If my employer doesn’t pay super contributions, can I still make a TPD claim?

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Up until recently, in order to claim your total permanent disability (TPD) benefit attached to your super fund, your employer has needed to make the mandatory superannuation contributions on your behalf to ensure your TPD insurance is active. Unfortunately, some employers fail to make these superannuation guarantee payments, resulting in workers who become unwell or injured having no TPD entitlements.

Federal Court orders employer to pay compensation after rejected TPD claim

A 2023 Federal Court of Australia case, *Payne v Secure Melbourne Protective Services Pty Ltd [2003] FCA 13:11*, has found that where an employer has failed to make super guarantee contributions in accordance with the relevant award, this failure results in the worker’s loss of chance to pursue a TPD claim. In *Payne,* the employer was ordered to pay compensation of $80,000 pursuant to section 545 of the *Fair Work Act*.

The facts of the case

In this case, the Court heard that Mr Payne worked as a crowd controller with the Respondent (the employer) between January and October 2014. He was covered by the Security Services Industry Award (the Award), which was a modern Award in accordance with the Fair Work Act.

In May 2014, Mr Payne was subject to a violent attack and subsequently developed post-traumatic stress disorder (PTSD) and a major depressive disorder.

In August 2018, Mr Payne made a TPD claim in respect of his psychological injuries against an insurance policy attached to his superannuation fund, Essential Super. At the time of making the application, Mr Payne was under the belief that he was a member of the fund and entitled to claim his TPD entitlements. The TPD benefit amounted to $100,000.00.

Essential Super rejected his claim for TPD insurance on the basis that he did not hold TPD insurance at the time of his injury as his employer had not made the required contributions in accordance with the Security Services Industry Award. This was not disputed in the Court proceedings.

Worker takes his case to the Federal Court

Mr Payne brought proceedings in the Federal Court claiming that his employer had contravened section 45 of the Fair Work Act, being a failure to make superannuation contributions in accordance with the relevant Award.

It was argued on behalf of Mr Payne that his employment with the employer commenced on 30 January 2014. At that time, the Award required the employer to make superannuation contributions no later than 28 April 2014, being 28 days after the end of the March 2014 quarter. Payne nominated Essential Super to receive is superannuation guarantee payments. Unfortunately, the employer made no payments into the super fund.

Had the employer made the contribution that the Award required it to make by 28 April 2014, then Mr Payne would, from that point onwards, have become the beneficiary of the Essential Super Fund insurance benefits. One of those insurance benefits would have been an entitlement to a TPD claim if the worker became sick or injured and was unable to return to work.

The Federal Court orders employer to compensate the worker in the amount of $80,000

The Court found in Mr Payne’s favour and determined that the employer had contravened section 45 of the *Fair Work Act* by not making superannuation contributions.

The Court was then required to assess Mr Payne’s loss. The loss was framed as a loss of opportunity to make a successful TPD claim on a valid and active TPD insurance policy, not whether Mr Payne met the TPD criteria.

The Court determined that:

1. Because the claim was for loss of chance (to access any TPD benefit), they had to assess the probability that the insurer would have accepted the claim had there been cover. It was accepted that this could not be 100%. Based on the material that would have been submitted to the insurer, the Court assessed the probability at 80%. This meant that the compensation was fixed at 80% of the insured sum.
2. Interest was also ordered, not from the date of the contravention of the *Fair Work Act* by the employer not paying superannuation contributions or from the date of the loss of cover, but from the date that the insurer rejected the claim.

What this means for injured or unwell workers

This decision by the Federal Court is a significant win for injured or unwell workers who have the misfortune of having an employer who fails to make superannuation contributions. It opens the door for people to rightly pursue compensation directly from their employer for the lost chance to pursue a TPD claim so that they can get the insurance payment they are rightly entitled to.

Why should I engage a lawyer to assist with my TPD claim?

Superannuation TPD claims can be highly complex, particularly when dealing with complex policies that overlap with other rights and entitlements, such as the *Fair Work Act*.

That is why it is essential to engage an experienced TPD lawyer who can assist you through the process. At Guardian Injury Law we are experts in superannuation TPD claims and undertake our work on a no win, no fee or expenses basis. Call us now for a free initial appointment.

Contacting Guardian Injury Law

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