hba *legal.*

Lee v Transpacific Industries Pty Ltd [2013] FCA 1322

Key Points

- The Court was required to consider whether the injury in question arose out of or in the course of the applicant's employment, using the tests set out in *Hatzimanolis* and *PVYW.*

Background

Mr Lee was employed as a supervisor with Transpacific. He submitted a claim for workers' compensation in respect of an ankle injury which he claimed to have sustained as a result of slipping on a patch of oil or water at a petrol station. When he sustained the injury, Mr Lee was on his way home from a medical appointment for a previously accepted knee injury. Mr Lee claimed that, at the time of sustaining the ankle injury, he was using a crutch, which was made necessary because of his existing knee condition.

Transpacific agreed that Mr Lee had suffered an injury, but contended that it was not compensable. Accordingly, liability was denied for Mr Lee's claim.

The Law

Tribunal Decision

The key issues for consideration by the Tribunal were:

(1) whether Mr Lee's ankle injury was compensable pursuant to the journey provisions in section 6 of the Act;

(2) whether Mr Lee's ankle injury "arose out of or in the course of his employment", pursuant to section 5A(1)(b) of the Act;

(3) whether Mr Lee's injury "arose as a result of medical treatment", pursuant to section 4(3) of the Act.

The relevant provisions for consideration in respect of the first issue were sections 6(1)(d),(f) and (g), and 6(2). The Tribunal took a literal approach to these sections, and found that none were applicable.

Relevantly, it was determined that, although Mr Lee had been performing light duties from time to time from his home, this was not the case at the time of the incident and his home did not therefore constitute his "*place of work*" as required by section 6(1)(g).

Further, the Tribunal found that, although Mr Lee's medical appointment was arranged by his return to work coordinator, there was no evidence to suggest that Mr Lee was travelling "*at the direction or request*" of his employer, as required by section 6(1)(d).

The Tribunal also found in favour of the employer in relation to the second issue: whether Mr Lee's right ankle injury "*arose out of or in the course of his employment*". It was found that there was an insufficient causal and temporal relationship between Mr Lee's employment and his ankle injury.

This was in part due to the injury being sustained during an interval between two discrete periods of work.

The final issue for consideration was whether Mr Lee's injury was suffered "*as a result of medical treatment of an injury*". Mr Lee had been using a crutch to help him get around following his knee injury. He asserted that he was using this crutch at the time of his fall.

Transpacific adduced evidence which suggested that Mr Lee was not, in fact, using his crutch when the incident occurred.

The Tribunal found it unnecessary to come to a conclusion in respect of this conflicting evidence. Instead, it was not satisfied that the crutch, whether or not it was used, could be properly said to have caused the injury and resulted in the fall.

Conclusion

Federal Court Decision

Mr Lee appealed the Tribunal's decision to the Federal Court. As the appeal period had expired, Mr Lee was also required to lodge an application for an extension of time in which to lodge an appeal, which was decided at the same time. The application for an extension of time is not relevant to this discussion.

Mr Lee appealed the Tribunal's decision on the basis that the Tribunal had misconstrued and misapplied the definition of "*injury*" set out in section 5A(1) of the Act, specifically in respect of whether Mr Lee's injury arose out of or in the course of his employment with Transpacific.

The Federal Court noted that the Tribunal had paid particular attention to whether the ankle injury occurred between two discrete periods of work, as set out in *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473.

> *"The course of employment is ordinarily perceived as commencing when the employee starts work in accordance with his or her ordinary or overtime hours of work and as ending when the employee completes his or her ordinary or overtime hours of work.*
>
> *... For the purposes of workers' compensation law, injury is more readily seen as occurring in the course of employment when it has been sustained in an interval or interlude occurring within an overall period or episode of work than when it has been sustained in the interval between two discrete periods of work."*

The Tribunal also noted Transpacific's observation that the Court in *Hatzimanolis* had given an example of an employee encouraged to visit his doctor outside of work hours as an instance where an injury sustained would not ordinarily be within the course of employment. On this basis, the Tribunal found that Mr Lee's injury had occurred in an interval between two discrete periods of employment and was therefore not ordinarily regarded to have been sustained in the course of his employment.

The Federal Court took particular interest in the Tribunal's finding that the actions of Mr Lee's supervisor in booking the appointment constituted implied encouragement, if not inducement, in respect of Mr Lee's attendance at the appointment. In support of his appeal, Mr Lee contended that the Tribunal failed to give effect to this finding.

In the time that the Federal Court's judgment was reserved, the High Court decision of *Comcare v PVYW* (2013) 303 ALR 1 was released. In that case, the High Court gave consideration to the proper applicant of the principles in *Hatzimanolis*, stating:

> *"The starting point when applying what was said in Hatzimanolis, in order to determine whether an injury was suffered in the course of employment, is the factual finding that the employee suffered injury, but not while engaged in actual work. The next enquiry is what the employee was doing when injured. For the principle in Hatzimanolis to apply, the employee must have been either engaged in an activity or present at a place when his injury occurred. The essential enquiry is then: how was the injury brought about? In some cases, the injury will have occurred at and by reference to a place. More commonly, it will have occurred while the employee was engaged in an activity. It is only if and when one of those circumstances is present that the question arising from the Hatzimanolis principle becomes relevant. When an activity was engaged in at the time of the injury, the question is: did the employer induce or encourage the employee to engage that activity? When injury occurs at and by reference to a place, the question is: did the employer induce or encourage the employee to be there? If the answer to the relevant question is affirmative, then the injury will have occurred in the course of employment."*

The Federal Court found that the Tribunal did not undertake the enquiries outlined by the High Court in *PVYW*, and that Mr Lee's appeal should therefore be allowed. Undertaking the test set out in *PVYW*, the Federal Court considered that there was no opportunity for a finding other this acceptance of liability to be reached by the Tribunal, and therefore did not consider it was necessary to remit the matter back for reconsideration.

Lessons Learnt

The decision provides an indication as to how the Court will interpret the very recent decision of *PVYW.*

For more information on this article, please contact:

Claire Tota
Solicitor
Email: claire.tota@hbalegal.com
Direct Line: (08) 9265 6011

Brett Ablong
Partner
Email: brett.ablong@hbalegal.com
Direct Line: (08) 9265 6001

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