Journey Claims - Keeping it 'real and substantial'

Summary

Dewan Singh and Kim Singh t/as Krambach Service Station v Wickenden [2014] NSWWCCPD 13

Link to the decision

Field v Department of Education and Communities [2014] NSWWCCPD 16

Link to the decision

Deputy President Roche of the Workers Compensation Commission has offered some insight into the interpretation of the words '*real and substantial connection between the employment and the accident*' contained in s 10(3A) of the *Workers Compensation Act 1987* (NSW) that must be satisfied in order to establish a liability for journey claims.

The decisions of ("Singh") and ("Field") were handed down within 9 days of each other in March 2014 and represent a shift in how those words are interpreted when compared to an earlier decision of Deputy President O'Grady in *Mitchell v Newcastle Permanent Building Society Ltd* [2013] NSWWCCPD 55 ("Mitchell"), that was handed down only 5 months previously.

The Facts

Singh

Ms Wickenden, was a casual employee at the Krambach Service Station, at Krambach NSW.

She usually worked a minimum of five hours a day for three days per week, starting at 9.30 am and finishing at 2.30 pm, with additional days as required. She normally rode her motorbike from her home at Nabiac to and from work. If she started and finished her work at the usual time, her journeys to and from work were in daylight.

From mid June 2012, her employer asked her to work longer hours to enable her to learn the additional duties required to open and close the service station. During the 'training' period, which was to last about three weeks, Ms Wickenden worked from 7.30 am until 5.30 pm.

On 5 July 2012, while still in the training period, Ms Wickenden closed the service station at the normal winter closing time of 5.30 pm and started her trip home in darkness. While riding her motorbike home, she was involved in an accident when a car driven by Ms Thomas swerved onto her side of the road, to avoid cattle and struck her motorbike.

Liability for the claim was denied on the basis that there was no 'real and substantial' connection between the worker's employment and the incident out of which the injury arose: s 10(3A).

It was not disputed that, but for s 10(3A), Ms Wickenden was on a journey to which sw 10 applies.

Arbitrator Caddies delivered a decision on 5 December 2013 in which he found that Ms Wickenden's journey

was a journey to which s 10(3A) applied because:

1. She usually finished work at 2.30pm when her journey home would be in daylight;
2. She was specifically required to work later on the date of her accident;
3. These extra duties placed her on the road in the dark;
4. The darkness made it more difficult to see the cattle;
5. The time of the day contributed to the accident in a manner that was real and of substance;
6. The lack of daylight on a country road reduced visibility for both the worker and the oncoming driver, reduced the time which both drivers had to react and reduced the opportunity to simply stop without an accident occurring;
7. The circumstance of confronting the cattle on a country road in the dark was a circumstance to which the worker was exposed because of her employment and would not otherwise have been exposed, and
8. The time of the journey, as dictated by the employer, contributed to the accident in a manner that was real and of substance.

The employer appealed.

Field

Mr Field worked for the Department of Education and Communities ('DEC') as a casual/relief primary school teacher. On 23 October 2012, he tripped and fell on broken and uneven ground in Yerrick Road, Lakemba, while walking to Hampton Park Public School.

As a casual/relief teacher an agency known as 'Casual Direct' (connected with DEC) would telephone him daily, usually between 6.30 am and 7.00 am, and tell him of the name and location of the school where he was needed. On 23 October 2012, he received a call at 7.30am asking him to attend Hampton Park Public School.

According to Mr Field he had *"taught there in the past and noted it was [a] strict school; staff were required to be present at the school by 8.30 am in order to be given lessons for the day, shown to the classrooms or given 8.30 am playground duty"*, so he hurriedly got dressed and ready and caught the first bus he could.

He continued "*A bus dropped me off near Lakemba Station at around 8.25 am … I noted the time; I only had a couple of minutes to get to the school so I walked hurriedly. I was half way up Yerrick Road towards Yangoona Rd when I tripped on [the] uneven surface. I fell to the ground heavily, hitting my head, shoulders, knees, and injuring my back".*

Mr Field fell at a point about 100 metres from the school's back entrance and noted " … *I didn't notice the crack. I was worried about being late. I was walking 3 times quicker than my usual pace".*

Arbitrator Edwards delivered a decision on 11 December 2013 in which he found that there was no real and substantial connection between Mr Field's employment and the accident out of which his injury arose because:

1. The causal nexus required by s 10(3A) is the connection between the employment and the incident as per *Mitchell;*
2. An absence of evidence meant he was unable to find that it was a requirement of DEC that at Mr Field be at the school by 8.30 am;
3. The link between the accident and the employment was too tenuous to meet the causal requirement of s 10(3A), and
4. The term 'connection' in s 10(3A) could not be construed as meaning a perception by Mr Field of an industrial commitment to pupils and the Principal to be at the school by 8.30 am.

Mr Field appealed.

The Decisions

Singh

Deputy President Roche found that Ms Wickenden did not have to prove that darkness was the cause of the accident. Further, the fact that the accident was caused by the actions of Ms Thomas did not defeat the requirement to establish a 'connection' between the worker's accident and her employment.

It is clear that the Arbitrator was satisfied Ms Wickenden met the test in s 10(3A) because her employment required her to work later than normal and required her to ride home in darkness, which exposed her to a risk of injury due to the darkness.

The Deputy President further explained that the expression 'real and substantial connection' does not require any causal relationship between the two circumstances or situations concerned. It simply requires an association.

The use of 'a', in s 10(3A), makes it clear that employment *"does not have to be "the" connection between the accident or incident … it only has to be "a" connection, albeit one that is real and of substance".*

By reference to the earlier decision of *Mitchell,* Deputy President Roche said "*Ms Wickenden's case fits within that special category to which Arbitrator Douglas referred (in Mitchell). If Ms Wickenden's case did not so fit, I find it very hard to contemplate a circumstance where section 10(3A) could apply".*

In *Mitchell*, the evidence did not establish the relevant connection between the employment and the accident where as in this case, s 10(3A) was satisfied because Ms Wickenden's employment required her to ride home in darkness and darkness played a role in the accident.

It was an obligation of Ms Wickenden's employment that she work back on the day of the accident. Because she worked back, she rode home in darkness on a narrow country road. On the evidence, the darkness played a role in the accident, though it may not have been the sole cause of the accident.

In these circumstances, the connection between the employment and the accident was real and of substance. These facts would not be enough to establish that, as a matter of commonsense, the employment caused the injury … however, they are enough to satisfy the different, less demanding, s 10(3A) test.

Field

The Arbitrator based his decision on the premise that Mr Field had to prove that his employment caused the accident or incident (the trip and fall). That was an error.

Deputy President Roche found that the '*logic of Mr Field's evidence was and is compelling. He explained the basis for his assertion that staff were required to be at the school by 8.30 am, namely, his past experience. He also explained why staff had to be present by that time. His reasons were logical and plausible. The respondent called no evidence to rebut Mr Field's evidence and did not challenge it in cross-examination'.*

The attempt to distinguish this matter from Singh because the worker in Singh was 'required' to work longer hours but Mr Field was not 'required' to hurry to the school on the morning he fell, was not accepted. The requirement was inferred from Mr Field's uncontested evidence.

Deputy President Roche found that it is no answer to a witness's evidence to say that it cannot be accepted because 'it is only his or her belief or perception'.

Finally, the stance the meaning of 'connection' in s 10(3A) provided in *Singh* only 9 days earlier was confirmed; that is '*connection' may, but does not necessarily, require a causal connection between the employment and the accident … it involves a wider concept than causation'.*

The Implications

The approach taken by Deputy President O'Grady in *Mitchell* has been softened by these latest decisions.

Now a 'real and substantial' connection may, although does not necessarily; involve a causal connection between the employment and the accident. That is the 'connection' does not need to be the cause of the worker's accident.' Connection' in s 10(3A) involves a concept wider than causation and certainly does not require that employment be the sole cause of the accident.

It can be expected that worker's solicitors will now revisit journey claims that were declined relying upon s 10(3A). This may result in a number of applications being made to insurers to review these decisions and perhaps inevitably an increase in the number of Applications filed in the Commission.

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