekly earnings; and the value of NPB.
- Consequential changes have been made to the calculation of weekly payments pursuant to sections 36, 37 and 38 of the 1987 Act.

All of these changes are being incorporated into the TurksLegal Online *Guide to Workers Compensation in NSW*. If you have not yet registered for access to the Guide, please ***click here***.

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**RECENT DECISIONS**

# When is a "Roadie" a worker?

*Kochmanz v Rekani Pty Ltd t/a Entertainment Installations* (2019) NSWWCC64

Link to decision

## Background

The employer was making arrangements for a band to perform in Melbourne.

The employer contacted the claimant to engage him to assist in setting up sound equipment for the band called "Yes" at the Palais Theatre in Melbourne. In other words, the claimant was working as a "roadie" for the band.

The contractual communications were fairly casual: text messages followed up by phone calls and emails. There was no written contract.

The claimant suffered injury to his right lower leg while performing his work on 18 November 2014. The insurer disputed the claim on the basis that the claimant was not a 'worker' under section 4 of the 1998 Act or a deemed worker under Schedule 1 Clause 2 of the 1998 Act.

## Determination of the Dispute

The claimant issued invoices to the employer under a business name "Trust in Passion Touring" that included an ABN. Although the ABN had lapsed prior to the injury, it was current at the time that the arrangement was entered into. The existence of the ABN at this time and the lack of any provision for holiday pay, sick pay or superannuation were factors that would favour the claimant being found to be an independent contractor rather than a worker under a contract of service.

However, the Arbitrator considered these factors were far outweighed by other factors in support of the claimant being found to be under a contract of service, including:

- The rate of pay was determined by the employer.
- The employer arranged and paid for the claimant's air travel to Melbourne.
- When the claimant arrived on the site, the employer told the worker what equipment was to be used and where and when to use it.
- There was a supervisor on site.
- The claimant's invoices had no GST component and the ABN was allowed to lapse before the injury.

On balance, the Arbitrator found that the claimant was working within the business of the employer subject to overall direction and control of the employer as to how the work was to be carried out. He was not acting as a representative of his own business.

The alternative argument put by the claimant was that if he was not a worker under a contract of service, then he was a deemed worker. In other words, at the time of the injury, he was not carrying out work that was incidental to a trade or business that he regularly carried on. The Arbitrator observed that the claimant had not worked for three months prior to the engagement and so it was difficult to conclude that he was regularly carrying on a business. The Arbitrator thereby determined that in the alternative, the claimant was also deemed worker.

## Implications

The use of an ABN number is not necessarily determinative of whether work being performed was incidental to a trade or business regularly carried on by a claimant under his own name or business.

The various 'indicia' of employment must be weighed up when considering the total relationship with the control test being just one factor to consider.

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**RECENT DECISIONS**

# Looking back to assess the future

*Fuller v Avichem Pty Ltd. District Court* 2017/00359791

## Summary

This case considers the appropriateness of assessing the level of economic incapacity based upon Average Weekly Earnings; contributory negligence; and increasing the allowance for vicissitudes of life.

## Background

The defendant employer conducted a hardware business in Broken Hill. The plaintiff suffered an injury to his back and neck when carrying six sheets of MDF (Medium Density Fibre building panels), one at a time, from the employer's storage facility to a customer's vehicle for loading. The MDF was stored vertically in racks and the plaintiff asserted that access to the racks was impeded by the presence of pallets loaded with goods adjacent to the racks, requiring him to adopt an awkward posture to remove the sheets.

The plaintiff had suffered a previous back injury and did not have a strong pre-injury work history. The plaintiff alleged that but for the injury he would have progressed to become a store manager however the employer refuted this on the basis that in the period prior to the injury the plaintiff had been suspected of taking cash from the business. His claim for economic loss was framed, on one alternative, on the basis of average weekly earnings statistics.

The plaintiff said that he felt pain in his back while lifting the first of the six sheets but persisted in the task notwithstanding. The defendant argued that he contributed to the severity of his injury by failing to stop when he felt the pain, having regard to his previous experience with back injury.

The defendant presented an earning capacity assessment, and the assessor gave evidence, to the effect that the plaintiff had a residual capacity to work of eight hours per week. The defendant also submitted that, because of the prior injury and poor work history, the reduction for vicissitudes of life should be greater than the usual 15%.

## Decision

The Court found that the defendant was in breach of its duty of care to its employer in respect of the system of work and the obstructions in the storage area. Although the Judge found the plaintiff to be an "unreliable" witness, he found that on the balance of probabilities there was a breach of duty, notwithstanding concurrent medical histories that were inconsistent. The employer was unable to contradict the general tenor of the plaintiff's version of events. He was satisfied that there were reasonably available alternative methods of performing the task which would have obviated the risk of injury.

As to contributory negligence, His Honour found that the defendant's culpability was significant and in comparison the plaintiff's contribution was not sufficient as to warrant a reduction of damages.

His Honour accepted that the plaintiff would have continued indefinitely in his employment with the defendant but for the injury. He did not accept that he would have progressed to store manager, as that role was occupied by the owner's son-in-law. He allowed past economic loss on the basis of pre-injury earnings incremented by 3% per annum.

The Court did not accept that future economic loss should be based upon average weekly earnings statistics of $1,400 net per week because the plaintiff had not demonstrated that level of earning capacity prior to the injury. The Judge accepted the evidence of the earning capacity assessor that his true uninjured capacity was $1,000 per week and that the plaintiff had a residual capacity to work of at least 20%. The Judge reduced future economic loss accordingly.

The Court accepted the defendant's submission as to the amount of reduction for the vicissitudes of life. The plaintiff had undergone previous back surgery and this increased his prospects of a diminished work life irrespective of the current injury. In addition, his pre-injury work history suggested that he may not have had unbroken future work prospects. Accordingly, a reduction of 25% was applied instead of the usual 15%.

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## Implications

The decision provides a demonstration of the utility of obtaining an earning capacity assessment to provide the Court with an alternative basis for assessing work capacity and the impact of the injury on that capacity. It also highlights the benefits of carefully considering the pre-injury medical and employment history of the plaintiff to identify aspects which may be brought into consideration of likely future earnings and the vicissitudes of life.

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**RECENT DECISIONS**

# No negligence by labour hire employer – sub-contractor (host employer) liable in damages

*Castillo v Presmist Formwork Contractors Pty Ltd* [2019] NSWDC 6

Link to decision

## Background

On 1 February 2019, Judge Levy of the District Court of NSW found that an occupier/subcontractor (Presmist) had failed to provide adequate lighting inside a lift shaft on a hotel construction site at Mascot which led to a casual labour-hire employee (Mr Castillo) suffering injuries to his knees.

The injuries occurred on 29 May 2015 as Mr Castillo ('the worker') was manipulating a large, heavy sheet of formwork plywood in preparation for a remedial concrete pour to fill a concreting gap.

Presmist was the occupier of the site and the subcontractor who provided formwork and concreting services. Valeron was the labour hire company from whom Presmist obtained the worker's services as a carpenter. Valeron (the employer) were not a party to the proceedings but despite this, Presmist alleged that Valeron was negligent as the employer (so as to reduce the damages payable).

## Decision

The worker was awarded $138,515 in damages with a finding that there was no contributory negligence. His Honour felt that the expert evidence did not support Presmist's *"non-specific"* allegations that the worker had failed to:

a) have sufficient regard for his own safety;

b) observe his surroundings; and

c) exercise the necessary degree of caution.

Importantly, for employers and workers compensation insurers, Judge Levy also found that Presmist had failed to prove that Valeron was aware of the risks facing the worker with respect to the work assigned to him; in particular the "dynamic nature of those risks" which was only within Presmist's knowledge.

Judge Levy also believed that Presmist's duty as an occupier to take reasonable care for the safety of the worker extended to ensuring the worker was provided with:

1. Help when manipulating heavy objects; and
2. *"An adequately illuminated environment in which he could carry out his assigned tasks".*

The Court found that the *"likely burden on [Presmist] of taking the precaution of assigning additional labour to assist [the worker] to manipulate and fix in place the heavy plywood sheet was, in the context of having form workers on a building site, relatively insignificant, if not negligible".*

## Implications

The decision demonstrates that absentee employers (such as in labour hire cases) will not automatically be found to have breached the non-delegable duty of care that they owe to their employees so as to attract a share of liability for a worker's injury.

The case required consideration of allegations of failure to provide manual assistance, failure to provide adequate lighting in certain workspaces and failure to provide proper site supervision by the occupier. Judge Levy was satisfied that:

*"The question must be asked as to what the plaintiff's employer, as a labour hire company, could have reasonably done as a precaution against injury other than to provide the plaintiff with a safety induction. This is particularly so where the plaintiff, as a formworker, was to carry out semi-skilled work such that it was the requirement of the defendant, and not the employer, who devised the work tasks and undertook the responsibility to supervise the plaintiff in the performance of those tasks. There is no evidence that the plaintiff's employer had special supervisory knowledge or skill in formwork"*

The decision distinguishes the position that an employer must be 25% liable based on the authority of *TNT v Christie & Ors* [2003] NSWCA 47 so that critically, each case must be assessed on its own facts.

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