

Employment & Safety Alert

High Court shines a light on after-dark injury

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In an important decision on the definition of 'in the course of employment', the High Court on Wednesday 30 October 2013 found in **Comcare v PVYW [2013] HCA 41** that an employee was not covered by workers compensation legislation whilst engaged in sexual activity during a work-related trip.

The Applicant had been staying at a motel in regional New South Wales on a work-related trip. After work, the Applicant engaged in sexual activity which led to a light fitting being pulled from a wall causing physical injuries to her nose and mouth and a subsequent psychological injury.

The Applicant sought compensation through the Comcare scheme, claiming that her injuries were sustained 'in the course of her employment' and were therefore compensable injuries in accordance with the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (**SR&C Act**). A similar test applies in state and territory workers compensation legislation.

Previous case law has extended the definition of 'course of employment' to situations in which an employee is engaged in personal activities in an 'interval or interlude' during the course of employment. For example, this could extend to activities during an employee's lunch break or at

a function or excursion arranged by the employer, save for any wilful misconduct.

In the *PVYW* case, the Full Court of the Federal Court had found that the injury occurred in the 'interval or interlude' during the overall period of work (i.e. the work-related trip). This finding was reached on the basis that the employee was at a place which the employer had required or encouraged her to attend (the motel) and she was not engaging in wilful misconduct at the time of the injury.

On appeal to the High Court, Comcare argued that the correct test was not merely whether the employer encouraged the employee to be in a particular place, but whether the employer encouraged the employee to engage in the particular activity that resulted in the injury.

In a 4:2 majority, the High Court accepted Comcare's argument and found that the earlier Full Court's decision had introduced an 'undue extension of an employer's liability to pay compensation under the *SR&C Act*'. The High Court indicated:

'if an employee is injured whilst engaged in an activity at a certain place, that connection [with the employment] does not exist merely because of an inducement or encouragement to be in that place... When an activity was engaged in at the time of injury, the question is: did the employer induce or encourage the employee to engage in that activity? When the injury occurs at and by reference to a place, the question is: did the employer induce or encourage the employee to be there?'

This essentially imposes a two stage test, looking at the cause of the injury (i.e. activity or place) and then at whether that cause was induced or encouraged by the employer. The majority confirmed that if the light fitting had merely come loose and fallen on the Applicant, rather than being pulled off the wall, the employer would have been liable.

In dissent, Bell J and Gageler J, in separate judgments, each found that investigating whether the activities engaged in were induced or encouraged by the employer added an unnecessary level of complexity to the test of what constituted the 'course of employment'. In their view, an employee should be compensated for any injury incurred during an interval or interlude on a work-authorized trip, excluding those injuries caused by the employee's wilful misconduct.

Whilst this case significantly assists in clarifying the scope

of an employer's liability in workers compensation matters, it would appear that an employer may remain liable for any injuries caused by defects or natural disasters at a location at which the employer requires an employee to be. Employers should therefore seek to ensure that any accommodation provided to employees on work-related trips or during lunch breaks are safe.

This case also has broader application in relation to matters regarding the scope of an employer's power to take disciplinary action against employees and/or an employer's vicarious liability for an employee's acts of misconduct, such as harassment or bullying. The case suggests that, outside of the actual work environment, an employee must be engaged in an activity or at a place under the employer's inducement or encouragement for the employer to have the scope to discipline the employee for misconduct and/or to be liable for the employee's acts.

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