Workers Compensation Commission

DETERMINATION OF APPEAL AGAINST A DECISION OF THE COMMISSION CONSTITUTED BY AN ARBITRATOR

CITATION:	**Li v Brighton Australia Pty Ltd [2020] NSWWCCPD 44**
APPELLANT:	Lei Li
RESPONDENT:	Brighton Australia Pty Ltd
INSURER:	icare Workers Insurance
FILE NUMBER:	A1-6366/19
ARBITRATOR:	Mr R Perrignon
DATE OF ARBITRATOR'S DECISION:	27 February 2020
DATE OF APPEAL DECISION:	16 July 2020
SUBJECT MATTER OF DECISION:	Injury occurring during an interval or interlude within an overall period or episode of work: application of *Hatzimanolis v ANI Corporation Ltd* [1992] HCA 21; 173 CLR 473; 106 ALR 611; 66 ALJR 365 and *Comcare v PVYW* [2013] HCA 41; 303 ALR 1; alleged factual error: application of *Raulston v Toll Pty Ltd* [2011] NSWWCCPD 25; 10 DDCR 156
PRESIDENTIAL MEMBER:	Acting President Michael Snell
HEARING:	On the papers
REPRESENTATION:	**Appellant:** Mr W Nicholson, counsel Brydens Lawyers Pty Ltd **Respondent:** Ms N Compton, counsel Hicksons Lawyers
ORDERS MADE ON APPEAL:	1. The Arbitrator's decision dated 27 February

2020 is confirmed.

INTRODUCTION AND BACKGROUND

1. Lei Li (the appellant) was employed by Brighton Australia Pty Ltd (the respondent) from about 2011 as a plasterer. There were periodic breaks in the employment depending on work availability.[1] He was employed to work in Sydney, which is where the respondent's head office was located. He stated he worked Monday to Saturday, and also, on occasions, Sundays.[2]

2. In February 2019, the appellant was asked to work in Adelaide on an urgent project. The appellant's work colleague, Peng Liu, drove from Sydney to Adelaide and the appellant accompanied him,[3] arriving on 25 February 2019. They worked on the construction of the Calvary Hospital, which was close to the Adelaide CBD. After two weeks the respondent's workers, including the appellant, were asked to stay on for a further two weeks.[4] The respondent sent a team of about 14 gyprockers/plasterers to Adelaide initially, and over the next few months had over 40 NSW workers working in Adelaide. The appellant worked night shifts for the first two weeks and then worked on day shift.[5]

3. The workers' accommodation and travel costs were paid by the respondent. The accommodation in which they were placed by the respondent was at a motel close to the job site. The workers received extra money to cover the cost of their meals.[6] The appellant stated that the additional money paid to him by the respondent, by way of meal allowance, formed part of the regular sum transferred to him by bank transfer while he was in Adelaide, which included his wage. The appellant said that returning to Sydney for weekends would be "most impractical", it would take 13 hours to drive each way. "[N]o other workers that [he] observed returned to Sydney on the weekends."[7] The respondent did not pay for the workers to return to Sydney for weekends.[8]

4. There was nowhere to buy meals at the hospital which was under construction. The work site included a refrigerator and a microwave oven. The appellant was in the habit, after work, of buying his dinner from a restaurant in Chinatown, the Ba Guo Bu Yi. He ate there with Mr Liu on several occasions each week. Initially they walked there, and when the accommodation at which they were placed by the respondent was moved to a location further away from the restaurant, they drove.[9] The appellant had a practice of additionally buying takeaway food from the restaurant to take to work for his lunch the next day; he would heat this food in the microwave at work.[10]

5. On Sunday 17 March 2019, the appellant went to a Chinese restaurant in Adelaide with two work colleagues, Mr Zhang and Mr Liu, to eat dinner. They had finished their meals and were sitting talking to the "boss" of the restaurant. The appellant and one of his colleagues had ordered takeaway for the next day. The appellant was to work on the following day, a Monday.[11]

6. An unknown man in the restaurant began hitting the appellant's colleague, Mr Zhang. The unknown man shouted out and "a group of young men all came into the restaurant and began to hit both [the appellant's] colleagues". The appellant said he stood up to try to separate the assailants and stop them hitting his colleagues. The appellant saw something

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[1] Sam Bunic statement, [10]–[12], Reply, p 25.
[2] Appellant's statement 16/7/19, [7], [20], Application to Resolve a Dispute (ARD), pp 5–6.
[3] Peng Liu statement, [14], Reply, p 20.
[4] Appellant's statement 16/7/19, [26]–[28], [30].
[5] Appellant's statement 16/7/19, [30].
[6] David Glass statement 24/7/19, [20]–[22], ARD, pp 13–14.
[7] Appellant's statement, 10/1/20, [3]–[5], [9]–[11], Application to Admit Late Documents (AALD) 14/1/20, p 1.
[8] Bunic statement, [24], Reply, p 27.
[9] Liu statement, [18], Reply, p 21.
[10] Appellant's statement 6/11/19, [11]–[13], [17], [19]–[20], ARD, pp 2–3.
[11] Appellant's statement 16/7/19, [41].

coming towards his left eye, he thought it was a glass. He felt pain, there was blood coming from his eye and he could not see anything. He was taken by ambulance to hospital and treated.[12] He did not work thereafter. Professor McCluskey, who has treated the appellant subsequently, described him as having been "glassed in the left eye", a penetrating wound. The appellant additionally developed blurred vision in his right eye, a condition of sympathetic ophthalmia.[13]

7. It is common ground that the appellant lost the vision in his left eye as a result of the injury, and that vision in his right eye has also been compromised. It is common ground that he has no capacity to work.[14]

8. The appellant made a claim for compensation in respect of the injury, which was denied in a s 78 notice dated 28 August 2019.[15] The insurer denied the appellant suffered injury in the course of or arising out of his employment. It stated the respondent had not "expressly or impliedly encouraged [the appellant] to spend his time at a particular place or in a particular way". The notice said the decision to dine at the particular restaurant was not reasonably incidental to the appellant's employment. It denied 'injury' pursuant to s 4 of the *Workers Compensation Act 1987* (the 1987 Act). It denied that s 9A of the 1987 Act was satisfied.

9. The current proceedings were listed for arbitration hearing on 21 February 2020. Mr Nicholson appeared for the appellant and Ms Compton for the respondent. There was no oral evidence, the matter proceeded on the documents. Counsel addressed and the Arbitrator reserved his decision. The Commission issued a Certificate of Determination dated 27 February 2020, accompanied by 12 pages of reasons (the reasons). There was an award in favour of the respondent. This appeal is against that decision.

ON THE PAPERS

10. Section 354(6) of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) provides:

> "(6) If the Commission is satisfied that sufficient information has been supplied to it in connection with proceedings, the Commission may exercise functions under this Act without holding any conference or formal hearing."

11. Having regard to Practice Directions Nos 1 and 6; the documents that are before me, and the submissions by both parties that the appeal can proceed to be determined on the basis of these documents, I am satisfied that I have sufficient information to proceed 'on the papers' without holding any conference or formal hearing and that this is the appropriate course in the circumstances.

THRESHOLD MATTERS

12. There is no dispute between the parties that the threshold requirements as to quantum and time pursuant to ss 352(3) and 352(4) of the 1998 Act have been met.

THE ARBITRATOR'S REASONS

13. The Arbitrator noted the respondent disputed whether the appellant had suffered injury arising out of or in the course of his employment and denied that employment was a 'substantial contributing factor' within the meaning of section 9A of the 1987 Act. These were

[12] Appellant's statement 16/7/19, [31]–[37].
[13] Professor McCluskey's report 6/8/19, ARD, pp 99–100.
[14] *Li v Brighton Australia Pty Limited* [2020] NSWWCC 55 (reasons), [4].
[15] ARD, pp 33–38.

identified as the issues. The respondent said it did not encourage or approve the presence of the appellant in the restaurant or anything he did there at the relevant time.[16]

14. The appellant submitted "the requisite causal connection with employment" was established. The respondent paid a meal allowance to the appellant, it should reasonably have expected the appellant to attend a restaurant during intervals between work. There was no provision for preparing meals at the accommodation where the appellant was placed and no cafeteria at the work site. It was the practice of the appellant to go "off site for meals". The employer provided a microwave oven at the work site which the appellant used to heat his takeaway lunch. It was the usual practice of the appellant and his colleagues to walk or travel to Chinatown to eat and to order takeaway for lunch the next day. The respondent would reasonably have expected the appellant to go to the aid of his fellow workers when they were attacked.[17]

15. The Arbitrator summarised the lay evidence from the appellant, Mr Zhang and Mr Liu.[18] He described the statements of Mr Liu as "the most detailed account of the affray", and an account that (bar one detail on which nothing turned) was "internally consistent and consistent with that of [the appellant]". The Arbitrator said he was "satisfied with the accuracy of Mr Liu's account" and made findings accordingly.[19]

16. The Arbitrator summarised the evidence from the respondent's lay witnesses, Mr Glass, Mr Pelesic and Mr Bunic. Mr Glass, the respondent's safety manager, said that meals were not provided at the hotel where the workers were accommodated, the workers were paid extra money to cover the costs of their meals. He stated (of the evening meal on 17 March 2019) that "this meal-drinks was definitely not a Brighton sanctioned event, what workers do in their time is their own business". He expressed the view that the claim was fraudulent. The Arbitrator noted there was no evidence to support that opinion. The Arbitrator said that putting that allegation to one side, Mr Glass's account was "not inconsistent with that of other witnesses". Mr Pelesic (the site manager at Calvary Hospital) could say little relevant to the issues. Mr Bunic (the operations manager) agreed that accommodation was paid for by the respondent at a motel not far from the job site, where meals were not provided and workers were paid an allowance to cover their costs.[20]

17. The Arbitrator made a series of factual findings. I will not seek to recite all of them. They included the following:

    (a) The respondent paid for the appellant's accommodation in Adelaide, including on days when the appellant was not rostered to work, such as 17 March 2019.

    (b) It was impractical for the appellant to return home on weekends, he did not have his own car and the respondent did not offer to fly him.

    (c) Employees were paid a weekly allowance of $300 for meals and other expenses.

    (d) There was no cafeteria at the hospital site where meals could be purchased.

    (e) It was the appellant's usual practice to travel to a restaurant in Chinatown where he would buy food for his dinner and takeaway food to eat for his lunch on the following day.

    (f) The appellant did not work on Sunday, 17 March 2019, but was required to work on the following day.

[16] Reasons, [5]–[6], [11].
[17] Reasons, [9].
[18] Reasons, [14]–[48].
[19] Reasons, [37], [50]–[51].
[20] Reasons, [55], [57]–[59], [60]–[63].

(g) On the evening of 17 March 2019 the appellant attended a restaurant in Chinatown with Mr Liu and Mr Zhang, where they bought and ate dinner, after which the appellant and Mr Liu ordered takeaway food for the next day.

(h) After the appellant's takeaway food was presented at table, the restaurant owner offered the appellant wine, which he declined.

(i) Another patron swore and hit Mr Zhang, who fell to the ground.

(j) When the appellant tried to assist Mr Zhang and Mr Liu the assailant called on associates outside, who entered and attacked Mr Zhang and Mr Liu. When the appellant went to their aid he was attacked with a glass or bottle by one of the assailants, suffering injury to his eyes.

(k) The injury did not occur "because of [the appellant's] mere presence at the restaurant, even though it occurred while he was there".

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

(m) "The injury occurred when [the appellant] came to the aid of his co-workers, and because he came to their aid".

(n) The Arbitrator was "unable to make any finding of 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 [the appellant's] ultimate involvement to protect them both." The Arbitrator noted the appellant's counsel did not rely on the appellant's refusal to drink more wine as being causative of the injury.

(o) The Arbitrator said the appellant "drank some wine with and after dinner", but he was not satisfied the appellant was affected by alcohol.

(p) The respondent knew and approved of the appellant staying at the accommodation, including on days when he was not working.

(q) The respondent was aware that workers could use the meal allowance off site and away from the hotel, and both encouraged and approved that course.

(r) The respondent knew and approved of the use of the microwave oven for preparation of food, including re-heating of food obtained from places outside the work site and the motel.

(s) There was no evidence the employer knew or approved of the appellant and his colleagues attending at the restaurant where the assault occurred.

(t) The Arbitrator was not satisfied the respondent knew the appellant would purchase or consume food at the particular restaurant, or that he would come to the aid of his colleagues in an affray.[21]

18. The Arbitrator quoted passages from the decisions in *Hatzimanolis v ANI Corporation Ltd*[22] and *Comcare v PVYW*.[23] The passages quoted from *PVYW* included the following:

[21] Reasons, [65].
[22] [1992] HCA 21; 173 CLR 473; 106 ALR 611; 66 ALJR 365 (*Hatzimanolis*).
[23] [2013] HCA 41; 303 ALR 1 (*PVYW*).

> "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."[24]

And:

> "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."[25]

19. The Arbitrator referred to his finding that the appellant was not injured because he was in the restaurant, but because of his activity there, defending his colleagues from attack. He said there was no evidence that the respondent induced or encouraged that activity. The injury was not compensable. The Arbitrator said that even if the injury was referable to a place, the restaurant where it occurred, that did not matter. The respondent had not induced or encouraged the appellant to attend that particular restaurant at that time.[26]

20. The Arbitrator then referred to whether the injury arose out of the employment. He quoted from *Pioneer Studios Pty Ltd v Hills* where Allsop P said:

> "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."[27]

21. The Arbitrator said that what the appellant in fact did in his employment was work as a plasterer. His activities in defending his colleagues did not arise from his employment.

22. The Arbitrator referred to s 9A of the 1987 Act. He said that as the injury did not arise from the employment, "employment cannot have been a substantial contributing factor to it", s 9A is not satisfied.

23. The Arbitrator entered an award for the respondent.

GROUNDS OF APPEAL

24. The appellant raises the following Grounds of Appeal:

    (a) The Arbitrator erred in his finding as a fact that after dinner the appellant and Mr Lui ordered takeaway food and erred in law in making a finding of fact not available on the evidence. (Ground No. 1)

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[24] *PVYW*, [39].
[25] *PVYW*, [60].
[26] Reasons, [77]–[80].
[27] [2012] NSWCA 324 (*Hills*), [29].

(b) The Arbitrator erred in law in finding that the injury did not occur because of the appellant's mere presence at the restaurant, this finding not being available on the evidence. (Ground No. 2)

(c) The Arbitrator erred at law in making a finding of fact not available on the evidence that the appellant's injury did not occur while the appellant was waiting for takeaway food, and in expressing a conclusion as to causation as a finding of fact. (Ground No. 3)

(d) The Arbitrator erred in law in making a finding that was not available on the evidence, being that the sole cause of the injury was the appellant coming to the aid of his co-workers. (Ground No. 4)

(e) The Arbitrator erred in law in finding as a fact that the respondent had no knowledge the appellant would attend a China Town restaurant and that the respondent had not encouraged or approved attendance and the finding was against the weight of the evidence. (Ground No. 5)

(f) The Arbitrator erred at law in making the following findings that were against the weight of the evidence:

i. that the appellant might buy food away from his accommodation site, and

ii. the respondent had no knowledge the appellant would assist a fellow employee during an unprovoked assault during a work interval. (Ground No. 6)

(g) The Arbitrator's finding that the injury did not occur in the course of or arising out of the appellant's employment was an error law. (Ground No. 7)

(h) The Arbitrator's finding that the appellant's injury [sic, employment] did not substantially contribute to the appellant's injury was an error of law. (Ground No. 8)

(i) The Arbitrator erred in law in failing to consider the full circumstances of the injury, in failing to consider the reasonable incidents of the appellant's employment. (Ground No. 9)

(j) The Arbitrator erred at law in wrongly applying the law as to what constituted a connection to 'inducement or encouragement' by the respondent as the appellant's employer. (Ground No. 10)

THE NATURE OF AN APPEAL PURSUANT TO SECTION 352(5)

25. Section 352(5) of the 1998 Act, pursuant to which this appeal is brought, provides:

> "An appeal under this section is limited to a determination of whether the decision appealed against was or was not affected by any error of fact, law or discretion, and to the correction of any such error. The appeal is not a review or new hearing."

26. In *Raulston v Toll Pty Ltd*,[28] Roche DP applied *Whiteley Muir & Zwanenberg Ltd v Kerr*[29] (cited with approval by Brennan CJ, Toohey, McHugh, Gummow and Kirby JJ in *Zuvela*

[28] [2011] NSWWCCPD 25; 10 DDCR 156 (*Raulston*).
[29] (1966) 39 ALJR 505 (*Whiteley Muir*), 506.

v Cosmarnan Concrete Pty Ltd[30]) to the nature of the appeal process pursuant to s 352 of the 1998 Act:

> "(a) An Arbitrator, though not basing his or her findings on credit, may have preferred one view of the primary facts to another as being more probable. Such a finding may only be disturbed by a Presidential member if 'other probabilities so outweigh that chosen by the [Arbitrator] that it can be said that his [or her] conclusion was wrong'.
>
> (b) Having found the primary facts, the Arbitrator may draw a particular inference from them. Even here the 'fact of the [Arbitrator's] decision must be displaced'. It is not enough that the Presidential member would have drawn a different inference. It must be shown that the Arbitrator was wrong.
>
> (c) It may be shown that an Arbitrator was wrong 'by showing that material facts have been overlooked, or given undue or too little weight in deciding the inference to be drawn: or the available inference in the opposite sense to that chosen by the [Arbitrator] is so preponderant in the opinion of the appellate court that the [Arbitrator's] decision is wrong'."[31]

27. In *Davis v Ryco Hydraulics Pty Ltd* Keating P observed that these principles "have been consistently applied in the Commission".[32] The Deputy President in *Raulston* also cited the following passage from *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd*:[33]

> "… in that process of considering the facts for itself and giving weight to the views of, and advantages held by, the trial judge, if a choice arises between conclusions equally open and finely balanced and where there is, or can be, no preponderance of view, the conclusion of error is not necessarily arrived at merely because of a preference of view of the appeal court for some fact or facts contrary to the view reached by the trial judge."[34]

28. In *Northern NSW Local Health Network v Heggie*[35] Sackville AJA said:

> "*A fortiori*, if a statutory right of appeal requires a demonstration that the decision appealed against was affected by error, the appellate tribunal is not entitled to interfere with the decision on the ground that it thinks that a different outcome is preferable: see *Norbis v Norbis* [1986] HCA 17; 161 CLR 513, at 518-519".[36]

29. The principles applicable to appeals pursuant to s 352(5) of the 1998 Act were recently considered by the Court of Appeal in *Workers Compensation Nominal Insurer v Hill.*[37] Their Honours said there was no error in a Presidential member, dealing with an appeal pursuant to s 352(5), applying the description of a judge's function on appeal as explained by Barwick CJ in *Whiteley Muir.* Basten JA said:

> "With respect to errors of fact finding, the line between preferring a different result and identifying error is by no means easy to draw, but that is clearly what the Deputy President sought to do by adopting the language complained of. It was also what Barwick CJ sought to do in *Whiteley Muir* in using such language to identify the difference between an appeal based on a finding of error and a hearing de novo (and,

[30] [1996] HCA 140; 140 ALR 227.
[31] *Raulston*, [19].
[32] [2017] NSWWCCPD 5, [67].
[33] [2001] FCA 1833, [28].
[34] *Raulston*, [20].
[35] [2013] NSWCA 255; 12 DDCR 95 (*Heggie*).
[36] *Heggie*, [72].
[37] [2020] NSWCA 54 (*Hill*).

one must now add, a rehearing). If, on an appeal by way of rehearing, the court asked whether the findings of fact were 'open' to the trial judge, that might demonstrate an unduly limited understanding of the court's function; however, that language is not out of place in determining an appeal from factual findings under s 352(5)."[38]

SOME BACKGROUND TO THE SUBMISSIONS

30. In accordance with usual practice, when the appeal documentation was returned after lodgement, it included a Direction by a Delegate of the Registrar dated 20 March 2020, setting a timetable for the appeal proceedings. The Direction provided that the respondent's Notice of Opposition and supporting documentation were to be lodged by 24 April 2020. The respondent lodged a Notice of Opposition to Appeal on 24 April 2020. The document addressed the various grounds raised. The document stated "The respondent reserves the right to provide additional supplementary submissions in due course."[39]

31. The Commission returned the Notice of Opposition to the respondent for service, under cover of an email from the Commission dated 27 April 2020. The email advised the respondent that "there is no further right of reply provided for in the Commission's standard timetable, leave from a Presidential member will be required for the filing of any further submissions".[40] On 28 April 2020, the respondent lodged amended submissions bearing that date. The Registrar's delegate wrote to the respondent's solicitor on 29 April 2020 noting that the further document contained no application seeking leave to lodge the document, nor did it describe "the extensive amendments that it has made to the submissions", nor did it include a chronology. The document did not indicate whether the appellant consented to or opposed the amendments. The letter advised the respondent's solicitor that the amended submissions "are rejected".[41] On 29 April 2020, the respondent's solicitors wrote to the Registrar enclosing further amended submissions, including a chronology and submissions by counsel dated 29 April 2020 seeking leave to rely on the amended submissions. These submissions on the application for leave seek to explain delay. They state the amended submissions "deal with all of the 10 grounds of appeal relied on by the appellant in appropriate detail". It is submitted there is no prejudice to the appellant. On 30 April 2020 the appellant's solicitor advised the Commission by email that the appellant did not oppose the respondent's request for leave.

32. The respondent did not on 28 April 2020 seek leave to extend the time to file its further submissions. It purported to reserve to itself a right, which it did not have, to lodge supplementary submissions without leave, after lodging its original submissions within time. It did this initially without (so far as the documents indicate) reference to the attitude of the appellant. This was inappropriate. Submissions should not be lodged outside any timetable in place, other than with the leave of the Commission and after appropriate notice to other parties, to ascertain their attitude. The Commission should be advised of the attitude of other parties when leave is sought.

33. The respondent's amended submissions were lodged a few days after the initial submissions were due, no prejudice is asserted and the appellant consents to that course. Leave is granted to the respondent to rely on its amended submissions. This is the document which, with the use of underlining and striking out, identifies the amendments made. References to the respondent's submissions in these reasons are to that amended document.

LEGISLATION

34. Section 4 of the 1987 Act relevantly provides:

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[38] *Hill*, [20].
[39] Respondent's submissions, [Pt B, 2.7 (14)].
[40] Email from Ms Taylor to Mr Pardy dated 27/4/20.
[41] Letter from the Registrar's delegate to Hicksons Lawyers 29/4/20.

"**4 Definition of 'injury'** (cf former s 6 (1))

In this Act—

injury—

(a) means personal injury arising out of or in the course of employment".

35. Section 9A of the 1987 Act provides:

9A No compensation payable unless employment substantial contributing factor to injury

(1) No compensation is payable under this Act in respect of an injury (other than a disease injury) unless the employment concerned was a substantial contributing factor to the injury.

Note. In the case of a disease injury, the worker's employment must be the main contributing factor. See section 4.

(2) The following are examples of matters to be taken into account for the purposes of determining whether a worker's employment was a substantial contributing factor to an injury (but this subsection does not limit the kinds of matters that can be taken into account for the purposes of such a determination)—

(a) the time and place of the injury,

(b) the nature of the work performed and the particular tasks of that work,

(c) the duration of the employment,

(d) the probability that the injury or a similar injury would have happened anyway, at about the same time or at the same stage of the worker's life, if he or she had not been at work or had not worked in that employment,

(e) the worker's state of health before the injury and the existence of any hereditary risks,

(f) the worker's lifestyle and his or her activities outside the workplace.

(3) A worker's employment is not to be regarded as a substantial contributing factor to a worker's injury merely because of either or both of the following—

(a) the injury arose out of or in the course of, or arose both out of and in the course of, the worker's employment,

(b) the worker's incapacity for work, loss as referred to in Division 4 of Part 3, need for medical or related treatment, hospital treatment, ambulance service or workplace rehabilitation service as referred to in Division 3 of Part 3, or the worker's death, resulted from the injury.

(4) This section does not apply in respect of an injury to which section 10, 11 or 12 applies."

THE APPEAL GENERALLY

36. The appellant states that he accepts the accuracy of the Arbitrator's summary, in the reasons, of the evidence of the appellant, Mr Zhang, Mr Liu, Mr Glass, Mr Pelesic and

Mr Bunic.[42] The appellant refers to the findings of fact set out in the reasons at [65]. The appellant submits that, although expressed as findings of fact, some of the matters are conclusions as to the significance of his findings.[43] The appellant submits the findings at subparagraphs (n), (t), (u), (v), (w), (cc) and (dd) at [65] contain factual error, draw conclusions inconsistent with the evidence or require further consideration.[44]

37. The respondent submits, in a general sense, that the appeal seeks to re-ventilate the merits of the dispute as argued before the Arbitrator. The respondent submits the Arbitrator's factual findings were reasonably available and involved a consideration of all of the evidence. It submits the appeal should be dismissed.[45]

GROUND NO. 1

Appellant's submissions

38. Ground No. 1 challenges the finding at [65(n)] of the reasons:

> "After dinner, Mr Li and Mr Liu ordered takeaway food for lunch the next day."

39. The appellant submits the evidence relevant to this finding was found in the statement of the appellant dated 16 July 2019, together with the statements of Mr Zhang and Mr Liu. The appellant submits his statement dated 16 July 2019 was silent regarding whether his takeaway order was placed at the same time that he ordered his dinner, or after eating his dinner. It is submitted that Mr Zhang's statement was also silent on this point. It is said the three of them were seated at the table after eating their dinner, waiting for the takeaway order to be ready, when the assault occurred. It is submitted that Mr Liu's statement similarly did not deal with whether the three of them had eaten their dinner before the takeaway order was placed. The appellant submits the finding that the takeaway order was placed by the appellant "after dinner was not open on the evidence".[46]

Respondent's submissions

40. The respondent submits that, in the appellant's statement dated 10 January 2020, he stated "I ate dinner with my two work colleagues at the restaurant, but then I ordered an extra 1 meal to take to work for lunch the next day."[47] The respondent submits the Arbitrator, at the arbitration hearing, outlined the factual matrix saying "After dinner he purchased takeaway food for his lunch at work the next day", a proposition the appellant did not, at the time, take issue with. The respondent submits that, in any event, this point did not affect when the assault took place, the alleged error would not have affected the result.[48]

Consideration

41. The passage in the statement dated 10 January 2020 is sufficient to support the factual finding challenged in Ground No. 1. The appellant additionally does not identify a basis on which this error, if made out, would affect the result. Ground No. 1 fails.

GROUND NO. 5

42. It is convenient at this point to deal with Ground No. 5, which potentially gives context to the arguments made by the parties relevant to Grounds Nos. 2, 3 and 4.

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[42] Appellant's submissions, [12]–[17].
[43] Appellant's submissions, [18].
[44] Appellant's submissions, [18]–[19].
[45] Respondent's submissions, [2], [11]–[13].
[46] Appellant's submissions, [20]–[24].
[47] Appellant's statement 10/1/20, [7], AALD 10/1/20, p 1.
[48] Respondent's submissions, [2.8 (1)–(8)].

43. Ground No. 5 challenges the finding made at [65(cc)] of the reasons:

> "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." (emphasis added)

44. It is appropriate to repeat the way in which Ground No. 5 is stated:

> "The Arbitrator erred in law in finding as a fact that the respondent had no knowledge the appellant would attend *a China Town restaurant* and that the respondent had not encouraged or approved attendance and the finding was against the weight of the evidence." (emphasis added)

45. The appellant's submissions dealing with this ground make it clear that the finding at [65(cc)] is that challenged in Ground No. 5.[49]

Appellant's submissions

46. The appellant submits the respondent knew meals were not provided at the arranged accommodation and knew that employees needed to leave the accommodation to eat. The appellant refers to the statements of Messrs Glass and Bunic. The respondent sent more than 40 of its Sydney based workers to the site in Adelaide. It had daily supervisory contact with the workers, including the appellant. There were daily "pre-start meetings, briefings, formal inductions and a daily pre-start meeting with interpreters present" (reference is made to Mr Glass's statement). Mr Pelesic was the respondent's foreman on the site. The appellant's submissions state that in the three weeks leading up to his injury he had dinner at the restaurant "almost every day", and on one occasion ate there with eight to nine of his "plasterer/gyprock work colleagues".[50] Mr Liu stated that he and his colleagues ate at the restaurant "on several occasions each week".[51]

47. The appellant submits that, given the "ongoing daily supervision", including "ensuring they were well fed", it would be reasonable to infer the respondent knew the appellant and his co-workers attended the Chinatown district restaurants for their daily main meal and takeaway food, if not the specific restaurant where the appellant was injured. It was reasonable to conclude the respondent knew the workers warmed up takeaway food brought from nearby Chinese restaurants. This would have been apparent from ordinary observation as part of the respondent's supervision of the workers.[52]

Respondent's submissions

48. The respondent submits the appellant "has not identified any factual evidence that the respondent knew that the appellant attended a Chinese restaurant or that the respondent encouraged and/or approved his attendance *at the restaurant*" (emphasis added). It submits there is no evidence that the respondent had knowledge of the matters referred to in the appellant's submissions. It submits "the highest the appellant's case can get" is that the evidence establishes an allowance of $300 per week for food and expenses was paid. The respondent refers to Mr Glass's statement that the meal on 17 March 2019 was not a work sanctioned event or dinner.[53] It also submits:

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[49] Appellant's submissions, [46]–[47].
[50] Appellant's statement 6/11/19, [12], [14], appellant's statement 16/7/19, [33], ARD, pp 2 and 7.
[51] Appellant's submissions, [55].
[52] Appellant's submissions, [56]–[58].
[53] Respondent's submissions, Ground 5, [1]–[4].

> "Had [the appellant] wished to argue that his employer knew that he and other workers were attending *the restaurant* and encouraged them to do so, that evidence should have been led at the hearing. It was not." (emphasis added)

Consideration

49. The appellant, at first instance, did not base his submission on the proposition that his case depended on the respondent having induced or encouraged his attendance at the specific restaurant where the injury occurred. The appellant submitted:

> "That activity was something that he was – is encouraged, as the respondent claims he needs to be, that activity was clearly an activity that was encouraged because it was all ancillary, all incidental to the simple task of having a main meal for the day which his employer paid for. It's quite clear on the evidence that over that period of what seems to be three weeks before this incident occurred the employer was aware that its Chinese background workers in fact took their meals in this district of Adelaide, the Chinatown restaurants and they knew, they were aware of the fact that the money that they paid for food was being used for that purpose."[54]

50. The respondent, before the Arbitrator, submitted that it did not know the appellant and his colleagues "were going to this Chinese restaurant or, in fact, any Chinese restaurant". It submitted "It might be inferred the employer might know that they would go and eat food but where … was not known to them".[55] It submitted "there can be no finding that at any stage the employer approved them to go to this particular location at this particular time".[56] The respondent submitted before the Arbitrator:

> "It is, in fact, simply nothing more than, I would submit, a random occurrence of going to a restaurant. It could be one of a multitude of restaurants and simply because it was the habit of this [appellant] to go to this restaurant more than once is no[t] sufficient, in my submission, to join the nexus that it was arising out of the course of employment."[57]

51. It is inherent in the Arbitrator's finding at [65(cc)] that the approach he adopted was consistent with that submitted by the respondent. His finding was a specific one, that there was no evidence the respondent knew of the practice of the appellant and his colleagues in attending "the restaurant in China Town where the assault occurred". This led to the Arbitrator's conclusion that he was "not satisfied the employer knew of their attendances *at that restaurant*, or encouraged or approved of them" (emphasis added).

52. The way in which Ground No. 5 is expressed is inconsistent with the finding the Arbitrator made at [65(cc)]. The Arbitrator's finding related to attendance at "the restaurant in China Town where the assault occurred". Ground No. 5, in contrast, refers to the finding as if it referred to attendance at "a China Town restaurant". The effect of this is that the appellant's submissions on this ground direct themselves to whether the respondent had knowledge of the appellant attending restaurants in the Chinatown district, rather than to whether it had knowledge of attendance at the restaurant where the appellant suffered injury (which was the finding made).

53. The appellant's submissions dealing with Ground No. 5 argue factual error in the Arbitrator's finding that the respondent did not know that the appellant had ever attended or would attend "China Town district restaurants if not the restaurant he was at when injured".[58] Ground No. 5 states this finding was against the weight of the evidence. The finding challenged is not the finding the Arbitrator made.

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[54] Transcript of arbitration hearing 21/2/20 (T), T 13.15–27.
[55] T 36.18–23.
[56] T 36.26–31.
[57] T 36.33–37.5.
[58] Appellant's submissions, [56].

54. The appellant's submissions on appeal argue that the respondent had, in a more general sense, knowledge of attendances by the appellant and other workers at restaurants in the Chinatown district.[59] Whether the Arbitrator asked himself the wrong question in making his finding at [65(cc)] is not raised in Ground No. 5. The respondent, in making submissions on this ground, has directed itself to whether the factual finding made at [65(cc)] was properly available on the evidence.

55. This ground is essentially misconceived. It is not, in the circumstances, appropriate to deal with Ground No. 5 on some more expansive basis, regarding whether knowledge of attendance by the appellant and other workers, at restaurants in the Chinatown district, was sufficient to put the respondent on notice of this practice, such that it could be inferred the appellant's attendance on 17 March 2019 was approved or encouraged by the respondent. This argument is not raised in Ground No. 5 and is not addressed in the respondent's submissions on this ground.

56. The respondent is correct in its submission, that there was no direct evidence it had knowledge of the use by the appellant of the restaurant at which he was injured. None of the evidence referred to by the appellant, in the submissions on this ground, supports the proposition that the respondent had prior notice of the appellant or his colleagues using the restaurant at which he was injured, before (or on) the night of the injury. The appellant submits an inference is available that the respondent was aware that the appellant and his co-workers ate their main daily meal in Chinatown district restaurants and brought their takeaway food from nearby Chinese restaurants. If it is accepted the respondent was aware of such matters, this is not inconsistent with findings actually made by the Arbitrator. The finding made by the Arbitrator in the reasons at [65(cc)] was properly available to him in the circumstances and was not against the weight of the evidence. Whether it reflected an appropriate approach, to whether the respondent induced or encouraged the appellant to be in the restaurant on the night he was injured, is a different question. This is further touched on in the consideration below of Ground No. 7.

57. Ground No. 5 does not succeed.

GROUNDS NOS. 2, 3, AND 4

58. Grounds Nos. 2, 3 and 4 go to the relationship between the appellant's presence at the restaurant and the injury. They relate to findings at (t), (u) and (v) of the findings in the reasons at [65]. The submissions on these matters in part relate to allegations of factual error, and in part to findings that go to how these events are characterised. The relevant findings challenged in these grounds are:

> "(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." (Ground No. 2)
>
> "(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." (Ground No. 3)
>
> "(v) The injury occurred when he came to the aid of his co-workers, and because he came to their aid." (Ground No. 4)

Appellant's submissions

59. Dealing with Ground No. 2, the appellant submits the finding at subpar (t) is in fact a conclusion as to causation, the injury did not occur because of the appellant's mere presence at the restaurant, although it did occur there. The appellant submits the Arbitrator found at

[59] See appellant's submissions, [56]–[58].

subpar (y) of [65] that the attack that caused the injury was "entirely unprovoked". That being so, the injury was "because of the irrational, violent and unprovoked attack". Had it not been for the appellant's presence at the restaurant he would not have been injured.[60]

60. Dealing with Ground No. 3, the appellant submits the finding, at subpar (u), involves a conclusion as to causation. The appellant went to the restaurant to order food for his dinner, takeaway food for his lunch the following day, to dine and wait for his takeaway order. He was assaulted and injured while waiting for his takeaway food. There should have been a finding that the appellant was present at the restaurant for the purpose of dining and waiting for takeaway food. The appellant submits that if he had not been present at the restaurant for this purpose he would not have been injured.[61]

61. Dealing with Ground No. 4, the appellant submits that although the injury occurred when he came to the aid of his co-workers, the finding that the injury occurred "because he came to their aid" was erroneous, as it infers coming to the co-workers' aid was the sole cause of the injury. The appellant submits the cause of the injury was that he was assaulted without provocation while present in the restaurant, having entered to order and eat his dinner, and to purchase takeaway for lunch the next day. If the appellant was in the course of his employment, or if the events arose out of his employment, then his employment substantially contributed to his injury.[62]

Respondent's submissions

62. Dealing with Ground No. 2, the respondent says it is "unfortunate" that what appears at (t) appears under a heading "finding of fact" as it is apparent that it is "a conclusion". It submits the conclusion was "drawn from the facts" and was open on the evidence. It submits the appellant has not identified an error of law. It submits the finding is consistent with the appellant's statement, in which he said "I was trying to drag them away and was standing when something was coming towards my left eye, I think it was a glass…".[63] The respondent submits the finding was consistent with the summation by the Arbitrator, at the outset of the arbitration hearing, that "the worker was injured when trying to defend his co-workers from assault".[64] It submits the appellant agreed with this proposition.[65] The respondent submits the injury did not occur simply because the appellant was present in the restaurant; it was caused during his participation in a physical altercation. The respondent submits that, consistent with *PVYW*, the question was whether the injury occurred while the appellant was doing something the respondent encouraged him to do. It submits there was no evidence the respondent induced or encouraged the appellant to participate in the activity of defending a co-worker.[66]

63. The respondent submits that Ground No. 3 essentially raises the same argument as Ground No. 2, and repeats its submission relating to Ground No. 2. The respondent additionally submits the appellant has not articulated the error of law that it says occurred.[67]

64. Dealing with Ground No. 4, the respondent says it repeats its submissions in respect of Grounds Nos. 2 and 3. It submits that for the appellant to have been in the course of his employment, it was necessary that he be injured while "doing something that he was

[60] Appellant's submissions, [25]–[27].
[61] Appellant's submissions, [35]–[39].
[62] Appellant's submissions, [40]–[44].
[63] Appellant's statement 16/7/19, [35], ARD, p 7.
[64] T 4.20–23.
[65] Respondent's submissions, Ground 2, [2]–[6].
[66] Respondent's submissions, Ground 2, [7]–[13].
[67] Respondent's submissions, Ground 3.

reasonably required, expected or authorised to do in order to carry out his duties. It submits there was no identified evidence that satisfied those questions.[68]

65. The respondent refers to *Badawi v Nexon Asia Pacific Pty Limited trading as Commander Australia Pty Limited* [69] and *Hills*. Dealing with whether injury arises out of employment, the respondent refers to the discussion in *Badawi* of *Nunan v Cockatoo Docks & Engineering Co Ltd*.[70] It submits 'arising out of' involves a causal element, a worker establishes injury arising out of employment if "the fact of his being employed in the particular job caused, or to some material extent contributed to, the injury".[71]

66. The respondent submits the appellant has not identified anything he was doing in his employment that caused the injury. The only identified factors were the consumption of food and waiting for more food. Neither of these contributed to the injury, the cause was the physical altercation. This did not arise from the employment.[72]

Consideration

67. The matter was conducted, appropriately, on the basis that the injury occurred in "an interval or interlude within an overall period or episode of work", such that the principles in *Hatzimanolis* and *PVYW* were engaged.

68. In *Hatzimanolis* the High Court said:

> "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'."[73]

69. In *PVYW* the plurality, explaining *Hatzimanolis*, said:

> "Because the employer's inducement or encouragement of an employee, to be present at a particular place or to engage in a particular activity, is effectively the source of the employer's liability, the circumstances of the injury must correspond with what the employer induced or encouraged the employee to do. It is to be inferred from the factual conditions stated in *Hatzimanolis* that for an injury to be in the course of employment, the employee must be doing the very thing that the employer encouraged the employee to do, when the injury occurs.
>
> Moreover, it is an unstated but obvious purpose of *Hatzimanolis* to create a connection between the injury, the circumstances in which it occurred and the employment itself. It achieves that connection by the fact of the employer's inducement or encouragement. Thus, where the circumstances of the injury involve the employee engaging in an

[68] Respondent's submissions, Ground 4, [3]–[4].
[69] [2009] NSWCA 324 (*Badawi*).
[70] (1941) 41 SR (NSW) 119.
[71] Respondent's submissions, Ground 4, [5]–[6].
[72] Respondent's submissions, Ground 4, [7]–[8].
[73] *Hatzimanolis*, [16].

activity, the question will be whether the employer induced or encouraged the employee to do so."[74]

And:

"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."[75]

70. Grounds Nos. 2, 3 and 4 raise the same fundamental issue. Consistent with the passage from *PVYW* at [38], quoted above, the question was "how was the injury brought about?" The effect of the findings at [65(t)], [65(u)] and [65(v)] was that the Arbitrator found the injury was not brought about by the appellant being in a place (the restaurant where the injury occurred) nor by the activity he initially carried on there of consuming a meal, followed by ordering and waiting for takeaway. The Arbitrator found the appellant was engaged in an activity "at the time of injury".

71. The appellant's statement dated 16 July 2019 described the sequence of events. He said the meal was finished and he and his two colleagues were sitting at the table. An unknown man began hitting Mr Zhang. The man shouted and a group of young men came in and began hitting both Mr Zhang and Mr Liu.[76] The appellant's statement continued:

"I stood up to try to separate them and to stop them from hitting my colleagues and the tables were scattered around. I was trying to drag them away and was standing when something was coming towards my left eye …".[77]

72. The Arbitrator described the statement of Mr Liu as being "internally consistent and consistent with that of [the appellant]", save for one difference on which nothing turned. This difference was whether the man who initially assaulted Mr Zhang had been sitting at a table behind that occupied by the appellant and his work colleagues, or rather entered the restaurant from outside and began to assault Mr Zhang.[78] The Arbitrator's observation that nothing turned on this discrepancy is not challenged on this appeal. The Arbitrator made a finding of fact at [65(v)] of his reasons:

"The injury occurred when [the appellant] came to the aid of his co-workers, and because he came to their aid."

73. At [77] of his reasons the Arbitrator said:

"As I have found, [the appellant] 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."

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[74] *PVYW*, [35]–[36].
[75] *PVYW*, [38].
[76] Appellant's statement 16/7/19, [34], ARD, p 7.
[77] Appellant's statement 16/7/19, [35], ARD, p 7.
[78] Reasons, [23], [50].

74. The Arbitrator referred to the following passage[79] from *PVYW* in this regard:

> "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."[80]

75. In considering how the Arbitrator dealt with the factual findings challenged in Grounds Nos. 2, 3 and 4, it is necessary that his reasons be read as a whole.[81] The way in which the Arbitrator dealt with these issues was consistent with the principles in *Hatzimanolis* and *PVYW*, it did not involve error. It flows from this that the appellant was not in the course of his employment when he suffered injury, consistent with those principles.

76. The appellant's submissions on these grounds refer to the fact that if he was not present at the relevant restaurant he would not have been injured. In *Tran v Vo* the Court of Appeal, referring to a passage from the judgment of Starke J in *Smith v Australian Woollen Mills Ltd*,[82] said:

> "Starke J's reference to *Stewart v Metropolitan Water, Sewerage and Drainage Board* (1932) 48 CLR 216; [1932] HCA 45 was a reference to his own judgment in that case. In *Stewart*, his Honour explained, by reference to six English decisions, that to show that an injury was one 'arising out of' employment it was not sufficient merely to show that but for the employment, the worker would not have been at the scene of the accident."[83]

77. *Stewart* is applied in *Tran*, where Payne JA said:

> "*Stewart* makes clear that it is not sufficient, as the appellant submitted orally, that the injury was one 'arising out of' employment because 'but for' the employment, the worker would not have been at the scene of the accident."[84]

78. In *Tran* Payne JA quoted extensively from passages in the decisions of *Badawi* and *Hills*, where the test of 'arising out of employment' was considered. His Honour said:

> "The critical enquiry was what the respondent actually did in her employment. Nothing about what the respondent actually did as part of her employment caused the injury she suffered on this occasion."[85]

79. Payne JA concluded in that case that the respondent's injury did not arise from her employment. The circumstances were that the respondent was not rostered to work on the day of injury, she went to the employer's premises not to work but to buy a drink and meet a friend, and at the time of injury the respondent was not performing a task her employer had induced or encouraged her to perform.[86] His Honour said these findings "strongly indicate that the requisite causal connection was not here present".

80. The appellant, dealing with Ground No. 7, submits that the injury was one arising out of the employment as he was required to eat so as to be ready for work on the following day (see [87] below). In *Tran* it was said that the "critical enquiry was what the [worker] actually did in

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[79] Reasons, [78].
[80] *PVYW*, [39].
[81] *Beale v Government Insurance Office (NSW)* (1997) 48 NSWLR 430, 444.
[82] [1933] HCA 60; 50 CLR 504.
[83] [2017] NSWCA 134 (*Tran*), (per Payne JA, Macfarlan and Leeming JJA agreeing), [98].
[84] *Tran*, [104].
[85] *Tran*, [103].
[86] *Tran*, [102].

her employment".[87] As the respondent submits, the cause of injury was the physical altercation; the evidence does not suggest this arose from the employment. There was not a sufficient causal connection between the appellant's work duties with the respondent and the injury. The Arbitrator did not err in concluding that the injury was not one arising out of the appellant's employment.

81. Grounds Nos. 2, 3 and 4 fail.

GROUND NO. 6

82. Ground No. 6 involves challenge to two separate findings made in the following paragraph of the reasons at [65(dd)]:

> "(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."

The appellant's submissions

83. The submissions describe the first of these findings, that the respondent knew its employees might buy food off site. The appellant submits there should have been "a more significant finding"; the appellant had no alternative but to go off site or he would not be able to eat. The appellant's submissions refer to other evidence and findings that meals could not be purchased at the accommodation or work site.[88]

The respondent's submissions

84. The respondent submits the first of these findings was open to the Arbitrator and did not demonstrate any error which could affect the determination of the matter.[89]

Consideration

85. The challenge to the first of the findings does not make any meaningful attempt to identify appealable error. The matters to which the appellant refers are not inconsistent with the finding made by the Arbitrator at [65(aa)] of the reasons. That part of the ground fails. The second limb of the ground challenges the finding that the Arbitrator was not satisfied the respondent knew that the appellant would come to the aid of his colleagues in an affray at the restaurant. There are no submissions directed to this second limb. It follows that Ground No. 6 fails. The argument regarding whether the respondent encouraged or induced the appellant's activity, in coming to the assistance of his co-workers, is also raised by the appellant's submissions in Ground No. 7, where it is dealt with.

GROUND NO. 7

86. Ground No. 7 is broadly and generally expressed, that there was error in finding the injury did not occur in the course of or arising out of the appellant's employment.

Appellant's submissions

87. The appellant submits it was necessary, if he was to carry out his employment, that he be able to rest, sleep and eat. The respondent supplied accommodation at which meals were not available, the appellant needed to leave the accommodation to obtain meals on both

[87] *Tran*, [103].
[88] Appellant's submissions, [59]–[61].
[89] Respondent's submissions, Ground 6 [1].

weekdays and weekends. The appellant and other work colleagues dined at the Ba Guo Bu Yi Chinese restaurant; it was convenient to the accommodation and the work site and suitable for Chinese workers, including the appellant. There was no previous suggestion that it was unsafe.[90]

88. The appellant submits the attack on his colleagues, and the injury he sustained, were unprovoked. It is submitted the appellant's "instinctive action in assisting one of his colleagues" was "understandable" and performed "to the advantage of the [r]espondent". They were expected to work the next day. The appellant submits that, at all times from when he left his accommodation on 17 March 2019 until he was injured, he was in the course of his employment. In the alternative he submits the injury arose out of his employment as he had to eat to be ready for work the next day, the circumstances were substantially contributed to by his employment.[91]

Respondent's submissions

89. The respondent submits the appellant's submissions on this ground constitute an attempt to rehear the matter on the facts. It submits an error of law is not articulated. It submits the submissions under this ground were not ventilated at the oral hearing and the appellant should not be permitted to argue them on appeal. It submits that, for an injury to occur in the course of his employment, the worker must be doing something "reasonably required, expected or authorised in order to carry out his actual duties". It says, other than the "basic need to eat", the appellant does not suggest anything else the respondent required him to do to carry out his role as a gyprocker.[92]

90. The respondent submits that, consistent with *PVYW*, the case law now requires that the employer have expressly or impliedly induced or encouraged the employee to spend a particular interval or interlude in a particular place or way. The respondent submits the appellant, in its submissions, refers to no evidence that it induced the appellant to attend the restaurant at that time on that day. It submits there is no evidence the respondent induced or encouraged the appellant to go to the aid of his fellow employees if an altercation occurred.[93] It submits the injury occurred during the physical altercation, and there is no evidence the respondent induced or encouraged the appellant to act as he did.[94]

Consideration

91. Ground No. 7 restates arguments dealt with above, particularly in the consideration of Grounds Nos. 2, 3 and 4, dealing with whether the injury occurred in circumstances such that it was in the course of or arising out of the appellant's employment.

92. Whether the appellant was in the course of his employment in the circumstances was to be determined with reference to the relevant authorities, particularly *Hatzimanolis* and *PVYW*. The appellant (and his fellow workers) were put up by the respondent in accommodation where meals were unavailable, and the respondent paid them an allowance to cover the cost of meals. It was the appellant's practice to eat meals in Chinatown and to buy takeaway there for his lunch. The respondent provided a microwave at the work site in which such meals could be reheated. All of the above is consistent with findings made by the Arbitrator. The Arbitrator found that the respondent encouraged and approved these practices.[95] The

[90] Appellant's submissions, [62]–[67].
[91] Appellant's submissions, [68]–[70].
[92] Respondent's submissions, Ground 7 [1]–[3].
[93] Respondent's submissions, Ground 7 [4]–[5].
[94] Respondent's submissions, Ground 7 [4]–[9].
[95] Reasons, [65(f)]–[65(i)], [65(aa)]–[65(bb)].

appellant argues he was in the course of his employment on the date of injury, from when he left his accommodation to travel to the restaurant to the time he sustained injury.[96]

93. The Arbitrator found the respondent's inducement and encouragement did not extend to attendance by the appellant at the specific restaurant at which the injury occurred, as the evidence did not suggest the respondent knew of the practice of attending and dining at the specific restaurant, and accordingly, it could not have approved or encouraged the practice.[97] Whether the Arbitrator erred in this regard is not directly raised in the grounds of appeal or the submissions.

94. If such an argument had been raised successfully by the appellant, it would not in any event have represented appealable error.

95. In *Leichhardt Municipal Council v Seatainer Terminals Pty Ltd* Moffitt P said:

> "... it is not sufficient to show that some error of law appears in the judgment or during the course of the trial. The error has to be one upon which the decision depends, so the decision is vitiated by the error ... It will not suffice to establish that one or some only of a number of alternate findings upon which the decision was given involved errors of law, if one alternative involved no error of law."[98]

96. There was an additional basis on which the appellant was not in the course of his employment when injured. The Arbitrator's findings extended to the activity in which the appellant was engaged when he suffered injury.[99] He found "the injury occurred when [the appellant] came to the aid of his co-workers, and because he came to their aid". The Arbitrator's reasons said:

> "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."[100]

97. This conclusion was properly available on the evidence. It follows that, having regard to the passages in *PVYW* at [38] to [39], whether the appellant was in the course of his employment when he attended at the restaurant was not determinative of whether the injury occurred in the course of employment. The issue was whether the respondent induced or encouraged the appellant to engage in the activity in which he was engaged at the time of injury. This involved the appellant's actions in seeking to protect his colleagues from physical assault.

98. There was no evidence that the respondent induced or encouraged the appellant to engage in this activity. The appellant submits his actions in this regard were "instinctive" and "understandable". He submits "it was an act performed to the advantage of the [r]espondent", which expected the appellant and his two colleagues to work the next day.[101] The appellant

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[96] Appellant's submissions, [69].
[97] Reasons, [65(cc)]–[65(dd)].
[98] (1981) 48 LGRA 409, 419, quoted and applied in *Trazivuk v Motor Accidents Authority of New South Wales* [2010] NSWCA 287 (per Handley AJA, Young JA agreeing), [110]. See also *Gerlach v Clifton Bricks Pty Ltd* [2002] HCA 22; 209 CLR 478; 76 ALJR 828, [7].
[99] Reasons, [65(t)]–[65(v)].
[100] Reasons, [77].
[101] Appellant's submissions, [68]–[69].

submits "[i]t is difficult to imagine any employer instructing employees to take no steps to assist a fellow employee dealing with an unprovoked violent attack such as occurred in the present case".[102] There was no basis to infer that the respondent induced or encouraged the appellant to engage in this activity. Contrary to the appellant's submissions, it is difficult to envisage an employer would induce or encourage an employee to engage in such an activity. This is an observation and not determinative. There was no evidence of the respondent inducing or encouraging such an activity, and no basis on which such matters could be properly inferred. At best it would involve "mere conjecture".[103]

99. It follows that Ground No. 7 fails.

GROUND NO. 8

Appellant's submissions

100. The submissions in support of this ground largely cover similar matters to those considered above relating to Ground No. 7. The appellant refers to *Inverell Shire Council v Lewis*.[104] It is submitted "It has long been established that injuries caused by a deliberate assault may be received in the course of a worker's employment where the assault was committed by a fellow worker [or] by a stranger."[105]

Respondent's submissions

101. The respondent refers to *Stewart v Metropolitan Water, Sewerage and Drainage Board*,[106] which it submits is authority for the principle that it is not enough to conclude that an injury arose out of employment, simply on the basis that but for the employment the worker would not have been at the scene of the accident. The respondent submits that in dealing with whether the injury arose out of the employment the question was what was the appellant in fact doing which caused or contributed to the injury. It submits the Arbitrator correctly found that there was nothing about what the appellant did working as a gyprocker that caused or contributed to the injury.[107]

Consideration

102. The appellant submits that in *Lewis*, the injury occurred at a place where the employer had encouraged the worker to stay and while doing something reasonably incidental to his temporary residence. That decision well predates the decision in *PVYW* which the Arbitrator applied in the current matter. The critical matter in the current case is the finding that at the time of injury the appellant was engaged in an activity that was not the subject of inducement or encouragement on the respondent's part. Consistent with *PVYW*, the issue was whether the respondent induced or encouraged the appellant to engage in that activity. Inducement or encouragement to be at a place then becomes irrelevant.[108]

103. For reasons given above, Ground No. 8 fails.

GROUNDS NOS. 9 AND 10

104. It is convenient to deal with these grounds together.

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[102] Appellant's submissions, [72].
[103] *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1, [5], *Luxton v Vines* [1952] HCA 19; 85 CLR 352 per Dixon, Fullagar and Kitto JJ, [8], *Fuller-Lyons v New South Wales* [2015] HCA 31, [46].
[104] [1992] NSWCA 114; 8 NSWCCR 562 (*Lewis*).
[105] Appellant's submissions, [79]–[80].
[106] [1932] HCA 45; 48 CLR 216 (*Stewart*).
[107] Respondent's submissions, Ground 8, [6]–[8].
[108] *PVYW*, [39].

Appellant's submissions

105. The appellant submits the facts in *PVYW* were "very different" to those in the current case.

106. The appellant submits the appellant was obliged to leave his accommodation to eat his main meal. He needed to do this to perform his work on the following day. The respondent paid the appellant $300 per week so he could do this. This could be contrasted with the facts in *PVYW*; an employee does not need to engage in sexual activity to perform work on the next day.[109]

Respondent's submissions

107. The respondent submits the Arbitrator applied *PVYW* correctly. It submits no error of law is identified. It submits the appellant did not need to go to a public place to eat in order to fulfil his employment role. It submits there was no evidence of inducement or encouragement of the appellant eating his meal at that time and place.[110]

Consideration

108. The appellant has not identified error in these grounds. Clearly the factual situation associated with the injury in *PVYW* was different to that in the current matter. The Arbitrator did not deal with the matter on the basis there was some factual similarity between the two. The Arbitrator applied statements of principle in *PVYW*, by which he was bound. He did not err in doing so. The balance of the appellant's submissions dealing with this ground deal with whether the respondent induced or encouraged the appellant to dine at the restaurant at which he was injured. The Arbitrator's factual findings were largely consistent with the case the appellant ran in this regard.[111]

109. There were two important respects in which the findings did not reflect the case run by the appellant. The Arbitrator was not satisfied the respondent "encouraged or approved" the appellant's attendance at the specific restaurant where he was injured.[112] The Arbitrator was not satisfied the respondent knew the appellant would come to the aid of his colleagues in an affray.[113] The Arbitrator said there was no evidence the respondent encouraged or induced the appellant to engage in that activity.[114] I concluded above that even if there was error in the finding regarding inducing or encouraging attendance at the specific restaurant, this would not be appealable error. The finding that there was no evidence the respondent induced or encouraged the appellant to engage in the activity in which the Arbitrator found he was engaged, at the time of the injury, was inconsistent with the appellant being in the course of his employment when injured. The argument that the injury alternatively was one arising out of the employment was rejected by the Arbitrator, I have concluded correctly.

110. Grounds Nos. 9 and 10 fail.

CONCLUSION

111. All of the appellant's grounds of appeal have failed. It follows that the appeal is unsuccessful.

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[109] Appellant's submissions, [83]–[87].
[110] Respondent's submissions, Ground 9 [1]–[4], Ground 10 [1]–[5].
[111] See subparagraphs (c), (f), (g), (h), (i), (z), (aa) and (bb) of the reasons at [65].
[112] Reasons, [65(cc)]–[65(dd)].
[113] Reasons, [65(dd)].
[114] Reasons, [65(t)], [65(v)], [77].

DECISION

112. The Arbitrator's decision dated 27 February 2020 is confirmed.

Michael Snell
ACTING PRESIDENT

16 July 2020