

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Wilson v Simon Blackwood (Workers' Compensation Regulator)* [2014] QIRC 097

PARTIES: **Wilson, Robert**
(Appellant)

v

Simon Blackwood (Workers' Compensation Regulator)
(Respondent)

CASE NO: WC/2013/290

PROCEEDING: Appeal against a decision of Simon Blackwood (Workers' Compensation Regulator)

DELIVERED ON: 30 May 2014

HEARING DATES: 7 and 8 April 2014

MEMBER: Industrial Commissioner Fisher

ORDERS:

- 1. The appeal is dismissed.**
- 2. The decision of the Regulator is confirmed.**
- 3. Costs are reserved.**

CATCHWORDS: WORKERS' COMPENSATION - APPEAL AGAINST DECISION - Injury to both shoulders at picnic - Where the employment relationship involves family - Whether injury arose out of or in the course of employment - Whether employer induced or encouraged appellant to engage in the activity - Whether employer induced or encouraged appellant to engage in water safety role - Whether employer induced or encouraged appellant to ride on an inflatable biscuit - Not found employer induced or encouraged appellant to engage in the activity - Appellant unable to establish injury satisfies elements of s 32(1) of Act - Determined injury did not arise out of or in the course of employment - Appeal dismissed.

CASES: *Worker Compensation and Rehabilitation Act 2003, s 32(1)*

Comcare v PVYW [2013] HCA 41
Hatzimanolis v ANI Corporation Ltd [1992] HCA 21; (1992) 173 CLR 473
Pioneer Studios Pty Ltd v Hills [2012] NSWCA 324

APPEARANCES:

Ms S. Anderson, Counsel instructed by Shine Lawyers for the Appellant.
 Mr C. Clark, Counsel directly instructed by Simon Blackwood (Workers' Compensation Regulator), the Respondent.

Decision

- [1] Robert Wilson was living in Brisbane in 2012 when he was asked by his nephew, Richard Wilson, whether he would be interested in working for his company, Wilson Survey Group (Qld) Pty Ltd (the Wilson Survey Group), which is located in Emerald. Robert Wilson accepted the offer and commenced employment on 19 February 2012.
- [2] On Good Friday 6 April 2012, Robert Wilson and his fiancée, Liying Wang, joined Richard Wilson, his wife, children and mother, and Gail Kruger, her husband, children and parents in a picnic and water sports at the Fairbairn Dam. Ms Kruger is the Office Administrator for the Wilson Survey Group. Robert Wilson claims to have sustained an injury to both shoulders while riding an inflatable "biscuit" attached to Richard Wilson's speedboat.
- [3] The key issue to be determined in this appeal is whether the injury arose out of or in the course of employment.

The Nature of the Employment

- [4] Nothing was put in writing at the commencement of Robert Wilson's employment. The absence of any such documentation has led to some differences of opinion as to Robert Wilson's position and employment conditions.
- [5] Robert Wilson claims to have been employed as a Business Development Officer on a salary of \$80,000 per annum. He said his duties were to be Richard Wilson's off-sider; to help gather information at the coal seam gas processing plant; to examine the business and recommend improvements as well as to get and keep Richard Wilson fit.
- [6] Richard Wilson said that he approached his nephew with a request to help with his weight management. No salary was discussed at the time although they had an understanding that Robert Wilson would be paid. Robert Wilson was provided with accommodation on the property for which he did not pay rent. Although Robert Wilson was inducted so that he could do mine site visits, nothing came of that. Essentially, Robert Wilson undertook personal training duties and acted as caretaker on the property.

- [7] Richard Wilson provided a letter to Robert Wilson stating that he was employed as a Business Development Officer on an annual salary of \$80,000. Although it was Richard Wilson's intention for this role to be fulfilled, it is clear that the duties Robert Wilson actually performed while employed were not substantially those of a Business Development Officer. His primary duty was to get and keep Richard Wilson fit. Robert Wilson had previously worked as a physical education teacher and had trained Richard Wilson on an earlier occasion. Robert Wilson trained Richard Wilson for two hours each morning and often in the evening, five to six days per week. There were some occasions when the training could not occur because Robert Wilson was away. His other duties were directed more towards Richard Wilson's stock horse stud which Richard Wilson described as caretaking.
- [8] While employed by the Wilson Survey Group, Robert Wilson did not receive a salary equating to \$80,000 per annum. In fact, for the period of his employment, Robert Wilson was paid substantially less.
- [9] Robert Wilson ceased employment and living on the property on or about 11 May 2012.

The Event

- [10] **Robert Wilson:** Robert Wilson said that on the morning of Good Friday 2012 he trained Richard Wilson as usual and did his normal chores round the property. He told his fiancée to sleep in as there was not much on after his chores were completed. After completing his chores and breakfast, he was told by Richard Wilson that "we're going to the dam today. You're coming with us. Go to town, fill up with fuel and get the vehicles ready to go to the dam." Robert Wilson said Richard Wilson told him it was the staff office picnic. Under cross-examination, Robert Wilson said he had no interest in going to the dam and he would not have gone had he not been directed to do so. In addition, Richard Wilson gave him a specific direction to act as an observer on the boat as required by Queensland Transport regulations as he (Robert) had a boat licence.
- [11] Robert Wilson said he did not know which staff were invited. On arrival at the dam, Ms Kruger was there with her husband, children and parents.
- [12] During the morning Richard Wilson had driven the boat at high speed, causing his children to scream and cry. After lunch, Robert Wilson said Richard Wilson repeatedly encouraged him to have a ride on the biscuit. Robert Wilson declined to do so but eventually agreed because Ms Kruger's son had decided to have a ride and he thought his weight would help stabilise the device.
- [13] Richard Wilson was driving the speedboat, doing tight turns and travelling very fast. As the boy was crying, Robert Wilson told him to let go of the rope. As Richard Wilson was curving round, the biscuit hit a small bow wave, which flung the boy into Robert Wilson's face. Before Robert Wilson could let go, the biscuit dived straight into the main bow wave. This broke his grip causing him to shoot up in the air by two metres. When he landed, he had pins and needles in one shoulder and excruciating pain in the other shoulder. Richard Wilson turned the boat around and came back to pick them up. Robert Wilson told him that he had "stuffed my shoulders", to which Richard replied that he was sorry but that he did not see him. Robert Wilson had difficulty climbing back into the boat and could not help Richard

Wilson put all the gear together to leave the dam. Although he had driven to the dam, Robert Wilson was unable to drive home.

- [14] Robert Wilson said his left shoulder was worse than the right shoulder. Once he arrived back at the property, he iced the left shoulder and took "massive" amounts of Panadol. He did not go to the doctor until 29 May 2012 as he did not have any money.
- [15] **Liying Wang:** On the morning of Good Friday, Robert Wilson told her, "we have to go". When she queried where they were going, Robert said, "I have to go with Richard to the dam. If you want to go, then you can go with me." Ms Wang agreed to go.
- [16] Richard Wilson, Robert Wilson and Ms Kruger's son were the only passengers on the last boat run. On their return, Ms Kruger's son was scared and crying. Robert Wilson said he could not lift his arm and he would have to have another operation. Ms Wang confirmed that Robert Wilson was unable to assist with loading the boat or drive home.
- [17] On their arrival home, Ms Wang assisted Robert Wilson to ice his shoulder. She said he took Panadol to help him sleep. He told her they had no money to be able to see a doctor in town.
- [18] **Gail Kruger:** Ms Kruger said that she suggested to Richard Wilson that they go to Fairbairn Dam on Good Friday as her family had recently bought a jet ski and her parents were staying with her. She took salad and prawns which she paid for. The two families had socialized in the past.
- [19] Ms Kruger said that her son had gone out on the biscuit with Robert and Richard Wilson. Her son was not concerned with the boat ride and she was unaware of any injuries Robert Wilson may have suffered.
- [20] **Richard Wilson:** Richard Wilson said his family had socialized on a few occasions with Ms Kruger's family, including going to Fairbairn Dam together. They had discussed their families going to Fairbairn Dam on Good Friday for a barbeque and to ski. The arrangements were informal. Both families brought food to share. He denied it was an office social event as if it had been, the five or six surveyors and their families who lived in Emerald would have also been invited.
- [21] Richard Wilson said he told Robert Wilson after training that morning that he was going to the dam and asked whether he would like to come. There was no other work to be done and the invitation was issued on the basis of having Robert Wilson join with Richard Wilson's family for the day. He did not direct Robert Wilson to attend.
- [22] When Robert Wilson said he would like to come, Richard Wilson asked him to get some ice. To do this, he needed to drive into Emerald - about seven kilometres away. Under cross-examination Richard Wilson said he might have asked Robert Wilson to get fuel for the car but not for the boat. Richard Wilson was aware that Robert Wilson held a boat licence. However, the invitation to attend was not made on the basis that Robert Wilson was required to assist with the boat and arrangements for the day.

- [23] Richard Wilson agreed that he had driven the boat at speed in the morning and his children had cried. However, he said that the incident with Ms Kruger's son falling off and hitting Robert Wilson's nose had occurred in the morning. Robert Wilson climbed into the boat and did not complain about his shoulders. He accepted though that at some point during the day Robert Wilson hurt his shoulders.

Consideration and Findings

- [24] It is common ground that on Good Friday 2012, Robert Wilson trained Richard Wilson before departing for the dam later that morning. Where the parties are at odds is whether Robert Wilson sustained an injury in the course of his employment. Determination of this issue requires consideration of whether the employer induced or encouraged Robert Wilson to attend the staff office picnic at the Fairbairn Dam.
- [25] The Workers' Compensation Regulator, Simon Blackwood (the Regulator) also addressed the issue of whether Richard Wilson induced or encouraged Robert Wilson to ride on the biscuit. The Appellant raised the issue of whether Robert Wilson was induced or encouraged to act as a safety officer on the boat but said, in answer to a question from the Queensland Industrial Relations Commission (the Commission), that it was unnecessary to make a finding on this matter because he was not injured while performing that role.
- [26] The question of whether an employee sustains an injury in the course of employment where that injury occurs in an interval between periods of actual work was recently considered by the High Court of Australia in *Comcare v PVYW*¹ ('*Comcare*'). In that matter the High Court was required to consider the reasoning in *Hatzimanolis v ANI Corporation Ltd*² ('*Hatzimanolis*'). The majority (French CJ, Hayne, Crennan and Kiefel JJ) said:

"[38] 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 the 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 a place. More commonly, it will have occurred while the employee was engaged in activity. It is only if and when one of those circumstances is present that the question arising from *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 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.

¹ *Comcare v PVYW* [2013] HCA 41.

² *Hatzimanolis v ANI Corporation Ltd* [1992] HCA 21; (1992) 173 CLR 473.

- [39] 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.
- [40] ... An injury occurs at a place when the circumstance of the injury is referable to the place."
- [27] The Commission accepts that Robert Wilson performed work on Good Friday by undertaking the personal training of Richard Wilson and carrying out the caretaking type tasks. The Appellant contends that Robert Wilson was paid for the work performed on Good Friday but again this is uncertain on the evidence, given the infrequency of payment. I am prepared to accept however, that the personal training and the work performed around the property on Good Friday 2012 was work for which Robert Wilson was entitled to be paid as part of his employment arrangements.
- [28] It is unclear on the evidence whether another personal training session was scheduled for the evening of Good Friday. In relation to whether other work was required to be performed that day, Robert Wilson said, "there wasn't much on after I finished my chores". In the circumstances I consider that while work was performed on the morning of Good Friday, there was to be an interval or an interlude before the next period of work was to be performed, whether that was to be later on Good Friday or on Easter Saturday.
- [29] During the interval, Robert Wilson went to the Fairbairn Dam. The Commission notes that the mechanism of injury as explained by Robert Wilson in the hearing differs from that recorded in the notes of his General Practitioner. This difference was raised by the Regulator for the purposes of considering Robert Wilson's credit. I proceed on the basis that Robert Wilson suffered an injury on 6 April 2012 at the Fairbairn Dam. Consistently with the reasoning of the majority in *Comcare*, Robert Wilson's injury occurred whilst he was not engaged in actual work.
- [30] Consideration must then turn to how the injury was brought about. The injury is said to have occurred when Robert Wilson was riding on a biscuit whilst on a picnic at the Fairbairn Dam. Given he was engaged in an activity, the critical question in this case is whether the employer induced or encouraged Robert Wilson to engage in the activity of the "staff office picnic" at the Fairbairn Dam on Good Friday 2012. The Appellant submits that Robert Wilson attended at the Fairbairn Dam because his employer directed him to do so. Further, it is impossible to sever the familial relationship from the employment relationship. The Regulator contends however that it was a family outing.
- [31] The Commission accepts that Robert Wilson lived and worked on Richard Wilson's property and, given it was located some distance from the town of Emerald, Robert Wilson largely remained on the property. However, the evidence shows that Robert Wilson left the property on a number of occasions, including periods of some weeks to attend to personal business. This flexibility suggests that the family relationship impacted on the employment relationship. The mere fact that Richard Wilson (through his company) was the employer of Robert Wilson does not mean that each and every interaction between them on the property was or must be an incident of the employment relationship.

- [32] The Commission finds that the "staff office picnic" at the Fairbairn Dam on Good Friday 2012 was not an activity of the Wilson Survey Group. The only regular office staff are Richard Wilson and Ms Kruger although Richard Wilson's wife also works part-time in the office. About five or six surveyors (and their families) are resident in Emerald. They do not regularly work in the office although they may attend the office before going out into the field. Although Robert Wilson said Richard Wilson described the event as a staff office picnic, I do not accept that evidence. I consider that had the event been a "staff office picnic" then the Wilson Survey Group would have been responsible for the provision and payment of the food. The evidence from Ms Kruger is that she organized some food for which she paid as did Richard Wilson. I also consider it likely that had it been an office event, the surveying staff and their families would have also been invited.
- [33] The "office staff" of Richard Wilson, Mrs Wilson and Ms Kruger (and their families) had socialized on several occasions, including previous trips to the Fairbairn Dam. The trip on Good Friday 2012 was no different, coinciding with the recent purchase by the Krugers of a jet ski and the visit by Ms Kruger's parents. Richard Wilson's mother was also visiting and was invited. Ms Kruger appears to have initiated the outing. In my view, the event on Good Friday 2012 at the Fairbairn Dam was nothing more than another informal, social occasion organized by friends from the office who also happened to be employer and employee and included their extended families.
- [34] The evidence from Richard Wilson and Ms Kruger is that the excursion was arranged with minimal planning. This contrasts with employer organized social events as described by Basten J in *Pioneer Studios Pty Ltd v Hills*,³
- "37 ... it is now well accepted that social events (such as the office Christmas party) and recreational activities (such as trips on days off work for employees required to remain at remote locations) can well form part of the course of employment. Such events and activities tend to be marked by the employer's commitment of time and resources to organising the events and encouraging staff to attend."
- [35] Because it was not an activity of the employer, I have determined that Richard Wilson was not acting in the capacity of Robert Wilson's employer when he asked him whether he would like to go the Fairbairn Dam. I do not accept Robert Wilson's evidence that he was directed to attend. There is nothing about the event that suggests it was an activity of the employer or that he was required to attend. It has all of the hallmarks of a social gathering of friends and family on a public holiday when little other activity was taking place. Robert Wilson was invited because he was part of Richard Wilson's family. Accordingly, I cannot find that the employer, the Wilson Survey Group, acting through Richard Wilson, induced or encouraged Robert Wilson to engage in the activity of the "staff office picnic" at the Fairbairn Dam.
- [36] In reaching this conclusion I have considered that Richard Wilson asked Robert Wilson to obtain ice and perhaps fuel and whether this was a direction issued by the employer. In my view, it was not. It was a request from one family member to

³*Pioneer Studios Pty Ltd v Hills* [2012] NSWCA 324.

another to assist in organising the outing given that Robert Wilson said that he would attend.

[37] As a consequence of this finding, it is unnecessary to determine the other issues raised by the parties. However, for completeness I will address these matters.

[38] The Commission has considered the evidence of Robert Wilson that he was directed by Richard Wilson to act as a safety officer or safety supervisor on the boat. This evidence is contrary to the Application for Claim Review prepared by Robert Wilson, which was tendered in evidence and which states:

"When directed to attend the staff office picnic on Good Friday I did not go as safety officer or safety supervisor. I assumed this responsibility to secure the safety and well being of the children after seeing Richard endanger them and reduce his own two children to tears because of his manner of driving the boat."

[39] I do not accept that Robert Wilson was directed to act in the capacity of safety officer or safety supervisor while on the boat in Fairbairn Dam. I consider the situation was that as outlined in Robert Wilson's Application for Claim Review, that is, that he assumed the role. It may be that Richard Wilson was driving the boat irresponsibly but any decision by Robert Wilson to act as a safety supervisor was a personal choice and not one directed by his employer.

[40] The third issue is whether the employer induced or encouraged Robert Wilson to ride on the biscuit attached to the speedboat. I accept that Richard Wilson asked Robert Wilson whether he wanted to ride on the biscuit. Robert Wilson said he repeatedly declined but eventually decided that he would in order to help keep Ms Kruger's son safe given the speed at which Richard Wilson was driving the boat. In my view, Richard Wilson did not induce Robert Wilson to participate. Repeated invitations may in some circumstances be tantamount to encouragement but it is clear on Robert Wilson's evidence that he did not view the invitations as encouragement. Rather, his decision to participate was altruistic, made ostensibly to protect the safety of the boy and was not acquiescence.

[41] Robert Wilson bears the onus of establishing that his injury satisfies the elements of s 32(1) of the Act. He has been unable to satisfy the Commission that his employer, acting through Richard Wilson, induced or encouraged him to engage in the activity of the "staff office picnic" at the Fairbairn Dam. Moreover, the picnic was not an activity of his employer. Robert Wilson was not induced or encouraged by his employer to act as a safety officer or to participate in the water sports, particularly riding on the biscuit. In the circumstances, the Commission is not satisfied that his injury arose out of or in the course of his employment. It is therefore unnecessary to consider whether employment was a significant contributing factor.

[42] The appeal is dismissed. The decision of the Regulator is confirmed.

[43] Costs are reserved.

[44] Order accordingly.