Clarke v Waylexson Pty Ltd [2009] NTSC 19

PARTIES:	PAUL CLARKE
	v
	WAYLEXSON PTY LTD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LA 11 of 2007 (20531309)
DELIVERED:	14 May 2009
HEARING DATE:	1 August 2008
JUDGMENT OF:	SOUTHWOOD J
APPEAL FROM:	WORK HEALTH COURT (Dr J A Lowndes SM)

CATCHWORDS:

WORKERS' COMPENSATION – Course of employment – injury during interval in overall episode of work – employer's encouragement of activity – particularity required – encouragement to stay awake during a work shift change – mine worker injured while going on a fishing excursion to stay awake – whether in the course of employment – Workers Rehabilitation and Compensation Act (NT)

The Commonwealth v Oliver (1962) 107 CLR 353; *Danvers v Commissioner for Railways (NSW)* (1969) 122 CLR 529; *Hatzimanolis v A.N.I. Corporation Ltd* (1992) 173 CLR 473; *Inverell Shire Council v Lewis* (1992) 8 NSWCCR 562; *Comcare v Mather* (1995) 56 FCR 456, applied

Henderson v Commissioner of Railways (W.A.) (1937) 58 CLR 281; *Humphrey Earl Ltd v Speechley* (1951) 84 CLR 126; *Work Cover Authority of New South Wales v Walling & Anor* [1998] NSWSC 315, referred to

REPRESENTATION:

Counsel:

Appellant:	I Morris
Respondent:	P Barr QC

Solicitors:

Appellant:	Pipers
Respondent:	Hunt & Hunt

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Clarke v Waylexson Pty Ltd [2009] NTSC 19
No LA 11 of 2007 (20531309)

BETWEEN:

CLARKE, Paul
Appellant

AND:

WAYLEXSON PTY LTD
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 14 May 2009)

Introduction

[1] The question in this appeal is: was the appellant, who was working at the Ranger Uranium Mine near Jabiru, within the course of his employment when he sustained injuries in a motor vehicle accident on 26 July 2005? The motor vehicle accident occurred while he was travelling on a fishing excursion between work shifts. The Work Health Court held he was not. I would allow the appeal. I would do so on the ground that the appellant sustained his injuries within an interval in an overall period of work while engaged in an undertaking that was encouraged by his employer. The practice of going fishing between work shifts grew out of an instruction to

workers at the Ranger Uranium Mine to stay awake as long as possible on a change over between a day shift and a night shift.

The facts

[2] The appellant is a diesel fitter who was employed by the respondent. The respondent conducts a labour hire business. It supplies skilled labour, which specialises in performing repairs and maintenance to heavy earth moving equipment, to remote mining sites in the Northern Territory.

[3] Starting in December 2004, the respondent had a contract with Energy Resources of Australia Limited for specialised labour hire for a period of 12 months. Under the contract the appellant was deployed to work at the Ranger Uranium Mine at Jabiru. He worked on the servicing, maintenance and repair of heavy earth moving equipment.

[4] It was a term of the appellant's employment that he would submit to supervision by the entity running the mining operation where he was deployed. While he worked at the Ranger Uranium Mine the appellant was supervised by Mark Todd who was employed as a supervisor by Energy Resources of Australia Limited. For all intents and purposes the respondent ceded supervision of the appellant to Energy Resources of Australia Limited's supervisor.

[5] For most of the time the appellant worked at the Ranger Uranium Mine the respondent did not have a representative at the mine. The appellant was

subject to very little supervision by the respondent. Such supervision was limited to checking the appellant's time sheets and paying his wages.

[6] The appellant worked rostered shifts at the Ranger Uranium Mine. He worked in cycles of seven days on, four days off, then seven days on, three days off. During the first seven-day period he worked three day shifts then four night shifts. During the second seven-day period he worked four day shifts and three night shifts. Each shift was of 12 hours duration. The day shift started at 6 am and ended at 6 pm. The night shift started at 6 pm and ended at 6 am.

[7] On his three and four days off the appellant returned to his home in Palmerston. The appellant was expressly precluded from returning home during a seven day work period. While at work at the Ranger Uranium Mine the appellant was, at first, accommodated at the Jabiru Mining Camp and then his accommodation changed to the Lakeview Caravan Park. At the time of the motor vehicle accident the appellant was staying at the Lakeview Caravan Park.

[8] It was common practice for workers at the Ranger Uranium Mine to stay up late at night when they were on a change over from a day shift to a night shift so that their bodies would adjust from day shift to night shift. The appellant and other workers were instructed by their supervisors, who were employed by Energy Resources of Australia Limited, to try and stay awake as long as possible during a shift change. The workers stayed up late at

night so that they would sleep in until late the following day. This would enable their bodies to adjust to the night shift starting that day.

[9] During a change over from day shift to night shift there were limited activities available to assist workers to fill in time and stay awake in order to make the adjustment to sleeping during the day and working at night. One means of staying awake on a shift change, which the appellant and other workers adopted, was to go fishing at night out of Jabiru and within the boundaries of Kakadu National Park. Workers frequently went fishing at night for that purpose.

[10] The senior management of Energy Resources of Australia Limited were aware workers engaged in fishing as a recreational activity. The workers' supervisors were aware that they went fishing at night. However, there was no specific policy about whether or not fishing should take place during a shift change.

[11] On 25 July 2005, the appellant completed the day shift at 6 pm. He returned to the Lakeview Caravan Park at 6.30 pm. He was on a turn around between a day and a night shift. He was due to start the night shift at 6 pm on 26 July 2005.

[12] At 11.30 pm on the night of 25 July 2005, Mr Todd asked the appellant if he could borrow his fishing rod and if he would like to go fishing with him. The appellant agreed to lend Mr Todd his fishing rod and he accepted his invitation to go fishing. There were a number of reasons why the appellant

accepted Mr Todd's invitation to go on the fishing trip. One reason was to stay up late to attune his body to his work shift change.

[13] The presiding magistrate also found:

- Energy Resources of Australia Limited did not encourage or induce fishing as a recreational activity during shift changes;
- Neither Mr Todd nor any other supervisor should be viewed as being synonymous with Energy Resources of Australia Limited;
- There is no evidence that Mr Todd had either express or implied authority from Energy Resources of Australia Limited to encourage workers, including the appellant, to go fishing at night in Kakadu National Park, as part of Energy Resources of Australia Limited's general encouragement to workers to stay awake as long as possible during shift changes;
- There is no evidence from which an inference can be drawn that Mr Todd was acting on behalf of Energy Resources of Australia Limited in encouraging the appellant to go fishing during the early hours of 26 July 2005;
- The authority of the supervisors was confined to encouraging workers to try and stay awake as long as possible during a shift change – indeed, that was the instruction given by Energy Resources of Australia Limited's supervisors to workers at the Ranger Uranium Mine;

- Mr Todd was not authorised to use the motor vehicle, which was hired by Energy Resources of Australia Limited from Thrifty Rent-A-Car, to go on the fishing excursion on 26 July 2005. There was nothing in the terms of Mr Todd's engagement by Energy Resources of Australia Limited which permitted company vehicles, in particular the bus, to be used for purposes other than as transport to and from the mine site;

- The company buses were to be used for limited purposes, and although some latitude may have been given for the use of such vehicles, the use of such vehicles to transport workers to and from fishing spots at night was not a permissible use;

- He was not satisfied that Mr Todd was acting on behalf of Energy Resources of Australia Limited when he encouraged the appellant and other employees to go fishing in order to adjust their bodies for the next shift;

- Mr Todd was dismissed for the unauthorised use of a company vehicle during the early hours of the morning on 26 July 2005;

- If Mr Todd was not acting on behalf of Energy Resources of Australia Limited, then that largely puts paid to the appellant's assertion that he was encouraged or induced by the respondent to go on the fishing excursion on 26 July 2005;

- He was not satisfied that Mr Peterson, who owns and manages the respondent, had knowledge that the appellant went fishing at night during shift changes and, in particular, had knowledge of the fishing excursion on 26 July 2005; and

- He was not satisfied that any encouragement given by Mr Todd to the appellant, and other labour hire employees, to engage in the fishing excursion on 26 July 2005, occurred during a period when the appellant was subject to the direction and control of Energy Resources of Australia Limited's supervisors.

[14] In the early morning of 26 July 2005, the appellant, Mr Todd and another worker, Geoffrey Verzeletti, left Jabiru to go fishing at Cahill's Crossing on the East Alligator River. They travelled in a motor vehicle hired by Energy Resources of Australia Limited from Thrifty Rent-A-Car. The motor vehicle was driven by Mr Todd. The appellant was injured while they were travelling from Jabiru towards Oenpelli. As they approached Magella Creek the motor vehicle went out of control, ran off the road and collided with some trees.

[15] The appellant sustained: a dislocation of his left hip with a fracture of his acetabular; a laceration of his left knee; avulsion of the left tibial tuberosity; and fractures of the head of the second metatarsal and proximal phalanges of the left second, third and fourth toes associated with a wound. He spent two months in hospital and he underwent a number of surgical procedures. He

continues to have problems with his left knee and when seen by Dr Millons on 29 November 2006, he was unfit for work as a diesel fitter.

[16] Following the motor vehicle accident the appellant made a claim for benefits under the Motor Accidents (Compensation) Act. The Territory Insurance Office rejected his claim.

[17] Since the accident on 26 July 2005 the management of Energy Resources of Australia Limited has not banned or discouraged workers fishing during shift changes.

In the course of employment

[18] Section 53(1) of the Workers Rehabilitation and Compensation Act provides that a worker who has suffered impairment or incapacity as a result of an injury is to receive compensation in accordance with the Act. Section 3(1) of the Act defines injury to mean "physical or mental injury arising out of or in the course of his or her employment".

[19] The words "in the course of his or her employment" cover not only the actual work which a worker was employed to do but also the natural incidents connected with the class of work. The words cover not only the performance of duties and the pursuit of ends laid down for a worker but also things which are but adjuncts or incidents growing out of the employment. A worker may be within the course of his employment not merely while he is doing the work set for him, but also while he was where

he would not be but for his employment, and is doing what a worker so employed might do without impropriety.

[20] Everything depends upon the nature of what a worker has to do, however, allowance should be made for the ordinary habits of human nature and the ordinary way in which those employed in such an occupation may be expected to act. In determining whether the injury occurred during the course of employment regard must be had to the general nature, terms and circumstances of employment and not merely the circumstances of the particular occasion out of which the injury arose. The sufficiency of the connexion necessary between a worker's employment and what he was doing at the time he was injured is a matter of degree in which time, place, practice and circumstances as well as the conditions of employment have to be considered.

[21] Authority for the principles stated above will be found in the following references: *The Commonwealth v Oliver*[1]; *Danvers v Commissioner for Railways (NSW)*[2]; and *Hatzimanolis v A.N.I. Corporation Ltd*[3], from where I have taken the well known statements of principle.

[22] In *The Commonwealth v Oliver*[4] a worker who was injured while playing cricket during his lunch break at his employer's premises was found to have been injured in the course of his employment. In *Danvers v Commissioner*

[1] (1962) 107 CLR 353.
[2] (1969) 122 CLR 529.
[3] (1992) 173 CLR 473.
[4] (1962) 107 CLR 353.

for Railways (NSW)[5] a railway worker who died in a fire which destroyed the railway van standing at a siding which was his abode while working at the siding was found to have died in the course of his employment. The deceased entered the van in the evening after stopping work. In *Hatzimanolis v A.N.I. Corporation Ltd*[6] a worker who was injured at a remote mine site while on an excursion organised by his employer on the worker's day off was found to have been injured in the course of his employment.

[23] In *Hatzimanolis v A.N.I. Corporation Ltd*[7] the majority of the High Court reformulated the test of what was incidental to the performance of work. The test had previously been enunciated in *Henderson v Commissioner of Railways (W.A.)*[8] and applied in *Humphrey Earl Ltd v Speechley*[9]. In the latter two cases it had been held that the test of whether an injury, which occurred between periods of actual work, had been sustained in the course of employment depended upon whether the worker was doing something he was "reasonably required, expected or authorised to do *in order to carry out his actual duties* [emphasis added][10]". In the opinion of the majority of the High Court, current authority was such that a finding that a worker, who was injured between periods of actual work, was doing something in order to carry out his duties at the time he sustained his injury was in many cases

[5] (1969) 122 CLR 353.
[6] (1992) 173 CLR 473.
[7] Ibid.
[8] (1937) 58 CLR 281 at 294.
[9] (1951) 84 CLR 126 at 133.
[10] (1937) 58 CLR 281 at 294.

simply fictitious. The test was reformulated so that it would accord with the conception of the course of employment as demonstrated by cases such as *The Commonwealth v Oliver*[11] and *Danvers v Commissioner for Railways*[12].

[24] The majority in *Hatzimanolis v A.N.I. Corporation Ltd* held[13]:

> The distinction between an injury sustained by a railway worker as in *Danvers* and a non-compensable injury sustained by an ordinary employee after the day's work has ceased lies not so much in the employer's attitude to the way the interval between the periods of actual work was spent but in the characterization of the period or periods of work of those employees. For the purposes of workers' compensation law, an injury is more readily seen as occurring in the course of employment when it has been sustained in an interval or interlude occurring within an overall period or episode of work than when it has been sustained in the interval between two discrete periods of work. Where an employee performs his or her work at a permanent location or in a permanent locality, there is usually little difficulty in identifying the period between the daily starting and finishing points as a discrete working period. A tea break or lunch break within such a period occurs as an interlude or interval within an overall work period. Something done during such a break is more readily seen as done in the course of employment than something that is done after a daily period of work has been completed and the employee has returned to his or her home. On the other hand, there are cases where an employee is required to embark upon some undertaking for the purpose of his or her work in circumstances where, notwithstanding that it extends over a number of daily periods of actual work; the whole period of the undertaking constitutes an overall period or episode of work. Where, for example, as in *Danvers*, an employee is required to go to a remote place and live in accommodation provided by his or her employer for the limited time until a particular undertaking is completed, the correct conclusion is likely to be that the time spent in the new locality constitutes one overall period or episode of work rather than a series of discrete periods or episodes of work. An injury occurring during the interval between periods of actual work in such a case is more readily perceived as being within the current conception of the course of employment than an injury occurring after ordinary working hours to

[11] (1962) 107 CLR 353.
[12] (1969) 122 CLR 529.
[13] (1992) 173 CLR 973 at 483 to 484.

> an employee who performs his or her work at a permanent location or in a permanent locality.
>
> Moreover, *Oliver* and the cases which follow it show that an interval or interlude in an overall period or episode of work will ordinarily be seen as being part of the course of employment if the employer, expressly or impliedly, has induced or encouraged the employee to spend the interval or interlude at a particular place or in a particular way. Indeed, the modern cases show that, absent gross misconduct on the part of the employee, an injury occurring during such an interval or interlude will invariably result in a finding that the injury occurred in the course of employment. Accordingly, it should now be accepted that an interval or interlude within an overall period or episode of work occurs within the course of employment if, expressly or impliedly, the employer has induced or encouraged the employee to spend that interval or interlude at a particular place or in a particular way. Furthermore, an injury sustained in such an interval will be within the course of employment if it occurred at that place or while the employee was engaged in that activity unless the employee was guilty of gross misconduct taking him or her outside the course of employment. In determining whether the injury occurred in the course of employment, regard must always be had to the general nature, terms and circumstances of the employment "and not merely to the circumstances of the particular occasion out of which the injury to the employee has arisen"

[25] The reformulated test is a more liberal test than the test which was enunciated in *Henderson v Commissioner of Railways (W.A.)*[14].

[26] There are two limbs to the reformulated test of whether an injury to a worker has occurred in the course of employment. First, it is necessary to consider whether the injury occurred during an interval or an interlude within an overall period or episode of work. Secondly, it is necessary to consider whether the employer has encouraged the employee to spend that interval or interlude at a particular place or in a particular way. When

[14] (1937) 58 CLR 281.

applying the reformulated test, regard must always be had to the general nature, terms and circumstances of the employment.

[27] Various authorities decided since *Hatzimanolis v A.N.I. Corporation Ltd*[15] have established that it is not always necessary for an injured worker to establish that the employer provided specific authorisation of the precise activity undertaken by the worker when he was injured; nor is it always necessary to establish that the employer positively encouraged the precise activity which resulted in the worker's injury. Activities will fall within the course of employment if they are a reasonable and foreseeable incident of the undertaking that a worker is encouraged to participate in by the employer, if they fall within the ambit of the encouraged undertaking or if they amount to conduct which logically arises from the undertaking the worker is encouraged to engage in by the employer. The activity may include the exercise of discretion or choice on the part of the worker. The authorities are consistent with the statement of the majority in *Hatzimanolis v A.N.I. Corporation Ltd* that, "In determining whether the injury occurred in the course of employment, regard must always be had to the general nature, terms and circumstances of the employment and not merely to the circumstances of the particular occasion out of which the injury to the employee has arisen"[16].

[15] (1992) 173 CLR 473.
[16] (1992) 173 CLR 473 at 484.

[28] In *Inverell Shire Council v Lewis*[17] the worker was found to have been injured in the course of his employment in circumstances where he was temporarily living in a caravan park while attending a training course away from his home. He was shot and injured outside working hours while on a social visit to another caravan in the park. Apart from his obligation to attend the course the worker was free to spend his time as he chose. In his reasons for judgment in the New South Wales Court of Appeal Handley JA stated:

> …. His injuries were sustained during an interval between periods of training while he was in the caravan park where he was being temporarily housed by the employer.
>
> …. The employer had induced or encouraged the worker to reside in the caravan park during his course and the injury occurred in that place. Although the employer did not induce or encourage the worker to visit Miss Davis' caravan that evening to have a cup of coffee in the company of others, I can see no basis for limiting the principle in this way.
>
> Neither the employer nor the Training School attempted to occupy the time of the worker and his fellow apprentice in the evenings. The course lasted nine weeks with thirty eight hours of training and practical work each week. The worker and his fellow apprentice were permitted to return home in the Council's motor vehicle on four weekends during the course. The employer must have contemplated that the worker would spend his other weekends and his free time in the evenings in and around the caravan park in the company of other persons of his own age. Social visits to other caravans in the park such as that occupied by Miss Davis was a reasonable and foreseeable incident of his residence in the park.
>
> In this case the worker was injured while he was at "the particular place" where his employer had encouraged him to stay, and while he was doing something that was reasonably incidental to his temporary

[17] (1992) 8 NSWCCR 562.

> residence there. Accordingly in my opinion Manser CCJ did not err in law in finding that the worker's injuries arose in the course of his employment.

[29] In *Comcare v Mather*[18] the workers were found to have been injured in the course of their employment in circumstances where the workers were attached to a transport squadron in the Australian Army which was camped at the Darwin Showground during a large scale military training exercise called "Exercise Kangaroo 1992". They were encouraged to take authorised local leave within the boundaries of the Exercise. Mather was injured and Mitchell was killed when they were struck by a car while walking back to camp along the Arnhem Highway from the Humpty Doo Hotel. The workers attended the hotel on a social occasion and they exercised their choice as to how to spend their leave. The employer contended that the men were not in the course of their employment when they were injured and killed because the employer's encouragement or inducement must relate to a particular activity or particular place which had not been demonstrated by the evidence in that case. In her reasons for judgment, after noting that the majority of the High Court in *Hatzimanolis v A.N.I. Corporation Ltd*[19] made it clear that the questions raised by the reformulated test were not to be determined narrowly by reference only to the particular circumstances of the particular occasion[20], Kiefel J stated[21]:

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[18] (1995) 56 FCR 456.
[19] (1992) 173 CLR 473 at 484.
[20] (1995) 56 FCR 456.
[21] Ibid at 461G, 462B to 463A.

… the formulation of principles required both a consideration of how the interval was placed in the scheme of the work involved in the employment and what the employer had said, done or encouraged concerning the activity or location of the employee within that interval ….

…. An injury will, within the statement of principles, have occurred at a "particular" place if it can be found to fall within the ambit of the employer's encouragement or inducement which may, in its terms, leave some matters to the decision of the employee. The statement of principles, read with the preceding analysis of case law, discloses an attempt to provide a satisfactory connection between injury and employment by a temporal connection (and as to which see *Inverell Shire Council v Lewis*) which is strengthened by connection via the employer, the "nexus" of which Lockhart J spoke in *Comcare v McCallum*. In that case the employer had been required to stay overnight at a country town. Whilst the town was specified, the place at which she might choose to stay was not. The employee slipped in the shower at that hotel and was injured. The Full Court upheld the decision of the Tribunal that compensation was payable. In the judgment of Lockhart J, with whom the other members of the Court agreed, the fact that the hotel was of the employee's choosing did not prevent the relevant nexus being present. Her employment required her to stay at a hotel of her choice, thereby constituting the spending of an interval at a "particular place or in a particular way" within the meaning of *Hatzimanolis*. His Honour did observe that injury occurring whilst she had chosen to attend a cinema or club that evening may not have the necessary connection with her employment. That may be so; it seems to me, because the activity may fall outside the ambit of what was involved in the employer's requirement for an overnight stay.

In my view "encouragement" is not to be taken as of 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. The two particular cases which their Honours in *Hatzimanolis* were concerned with in this context, *Commonwealth v Oliver* and *Danvers v Commissioner for Railways (NSW)* involved, respectively, an expectation of presence coupled with a recognised practice and making available facilities for an employee's use. The facts in *Hatzimanolis* did not require the Court to discuss in greater detail what was encompassed by the phrase "induced or encouraged". 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. Further attempt at definition would be fruitless. In each case, the question will be whether the attendance at the place at which or the undertaking in which the employee is involved when injured in an interval falls within the ambit of statements, acts or conduct made by the employer and what may be said to logically arise from them. And in each case, importantly, they must be viewed in the background of the particular employment and the circumstances in which the employer is then placed.

The decision of the Work Health Court

[30] The presiding magistrate distinguished *Inverell Shire Council v Lewis*[22] and *Comcare v Mather*[23]. He decided that:

- Even if Mr Todd had been acting on behalf of Energy Resources of Australia Limited and the respondent had ceded supervision of the worker to Energy Resources of Australia Limited, both on and off site, the delegation of the supervisory function would not, by itself, be sufficient to attribute to the respondent any encouragement given by Mr Todd to the appellant. Given the unusual nature of the activity – an activity which would not ordinarily be regarded as being incidental to employment – the respondent would have to have had specific knowledge of the encouragement or inducement in order for it to be properly attributed to it.

- What counts is that the practice of staying up late by going fishing was encouraged or induced by the respondent. If there was such

[22] (1992) 8 NSWCCR 562.
[23] (1995) 56 FCR 456.

encouragement or inducement, then the appellant's participation in the fishing excursion on 26 July 2005 occurred in the course of his employment.

- Although the period of the appellant's shift change amounted to an interval or interlude occurring within an overall period or episode of work, the fishing excursion on 26 July 2005 was not in the course of the appellant's employment. The fishing excursion was spontaneous and unorganised and Mr Todd had neither actual nor implied authority to act on behalf of Energy Resources of Australia Limited.

- The appellant is not able to rely on the line of authorities which maintains the proposition that the requirement of encouragement or inducement is not essential to a finding that the injury arose in the course of employment. That proposition represents the law only in relation to "place-based" cases, like *Work Cover Authority of New South Wales v Walling & Anor*[24]. The appellant was not injured at his place of employment or temporary residence.

- Nor can the appellant rely on authorities such as *Comcare v Mather*[25] and *Inverell Shire Council v Lewis*[26], which hold that it is not necessary for an employer to induce or encourage the specific activity in which a worker is engaged at the time he is injured. The present case is

[24] [1998] NSWSC 315.
[25] (1995) 56 FCR 456.
[26] (1992) 8 NSWCCR 562.

distinguishable from those two cases. Although Energy Resources of Australia Limited induced or encouraged its workers to defer sleep during the course of a shift change, it did not encourage or induce workers to leave the confines of the camp or the immediate environs of Jabiru and be at a particular place or take up temporary residence at a particular location.

[31] In so doing he erred in law. He misapplied the test enunciated in *Hatzimanolis v A.N.I. Corporation Ltd*[27]. He failed to address the question whether the activity in which the appellant was involved when he was injured fell within the ambit of the employer's instructions to stay awake during a shift change and what may be said to logically arise from the instructions. He failed to recognise the ordinary way in which the workers at the Ranger Uranium Mine may be expected to act during a shift change in the circumstances of their employment in a remote location.

Did the appellant sustain an injury in the course of his employment?

[32] In determining whether an injury occurred in the course of employment regard must always be had to the general nature, terms and circumstances of the employment and not merely to the circumstances of the particular occasion out of which the injury to the worker has arisen[28]. The sufficiency of the connexion necessary between a worker's employment and what he was doing at the time he was injured is a matter of degree in which time,

[27] (1992) 173 CLR 473.
[28] (1992) 173 CLR 473 at 484.

place, practice and circumstances, as well as the conditions of employment, have to be considered[29]. The question to be determined in this case is whether the undertaking in which the appellant was involved when injured fell within the employers instruction to stay awake as long as possible during a change over between a day shift and a night shift and what may be said to logically arise from the instruction or what may be said to be a reasonable and foreseeable incident of the instruction[30].

[33] The salient facts of this case are: the appellant was employed at a remote mining site; he was not allowed to return home during a seven day work period; he was required to stay in rudimentary accommodation in a caravan park; he was injured during an interval within an overall period of work; he was instructed to stay up late at night during a change over from a day shift to a night shift; there were limited activities available to assist workers to fill in time and stay awake in order to make the adjustment to sleeping during the day; it was left to the worker to choose the activities he engaged in to stay awake; it was a common and established practice for workers employed at the Ranger Uranium Mine to go fishing during a change over from a day shift to a night shift; the workers' supervisors knew the workers went fishing at night; the senior management of Energy Resources of Australia Limited knew that the workers at the mine engaged in recreational fishing between shift changes; even after the appellant's accident, workers

[29] *Hatzimanolis v A.N.I Corporation Ltd* (1992) 173 CLR 473 at 478.
[30] *Comcare v Mather* (1995) 56 FCR 456 at 462G to 463A; Inverell Shire Council v Lewis (1992) 8 NSWCCR 562.

were not instructed not to fish at night during a changeover between shifts; one of the reasons the worker went on the fishing excursion was to stay up late to attune his body to his work shift change; and, at the time of his injury the appellant was doing what a man employed at the Ranger Uranium Mine might do without impropriety.

[34] The incident during which the appellant was injured was an incident growing out of his employment. The appellant was acting in the ordinary way those employed at the Ranger Uranium Mine might be expected to act in order to stay awake as long as possible during a change over between a night shift and a day shift.

[35] So far as the application of the second limb of the *Hatzimanolis* test to this case is concerned, the relevant instruction of the employer to the appellant was the instruction to stay awake as long as possible during a change over from a day shift to a night shift. The appellant was encouraged to spend the relevant part of the interval when he was injured in a particular way; he was encouraged to spend the interval awake. The instruction left the manner of staying awake to the discretion of the appellant. At the time he was injured the appellant was doing something that was reasonably incidental to the expectation that he stay awake in order to adjust to his shift change. The fact that the fishing excursion was of the appellant's choosing does not prevent the relevant nexus being established. His employment required him to stay awake and such fishing excursions as the appellant embarked upon were a reasonable and foreseeable incident of the instruction to stay awake,

his remote location, the rudimentary accommodation where he was required to reside and the limited activities available to assist workers to fill in time and stay awake. It was a common practice. The employer placed no restrictions on such fishing excursions. The activity in which the appellant was injured fell within the ambit of the instruction to stay awake during a shift change.

Orders

[36] The appeal is allowed. I will hear the parties further as to incidental orders and costs.
