

Between the Lines

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Recovery against employers: a practical review of calculations under 151Z of the *Workers Compensation Act 1987* (NSW)

Reviewing the basics

1. A worker who suffered an injury at work may be entitled to compensation (such as weekly income replacement) from his or her employer through the 'no fault scheme' provided by the *Workers Compensation Act* (NSW) (**WCA**). An award of compensation does not require any finding that the employer was negligent. A worker may also be entitled to damages from his or her employer if the workplace injury was caused by the employer's negligence.
2. Where both an employer and non-employer are found liable to a worker for damages, and the worker is assessed as having a minimum 15% whole person impairment (**WPI**) (as defined under the WCA), the employer will pay its apportioned damages assessed under Division 3 of the WCA, and the non-employer(s) will pay their apportioned damages assessed under the *Civil Liability Act 2002* (NSW) (**CLA**), or some other relevant act. Under Division 3 of the WCA, the damages an injured worker is entitled to from his employer are limited to past and future economic loss and loss of superannuation benefits only, in addition to other more restrictive limitations.
3. Therefore, in personal injury claims for damages arising out of an alleged workplace injury, a worker's total entitlement to damages is the sum of the amounts assessed under these different statutory schemes.

Multiple Defendant Scenarios

4. Let's assume that a work-injury matter proceeded to hearing and judgment. There were two defendants: the employer, which was a labour-hire company (**Employer**), and the occupier of the property (**Occupier**) where the accident occurred. The worker was assessed as having 23% WPI. The Court apportions liability 15% to the Employer, and 85% to the Occupier. The Court awards CLA damages of \$1 million and WCA damages of \$600,000.

Scenario 1

4.1. In Scenario 1, the Employer is a defendant in the proceedings along with Occupier.

4.2. The amount the Employer will pay to the injured worker will be calculated as follows:

- 1) The Court will multiply Employer's apportioned liability of 15% by the WCA damages of \$600,000, which equals \$90,000. This is the amount to be paid by Mr Employer to the plaintiff.

4.3. Occupier's damages will be calculated as follows:

- 2) The Court will take the CLA damages of \$1 million and deduct the WCA damages of \$600,000, which equals \$400,000.
- 3) The Court will then multiply the \$400,000 by the Employer's apportioned liability of 15%, which equals \$60,000. The \$60,000 is deducted from the CLA damages of \$1 million, which equals \$940,000.
- 4) From the \$940,000, the Court deducts the amount to be paid by the Employer to the plaintiff of \$90,000, for a sum of \$850,000. This is the amount that will be paid by Occupier to the plaintiff.

4.4. Therefore, in scenario 1, Employer pays the plaintiff \$90,000, and Occupier pays \$850,000 (plus interest and costs, depending on costs orders).

Note: Where there are multiple non-employer defendants, the Court will round up the apportioned liability of each non-employer so that it equals 100%. For example, if there were two non-employers with apportioned liability of 40% each, that would be rounded up to 50% each. The Court would then carry out the calculation as set out in (4) above, with the added step of taking that last sum and multiplying it by each non-employer's rounded up percentage. Those two amounts would be what each non-employer would pay the plaintiff.

Scenario 2

4.5. In scenario 2, the apportionment of liability as against the Employer and Occupier, and WPI assessment, remain as in scenario 1. However, the Employer has not been joined to the proceedings as a defendant. This means the calculation of the amounts to be paid by the occupier is slightly different.

- 1) The Court will first carry out step 4.3(2)-(3) as set out above, which gave the sum of \$940,000. However, in this case Mr Employer will not be making any payments to the plaintiff. Occupier will therefore pay the \$940,000 to the worker.

4.6. Therefore, in scenario 2, Occupier pays the plaintiff \$940,000 (plus interest and costs, depending on costs orders).

Note: As set out above, if there are multiple non-employers, their apportioned liability is again rounded up to equal 50% each and multiplied by the amount to be paid to the worker of \$940,000. Those two amounts would be what each non-employer would pay the plaintiff.

Scenario 3

4.7. In scenario 3, the Employer is still not a party, is still found negligent and apportioned 15 % liability. Occupier is still apportioned liability of 85% as in scenario 1 and 2. However, the plaintiff is assessed as having less than 15% WPI. , the Employer is still not a party, is still found negligent and apportioned 15%

4.8. In that case, no damages will be awarded by the Court under the WCA. The CLA damages of \$1 million are simply multiplied by Occupier's apportioned liability. Where there are multiple non-employers, there is no rounding up of liability.

4.9. In this scenario Occupier will pay 85% of the \$1 million to the worker, namely \$850,000.

Conclusion

4.10. As you can see from the above three scenarios, where the worker has been assessed as having a minimum of 15% WPI, the non-employer is best off when the employer is joined.

4.11. Therefore, where the worker has not joined the employer, it is important to consider whether there would be any basis upon which the non-employer could cross-claim against the employer.

Case Note

Endeavour Energy v Precision Helicopters Pty Ltd

The Facts

On 4 April 2006, pilot David Carter, and Simeon Edwards, an employee of Energy Endeavour (**Endeavour**) were conducting an aerial inspection by helicopter of Endeavour's power lines in St Albans. The helicopter and pilot were provided by Precision Helicopters Pty Ltd (**Precision**). The helicopter crashed as a result of its rear rotor coming into contact with a catenary wire suspended across a gully by Telstra Corporation Ltd (**Telstra**).

Mr Edwards survived but suffered catastrophic injuries.

Trial Proceedings

Mr Edwards sued Endeavour and Precision for damages. That claim was settled by the defendants for \$16 million.

Endeavour and Precision commenced separate proceedings against each other and Telstra, each arguing that the others were liable to Mr Edwards and should pay the settlement sum. Under s151Z(1) an employer can recover the amounts of compensation it paid to the worker (such as weekly payments) from other liable non-employers. Under that provision, Endeavour also sued each defendant for contribution for the compensation paid to Mr Edwards.

The trial judge found that Precision and Endeavour were liable in negligence to Mr Edwards, but dismissed the claim of negligence against Telstra. The trial judge apportioned liability between Precision and Endeavour at 85% and 15% respectively.

Significantly, the trial judge determined that Mr Edwards was not a “passenger” in the helicopter pursuant to the *Civil Aviation (Carriers’ Liability) Act 1967* (NSW) (**State Carrier’s Act**). This meant that Precision’s liability for damages was not capped at \$500,000 (as the limit then was).

Endeavour and Precision appealed.

Appeal Proceedings

The Court of Appeal reversed the trial judge’s determination that the relevant carriage was not covered by the State Carrier’s Act. As a result of the reversal, Precision’s liability was strict and the statutory cap on damages of \$500,000 for personal injury applied. The Court of Appeal also reversed the decision that Telstra was not negligent.

Under s151Z, if the amount that a court orders a non-employer to pay the employer as contribution for prior compensation paid to the worker exceeds the amount of damages the non-employer is required to pay the worker under the same judgment, that non-employer is deemed to have satisfied the whole of the judgment against it when it pays its contribution of compensation to the employer.

Precision’s damages were capped at \$500,000 and that sum was paid to Endeavour to satisfy the s151Z indemnity. As a result, Precision did not have to make any other payments under the Court of Appeal judgment.

Telstra would have been entitled to reduce its damages pursuant to s151Z, as set out at Scenario 1 above. However, as a result of Precision's capped liability and its payment of compensation made to Endeavour (which would have satisfied the whole of the judgment against it), Telstra alone would have been required to pay the CLA damages awarded to the plaintiff.

The above case is a good example of the complexities of assessing work injury damages in multi-defendant, multi-scheme proceedings.



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