Jackson McDonald

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Are injuries resulting from "*hijinks*" compensable?

Comcare v PVYW [2012] FCAFC 181

Insurance Update

Why this bulletin is important to you

You should read this bulletin if you presently deal with workers' compensation claims.

The Federal Court held on 19 April 2012 that injuries suffered by an employee whilst engaging in sexual activity in a motel room paid for by her employer on a business trip occurred "*in the course of employment*".

After an unsuccessful appeal to the Full Court of the Federal Court in December 2012 the employer's insurer, Comcare, has now been granted special leave to appeal to the High Court against this decision. Comcare seeks a ruling on whether the circumstances surrounding an injury may be relevant to an assessment of whether an injury occurs "*in the course of employment*".

The hearing is expected to occur in August this year.

The current position

It has been accepted, since the High Court's decision in *Hatzimanolis v ANI Corporation Limited* (1992) 173 CLR 473, that an interval or interlude that occurs within an overall period of work occurs "*in the course of employment*" if the employer has induced or encouraged the employee to spend the interval or interlude at a particular place or in a particular way.

This will be the case unless the employee is guilty of gross misconduct which takes the employee outside the course of employment.

The decision in Comcare

In Comcare, the Court held that the mere fact that the employee was in the motel room at which her employer encouraged her to stay when she suffered her injuries was enough to show a sufficient relevant connection to employee's employment, such that the injury occurred "*in the course of employment*".

Who does this affect?

- Anyone who deals with workers' compensation claims.

Article Highlights

- The issues surrounding in what circumstances injuries will be compensable in 24/7 employment will be considered by the High Court.

The Court was of the view that it was not necessary to show that the activity from which the injury resulted was induced or encouraged by the employer. The fact that the employee was engaged in lawful sexual activity whilst in her motel room did not lead to a different result than if she had been "*playing a game of cards*".

In order for an employee's activities to fall outside the scope of employment there would need to be gross misconduct or self-inflicted injury on the part of the employee.

Implications of the decision

At this stage, it appears that regardless of the nature of the lawful activity being undertaken by the employee during an interval or interlude, the employee will be entitled to workers' compensation payments for any injury suffered by the employee, provided that there is a sufficient connection to the employee's employment.

Various courts and tribunals have often given a very liberal interpretation to the principles outlined in *Hatzimanolis*, with claims upheld where the employee's injuries could hardly have arisen from the employer inducing or encouraging the activity giving rise to the injuries. Hopefully the High Court will provide guidance to trial and intermediate appellate courts as to the proper application of the *Hatzimanolis* principle.

The future of this position will depend on the outcome of Comcare's appeal to the High Court, and it may be that there are other restrictions placed on the types of activities undertaken by an employee "*in the course of employment*" other than the need for them to simply be "*lawful*".

Contact Us

t +61 8 9426 6611 f +61 8 9321 2002 e jacmac@jacmac.com.au
a Level 25, 140 St Georges Terrace, Perth, Western Australia 6000
GPO Box M971, Perth, Western Australia 6843

www.jacmac.com.au

Contact

Michael Schwikkard
SPECIAL COUNSEL

t: +61 8 9426 6850
e: mschwikkard@jacmac.com.au

Zaneta Witherington
ASSOCIATE

t: +61 8 9426 6656
e: zwitherington@jacmac.com.au

Elyse Johnstone
LAW GRADUATE

t: +61 8 9426 6667
e: ejohnstone@jacmac.com.au