[2015] AATA 298

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| Division | **GENERAL ADMINISTRATIVE DIVISION** |
| File Number(s) | 2014/3702 |
| Re | EDWARD WESTRUPP |
|  | APPLICANT |
| And | BIS INDUSTRIES LTD |
|  | RESPONDENT |

# Decision

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| Tribunal | **The Hon. R Nicholson, Deputy President** |
| Date | **5 May 2015** |
| Place | **Perth** |

The Tribunal affirms the decision under review.

......(Sgd) Hon. R Nicholson......................................

**The Hon. R Nicholson, Deputy President**

# CATCHWORDS

WORKERS’ COMPENSATION – employee injured during visit to tavern in mining town in which he resided – employee assaulted by co-worker in relation to employee’s farewell hug to female – employee between definite periods of engagement overnight – whether an interval within overall period of work – whether employees injuries arose out of or in the course of his employment – whether assault would not have occurred but for employee’s employment – whether employee at place of work for the purposes of his employment or was temporarily absent from that place during an ordinary recess in that employment

# Legislation

Safety, Rehabilitation and Compensation Act 1988 (Cth)- s 5(1) – s 5A – s 6 (1)(a) – s 6 (1)(b) – s 14

# Cases

Comcare v Mather [1995] FCA 1216

Comcare v PVYW [2013] HCA 41

Gregory v Comcare Australia (1997) 72 FCR 196

Hatzamanolis v ANI Corporation Ltd (1992) 173 CLR 473

Kennedy v Telstra Corporation [1995] FCA 1640

Kennedy v Telstra Corporation (1995) 61 FCR 160

Lee v Transpacific Industries Pty Ltd [2013] FCA 1322

Military Rehabilitation & Compensation Commission v Roberts (2007) FCA 1

# REASONS FOR DECISION

**Perth**

**5 May 2015**

# introduction

1. The applicant applied for review of a decision made on 23 June 2014 affirming a determination made on 26 May 2014. By that determination the respondent denied liability to pay compensation pursuant to s 14 of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (‘the SRC Act’) in respect of ‘rotator cuff tears with rupture and retraction of the supraspinatus, infraspinatus and subscapularis tendons, right shoulder’ sustained on 26 March 2014. The denial was made on the basis that the applicant’s injury had not ‘arisen out of, or in the course of, his employment’ with the respondent.
2. The applicant gave evidence by way of a written statement, evidence in chief and cross-examination. Evidence was also given for the applicant by Mr Lewis Roberts and Dr Neil McGill. The respondent led evidence from Mr Duncan Roos, Operations Manager of the respondent and Dr Neil McGill.

# FINDINGS OF FACT FROM APPLICANT’S EVIDENCE

1. The applicant was born on 7 November 1953. He is approximately 61 years of age and has been in the employment of the respondent since 2006.
2. The applicant’s normal place of residence is Pine Hill, New Zealand.
3. He is employed on a fulltime contract basis and works on a two weeks on and one week off roster, fly in/fly out. That could be to New Zealand. When not flying there the applicant may have driven to Leonora, Kalgoorlie or Perth during a break, but not a shift change.
4. Day shifts are from 05.30am to 17.00pm and the night shifts are from 17.30pm to 05.00am. The applicant’s shifts changed from day to night on Wednesday evenings so that he would commence night shift on a Thursday at 17.30pm.
5. In the two weeks he is at work, he resides at the SPQ Leinster Mining Camp in Leinster, Western Australia.
6. Leinster is owned by BHP Billiton. Leinster is described as a closed town as generally only individuals and their families that work within the operations are eligible to reside within Leinster. The housing area at Leinster Village is accommodated by BHP personnel, contractors and families and partners.
7. The respondent is one of several contractors employed by BHP Billiton to carry out work pertaining to their specific skills.
8. All contractors plus BHP personnel reside at either the Leinster fly in/fly out accommodation or the housing area.
9. They are catered for with a dry and also a wet mess (‘the Tavern’) which are run by Spotless Catering under contract to BHP Billiton.
10. The applicant’s accommodation was approximately 60 metres from the dry mess, that being where he ate breakfast and dinner, and where he assembled lunch from hot and cold food available.
11. The Tavern is about 250 metres from the applicant’s accommodation. It provides drinks and an a la carte menu. It was no more than three minute walk from the applicant’s accommodation.
12. Both the dry mess and the Tavern are usually open seven days a week.
13. The Tavern will cater for visitors to Leinster, although the applicant has not seen members of the public in the Tavern.
14. At about 18.15pm on 26 March 2014, the applicant went to the Tavern at the invitation of a friend Nathan, a BIS colleague, intending to have a couple of drinks.
15. During the evening, he had about four drinks of Carlton Dry, but was not intoxicated. At about 21.00pm, Nathan had wanted to go home and they were standing outside by the smoker’s area.
16. At the Tavern the applicant had recognised some Cape Crushing personnel. He engaged with a woman known as Lauren, whom he had known since 2006.
17. The applicant went over to where Lauren was sitting, where about four other individuals were also sitting there, one of which he knew to be Mr Troy Jones. The applicant later discovered that although Mr Jones was off shift, he was still on call.
18. The applicant was about a foot from the table, where he remained standing and said to Lauren ‘all the best’. She said ‘I won’t see you again give us a cuddle’. She got up and gave him a hug. He wished her the best again and said ‘see you later’ to the group.
19. Troy, who was sitting down, turned towards the applicant and said ‘F… off you f…wit’. The applicant turned around and walked away.
20. Outside the Tavern entrance the applicant stated that he had been in a conversation with Nathan, and a BHP employee by the name of Rangi. He noticed Mr Jones approaching them in an ‘aggressive manner, fists clenched by his side’.
21. Mr Jones then grabbed the applicant by the T-shirt with both hands pushing and pulling him, ripping his T-shirt. The applicant had both hands in his pockets. Mr Jones then grabbed the applicant around the throat with both hands and started choking him. As the applicant could not breathe, he grabbed Mr Jones’s forearms and they both fell to the ground. As a result, Mr Jones was on top of the applicant and was swinging punches to the applicant’s head. The applicant was trying to protect his head with his left arm, as he could not move his right arm. Mr Jones was finally pulled off by a BHP employee.
22. The applicant and others moved to the car park area where Mr Jones again attempted to punch the applicant in the head and chest area but missed. He was pushed away by Nathan and told to go home.
23. In a Discipline Review Form submitted on 30 March 2014, it was noted that Mr Jones has become aggressive towards the applicant after the applicant had hugged a woman goodbye (assumed to be Lauren) at the Tavern.
24. The applicant was taken to the medical centre by ambulance, attended to by the nurse, who repositioned his shoulder.
25. The issue which Mr Jones had against the applicant was one related to a girl and did not have any connection with any conflict at work or work issue.
26. The applicant was aware that BIS interviewed Mr Jones and found him in breach of the fly in/fly out Code of Conduct.
27. Whilst at work, employees are all bound by the Leinster Township, SPZ Village Rules and the Code of Conduct. They are given the rules and code as part of their induction when they start.

# findings of fact from manager’s evidence

1. Mr Roberts is the town manager of Leinster and is employed by BHP Billiton.
2. The town of Leinster was developed as a result of a State Agreement to provide accommodation and other facilities for mining operations located in the vicinity of the town.
3. Leinster is described as a closed town. (Also supported by the evidence of Mr Roos). Only workers employed at or associated with the mining operations or in businesses that support the operations or the town can reside in Leinster. Tourists can stay in the caravan park or lodge and use facilities in the Leinster provided they pass through and do not remain permanently in the town.
4. Accommodation is either residential occupying a house under a Tenancy Agreement or fly in/fly out occupying a Single Persons Quarter (‘SPQ’) room.

# Findings of fact on issues from the evidence of Mr Roos

1. The only time when the respondent takes employees to the Tavern is Christmas time.
2. The respondent does not have a policy in relation to somebody attending the tavern between shifts and does not tell people to go there; if people want to go there that is at their own discretion.
3. Because the respondent wants employees fit for work, it does not want a drinking culture.
4. Leinster SPQ has a dry mess where meals are available; the wet mess there had been closed down.
5. Meals obtained at the Tavern are paid for by the person acquiring them.
6. The applicant was required to stay in Leinster while on shift but after shift was free to do what he wished provided he was back at work the following night, fit for work.
7. In addition to the Tavern, Leinster has a gym, a swimming pool, and a basketball, squash and tennis courts.
8. Troy resigned and left the respondent following the incident.
9. The area management did not encourage employees going to the Tavern but staff and management went to the Tavern and had a beer, including some visiting management. It depended upon the individual whether an employee sought to go to the Tavern.

# **F**inding**s of fact from the evidence of Dr McGill**

1. The fall which the applicant experienced at the time of the incident on 26 March 2014 caused substantial damage to an already abnormal right rotator cuff resulting in the symptoms he experienced, the ongoing impairment of his right upper limb following the injury and the requirement for surgery.
2. All of the applicant’s current right upper limb impairment has occurred because of the injury sustained on 26 March 2014.

# Was the injury arising out of, or in the course of, the employee’s employment?

1. An injury (in contrast to a disease) is defined by s 5A of the SRC Act as ‘a physical or mental injury arising out of, or in the course of, the employee’s employment’.
2. The applicant argues as follows.
3. The applicant was induced or encouraged to live in the mining town of Leinster which was a closed town. He was subject to the Code of Conduct which extended to all of the facilities in Leinster, including the tavern and bistro.
4. The Code had been extended by the respondent beyond the bounds of the town of Leinster to extend to conduct in airports and bus stations through which employees would pass.
5. There was no contention that the applicant contributed in any way by way of an activity to the occasion of the assault.
6. The injury was sustained by reference to the place where he was at the material time.
7. The fact that non-employees could attend the tavern did not have the consequence that the applicant had removed himself from the course of his employment.
8. A similar case is *Kennedy v Telstra Corporation* [1995] FCA 1640. There the applicant was found to be assaulted in the course of employment by strangers in a car park whilst returning to the hotel in which he had chosen to stay from another hotel from which he had gone to have ‘a few beers and watch the dogs on Sky channel.’ The present case is more favourable to the applicant because:

* The applicant here was within the mining town;
* He was assaulted by a co-worker;
* The tavern was run by mining camp caterers (Spotless);
* The workers within the tavern were subject to the employer’s Code of Conduct.

1. Another similar case is that of *Lee v Transpacific Industries Pty Ltd* [2013] FCA 1322 where it was held that a worker was within the course of employment when he slipped on the forecourt of a public roadhouse whilst taking a toilet break.
2. Reliance was placed upon *Hatzamanolis v ANI Corporation Ltd* (1992) 173 CLR 473 at [617] to [618] where it was stated:

[A]ccordingly, it should now be accepted that an interval interlude within an overall period or episode of work occurs within the course of employment if, expressly or impliedly, the employer has induced or encouraged the employee to spend that interval or interlude at a particular place or in a particular way. Furthermore, an injury sustained in such an interval will be within the course of employment if it occurred at that place or while the employee was engaged in that activity unless the employee was guilty of gross misconduct taking him or her outside the course of employment. In determining whether the injury occurred in the course employment regard must always be had to the general nature, terms and circumstances of the employment ‘and not merely to the circumstances of the particular occasion out of which the injury to the employee has arisen’: Danvers v Commission for Railways NSW [1969] HCA 64.

1. The decision of the HighCourt in *Comcare v PVYW* [2013] HCA 41 did not overturn these principles. Encouragement or inducement is not to be narrowly construed: *Comcare v Mather* [1995] FCA 1216 at [22] per Kiefel J.
2. The respondent submits on this issue as follows.
3. This is not a case concerning an interval within an overall period of employment. This is not therefore a case like *Hatzimanolis*.
4. The facilities at Leinster were not built by the respondent – they were built by BHP.
5. The evidence shows the applicant went to the tavern because he was asked to do so by a friend.
6. The usual permanent place of work of the applicant was Leinster. The respondent did not require the applicant to be at the Leinster Tavern; it was between two discrete periods of employment. Cf *Gregory v Comcare Australia* (1997) 72 FCR 196 at 201-2 per Cooper J referred to in *Lee v Transpacific Industries Pty Ltd* [2013] FCA 1322 at [33] and [45] to [49].
7. Even if you could be satisfied that there was some inducement to the applicant to be at the Tavern, there is nothing to establish that the assault arose as the result of some characteristic of the place.
8. See *PVYW* at [38] and [39], and [45] where it was stated that:

An injury occurring to an employee by reference to or associated with a place where the employee is present may involve something occurring to the premises or some defect in the premises. For example, if the light fitting in this case had been insecurely fastened into place and simply fell upon the respondent, the injury suffered by her would have arisen by reference to the motel. The employer would be responsible for injury because the employer had put the respondent in a position where injury occurred because of something to do with the place. Liability in those circumstances is justifiable. Liability for everything that occurs whilst the employee is present at that place is not. See also [46] to [49] and [60].

1. My views on these submissions are as follows.
2. I agree with the submission of the respondent that the interval found to have occurred in this application is of a different type to that to which the principles in *Hatzimanolis* are applicable. Those principles having been understood to have sought, and achieved, a connection or association with employment, it follows that in the absence of such principles being applicable there is nothing upon which to find that the injury arose out of the applicant’s employment or in the course of that employment: *PVYW* at [60]. In any event I consider that there is nothing in the evidence to support a finding that the words in s 5A (b) of the SRC Act can be satisfied.
3. If *Hatzimanolis* is applicable, I do not consider that the applicant has established that the applicant’s injury was brought about by reason of an activity or the place at which he was when the injury occurred. The applicant was not engaged in any activity. The place was the Tavern. The establishment and provision of the Tavern (even if able to be established as being on behalf of the respondent) does not create a liability on the respondent ‘for everything that occurs whilst the employee is present at that place or not’: *PVYW* at [45]. In any event, the place was not causative of the applicant’s injury.

# liability within s 6 (1)(a)

1. The applicant advances a second contention that the concept of injury is extended because it was sustained ‘as a result of an act of violence that would not have occurred but for the employee’s employment or the performance by the employee of the duties or functions of his or her employment’: s 6(1) (a) of the SRC Act. The ‘but for’ test in this provision requires a causal nexus between the employment or the performance by the employee of duties or functions of employment and the assault: *Kennedy v Telstra Corporation* (1995) 61 FCR 160 at 170 per Tamberlin J.
2. I agree with the submission of the respondent that the assault which resulted in the injury to the applicant was of a personal nature, arising from the applicant having been hugged by a woman to whom he was saying farewells. There was no nexus between the employment or the performance by the applicant of the duties or functions of his employment and the assault. It is therefore unnecessary to consider the decision in *Military Rehabilitation & Compensation Commission v Roberts* (2007) FCA 1 that where an injury occurs in a private dispute s 6(1) of the SRC Act has no application in any event.

# LIABILITY WITHIN S 6 (1)(b)

1. Finally the applicant submits that the injury was sustained ‘while the employee was at the employee’s place of work, for the purposes of that employment, or was temporarily absent from that place during an ordinary recess in that employment’: s 6(1)(b) of the SRC Act. The evidence has established that the applicant was at the tavern for the purposes of meeting a friend and having a beer with him, not for any purpose related to his employment. There was no ordinary ‘recess’ here: the applicant was between two ordinary discrete periods of employment.

# Conclusion

1. It follows that the reviewable decision dated 23 June 2014 should be affirmed.

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| I certify that the preceding 69 (sixty-nine) paragraphs are a true copy of the reasons for the decision herein of The Hon. R Nicholson, Deputy President. |

.......(Sgd) A Tran ............................................................

Associate

Dated 5 May 2015

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| Date(s) of hearing | **25 March and 26 March 2015** |
| Solicitor for the Applicant  Solicitor for the Respondent | **K Wong**  **C Tota** |
| Counsel for the Respondent | **D Richards** |