By Bruce McManamey

Worker injured while temporarily in another state

In the past, it was necessary for an employer to obtain workers' compensation cover in every state or territory in which one of its workers may be in the course of his employment. The result of decisions such as *Mynott v* Barnard[1] was that an injured worker was entitled to compensation under the scheme of the state or territory in which the injury occurred. In most instances, the worker was also entitled to compensation benefits under the scheme of the state or territory where the contract of employment was formed.

In order to reduce the need for multiple policies and the duplication of compensation benefits, the states and territories passed legislation limiting the entitlements for workers' compensation to one scheme only. Each state or territory made an amendment that limited cover to a worker of the state or territory. The legislation also provides that the various provisions restricting or abolishing common law actions also apply to a worker of the state or territory, regardless of the state or territory in which the injury occurs.

The test for determining which state or territory applies to a worker is the same in each state or territory. In NSW it is found in s9AA.

Section 9AA provides:

1. Compensation under this Act is payable only in respect of employment that is connected with the state.
2. The fact that a worker is outside this state when the injury happens does not prevent compensation being payable under this Act in respect of employment that is connected with this state.
3. A worker's employment is connected with:
   - The state in which the worker usually works in that employment; or
   - If no state or no one state is identified by paragraph

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The law of locus no longer applies: the worker's employment arrangements determine which law applies for both compensation and work injury damages.

(a), the state in which the worker is usually based for the purposes of that employment; or
- If no state or no one state is identified by paragraph (a) or (b), the state in which the employer's principal place of business in Australia is located.

4. In the case of a worker working on a ship, if no state or one state is identified by subsection (3), a worker's employment is, while working on a ship, connected with the state in which the ship is registered or (if the ship is registered in more than one state) the state in which the ship has most recently been registered.
5. If no state is identified by subsection (3) or (if applicable) (4), a worker's employment is connected with the state if:
   - The worker is in the state when injury happens; and
   - There is no place outside Australia under the legislation of which the worker may be entitled to compensation for the same matter.
6. In deciding whether a worker usually works in a state, regard must be had to the worker's work history with the employer and the intention of the worker and the employer. However, regard must not be had to any temporary arrangement under which the worker works in a state of a period not longer than six months.
7. Compensation under this Act does not apply in respect of the employment of a worker on a ship if the *Seafarers Rehabilitation and Compensation Act* 1992 of the Commonwealth applies to the worker's employment.
8. In this section:
   'Ship' means any kind of vessel used in navigation by water, however propelled or moved, and includes:
   (a) a barge, lighter or other floating vessel; and
   (b) an air cushion vehicle, or other similar crafts,
   used wholly or primarily in navigation by water. 'State' includes territory and, in a geographical sense, a states or territories relevant adjacent area as described in schedule 1.

Section 9AB makes provision that if a court determines the state with which a worker's employment is connected for the purpose of corresponding law, that determination is recognised for the purpose of s9AA, and s9AC makes provision preventing double compensation.

Section 150A to 150F contains provisions that affect claims for damages. The effect of those provisions is that if compensation is payable under the statutory workers' compensation scheme of the state in respect of an injury to a worker, the substantive law of that state is the substantive law that governs a claim for work injury damages. The effect is that once there has been a determination in accordance with s9AA or its counterpart in other states, the law of that state applies to determine both the worker's compensation entitlements and their entitlements to work injury damages.

The test in 9AA has been the subject of some judicial consideration.

Hanns v Greyhound Pioneer Australia Limited[2] involved consideration of the equivalent provision of the *Workers' Compensation Act* (1951) (ACT). Justice Gray of the Supreme Court of the ACT referred to the minister's presentation speech and concluded '..., I consider that it is quite clear the purpose of s7A of the ACT Act is to give effect to a national scheme to enable the ascertainment of the appropriate state jurisdiction for workers' compensation purposes'.

In *Hanns*, the Court was concerned with the first step of the test, which is to determine the state in which the worker 'usually' works. It has been accepted that the test contained in s9AA (and its equivalents) is a cascading test. That is, one considers the first test and moves on to the next test only if the first test fails to determine the state with which the worker's employment is connected.

His Honour considered the dictionary definitions of the word 'usually'. His Honour rejected an interpretation that gives it a meaning of prevalence, in the sense of more often than not. He thought that such a definition was inconsistent with the dictionary definitions that involved a notion of usage which embraced that which is customary, frequent or regular. He considered that if it had been intended to determine the state of employment merely by quantifying the time spent in each place, the legislature could simply have provided such a test. He concluded that 'usually' should be given its obvious meaning of habitual or customary or 'in a regular manner'.

This interpretation of the first leg of the case has been followed in subsequent decisions. In *Tamboratha Consultants Pty Limited* v Knight,[3] Commissioner Herron also rejected an interpretation that the expression 'usually works' was synonymous with where the worker 'works for the majority of the time'. He pointed out:

> 'If a worker works 51 per cent of his time in one state and 49 per cent of his time in another it does not in my view follow that the worker 'usually works' in the state where he works majority of his time simply assessed on a percentage basis. The same conclusion was reached in *Avon Products Pty Ltd v Falls* [2009] ACTSC 141.'

In *Martin v Respondent J Hibbens Pty Ltd*,[4] Deputy President Roche had a matter in which he considered every step of the test.

In that matter, the worker worked for the respondent employer and other employers doing general forestry work for several periods between 2003 and January 2006. She generally worked in South East Queensland, Northern NSW, or sometimes in Victoria. On the 31 January 2006, she suffered injury while working on a property in Northern NSW. The evidence showed that her employment consisted of a series of short-term contracts performing different types of work. The contracts were all short term.

Applying the first test, the Deputy President referred to

Hanns, *Knight* and *Falls*. From those authorities, he extracted the following principles:

1. Regard should always be had to the terms of the contract of employment.
2. 'Usually works' means the place where the worker habitually or customarily works, or where he or she works in a regular manner. It does not mean the place where the worker works for the majority of the time and is not simply a mathematical exercise, though the time worked in a particular location will naturally be relevant. It will also be relevant to look at where the worker is contracted to work. Regard must be had to the worker's work history with the employer and the party's intentions, but 'temporary arrangements' not longer than six months in the long and definite period of employment are to be ignored. Whether an arrangement is a 'temporary arrangement' will depend on the parties' intentions, to be ascertained by looking at the worker's work history and the terms of the contract. A short-term contract of less than six months that is not part of a longer or indefinite period of employment will not usually be a 'temporary arrangement'.
3. 'Usually based' can include a campsite or accommodation provided by the employer. Where a worker is usually based may coincide with the place where the worker usually works, but that need not necessarily be so. In considering where a worker is 'usually based', regard may be had to the following factors, though no one factor will be decisive: the work location in the contract of employment, the location the worker routinely attends during the term of employment to receive directions or collect materials or equipment, the location where the worker reports in relation to the work, the location from where the worker's wages are paid.
4. An employer's 'principal place of business' is the most important or main place where it conducts the main part of majority of its business. It will not necessarily be the same as its principal place of business registered with ASIC.

On the facts of that case (*Martin*), the Deputy President found that the 'usually works' test did not answer the question because Ms Martin usually worked in two states and there was 'no state or no one state' with which her employment was connected. He therefore considered the 'usually based' test.

In respect of that test, the only evidence was that Ms Martin's base moved with her. As such, it could not be said that she was usually based in one state or the other. Matters relevant to determining where a work is usually based include the work location specified in a worker's contract of employment; the location the worker routinely attends during the term of employment to receive directions or collect materials or equipment in relation to the work; the location the worker reports to in relation to the work; and the location for which the worker's wages are paid.

The Deputy President then turned to the third test, which is the 'principal place of business' test. The Deputy President agreed with Commissioner Herron's conclusion in *Knight* – that the principal place of business is not necessarily the same as its principal place of business as registered with ASIC under the *Corporations Act*. A business may not be a corporation and therefore not be registered with ASIC. He agreed that the principal place of business means 'chief, most important or main place of business from where the employer conducts most or the chief part of its business'. The evidence established that the employer largely conducted his business from premises at Kyogle. The respondent provided all equipment that would be at either site or collected from his home in Kyogle. The employer's correspondence was addressed from Kyogle, which was the place at which all the accounting activities took place.

In the course of the decision, the Deputy President also considered the meaning of s9AA(6). The employer had submitted that the various short term contracts had to be ignored because they were for periods of not longer than six months. The Deputy President thought that s9AA(6) was intended to operate where a worker usually works under a contract of employment with the employer in one state and works in another state for a period not longer than six months under a 'temporary arrangement' with that employer. The assumption in s9AA(6) is that there is a contract of employment that continues with the same employer even if the place of work change is because of a 'temporary arrangement' that requires the worker to work in another state.

The decision in *Martin* was followed shortly thereafter by Deputy President O'Grady in *Merrick v Aaron John Shelly and Geoffrey David San trading as Nationwide Transport Solutions and Workers' Compensation Nominal Insurer*,[5] though that matter was limited to the 'principal place of business' test.

The decisions in the different states have so far adopted a common approach to the interpretation of the provisions.

Practitioners need to be aware of these provisions when dealing with cases of people injured when temporarily in a state. The old approach of applying the law of the locus has been changed. It is now necessary to examine the worker's employment arrangements to determine what law applies for both workers' compensation and work injury damages purposes.

Further complications will arise when third parties are involved. The third parties' liability will arise under the state where the accident occurred, but the liability of the employer may arise under the law of a different state. ■

Notes: 1 *Mynott v Barnard* [1939] ALR 193. **2** *Hanns v Greyhound Pioneer Australia Limited* [2006] ACTS 5. **3** *Tamboratha Consultants Pty Limited v Knight* [2008] WADC 78. **4** *Martin v Respondent J Hibbens Pty Ltd* [2010] NSWWCCPD 83. **5** *Merrick v Aaron John Shelly and Geoffrey David San trading as Nationwide Transport Solutions and Workers' Compensation Nominal Insurer* [2010] NSWWCCPD 106.

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