***WHITTINGHAM V ASCOTT AIR CONDITIONING PTY LTD* [2010] NSWWCCPD 36**

Extension of time to appeal; s 352(4) of the 1998 Act; injury at a Christmas party at the employer's premises; ss 4, 9A and 14 of the 1987 Act; alcohol supplied by the employer; excessive consumption of alcohol; whether worker's conduct in the course of employment; gross misconduct; serious and wilful misconduct.

FACTS

Mr Whittingham, a sheet metal offsider, suffered injuries to his back and right shoulder, and fractured his ribs at a staff Christmas party where he was said to have been affected by alcohol. He alleged being tackled by the employer's managing director, Mr Scott, who was also intoxicated. Mr Scott denied tackling Mr Whittingham, but recalled the worker injuring himself when he fell across a gutter. Both the worker and Mr Scott conceded they did not recall the entire incident due to their levels of intoxication.

Mr Whittingham's supervisor, who was not drunk, had asked Mr Whittingham to "settle down", but was ignored. He saw Mr Whittingham charge at Mr Scott, but did not notice the worker being injured. He later saw Mr Whittingham on the kerb of the garden. Mr Whittingham later complained he was a bit sore because he struck his midsection and chest falling onto the kerb.

The ARD sought ss 60/66/67 for injuries sustained on 19 December 2008 and for a separate incident involving his thumb on 15 January 2009 (conceded by the employer).

The respondent accepted that the worker was in the course of his employment while at the party, but argued that he took himself outside the course of employment when he attempted to charge at Mr Scott and fell over.

The Arbitrator found in favour of the employer in respect of the 19 December 2008 incident due to a self-inflicted injury as a result of gross misconduct.

Held: Arbitrator's decision revoked in respect of the 19 December 2008 incident. Matter remitted for further orders consistent with DP Roche's findings. Arbitrator's decision in respect of 15 January 2009 injury confirmed.

1. The circumstances in which Mr Whittingham received his injury were important. Mr Whittingham's behaviour at the party was fuelled by an unlimited supply of alcohol provided freely by his employer at a social function where his boss was also intoxicated. The employer impliedly encouraged the excessive consumption of alcohol and took no effective steps to stop it when it was in a position to do so.

2. Mr Whittingham's injury did not result from an assault where he was the aggressor, but from his conduct while drunk at a work-sponsored and funded social function. It cannot be said that Mr Whittingham's conduct either took him outside the course of his employment or amounted to wilful gross misconduct.

3. "Wilful" connotes that the worker must have acted deliberately. S/he must have had knowledge of the risk of injury and, in the light of that knowledge, proceeded without regard to the risk (*Sawle v Macadamia Processing Co Pty Ltd* (1999) 18 NSWCCR 109). In view of his intoxication, Mr Whittingham was incapable of assessing the risks involved and his actions could not be described as wilful [73].

4. To satisfy s 9A, it is the "employment concerned" and not what the worker was doing at the actual time of the injury, that is important. The causal connection between the employment and the injury must be "real and of substance" (*Badawi v Nexon Asia Pacific Pty Ltd t/as Commander Australia Pty Ltd* [2009] NSWCA 324; (2009) 7 DDCR 75). Given the time and place of the injury, and the general circumstances of the employment, s 9A was satisfied. The injury occurred at a social function organised and supervised by the employer. Whether Mr Whittingham's conduct was out of character was irrelevant. His conduct (and injuries) resulted from the general circumstances of his employment which was the relevant causal factor.