RECENT DECISIONS

At fault driver's injuries arose out of employment!

Ballina Shire Council v Knapp [2018] NSWWCCPD 35 (27 August 2018)

Link to decision

Background

On 5 July 2014, at about 6:18am, the worker was driving to work to perform overtime when his vehicle was involved in a head on collision. The worker was severely injured and two passengers in the oncoming vehicle died as a result of their injuries. The worker was charged with dangerous driving occasioning death. He pleaded guilty and was sentenced to 12 months imprisonment.

As part of agreed facts tendered in the criminal proceedings, the worker admitted that he was using a mobile phone while driving either, at the time of, or shortly before the accident, and that he was driving at a speed of at least 111kph in a 100kph zone.

The worker subsequently made a claim for compensation against his employer, Ballina Shire Council, asserting that his injuries arose out of the course of employment or that the injuries had occurred while on a compensable journey. The claim was disputed, on the following grounds;

1. He did not suffer injury arising out of or in the course of employment (s4 of the *Workers Compensation Act 1987* (1987 Act)
2. There was no real and substantial connection between the accident on a journey and employment (s10(3A) of the 1987 Act)
3. If he was in the course of employment, then his gross misconduct by using a mobile phone and driving in excess of the speed limit took him outside the scope of his employment;
4. If he was on a journey, the injury was solely attributable to his serious and wilful misconduct (s10(1A) of the 1987 Act)

The Arbitrator found in favour of the worker, determining that the worker was on a journey and that his conduct that resulted in the injury was not 'serious and wilful'.

On appeal, DP Wood found that the Arbitrator had erred by not considering all of the relevant facts in assessing whether the worker's conduct was 'serious and wilful'. DP Wood found that the conduct of the worker was 'serious and wilful', but determined that as the injury 'arose out of employment' the causal nexus with employment was satisfied so that the worker's conduct was irrelevant to the determination of liability.

Legislation

Section 4 - Definition of "injury"

injury:

(a) means personal injury arising out of or in the course of employment,

Section 10 - Journey claims

(1) A personal injury received by a worker on any journey to which this section applies is, for the purposes of the 1987 Act, an injury arising out of or in the course of employment, and compensation is payable accordingly.

(1A) Subsection (1) does not apply if the personal injury is attributable to the serious and wilful misconduct of the worker.

(3A) A journey referred to in subsection (3) to or from the worker's place of abode is a journey to which this section applies only if there is a real and substantial connection between the employment and the accident or incident out of which the personal injury arose.

Decision of Arbitrator

The arbitrator accepted that the worker was on a journey and found that his telephone call to his supervisor on the way to work established a real and substantial connection between employment and the accident.

back to top

In relation to the dispute that section 10(1A) of the 1987 excludes the worker from compensation on a journey because the injury was attributable to 'serious and wilful' misconduct, the arbitrator concluded that the worker's conduct did not satisfy the threshold of 'serious and wilful'. He stated that the worker did not comprehend the risk of using his mobile phone and driving in excess of the speed limit. He found that in the absence of any evidence that the worker was aware of the risks associated with using his mobile phone while driving, he could not be considered to have wilfully ignored those risks.

Decision on Appeal

The employer appealed from the arbitral decision, arguing that the arbitrator did not take adequate account of the worker's conduct, and that the relevant legal authority regarding serious and wilful and/or gross misconduct was incorrectly applied.

DP Wood found that the arbitrator had erred by failing to consider the totality of the worker's conduct. She stated that the arbitrator's comment that the worker was driving 'slightly' over the speed limit was a value based assessment, and his discussion of the conduct did not take account of the total factual circumstances. She noted that the speed of the vehicle travelling at 111kph, on a single lane road, with no dividing safety barrier, and that using the mobile phone required him to take one hand off the steering wheel, was insufficiently addressed in the arbitral reasons. DP Wood decided it was appropriate to re-determine the issues in dispute.

DP Wood noted that it was not in dispute that the injury either arose out of or in the course of employment, and that there was a real and substantial connection between employment and the accident. The Council had only sought to argue that the worker's conduct was serious and wilful misconduct disentitling him to compensation while on a journey, or that gross misconduct took him out of the course of employment.

In relation to 'serious and wilful' misconduct, DP Wood disagreed with the arbitrator, she stated that it was common knowledge that driving while using a mobile phone was dangerous, and that by current standards of road safety speeding and using a mobile phone was a serious matter. She observed that police advertising campaigns had highlighted the serious risks associated with speeding and mobile phone usage, and a licensed driver must have knowledge of the risks associated with that conduct.

She also noted the relevance of the total speed of at least 111kph, and that a single lane highway provided minimal margin for driver error, both factors which increased the nature of the risk, which the worker had deliberately disregarded by his conduct.

As the injury to the worker resulted in serious and permanent disablement, there was no dispute raised by the insurer under section 14(2) of the1987 Act, that the worker was disentitled due to the injury being solely attributable to his serious and willful misconduct.

With respect to whether the worker suffered a compensable injury arising out of or in the course of employment, DP Wood found that there were causal factors relating to his being employed which resulted in the accident; namely, that he was calling his employer for a work related purpose on a work issued mobile phone. Thus, the worker's injury 'arose out of employment', which satisfies a causal relationship between the injury and employment. DP Wood stated that as there was a causal relationship between employment and the injury, whether the worker's conduct took him 'out of the course of employment' was irrelevant. She then referred to authorities in support of her determination:

- *Tarry v Waringah Shire Council - a worker engaged in a physical fight with a colleague had taken himself out of the course of employment, but because the fight was about work related matters the injury was considered to have arisen out of employment.*
- *Davis v Mobil Oil Australia Ltd - a worker injured in an altercation had refused to follow a direction of a supervisor, but the altercation arose out of employment because it was about work related matters.*
- *Kassim v Busways Blacktown Pty Ltd - held that a bus driver who assaulted a passenger was not in the course of employment at the time of the injury as his conduct took him out of the course of employment, but that as the altercation arose from provocation from the passenger, the injuries resulting from the assault arose out of employment.*
- *Which supports the finding that if an injury arises out of employment, the conduct or misconduct of a worker is not relevant to liability.*

On that basis, DP Wood found that a compensable injury had occurred under section 4 of the 1987 Act.

Interesting findings in this matter

- A person who suffers an injury due to an accident resulting from making a work related telephone call while on a journey to or from work is likely to satisfy the requirement for a real and substantial connection between employment and the accident.

back to top

- The conduct of a worker making a mobile phone call while driving, may or may not be, considered as 'serious and wilful misconduct' based on the totality of the factual circumstances of the accident, such as; speed of travel, road quality, traffic situation and location.
- A worker making a work related telephone call while on a periodic journey to work, who then suffers an injury as a consequence of making the phone call, may be considered to have suffered an injury which 'arises out of employment'.
- The findings made by the arbitrator and the Deputy President do not delineate between whether the worker was on a periodic journey (s10) when the injury occurred, or whether the injury occurred arising out of or in the course employment (s4). On one view, these concepts are mutually exclusive and cannot be simultaneously correct. A finding that the injury arose out of or in the course of employment must exclude the operation of the journey provisions.

For more information, please contact:

Robbie Elder
Senior Associate
robbie.elder@turkslegal.com.au

Craig Bell
Partner
craig.bell@turkslegal.com.au