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| CITATION: | *Jonathon Turner V Gebie Civil & Construction Pty Ltd (2019) NTLC 010* |
| PARTIES: | JONATHON TURNER<br>V<br>GEBIE CIVIL & CONSTRUCTION PTY LTD (ABN 311 449 555 28) |
| TITLE OF COURT: | WORK HEALTH COURT |
| JURISDICTION: | WORK HEALTH |
| FILE NO: | 21758967 |
| DELIVERED ON: | 21 June 2019 |
| DELIVERED AT: | DARWIN |
| HEARING DATEs: | 12 – 16 November 2018 |
| JUDGMENT OF: | Judge Neill |

**CATCHWORDS:**

*in the course of employment - injury during an interval or interlude occurring within an overall period or episode of work; identification of an 'activity' within such a period; express or implied inducement or encouragement to engage in that 'activity'.*

*partial incapacity – meaning of 'reasonably capable of earning' where work duties are modified to allow for incapacity or otherwise beyond capacity; legal onus to identify weekly dollar value of partial earning capacity; evidentiary onus to identify weekly dollar value of partial earning capacity in specific periods where the relevant information is in the hands of one party only.*

*Return to Work Act subsections 4(1), 4(4), 65(2)(b)(i), 87(1), 88(1), 89(1), 89(2), 109(1), section 110 and subsection 116(1).*

*Hatzimanolis v A.N.I. Corporation Limited [1992] 173C.L.R. 473*

*Northern Cement v Ioasa [1994] NTSC 58*

*Comcare v Mather; Comcare v Mitchell (1995) 56 FLR 456*

*Glen William Plewright v Mark Passmore t/as Passmore Roofing – unreported Decision of Chief Magistrate Gray NT Work Health Court delivered 15 May 1996*

*Waylexson Pty Ltd t/as Peterson Earthmoving Repairs v Clarke (2010) 25 NTLR 168*

*Betty Millar v ABC Marketing and Sales Pty Ltd [2012] NTSC 21*

*Comcare v PVYW HCA [2013] HCA 41*

*Westrupp v BIS Industries Limited and Comcare [2015] FCAFC 173*

**REPRESENTATION:**

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| | Employer: | Mr W. Roper |

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| Judgment category classification: | A |
| Judgment ID number: | 010 |
| Number of paragraphs: | 187 |

IN THE WORK HEALTH COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

Claim No. 21758967

BETWEEN

JONATHON TURNER

Worker

AND

GEBIE CIVIL & CONSTRUCTION PTY LTD

Employer

REASONS FOR DECISION

(Delivered 21 June 2019)

JUDGE JOHN NEILL

**Introduction**

1. Jonathon Andrew Turner ("the Worker") was born on 8 October 1968 and he is currently aged 50 years.

2. Gebie Civil & Construction Pty Ltd ("the Employer") on and around 21 May 2017 was a corporation engaged in building and construction works on Groote Eylandt in the Northern Territory of Australia ("the NT").

3. On and around 21 May 2017 the Worker was working for the Employer on Groote Eylandt as a supervisor carpenter ("the employment"). The employment was a fly in/fly out arrangement between Groote Eylandt and the Worker's home in Queensland.

4. The Worker did not usually work on Sundays while he was on Groote Eylandt. On Sunday 21 May 2017 the Worker went on a fishing trip with the Employer's General Manager Glen Smith and the Employer's Construction Manager Beau Johnson. This took the three men on a 2½ hour driving trip from the township of Alyangula where they were based on Groote Eylandt to a coastal site known as Wayne's World.

5. On Sunday 21 May 2017 while walking over a headland at Wayne's World the Worker slipped and fell ("the accident") and he suffered injuries ("the injuries") and was evacuated to Darwin for medical treatment.

6. The Worker made a claim under the *Return to Work Act* ("the Act") on about 28 August 2017 in respect of the accident and the injuries. The Employer disputed that claim by a Notice of Decision dated 5 October 2017, on the basis that the injuries "*did not arise out of or in the course of your employment with the Employer*".

7. The Employer's Notice of Decision was given to the Worker more than 10 working days after his claim was made. This delay had the consequence of deeming the Employer to have accepted the claim from the date of the accident until 14 days after the Employer's Notice of Decision disputing the claim was given to the Worker – subsection 87(1)(a) of the Act. The Employer has accepted this consequence and I am informed by counsel for the parties that the Employer has paid the Worker all his entitlements under the Act including weekly benefits on the basis of total incapacity for this period, agreed as being 22 May 2017 (the day after the accident) to 19 October 2017 inclusive. The Employer otherwise continues to dispute the Worker's claim.

**Pleadings and Issues**

8. The Worker filed an Amended Statement of Claim dated 14 August 2018. The Employer filed its Amended Notice of Defence to the Amended Statement of Claim on 8 October 2018.

9. In paragraph 5 of this Statement of Claim, the Worker pleads injuries arising out of or in the course of the employment on 21 May 2017. In paragraph 5 of its Defence the Employer denies that any injuries arose out of or in the course of the employment.

10. In paragraphs 11 and 12 of his Statement of Claim the Worker pleads ongoing total or alternatively partial incapacity for work as a consequence of the injuries. In paragraphs 11 and 12 of its Defence the Employer formally does not admit any ongoing incapacity as a consequence of any injuries.

11. In paragraph 5 of his Statement of Claim the Worker particularises 14 separate injuries and/or symptoms constituting the injuries. The Worker particularises but does not formally plead any of these 14 identified injuries and the Employer in paragraph 5A of its Defence notes it is not required to plead to particulars but then does plead to them anyway by formally not admitting them.

12. In paragraph 14 of his Statement of Claim the Worker says he will plead his normal weekly earnings when the Employer discovers his relevant wage records. In paragraph 14 of its Defence the Employer pleads normal weekly earnings in the amount of $2,227.23 gross. I am satisfied this exchange adequately puts the issue in contention and the Worker did not need to file a Reply formally contesting the Employer's figure. However, no evidence was tendered and no submissions were

made at the hearing on this issue and I make no finding as to the amount of the Worker's normal weekly earnings.

13. Medical records and reports were tendered by consent at the hearing. No live medical evidence was called. The position therefore as to the precise nature of the injuries and any incapacity arising from them is that the Worker is simply put to his proof.

14. The Worker bears the onus of proof in respect of the precise nature of the injuries although not that some injuries occurred, which is not in dispute. He bears the onus of proof in respect of establishing any incapacity, on and after 20 October 2017, arising from any injuries.

15. The Worker bears the onus of proof in respect of whether the accident and any consequential injuries arose out of or in the course of the employment.

16. The Worker was *dux litis* at the hearing. The hearing ran from 12 to 16 November 2018 inclusive. Written submissions were subsequently filed, with the last being the Employer's submission filed on 18 December 2018.

**Workers' Compensation**

17. At first consideration it might seem strange that the Worker has claimed workers' compensation benefits for injuries he suffered while on a fishing trip with workmates on his Sunday off work. How can such injuries be work-related? How are they the Employer's problem?

18. Further consideration shows that the idea of such a claim is not as challenging as it may sound. It is instructive to look briefly at the history of the whole idea of workers' compensation and then in more detail at the development of the fundamental concept of "*arising out of or in the course of employment*" which appears in subsection 4(1) of the Act as well as in other workers' compensation legislation throughout Australia.

19. The first formal workers' compensation system was introduced in Germany by Chancellor Otto von Bismarck in 1871. At the time Germany was experiencing significant social and labour unrest and the German *Employer's Liability Law 1871* was an effort in part to address this.

20. Social unrest in the 19th and early 20th Centuries was not confined to Germany. The first workers' compensation legislation in Australia was introduced in the then self-governing colony of South Australia in 1900 modelled on legislation introduced in the UK in 1897. All Australian jurisdictions in the new Federation after 1 January 1901 introduced their own workers' compensation laws between 1911 and 1920

21. What all these early workers' compensation systems had in common was that entitlement to benefits was not founded in contract nor was it tort-based. No

concepts of breach of any contractual duty or of any wrong-doing or negligence on the part of the employer were involved. Compensation was payable irrespective of any specific or systemic failing by the employer. All that had to be established was that the worker had suffered an injury and that this occurrence was connected with the worker's employment with the employer.

22. This idea of no-fault compensation to be funded entirely by the employer involved a radical change in the law and it was unpopular with employers when it was first introduced. However, because it was mandated by statute subject to significant penalties for non-compliance, and because over time it applied throughout Australia and the broader British Empire (as it then was), employers came to accept it. Over the last 100 years or so what started out as a challenging innovation has become an accepted part of Australia's legal and social landscape.

23. The nature and extent of the necessary connection between an injury and an employment in workers' compensation law has evolved over the same period. The concept has been the subject of much judicial consideration. It is embodied in the clause "*arising out of or in the course of employment*" referred to above. The second part of this clause, "*arising…in the course of employment*", has been given an extended meaning in a number of Decisions of the High Court, particularly since World War II. The present position is that, in some circumstances, workers might indeed be in the course of their employment even when not working and even while engaged in apparently purely personal activities.

**In the Course of Employment – the Hatzimanolis Principle**

24. In *Hatzimanolis v A.N.L. Corporation Ltd* ("*Hatzimanolis*") [1992] 173 C.L.R. 473, Mason CJ, Deane, Dawson and McHugh JJ reconsidered the extent and meaning of the expression "*in the course of employment*" in the sub-category of workers' compensation cases where an injury occurred in an interval or interlude within an overall period or episode of work.

25. Starting at point 4 on page 482, their Honours said as follows:

> *Beneficial as the* Henderson-Speechley *test has proved to be in the law of workers' compensation, its formulation no longer accurately covers all cases of injury which occur between intervals of work and which are held to be within the course of employment. A finding that a worker was doing something "in order to carry out his duties" at the time he sustained injury is in many cases simply fictitious. Consequently, the rational development of this area of law requires a reformulation of the principles which determine whether an injury occurring between periods of actual work is within the course of the employment so that their application will accord with the current*

*conception of the course of employment as demonstrated by the recent cases, particularly the decisions of this Court in* Oliver *and* Danvers.

*A striking feature of the recent cases which have held that an injury occurring in an interval between periods of actual work was within the course of employment is that in almost all of them the employer has authorised, encouraged or permitted the employee to spend his time during that interval at a particular place or in a particular way. However, it would be an unacceptable extension of the course of employment to hold that an employee was within the course of employment whenever the employer had authorised, encouraged or permitted the employee to spend the time during an interval between periods of actual work at a particular place or in a particular way. That formulation would cover not only the case of the "lunchtime" injury, as in* Oliver*, and the case of the railway worker, as in* Danvers*, but also many cases involving injuries occurring during intervals between daily periods of work which could not fairly be regarded as within the course of employment. Thus, an employee who is encouraged by his or her employer to see a doctor after working hours is not ordinarily within the course of employment if injured while visiting the doctor, although the case would come within such a formulation. The course of employment is ordinarily perceived as commencing when the employee starts work in accordance with his or her ordinary or overtime hours of work and as ending when the employee completes his or her ordinary or overtime hours of work.*

*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 characterisation 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*** (emphasis added). *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 an employee who performs his or her work at a permanent location or in a permanent locality*** (emphasis added).
>
> ***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*** (emphasis added).

26. The High Court went on to take a broad view of "the employment". It said:

> ***" 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' -* Danvers *(1969) 122 CLR, at p 537*** (emphasis added)" - page 484.4.

27. Justice Toohey delivered a separate but concurring judgement in *Hatzimanolis*. He too directed attention to the general nature, terms and circumstances of the

employment rather than to the circumstances of the particular occasion out of which the injury arose. He said at page 491.6 as follows:

> *"But when regard is had to the terms of the appellant's employment, what was said at the time of his engagement, the location where he was working, the hours and days worked, the use made of the respondent's vehicles for the convenience of its employees and the role of the respondent's supervisor in organising the trip to Wittenoom Gorge for the appellant and his fellow employees, the conclusion is inevitable that the appellant was, at the time of the accident, doing something which he was 'reasonably…authorised to do in order to carry out his duties',* ***that is, an activity which the respondent (*** the employer ***) saw as making the working conditions more attractive than they would otherwise be*** (emphasis added)"**.**

**That Place or…that Activity**

28. The quotation from *Hatzimanolis* underlined in paragraph 25 above identifies a general principle. However 21 years after *Hatzimanolis* was decided, a "*further explication*" but not a "*reformulation*" of that principle was considered desirable by a differently constituted High Court. In *Comcare v PVYW* ("*PVYW"*) [2013] HCA 41 the High Court was again considering an injury sustained in an interval or interlude within an overall period or episode of work when it made this distinction in paragraph 14 of that Decision.

29. In *PVYW* the employee was required by her employment to travel away from her home to another town and stay overnight in a motel. While away from her home in these circumstances she took an acquaintance back to her motel room where they engaged in sexual intercourse. During this activity a glass light fitting over the motel bed was dislodged by one or other of the participants. It struck the employee in the face and caused physical injuries and subsequent psychological injuries.

30. The employee made a workers' compensation claim. This was unsuccessful at first instance but she was successful on her appeal to a single judge of the Federal Court, and she was again successful on Comcare's appeal to the Full Federal Court. Both the single judge and the Full Court of the Federal Court adopted the *Hatzimanolis* principle set out above. They found that because the injury had happened in an interval or interlude occurring within an overall period or episode of work, and because the employer had expressly encouraged the employee to spend that interval or interlude at a specific place, namely at that motel, the injury occurred in the course of the employment.

31. Comcare appealed to the High Court. French CJ, Hayne, Crennan and Kiefel JJ delivered a joint judgement, with Bell and Gageler JJ dissenting. The majority considered the sentence appearing toward the end of the passage from *Hatzimanolis*

set out above - "*Furthermore, an injury sustained in such an interval will be within the course of employment* ***if it occurred at that place*** *<u>or</u> while the employee* ***was engaged in that activity****...* (emphasis added)*".* It noted that this formulation might appear to establish the occurrence of an injury either "at that place" or, alternatively, "while engaged in that activity", as being sufficient to establish occurrence within the course of employment. However, the majority in *PVYW* did not accept that this simple disjunction was what the majority in *Hatzimanolis* had intended – paragraph 11.

32. Instead, the majority in *PVYW* concluded the usual focus should be on the "activity" rather than the "place". It noted that it is only in relatively rare cases that there will not have been a relevant "activity" but only a "place". In such rare cases the question might indeed turn simply on the employee's presence at a particular "place", but not otherwise – paragraph 26.

33. The Court in *PVYW* explained this as follows:

> *"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 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 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 commonly, it will have occurred while the employee was engaged in an activity. It is only if and when one of these 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*** (emphasis added)**.**
>
> *"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*** (emphasis added)***".***

34. The High Court in *PVYW* summarised its "*further explication*" of the *Hatzimanolis* principle as follows:

> "*58. Nothing said in* Hatzimanolis *suggests that an association between the circumstances in which injury is suffered by an employee and the employment is not necessary. In stating the purpose of earlier tests as being, properly, to limit compensation for injury which is work-related, the joint reasons in* Hatzimanolis *may be taken to acknowledge the need for that association or connection with the employment.*
>
> *"59. This is not to suggest that there should be added to the application of the principle in* Hatzimanolis *a separate test of connection or association. That would run counter to what* Hatzimanolis *sought to achieve and the method by which it did so. Whilst the decision did not doubt the correctness of the object of earlier tests, it was able to effect the necessary connection by other means. Instead of testing for connection, as by the enquiry whether something done was incidental to employment, it enquired whether the employer had induced or encouraged that which was done. The connection or association it achieved with the employment is a by-product of the principle, but it is not itself a test.*
>
> *"60. The principle in* Hatzimanoli*s should nevertheless be understood to have sought, and achieved, a connection or association with employment. For present purposes that understanding is helpful to explain, if it be necessary, that for an injury occurring in an interval in a period of work to be in the course of employment, the circumstance in which an employee is injured must be connected to the inducement or encouragement of the employer. 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".*

35. The conclusion in *PVYW* was that the employee was engaged in an activity, and therefore any encouragement by the employer for the employee simply to be present at the motel, being the place where the activity occurred, was "*…not relevant in such a case*" – *PVYW* paragraph 39. The activity in question was identified as the employee's engaging in sexual intercourse. Sexual intercourse is not an activity that in the normal course an employer could be said to induce or encourage an employee to engage in. There was no evidence in *PVYW* of any express or implied inducement or encouragement by the employer of that activity. Accordingly, Comcare's appeal was upheld and the employee was unsuccessful in her claim for compensation.

36. The *Hatzimanolis* principle was considered again two years after *PVYW* in *Westrupp v BIS Industries Limited and Comcare* ("*Westrupp*") [2015] FCAFC 173. This was a Decision of the Full Court of Appeal of the Federal Court which delivered a unanimous opinion. It said as follows:

> *"53. It is important, in our respectful view, to recognise that those concluding remarks* (in PVYW) *affirm the existence of two streams of analysis having their origins in two different circumstances – activity and place. Despite the obvious possibility for overlap on the facts of particular cases, we do not understand the majority judgement in* PVYW *to say that satisfaction of both tests is required as a condition for liability. Such a combined test could not have been satisfied in* Danvers.
>
> *"54. We take it, therefore, that it is not necessary to ask whether the place at which the injury occurred and the activity in which the employee was engaged were each induced or encouraged by the employer. Such an approach would be inconsistent with the explanation given in* PVYW *about the process of reconciliation amongst* Danvers, Hatzimanolis *and* PVYW *itself. However, in some cases, (and* PVYW *was one such case) the employee's own conduct might indicate a lack of connection with employment".*

37. Otherwise, the Full Federal Court of Appeal was of the view that the *Hatzimanolis* principle remained good law. It said as follows:

> "*67 If Mr Westrupp had been injured by a fire at his quarters while sleeping (*Danvers*) or whilst showering (*Comcare v McCallum *(1994) 49 FCR 199 ("*McCallum*") ) or had been struck by a car while returning to his accommodation (*Mather*; see also* Watson v Qantas Airways Ltd *(2009) 75 NSWLR 539) ("*Watson*") ) or had been assaulted by strangers while returning to his quarters after a meal and a few beers (*Kennedy v Telstra Corporation *(1995) 61 FCR 160 ("*Kennedy*")), then, on the authority of* Danvers*, and cases in this Court and in other courts which have applied* Hatzimanolis, *he would have been entitled to compensation. We do not understand these authorities to have been overruled, expressly or by implication, by* PVYW. *The circumstances of the present case, in our view, are not materially different".*

**The Activity**

38. In the present case it is common ground that the injuries occurred on 21 May 2017 when the Worker slipped and fell while traversing a headland on foot at Wayne's World where he and his companions had gone to fish. However, the correct identification of the 'activity' is fundamental to answering the question whether the

Employer had expressly or impliedly induced or encouraged that 'activity' and thus whether the injuries arose in the course of the employment.

39. In *Hatzimanolis* the analysis relevant to 'activity' was that the injured worker was engaged broadly in an "*outing*" – page 485.1 – or an "*excursion*" – page 485.7 - rather than say the more narrow undertaking of simply travelling in a car when he suffered injury in a car accident.

40. In *Comcare v Mather; Comcare v Mitchell* ("*Mather*") (1995) 56 FCR 456 the analysis was also that the injured workers were engaged broadly in the activity of "*recreation*" by way of "*drinking and socialising at hotels*" – page 463.4 - rather than say simply walking along the road at the time they were struck by a car.

41. In *Waylexson Pty Ltd t/as Peterson Earthmoving Repairs v Clarke (2010) 25 NTLR 168* (*"Waylexson"*) the Northern Territory Court of Appeal specifically considered the question of identification of a relevant activity. That case involved a motor vehicle injury to a worker associated with a fishing trip. The evidence found at first instance by the Work Health Court was that the accident occurred in an interval or interlude in an overall period or episode of work.

42. That worker was changing his shift and went on a fishing trip to occupy himself while keeping awake during the gap between his changing shifts. The Work Health Court had found that the employer encouraged its employees to stay awake until later at night on the day following the completion of a day shift and to rise late the next day, to enable their bodies to adjust to the change in shifts.

43. The worker was invited by his immediate supervisor Mark Todd to go fishing with him. The evidence found was that the worker accepted the invitation for a number of reasons. These were: i) in order to keep on the good side of Todd, so as to enhance his prospects of obtaining future employment; ii) there were in any event limited suitable activities to fill in time between shifts and employees frequently chose the activity of fishing for this reason; and iii) as a means of staying awake during the shift change.

44. The Work Health Court at first instance had found that although the employer in general knew that workers went fishing as a recreational activity, it did not expressly or impliedly induce or encourage them to do so during shift changes. On appeal to the Supreme Court of the Northern Territory, Justice Southwood ruled that this was the answer to the wrong question. He ruled that the correct question had to be identified by reference to the general nature, terms and circumstances of the employment, and not merely by reference to the particular circumstances out of which the injury to the worker had arisen. He ruled that the correct question to be determined *"…was whether the undertaking fell within the instruction to stay awake as long as possible and whether the activity logically arose from that instruction or was a reasonable and foreseeable incident of the instruction*" –

quoted in *Waylexson* Court of Appeal at paragraph 20. The answer to the correctly formulated question before Justice Southwood was that that the undertaking did fall within the instruction to stay awake, and so the worker was successful on that appeal.

45. The employer further appealed to the Court of Appeal. Mildren J held that Justice Southwood had reached the correct conclusion: "***The learned magistrate*** (of the Work Health Court) ***focused his attention on the fishing expedition , rather than the real activity which was 'staying awake***' (emphasis added), *when he found that the worker went on a trip to stay awake, there were limited suitable activities available to fill in time to assist workers to stay awake, whilst making the advisable adjustment to sleeping during the day, the employer left the choice to the (worker) as to how he might achieve that objective…In order to succeed, the (worker) did not have to show that the activity of taking a fishing trip at night was either expressly or impliedly approved by his employer.* ***This confuses the 'activity' in the broad sense with the means by which the activity was accomplished, which was left to the (worker)*** (emphasis added)*"* – paragraph 44.

46. Accordingly, in *Waylexson* the injury suffered by the worker in a motor vehicle accident while going fishing between shifts was held to have arisen in the course of his employment. This was because the "activity" to be considered was his doing something to keep awake over the shift change, not the fishing trip itself. This was so even though the fishing trip was engaged in by the worker only partly for the work purpose of keeping awake.

**The Evidence**

47. The organisational structure of the Employer involved a General Manager, a Construction Manager, a Workshop Manager, two supervisors, and employed tradesmen including carpenters, electricians, plumbers and a roofer.

48. The General Manager was responsible for the operations of the Employer on Groote Eylandt – transcript 14 November 2018 at page 179.

49. The Worker ordinarily lived in Cairns, Queensland and was a fly in/fly out worker from there to Groote Eylandt in the NT during the whole of the employment – transcript 12 November 2018 pages 12.8 and Original Terms of Contract – ExW2.

50. The Employer required the Worker to work on Groote Eylandt for three weeks then return to his home for one week on an ongoing regular basis, with the Employer organising and paying for all travel expenses – Original Terms of Contract EXW2.

51. During each three week period on Groote Eylandt the Worker was accommodated at the Dugong Lodge at the township of Alyangula, seven days each week, and was

provided with three meals each day at the Lodge, all at the Employer's expense – transcript 12/11/18 at page 19.

52. During each three week period on Groote Eylandt the Worker worked in the employment 11 hours each day from 6:00am to 5:00pm Monday to Saturday inclusive including working on public holidays but almost always with Sundays off – transcript 12 November 2018 page 19.9. During each 11 hour shift the Worker had two breaks of half an hour each.

53. During each three week period on Groote Eylandt the Employer provided the Worker with work clothes. The Employer also provided the Worker with a work vehicle for his own use which he was permitted to use in and around the township of Alyangula and to travel to work sites, but not to use to travel otherwise on Groote Eylandt – transcript 12/11/18 Page 10.6 to 18.8.

54. During each three week period on Groote Eylandt the Worker was permitted to be present at Alyangula and to travel to and between work sites for the employment but he was not permitted to travel outside these places unless he first obtained a recreational permit issued by traditional owners on Groote Eylandt – transcript 12/11/18 page 18.3 to 18.6.

55. The evidence was that workers came home to the Dugong Lodge from the worksite shortly after 5:00pm, cleaned up and went down to have dinner. They would sit with other workers, eat their dinner, and then usually go back to their rooms to rest and sleep before the 6:00am start the following morning.

56. All employees were on Groote Eylandt for the purpose of working. Late nights and in particular heavy drinking were discouraged – transcript 14 November 2018 at page 217. Workers could be subject to random breath tests when they started work in the morning – transcript 12 November 2018 Page 23.

57. While on Groote Eylandt all employees were subject to a Code of Conduct which applied 24 hours a day, seven days a week, including when the employees were not actually engaged in working - transcript 14 November 2018 page 208. Breaches of the Code could result in disciplinary action. There was evidence that such action could include termination of employment. This could happen even when the breaches of the Code occurred outside working hours - transcript 14 November 2018 at page 212.

58. There was no express prohibition in the terms of the employment preventing the Worker from physically departing from Groote Eylandt at any time he was not engaged in work. Theoretically, this could have included the five days from Monday to Friday inclusive after he completed each 11 hour shift at 5:00pm and before he was due to commence the next day's shift at 6:00am, and he could also theoretically have departed from Groote Eylandt at any time after 5:00pm on any

Saturday provided he was back for work by 6:00am the following Monday. Plainly however there were practical limitations restricting the Worker's ability to leave Groote Eylandt at any time during each three week period he was required by the terms of the employment to be there.

59. I take judicial notice of the following facts - Groote Eylandt is situated off the mid North East Coast of the Top End of the Northern Territory. It is an island and therefore can be reached only by boat or by aircraft. The nearest major centre to Groote Eylandt is the town of Nhulunbuy on the North East tip of the Top End, about 200 kilometres away as the crow flies.

60. I take judicial notice of the following further facts - there was and is no regular passenger service to Groote Eylandt by sea. The only practicable means of transport into and out of Groote Eylandt for workers such as Mr Turner was and is by air. Regular air services were and are provided only at set times by commercial carrier Airnorth upon payment of the commercial airfare. It was and is possible to charter a private plane, but that would have needed to be organised in advance of any proposed travel, and it would be likely to be more costly than the regular commercial service provided by Airnorth.

61. There was evidence that workers on Groote Eylandt when not actually working did go fishing in small boats in their free time in coastal waters around Groote Eylandt and the Worker said in his evidence that on a few occasions he had been out fishing in these coastal waters in small boats owned by acquaintances.

62. The Worker commenced the employment on about 21 September 2016 as a carpenter and towards the end of November 2016 he was promoted to supervisor carpenter – exhibit W2.

63. It was just before the Worker's promotion that he first went on a fishing expedition to Wayne's World on Groote Eylandt. This fishing trip was organised by Glen Smith who was at that time the Construction Manager for the Employer. Glen Smith invited the Worker to come on that fishing trip – transcript 12 November 2018 at page 24.

64. Wayne's World is about a 2 ½ hour drive from Alyangula. The trip requires driving over rough roads and then upon arrival driving along beaches. It requires a four-wheel drive vehicle and the skill to drive that vehicle in those conditions. The trip to Wayne's World took some planning because all food, fuel, water and recreational permits have to be organised and obtained at least the day before travelling. This is because the trip to Wayne's World and back is a full day trip leaving no time to organise these arrangements on the day. There are no places where food or water or fuel can be purchased during the course of the trip – transcript 14 November 2018 page 210.

65. After the Worker's promotion Glen Smith approached him and asked him to become the nominee builder for the Employer - transcript 12 November 2018 page 32. The Employer was engaged in government housing contracts and it was a requirement that the Employer provide a nominee licensed builder registered in the Northern Territory. The Worker agreed and all documentation was completed in January 2017. The Employer through Glen Smith paid for the necessary registration which included the cost of a financial statement required to be lodged in support of the application. This payment was made using a corporate credit card available to Glen Smith – transcript 14 November 2018 page 222.

66. In around December 2016 or January 2017 Glen Smith was promoted from Construction Manager to General Manager for the Employer – transcript 14 November 2018 page 187.

67. The role of General Manager for the Employer was a major one. It included having the day-to-day operational control of all the Employer's activities on Groote Eylandt, all hiring and firing of staff, implementing or enforcing the Code of Conduct in respect of the Employer's workers and maintaining safety on all worksite operations – see the evidence of Coralie Ferguson, Chief Executive Officer of GEBIE of which the Employer is a wholly owned subsidiary - transcript 14 November 2018 pages 174 to 180.

68. The Employer allocated Glen Smith a four-wheel drive motor vehicle which he was permitted to drive and take off-road for recreational purposes. Glen Smith occasionally took other employees of the Employer with him on such trips. Glen Smith was not certain whether he was "authorised" to take fellow workers with him on such trips and he believed that there was nothing official written about that subject. However he gave evidence that the Employer was aware that he did it and that they had not told him he could not do it – transcript 14 November 2018 pages 211 and 212.

69. Beau Johnson was appointed Construction Manager for the Employer and commenced work on about 28 April 2017. Around 20 May 2017 Glen Smith organised a fishing trip to Wayne's World involving both Beau Johnson and the Worker - this was to be the Worker's second fishing trip to Wayne's World. Glen Smith was uncertain in his live evidence before the Court how the Worker came to be involved - transcript 14 November 2018 page 226. However, in a statutory declaration made 6 December 2017 Glen Smith stated in paragraph 23: "*I do not recall how the trip came about… I would have been talking with Beau Johnson about going the next day. I would have been telling stories. I do not have any recollection of Jonathan Turner asking to go… I did not formally invite Jonathan Turner to go fishing… I received a text message from Jonathan Turner at 8 PM on*

*20 May 2017 asking, 'Hey mate, what you think about fishing tomorrow'*" - exhibit E39.

70. The Worker however was quite certain in his evidence before the Court that Glen Smith had invited him on that second fishing trip to Wayne's World which took place on 21 May 2017 – transcript 12 November 2018 page 37. The Worker remained firm about this when tested in cross examination – transcript 12 November 2018 pages 67 to 70.

71. The evidence of Glen Smith on this issue was uncertain. He did not recall how the trip came about, and his evidence was phrased in terms of what he "would have" been doing in terms of organising the trip. I am satisfied that Glen Smith was doing his best but that he was reconstructing his recollection of how the trip came about.

72. The text message from the Worker referred to in exhibit E39 above was explained by the Worker in cross examination, also by way of a memory reconstruction. The Worker said that he did not recall sending the text message but that he had subsequently been shown a copy of it. He explained: "*I would have sent that through to him just make sure that the meeting was still on… He invited me earlier* (emphasis added) *and I wouldn't have heard from him that afternoon because he used to work late. And, I would have just been reminding, saying is it on tomorrow?"* -Transcript 12 November 2018 page 68.

73. The language of the text message from the Worker to Glen Smith is capable of being read as the Worker suggested. It is also capable of being read as the Worker's inviting himself along on the fishing trip. The Worker does not recall sending the message and Glen Smith does not recall how the trip came about.

74. On balance I am satisfied that the Worker had a clear recollection of having been invited on the fishing trip on 21 May 2017 by Glen Smith and that Glen Smith did not have a clear recollection of how the Worker came to be invited on that fishing trip. I am satisfied on the balance of probabilities and I find that Glen Smith invited the Worker to accompany him and the Employer's new Construction Manager Beau Johnson on the fishing trip to Wayne's World on 21 May 2017.

75. In his statutory declaration exhibit E39 Glen Smith stated in paragraph 17: "*The normal activities undertaken on rostered days off are: staying in the resort; playing golf or going to the gym; going fishing*". He stated in paragraph 19: "*In an environment where fishing is a focus, it is given that those who like fishing will go fishing every Sunday*". He stated in paragraph 26 when talking about the accident: "*I arranged the fishing trip*".

76. The Worker gave evidence that he wanted to go on the fishing trip for a number of reasons. One was to get to know the new Construction Manager Beau Johnson better, another was to continue to foster the Worker's ongoing employment

relationship with the Employer, and a third was to enjoy a day's fishing – transcript 12 November 2018 page 38.

77. I make formal findings of fact in respect of all the foregoing paragraphs under the heading "The Evidence" except where it is otherwise stated.

**Interval or Interlude within an Overall Period or Episode of Work**

78. **T**he Employer disputes that the accident and injuries suffered by the Worker on 21 May 2017 occurred in an interval or interlude occurring within an overall period or episode of work.

79. Mr Roper for the Employer submits that in this case the relevant overall period or episode of work during each three weeks the Worker was on Groote Eylandt was from 6:00am each Monday to 5:00pm each Saturday – paragraph 20 of the Employer's written submission dated 17 December 2018.

80. Mr Roper submits that the period from 5:00pm each Saturday evening to 6:00am each following Monday morning was an interval between two discrete periods of work and the Worker and his fellow employees in his situation were free to spend that period however they chose - paragraph 21 of the Employer's written submissions.

81. Mr Roper submits that the Worker had a real choice as to how he could spend that free time. He could spend time at or around the Dugong Lodge where he was accommodated, watching television or on his computer utilising the free Wi-Fi, perhaps studying, or socialising at the bar at the Lodge; outside the accommodation he could play golf, or go to the gym; he could socialise at the Alyangula Hotel or at the Golf Club with friends and acquaintances among other fly in/fly out workers or the small number of permanent residents employed in Alyangula; or he could go fishing.

82. The evidence before the Court is that all of these identified activities were indeed options for the Worker's entertainment and or relaxation on each Saturday evening and Sunday during each three week stint on Groote Eylandt, and I so find. There were no other options, and I so find. The evidence is that, other than fishing, all these available activities were limited to the Worker's accommodation at the Dugong Lodge or within the adjacent township of Alyangula – a small geographical area inhabited by a small population – and I so find.

83. In *Hatzimanolis* at page 484.6 the High Court considered Mr Hatzimanolis's employment circumstances and the question of an overall period or episode of work. "*In the present case, the appellant was already a casual employee of the respondent at Wollongong in New South Wales when he was engaged to work as an employee of the respondent on a project at the remote location of the mine at Mt Newman in Western*

*Australia. The project was expected to last for some three months. The appellant was briefed in Wollongong and travelled to Mt Newman in his capacity as an employee of the respondent. His air fares to and from Mt Newman were the responsibility of the respondent. The basis upon which he was engaged for the project was that he would be working extended working hours (approximately sixty hours per week) spread over six days per week with the possibility of also being required to work on the seventh day (i.e. Sunday). While on location at Mt Newman, the respondent provided him with free accommodation and full board in a "camp" which included some recreational facilities. In these circumstances, the whole period during which the appellant was engaged in working at Mt Newman constituted an overall period or episode of work. The outing in the course of which the appellant sustained his injuries took place in an interlude or interval in that overall period or episode of work".* That outing took place on a Sunday when Mr Hatzmanolis was not required to work. The High Court in its analysis did not distinguish between Mr Hatzimanolis's Sundays off and time off on the other six days in his working week at Mt. Newman.

84. The Worker's employment with the Employer in the present case involved strikingly similar circumstances. Adopting the analysis used in *Hatzimanolis* in the preceding paragraph, I find that "*The (Worker) was briefed in (Cairns) and travelled to (Groote Eylandt) in his capacity as an employee of the (Employer) …*". I find the employment required him to be a long way away from his usual residence and to live and work "*in a remote location*" during the entirety of each three week period of work, including on Sundays. I find "*His air fares to and from* (*Groote Eylandt*) *were the responsibility of the (Employer*)". I find that while on location on Groote Eylandt "*the (Employer) provided him with free accommodation and full board in (accommodation) which* i*ncluded some recreational facilities*...". I find that "*The basis on which he was engaged for the (employment) was that he would be working extended hours (approximately sixty hours per week) spread over six days per week with the possibility of also being required to work on the seventh day (i.e. Sunday)*". I find that it was impracticable for the Worker to leave the island during each three week period, including over Saturday evenings and on Sundays, even though he was not expressly prohibited from doing so.

85. The evidence is also that the Worker and his fellow employees worked long, 11 hour days with only two 30 minute breaks each day, six days each week, for three weeks straight, in taxing tropical conditions, and I so find.

86. Each Sunday within each three week stint was usually kept free as a day off work for rest and recuperation for all employees, including the Worker, and I so find.

87. I am satisfied and I find that the employment in this case too was one 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 work period of the undertaking constitutes an overall period or episode of work*" – *Hatzimanolis* page 483.7.

88. I find that the Worker's three week stints on Groote Eylandt, including Sundays, constituted an overall period or episode of work.

89. I find that any activity by the Worker while on Groote Eylandt at all times other than when he was actually engaged in work, took place in an interlude or interval in the overall three week period or episode of work, including Sundays.

90. I find that the fishing trip to Wayne's World on Groote Eylandt on Sunday 21 May 2017 in the course of which the Worker fell and suffered the injuries, took place in an interlude or interval in that overall period or episode of work.

## The 'Activity' in the Present Case

91. In the present case the relevant 'activity' in which the Worker was engaged at the time of the accident has to be identified by reference to the general nature, terms and circumstances of the employment, and not merely by reference to the particular circumstances out of which the injuries to the Worker arose – *Hatzimanolis* page 484.4.

92. I have made findings earlier in these Reasons that the general nature, terms and circumstances of the employment in the present case included the Worker's social and physical isolation living and working in a remote location, his long working hours of 11 hours each day, six days each week in taxing tropical conditions and his having only one day off work each week in each three week stint. I find there was a consequent need for the Worker and other workers employed under similar conditions on Groote Eylandt to undertake rest and recuperation on their one day off work each week. I have identified and found the limited recreational pastimes available to the Worker when he was not engaged in work. I am satisfied and I find, in the words of Justice Southwood quoted in paragraph 44 above, that going fishing was "a reasonable and foreseeable incident" of the Worker's need to undertake rest and recuperation on his one day off work at the end of his demanding working week.

93. I am satisfied and I find that the relevant 'activity' in the present case was the Worker's engaging in rest and recuperation on his Sunday off work, by way of recreation.

94. This 'activity' in the broad sense should not be confused with the means by which the activity was to be accomplished, namely going on a fishing trip, the choice having been left to the Worker. It might equally have been accomplished by any one of the other limited choices for rest and recuperation by way of recreation available

to the Worker on a Sunday on Groote Eylandt which I have identified earlier in these Reasons.

95. No question was raised on the pleadings or in submissions whether the Worker in going on the fishing trip had voluntarily subjected himself to any abnormal risk of injury – no such issue arises for consideration in this matter.

**Overview**

96. I have found that the accident occurred and the Worker suffered the injuries while he was not working.

97. I have found that the accident occurred and the Worker suffered the injuries during an interval or interlude within an overall period or episode of work.

98. I have found that at the time the accident occurred and the Worker suffered the injuries he was engaged in an activity, namely rest and recuperation by way of recreation.

99. The remaining question to be answered is whether the Employer expressly or impliedly induced or encouraged the Worker to engage in the activity. If this question is answered in the affirmative then the injuries will have occurred in the course of the employment – see the last sentence in paragraph 38. of PVYW quoted in paragraph 33. of these Reasons.

**Induced or Encouraged – Examples**

100. In *Hatzimanolis* the evidence was that the employer in that case by its supervisor had expressly induced Mr Hatzimanolis to spend his work-free Sunday in going on an excursion to Wittenoom Gorge for recreational purposes. The supervisor organised that excursion for a number of employees, provided work vehicles for transport, provided food, and invited Mr Hatzimanolis to "come along". Mr Hatzimanolis accepted and was injured in a motor vehicle accident on the way. The High Court found he was injured in the course of his employment.

101. The question of inducement or encouragement was therefore easily answered in the affirmative in *Hatzimanolis* – the evidence was of an express inducement by way of a specific invitation to the worker in that case, to engage in recreation by going on an excursion.

102. The same question was also answered in the affirmative in *Mather*, where the finding was of an implied encouragement for the workers on their day off to engage in recreation in any appropriate way they might choose. Kiefel J (as she then was) considered the question of what might amount to "encouragement" on the part of an employer of a worker's activities during an interval in an overall period of work.

103. Mather and Mitchell were soldiers temporarily in Darwin with the Army during a large scale military training exercise. They were permitted to take local leave during the training period for a whole day from 8:00am to midnight. Mather was killed and Mitchell was injured when they were both struck by a car while walking back to camp along the Arnhem Highway. Both men had been drinking at hotels in the course of that day.

104. There had been no prescription as to how the soldiers were to spend their day. There was no restriction on where the soldiers could go or what they could do during this day, except that two specified hotels were expressly out of bounds. The hotels Mather and Mitchell in fact attended were not these two. Transport was provided by the Army from the soldiers' camp to two places in Darwin - the Casino and a hotel. It was anticipated but not required that soldiers taking leave would do so in and around Darwin CBD. The Army made return transport available from the CBD however soldiers who ventured further afield were expected to make their own arrangements to return to camp on time. Mather and Mitchell were in this category and they ended up at a pub in Humpty Doo. When they could not find a taxi back to camp they started walking along the highway in the course of which they were struck by the car.

105. Kiefel J considered "encouragement" in the context of these facts. She said at page 462.7 as follows:

> "*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 *(1962) 107 CLR 353 and* Danvers v Commissioner for Railways (NSW) *(1969) 122 CLR 529 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,* ***recognitions of practices, fostering of participation, or providing assistance*** (emphasis added) *and may include the exercise of discretion or choice on the part of the employee. Further attempts 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*".

106. Kiefel J found the two soldiers had been encouraged both to be where they were at the time of the collision and to have engaged in their activity, as follows: "*The terms of the inducement or encouragement here were such as to leave the soldiers some choice as to location and activity to be undertaken during the interval in question. Attendance at locations outside the boundaries or even beyond points which could be conveniently accessed by available transport in the short period allowed and undertaking activities which could not be regarded as social or recreational pursuits may not fall within the compass of the matters in which the army might expect or foresee the soldiers' participation.* ***Drinking and socialising at hotels and returning to camp from not-distant points do not fall into this category. The soldiers' participation in them and which placed them on the highway at the relevant time <u>was encouraged by the army by the grant of local leave</u> which, of its nature and having regard to the condition of the exercise, implied these undertakings*** (emphasis added). *The encouragement could fall into either category in* Hatzimanolis, *that the soldiers spend the interval in a place of their choice or in a way chosen by them, the latter being the finding of the tribunal".*

107. In *Waylexson* the question was again considered and answered in the affirmative. In that case the finding was of the employer's express encouragement for its workers to achieve a specific objective, namely to stay awake between shifts, in any appropriate way they might choose.

108. In *Westrupp* the evidence was of an implied encouragement for the employee to engage in recreation generally, which happened on that occasion to be by attending a tavern in the isolated BHP company town of Leinster, north of Kalgoorlie in Western Australia where the employee's camp accommodation was located.

109. The employee was a fly in/fly out worker who worked a two-week on one week off roster in Leinster. He attended the tavern one evening at the end of his shift. He suffered injury when he was assaulted as he was leaving the tavern, in circumstances where it was found he was blameless.

110. The Court found the whole period during which the employee was engaged working at Leinster constituted an overall period or episode of work, and that the assault and consequent injury occurred in an interlude or interval in that overall period or episode of work – paragraphs 58 and 59.

111. The Full Federal Court found the injury arose in the course of employment. It found that the implied encouragement by the employer was for the employee outside working hours to use the recreational facilities in the town, including the tavern, put in place by the head contractor BHP for use by all employees in the company town. It ruled that this was a case of an encouragement by the employer for the employee to spend the interval or interlude in a particular 'place', namely the whole town and its facilities, of which the tavern was a part – paragraph 68. This Decision did not turn on any question of any 'activity' such as drinking alcohol or socialising or anything else – merely presence at a 'place'.

112. The Tribunal in *Westrupp* at first instance had found the 'place' was simply the tavern. The Full Federal Court of Appeal held that approach was too narrow in that it "*… paid insufficient attention to the general nature, terms and circumstances of the employment. It gave too much prominence* 'to the circumstances of the particular occasion*'* (*Hatzimanolis at 484) and* 'focused just upon the occasion giving rise to the injury' *(PVYW) at [33]*)" – *Westrupp* paragraph 68.

**Induced or Encouraged – the Present Case**

113. The High Court in *Hatzimanolis* at page 484.5 observed: *"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.*" So, in the present case in determining whether the Employer had expressly or impliedly induced or encouraged the Worker to spend an interval or interlude at a particular place or in a particular way, the entirety of the employment circumstances are relevant, and not merely the immediate circumstances of the activity in which the injuries arose. It will also be necessary to consider whether the activity was one *"…which the (employer) saw as making the working conditions more attractive than they would otherwise be*" – *Hatzimanolis* per Toohey J at page 491.9.

114. On the basis of the evidence I have found in these Reasons, I am satisfied and I find that his location on Groote Eylandt and some of the other identified conditions of the employment – such as social and physical isolation, limited options for recreation, compliance even outside working hours with a strict Code of Conduct, long hours or work six days a week in taxing tropical conditions – all imposed very significant limitations ("the limitations") upon the behaviour, movements, and occupations of the Worker, in effect rendering him captive on Groote Eylandt and circumscribed in his lifestyle when not engaged in work during his three week stints. This is not to suggest that any of these conditions of the employment or the overall effect of them was in any way unlawful or improper. I am satisfied that the Worker had embraced the employment and the limitations willingly and in full knowledge and understanding of their import.

115. The Employer was equally aware of the limitations and it equally understood and was fully aware of their import, and I so find.

116. Fly in/fly out workers on Groote Eylandt including the Worker received generous pay and conditions to induce them to undertake and to persevere in their employments notwithstanding the limitations. These conditions included the social and recreational institutions and activities I have identified earlier in these Reasons. These were important for maintaining the health and morale of all workers on Groote Eylandt. These social and recreational institutions and activities were in part provided by or through the head contractor on Groote Eylandt, and/or provided pursuant to an arrangement with the Dugong Lodge, but were available to and benefitted all employees of the head contractor and of subcontractors such as the Employer. As such, they were of value to the Employer "*…as making the working conditions more attractive than they would otherwise be*" – *Hatzimanolis* per Toohey J at page 491.6.

117. In the circumstances, rest and recuperation by way of recreation was of significant importance to the Employer's workforce, including the Worker, and therefore also of significant importance to the Employer, and I so find.

118. The Employer was aware that its employees, including its General Manager Mr Glen Smith, very often engaged in fishing as a popular recreation on their Sundays off work. The Employer was aware by its General Manager Glen Smith that he and other employees from time to time went fishing at distant locations on Groote Eylandt, including Wayne's World.

119. The Employer provided its General Manager Glen Smith with a four-wheel drive motor vehicle for work use and also for his personal use. This vehicle was capable of negotiating the rough, unsealed road to Wayne's World. Glen Smith was permitted to use that vehicle away from Alyangula and on personal trips of this type on Groote Eylandt.

120. The Employer regarded the Worker as a valuable employee as evidenced by his promotion from carpenter to supervisor carpenter and by his having been identified and put forward by the Employer to hold a building licence on the Employer's behalf for its Groote Eylandt activities.

121. The Employer's General Manager Glen Smith had once before invited the Worker on a fishing trip to Wayne's World. On the occasion of the accident he had again invited the Worker to accompany him fishing at Wayne's World, this time together with the Employer's newly appointed Construction Manager Beau Johnson.

122. The Worker accepted this second invitation for a number of reasons. One of these reasons was to get to know Beau Johnson for the purpose of their future working relationship as fellow, senior employees of the Employer on Groote Eylandt. Another reason was the attractiveness of the fishing trip itself as a recreation providing a welcome respite from the Worker's constrained routine on Groote

Eylandt. A third reason was the Worker's desire to foster his relationship with Glen Smith to secure and promote his employment relationship with the Employer.

123. In *Mather* Justice Kiefel discussed "encouragement" in these terms: *"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"* – page 462.7.

124. The Employer provided the four-wheel drive motor vehicle to its General Manager Glen Smith for his personal use outside working hours. It permitted Glen Smith to use that vehicle for recreational trips away from Alyangula and the worksite. It was aware that Glen Smith included other employees of the Employer in such recreational trips and it did not take steps to prevent him or otherwise indicate any opposition to his doing so. In these circumstances, I am satisfied that in the terms identified by Justice Kiefel in *Mather* at page 462.9, the Employer recognised the practice of such fishing trips, fostered the participation of its employees in such fishing trips and provided assistance to its employees to undertake such fishing trips.

125. The Employer's material support for and acquiescence in its employees' recreation by way of such fishing trips establish its knowledge of and approval for this type of recreation.

126. Justice Kiefel concluded her consideration of the Army's 'encouragement' in *Mather* of the soldiers' activities of drinking at hotels and then returning to camp, in these terms: "*The soldiers' participation in them and which placed them on the highway at the relevant time was encouraged by the army by the grant of local leave which, of its nature and having regard to the condition of the exercise, implied these undertakings"* – page 463.4.

127. Similarly in the present case, the Worker's participation in the activity of rest and recuperation by way of recreation, specifically by undertaking a fishing trip, was encouraged by the Employer by allowing the Worker one day off work each week which, in the context of the long working hours under taxing tropical conditions and having regard to the conditions of the employment and to the limitations, particularly the limited options for recreation, and in the context of the Employer's recognition of the practice of its employees' going fishing on their day off work, implied both the activity and the specific undertaking of going fishing.

128. Further, the fishing trip had been organised by the Employer's General Manager Glen Smith who invited the Worker to participate in that undertaking.

129. In *Hatzimanolis* the High Court considered a submission on behalf of the employer that its supervisor was acting in his private capacity when he invited Mr Hatzimanolis on the excursion to Wittenoom Gorge on his Sunday off work. The majority responded to this submission as follows: *"But when regard is had to Mr Pope's* (the supervisor's) *position in relation to the other employees, his role as spokesman for A. N. I. in explaining the general nature, terms and conditions of the employment at Mt Newman, and his part in organising and providing the vehicles and food for the 800 kilometre trip, the most cogent conclusion to be drawn from the evidence is that he acted on behalf of A.N.I. when he organised the trip and invited the appellant and the other employees "to come along". In the absence of any denial from Mr Pope or other officials of A.N.I. , the inevitable conclusion is that Mr Pope was authorised to make the company's vehicles available for the use of the employees on their day off and that his authority extended to organising and making the vehicles available for sightseeing journeys of the kind embarked on, on this particular Sunday".*

130. I have made a finding of fact that the Employer provided the four-wheel vehicle to its General Manager Glen Smith for both his use at work and for his private use, including at large on Groote Eylandt on fishing trips. I have found the Employer knew that Glen Smith took others of its employees with him in this vehicle on fishing trips on their Sundays off work and it took no steps to curtail this practice. I have found that Glen Smith invited the Worker on the fishing trip to Wayne's World on 21 May 2017. I have found that Glen Smith's role as General Manager included the day-to-day operational control of all the Employer's activities on Groote Eylandt, all hiring and firing of staff, implementing or enforcing the Code of Conduct, and maintaining safety on all worksite operations.

131. I am satisfied that in the present case the inevitable conclusion also is that Glen Smith was permitted to make the Employer's vehicle available for the use of its employees, including the Worker, on recreational trips on their Sundays off work. I am satisfied that Glen Smith's authority extended to organising and making the vehicle available for fishing trips of the kind embarked on on this particular Sunday.

132. I am satisfied and I find that the Employer impliedly encouraged the Worker to engage in the activity, namely rest and recuperation by way of recreation, which in the circumstances of this case comprised the fishing trip to Wayne’s World.

133. I find that the Worker had the accident and suffered the injuries on Groote Eylandt on 21 May 2017 in the course of the employment.

**Injuries and Incapacity**

134. In paragraph 5 of the Worker's Amended Statement of Claim dated 14 August 2018 he has particularised 14 physical and/or medical consequences of the accident as constituting the injuries. These can be broadly broken up into three general categories.

135. The first category is orthopaedic and includes particular 5.1 – skull fractures; 5.4 – fractured right heel and foot; 5.7 – injury to jawbone; and 5.11 multiple haematomas (bruising).

136. The second category comes within the specialty of ENT – Ear, Nose and Throat. This includes particular 5.2 – fractured ossicle chain in the right ear; 5.3 – middle ear damage; 5.5 – facial nerve damage; 5.8 – injury to cartilage in right ear; 5.9 – hearing loss; and 5.10 – tinnitus.

137. The third category is neurological and includes particular 5.6 – damage to vision; 5.12 – injury to nerves; 5.13 – acquired brain injury; and 5.14 – headaches.

138. At the hearing the Worker tendered medical documentation being exhibits W17 and W18 and W22 through to W35. The Employer tendered medical documents being exhibits E19 and E20.

139. I am satisfied on the basis of this material and I find that as a consequence of the accident the Worker suffered (i) a basal skull fracture; (ii) a subdural haemorrhage; (iii) a subarachnoid haemorrhage; (iv) a cranial nerve 7 palsy; and (v) a right calcaneal fracture. Associated with the basal skull fracture the Worker also suffered a disruption of the ossicular chain with right mixed mild to profound hearing loss and left mild to moderate neurosensorial hearing loss. At the time of his admission to the Royal Darwin Hospital and for some weeks thereafter he had various abrasions and haematomas as a consequence of the accident.

140. In exhibit W30 which is a report dated 14 August 2018, one year and three months after the accident, the Worker's treating General Practitioner Dr Lars Schneider lists the original injuries and notes the Worker's history and ongoing symptoms as follows: "*Since his accident Mr Turner has been through both inpatient and outpatient rehabilitation programs. At this point in time he continues to suffer from moderate–severe chronic pain in his right ankle, poor concentration and short-term memory, and reduced hearing on his right hand side".* Dr Schneider goes on to express his opinion as follows*: "I believe Mr Turner continues to have issues with poor short-term memory, concentration, hearing loss, tinnitus and headaches. In particular, he struggles with higher order executive tasks that involve planning and calculating. He notices this predominantly when he attempts construction work and*

*often finds he mismeasures materials and/or forgets how to undertake a fairly routine task".*

141. Although Dr Schneider expresses reservations in offering any concluded opinion about the Worker's capacity to work, he does express his view as the Worker's treating General Practitioner that the Worker has ongoing significant restrictions on his capacity to work. He sets out this view on the following terms:

> "*That said, it seems that Mr Turner has engaged fully with all his rehabilitation and has been proactive in getting back to the workforce, however, continues to struggle mentally and physically with the requirements of his previous employment. He relates not being able to undertake planning/design tasks which were second nature to him prior to the accident. He often mismeasures material, and finds he has to revise tasks which should be straightforward. This may improve with time, however, there is no certainty that he will return to his previous level of functioning. In addition, his hearing loss and tinnitus continue to impact upon his ability to concentrate. Physically, his ankle continues to cause him issues with uneven surfaces and he is unable to climb a ladder or scaffolding as a result of the pain. An ankle fusion/posterior tibialis tendon repair was discussed, however, this would require a 12 month recovery and likely place further limitations on his ability to perform the physical aspects of his trade. The ankle fusion may help with his chronic pain. It is unlikely that his ankle will improve markedly at this stage of his recovery without surgical intervention".*

142. Orthopaedic surgeon Dr Bruce Low provided a report dated 27 September 2018 which is exhibit W33. In that report Dr Low concludes that as a consequence of the accident, specifically the right calcaneal fracture involving the subtalar joint, the Worker "*… will never return to work again on a building site as a carpenter. He has too many injuries inconsistent with working as a builder on a building site. He is permanently unfit for his pre-injury occupation in my opinion. He will required retraining through TAFE to become a building inspector or estimator for example".*

143. In response to a question concerning the Worker's future symptomatology following possible medical and surgical treatments, Dr Low says the following: "*He will have a subtalar fusion, which is a salvage procedure to relieve some of the hind foot pain that he is currently experiencing. However, he will still be severely disabled and will not be able to walk on uneven ground on building sites. He will not be able to kneel, squat, hop, climb, run, play sport, walk too far or stand for too long. He will still have a limp. He will require a seated, sedentary job".*

144. All of the foregoing evidence as to the Worker's injuries and his symptomatology and his disabilities and incapacities arising from the injuries was before me

essentially uncontested. I make formal findings of fact in respect of all the foregoing injuries and the incapacities and symptomatology arising from them. I find that they are all consequences of the accident.

145. A number of the medical practitioners who have provided the reports which are before the Court noted the Worker's self-reported history of neurological deficits apparently arising from the accident and have recommended various investigations to assess this. However, no results of any such investigations are before the Court. These symptoms require investigation and assessment but on the evidence presently before me I am unable to make any findings as to any brain damage suffered by the Worker as a consequence of the accident or the extent of any symptoms or limitations arising from any such brain damage.

146. In exhibit W33 Dr Low observes of the Worker that "*He is severely depressed*". Exhibit W17 is a report from consultant psychiatrist Dr Curtis Gray dated 7 August 2018. There is no pleading of any sort of psychiatric or psychological injury either directly caused by the accident or as a *sequela* of the injuries. However, Dr Gray's report was tendered in the Worker's case without objection by the Employer - see transcript 12 November 2018 at page 71.5. The Worker was cross-examined on that report by Mr Roper for the Employer – transcript 12 November 2018 pages 70 to 73.

147. I conclude that notwithstanding the lack of any pleading of a psychiatric or psychological injury the parties have conducted their respective cases on the basis of Dr Gray's report and the evidence contained in that report. That evidence includes a diagnosis of a psychiatric condition arising out of the accident and its consequences.

148. There was no evidence to the contrary. I accept Dr Gray's diagnosis and his opinion that the diagnosed psychiatric injury was caused by the accident and the injuries.

149. I find that as a consequence of the accident and of the injuries the Worker has developed an Adjustment Disorder with Mixed Anxiety and Depressed Mood – exhibit W17 at page 9.8 and page 10.1.

150. The Worker gave evidence that he had attempted to return to work on perhaps three separate occasions. During the course of those attempts the Worker reported problems with his right foot and ankle. He said that he could not weight-bear on the front of his foot, he could only walk on flat surfaces and experienced problems with his balance – transcript 12 November 2018 at page 41. He said that he experienced difficulties carrying a tool bag or any heavy items – transcript 12 November 2018 at page 42. He gave evidence that he experienced difficulties working at heights and

that he couldn't stand for long periods and his ankle frequently became swollen and painful – transcript 12 November 2018 pages 42 and 43.

151. The Worker gave evidence that on his first attempt to return to work he could not wear work boots because of the problem with his right foot and ankle and that he could not cope with slopes and stairs – transcript 12 November 2018 pages 53 and 54.

152. The Worker gave evidence that on his second attempt at returning to work he could not cope with the duties of that work because of his mobility, his memory and his ankle – transcript 12 November 2018 at pages 54 and 55.

153. The Worker gave evidence that on his third attempt to return to work his employment was terminated because he couldn't manage the pressure of carrying out his assigned tasks quickly and his work got behind – transcript 12 November 2018 at pages 55 and 56.

154. I am satisfied that the Worker's evidence as to his disabilities generally and as to the problems he experienced during his attempts to return to work after the accident is entirely consistent with the medical evidence which I have accepted concerning the injuries and their effects upon the Worker.

155. I find that as a consequence of the accident and the injuries the Worker has been partially incapacitated for work from and including 22 May 2017 (the day after the accident) to the conclusion of the hearing on Friday, 16 November 2018, and continuing.

**Arrears of Weekly Benefits**

156. In paragraph 7 of these Reasons I have noted that the Worker has already received payment of all benefits to which he is entitled under the Act, including payment of weekly benefits on the basis of total incapacity for the period 22 May 2017 (the day after the accident) inclusive to and including 19 October 2017.This is because the Employer is deemed to have accepted liability for the claim over that period. For that reason, I disregard any evidence of partial capacity for work within that period such as is set out in the Notice of Decision being exhibit W11.

157. The Worker gave evidence of his attempts to return to work after 19 October 2017 with other employers. However, he was unable to give detailed evidence of precisely when he worked or what were his weekly earnings from that work.

158. The clinical notes from Redlynch Medical Centre suggest the Worker was in casual employment from mid October 2017 to about 15 November 2017. On the basis of this evidence I find the Worker was in employment and earned income from 20 October 2017 to 15 November 2017 inclusive.

159. The Worker gave evidence he received Centrelink benefits from November 2017 to mid-May 2018. I find that he was not in employment and earned no income from any work from 16 November 2017 to 15 May 2018 inclusive.

160. The Worker gave evidence he was again employed from mid-May 2018 to about September 2018. Evidence from Dr Low shows the Worker was no longer employed by the time of their consultation on 14 September 2018. I find that the Worker was in employment and earned income from 16 May 2018 to 13 September 2018 inclusive.

161. The Worker gave evidence that he did not engage in paid employment after September 2018. I find that the Worker was not in employment and earned no income from any work from 14 September to the end of the hearing before me on Friday 16 November 2018.

162. In this case the Worker bore the onus of proving any incapacity. He has discharged that onus and I have found that he has been partially incapacitated for work as a consequence of the injuries on and from 20 October 2017 to and including Friday 16 November 2018 and ongoing, and that he has lost earnings over part of that period. The Employer now bears the onus of establishing the dollar value of the Worker's remaining capacity to earn - see *Northern Cement v Ioasa* ("*Ioasa*") [1994] NTSC 58 per Martin CJ at paragraph 15 – "…*Once there is evidence to demonstrate incapacity and loss of earning capacity on the part of the worker, then minimising the financial consequences of such findings rests with the employer".*

163. It is clear that the Worker did earn something in all the employments he engaged in after the accident. No evidence was put before the Court as to these earnings. That evidence was at all times solely within the Worker's knowledge, possession or control and it has never been available to the Employer. For this reason the Worker bears the evidentiary onus of establishing those amounts - see *Betty Millar v ABC Marketing and Sales Pty Ltd* [2012] NTSC 21 per Mildren J at paragraphs [25] and [26].

164. The Worker's earnings in these employments might establish "…*the amount, if any, he… is from time to time reasonably capable of earning in a week in work he … is capable of undertaking if: (i) … he… were to engage in the most profitable employment…, if any, reasonably available to him*…" for the purpose of subsection 65(2)(b)(i) of the Act. Section 65 of the Act entitles a partially incapacitated worker to be paid 75% of the difference between his normal weekly earnings at the time of the injury, indexed in accordance with a statutory formula from time to time, and his earnings in the most profitable employment reasonably available to him as set out in subsection 65(2)(b)(i).

165. The Worker's failure to lead evidence to establish the amount of his earnings in these employments arguably could deny him any payments of weekly benefits after 19 October 2017. This is because without that amount to establish a difference between "*the amount… he… is from time to time reasonably capable of earning*…"

and his indexed normal weekly earnings, there can be no finding of any such difference.

166. I am satisfied however that this is not the position in this case. This is because the Worker's evidence in respect of the employments is that he was not capable of carrying out all the duties of those employments. His evidence is that he was only able to keep working in the employments because he was permitted or able to carry out only some of the duties of the employments. He gave evidence that carrying out even the limited duties which were within his capacity caused him to suffer pain.

167. In *Glen William Plewright v Mark Passmore trading as Passmore Roofing* – unreported Decision of Chief Magistrate Ian Gray of the Work Health Court delivered 15 May 1996 – the Court found that the worker was partially incapacitated and that he worked as a labourer for a period. It found however that his income working as a labourer did not establish his "most profitable employment" because on the evidence he was able to carry out the work of a labourer only by relying on the assistance of fellow workers, taking rests and by taking painkillers. This was because of the effects of his work injury. The Work Health Court held at page 9 as follows: "*I am not satisfied that he is capable of performing the work they describe <u>unless</u> he continues to use pain relieving medication… He should not be required to do so. To place such a requirement upon him would in my opinion be unreasonable. As a matter of logic it follows that I find that he is not 'reasonably capable' of earning income at…"*.

168. This ruling was appealed to the Supreme Court and heard by Chief Justice Martin – see [1997] NTSC 34. Chief Justice Martin considered subsection 65(2)(b)(i) of the Act and ruled at paragraph [25] : "*Reasonably capable is a narrower term than physically capable or even physically possible, and what the worker is reasonably capable of earning necessarily depends on the circumstances. It is a question of fact".* Because appeals from the Work Health Court to the Supreme Court are limited to a question of law, no appeal lay to the Supreme Court from this finding of the Work Health Court - see subsection 116(1) of the Act.

169. In the present case, I am satisfied on the Worker's evidence and I find that as a consequence of the injuries and the symptoms arising from the injuries he was not able to carry out all of the duties in any of his employments after the accident and further, I find that he was not able to carry out even the limited duties which he could manage, without experiencing pain.

170. For these reasons I rule that whatever the Worker's earnings in the employments, those earnings would not be capable of identifying or establishing the amount he was or is reasonably capable of earning within the meaning of subsection 65(2)(b)(i) of the Act. The Worker is thus not required to discharge this evidentiary onus in respect of the periods when he was not working.

171. Because the Worker has not led any evidence of his earnings in the employments he engaged in after 19 October 2017, I rule that he has not discharged his evidentiary onus to establish any difference between his indexed normal weekly earnings and

his actual earnings within those periods of employment and so has not proved any entitlement to receive top-up weekly benefits under the Act during those periods.

172. In accordance with *Ioasa* the Employer bears both the evidentiary onus and the legal onus of identifying the dollar value of the Worker's partial capacity to earn. The Employer has not discharged either onus. As a consequence, I rule that the Worker is entitled to be paid weekly benefits in accordance with the Act after 19 October 2017 in all the periods when he was not working up to and including 16 November 2018, as if he was totally incapacitated.

**Medical Expenses**

173. It is plain from the evidence and I find that the Worker has incurred medical expenses as a consequence of the injuries. Details of these expenses have not been provided to the Court and the parties have indicated they will resolve this question between themselves.

**Interest**

174. In paragraph 15.5 of his Amended Statement of Claim the Worker has sought "interest on arrears of compensation in accordance with the Act". The Worker has not specified whether he is seeking interest pursuant to either or both of the relevant sections being sections 89 and 109 of the Act.

175. The Worker's claim was disputed by the Employer from the outset. However, subsection 89(2) of the Act provides as follows: "If the liable person disputes liability for compensation and the dispute is later resolved wholly or partly in favour of the worker, for the purpose of calculating interest under subsection (1), weekly payments are taken to have fallen due when they would have fallen due had there been no dispute".

176. If there had been no dispute then weekly payments would have fallen due seven days after the accident, that is on 28 May 2017 - see subsection 88(1) of the Act. Accordingly, interest on arrears of weekly payments of compensation pursuant to subsection 89(1) of the Act is to be calculated from and including 29 May 2017 to the date of payment of the arrears due to the Worker.

177. The other section of the Act which might relate to the question of interest is section 109. Subsection 109(1) of the Act provides that interest must be ordered payable on compensation generally, not just weekly payments of compensation, if the Court is satisfied that the employer has caused unreasonable delay in accepting a claim.

178. The consideration and determination of this matter has involved questions of law of significant complexity. I am satisfied that the Employer in disputing the Worker's claim for compensation did not act unreasonably and there has been no unreasonable delay occasioned by that dispute. Accordingly, the Worker has no entitlement to interest on any compensation pursuant to section 109 of the Act.

## Costs

179. The Worker has been wholly successful in these proceedings. Nothing arose during the hearing and no suggestion was made in the parties' written submissions that the parties had conducted themselves in any way which might impact upon the question of costs. No evidence or submissions were put before the Court relevant to the question of the efforts of the parties before or after the commencement of these proceedings in attempting to come to an agreement about the matter in dispute, for my consideration pursuant to section 110 of the Act. Accordingly, costs will follow the event.

## Orders

180. The Employer pay weekly benefits to the Worker for the period 16 November 2017 to 18 May 2018 inclusive on the basis of total incapacity, in accordance with the Act.

181. The Employer pay weekly benefits to the Worker for the period 14 September 2018 to 16 November 2018 inclusive on the basis of total incapacity, in accordance with the Act.

182. The Employer pay interest on arrears of weekly benefits pursuant to subsection 89(1) of the Act calculated from and including 29 May 2017 to the date of payment of the arrears.

183. The Employer pay weekly benefits to the Worker after 16 November 2018 in accordance with the Act.

184. The Employer reimburse the Worker for payments he has already made of medical expenses arising pursuant to section 73 of the Act, in accordance with the Act.

185. The Employer pay the Worker's medical expenses arising pursuant to section 73 of the Act which have not been paid as at the date of these Orders, in accordance with the Act.

186. The Employer pay the Worker's medical expenses arising pursuant to section 73 of the Act which are incurred after the date of these Orders, in accordance with the Act.

187. The Employer pay the Worker's costs of and incidental to the proceedings and the mediation process prior to the commencement of the proceedings to be taxed in default of agreement at 100% of the Supreme Court scale, certified fit for senior/junior counsel including all attendances at Directions Hearings and/or the hearing of interlocutory applications arising after the proceedings were listed for hearing.

Dated this 21st day of June 2019

JOHN NEILL
WORK HEALTH COURT JUDGE