INJURY IN AN INTERVAL OR INTERLUDE DURING AN OVERALL PERIOD OR EPISODE OF WORK

PURPOSE

To provide guidance about the interpretation of the phrase 'in the course of employment' where an employee sustains an injury (other than disease) in an interval or interlude during an overall period or episode of work.

BACKGROUND

A decision of the High Court (Comcare v PVYW[1]) clarified the application of the 'in the course of employment' test where an employee sustains an injury in an interval or interlude during an overall period or episode of work. The High Court held that in determining whether an injury which occurs in an interval or interlude during an overall period or episode of work is suffered in the course of employment, a determining authority[2] must establish how the injury was brought about (i.e. while engaged in an activity or by reference to a place) to consider whether the necessary connection with employment exists.

GUIDANCE

Injury arising out of or in the course of employment

The phrase 'arising out of, or in the course of, an employee's employment' is contained in the definition of injury in section 5A of the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) and is the connection required between the injury and employment.

Arising out of employment

An injury may arise 'out of employment' if there is a causal relationship between the injury and employment.

Arising in the course of employment

For an injury to arise 'in the course of employment' there needs to be a temporal connection between the injury and employment. This means that the injury has occurred while the employee is undertaking work-related activities or activities incidental to their work. It extends cover beyond the period the employee is undertaking their normal work duties or at their place of work, to include something the employee is reasonably required or expected to do in order to carry out their duties.

1 HCA 41, 30 October 2013.

2 Determining authority, in relation to a determination, means the person who made the determination [subsection 60(1) of the SRC Act]. For the purposes of this guidance, the determining authority will be referred to as the 'decision-maker'.

Interval or interlude during an overall period or episode of work

An injury is more likely to be considered in the course of employment when it is sustained in an interval or interlude during an overall period or episode of work. For example, it can include a short break (outside of an ordinary recess) within a workday or a long break such as a night, or nights and days at a remote location as part of a work-related trip.

This is distinct from an injury sustained during an interval between two discrete periods of work, which is unlikely to be considered in the course of an employee's employment. For example, it can be the period between the end of one working day and the start of the next for an employee who performs their work at a usual location.

Guidelines for decision-makers

Where an employee claims compensation for an injury sustained during an interval or interlude during an overall period or episode of work (e.g. free time on a work trip), in order to establish whether the injury arose in the course of employment (section 5A), the following steps/considerations must be undertaken by the decision maker.

1. Determine whether the injury occurred whilst the employee was engaged in actual work. If it did, the injury is likely to have been sustained out of or in the in the course of the employee's employment.

2. If not, determine what the employee was doing when they were injured.

   > If the employee was engaged in an activity at the time of the injury, consider whether the employer induced or encouraged the employee to engage in that activity.

   - If the employer did, the injury is likely to have been sustained in the course of employment. There is no need to consider the inducement or encouragement of an employee to be present at a place.
   - If the employer did not, consideration should be given to whether an employer induced or encouraged an employee to be present at a place.

   Example 1 (activity): An employee is required to travel interstate for 2 days to conduct workplace audits. They are staying at a hotel of their choice, within the requisite travel allowance.

   During the night the employee rolls over while asleep and hits their eye on the bedside table while in their hotel bed. The employee sustains a split eye that requires stitches, as well as a contusion to their face.

   The activity of sleeping is impliedly induced or encouraged during an overnight work trip and the injury is therefore 'in the course of employment' and liability is accepted.

   > If the injury occurred at and by reference to a place, consider whether the employer induced or encouraged the employee to be at that place.

   - If the employer did, the injury is likely to have been sustained in the course of employment.
   - If the employer did not, the injury is not likely to have been sustained in the course of employment.

   > If the injury occurred by reference to both the activity the employee was engaged in and by reference to a place, the decision-maker should consider the circumstances, including both the place and the activity, and determine whether the circumstances of the injury relate to what the employee was induced or encouraged to do by their employer.

Example 2 (activity and place): *Dring v Telstra Corporation Limited* [2021] FCAFC 50

The employee sustained an injury when they slipped and fell on wet tiles in the foyer of a hotel they were staying at during a work trip. The injury occurred when the employee was returning to their hotel room at approximately 2.30 am after socialising with a friend. Telstra denied liability for the injury on the basis that the injury was sustained while the employee was undertaking an activity that they were not reasonably required or expected to engage in, i.e., the personal activities they engaged in between dinner and the time of the injury.

The Tribunal affirmed Telstra's reviewable decision. The employee appealed to the Federal Court, which upheld the decision of the Tribunal. The employee filed a further appeal with the Full Federal Court.

The Full Federal Court dismissed the appeal, holding that decisions on this issue do not support a proposition that any injury suffered by an employee at a place at which the employee is required to be necessarily attracts compensation. For the test to be met, there must be a connection between the injury, the circumstances in which it occurred, and the employment itself.

Example 3 (activity and place): The employer provides the employee with a workplace car park located in the basement of their usual place of work.

The employee is away from their usual place of work (at the request of their employer) to attend a workplace meeting across town. On returning to their usual place of work, the employee sustains a back injury while attempting to move several boxes blocking access to their parking space.

The activity of moving of boxes was not explicitly or impliedly induced or encouraged by the employer. It is therefore necessary to consider whether the employer explicitly or impliedly encouraged the employee to access the carpark (the place).

The provision of a carpark denotes inducement or encouragement by the employer to access the parking area (the place). The injury is therefore 'in the course of employment' and liability is accepted.

Inducement or encouragement

Inducement or encouragement by an employer may be explicit. It might include clear instruction, direction or request for an employee to engage in a particular activity or be present at a particular place. However, inducement or encouragement can also be implied. For example, it may be that an activity incidental to employment is sufficient to meet the requirements of this test. Activities such as sleeping, eating or showering on an overnight trip for work are likely to be regarded as impliedly induced or encouraged by employers. Other activities, like visiting a friend or sightseeing while on a break during a work trip, are unlikely to be regarded as impliedly induced or encouraged.

Circumstances in which an injury is treated as arising out of or in the course of employment

If the injury was not sustained during an interval or interlude during an overall period or episode of work, or is not referrable to an activity or place, the above guidance does not apply. A decision-maker will need to consider the broader meaning of 'injury arising out of, or in the course of, the employee's employment' under section 5A of the SRC Act.[3]

If the connection between an injury and employment is not established following the application of section 5A, the decision-maker must refer to section 6 under the SRC Act to determine if one of the extended injury circumstances applies. Where section 6 is applied, and an injury is suffered in a circumstance listed in section 6(1), the guidelines in this scheme guidance do not apply. This is because these are all circumstances and places where the injury is deemed to have arisen out of or in the course of employment (subject to the clarifying and disqualifying provisions under section 6).

For example, if an injury occurs during a lunch break (an ordinary recess) it is captured by section 6(1)(b) and it will not be necessary to consider whether the injury was sustained in an interval or interlude during an overall period or episode of work.

3 Refer to Comcare Scheme Guidance –Injury arising out of or in the course of employment

PROCESS AND PRACTICES

Decision-makers are advised to have processes and practices in place to assist in considering the interpretation of the phrase 'in the course of employment' where an employee sustains an injury (other than disease) in an interval or interlude during an overall period or episode of work.

RELATED COMCARE SCHEME GUIDANCE

Other relevant scheme guidance:

> Injury arising out of or in the course of employment

> Considerations in the reconsideration process.

FURTHER INFORMATION

For further information, please contact Comcare's Scheme Policy and Design team on 1300 366 979 or email: scheme.policy@comcare.gov.au.