

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

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.

- 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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