WORKING FROM HOME
THE SCOPE OF 'IN THE COURSE OF EMPLOYMENT'

INTRODUCTION

It is an enticing thought for a day's work to consist of answering a few work emails between dips in the pool and the next banana daiquiri. But, if you slip on the banana peel whilst walking from your computer to the pool, do you have a valid workers' compensation claim?

In a world where the place of work has become less defined, with hot-desking and working from home becoming the new norm, it is important to consider when an injury sustained at home will be held to arise "in the course of employment" for the purposes of the *Workers' Compensation and Injury Management Act 1981* (WA).

IN THE COURSE OF EMPLOYMENT

The phrase 'in the course of employment' was clarified in the decision of *Kavanagh v Cth* (1960) 103 CLR 547.

Dixon CJ at 556 importantly stated:

"the words 'arising in the course of the employment' describe a condition which is satisfied if the accident happens while the workman is doing something in the exercise of his functions although it is no more than ***an adjunct to or an incident of his service****."*

In other words, an accident is considered to have occurred in the course of employment, when the task is in aid of or incidental to the work.

The phrase was further considered in the landmark decision of *Hatzimanolis v ANI Corp Ltd* (1992) 173 CLR 473.

The implication of this case was that the scope of the phrase "in the course of employment" was broadened to include **intervals and interludes which occur during the course of employment**, where the employer has **induced or encouraged** the employee to spend those breaks at a particular place or in a particular way.[1]

[1] J Fiocco and M A Tedeschi, 'Section 5[5] Terms Used', *Workers' Compensation and Injury Management Act 1981 Annotated Legislation*.

The scope of the phrase has since come to include various circumstances, such as:

- an engineer contracting an infectious disease during a flight from Sydney to New York required by his employment;[2]
- a farmhand fixing a TV set that was not owned by his employer and not on the employer's property, as checking the weather was incidental to performing his duties;[3] and
- skiing down a mountain to return to a business meeting.[4]

In contrast, the following scenarios were considered not to fall within the scope of the phrase:

- a worker hit by a car during her lunch hour, whilst she was getting her lunch; and
- a worker at a roadhouse who lived on the premises falling on her way to the bathroom during the night.[5]

WORKING FROM HOME – INCIDENTAL TO EMPLOYMENT

Within the context of 'in the course of employment' we now direct our focus on instances where accidents occur whilst the worker is at home.

In the matter of *Van Oosterom v Aust Metropolitan Life Assurance Co Ltd* [1960] VR 507, liability for workers' compensation was considered when an insurance agent who worked from home with no set hours suffered a heart attack on a Saturday.

To provide some context as to the nature of his employment, the Applicant:

- operated from his residence but was required to travel from place to place making 'house calls';
- only attended on the Respondent's office on Fridays to hand in reports;
- had a work vehicle which was partly purchased by the Respondent; and
- did not have a specific room as a 'home office' but regularly performed clerical work in his lounge room.

When the heart attack occurred, the Applicant was in the process of walking to his car in the garage, for the purpose of attending on a client with respect to reinstatement of an insurance policy. **The Court held that this was in the course of employment**.

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[2] *Favelle Mort Ltd v Murray* (1976) 133 CLR 580.
[3] *L J Newing & Co v Newing* (WASC, SCL 8531, 12 September 1990, unreported).
[4] *Badawi v Nexon Asia Pacific Pty Ltd* [2009] NSWCA.
[5] *WorkCover/EML (Lauman Pty Limited t/a Roseworthy Roadhouse)* [2008] SAWCT 55.

The Court found that in such cases, there is no fixed place of employment; a liberal approach must be taken in regards to place.

What is of importance however, is that when the accident or injury occurs, the worker is performing a task which is incidental to his employment.

An example given by the Court was that if the worker was to be performing clerical work in the lounge room, but was required to travel to another room to collect ink, he would still be in the course of his employment.

In *Re Ledwidge and Optus Administration Pty Ltd* [2008] AATA 58, the Administrative Appeals Tribunal found that a field technician who was cleaning his work vehicle at home on a Sunday **was in the course of his employment**.

The nature of his employment was that:

- his usual working hours were Monday to Friday, 9am – 5pm;
- his managers encouraged him to keep his work vehicle clean;
- there were regular meetings on Mondays, and at these meetings managers would comment on the cleanliness of the work vehicles.

The Tribunal applied the principles of *Hatzimanolis* to conclude that the task he was performing was in preparation for his duties on Monday and thus incidental to his employment.

It was important that the Applicant was encouraged to have a clean vehicle; this suggested that cleaning the vehicle outside usual work hours was a reasonable task and incidental to his work duties.

In the matter of *WorkCover/EML (Lauman Pty Limited t/a Roseworthy Roadhouse)* [2008] SAWCT 55, the worker and her husband were sole directors and operators of the Roseworthy Roadhouse.

The worker and her husband resided in the living quarters of the roadhouse, and on one occasion the worker fell down the stairs on her way to the toilet during the middle of the night.

She was found **not to be in the course of her employment**, with regard had to the following factors:

- the premises constituted her usual place of residence, and not a remote location she was required to attend to carry out her duties; and
- it was difficult to see a connection between the task and the carrying out of her duties.

If it were the case that the worker moved from another residence, in order to live at the roadhouse (and if she was encouraged or induced to do so by her employer), this may have altered the Tribunal's opinion.

RECENT CASES

In *Hargreaves v Telstra [2011] AATA 417*, the worker, whilst working from home was struck by a violent coughing fit, as a result of which she left her work desk to get some cough mixture. In doing so, she fell down the stairs and sustained injuries.

This fall was found to be **in the course of employment** as the coughing constituted a need of absence from the work station for necessities of nature.

She fell again on another journey down the stairs; on this occasion her supervisor had asked her to check if her screen door at home was locked. This was established to be **in the course of employment** because the fall occurred whilst performing an instruction from her supervisor.

In *Demasi and Comcare* [2016] AATA 644, the worker was a producer and presenter for the ABC. She regularly worked from home and did so on the date of the incident. She would frequently go jogging whilst working from home during work hours (not during her specified lunch break).

The Applicant injured herself on one of her on morning runs and the Tribunal found that her injury was **not in the course of her employment**.

Some of the factors considered included:

- the Applicant worked sporadic hours, but often well past 5pm; and
- the Applicant regularly went jogging during the specified work hours and this was an accepted practice by the supervisors (however not encouraged or induced).

The Tribunal was of the view that the Applicant's morning run was 'indistinguishable' from a lunchtime run, even though a lunchtime run is undertaken during an ordinary recess in the workers' employment, and a run taken on an impromptu basis is not.

More recently, albeit in the industrial relations context, the issue was considered in the matter of *Australian Maritime Officers' Union v Remick Pty Ltd T/A Pro Dive Cairns* [2020] FWC 431 (30 January 2020).

This case does not specifically address working from home; however, it does demonstrate the element of a worker's "free will" vs "obligation to the employment" as a factor which is taken into consideration to determine if they were in the course of employment.

The Commission was tasked with determining whether boat masters and crew of a Great Barrier Reef tour boat were in the course of their employment when assisting passengers

during unpaid meal breaks.

The Deputy President took into account the following factors:

- the crew were encouraged to take their break amongst the passengers;
- passengers would often engage with the crew during their lunch breaks; and
- sometimes during the lunch break, the crew would be required to undertake tasks necessary to maintain the safety of passengers.

In these circumstances, employees may be required to perform tasks, even though they have been directed or encouraged by the employer to take an unpaid break. For example, if passengers engaged with staff during their meal and required assistance, staff would have no choice but to assist - given the nature of the industry and safety requirements.

On the facts established, the Commissioner found that the crew were **in the course of their employment**.

CONCLUSION

From the case law, it is evident that each case will turn on its facts; making it difficult to formulate a global approach to 'working from home' cases.

However from looking at the patterns of interpretation of the phrase, we can establish a guideline as to what factors need to be considered. These factors are:

1. Look at the contract of employment.
    (a) Is a place of work specified?
    (b) Are the hours of work specified?
2. What task was being performed at the time of the accident?
    (a) Was it incidental to the employment?
    (b) Was the task encouraged by the employer?
    (c) Was the task reasonable or required for the employment?
    (d) Was the worker on a break?
    (e) Was the break an ordinary recess which formed part of the employment or an impromptu absence during work hours?

It is a question of law that has not been recently considered in the Western Australian jurisdiction; therefore it has been necessary to broaden our consideration to interpretations of similar provisions interstate. By gaining a sense of the national approach to this question, local insurers will be able to adopt an approach to defending such claims which encompass the solidified principles in *Hatzimanolis* and the developments since.

Ultimately, such matters require an element of common sense; to answer the question of whether the worker was acting under the direction of their employer, incidentally/out of necessity to perform a work duty or if they were "*free from the employment and the duties of the employment*".[6]

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Should you require any further information relating to the above decision, please contact one of the following partners on telephone (08) 9221 3110.

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[6] His Honour Deputy President Judge McCusker, *West v WorkCover/QBE* [2005] SAWCT 1999 at [19].