TIVER CONSTRUCTIONS PTY LTD V CLAIR

Supreme Court of the Northern Territory of Australia

Angel J

31 October, 1 November 1991 and 19 February 1992 at Darwin

APPEAL - Workers Compensation - whether respondent in course of employment at time of accident - whether 'journey' case - respondent driving whilst intoxicated towards work site with spare parts for employer's plant - appeal and cross appeal dismissed

Cases referred to:
Humphrey Earl v Speecly (1951) 84 C.L.R. 126
Scobie v KD Welding Co Pty Ltd (1959) 103 C.L.R. 314
Simons v Herald and Weekly Times Ltd [1970] V.R. 131
Watkins v Renata (1984) 29 N.T.R. 38

Statutes:
Workers Compensation Act ss.7(1), 7(3), 8, 10 and 26(1),second schedule paragraph 1(b)

Counsel for the appellant: T Riley QC/C Ford
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 293 of 1991
(9115333)

IN THE MATTER OF THE
WORKERS COMPENSATION ACT

BETWEEN:

TIVER CONSTRUCTIONS PTY LTD
Appellant

AND:

STEPHEN JOHN CLAIR
Respondent

CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 19 February 1992)

This is an employer's appeal from a decision of the Workers Compensation Court made on 2 August 1991.

In July 1986, the respondent was employed by the appellant at a construction site at Bynoe Harbour. He had lived and worked on the site for approximately two weeks prior to 28 July 1986. His duties placed him in charge of

two other workers there and, subject to the overriding instructions of a Mr Tiver, he was responsible for the day to day supervision of work performance at the construction site. He was paid a fixed salary each week and was expected to work and worked at such times and for such hours as the job required. His working hours were very flexible and a day's work for him varied from 15 hours work one day to two or three hours the next day. The respondent's uncontradicted evidence to this effect was accepted by the learned Special Magistrate.

At about 5.00pm on Sunday, 27 July 1986, the respondent left Bynoe Harbour. He travelled to Darwin. He did so for the purpose of purchasing fuel. It was his intention to return to Bynoe Harbour the following day with the fuel. The fuel was required to work the appellant's plant equipment. Once in Darwin, the respondent "got drunk" and slept in his vehicle in the driveway of a friend's home.

The learned Magistrate found that at approximately 8.00am on Monday, 28 July 1986, the respondent purchased the appellant's fuel requirements and set out for Bynoe Harbour. At Berry Springs he met a fellow employee, one Scarborough, who was travelling to Darwin from Bynoe Harbour. Scarborough's visit to Darwin was to purchase parts required for the appellant's plant at Bynoe Harbour. The respondent

and Scarborough re-arranged their respective schedules. Scarborough took the truck that the respondent had been driving to obtain water. The respondent took the vehicle Scarborough had been driving to purchase the required parts. The respondent left Berry Springs at approximately 10.30am to return to Darwin. He and Scarborough had arranged to meet at 6.00pm that evening at the Noonamah Hotel, with the joint intention to thereafter return to Bynoe Harbour.

The respondent completed his acquisition of the required parts from Hastings Deering in Darwin at approximately 3.00pm. Thereafter he roamed around various yards and sites in Darwin and at Howard Springs looking at machinery. He returned to the Noonamah Hotel and met Scarborough there as pre-arranged at approximately 6.00pm. The respondent and Scarborough had a meal and consumed soft drinks and some alcohol. Scarborough left the hotel some half-hour or more before the respondent. Between 9.00pm and 10.00pm, the respondent left the hotel and drove along the only road to Bynoe Harbour. He had spent some three to four hours eating and drinking at the hotel. The learned Magistrate in the course of her reasons said: "On the face of it, to spend three or four hours eating and drinking at the hotel is a substantial interruption to his employment."

Shortly after leaving the Noonamah Hotel, the respondent was involved in an accident. The near side of the utility he was driving struck a culvert. He was severely injured. The learned Magistrate found that at the time of the accident, on the balance of probabilities, the respondent was intoxicated and had a blood alcohol reading of .208. There is no reason to disturb these findings.

It was argued by the appellant that by spending three to four hours at the Noonamah Hotel and consuming sufficient alcohol to become intoxicated, the respondent removed himself from the course of his employment. It was argued that whilst at the hotel he was not "doing something which he was reasonably required, expected or authorised to do in order to carry out his duties." It was argued that his conduct was "so great a departure from what is an allowable incident of the employment" and was "for a purpose of his own, not fairly resulting from the nature or incident of the employment" such that he could not be considered to be in the course of his employment. It was argued that at the time of the accident the respondent was not in the course of his employment and that the Act, in particular s.7(1), had no application to the incident. The appellant relied upon Humphrey Earl v Speechly (1951) 84 C.L.R. 126 at 133.

I cannot accept the appellant's submissions. I agree with the learned Magistrate that the respondent suffered personal injury by the accident arising in the course of his employment and that s.7(1) prima facie applies. At the time of the accident, the respondent was returning to Bynoe Harbour with spare parts required at his employer's work site at Bynoe Harbour. The respondent's employment required him to travel to Darwin, to obtain fuel and parts for a grader (comprising part of the appellant's plant) and to travel back to Bynoe Harbour with the parts and to complete that task by early Tuesday, 29 July 1986. The learned Magistrate found and the fact is incontrovertible that the respondent was driving to Bynoe Harbour that night in order to have himself and the parts available to commence work the following morning.

The appellant argued that if the respondent was in the course of his employment then this case is a journey case falling within s.8 of the Act. It was argued that the interruption of the hotel was substantial, comprising as it did a three to four hour interruption to what would have otherwise been a two hour journey. The appellant relied upon, amongst other cases, Simons v Herald and Weekly Times Ltd [1970] V.R. 131. The appellant submitted that there was an increased risk of accident and for two reasons - first, it was said the daylight journey became a night-time journey

(reference was made to Scobie v KD Welding Co Pty Ltd (1959) 103 C.L.R. 314) - and, secondly, because of the respondent's consumption of alcohol and driving whilst in an intoxicated state.

The learned Magistrate rejected as a fact the appellant's first assertion. The learned Magistrate found that the only access road from Darwin to Bynoe Harbour was the Finniss River Road which was a difficult road to traverse "with lots of rock, blind corners and ruts". Driving in the late afternoon meant driving into the setting sun and the learned Magistrate found there was less risk of accident at night because the lights of approaching vehicles could be seen when approaching blind corners. The learned Magistrate expressly found that in the circumstances it was reasonable to make the return journey after dark, ie from approximately 7.00pm onwards.

As to the appellant's second submission, ie as to the alcohol, the learned Magistrate only dealt with this issue when considering the question of serious and wilful misconduct for the purposes of s.7(3) of the Act.

I do not accept the appellant's submissions that this was a journey case. I agree with the respondent's submission that the respondent's situation was no different

to that of a person whose primary job was to drive, for example, a truck driver or of a person whose employment has as one of its incidents activities taking one way from one's primary place of employment, for example a mechanic who travels to buy spare parts or an office girl who goes to the post office to collect mail. Subject to the question of serious and wilful misconduct and s.7(3) of the Act, the respondent was entitled to compensation.

On the issue of serious and wilful misconduct, the learned Magistrate found that the respondent's injuries were attributable to his serious and wilful misconduct. The learned Magistrate said,

> "Certainly consuming alcohol over a period of some hours before driving was likely to increase the risk of accident and I consider in these circumstances amounted to serious and wilful misconduct. I am satisfied on the balance of probabilities that Mr Clair was at the time of the accident intoxicated and that he had a blood alcohol reading of .208. The evidence of Dr Somasundaram is that Mr Clair was intoxicated on arrival at the hospital."

However, the learned Magistrate held that s.7(3) had no application because the respondent's injuries resulted in serious and permanent disablement. The appellant attacked this finding but, in my view, it is supported by the evidence and should not be disturbed. The learned Magistrate made findings of a permanent partial incapacity

with percentage disabilities. The respondent's disablement is serious and permanent. The respondent's left leg is and always will be 1-1½cm shorter than his right leg. The fact that his disablement might be rendered less serious than it presently is by a hip replacement every seven years or so does not mean that his disablement is less than serious. Nor does it, in my view, mean that he is not permanently disabled.

The appellant also challenged the learned Magistrate's findings of fact on quantum. The respondent contended for some increase. The respondent's contentions rested on a different view of the facts to that of the learned Magistrate. Appeals can only be brought in respect of questions of law, see s.26(1) of the Act.

The learned Magistrate did not find that the respondent was fit or able to perform any particular job, although she held that he could do work not involving heavy labour, prolonged standing, sitting, bending or lifting. She did not find that he was "able to earn" for the purposes of paragraph 1(b) of the second schedule of the Act. There was no evidence that the respondent could earn any income. It follows that if the respondent was only partially (as distinct from totally) incapacitated, the "lesser" amount for the purposes of the second schedule paragraph 1(b) is

$197.00 and it is to this amount that the proviso is to be applied, see Watkins v Renata (1984) 29 N.T.R. 38.

The appeal against the orders for weekly compensation should be dismissed.

As to the learned Magistrate's orders for redemption and the lump sum payment pursuant to s.10 of the Act, I think it is sufficient to say that the only attack against those orders was an attack on the evidence. I think the learned Magistrate's orders should be affirmed and the appeal and cross appeal dismissed.