Real Estate Agents and Workers' Compensation

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Abstract

This paper examines aspects of the *Workers Compensation and Rehabilitation Act 1981* (WA) ('the Act') and its application to Real Estate Agents. The paper establishes that, despite their relative freedom from supervision, real estate salespersons ('agents') will in most cases be covered by the Act and therefore their employers are obliged to take out insurance to cover their potential liability under the Act. A number of features of the Act have a significant impact on agents, in particular those provisions which relate to claims made for injuries that occur during travel and the calculation of weekly payments.

Introduction

This paper examines the provisions of the *Workers Compensation and Rehabilitation Act 1981* (WA) ('the Act') which are relevant to real estate agents. The first part of this paper sets out the criteria for establishing a claim for compensation and in particular examines the issues that are relevant to agents. The second part of the paper outlines the entitlements available under the Act and considers some provisions which have particular impact on agents.

Criteria for Making A Claim

Section 18 of the Act provides as follows: 'If the disability of a worker occurs, the employer shall, subject to this Act, be liable to pay compensation in accordance with Schedule 1.'

This deceptively simple provision is the cornerstone of the Act. In effect, three requirements need to be satisfied before a claim can properly be made. First, it is necessary to establish that the person injured is a 'worker' within the meaning of the Act. Second, it is necessary to establish that the injury or disease suffered is the kind of disability which is compensable under the Act. Third, it is necessary to calculate the entitlements due under Schedule 1 of the Act. These requirements will be dealt with in turn.

Are Real Estate Agents 'Workers' under the Act?

Section 5 of the Act defines, among other things, who are workers for the purposes of the Act. A worker includes a person under a contract of service, a casual worker who is employed in the employer's trade or business, a person covered by an industrial award or industrial agreement, and a person employed under a contract for service (the remuneration by whatever means of that person so working being in substance for their manual labour or services).

The definition of worker is broad, and covers in the first instance those people who are normally regarded as employees (persons engaged under a 'contract of service'). The term contract of service has been subject to considerable litigation. The courts are frequently asked to determine whether a claimant is an employee or an independent contractor. The High Court in *Stevens v. Brodribb Sawmilling Co. Pty Ltd*[1] determined that, in order to establish whether a person was an employee,

it was necessary to consider a number of indicators. These indicators are generally used to determine the level of control that the purported employer has over the employee. Some of the determinants of the level of control were noted by the High Court in *Stevens* to include the method of remuneration and the hours of work. Other indicators include the specific terms of the contract, and whether materials and equipment were supplied by one of the parties. The Court also found that the right to hire and fire, the provision of uniforms, and the deduction of taxation should be considered in assessing the level of control.

In *Stevens*, it was observed that even if a person is engaged under a contract stating that a person is to be regarded as an independent contractor, that provision may be disregarded where other factors point to the level of control being sufficient to amount to a contract of service. In other words, even where the contract says that a person is an independent contractor, the courts may find on the facts presented that the person is an employee.

A few cases have dealt specifically with the status of agents. In *Federal Commissioner of Taxation v Barrett*[2] the High Court considered the case of agent who was paid (not unusually) by commission, and who was allowed to determine, more or less, his own hours of work and holidays. There was very little supervision of the agent although he was expected to report his whereabouts each working day and was required to pay all monies received from purchasers to his firm. He was also required to attend the employer's office and certain sales sites according to a roster. It was held in the circumstances that this agent was engaged under a *contract of service* and was therefore an employee.

The circumstances outlined in *Barrett's* case are common to most agents. Whilst there is a great deal of flexibility in working hours, terms and condition of employment, and the method of payment, it is likely that most agents will be regarded as employees and therefore workers within the meaning of the Act. Even if an agent works only on a casual basis, the Act contemplates coverage for casual workers where the nature of their work is for the purpose of the employer's trade or business (real estate sales). The issues of control spelt out in *Stevens* may not be so crucial to most agents who are subject to little supervision.

The enduring significance of *Stevens* is its reference to the fact that it is the Court which determines the status of the relationship and that the contractual terms are only one factor in that consideration. In any event, the Act provides an extended definition of worker to cover persons who may not be regarded as working under a contract of service, but who are working under a *contract for service* where they are providing 'in substance their manual labour or services'.[3]

In most instances, agents are providing their manual labour, skills and services rather than providing materials and equipment. Even if a court were to determine that the level of control over an agent was not sufficient to establish a contract of service, it is almost certain that for the purposes of the Act agents will be regarded as workers within the extended definition. In effect, notwithstanding the flexible nature of an agents conditions of employment, agents will in most circumstances be regarded as workers for the purposes of the Act.

Types of Disabilities Covered by the Act

Broadly speaking, the Act covers two forms of disability. First, the Act covers 'personal injury by accident arising out of or in the course of the employment, or whilst the worker is acting under the employer's instructions'.[4] This aspect of the definition

[1] (1986) 63 ALR 513.
[2] (1973) 129 CLR 395.
[3] Section 5 of the Act.
[4] Section 5 of the Act.

of disability provides coverage for workers who can establish that the injury from which they suffer arose out of an unexpected or unintended event which brought about a sudden physiological change for the worse. In simple terms, injury by accident occurs where a specific traumatic event can be identified, such as a bruise, a bump, a cut or a broken bone. Such an injury must occur whilst the worker is actively engaged in their work activity, or when the worker is engaged in some activity which is incidental to the employment. The phrase 'in the course of the employment'[5] has been held to cover a range of circumstances. It covers situations where the employer has encouraged, sponsored or promoted a particular activity which may not even be directly related to the business of the employer, but which is beneficial to employers and workers in terms of morale, corporate promotion, or public relations.

There have been cases which establish that an injury by accident in the course of employment has occurred during staff cricket matches, employer Christmas parties and other social activities. The definition of what is 'in the course of the employment' will vary on the facts and circumstances of the case and will depend on the nature of the employer's business and the employer's relationship with their worker. In *Van Oosterom v Australian Metropolitan Assurance Co Ltd* [6] it was held that an insurance salesperson was entitled to compensation when he was injured at home whilst working in his home office. In a more recent case *Re Commonwealth Bank of Australia v Wark*[7] the worker was found to be entitled to compensation when she was injured at home whilst 'on call'. These cases clearly have application to agents who often work from home.

Second, the Act also covers various forms of disease where it can be established that the employment has been a significant contributing factor in the contraction or worsening of a disease. A disease has been regarded as a condition of gradual onset as opposed to an injury, which originates from a specific identifiable event. In order to establish a claim under the Act it must be shown that the employment contributed to the condition, not simply that the person contracted the condition whilst at work. In most cases, it is more difficult to establish a claim if the condition relates to a disease, rather than an injury by accident.

There are a number of specific conditions which are now subject to special rules under the Act. In relation to conditions which arise from stress, the Act provides that these conditions are only compensable where it can be shown that they do not arise from industrial relations circumstances, such as dismissal, transfer, or failure to obtain promotion. However, if the worker establishes that the employer's behaviour has been harsh and unreasonable in relation to those circumstances, the worker is able to make a claim for stress related conditions.[8]

Entitlements under the *Workers Compensation and Rehabilitation Act 1981* (WA)

The Act creates two forms of entitlement: payment for incapacity for work, which is made by weekly payments; and, where the disability sustained is permanent, lump sum payments. In most cases, claims for compensations are made under sections 18 and 58 of the Act. These sections provide that where a worker suffers a disability, the worker is entitled compensation in accordance to Schedule 1 of the Act. That schedule provides, that where the worker can establish an incapacity for work, they are entitled to weekly payments of compensation for duration of that incapacity up to a limit of the 'Prescribed Amount' (currently about $120,000). Where the worker is fit to

[5] Section 5, definition of Disability.
[6] [1960] VR 507.
[7] (1995) 37 ALD 697.

[8] *Catholic Care v Wrafter* (unreported CM(WA) 60/96 28 October 1996).

return to work these weekly payments cease or are reduced according to the workers earnings.

The Prescribed Amount is pivotal in the Act. It sets out the maximum amount of compensation available in relation to weekly payments, medical expenses and rehabilitation allowances. The worker who requires medical treatment is entitled to payment of medical expenses up to the equivalent of 30%, and rehabilitation allowances up to 7% of the Prescribed Amount. These sums are cumulative; so that taken together an injured worker is entitled to a maximum of weekly payments of approximately $120,000, a maximum of medical expenses of approximately $37,000 and rehabilitation expenses to approximately $8,500.[9]

If a worker suffers a permanent injury to the limbs, spine, or the senses, a payment is available under Schedule 2, which sets out a table of injuries that attract a lump sum payment. The amount payable will depend on the assessment given by a specialist. If a worker elects to take a lump sum under Schedule 2 all other entitlements to compensation cease.

Calculation of Weekly Payments

Schedule 1 of the Act provides the formula by which weekly payments of compensation are to be calculated. New provisions apply to the calculation weekly earnings as from 5th October 1999. For the purposes of calculating weekly earnings, workers are categorised into groups. The first group is workers whose weekly earnings are calculated by reference to an industrial

[9] In limited circumstances it is possible to apply for an extension of the prescribed amount for weekly payments up to further $50,000, and likewise the payment of additional medical expenses up to an additional $50,000. Medical and rehabilitation expenses continue to be paid even if the worker has returned to work, but payment of these expenses is dependant upon the treatment being reasonable and associated with the work disability. Sections 84E and clauses 17-19 of Schedule 1.

award. These workers are entitled to receive their average earnings for the first 4 weeks, based upon a calculation which averages their earnings over the preceding 13 weeks. Weekly payments will include over-time, bonuses, allowances and other over-award or service payments. For the first 4 weeks, they will receive roughly their usual pay. Obviously, some difficulties occur where a worker has not been employed for 13 weeks. In these circumstances the insurer will calculate an average payment having regard for what the worker may have earned. This is usually done by using the wages of workers in similar positions as a guide. The Act now provides that the average weekly earnings may not exceed $858.52 per week. Even if a worker's average weekly payments are above $858.52 per week, the payment will be capped at this level.

After 4 weeks, the worker who is covered by an award will no longer be entitled to receive overtime, bonuses, allowances, and over-award or service payments. Therefore, after four weeks, payments for workers covered by awards will be reduced, because these over-awards payments will not be taken into account. These provisions will affect agents who are covered by an award.

If an award does not cover an agent, they fall into the second category of workers who are covered by some other form of agreement. Many agents work under common law contracts, which are not registered industrial awards or agreements, but contracts between the employer and the worker. These contracts are enforceable, but special provisions apply to the calculation of weekly payments. For the first four weeks, the worker will be paid their average weekly earnings calculated over the last 12 months to a maximum of $858.52 per week. After four weeks, the worker will receive 85% of this amount. For most agents, their weekly payments will be capped at $858.52. If they are incapacitated for more than four weeks, their weekly payments will be reduced, usually to a figure of 85% of $858.52.

Making a Claim

Workers make a claim for compensation by giving their employer notice of a disability in writing. The claim must be accompanied by a medical certificate that certifies as to the nature of the disability and sets out whether the worker is incapacitated, and whether they require treatment or rehabilitation.

As soon as practicable the worker must indicate to the employer how the disability arose, where it arose, and when the disability occurred.[10] In addition, the standard 'accident report form' requires the worker to give details of their relevant past medical history and the names of witnesses to the cause of the disability (if appropriate). Workers are also required to provide a medical authority to the employer so that the employer or its insurer can obtain additional medical opinion.

The worker is required to forward the claim form to the employer. The employer must send the claim form and medical certificates to its insurer within 3 days.[11] The insurer is obliged to advise the worker on the progress of the claim within 14 days. Such advice may consist of a notice which denies the claim, approves the claim, or advises the worker that more time is necessary to investigate the claim. The procedure for making claims is set out in the flow-chart provided at the end of this paper.

The Process of Claiming Compensation in Western Australia

Insurers

In Western Australia, employers are able to insure through a range of private insurers. At the time of writing, 16 insurers offer workers compensation insurance. In addition, most government departments and authorities are insured through the Insurance Commission of WA which controls approximately 50% of the workers compensation insurance market. It is

[10] Section 84I.
[11] Section 57 of the Act.

compulsory for employer to obtain insurance, although larger employers are entitled to self-insure if they are able to deposit with WorkCover a bond sufficient to meet claims. WorkCover is the government department which administers the Act and oversees the operations of insurers. Employers who fail to insure may be liable to a penalty and, in any event, are liable to pay compensation under the Act to the worker.

Workers compensation insurers have a contractual right of subrogation under the policy of insurance. Subrogation essentially means that the insurer 'stands in the shoes' of the employer, and takes over and manages any claim made against the employer. It also allows the insurer to represent the employer at all levels where any dispute about a claim takes place. In effect the right of subrogation ensures that the insurer manages the claim and that the employer is not required to investigate the claim or make any decisions on the merits of the claim.

By completing an 'employer report form' an employer makes a claim for indemnity from their insurer. Indemnity means that the insurer will, if the employer has complied with the policy, cover the costs of any claim under the Act made against the employer by the worker. Where an employer ceases to exist by reason of death or liquidation, the worker has a right to claim directly against the insurer.

In the case of self-insured employers claims are administered through a combination of in-house compensation claims officers and lawyers, who assist with decisions in relation to liability.

Other Considerations

Workers who sustain a disability under the Act are generally subject to considerable scrutiny. Insurers are entitled to refer workers to a medical practitioner to obtain an opinion as to whether or not the worker remains incapacitated for work. Workers must attend that appointment although they are entitled to seek alternative medical advice from their own practitioner.[12] In addition, in many circumstances workers may be referred for inclusion in a rehabilitation program and are required to cooperate with the program.[13]

Where the worker unreasonably refuses to undergo a medical examination or to participate in a rehabilitation program, their weekly payments may be ceased or reduced. The emphasis under the Act is to return the worker as quickly as possible to their employment. Section 84AA provides that the employer must hold open the worker's position for a period of 12 months and must accept the worker back at their place of employment provided that the worker is able to perform their pre-accident employment or some other employment for which they are suited. Workers will lose their entitlement to weekly payments of compensation if they submit a fraudulent claim, fail to cooperate with medical examinations or rehabilitation programs, or fail to return to work when they are fit to perform their pre-accident duties.

In most cases where the worker has been off work for an extended period, the insurer will refer the worker to a specialist medical practitioner who will assess the worker's permanent disability. The worker is entitled to obtain an alternative opinion from his or her own practitioner. Often, the assessments made by the specialists can be reconciled and the percentage agreed upon. Some caution is required in the calculation and acceptance of a lump sum payments under the Act because acceptance of a lump sum will end the worker's entitlements under the Act. Where a worker has ongoing medical requirements, or wishes to pursue a course of rehabilitation, it is unwise to accept a lump sum payment without seeking legal advice.

[12] Sections 64 and 65 of the Act.
[13] Section 157 of the Act.

Specific Issues for Agents

Real estate offices operate in a number of ways. Licensees who operate in partnership would not be classified as workers under the Act, because as partners they are self-employed and are not under a contract of or for services. Many real estate offices operate through companies and the directors of those companies would be, in most circumstances, workers under the Act. This is because the company and the directors are legally separate persons. As such directors are regarded as employees of the company for the purposes of the Act. There are specific provisions, which relate to directors. Recent amendments to the Act provide that directors who do not have an active part in the business can choose whether or not to be covered under the Act.[14]

Many real estate offices operate through a franchise. The relationship between a franchiser and franchisee is not a contract of employment, but is a commercial contract requiring the franchisee to fulfil certain obligations to the franchiser. A franchisee may be an employer either as a sole trader or as a partner. If the franchisee is a company then the directors of a franchisee company will generally be workers. Other persons employed directly by the franchisee will be regarded as workers under the Act.

A matter of some concern to agents is that after 1993 section 19 of the Act was amended to provide that where an injury was sustained during the course of a regular journey to and from the worker's place of work, that injury is not covered by the Act. This is particularly relevant to agents whose employment requires considerable travel. Travel during the course of the day to and from the office, for example, a 'home-open' for inspection, are probably not affected by section 19. The journey most likely to be affected by section 19 is the first journey of the day into the office or the last journey of the day to the individual's home.

In many instances, agents do not go direct to the office in the morning or home directly in the evening. Section 19 does provide coverage where the attendance is for the 'purpose of or in connection with the worker's employment with the employer and the employer agrees to the attendance'. In most cases travel by an agent to a prospective purchaser, or vendor, will be covered by this provision. In other words, whilst the 1993 amendments appear to affect agents directly, it is likely that most of the journeys undertaken by agents are not affected by section 19. However, it would be advisable for agents to obtain their employer's permission for journeys undertaken outside of regular working hours (if such a thing exists in the real estate industry), in particular for travel to the first appointment of the day and the last appointment in the evening.

Agents are mobile in a number of senses. Many agents change employers during the course of their career in real estate. This may affect the ability of agents to claim compensation where a disease or injury is affected by employment with a number of employers.

The Act provides that the worker must make a claim against the employer who they are employed with at the time of the injury or disease. Where the injury or disease may have occurred initially with another employer, the current employer is entitled to claim a contribution from any past employer.

Litigation can become complicated where, for example, an agent suffers a back injury with one employer and then, some years later, whilst working for another employer, aggravates the same back injury. The agent is entitled to make a claim against the current employer and the current employer should pass this claim to their insurer. Insurers aware of the circumstances usually seek information from the worker of their previous work history and attempt to obtain a contribution to any compensation paid by them from past employers.

[14] Sections 10A and 160 of the Act.

The calculation of weekly payments for agents may present some difficulties. It is possible in some circumstances that an agent may have had little or no earnings over the relevant period used to average payments. Conversely, the agent may have had extremely high earnings over that particular period. In the former circumstance, the agent would be entitled to some weekly payments but the averaging effect may produce a low payment. In the latter circumstance, even though the earnings over the preceding period may have been high, the effect of the provisions is that a cap of $858.52 per week will apply.[15]

The Rate of Injury in the Real Estate Industry

WorkCover keeps statistics on the rate of injury and disease for each industry classification. Agents fall under the classification of 'property and business services'. This classification has, over a 4-year period, shown an increase in the rate of claims made for injury and disease.

During the period from 1994/95 to 1997/98 property and business services have shown an increase of 17.3% in the rate of injury. The break down of the cause of injury shows that body stressing (lifting and bending) is the major cause of injury in property and business services. This makes up approximately 30% of all injuries sustained. This is followed by falls, trips and slips, which make up approximately 20% of injuries sustained.

These statistics confirm an intuitive expectation that most agents sustain injuries lifting signs and objects from their cars or whilst slipping and tripping in the course of inspecting and surveying property. An analysis of the average time lost for claims shows that, on average, men who sustain injury or disease in this industry are absent from work for approximately 36.6 days. Women are absent on average 64.7 days.[16]

Conclusions

It is somewhat surprising that there are so few cases that discuss compensation claims made by agents. Save for the question of whether an agent is a 'worker' the courts have not been called upon to discuss the nature of an agents work. It is likely that in the future that there will be disputes relating to pay rates and travel claims, but these cases have yet to appear in the law reports. Most agents will be covered under the Act, either because they are employees or workers under the extended definition of the Act. In some instances, licensees will be covered by the Act where they are directors of real estate companies. Some specific provisions of the Act may be of concern to real estate agents, such as the provisions that limit coverage in relation to travel. Some care should be taken to ensure that the agent notifies the employer of the nature of the journey undertaken, so that the employer can consent to the attendance.

The calculation of weekly payments may also be of concern to agents particularly those who are high-income earners. Recent amendments to the Act will cap the earnings of agents to the equivalent to 1.5 x the average weekly total earnings in Western Australia ($858.52 per week). Employers in the industry must insure all agents engaged by them, whether or not they are full time or casual workers. The Act also requires the employer to process all claims by forwarding them to their insurer, whether or not the employer considers that the claim is valid.

[15] Clauses 11 and 11A of Schedule 1 cover both categories of workers.

[16] WorkCover Western Australia (1999), *Workers' Compensation Statistical Report 1994/95-1997/8*, pp 22-26.

The Process of Claiming Compensation in Western Australia