WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

Issued in accordance with section 294 of the *Workplace Injury Management and Workers Compensation Act 1998*

Matter Number: **6366/19**
Applicant: **Lei Li**
Respondent: **Brighton Australia Pty Limited**
Date of Determination: **27 February 2020**
Citation: **[2020] NSWWCC 55**

The Commission determines:

1. Award for the respondent.

A brief statement is attached setting out the Commission's reasons for the determination.

R J Perrignon
Arbitrator

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF R J PERRIGNON, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. The applicant, Mr Li, claims weekly compensation and medical expenses as a result of injury to his left eye on Sunday 17 March 2019.

2. He was employed by the respondent as a plasterer and gyprocker in Sydney. In February 2019, at his employer's request he travelled to Adelaide and worked with his co-employees on the Calvary Hospital which was then under construction. He worked weekdays, and spent his weekends in Adelaide. His employer paid for his accommodation, and paid him an extra $300 per week for expenses, including meals.

3. On the evening of Sunday 17 March 2019, he attended a Chinese restaurant in Chinatown, Adelaide, with two work colleagues, Mr Zhang and Mr Liu. After dinner, Mr Li purchased takeaway food for his lunch at work the next day. Mr Zhang was attacked by a patron at the restaurant, and the altercation developed into a larger affray. In the course of it, Mr Li was attacked in the left eye, causing him to lose his vision in that eye. As a result of that injury, he suffers sympathetic ophthalmia in the right eye, which has comprised his vision in the right eye. As a result, he has no capacity for work.

4. The insurer does not dispute that Mr Li lost the vision in his left eye as a result of being attacked on that night at the restaurant, or that his right eye vision has been compromised as a result of injury to the left eye. It does not dispute that the worker now suffers total incapacity for employment as a result.

5. The insurer says that Mr Li's left eye injury, and the condition of the right eye which resulted from it, are not compensable, because:

    (a) the injury to the left eye did not arise out of or in the course of his employment, as required by section 4, *Workers Compensation Act 1987*, and

    (b) employment was a not a substantial contributing factor to the left eye injury, as required by section 9A.

6. It says that, notwithstanding the payment of $300 for meal and other expenses per week, the employer did not encourage or approve of his presence at the restaurant in question, or his doing anything there, either on 17 March 2019 or at all.

7. Mr Li says that his injury arises out of or in the course of his employment, and that his employment substantially contributed to his injury, because:

    (a) there is a causal nexus between injury on the one hand, and his presence at the restaurant and activities there on the other, and

    (b) the employer encouraged or approved of his attending the restaurant, and doing the things he did there.

8. In respect of the first proposition, he submits that his left eye was injured:

    (a) because he was present at the restaurant on the night in question, and

    (b) because of his activities there – namely, ordering dinner, consuming it, ordering and obtaining take-away food for lunch the next day, and going to the assistance of his fellow employees when they were under attack.

9. He says further that, whether the injury was referrable to that place, or to his activities there, the requisite causal connection with employment is established, because:

    (a) the employer paid him an allowance intended to cover meals;

    (b) it should reasonably have expected that he might attend that restaurant – or any other restaurant of his choice – during intervals between work,

    (c) there was no provision for preparing meals at the hotel where the employer placed him,

    (d) there was no cafeteria at which the worker could buy food on the worksite, as the hospital was then under construction,

    (e) it was his practice and that of his colleagues to go off site for meals,

    (f) it was their practice to walk or travel to Chinatown and eat, and to order takeaway for lunch at work the following day,

    (g) the employer provided a microwave oven at the work site for the workers to heat up their meals, which the worker used to heat his takeaway food at lunch, and

    (h) the employer would reasonably have expected him to go to the aid of his fellow workers when they were attacked.

10. The parties agree that if the requisite causal nexus with employment is established, there should be a general order for medical expenses, and a direction that they bring in short minutes of awards of weekly compensation, after pre-injury average weekly earnings are calculated and agreed by the parties.

ISSUES FOR DETERMINATION

11. The following issues remain in dispute:

    (a) Whether the injury to the applicant's left eye arose out of or in the course of his employment with the respondent.

    (b) Whether his employment was a substantial contributing factor to the left eye injury.

PROCEDURE BEFORE THE COMMISSION

12. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

EVIDENCE

Documentary Evidence

13. The following documents were in evidence before the Commission and taken into account in making this determination:

    (a) Application to Resolve a Dispute and attached documents;
    (b) Reply and attached documents;
    (c) Applicant's Application to Admit Late Documents with an attached supplementary statement of the applicant, and
    (d) Respondent's Application to Admit Late Documents with attached signed statements previously attached to the Reply in unsigned form.

FINDINGS AND REASONS

Mr Li's evidence

14. The worker provided three signed statements. He said that he was born in China and migrated to Australia in 2000. He had worked for Brighton Australia as a plasterer for some years. Brighton's project manager would tell him what sites he was required to work at, and he would work there.

15. On 22 February 2019, he said, he was working for the employer at the train station at Kellyville. The manager there told him he was needed to work urgently at an Adelaide site for two weeks. Mr Li said he didn't want to go, but the manager pleaded with him, and he agreed to go.

16. On 25 February 2019, he chose to drive to Adelaide with a work colleague. From other evidence, that colleague was Mr Liu. The two travelled in Mr Liu's car.

17. The car journey took about 13 hours. Mr Li said, and I accept, that it was not practical for him to return to Sydney on weekends, because most of the time he was awake would be spent travelling by road. As he did not have his own car, I readily infer that he would have had to rent one or convince a colleague to drive him, or travel by air at his expense. So, Mr Li stayed in Adelaide on the weekends when he was not required to work.

18. The work site was a hospital close to the Adelaide CBD. From Mr Glass' evidence (below), I am satisfied that was the new Calvary Hospital. He started work on 25 February, and did night shifts for two weeks.

19. Other workers were flown to Adelaide by the employer. Mr Li said the employer paid for them to be housed at a hotel.

20. After two weeks, another manager came and asked the workers to stay another two weeks. Mr Li's shifts changed to day shifts.

21. On Sunday 17 March 2019, he was not working. He was due to recommence work the next day. He attended a Chinese restaurant in China Town with his co-workers, Mr Zhang and Mr Liu. There, they ate dinner, finishing about 9pm. They paid for the meal and were ready to leave. Mr Li was seated at his table, waiting for take-away food that he had ordered.

22. He explained that he and his colleagues would always have their meals in China Town and order takeaway for lunch the next day.

23. While seated at the table, and talking to the restaurant owner, a man entered the restaurant and hit Mr Zhang. The assailant shouted out and a group of young men entered the restaurant and began to hit Mr Zhang and Mr Liu.

24. Mr Li said he went to their aid, trying to separate the men and stop them from hitting his work colleagues. He tried to drag them away. As he stood, he noticed what he thought was glass coming towards his left eye. He felt pain and was aware of blood coming from the eye. He squatted, grabbed a napkin and attempted to stall the bleeding. He could not see. His colleague helped him to a seat. The chairs were scattered around by that stage.

25. The restaurant owner rendered no assistance.

26. Police and an ambulance attended, and Mr Li was taken by ambulance to the Royal Adelaide Hospital with his two colleagues. He was admitted and came to an operation on his left eye the next day. He lost the vision in that eye. Naturally, he did not attend work. He went to the police station and identified the perpetrators.

27. He flew back to Sydney on 22 March 2019.

28. He attended the Sydney Eye Hospital where stitches were removed from his left eye. Soon after, his right eye became inflamed. He has been diagnosed with sympathetic ophthalmia requiring immunosuppressive therapy. He tries to protect what vision is left in his right eye, to avoid complete blindness.

29. With the exception of his account that the first assailant came from outside the restaurant, his account is consistent with that of the other two eye witnesses whose statements are before the Commission – Mr Zhang and Mr Liu, summarised below – and I am satisfied that it is accurate. Nothing turns on whether the initial assailant came from within or outside the restaurant.

30. Counsel for the respondent, Ms Compton, invited the Commission to infer:

    (a) that the worker had made a statement to police in the course of their investigation into the assault, and

    (b) that as the statement had not been provided in evidence, its contents would not assist the worker's case.

31. There is no evidence before me that any written statement was provided to police, which has not been produced. It is possible that one exists, but I cannot be satisfied on the balance of probabilities that it does. Even if I were so satisfied, and drew the further inference sought, it would not permit an inference that the evidence would assist the case of the respondent. It would not cause me to doubt the accuracy of the worker's account as summarised above.

Mr Zhang's statement

32. Mr Zhang recalled being present at the restaurant when Mr Li was assaulted. He said he did not know why four or five men assaulted him, Mr Li and Mr Liu that night.

33. He agreed that the employer paid for his accommodation, and an allowance of $300 per week for expenses, including meals.

34. Mr Zhang himself sometimes cooked meals and sometimes bought them.

35. As he worked night shift, he did not need to purchase takeaway for lunch the next day. However, Mr Li and Mr Liu did so. The assault occurred when the three were waiting for the takeaway food ordered by Mr Li and Mr Liu.

36. As Mr Zhang's account is internally consistent and not inconsistent with other evidence, I am satisfied of its accuracy and make findings in accordance with it.

Mr Liu's statement

37. Mr Liu gave two statements. His was the most detailed account of the affray.

38. He said that he drove in his car with Mr Li to Adelaide, that he was paid an allowance for meals by his employer, and that he stayed at the same motel in Adelaide as Mr Li, for which the employer paid.

39. He said that he and Mr Li attended the restaurant in question several times a week. For the first two weeks, their motel was within walking distance of it, so they walked. Thereafter their motel changed, and they drove. On each occasion, they would eat a meal and order takeaway for the next day's lunch.

40. On Sunday 17 March 2019, they arrived at the restaurant around 6pm or 7pm. They had a meal with drinks. Mr Li drank a glass of red wine and a glass of Chinese wine. That is consistent with the hospital records to which I was taken by counsel for the respondent, which found there to be some ethanol in a sample of Mr Li's blood.

41. After the meal was eaten and paid for, the waiter brought takeaway to the table. The restaurant owner offered them wine to drink, explaining that, as people from Sydney, they should try Adelaide wine. Mr Zhang declined, explaining they had to work the next day. The owner poured wine into a glass, and sat next to Mr Li, who declined it on the same basis.

42. He drank a little of it, but declined when the owner exhorted him to drink more.

43. A man sitting at a table behind them said, "Fuck you" and punched Mr Zhang in the face. Mr Zhang fell. Mr Liu tried to stop the assailant, but the latter called to his friend outside, and five or six of them entered the restaurant and attacked Mr Zhang and Mr Liu, who ended up on the ground.

44. He did not see Mr Li, but believes Mr Li stood up and tried to stop the assailants hitting his colleagues. Mr Liu got up and saw blood coming from Mr Li's eye.

45. The owner did nothing. The attackers decamped. Police arrived.

46. Mr Zhang talked to police. An ambulance drove the three work colleagues to hospital.

47. Stitches were applied to Mr Zhang's head and above his eye. Mr Li was taken to Emergency.

48. The three men later attended the police station for photo identification of the perpetrators.

49. Mr Liu does not know why the affray occurred. He was told the first assailant owned another restaurant in Adelaide.

50. Mr Liu's evidence is internally consistent and consistent with that of Mr Li, save that Mr Liu recalls that the first assailant was sitting at a table behind the work colleagues' table. Nothing turns on that difference, and it is unnecessary to make any finding as to whether the first assailant came from outside, was sitting at a table, or came from outside to sit at a table prior to the assault.

51. Otherwise, I am satisfied with the accuracy of Mr Liu's account and make findings accordingly.

Mr Glass' statement

52. Mr Glass was the employer's safety manager. He gave a statement addressing the terms of Mr Li's employment, safety precautions taken on work sites by the employer, and other matters.

53. He said that Brighton sent 14 gyprockers and plasters to Adelaide, who started work there on 25 February 2019 at the Calvary Hospital site, which was then under construction.

54. He agreed that their accommodation, and travel to and from Adelaide when the job was completed, was paid for by the employer. He noted that some employees travelled by car, giving themselves the flexibility to take and use their own tools and return to Sydney on weekends if they wished, "but that would be up to them to make any travel arrangements" [par 21].

55. He said meals were not provided at the hotel, but "the workers received extra money to cover costs of their meals while they are away" [par 22].

56. Mr Glass did not give an eye witness account of the assault, as he was not present. He did, however, meet with the worker some time later, observing a patch over one eye. Mr Li gave him an account of the assault, indicating that his eye was hit with a glass or bottle when he "followed the altercation to support his work mates" [par 27].

57. Observing that the assault occurred on a weekend when Mr Li was not working, Mr Glass expressed the opinion [par 27, repeated at par 32] that "this meal – drinks was definitely not a Brighton sanctioned event, what workers do in their time is their own business and this was not a Brighton sanctioned luncheon, dinner and was definitely not during one of his work shifts whilst working in Adelaide".

58. Unfortunately, he also expressed the opinion [par 28] that the claim was fraudulent. There is no evidence before me to support that opinion. Counsel for the worker Mr Nicholson submitted that it coloured Mr Glass' account, demonstrating that he was acting as an advocate rather than as a witness, and that to the extent if any that Mr Glass' account was adverse to the worker, it should be treated with caution.

59. It is unnecessary to make any findings on that point because, putting to one side Mr Glass' opinions, his factual account is not inconsistent with that of other witnesses. To the extent I have summarised it above, I am satisfied of its accuracy. Notwithstanding the opinions expressed by Mr Glass, whether the requisite causal nexus is established with employment is a matter for determination by the Commission.

Mr Pelesic's statement

60. The employer's site manager at the Calvary Hospital was Mr Pelesic, who also gave a statement.

61. He did not witness the assault. He said – and I accept – that he did not stay at the same motel as Mr Li or go out with him, and that he did not know what Mr Li or the others were doing when they were not at work.

Mr Bunic's statement

62. The employer's Operations manager, Mr Bunic, also gave a statement.

63. Like Mr Glass, he addressed the terms of Mr Li's employment, safety precautions and other matters. He said it was he who asked Mr Li to work on the Adelaide site, and that Mr Li was happy to go. He said the respondent sent 14 plasters to Adelaide, who were expected to work from 25 February 2019 to April 2019. He agreed the accommodation was paid for by the employer, at a motel not far from the job site. Though meals were not provided at the hotel, the workers were paid an allowance to cover their costs while away.

64. Once when he attended the job site, he observed that Mr Li had a black eye, and Mr Li gave him an account of the assault, which so far as it went was by and large consistent with Mr Liu's account above.

Findings of fact

65. Having regard to the eye-witness and other evidence above, I make the following material findings of fact.

    (a) On 25 February 2019, Mr Li travelled to Adelaide at his employer's request to work on the Calvary Hospital, which was then under construction.

    (b) He worked there, with breaks, until he was assaulted on Sunday 17 March 2019.

    (c) The employer paid for his accommodation, seven days per week, at two different motels – at one for the first two weeks, and at another thereafter.

    (d) The accommodation was paid for by the employer on the days Mr Li was at work, and on the days he was not, including Sunday 17 March 2019.

    (e) It was impractical for Mr Li to return home on the weekends, because of the distance between Adelaide and Sydney, because he did not have his own car in Adelaide, and because the employer did not offer to fly him to and from on weekends.

    (f) The employer did not pay for meals to be provided at the hotels. Instead, it paid its employees an allowance of $300 for meals or other expenses as they wished.

    (g) There was no cafeteria at the hospital site where workers could purchase meals, as the hospital was under construction.

    (h) It was Mr Li's usual practice in the first two weeks to walk to a restaurant in China Town, and thereafter (when his accommodation was transferred) to drive to it to obtain his meals, including takeaway food for lunch at work the next day.

    (i) The employer provided a microwave oven at the job site for workers to cook or heat meals, and Mr Li used that from time to time to heat takeaway food bought the previous day.

    (j) On Sunday 17 March 2019, Mr Li did not work. He was due to recommence work on Monday 18 March 2019.

    (k) On Sunday 17 March 2019, he was not required to work. He was required to work the next day.

(l) On the evening of 17 March 2019, he attended a restaurant in China Town with his work colleagues, Mr Liu and Mr Zhang.

(m) There, he purchased and ate dinner with Mr Zhang and Mr Liu.

(n) After dinner, Mr Li and Mr Liu ordered takeaway food for lunch the next day.

(o) After Mr Li's takeaway food was presented at table, the restaurant owner asked Mr Li to drink some wine, or some more wine, which Mr Li declined.

(p) Another patron of the restaurant unknown to Mr Li and his colleagues said, "Fuck you" and hit Mr Zhang, who fell to the ground.

(q) When Mr Liu tried to assist, the assailant called on associates outside the restaurant, who entered the restaurant and attacked Mr Zhang and Mr Liu.

(r) Mr Li went to their aid. In the course of his doing so, one or more of the assailants attacked his left eye with a glass or bottle.

(s) As a result of the attack, Mr Li lost the sight in his left eye, and has suffered severe compromise of the vision in his right eye.

(t) Mr Li's left eye injury did not occur because of his mere presence at the restaurant, even though it occurred while he was there.

(u) The injury did not occur while he was ordering or consuming a meal there, or because he did so. It did not occur while he ordered or waited for takeaway food there, or because he did so.

(v) The injury occurred when he came to the aid of his co-workers, and because he came to their aid.

(w) I am unable to make any finding as to the reasons for the initial assault on Mr Zhang, which caused Mr Liu to intervene, and led to the subsequent attacks on him and Mr Zhang, and to Mr Li's ultimate involvement to protect them both. Though it is possible that Mr Zhang was assaulted because Mr Li refused the restaurant owner's request to drink more local wine, it is not possible to reach that conclusion on the balance of probabilities, as any offence taken from Mr Li's refusal would be more likely to result in an assault upon him rather than upon Mr Zhang. In any event, counsel for the worker Mr Nicholson helpfully indicated that he did not rely on Mr Li's refusal to drink more wine as being causative of injury.

(x) I am not satisfied that Mr Li was affected by alcohol, notwithstanding the fact that he drank some wine with and after dinner.

(y) The attacks upon Mr Li and his colleagues were entirely unprovoked.

(z) By paying for his accommodation on weekdays and weekends, the employer knew and approved of his staying at that accommodation, both on the days that he worked, and on the days that he did not.

(aa) By paying a weekly meal allowance in circumstances where meals were not provided by the employer at the hotel, and to the employer's knowledge there were no facilities from which food could be purchased at the work site, the employer was aware that workers could use the allowance to purchase meals off site and away from the hotel, and both encouraged and approved that course.

(bb) By providing a microwave oven at the work site, the employer demonstrated its approval and encouragement of its use for preparation and, if necessary, re-heating of food, obtained from places outside the work site and outside the motel.

(cc) However, there being no evidence that the employer knew that Mr Li and his colleagues ever attended or would attend the restaurant in China Town where the assault occurred, I am not satisfied the employer knew of their attendances at that restaurant, or encouraged or approved of them.

(dd) Though I have found that by paying a weekly allowance for food among other things, the employer knew that its employees might buy food off site, and encouraged and approved that course, I am not satisfied that it knew that he would purchase or consume food at the particular restaurant in question, or that he would come to the aid of his colleagues in an affray there.

66. Mr Li's actions in coming to the aid of his colleagues were admirable. The remaining issue for determination, however, is whether those actions, to which his injury is referrable, had the requisite connection with employment. That depends on the application of the relevant principles of law, summarised below.

Causal nexus with employment

67. A worker who receives an injury is entitled to compensation in accordance with the *Workers Compensation Act 1987*, whether the injury is received at or away from the worker's place of employment: section 9.

68. "Injury" is relevantly defined as a 'personal injury arising out of or in the course of employment': section 4.

69. Except in the case of a disease injury (not here relevant), no compensation is payable 'unless the employment concerned was a substantial contributing factor to the injury': section 9A.

Whether injury arose in the course of employment

70. In *Hatzimanolis v ANI Corporation Limited* [2002] HCA 21, the High Court considered the meaning of injury 'in the course of employment'.

71. The worker had been sent from Wollongong to work at Mt Newman in Western Australia. On a Sunday, when he was not working, he attended an excursion to Wittenoom Gorge organised by the employer, and was injured. In finding that he had been injured in the course of his employment, the majority said at [16] (footnotes omitted):

> "Moreover, *Oliver* and the cases which follow it show that an interval or interlude in an overall period or episode of work will ordinarily be seen as being part of the course of employment if the employer, expressly or impliedly, has induced or encouraged the employee to spend the interval or interlude at a particular place or in a particular way. Indeed, the modern cases show that, absent gross misconduct on the part of the employee, an injury occurring during such an interval or interlude will invariably result in a finding that the injury occurred in the course of employment. Accordingly, it should now be accepted that an interval or interlude within an overall period or episode of work occurs within the course of employment if, expressly or impliedly, the employer has induced or encouraged the employee to spend that interval or interlude at a particular place or in a particular way. Furthermore, an injury sustained in such an interval will be within the course of employment if it occurred at that place or while the employee was engaged in that activity unless the employee

was guilty of gross misconduct taking him or her outside the course of employment. In determining whether the injury occurred in the course of employment, regard must always be had to the general nature, terms and circumstances of the employment " and not merely to the circumstances of the particular occasion out of which the injury to the employee has arisen"."

72. In *Comcare v PVYW* [2013] HCA 41, an employee of a Commonwealth government agency had been sent to a regional office, and was housed overnight by her employer in a motel. She suffered injury there while engaging in sexual intercourse. It was not alleged that the employer had induced or encouraged that activity. The worker submitted that she was injured 'in the course of' employment' because the injury was received when she was at a place [the motel] where the employer had encouraged and approved her to stay [7]. The High Court explained its reasoning in *Hatzimanolis* as follows [38-39] (emphasis added):

> "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 an activity or present at a place when the injury occurred. **The essential enquiry is then: how was the injury brought about? In some cases, the injury will have occurred at and by reference to the place. More commonly, it will have occurred while the employee was engaged in an activity.** It is only if and when one of those 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.
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> 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."**

73. The plurality continued [53-54]:

> "52. The relevant connection or association created by the *Hatzimanolis* principle is between that activity and the employer's encouragement to engage in it. Likewise, when an injury is sustained by an employee at a place and by reference to that place, in the sense earlier discussed , the connection between that circumstance and the employment is provided by the fact that the employer induced or encouraged the employee to be present at that place.
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> 53. The connection or association spoken of is not the causal connection which is attributed to the expression "arising out of … the employee's employment" in the definition of "injury" in the SR&C Act . It is accepted that compensation may be payable in respect of an injury which is suffered "in the course of" the employee's employment notwithstanding that there is no such causal connection . The connection presently spoken of is by way of an association with the employment. In *Kavanagh v The Commonwealth* , Dixon CJ said that "no direct … causal connexion … is proposed as an element necessary to satisfy the conception of an injury by accident arising in the course of the employment but only an association" with the employment.

> 54. Dixon CJ expressed that association in two ways. In a positive sense it might be said that, had it not been for the employment, the injury would not have been sustained. Put negatively, and perhaps more usefully for present purposes, it requires that "the injury by accident must not be one which occurred independently of the employment and its incidents."

74. In finding that the PVYW was not injured in the course of employment, the Court said [60-61]:

> "60. The principle in *Hatzimanolis* 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.
>
> *Conclusion*
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> 61. It may be accepted that the purpose and the effect of the principle stated in *Hatzimanolis* was to create an interval between periods of actual work, to better explain the connection that an injury suffered by an employee in certain circumstances has to the employment. It did so by reference to the fact that the employer induced or encouraged the employee to do something or be somewhere in particular and the fact that the employee did so and was injured. The two circumstances identified by *Hatzimanolis* were where an injury was suffered by an employee whilst engaged in an activity in which the employer had induced or encouraged the employee to engage; or where an injury was suffered at and by reference to a place where the employer had induced or encouraged the employee to be. An injury sustained in these circumstances may be regarded as sustained in the course of the employee's employment. Properly understood, whilst the inducement or encouragement by the employer may give rise to liability to compensation, it also operates as a limit on liability for injury sustained in an overall period of work."

75. The principles in *Hatzmanolis* and *PVYW* were discussed and applied by the Court of Appeal in *Tran v Vo* [2017] NSWCA 134 and *The Star Pty Limited v Mitchison* [2017] NSWCA 149, to which counsel for the respondent helpfully referred in argument. Unlike *Hatzmanolis* and *PVYW,* those were not 'camp cases' in which the worker was injured while living away from home for the purposes of employment.

76. Like Mr Hatzimanolis and Ms PVYW, Mr Li was injured in an interval during an overall period of work, while he was stationed far from his home for work purposes. His injury will have arisen in the course of his employment if it "was suffered … whilst engaged in an activity in which the employer had induced or encouraged the employee to engage; or where [it] was suffered at and by reference to a place where the employer had induced or encouraged the employee to be": *PVYW, supra*.

77. As I have found, Mr Li was not injured because he was in the restaurant, but because of his activity there in defending his colleagues from attack. His left eye injury is directly referrable to his actions in defending his colleagues. To submit that the employer might or would reasonably have been expected to approve of that course is to answer the wrong question. Compensability depends on whether the employer encouraged or induced that activity. There is no evidence that it did, or even that it knew Mr Li would come to the aid of his colleagues in the circumstances and at the time he did. In those circumstances, the injury is not covered by the principle in *Hatzimanolis*, and is not compensable.

78. As the High Court observed in *PVYW* at [39] *supra*:

> "… 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."

79. It follows that, even if – contrary to the finding at par 65(cc) above - the employer had induced or encouraged Mr Li to be at the restaurant at that particular time, it would make no difference to the outcome.

80. Even if, contrary to my finding at par 65(t) above, Mr Li's injury was referrable to a place – that is, to his presence in that particular restaurant at that time - the result would be the same, because the employer did not encourage or induce him to attend that particular restaurant at that time, even if by paying him a food allowance it encouraged, induced or approved of him purchasing food generally when off work or off site.

Whether injury arose out of employment

81. The expression, 'arising out of' implies a causal connection with employment, though not necessarily a direct or physical causation: *Smith v Australian Woollen Mills Limited* [1933] HCA 60 per Starke JA. The question to be answered is, 'was is part of the injured person's employment to hazard, to suffer, or to do that which caused his injury?': *ibid*.

82. The test cannot be satisfied merely by proving 'that, but for the employment, the worker would not have been at the scene of the accident': *Mitchison* [at 82].

83. In *Pioneer Studios v Hills* [2012] NSWCA 324, Allsop P (with whom Basten and Hoeben JJA agreed) observed at [29]:

> "[29] In circumstances where it is not expressly concluded that the injury arose in the course of employment and thus where, on this hypothesis, the injured worker was not at work, it is not apparent how the Deputy President could draw any conclusion about the injury arising out of employment or employment being a substantial contributing factor without considering the kinds of matters to which Mason P referred in *Mercer* at 745 [13]. This is not to confine "arising out of" to what is required of an employee but rather what she in fact does in the employment. This would require focus upon what was the employment, not what Ms Hills thought was the employment."

84. Whether Mr Li's left eye injury arose out of his employment depends on a consideration of what he in fact did in his employment. He was a plasterer. He applied plaster at the Calvary Hospital site. Having regard to what he actually did for his employment, his activities – admirable though they were – in defending his colleagues did not arise from his employment.

Whether employment was a substantial contributing factor

85. As the injury did not arise out of Mr Li's employment, it follows that his employment cannot have been a substantial contributing factor to it, and the test in section 9A is not satisfied.

86. For these reasons, there must be an award for the respondent.