

Westrupp v Bis Industries Ltd [2015] AATA 298 (5 May 2015)

Key Points

- The applicant was a fly-in fly-out worker employed on a two-week-on, one-week-off roster.
- The Tribunal was required to consider whether an injury sustained as a result of an act of violence was compensable, where the act of violence had no causal connection to the employee's employment.

Background

Mr Westrupp is employed as a Silo Operator by Bis Industries Ltd (**Bis**) on a fly-in fly-out basis, based in the town of Leinster, Western Australia. On 26 March 2014, Mr Westrupp was assaulted at the Leinster Tavern while he was on shift change, meaning that he was on a 24-hour break having worked day shift on the day of the assault, and commencing night shift the following evening.

Mr Westrupp lodged a claim for workers' compensation in respect of an injury to his shoulder, sustained in the assault. Bis issued a determination on 26 May 2014 which denied liability in respect of Mr Westrupp's claim, on the basis that the injury did not arise out of, or in the course of, his employment with Bis. The determination was affirmed by reviewable decision dated 23 June 2014, and Mr Westrupp sought further review at the Tribunal.

The Tribunal was required to consider whether the injury arose out of, or in the course of, Mr Westrupp's employment pursuant to section 5A, and further, whether the circumstances in which the injury arose bring it within the extended definition of injury as set out in sections 6(1)(a) and 6(1)(b) of the SRC Act.

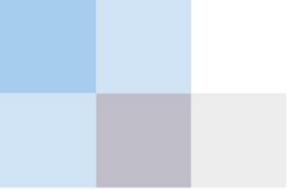
The Law

Section 5A of the SRC Act relevantly defines "injury" to mean a physical or mental injury arising out of, or in the course of, an employee's employment.

Section 6(1) provides a number of specific circumstances in which the definition of injury in section 5A will be extended. Section 6(1)(a) provides that an injury will be taken to have arisen out of or in the course of employment if it was sustained as a result of an act of violence that would not have occurred but for the employee's employment or performance by the employee of the duties or functions of his employment. Section 6(1)(b) provides that an injury will be taken to have arisen out of or in the course of employment if it was sustained while the employee was at his place of work for the purposes of his employment, or was temporarily absent from that place during an ordinary recess in that employment.

Conclusion

At the hearing, the circumstances of the assault were not disputed. A large amount of evidence was presented regarding the characteristics of Leinster and the Tavern, and Mr Westrupp's usual activities during his shift change.



Leinster was originally developed by BHP as a closed town, and only those employed in the mining operations were permitted to reside there. During the two weeks that Mr Westrupp was at work (known as a “swing”), he resided in the Single Persons Quarters (**SPQ**) in Leinster. There is a dry mess, where no alcohol is permitted, at the SPQ.

BHP does not provide a facility which supplies alcohol in Leinster, however there is a Tavern which is run by Spotless Catering. The Tavern is located approximately 250m from the SPQ, and offers an *a la carte* menu. The Tavern is open to the public, as well as those employed in the mining operations. Bis does not encourage its employees to spend time at the Tavern.

On the date of the incident, Mr Westrupp was at the Tavern with a friend. While there, he saw a female friend of his and gave her a hug. A male who was sitting with the female friend took offence to the hug and assaulted Mr Westrupp.

Counsel for Mr Westrupp sought to argue that he was engaged in an overall period of employment for the entirety of his swing. Similarly, Mr Westrupp’s Counsel argued that the whole of the town of Leinster constituted Mr Westrupp’s usual place of work.

The Tribunal found that the matter did not fall within category set out in *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473, which involved an injury occurring in an interval or interlude within an overall period of work. As such, the injury was not sufficiently connected with Mr Westrupp’s employment to bring it within the normal definition of injury in section 5A. The Tribunal commented that, even if *Hatzimanolis* did apply, it was unable to find that the injury was brought about as a result of Mr Westrupp being at the Tavern, or being involved in a particular activity. At [65], Deputy President Nicholson noted:

“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].”

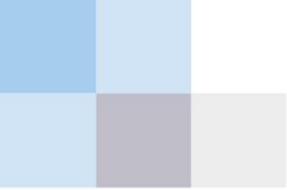
The Tribunal accepted Bis’ submission that the “but for” test contained in section 6(1)(a) required a causal connection between the injury and Mr Westrupp’s employment, and found that no such connection existed in this instance.

Finally, the Tribunal did not accept that section 6(1)(b) had any application in the circumstances, as there was no “ordinary recess” as required by that section. The Tribunal found that, as Mr Westrupp was on shift change, the injury occurred when he was between two discrete periods of employment.

The decision under review was affirmed.

Lessons Learnt

The decision has jurisdictional significance, particularly to licensees that employ workers on a fly-in fly-out basis. In particular, the Tribunal’s rejection of the argument that the period of employment lasted for the employee’s entire swing, and that the employee’s usual place of work encompassed the whole town, provides some protection for licensees who employ workers on this basis.



For more information on this article, please contact:

Claire Tota

Associate

T: +61 (0) 8 9265 6011

F: +61 (0) 8 9265 6099

M: 0418 656 164

claire.tota@hbalegal.com

Brett Ablong

Partner

T: +61 (0) 8 9265 6001

F: +61 (0) 8 9265 6099

M: 0400 263 807

brett.ablong@hbalegal.com

Disclaimer: This article is intended for informational purposes only and should not be construed as legal advice. For any legal advice please contact us.