QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*Australian Leisure & Hospitality Group Pty Ltd v Simon Blackwood (Workers' Compensation Regulator) & Campbell* [2014] QIRC 105
PARTIES:	**Australian Leisure & Hospitality Group Pty Ltd** (Appellant) **v** **Simon Blackwood (Workers' Compensation Regulator)** (Respondent) and **Campbell, Jonathon** (Second Respondent)
CASE NO:	WC/2014/13
PROCEEDING:	Appeal against decision of Regulator
DELIVERED ON:	13 June 2014
HEARING DATES:	19, 20 May 2014
MEMBER:	Deputy President O'Connor
ORDERS:	**1. The appeal is allowed;** **2. The application for compensation dated 18 June 2013 is one for rejection;** **3. The decision of the first respondent dated 12 December 2013 is set aside;** **4. The decision of the self-insurer dated 7 August 2013 is restored; and** **5. The respondents are to pay the appellant's costs of and incidental to the appeal to be agreed or, failing agreement, to be the subject of a further application to the Commission.**
CATCHWORDS:	WORKERS' COMPENSATION - "INJURY" - MEANING OF - WHETHER AROSE OUT OF, OR IN THE COURSE OF, EMPLOYMENT - WHETHER EMPLOYMENT A SIGNIFICANT CONTRIBUTING FACTOR - Where appellant was an employer aggrieved by a decision of the Regulator - Where the second respondent was a person claiming an entitlement to compensation as a

dependant of the deceased worker - Where the deceased worker died as a result of injuries sustained when she dived into shallow water whilst in attendance at what was described as a "staff social event"/"Christmas party" - Whether the deceased worker was induced or encouraged to attend at the place where the injury occurred - Whether the injury was "referable to the place" - Whether the injury was suffered whilst the deceased worker was engaged in an activity in which she was induced or encouraged to engage

Workers' Compensation and Rehabilitation Act 2003, ss 32, 549

Barlow-Coard v Adelaide Central Community Health Service [2002] SAWCT 7
Comcare v Mather (1995) 56 FCR 456
Comcare v PVYW [2013] HCA 41
Coulthard v South Australia (1995) 63 SASR 531
Croning v Workers' Compensation Board of Queensland (1997) 156 QGIG 100
Electrolux Pty Ltd v Zakrevsky (Unreported, Full Court of the Supreme Court of Western Australia, Wallace, Smith, Kennedy JJ, 9 October 1981)
Hatzimanolis v ANI Corporation Ltd (1992) 173 CLR 473
Kennerley v Qantas Airways Ltd (WC/2011/7) - Decision <http://www.qirc.qld.gov.au>
Labschin v WorkCover Corporation/Royal Sun Alliance Workers' Compensation (SA) Ltd (Eagle Paint and Panel) [2000] SAWCT 146
Newbury v Suncorp Metway Insurance Ltd [2006] 1 Qd R 519
Newman v Andgra Pty Ltd (2002) 171 QGIG 883
Qantas Airways Limited v Q-Comp and Blanch (2009) 191 QGIG 115
Thiess Pty Ltd v Q-COMP (WC/2009/74) - Decision <http://www.qirc.qld.gov.au>
Williams v Q-Comp (Unreported, Magistrates Court of Queensland, Magistrate Lynn, 11 February 2004)
WorkCover Queensland v BHP (Qld) Workers' Compensation Unit (2002) 170 QGIG 142

APPEARANCES:

Mr P. B. Rashleigh, instructed by McInnes Wilson Lawyers, for the appellant.
Mr P. B. O'Neill for the first respondent, directly instructed.
Mr R. Reed, instructed by Maurice Blackburn Lawyers, for the second respondent.

Decision

[1] This is an appeal by Australian Leisure and Hospitality Group Pty Ltd ("the appellant") pursuant to s 549 of the *Workers' Compensation and Rehabilitation Act 2003* ("the Act") from a decision of the first respondent ("the Regulator") which overturned a decision of WOW Care, a self-insurer under the Act, and accepted a claim by the second respondent ("Campbell") for workers' compensation benefits under the Act consequent upon the death of his wife, Mrs Jukes Campbell ("the deceased").

[2] The deceased was employed as a fine wine manager by the appellant, Australian Leisure and Hospitality Group Pty Ltd, trading as Dan Murphy's Noosaville.

[3] It is not in issue between the parties that the deceased was a "worker" for the purposes of the Act.

[4] On 31 March 2013 the deceased died as a result of head and neck injuries sustained on 29 March 2013 after diving into the Noosa River while attending a "Christmas" function organised by her work social club.[1]

[5] The claim by Campbell is a claim by a dependant pursuant to ch 3 pt 11 of the Act.

Nature of Appeal

[6] In short, the appellant contends that the deceased's injury did not arise out of, or in the course of, her employment with Dan Murphy's and her employment was not a significant contributing factor to her injury.

Statutory provisions

[7] The Act relevantly provides:

> "**32 Meaning of injury**
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> (1) An injury is personal injury arising out of, or in the course of, employment if—
>
> (a) for an injury other than a psychiatric or psychological disorder—the employment is a significant contributing factor to the injury;
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> …
>
> (3) Injury includes the following—
>
> …
>
> (d) death from injury arising out of, or in the course of, employment if the employment is a significant contributing factor to causing the injury;…"

[1] Exhibit 1(3) "Death Certificate".

The Evidence

[8] Michael Smith was the manager of the Dan Murphy's Noosaville liquor outlet, a position he had held since March 2012.

[9] The Dan Murphy's store was open all year round with the exception of Christmas Day and Good Friday. It was the practice to hold an annual staff social event ("Christmas Party"), but no such event was held in 2012.

[10] Smith had previously been the manager at the Dan Murphy's at Hervey Bay and had seen the collegiate benefit of having some form of social get together. The evidence suggests that Smith supported the event as it was "likely to improve staff cohesion and staff moral".

[11] Whilst no formalised social club was in existence, a small working group was established which included Sue-Ellen Giacca, the assistant store manager at the Dan Murphy's Noosaville. An honour system was established to sell confectionary and soft drinks to staff with the proceeds of the sales going to fund a Christmas party.

[12] A notice was prepared by Giacca and placed in the staff room setting out various options for a staff event and staff were asked to indicate their preference. One of the options on the notice was a "BBQ at The Woods".

[13] It was decided to hold a "Christmas Party" at The Woods - located at the end of Hastings Street at Noosa and adjoining the Noosa River - on Good Friday, 29 March 2013.

[14] A further notice was placed on the staff notice board seeking an indication from staff as to whether they were attending the event at The Woods and, if so, their preference as to food and drink. Smith maintained an "Excel" spreadsheet of staff preferences for food and drink and to monitor the budget.

[15] It is common ground that Smith and Giacca purchased food, drinks and ice from the $800 raised from the honour system. The ice tubs and decorations were supplied by Dan Murphy's and the set-up at The Woods was primarily undertaken by Smith and Giacca with the assistance of a junior member of staff.

[16] The Christmas party started at around 11am and all but two of the approximately 20 to 30 staff members attended with their families.

[17] The deceased arrived at The Woods sometime after midday. In his evidence, Campbell said that his wife went to everything and "she felt it was her duty" to attend the Christmas party.

[18] At around 3pm the deceased and Nicole Perry asked Smith if he would take photographs of them running into the Noosa river. Smith's evidence was:

> "And I was standing at a table that was closest to the water and I remember Jigs asking me could I take some photos of them running into the water.
> …

> But you were asked to take some photos of Ms Campbell and Ms Perry running into the water? Yes. So I took a series of photos of them running in. And more or less as soon as they both dove in the water, Nicky started screaming and I ran straight into the water and pulled Jigs out of the water."

[19] Smith recalls hearing Nicole Perry calling for help. In response, Smith ran into the Noosa River to assist. He was joined by an off-duty lifesaver and members of the Noosa Surf Club. An ambulance was called and the deceased was transported to the Noosa Hospital. The deceased died on 31 March 2013.

Analysis

[20] The majority in *Comcare v PVYW* [2013] HCA 41 ("*PVYW*") held that when considered in proper context *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473 did not lay down an inflexible rule of universal application that "absent gross misconduct on the part of a particular employee, an employer who requires an employee to be present at a particular place away from their usual place of work will be liable for any injury which the employee suffers whilst present there".[2]

[21] In *Hatzimanolis* the High Court held (at 483) that an injury will more readily be seen as occurring in the course of employment when it is sustained in an interval or interlude within an overall period of work than when it is sustained in an interval between 2 discrete periods of work. It was the principles relevant to determining what constituted 'the course of employment' in an interval or interlude within an overall period of work that PVYW was concerned with (see [6], [61], [99]).

[22] The decision in *PVYW* has clarified the applicable principles to be applied in determining when an employee is "in the course of employment" for the purposes of workers' compensation legislation.

[23] The majority in *PVYW* concluded that the essential inquiry is "how was the injury brought about". They held that an injury will have been suffered in the course of employment if the injury was either:

1. "suffered by an employee whilst engaged in an activity in which the employer has induced or encouraged the employee to engage" or;
2. "where an injury was suffered at and by reference to a place where the employer had induced or encouraged the employee to be."[3]

[24] The majority held:

> "The starting point in 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 an employee suffered injury, but not whilst 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 the 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 the place. More

[2] *PVYW* [2013] HCA 41 [9], [11].
[3] Ibid [38], [40], [61].

> 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 injury, the question is: did the employer induce or encourage the employee to engage in 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.
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> It follows that where an activity was engaged in at the time of the injury, the relevant question is not whether the employer induced or encouraged the employee to be at a place. An employer's inducement or encouragement to be present at a place is not relevant in such a case."[4]

[25] The majority went on to state:

> "An inducement or encouragement to be at a particular place does not provide the necessary connection to employment merely because an employee is injured whilst engaged in an activity at that place."[5]

[26] Crucially, an inducement or encouragement to be at a particular place does not provide the necessary connection to employment merely because an employee is injured while engaged in an activity at that place.

[27] The majority in *PVYW* held:

> "Because the employer's inducement or encouragement of an employee, to be present at a particular place or to engage in a particular activity, is effectively the source of the employer's liability, the circumstances of the injury must correspond with what the employer induced or encouraged the employee to do. It is to be inferred from the factual conditions stated in *Hatzimanolis* [54] that for an injury to be in the course of employment, the employee must be doing the very thing that the employer encouraged the employee to do, when the injury occurs."[6]

[28] Adopting the reasoning in *PVYW* when an activity was engaged in at the time of injury, the question to be considered by the Commission is: did the employer induce or encourage the employee to engage in that activity? If the answer to the question is yes, then the injury is within the course of employment. If it is no, then it is outside the course of employment.

[29] The activity to be considered is the diving into the Noosa River. It is not, as submitted by the Regulator, the Christmas party. It must be the injury engaged in by the employee at the time of the injury.

[30] Counsel for the Regulator referred the Commission to a series of authorities to support his submissions in relation to whether an injury occurring in a social context

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[4] Ibid [38]-[39].
[5] Ibid [60].
[6] Ibid [35].

could amount to "in the course of employment". In particular, *Williams v Q-Comp*,[7] *Labschin v WorkCover Corporation/Royal Sun Alliance Workers' Compensation (SA)*,[8] *Electrolux Pty Ltd v Zakrevsky*,[9] and *Barlow-Coard v Adelaide Central Community Health Service*[10] are cases which turn on their own facts and have, in my view, a greater connection with work. The Commission was also referred to *Qantas Airways Limited v Q-Comp and Blanch*,[11] *Thiess Pty Ltd v Q-Comp*,[12] and *Kennerley v Qantas Airways Ltd*[13] to support the submission that, for employment to be a significant contributing factor to the injury, the employment must be important or of consequence.

[31] It was submitted by Counsel for the Regulator that the evidence of Smith supports a conclusion that he had induced or encouraged Campbell to engage in the activity that she did, namely, to dive into the Noosa River. It was submitted that by the taking of photographs he had encouraged the deceased to dive into the Noosa River.

[32] The evidence does not, in my view, support a conclusion that Smith induced or encouraged the deceased to dive into the Noosa River. The evidence of Smith was that he was asked to take photos of the deceased and Perry running into the water. It was never suggested to him by the deceased that she proposed to dive head first into the Noosa River.

[33] The submission of the Regulator also ignores the evidence of Giacca which was as follows:

> "Did she have any discussion with you about going into the water? She certainly did.
>
> All right. Are you able to recall what she said? She was trying to convince myself and another staff member to run in and dive into the water with her, and I told her it was a stupid idea."

[34] I do not accept the submission that the employer had induced or encourage the employee either expressly or impliedly to engage in the activity. The evidence of Smith was as follows:

> "Now, an incident happened at around 3 o'clock that afternoon. Can you just explain to the Commission what happened, or what you saw happening? So there was Dukes and another girl, Nicky, who was working at the store at the time
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> What was her last name? Nicky Perry. And I was standing at a table that was closest to the water and I remember Jigs asking me could I take some photos of them running into the water. For what reason, I don't really know to be honest, other than maybe just to take the

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[7] (Unreported, Magistrates Court of Queensland, Magistrate Lynn, 11 February 2004).
[8] [2000] SAWCT 146.
[9] *Electrolux Pty Ltd v Zakrevsky* (Unreported, Full Court of the Supreme Court of Western Australia, Wallace, Smith, Kennedy JJ, 9 October 1981).
[10] [2002] SAWCT 7.
[11] (2009) 191 QGIG 115.
[12] *Thiess Pty Ltd v Q-COMP (WC/2009/74) - Decision <http://www.qirc.qld.gov.au>* .
[13] *Kennerley v Qantas Airways Ltd (WC/2011/7) - Decision <http://www.qirc.qld.gov.au>* .

> Well, if you don't know, don't speculate? Yes.
>
> But you were asked to take some photos of Ms Campbell and Ms Perry running into the water? Yes. So I took a series of photos of them running in. And more or less as soon as they both dove in the water, Nicky started screaming and I ran straight into the water and pulled Jigs out of the water."

[35] In cross-examination, Smith gave the following evidence:

> "People that had attended the Christmas function, including some of the children of staff members, had gone swimming in the Noosa River? Correct.
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> You had observed that to occur? Correct.
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> You had taken no step to speak to any of those people to direct them not to swim? No.
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> And indeed, prior to Ms Campbell going into the water, she had approached you to tell you that she and Ms Perry intended to run into the water. That's correct? Correct.
>
> And she in fact asked you to take some photographs? Correct.
>
> You agreed with that proposal? Yes.
>
> And indeed, we can take it from that that you gave no direction or instruction to Ms Campbell or Ms Perry that they weren't to go into the water? No.
>
> Correct. All right. And you subsequently then took the photographs, which are part of exhibit 1, as Ms Campbell and Ms Perry ran into the water. Is that so? Correct."

[36] In *Comcare v Mather* (1995) 56 FCR 456 ("*Mather*"), Kiefel J wrote:

> "In my view, 'encouragement' should not be given a narrow meaning and limited to some positive action and in specific terms which might lead the employee to undertake a particular activity or attend at a particular place."[14]

[37] Her Honour went on to note:

> "To be said to have, expressly or impliedly, induced or encouraged an undertaking or presence at some location could refer to, by way of example only, requirements, suggestions, recognition of practices, fostering of participation, or providing assistance and may include the exercise of discretion or choice on the part of the employee."[15]

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[14] *Mather* (1995) FCR 456, 462.
[15] Ibid.

[38] In reliance on *Newbury v Suncorp Metway Insurance Ltd* [2006] 1 Qd R 519 and *Croning v Workers' Compensation Board of Queensland* (1997) 156 QGIG 100 it was submitted by the appellant that in circumstances where the injury occurs outside work hours and does not involve a work activity, for a worker to be compensable the employer must encourage or induce a worker to engage in the activity which caused the injury. It is not enough that the deceased was at a place, even if induced by her employer to be there. What must be established is that the employment needs to be a significant contributing factor causing the injury. It must be a real or effective cause of the injury, not merely the setting in which it occurs.

[39] In *Coulthard v South Australia* (1995) 63 SASR 531, Debelle J observed:

> "While there are cases such as *Lloyd v Grace Smith & Co* [1912] AC 716 where an employee is liable even though the employee has wrongfully acted solely for his own benefit, generally speaking, an employer is not liable where the employee has acted outside the scope of his employment or has engaged in a frolic of his own. As the House of Lords noted in *Kooragang Investments Pty Ltd v Richardson and Wrench Ltd* [1982] AC 462 at 473:
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> > 'It remains true to say that, whatever exceptions or qualifications may be introduced, the underlying principle remains that a servant, even while performing acts of the class for which he was authorised, or employed, to do, may so clearly depart from the scope of his employment that his master will not be liable for his wrongful acts.'[16]

[40] In *WorkCover Queensland v BHP (Qld) Workers' Compensation Unit* (2002) 170 QGIG 142, Hall P said:

> "The critical case is *Kavanagh v Commonwealth* (1960) 103 CLR 547. The case concerned a worker who had ruptured his oesophagus as a result of vomiting at work. By a majority the High Court held that it was enough that Mr Kavanagh's vomiting fit occurred while he was 'at work'. Dixon C.J. (at 557) and Fullagar J. (at 559) expressly repudiated the view that an accident would not occur 'in the course of the employment' if the workman could equally well have sustained the injury had he not been at work at all. I accept, of course, that a mere 'temporal' relationship between the injury and the work is insufficient. An employee who sustains an injury whilst on a frolic of his own in his employer's time has no entitlement to compensation. The essential notion is that of 'being on the job', Sykes and Yerberry, *Labour Law in Australia*, (2nd edition) Butterworths at para [1322]. In Charles R. Davidson v McRobb [1918] AC 304 at 321 Lord Dunedin put the matter this way:
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> > 'In my view, "in the course of employment" is a different thing from "during the period of employment". It connotes, to my mind, the idea that the workman or servant is doing something which is part of his service to his employer or master. No doubt it need not be actual work, but it must, I think, be work or the natural incidents connected with the class of work ...'.

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[16] *Coulthard v South Australia* (1995) 63 SASR 531, 554.

It seems to me to be plain that a workman who changes his clothes in the change room provided by his employer at the conclusion of his shift is, whilst doing so, engaged in a natural incident of his employment'."

[41] Whether or not a worker has embarked on a "frolic of his own" will always be a question of fact and degree.[17]

[42] I accept the submission of the appellant that it was because of the behaviour of the deceased that she suffered her injury. In that regard she was on a frolic of her own. To use the words of the appellant in submissions to the High Court in PVYW, "… the employee makes a wholly private choice to engage in an activity which falls outside the ambit of the employer's requirement that the employee be away from the usual 'place' of work. Such choices will carry their own benefits, risks and consequences which the employer is not required to be an insurer against."

[43] It was conceded by the appellant that the deceased was, on the evidence before the Commission, encouraged to attend the Christmas party at The Woods on 29 March 2013. However, it was not conceded that the employer induced or encouraged the deceased to engage in the activity that she did, namely the diving into the Noosa River. For the reasons stated above, I cannot conclude that the evidence before the Commission supports a conclusion that the deceased was induced or encouraged, either implicitly or explicitly to undertake the activity she did.

Findings

[44] I make the following findings:

- The deceased was a worker for the purposes of the Act;
- The deceased suffered an injury, namely neck and head injuries which resulted in her death on 31 March 2013;
- I am not satisfied, on the balance of probabilities, that the evidence before the Commission is sufficient to conclude that the injury sustained by the deceased on 29 March 2013 arose out of, or in the course of her employment with the appellant; and
- I am not satisfied, on the balance of probabilities that the deceased's employment was a significant contributing factor to her injury.

[45] The appellant has discharged its onus of establishing that the injury sustained by the deceased on 29 March 2013 resulting in her death was not an injury within the meaning of s 32 of the Act.

Orders

[46] I make the following orders:

1. The appeal is allowed;
2. The application for compensation dated 18 June 2013 is one for rejection;

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[17] *Newman v Andgra Pty Ltd* (2002) 171 QGIG 883.

3. The decision of the first respondent dated 12 December 2013 is set aside;
4. The decision of the self-insurer dated 7 August 2013 is restored; and
5. The respondents are to pay the appellant's costs of and incidental to the appeal to be agreed or, failing agreement, to be the subject of a further application to the Commission.