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Insurance law update

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CASE NOTE

Employers take note: **safety audits and your duty of care**

Govic v Boral Australian Gypsum Ltd [2015] VSCA 130

Govic v Boral Australian Gypsum Ltd [2015] VSCA 130, demonstrates yet again the extremely high standards an employer must adopt if it is to avoid liability.

The appellant worker was an experienced and capable tradesman who supplied a lot of his own equipment and had even occupied supervisory roles in the past. Given his experience he was largely left to his own devices to undertake repair plastering work. When doing so he engaged in activities that the trial judge characterised as ordinary plasterers work. The Court of Appeal disagreed and said that some of the activities undertaken by the worker were plainly potentially hazardous. As a result the Court of Appeal concluded that the employer's failure to ensure that the worker did not adopt unsafe work practices meant that the employer had been negligent.

Importantly, the Court of Appeal also held that the Occupational Health and Safety (Manual Handling) Regulations 1999 (1999 Regulations) and the Occupational Health and Safety Regulations 2007 (2007 Regulations) conferred a private right of action.

BACKGROUND

The appellant, a very experienced plasterer by trade, was engaged by Boral as a 'repair plasterer' between 1997 and November 2010. In November 2010 the appellant stopped working because of degenerative tendonitis in his left and right Achilles tendons ("the injury"). The appellant issued proceedings against Boral, in negligence and for breach of statutory duty arising out of occupational health and safety regulations.

THE APPELLANT'S WORK

The appellant's work was described as 'plasterers repair' work – to 'fix up' damaged work caused by other trades and add the 'finishing touches' to cornices before the painting of residential building sites. The appellant performed the work by lifting and carrying sheets of plaster that weighed approximately 20 kilograms, repeatedly climbing up and jumping down on a plasterers' stool (at a height of approximately 600mm) whilst carrying what was described as a heavy load.

It was the going up and down ladders, steps, overstretching, carrying heavy equipment, walking over rough/uneven terrain and at times, without assistance that affected the appellant's heels/feet which were prone to injury due to an underlying degenerative condition

Through the use of the appellant's own work practice of 'jumping' up and down a 600mm plasterers' stool, the Court of Appeal determined there was a foreseeable risk of potential injury. It was this 'jumping' up and down that could have been addressed by a risk assessment and manual handling training.

DECISION AT FIRST INSTANCE

The trial judge dismissed the appellant's claim, said the appellant's work and method was ordinary plasterers' work. The trial Judge also said that Boral was unaware of the appellant's vulnerability and was not negligent in requiring the appellant to perform ordinary plasterer activities.

DECISION ON APPEAL

The Court of Appeal found in favour of the appellant and held that Boral failed to take adequate steps to ensure that any risk injury was eliminated or reduced as far as was reasonably practicable. Effectively, had Boral conducted a proper risk assessment, it was determined that they would have identified the hazards that caused the appellants injury.

Even though the appellant worker thought his method of work was safe and he supplied his own stool, expert evidence (which was unchallenged) suggested that the appellant's method of work exposed the appellant to a risk of injury - the use of the 600mm plasterers stool meant that the work was not ordinary plasterers' work. Using the plasterers stool was an unusual work practice that was potentially hazardous because the worker was 'jumping' up and down the stool.

Boral had breached its duty of care to the appellant by allowing him to use a 600mm stool and by not identifying the risk of injury.

This was reinforced by the 1999 and 2007 Regulations which required employers to identify risks of injury and to take reasonably practicable steps to alleviate the risk. Even though Boral had conducted three safety audits, those audits failed to note the appellant's use of the 600mm plasterers' stool. The Court of Appeal said that Boral owed a duty of care to the appellant, it had breached that duty, as a result the appellant suffered an injury and the Regulations conferred a right to sue.

IMPORTANT POINTS TO NOTE

- This case is a reminder of the extremely high standard of care imposed upon employers;
- A breach of Occupational Health & Safety regulations by an employer confers a private right of action. The regulations impose broad and onerous obligations and there is no scope for "cutting corners";
- Think about the next safety audit and question whether you are identifying any and all potential hazards;
- Great care also needs to be exercised to ensure that proper evidence is available to rebut any expert evidence called by the plaintiff.

To discuss any queries you may have relating to a similar claim or the safe system of work practices you may be required to put in place as an employer, please contact your local Hunt & Hunt lawyer.

INSURANCE CONTACTS

Shona Wilde, Sydney
Graeme Armstead, Melbourne
Peter Harvey, Newcastle
Peter Jones, Adelaide
Peter Forbes-Smith, Hobart
Darren Miller, Perth
Chris Osborne, Darwin

Authors:
Graeme Armstead, Partner
Hannah Cohley, Lawyer