Journey Claims in South Australia

When the NSW Government changed the workers compensation legislation in relation to journey claims they said the new provisions were modelled on the situation in South Australia. This paper provides an analysis of the interpretation of the South Australian journey claim provisions, which may be indicative of how the NSW provisions will be applied.

The new NSW journey claims clause is as follows:

> *(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.*

What the South Australian legislation says

The South Australian *Workers Rehabilitation and Compensation Act* 1986 in section 30(1) provides that a disability is compensable if it arises from employment. Sections 30(5), 30(6) and 30(7) go on to define when a journey arises from employment. This section has been reproduced below.

> *(5) A disability that arises out of, or in the course of, a journey arises from employment only if—*
> *a) the journey is undertaken in the course of carrying out duties of employment; or*
> *b) the journey is between—*
> *i. the worker's place of residence and place of employment; or*
> *ii. the worker's place of residence or place of employment and—*
> *A. an educational institution the worker attends under the terms of an apprenticeship or other legal obligation, or at the employer's request or with the employer's approval; or*
> *B. a place the worker attends to receive a medical service, to obtain a medical report or certificate (or to be examined for that purpose), to participate in a rehabilitation program, or to apply for, or receive, compensation for a compensable injury,*
> *and there is a real and substantial connection between the employment and the accident out of which the injury arises.*
> *(6) However, the fact that a worker has an accident in the course of a journey to or from work does not in itself establish a sufficient connection between the accident and the employment for the purposes of subsection (5)(b).*
> *(7) The journey between places mentioned in subsection (5)(b) must be a journey by a reasonably direct route but may include an interruption or deviation if it is not, in the circumstances of the case, substantial, and does not materially increase the risk of injury to the worker.*

The key phrase common to both pieces of legislation is "real and substantial connection between the employment and the accident", which has been underlined in both.

Interpretation of the South Australian legislation

In most circumstances there is no ground for a workers compensation claim. Generally, the circumstances in which an employee can make a claim are:

1. If they have entered the work premises;
2. If they are travelling between appointments, in certain circumstances (eg, delivery driver); or
3. If a task/duty or the nature of work has caused the accident.

Attendance at a place of employment before and after work

Workers are covered if they are at their place of employment before and after work on a working day and are injured while preparing for work, preparing to leave work or in the process of leaving the place of employment. However this is because of explicit South Australian provisions that state a workers employment includes this. No such provisions exist in NSW.

Case example:

- *Twining v Bridgestone Australia J.D. 96/1999*0 – worker arrived at work half hour early, in preparation for work he clocked on, went to the toilet and had coffee with work colleagues in the tea room. During coffee the worker had a heart attack which was covered by Workers Compensation. **The worker was considered to be preparing for work, in the sense that the activities he performed would allow him to commence work at the appointed starting hour**.

Journey accident in the course of work

A journey claim can be made if the journey is undertaken in the course of carrying out the duties of employment, namely carrying out tasks under a contract of employment or the performance of an activity which is related to that which the worker was employed to do. This does not include "statutory duties" like attending a medical examination for a work related injury but could include trips to transport work to perform at home.

Case examples:

- *TransAdelaide v Karanicos Supreme Court S5536 1996* – the worker was injured on a journey to receive treatment for a work related injury she had sustained earlier. The Tribunal found that the journey was covered because it was undertaken in the course of carrying out her duties of employment as she was required to meet statutory duties imposed by her employment such as seeking proper treatment for a work related injury. However, the Supreme Court disagreed, stating that statutory duties are not to be regarded as duties of employment for the purposes of section 30(5)(a). "The journey undertaken to obtain treatment for a compensable disability was unrelated to the tasks, the worker, a cleaner, was employed to do."
- *Owen v Department of Education Training and Employment SAWCT104* –An assistant principal of a school was injured when riding her bicycle home at the end of a school day. The worker had intended to collect her car from her home and return to school to collect folders and files to work on over the weekend. It was found that the bicycle journey was something 'reasonably incidental to the performance of her duties' and therefore was undertaken in the course of carrying out her duties of employment. The injury was compensable. In their decision the tribunal considered that the employer acknowledged that the employees work was not confined to formal school hours and working from home was a normal part of her employment, and that the employer was aware of the employees

commuting practice, which was performed regularly. The Tribunal stated that carrying out the duties of employment mean that:

> "the worker was performing the worker's job, complying with an instruction from the employer given by the employer in the exercise of its control as an employer, or doing something reasonably incidental to one of these things."

- *State of South Australia v Brophy S6046 1997* – A police officer travelled home in uniform on his police motor cycle, an arrangement permitted by the Police Commissioner. The worker had his radio on and was required to respond if he received a call. The worker was involved in a road accident. The worker argued that the journey should be covered by Workers Compensation as it formed part of his duties of employment as he was obligated to exercise his power as a police officer if the need arose. He also argued that being on the road in uniform influenced the behaviour of other motorists. The Supreme Court found that he was not carrying out his duties of employment but on a journey home and there was not legal distinction between an ordinary worker and a police officer travelling home. If he had had to respond to a call, the purpose of the journey would have changed, but that was not the case.
- *Curran v Willis Industries 2000 SAWCT 36* – the worker had a long term practice, as requested by her employer of picking up the employer's mail from a post office on her route to work. She was involved in a motor accident before she reached the post office. The claim was rejected as she had not reached her first place of employment, the post office. However, the Tribunal found that the journey should be viewed as a whole and not in component parts. The journey has a dual purpose: the collect the mail and get to work. In the circumstances of the whole of the journey, it was regarded as employment related.
- *Workcover/EML (RP and LJ Robertson) v Jellicoe [2007] SAWCT 59* – If a call-out arrangement exists, any injury sustained in the course of a journey while responding to a call would be considered to be a journey undertaken in the course of carrying out duties of employment under section 30(5)(a) and would be compensable.

It should be noted than one example provided on NSW WorkCover website is that if a nurse en route to work stops to assist at a car accident, and is subsequently injured on her way to work, he or she would be covered by workers compensation insurance.

<u>Journey between place of residence and employment</u>

In order to make a claim when travelling between work and home, there must be a real and substantial connection between the accident and the employment. Cases mostly incorporate fatigue caused by work. When citing fatigue as the connection between work and the accident, it must be shown that:

a) the worker was fatigued; and

b) that the work environment was the sole cause of that fatigue.

Case examples:

- *Cusack v State of South Australia [2005] SAWCT21* – A police officer was driving home from work after working a number of consecutive shifts with overtime. On the way home he had a

road accident after falling asleep at the wheel. It was found that the worker falling asleep was most likely attributable to his work. Therefore, there was a real and substantial connection between the employment and the accident.

- *WorkCover Corporation/Mercantile Mutual Insurance (SA) v Andrew Paul Davies SAWCAT9139 1997* – it was held that a work pattern would cause substantial levels of fatigue. However the tribunal did not accept that this fatigue caused the inattention which lead to the crash.
- *WorkCover Corporation v Buston (A17/1996)* – A worker was supplied free alcohol by his employer at a social function, which coincided with the workers shift. The worker was paid for the shift. The worker was one of only a few people remaining at the party when he left. The worker was drunk and disorderly when he got in his car to presumably drive home. It was found that the state of inebriation was a substantial cause of the accident. It was found that there was a real and substantial connection between the employment and the accident as the liquor had been supplied by the employer and because the worker was expected to attend the function during normal work hours and was paid for his attendance.

Special considerations

In determining whether a journey was undertaken in the course of carrying out duties of employment, special consideration may be made in regards to the consideration of contemporary employment values or in regards to work in remote areas.

Case examples:

- *Natural Resources v Wickham A126/1996* – a worker was injured when he fell off his bike when riding from his home to the employer's car depot where he intended to collect a work vehicle and proceed to a worksite. The worker chose not to go to his normal place of work before picking up the car as it would involve back tracking and the worker considered it to be a waste of time. The injury was considered to be in the course of employment having regards to important contemporary employment values of 'efficiency and productivity'.
- *State of South Australia v. Atwell-Gill A105/1996* - a school teacher was required to utilise his first two paid duty days of the school term to travel from his place of residence to the remote school location. It was acknowledged by the employer that such travel was necessarily incidental to the performance of his teaching duties and was undertaken in the course of carrying out duties of his employment.

Analysis

The South Australia legislation contains much greater detail than the New South Wales legislation. Of particular importance to the case law is the provision that gives coverage of journeys if "the journey is undertaken in the course of carrying out duties of employment". There is not similar detail in the NSW legislation, although the "real and substantial connection" provision may have the same effect.