



# DISCUSSION PAPER

## WHEN DOES AN INJURY ARISE OUT OF, OR IN THE COURSE OF, EMPLOYMENT?

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## 1. INTRODUCTION

- 1.1. The *Workers Rehabilitation and Compensation Act 1988 (Tas)* ('Act') provides that an employer is liable to pay compensation to a worker if:
- (a) the worker suffers an injury, which arises out of or in the course of his employment; or
  - (b) the worker suffers an injury, which is a disease,<sup>1</sup> to which his employment contributed to a substantial degree, in that it was the major or most significant factor.
- 1.2. This paper considers the first test: whether an injury has arisen out of, or in the course of, a worker's employment. The answer is often obvious; however some factual settings may cause uncertainty as to whether an injury is work related, and therefore compensable.

## 2. POTENTIAL FACTUAL SETTINGS

- 2.1. The following factual scenarios demonstrate the issue:
- (a) injuries suffered by workers during a journey to or from their place of employment ('Journey Claims');
  - (b) injuries suffered by workers whilst undertaking recreational or sporting activities that have some connection to their employment ('Recreation Claims'); and
  - (c) injuries suffered by workers whilst on an interval between periods of employment ('Interval Claims').
- 2.2. Journey Claims

It is clear that injuries suffered by workers whilst travelling between work and home are generally not compensable. However, altering or adding certain facts to the scenario can potentially change that position.<sup>2</sup> What happens where a worker is injured when:

Example 1: The worker has left a piece of equipment at home and his employer has told him to go home and collect it?

Example 2: The employer organises and provides the method of transport to and from the work site, such as with fly in-fly out mining employees?

Example 3: the worker is not going home, but is instead travelling to attend a work function directly after finishing work for the day?

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<sup>1</sup> The difference between an 'injury' and 'an injury which is a disease' is that the latter (a disease) is said to develop or occur by gradual onset: see *Attorney General v Smith* A35/1994 per Zeeman J.

<sup>2</sup> These Journey Claim injuries often arise from motor vehicle accidents, which in Tasmania will often see the Motor Accidents Insurance Board involved and third party recovery actions initiated by the employer/insurer.



### 2.3. Recreation Claims

Recreation Claims are less common than Journey Claims. Usually, if a worker is injured away from the work place whilst performing a sporting or recreational activity, the injury is non-compensable under the Act. Again though, the position may change if certain facts are altered. What happens if a worker is injured when:

Example 4: participating in a “fun run” or similar organised by the employer? Or even a “fun run” organised by an independent third party that the employer sends a team to participate in?

Example 5: participating in a game or competition organised by a third party where the worker is ostensibly representing the employer?

Example 6: exercising or engaging in an activity at work (perhaps using a gym located on the work premises) on a lunch hour?

### 2.4. Interval Claims

Interval claims refer to injuries that are suffered by workers whilst they are not working, but are in an interval between periods of work. Usually this occurs when workers need to attend conferences or work in an alternative location for an extended period. They work throughout the day, and then are in an interval between work periods where they do not go home, but simply pass the time (say in a hotel) until the next work period, and an injury occurs during that interval.

## 3. IS THE INJURY COMPENSABLE?

3.1. The starting point in assessing liability for Journey Claims and Recreation Claims in Tasmania is s. 25(6) of the Act. It essentially establishes that if a journey is undertaken, or a recreational activity is performed:

(a) at the request or direction of the employer;

or alternatively,

(b) with the authority, either express or implied, of the employer.<sup>3</sup>

then any injury which results from that journey or activity will be compensable.

3.2. Section 26(6) answers some of the queries listed in paragraphs 2.2 and 2.3 above. It is likely that liability under the Act would be accepted for the injured workers from Example 1 and Example 4:

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<sup>3</sup> Journey's from/to work and home must be for a work related purpose if a worker is going to rely on the express or implied authority argument to establish liability: see s. 25(6)(iii) and s. 25(7).





- (a) The worker who was injured whilst travelling home to collect a tool he left behind undertook the journey at the request of his employer; and
- (b) The worker who was injured whilst participating in the corporate “fun run” engaged in that activity with the express or implied authority of her employer.

3.3. However, if we move onto the workers from Example 2 and Example 5, there are grey areas and points of contention to consider:

- (a) The employer of the fly in-fly out mining worker pays for and arranges motor vehicle transport from the mine site to the nearest airport.<sup>4</sup> It would therefore not be unreasonable to assume that the worker has undertaken that journey at the request or direction of the employer. However the Tasmanian Supreme Court considered that issue in *Cook v Buckingham* [2012] TASSC 53 and held that an injury suffered in those circumstances was not compensable. This was upheld unanimously on appeal (see *MAIB v Cook* [2013] TASFC 4). The basic reasoning behind the decision was that the workers were not compelled by their contract of service to travel to/from the work site in the method provided by the employer. They merely had to present to work on time, and had the ability to ignore or refuse the offer of free transport from the employer. Accordingly they were not directed to travel in that method, and any injury suffered whilst travelling was not compensable under the Act.
- (b) The example of a worker who participated in a game organised by a third party, ostensibly representing their employer was taken from the case of *TGIO & The Friends' School v Berkery* (1994) 4 Tas R 156. Ms Berkery was a teacher who participated in a softball game with her co-workers against teachers from another school. The game was conducted outside of teaching hours, and was at the other schools premises. The employer had not specifically authorised or directed Ms Berkery to participate in the game in question. Nevertheless, Cox J (as he then was) determined that the injury she suffered during the game arose out of, or in the course of, her employment. This was largely due to the fact that the game was “approved” generally by the employer as a way to foster staff relationships and similar events had occurred previously.

3.4. Example 3 and Example 6 are not taken from existing case examples.<sup>5</sup> However, it would be arguable that they are compensable because they would be occurring with at least the implied authority of the employer given that: it is a work function the worker from Example 3 is attending; and, the employer has provided the worker from Example 6 with a gym at the work premises, with the implication that it is obviously intended to be used by workers.

3.5. Interval Claims are more difficult to assess and essentially come down to a technical evaluation of whether there is sufficient connection between the action which resulted in the injury and the workers employment. This usually involves a detailed analysis of the facts of each case. Some high profile examples of Interval Claims are:

- (a) The High Court case of *Hatzimanolis v ANI Corporation Ltd* [1992] HCA 21; [1992] 173 CLR 473. The worker in that case was recruited from New South Wales to work six days out of seven in a remote part of Western Australia over a three month period. On one of the worker's rare days off, the employer organised a driving excursion into the

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<sup>4</sup> The employer often pays for the flight out of the airport as well.

<sup>5</sup> To the knowledge of the writer.



outback for employees and the worker accepted the offer to participate. On the return journey, the vehicle he was travelling in overturned and resulted in injury. The High Court held that the injury had arisen in the course of employment because the employer had, expressly or impliedly, induced or encouraged the worker to spend his one day off (the interval between periods of work) at a particular place or in a particular way.

- (b) The High Court case of *Comcare v PVYW* [2013] HCA 41 involved a worker who was staying at a hotel booked by her employer whilst visiting an alternative branch of the business for work purposes. She engaged in sexual intercourse with an acquaintance in the hotel and injured herself whilst doing so.<sup>6</sup> The High Court held by a 4-2 majority that an inducement or encouragement by the employer for a worker to perform the activity which resulted in the injury was required during the relevant interval in the overall work period. An inducement or encouragement to simply be at a particular place where the injury occurred was not sufficient. The employer had not induced or encouraged her to have sexual intercourse at the hotel, and therefore she was not entitled to compensation for the injury suffered whilst engaged in that activity.

#### 4. CONCLUSION

- 4.1. Journey Claims, Recreation Claims and Interval Claims are three examples of the difficulties that can arise in determining whether an injury has arisen out of, or in the course of, a workers employment.
- 4.2. This paper should assist workers to be aware of their rights, and assist employers in being aware of the potential risks associated with organising or authorising activities (even impliedly) that otherwise appear harmless (i.e. the “fun run” example).
- 4.3. An additional risk for employers is the obligation in s. 33A of the Act to provide injured workers with notice of the right to make a workers compensation claim. This can be difficult to comply with if an employer is not even aware of the workers right to make a claim.
- 4.4. In the end, the safest approach if you are uncertain whether an injury has arisen out of, or in the course of, a workers employment is to seek legal advice.

**If you are involved in a Journey Claim, Recreation Claim or Interval Claim, or would simply like further information in relation to the issues discussed in this paper, please contact either Aaron Hindmarsh or Joe Brown.**

*The contents of this publication, current at the date of publication set out above, are for reference purposes only. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.*

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<sup>6</sup> A gas light fitting was pulled from its mount and struck her on her nose and mouth.