

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Natasha Greer and Shane McGee t/a Stuart Panel Works v Simon Blackwood (Workers' Compensation Regulator)* [2014] QIRC 003

PARTIES: **Greer, Natasha and McGee, Shane t/a Stuart Panel Works**
(Appellant)

v

Simon Blackwood (Workers' Compensation Regulator)
(Respondent)

CASE NO/S: WC/2012/293

PROCEEDING: Appeal against a decision of Simon Blackwood (Workers' Compensation Regulator)

DELIVERED ON: 14 January 2014

HEARING DATE: 20 November 2012
3 December 2012
23 and 24 July 2013
23 September 2013 (Appellant submissions)
1 October 2013 (Respondent submissions)

MEMBER: Deputy President Swan

ORDERS :
1. The Appeal is dismissed.
2. The decision of the Regulator is upheld.
3. The Appellant is to pay costs incurred by the Regulator.

CATCHWORDS: WORKERS' COMPENSATION – APPEAL AGAINST DECISION – decision of Simon Blackwood (Workers' Compensation Regulator)- Appellant bears onus of proof – journey injury – reasons for interruption of journey – no substantial deviation or interruption from journey – application dismissed.

CASES: *Workers' Compensation and Rehabilitation Act 2003*, s. 11, s 32(1), s. 35(1)(a), s 36, s. 566
Walker v Wilson (1991) 65 ALJR 273
WorkCover Queensland Amendment Bill 1999
Soden v QComp MAG 050256/4(6)
Vetter v Lake Macquarie City Council (2001) 202

CLR 439
 Greer v Workers' Compensation Board QIC
 26/1/1990

APPEARANCES:

Mr R. Pack, counsel instructed by Wilson, Ryan
 Grose Lawyers for the Appellant.

Mr P. O'Neill, Counsel directly instructed by
 Simon Blackwood (Workers' Compensation
 Regulator).

- [1] This application has been made by Natasha Greer and Shane McGee t/a Stuart Panel Works (SPW - the Appellant) against the decision of Workers' Compensation Regulator formerly known as Q-COMP (the Regulator), dated 26 June 2012, to reject their claim pursuant to s. 32 of the *Workers' Compensation and Rehabilitation Act 2003* [the Act].
- [2] The Review Unit of the Regulator stated in its decision that Mr Kelly (the Claimant) sustained an 'injury', as a result of an event which happened to him while he was on a journey between work and home, within the meaning of s. 32 and 35(1)(a) of the Act and confirmed the decision by WorkCover to accept the application for compensation.
- [3] The Act relevantly provides:

"32 Meaning of *Injury*

- (1) An *injury* is personal injury arising out of, or in the course of, employment if the employment is a significant contributing factor to the injury."

"35 Other circumstances

- (1) An injury to a worker is also taken to arise out of, or in the course of, the worker's employment if the event happens while the worker –
 (a) is on a journey between the worker's home and place of employment;"

"36 Injury that happens during particular journeys

- (1) This section applies if a worker sustains an injury in an event that happens during a journey mentioned in section 35.
- (2) The injury to the worker is not taken to arise out of, or in the course of, the worker's employment if the event happens -
 (a) while the worker is in control of a vehicle and contravenes-
 (i) the *Transport Operations (Road Use Management) Act 1995*, section 79, or a corresponding law, if the contravention is the major significant factor causing the event; or
 (ii) the Criminal Code, section 328A or a corresponding law, if the contravention is the major significant factor causing the event; or
 (b) during or after -
 (i) a substantial delay before the worker starts the journey; or

(ii) a substantial interruption of, or deviation from, the journey.

(3) However, subsection (2)(b) does not apply if -

- (a) the reason for the delay, interruption or deviation is connected with the workers' employment; or
- (b) the delay, interruption or deviation arises because of circumstances beyond the worker's control.

(4) For subsection (2)(b)(i), in deciding whether there has been a substantial delay before the worker starts the journey, regard must be had to the following matters -

- (a) the reason for the delay;
- (b) the actual or estimated period of time for the journey in relation to the actual or estimated period of time for the delay.

(5) For subsection (2)(b)(ii), in deciding whether there has been a substantial interruption of, or deviation from the journey, regard must be had to the following matters -

- (a) the reason for the interruption or deviation;
- (b) the actual or estimated period of time for the journey in relation to the actual or estimated period of time for the interruption or deviation;
- (c) for a deviation - the distance travelled for the journey in relation to the distance travelled for the deviation.

...".

Onus of Proof

[4] This hearing is a hearing *de novo*.

[5] The appellant bears the onus of proof to establish that there is an error in the Respondent's Review Decision. The standard of proof is on the balance of probabilities.

Witnesses

[6] Witnesses for the Appellant were:

- Mr Jed Collin (witness to the accident)
- Mr Joshua Phipps (witness to the accident)
- Mr Stephen King (witness to the accident)
- Ms Shelley Young (Police Officer)
- Mr Darren Cook (Police Officer)
- Mr Shane McGee (Owner/Manager Stuart Panel Works)
- Ms Heather Laurie (private investigator).

[7] Witnesses for the Respondent were:

- Adam Wilson (client of injured worker)
- David Slatter (client of injured worker)
- Mark Wilson (client of injured worker)

- Jason Kelly (injured worker).

Overview of Appellant's Admissions

- [8] The Claimant (Mr Kelly) was a 'worker' in accordance with s. 11 of the *Workers' Compensation and Rehabilitation Act 2003* (the Act).
- [9] The Claimant suffered an "injury" in accordance with s. 32 of the Act, namely a fracture to his left hip, requiring initial fixation and replacement, a fracture to the lateral malleolus (ankle) requiring open reduction and grazing to his body.
- [10] The Claimant was on a journey home from his place of employment at SPW on 10 February 2012, within the meaning of section 35(1) of the Act.

Issues for Determination

- [11] The issue to be determined is whether the claim ought to be excluded under s. 36 of the Act. S. 36(2)(b)(ii) of the Act provides that a claim can be excluded if it occurs after a substantial interruption of, or deviation from the journey.
- [12] In determining whether the injury occurred after a substantial interruption regard must be given to s. 36(5) of the Act namely:
- The reason for the interruption or deviation;
 - The actual or estimated period of time for the journey in relation to the actual or estimated period of time for the interruption or deviation;
 - For a deviation - the distance travelled for the journey in relation to the distance travelled for the deviation.
- [13] The onus is on SPW to establish that the Claimant's stop at 5 Starcross Court, Annandale [Annandale] was a substantial interruption or deviation from his usual journey home.
- [14] The word 'substantial' is not defined in the Act. The High Court in *Walker v Wilson (1991) 65 ALJR 273* held the best one can do is look at relevant circumstances. The Concise Dictionary's meaning of the word provides "*of considerable importance, size or worth*".
- [15] The term 'interruption' is also not defined in the Act however the Oxford Dictionary defines interruption as "*a period which interrupts someone or something*", in this case the Claimant's journey home.

Appellant Admissions

- [i] The Claimant was a "worker" in accordance with s. 11 Workers Compensation and Rehabilitation Act 2001 (the Act).
- [ii] The Claimant suffered an "injury" in accordance with s. 32 of the Act, namely a fracture to his left hip, requiring initial fixation and replacement, a fracture to the lateral malleolus (ankle) requiring open reduction and grazing to his body.
- [iii] The Claimant did not take the most direct route home.

[iv] That there is no defence under Section 36(2)(a)(ii) of the Act that the Claimant breached Section 328A of the Criminal Code by driving dangerously at the time of the crash.

[16] At the time of this hearing, the Claimant confirmed that his claim had been finalized and he was no longer on workers' compensation. It is noted that the insurer is not able to claim back any payments made to the Claimant [s. 566 of the Act].

Appellant's evidence

[17] The Appellant owns and operates a panel beating shop, SPW, in Stuart, Townsville.

[18] The Claimant, Mr Jason Kelly, was employed as a panel beater with SPW. The Claimant said that he had worked at SPW for around 6 to 8 weeks before the following occurred although the Appellant says it was just over 3 weeks.

[19] On 10 February 2012, the Claimant was riding his motorcycle home to 5 Rigby Court, Aitkenvale when he deviated to Annandale to inspect a vehicle for the purpose of doing some repair work on it as a "quick cashie".

[20] At Annandale he met Mr Michael Slattery (the owner of the vehicle and resident) and Mr Adam Wilson for the first time. He told them he could commence work on the vehicle the following day. After leaving Annandale, the Claimant said he crashed his motorcycle at the roundabout at Charlotte and Warratah Street, Aitkenvale causing an injury.

"The reason for the interruption or deviation" [s. 36(5)(a)]

[21] The Appellant states that the deviation was for the purpose of inspecting a vehicle. The Claimant had not known the owner of the vehicle or his friend. He says he had agreed, after inspecting the vehicle, to perform panel beating work for Mr Slattery in a private transaction for reward.

[22] The inspection had been arranged when the Claimant was at work at SPW. The request to do this work came through Mr Wilson's father who had spoken initially to Mr McGee (the Appellant) who then passed the phone to the Claimant. After listening to Mr Wilson, the Claimant's evidence was that the job would be a "quick cashie" and he then organized a time to meet.

[23] The Claimant said that he had arrived at Annandale; had a quick look at the vehicle and then agreed to start work on the vehicle the next morning at 10.00am. Price was not discussed, but the Claimant says he knew that he would be paid for the work.

[24] The Claimant said that the Appellant Mr McGee knew about the job, and that he had said to the Appellant "I'll try and get (the car) and bring it into the shop because it will throw some more work our way for the business, you know what I mean." [T 3-14]. While that conversation was denied by the Appellant, Mr McGee stated that he was aware of the Claimant going to give a quote but denied discussing his business making some money out of the arrangement. He also denied agreeing with the Claimant that he could perform the work at the premises of SPW.

[25] The Appellant's evidence was that he did not let people do "cashies" at SPW and, further to that, he was not in need of the extra cash. He employed 4 people and SPW was a busy workshop.

[26] The Appellant tendered the Explanatory Notes contained in the WorkCover Queensland Amendment Bill 1999 which he stated provided some understanding and interpretation of the reasoning of the substantial delay provisions. Those Explanatory Notes suggest the amendment:

"removes the requirement for a journey to or from work to be by the shortest convenient route, as there was concern regarding the strict interpretation and application of the provision. The provisions in relation to substantial deviation, delay and interruption will allow for contemporary working arrangements such as reasonable journeys for working parents taking children to school or child care on the way to and from work. The provisions still provide protection for employers against claims that are incurred beyond those that could be reasonably expected in a journey to and from work."

[27] The Appellant submitted that the Claimant's deviation for the purpose of performing panel beating work of the type for which he was already employed, for personal profit can be distinguished from the following examples of accepted behaviour.

- The Claimant did not stop to pick his children up from school (Taken from the Explanatory Notes aforementioned).
- The Claimant did not make a regular stop for fuel and a few pots of beer before commencing his journey home [Soden v QComp MAG 050256/4(6)].
- The Claimant did not stop for his regular visit with his grandmother [Vetter v Lake Macquarie City Council (2001) 202 CLR 439].
- The Claimant did not stop at a hotel after collecting his wages [Greer v Workers' Compensation Board QIC 26/1/1990].

[28] The Appellant asserted that the type of deviation undertaken by the Claimant did not fit into the type of deviation contemplated in the Explanatory Notes.

[29] Primarily the Appellant states that, because of the type of arrangement into which the Claimant had entered with Mr Wilson and/or Mr Slattery (work of an independent nature undertaken by the Appellant and separate from his work and place of employment) a finding should be made in the Appellant's favour that the Claimant's deviation was not a reasonable and necessary incident of his travelling to and from work and home.

[30] The Appellant further submits that even if a finding was made to the effect that Mr McGee would receive cash (which was denied), the ties between the Appellant and the Claimant were severed the following day as the Claimant did not return to work.

[31] As well, the Appellant claimed that the Claimant had severed any ties he had with the Claimant when he breached his fiduciary duty by agreeing to perform work of a substantial or similar nature to that in which he was employed when he agreed to perform work for a third party which the employer did not stand to profit from in any way.

The actual or estimated period of time for the journey in relation to the actual or estimated period of time for the interruption or deviation [s. 36(5)(b)]

[32] The Appellant states that the matters to be addressed within this criterion are:

- The time the Claimant departed SPW.
- The time the Claimant arrived at Annandale.
- The time the Claimant departed Annandale.
- How long it should have taken to ride from Annandale to the accident scene and the time of the accident.
- The length of time for the Claimant's usual journey.
- Whether any time is unaccounted for.

The time the Claimant departed SPW

[33] The Appellant said that the Claimant's usual working hours were 7.30am. to 4.00pm. On the day of the incident the Appellant said that the Claimant had stayed longer because of a particular job he was performing.

[34] The Appellant believed that the Claimant left SPW at 4.26pm because he was keeping an eye on the clock. With the time taken for an employee to walk from his place of work to his vehicle (motorcycle), the Appellant believed that the Claimant would have started his journey from SPW at around 4.30pm.

[35] The Appellant says that this time should be accepted as it is supported by the WorkCover Queensland correspondence stating that the Claimant had finished work at 4.30pm; that Mr Wilson gave evidence of receiving a telephone call from the Claimant between 4.20pm to 4.30pm saying that he was on his way; the Claimant being in a rush to go and the Claimant previously indicating that it was 4.25pm when he finished work.

The time the Claimant arrived at Annandale

[36] The Appellant says that the Claimant should have taken about 8 minutes to travel from SPW to Annandale thereby arriving at Annandale at 4.38pm. The evidence to support this was found in the Claimant stating that the journey took him between 5 to 10 minutes; WorkCover Queensland correspondence of 22 March 2012 indicating it took the Claimant 10 minutes to make the journey; the factual investigator, Ms Laurie timed the journey on 2 occasions and each took around 8 minutes and Mr Wilson stating that the Claimant arrived at Annandale about 20 minutes/15 minutes to 5.

[37] The Appellant rejects Mr Slattery's evidence that the Claimant arrived at around 4.45pm.

The time the Claimant departed Annandale

[38] The Appellant says that it should be found that the Claimant spent 10 minutes inspecting the vehicle at Annandale. This is because Mr Wilson's evidence was that it was a rushed meeting because he had to attend his Mother's home for dinner at

5.00pm. Mr Wilson says that the Claimant spent no longer than 10 to 15 minutes inspecting the vehicle; Mr Slattery said it took the Claimant between 5 – 10 minutes to look at the vehicle and the Claimant gave evidence that he spent 5 to 10 minutes inspecting the vehicle.

[39] If that analysis was to be accepted, then the Claimant would have left Annandale at 4.48pm.

How long it should have taken the Claimant to ride from Annandale to the accident scene and the time of the accident.

[40] The Claimant says the journey to the scene of the accident at Charlotte St, Aitkenvale took 6 – 7 minutes. Ms Laurie's evidence was not helpful on this point because she did not travel the route taken by the Claimant.

[41] If this time frame were to be accepted, then the journey to the crash scene would have taken 7 minutes.

[42] The Claimant's initial evidence was that the accident occurred around 4.50pm notwithstanding his original application for compensation showing the time to be 5.10pm.

[43] The ViseCAD system used by the Queensland Ambulance Service (QAS) records the 000 call being logged at 17.25.24.

[44] Mr Collin's evidence was that the 000 call was made immediately the accident occurred.

The length of time for the Claimant's usual journey between his home (Aitkenvale) and his place of work SPW.

[45] Primarily the Appellant says that the Claimant's usual journey should take 20 minutes.

Whether any time is unaccounted for

[46] The appellant believes that 24 minutes remained unaccounted for in the Claimant's journey.

[47] This was calculated as follows:

- The Claimant's usual journey to work from his home took 20 minutes.
- The Claimant departed SPW at 4.30pm
- The Claimant deviated to Annandale for 10 minutes
- The accident occurred at 5.24pm.

[48] The Appellant referred to the matter of *Greer v Workers Compensation Board of Queensland* where there was an unexplained gap of about 45 minutes between the worker leaving the hotel and the accident. Moynihan J said that whilst a large interval of time which was unexplained would generally call into question the

purpose of the journey, however in that case it was clear the purpose of the journey was to collect the workers' pay.

- [49] The Appellant said this matter can be distinguished from Greer because there is no explanation for such a large unexplained interval in an otherwise short journey.

Workers' Compensation Regulator response

- [50] The Regulator submits that there is nothing in the Legislation which states that an interruption may not be longer than the usual time taken for the journey home. There is also nothing in the Legislation that indicates that whether the interruption or deviation increases the risk of the accident is a relevant consideration.
- [51] In effect, the Regulator states that the only issue effectively left to decide is whether there was a substantial deviation or interruption of the Claimant's journey home which will enliven the operation of section 36(2)(b)(ii) of the Act.
- [52] By attending the premises in Annandale, the Claimant undertook a deviation of 600-700 metres from his normal path of travel. On any view, this could not be regarded as being substantial.
- [53] In terms of the interruption to the Claimant's journey, his normal journey home took approximately 20-25 minutes, subject to traffic. In all, the Claimant stopped for approximately 10 minutes at Annandale to inspect a vehicle that required some repair.
- [54] There was a disagreement between the parties as to the hours of work of the Claimant whilst at SPW. While the Appellant said that the Claimant had agreed in evidence that his hours of work were from 7.30am to 4.00pm, the Claimant said those were the initial hours worked, but they later changed to 8.00am to 4.30 pm.
- [55] When reviewing the transcript, what the Claimant appears to have agreed to in evidence was the proposition that one of the reasons for him coming to work at SPW was because the hours were from 7.00am to 4pm initially, but when stating the hours he actually worked, the Claimant was clear that the hours were from 8.00am to 4.30pm. The Claimant's evidence on the hours worked was not later challenged and I accept that the hours nominated by the Claimant are correct.
- [56] The journey to the Claimant's home from SPW is 13 kilometres and the time taken for the journey varied depending upon which way he travelled home and the traffic. The Claimant mentioned three possible routes he could take home.
- [57] The Appellant's claim that 20 minutes is the correct amount of time taken by the Claimant to return home is, in the Regulator's view questionable. Reliance placed by the Appellant upon what was contained in the WorkCover Queensland Reasons for Decision (dated 22 March 2012) is erroneous in that those documents are tendered to the Commission as jurisdictional documents and not evidence.
- [68] The Regulator states that Ms Laurie failed to make the journey from the SPW to the Claimant's home taking the route that he chose to on that day. Consequently, the Appellant can only guess at the time taken.

- [59] On 10 February 2012, Mr Wilson, an assessor employed by Allianz, telephoned SPW to speak with the Claimant. He says that Mr McGee took the call and he believed that he told Mr McGee the reason for the call – i.e. that he wanted to speak to Mr Kelly to ask him to do some weekend work.
- [60] Mr McGee confirmed this but thought that he was told this the next day. I have preferred the evidence of Mr Wilson on this point. – i.e. that Mr McGee was aware of the nature of the call on 10 February 2012. Mr Wilson has no vested interest in this matter and held no allegiances to the Appellant or the Claimant.
- [61] The Claimant's evidence was to the effect that he told Mr McGee he had been offered this cash job and he'd bring the work to the shop, and then "sling" Mr McGee some "coin". This was denied by Mr McGee.
- [62] In consideration of this point, there was no evidence given by Mr McGee to the effect that the Appellant could not attend the quote or perform this type of work outside of his work hours.
- [63] Within this context, the Regulator put to the Commission that the Claimant's claim has finalized and he has been paid all of his workers' compensation and, as such, he has no further vested interest in the matter. This is a point which must be duly considered.
- [64] The Claimant states that he finished work at SPW at 4.30pm on 10 February 2012 and left SPW at around 4.35pm to 4.40pm. While Mr McGee had stated that the Claimant had finished work at 4.26pm, he conceded in cross-examination that it could have been 4.30pm and further conceded that it could have been around 4.30pm to 4.35pm that the Claimant actually left SPW [T2-49].
- [65] Finally, Mr McGee stated that he could not actually say when the Claimant had left the premises as he did not watch him ride out of the gate [T 2-50].
- [66] Having left SPW around 4.30pm – 4.40pm, the Claimant said that the journey to Annandale took about 5minutes – 10 minutes. The route taken to Annandale was on the normal route to his home, with a short detour off the main road to the property at Annandale.
- [67] Mr Slattery and Mr Wilson's evidence was that they had finished their own work at around 4.00pm on 10 February 2012.
- [68] Mr Wilson said that he had arrived at the Annandale address at around 4.30pm and shortly after they had arrived at the Annandale address, the Claimant had telephoned them to say he was leaving SPW.
- [69] Mr Wilson said it took around 10 – 15 minutes to get to the Annandale address from their work. After finishing work at 4.00pm and cleaning up (usually around 10 – 15 minutes) they would have arrived at Annandale between 4.25pm and 4.30pm.

- [70] The Regulator states that the evidence given by Messrs Slattery and Wilson and that of the Claimant was consistent on the question of the arrival time at Annandale and the time taken to inspect the vehicle.
- [71] The Claimant, according to Mr Slattery's evidence, arrived at Annandale at 4.45pm. Mr Wilson's evidence was that the Claimant had arrived at between 4.40pm and 4.45pm. The Claimant's evidence was that he had arrived sometime around 4.40pm – 4.45pm. I have accepted that evidence.
- [72] The inspection time according to the Claimant took about 5 - 10 minutes. The Claimant stated that Mr Wilson said "look I've got to go, it's 10 to 5, I've got to go and see Mum..." [T3-42]. Mr Wilson's evidence was that his watch was always 10 minutes slow, so that when looking at it, the time would have been 5.00pm.
- [73] Mr Wilson said he left the Annandale resident a couple of minutes before 5.00pm and that the Claimant also left at that time.
- [74] The Claimant, after leaving Annandale, was travelling directly towards his home in Aitkenvale. The route taken involved travelling through two traffic lights (one was red); waiting at a stop sign and at a roundabout. The Claimant said that the traffic conditions on that day were 'hectic'.
- [75] Driving along Charlotte Street, Aitkenvale, the Claimant said he noticed a noise coming from his bike and he looked down to inspect what was happening. Upon looking he realized that he was closer to the roundabout than he had anticipated and he clipped the roundabout and fell from his motorbike, and was injured as previously described.
- [76] The Claimant said he was travelling at around 50-55 km/hr before the incident and it was a built up area with kids playing in the park.
- [77] The Claimant stated that he was heading straight home from Annandale and hadn't stopped elsewhere.
- [78] The Claimant believed that the accident occurred at 5.10pm.
- [79] Police Officers attended the accident scene and recorded the accident as having occurred at 5.15pm [T 2-33 – evidence of Constable Young].
- [80] The Queensland Police Service Traffic Crash with Injury Report timed the accident as having occurred between 5.15 and 5.20pm.
- [81] Officer Cook was unable to recall when he attended the accident scene, but he began taking notes around 5.45pm.
- [82] Neither Police Officer spoke to the Claimant as he was receiving treatment. He was ultimately tested at the Hospital and his blood alcohol reading was zero [T-2-38].
- [83] It has previously been mentioned that Ms Laurie drove on some of the route travelled by the Claimant on 10 February 2012. During her timing of the drive, she recorded that traffic flow was light and she stayed on cruise control and within the

speed limits. The Regulator requests that this evidence is contrasted with that given by the Claimant who stated that the traffic on 10 February 2012 was 'hectic'.

- [84] The difficulty with Ms Laurie's report is that, on the two occasions she sought to record the time taken to drive from SPW to Annandale, she had not travelled the exact route taken by the Appellant on the day of the accident.
- [85] Ms Laurie had never had a discussion with the Claimant to ascertain the exact route he had taken from SPW to Annandale and she had not taken into consideration the number of traffic lights on the journey. On 10 February 2012, the Claimant said he had taken a route different to the one nominated by Ms Laurie. The route taken by the Claimant was longer and involved more stoppages than the route taken by Ms Laurie on 9 November 2012. Ms Laurie's evidence to the Commission was largely unhelpful.
- [86] Evidence was given by Mr Joshua Phipps who lived near to the accident scene. He says that he was 150-200 metres away from the accident scene and said it had taken him a minute or two to get there. He did not know who had called the Ambulance. The Regulator says that from the evidence it would seem that Mr Phipps was at the scene at around 5.23pm.
- [87] Evidence was also given by Mr Steven King. The accident occurred outside of his house. Mr King heard, rather than saw the accident occur. He recalled kneeling down with Mr Kelly and enquiring as to his wellbeing. He believed that the Claimant was in shock at the time.
- [88] Mr Jed Collin and a friend were walking along the street prior to the incident and heard rather than saw the motorcycle. He thought the motorcycle was speeding.
- [89] Mr Collin was approximately 100 metres away from where the Claimant was on the road. Mr Collin stated that he called the Ambulance at 5.23pm and remembered this because he had looked at the time on his phone. Mr Collins' evidence was that Mr King took the phone off him because Mr Collin was nervous and upset.
- [90] In the time period before that call was made by Mr Collins to the Ambulance Service, he stated that a number of things had occurred at the site. Mr King was kneeling down talking to the Claimant; questions were being put to the Claimant about where he was hurt etc...; the Claimant had tried to get up and Mr King stopped him; then the Claimant had tried to get up on again and that the Claimant was asking for water.
- [91] For consideration is whether Mr King made a call to the ambulance upon first seeing the accident, or whether the evidence of Mr Collins more accurately reflects the situation – i.e. that it took some time to make the phone call because of attention being given to the Claimant. I have accepted Mr Collin's evidence in preference to that of Mr King.
- [92] The Regulator states that the evidence put that the Claimant was speeding made by Mr Collins seems to be based on the noise it was making rather than any direct observation of the bike by Mr Collins. His evidence was he had his back to the motorbike as it came down the street and turned around to see the motorbike

approaching. The Claimant said that his bike was always loud as it was a sports motorcycle. At best I have found that Mr Collin's view was based on perception rather than fact.

- [93] The Claimant denied speeding and his evidence was that he was driving in a built up area and kids were playing in the park nearby. The street he was driving on had speed bumps which slowed the motorbike and he was on his way home and was not in any rush. I have accepted this evidence.
- [94] The Appellant's submissions were that the Claimant had lost any right to claim compensation for his journey injury because he had "breached his fiduciary duty" to his employer by agreeing to perform work of a substantial or similar nature to that in which he was employed.
- [95] The Regulator's response is that there was no breach of fiduciary duty because the Appellant was clearly aware of what the Claimant was doing (this was admitted by the Appellant) and he had raised no objections to the Claimant undertaking that work. That evidence is accepted.

Consideration of the Evidence and Conclusion

- [96] It is clear from the evidence that the Claimant was on a journey home from his workplace on 10 February 2012 within the context of section 35(1) of the Act.
- [97] The primary issue for determination is whether there was a substantial deviation or interruption of the Claimant's journey home which will enliven the operation of section 36 (2)(b)(ii) of the Act.
- [98] Relevantly, that section is as follows:
- "(1) The injury to the worker is not taken to arise out of, or in the course of, the workers' employment if the event happens –
-
- (b) during or after –
- ... (ii) a substantial interruption of, or deviation from, the journey."
- [99] The facts of this case show that the Claimant undertook a deviation of 600-700 metres from his normal path of travel from his workplace to his home. That factor does not indicate a 'substantial' deviation from the journey. That distance is not in contention between the parties.
- [100] The Appellant had claimed that the reason for the deviation was because the Claimant intended to perform paid work outside SPW for a person, which work was not connected to SPW. The Appellant said this was not the type of situation envisaged by the Legislation and/or the Explanatory Notes. In my view, the Appellant had made no issue of the fact that the Claimant was going to perform this work on the week-end. The Appellant was aware of this and expressed no concern. The Explanatory Notes and case law cited deal with a range of instances that might constitute acceptable reasons for a deviation but that list is not

exhaustive. I have found that the reason for the deviation does not fall outside of any Legislative provision or commentary relevant to the point.

- [101] The Appellant's claim primarily goes to what is said to be the "unaccounted for 25 minutes" and the reasons for the deviation – i.e. that the Appellant had breached his fiduciary duty to his employer in undertaking work outside of the workplace where that type of work was usually performed.
- [102] The Appellant, relying upon the decision of Moynihan J in *Greer* says that because of the lost 24 minutes, then the Commission should consider the purpose of the injury.
- [103] Moynihan J in *Greer* discusses a "*large interval of time which was unexplained*" as an issue which would require some investigation as to the purpose of the journey.
- [104] Q-COMP submits that there is nothing in the Legislation which states that an interruption may not be longer than the usual time taken for the journey home. That submission is accepted.
- [105] While the period of time in question raised by the Appellant is 24 minutes, it would be questionable whether that exact period of time could be extracted from the evidence and whether that period of time could be considered a "*large interval of time which was unexplained*".
- [106] The Appellant said that the Claimant departed his workplace at 4.30pm. Mr McGee initially held to this view, but later conceded that he was unaware of when the Claimant actually left the workplace. [T-20] The Claimant said that he worked according to his roster to 4.30 on 10 February 2012. I have preferred the evidence of the Claimant in that he worked until 4.30pm on that day and then took some time to clean up and get his motorbike. His estimation of the time of leaving SPW of between 4.35 and 4.40pm is accepted.
- [107] The Claimant then stated that his journey to Annandale took around 5 – 10 minutes. It is accepted that the route taken by the Claimant to Annandale was his normal route to his home with a short detour.
- [108] The evidence of witnesses Messrs Slattery and Wilson, and the Claimant was that the Claimant arrived at the Annandale residence between 4.40 and 4.45pm. The Claimant then inspected the vehicle and, from the evidence left that residence at around 5.00pm. This evidence is accepted as neither Mr Slattery or Mr Wilson had any reason to submit other than had occurred. As well, I have accepted the Claimant's evidence. I found the Claimant to be a straight forward and honest witness.
- [109] I have accepted the Claimant's version of events in that he commenced heading straight for his home in Aitkenvale.
- [110] The Claimant believed that the accident occurred at around 5.10pm.

- [111] Supporting that time frame is the evidence of Constable Young who said the accident occurred around 5.15pm; the Queensland Police Unit Traffic Crash Injury Report nominates the time at around 5.15 – 5.20pm.
- [112] Mr Collins' evidence was that he called 000 for an Ambulance to attend to the Claimant at 5.23pm. Mr King had taken the telephone from Mr Collins because he noticed that Mr Collins was nervous.
- [113] While the Claimant was on the ground, and before QAS had arrived, he was being spoken to by others (ie Mr Collins); questions were put to him as to where he was hurt etc.; the Claimant had tried to get up but Mr King had stopped him; on another occasion the Claimant had tried to get up and this was stopped and he was also requiring water. In effect, a number of events occurred whilst the Claimant was on the ground awaiting appropriate treatment by members of QAS.
- [114] This was followed by evidence given by Police Officers, and others, which I have accepted, to the effect that the Claimant lay on the ground for some time receiving treatment.
- [115] I have been unable to accept that there is a real issue around any "missing 24 minutes". With all that occurred to the Claimant, the time frames in question are so close in proximity as to more than indicate that the evidence of the Claimant and others is correct.
- [116] As to the purpose of the 'deviation' – the purpose is clear from all evidence given. Mr McGee ultimately admitted that he was aware of the reason why the Appellant had gone to the Annandale address.
- [117] A further limb of the Appellant's submission is that the Claimant had breached his fiduciary duty to the Appellant in that the purpose of his trip was to perform paid work for similar work that he was performing for the Appellant.
- [118] The Appellant was aware of what was happening and had given implied consent to the Claimant to perform the work – i.e. he knew of the detail of the work and had raised no objection.
- [119] In accordance with s. 36(2)(b)(ii) of the Act:
- The "reason for the interruption or deviation" has clearly been established and accepted as reasonable in the circumstances.
 - In considering whether "the actual or estimated period of time for the journey, in relation to the actual or estimated period of time for the interruption or deviation" was substantial, the following question is posed. Was a 10 minute interruption to the usual 20-25 minute journey substantial? In my view it was reasonable for the Claimant to interrupt his journey by the short period of 10 minutes to attend to a personal matter and then to continue his journey to his home. The estimated period of time is insubstantial.
 - "The distance travelled for the journey in relation to the distance travelled for the deviation". Evidence is clear that the distance of the deviation was some 600-700 metres. This is a minor deviation in terms of distance.

[120] The Application is dismissed. The decision of the Regulator is upheld. The Appellant is to pay the costs incurred by the Regulator.