

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

Issued in accordance with section 294 of the *Workplace Injury Management and Workers Compensation Act 1998*

Matter Number: 3259/19
Applicant: IAIN DUFF
Respondent: HELICOPTER AERIAL SURVEYS PTY LIMITED
Date of Determination: 2 DECEMBER 2019
Citation: [2019] NSWCC 382

The Commission determines:

1. The applicant's employment was connected with New South Wales pursuant to s 9AA(3)(c) of the *Workers Compensation Act 1987*.
2. The respondent is to pay to the applicant weekly compensation in accordance with the applicant's Wages Schedule annexed to the Application to Resolve a Dispute, in accordance with the Acts.
3. Leave to apply on the issue of weekly compensation.
4. That the respondent pay the applicant's section 60 of the *Workers Compensation Act 1987* expenses on production of accounts/receipts.

A brief statement is attached setting out the Commission's reasons for the determination.

Ross Bell
Arbitrator

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF ROSS BELL, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Jackson

Ann Jackson
Acting Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. This Application to Resolve a Dispute is dated 28 June 2019 and is in respect of a claim for injury on 5 January 2015 for weekly compensation and s 60 of the *Workers Compensation Act 1987* (1987 Act) expenses. The insurer denied the claim in a notice dated 4 July 2018.

ISSUES FOR DETERMINATION

2. The claim for weekly compensation and s 60 of the 1987 Act are disputed on the basis that the employment was not connected with New South Wales. They are not disputed individually and if the finding as to the issue below is in favour of the applicant, he will be entitled to weekly compensation and s 60 of the 1987 Act expenses.
3. The following issue remains in dispute:
 - (a) Whether Mr Duff was engaged in employment connected with NSW at the time of the incident causing injury on 5 January 2015 (s 9AA (3)) of the 1987 Act.

PROCEDURE BEFORE THE COMMISSION

4. The parties attended a conciliation conference and arbitration hearing on 4 November 2019. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

EVIDENCE

Oral Evidence

5. There was no oral evidence adduced.

Documentary Evidence

6. The following documents were in evidence before the Commission and I have taken them into account in making this determination:
 - (a) Application to Resolve a Dispute and annexed documents;
 - (b) Reply and annexed documents;
 - (c) Application to Admit Late Documents and annexed documents filed for the respondent on 25 October 2019, including:
 - (i) Report Huxley Hill 12 June 2015.
 - (d) Application to Admit Late Documents and annexed documents filed for the applicant on 21 October 2019, including:
 - (i) Westpac Bank statements;
 - (ii) Report of Dr Selvarag 13 October 2019;
 - (iii) Supplementary statement of the applicant 21 October 2019;
 - (iv) Wages Schedule (undated).

Documents relevant to the issue of whether the employment was connected with New South Wales s 9AA(3) of the 1987 Act include the following:

7. The statement of Mr Jones, Company Director of the respondent, of 21 May 2015 outlines the nature of the business which employed Mr Duff. Mr Jones states that,
 - (a) He spends about 50 per cent of his time overseas for the business's purpose of running a fleet of helicopters to spot fish in the commercial fisheries of Micronesia;
 - (b) "All mail should be sent to PO Box 403 Sutherland NSW 2232";
 - (c) Mr Jones in mid-January 2015 sought and obtained a s 175C Private Ruling from WorkCover stating Mr Duff was a worker for the purposes of the 1987 Act;
 - (d) Mr Duff was paid his wages by transfer to the Bank of Guam via a US dollar account.

8. Mr Duff in his statement of 21 May 2015 avers that,
 - (a) "My Manager is Barry Jones. Helicopter Aerial Surveys is located at 201 Prices circuit Woronora NSW 2232. To the best of my knowledge, the postal address is in Sutherland NSW."
 - (b) Mr Duff lived in Queensland before his employment with the respondent.
 - (c) His duties with the respondent involved running the helicopter maintenance operation at Pohnpei, Micronesia.

9. Letter to Mr B Jones from WorkCover dated 7 January 2015 regarding his application under s 175C of the 1987 Act for a private ruling as to the status of Mr Duff. This letter states that the private ruling is based on the information provided by Mr Jones. The decision was that Mr Duff was a "worker" in the period covering the incident of injury. It sets out the "key indicators" for the decision, including,
 - Iain Alister Duff is engaged by Helicopter Aerial Surveys Proprietary Ltd for a twelve-month contract.
 - Iain Alister Duff is employed and managed by Helicopter Aerial Surveys Proprietary Ltd's Sydney office.
 - Iain Alister Duff is paid a fixed monthly salary and is required to work fixed hours.
 - Iain Alister Duff is entitled to annual leave. ..."

10. This letter also extracts s 9AA of the 1987 Act, and notes,

"In this instance, Helicopter Aerial Surveys Pty Ltd's principal place of business is NSW, therefore, NSW is the State of connection and a NSW workers compensation policy would be required."

11. An email from Mr Jones to WorkCover dated 9 March 2011 sought a private ruling as to the status of another employee. This contains information including Mr Jones' daytime (Sydney) telephone number and the address for correspondence is a post office box at Sutherland NSW. The information provided otherwise is (emphasis added),

"We are an Australian Incorporated company located in Sydney NSW'
ABN55088007765

We are an aviation (Helicopter) operator.

We would normally operate anywhere on the east coast of Australia.

We have been requested to supply helicopters to be aboard large deep-sea fishing vessels fishing off the east Coast of Australia, extending to PNG and adjacent waters. Some fishing is done in international waters.

we will have a pilot and a mechanic aboard the vessel to fly and maintain the helicopter.

They are engaged on 6 month or 12-month contracts.

They work as directed by the Fishing master on the fishing boat, looking for schools of fish.

All of our commercial business activity is conducted from Sydney.

The fishing companies are overseas companies.

All invoicing is done from Sydney and payments are made direct to our Westpac account in Sydney.

The pilots and mechanics are employed and managed from Sydney.

Their nationality may vary from time to time. Australian, New Zealand, Korean and sometimes from the Philippines as an example."

12. Application for S 175C Private Ruling about another employee of the respondent on 15 November 2013 providing the same contact details for the respondent as the application in 2011.
13. The email from Mr Jones to the insurer's investigator, Ms Edwards, of 28 May 2015 contains the following:

"We operate a USD account at Westpac account [#####].PO Box 403
Sutherland NSW

I transfer one or two transfers a month to our account at the Bank of Guam (BOG),
Pohnpei Branch, for local expenses."

...

"The address of the account is Tropic Helicopters PO Box 403 Sutherland NSW"

...

"All of our accounts and bookkeeping is [done] by an external accountant. This includes the quarterly BAS, ATO returns etc. The accountant is away sometime next month. The accountant is David Kutcher and Co of Peshurst (where the registered office of Helicopter Aerial Surveys actually is)."

...

"The bottom line is that the GIO have been through all of this before, complete with an investigator interviewing me, following the salary trail, banking procedures, advice from their lawyers, accepting [the] claim, all on the same working methodology we have been using for ten or more years Deju vu (all [over] again)! They have it all on file."

14. Letter from Westpac Bank to "The Secretary, PO Box 403, Sutherland NSW 1499 (undated), with details of a USD currency account in the name of the respondent.
15. Letter from Mr B Jones to GIO dated 18 January 2009 on the respondent's letterhead with the same post office box at Sutherland as the address, with Sydney telephone and facsimile numbers, regarding a previous works compensation claim for another employee. The letter outlines the management by Mr Jones of the situation for that injured worker at Wewak.
16. Employer Injury Claim Report form completed by Mr Jones dated 5 February 2009 regarding a former employee's claim which gives Mr Jones' home address at Woronora NSW, the same PO Box at Sutherland, and his Sydney phone number for contact.

Discussion

17. The relevant sub-sections of section 9AA of the 1987 Act are as follows [emphasis added]:

“Section 9AA provides:

(1) Compensation under this Act is only payable in respect of employment that is connected with this 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:

(a) the State in which the worker usually works in that employment, or

(b) if no State or no one State is identified by paragraph (a), the State in which the worker is usually based for the purposes of that employment, or

(c) 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.

18. It is common ground that subsection (3) (a) and (b) are not applicable. The dispute is around s 9AA(3)(c) highlighted above.

19. The respondent disputes that the respondent’s principal place of business in Australia is in NSW. In *Martin v R J Hibbens Pty Ltd* [2010] NSWCCPD 83 (*Martin*) Roche DP said that “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”. That place is not necessarily the same as a business address registered with ASIC.

20. As emphasised in *Workers Compensation Nominal Insurer v O’Donohue* [2014] NSWCCPD 1 at [79] [80] [84] by Roche DP it is important to note that the wording of subsection (3)(c) is directed at the employer’s principal place of business in Australia. It is irrelevant whether it conducts business or has a registered office overseas.

21. The evidence in this matter establishes that the employer’s principal place of business in Australia was in NSW at the time of injury. The factors establishing this are found in the material noted above:

(a) The business post office box is located at Sutherland NSW;

(b) Mr Jones lives at Woronora NSW, which is also the business “base”;

(c) The activities taking place in NSW include banking receipts and payments, accounting, bookkeeping, invoicing, taxation, and personnel management.

(d) The ASIC registered office is designated to be at the business’s accountant nearby at Penshurst NSW.

22. This satisfies the test in *Martin* in which Roche DP cited *Tamboritha Consultants Pty Ltd v Knight* [2008] WADC 78. It is important to consider the nature of the employer which may or may not be a large corporation. In this case the respondent has a small management, with Mr Jones the only Director.

23. The respondent submits that the applicant has not discharged the onus of proof as to NSW being its principal place of business in Australia. It is submitted that it is not known whether the employer has an office near to the post office at Sutherland or how often the box is emptied. In my view the frequency at which the post office box is emptied is irrelevant. It is clear the business has a small management business in the modern days of email and other means of internet communication.

24. The respondent submits that Mr Jones does not say he runs the business from Woronora. However, it is an easy inference to draw from the materials, including correspondence and an unrelated claim form that the address is the practical place of business in Australia, with landline phone and facsimile contact.
25. The respondent submits it is significant that all the helicopter work is done overseas and there is no evidence of helicopter work in NSW. However, this is irrelevant to the issue as to a place of business in NSW. There is no requirement that there be helicopter operations within NSW in order for the respondent to have a place of business there.
26. The respondent submits the registered address with ASIC at the office of the respondent's accountant at Penshurst NSW is not conclusive. I agree, but this is nevertheless useful as a factor consistent with the other evidence.
27. The nature of the business in NSW is the conduct of the administrative and financial side as well as employment and operational matters. That the helicopter work is all outside Australia and some administrative tasks are conducted in Micronesia is not relevant for the purposes of the section.
28. As the respondent submits, the WorkCover private rulings are not in any way conclusive or binding, yet the correspondence about these rulings is useful for background information relevant to establishing whether there was a place of business in NSW.
29. There is enough evidence to establish that the Australian principal place of business of the respondent is at Sydney. There is no evidence of a place of business in any other Australian state. It can be inferred that the information given to WorkCover in 2011 and 2013 by Mr Jones about other employees was essentially the same as was provided to them in January 2015 about Mr Duff's status
30. Presumably, as the respondent sought to deny the claim on the basis of s 9AA(3)(c), had there been evidence from Mr Jones as Director or from elsewhere which contradicts the body of material provided by him about the operation of the business it would have been relied on. The investigator for the insurer has made enquiries of Mr Jones and Mr Duff, but there is little or nothing to contradict the evidence supporting the existence of a place of business in NSW.
31. The respondent relies on paperwork from Micronesia including the records of a bank account at the Bank of Guam in the unregistered business name of Tropic Helicopters, and a certificate of the Philippines Aviation Authority showing an address for the respondent at Pomphai, not Sydney. This is not relevant to the issue to be determined. That there is an office in Micronesia is not salient for the purposes of the section.
32. In any case, the document from the Bank of Guam shows a transfer of funds and is addressed to Tropic Helicopters at the post office box at Sutherland NSW. This is the alternative business name used by the respondent in Micronesia (see pp 38 and 44 of the annexures to the respondent's Application to Admit Late Documents). I note that Mr Jones uses that name in his email address. The "originating party" for that bank transaction is the respondent with the address shown as Mr Jones' address at Woronora. This document is consistent with what Mr Jones told Ms Edwards, the investigator, in his email to her of 28 May 2015 as to transfers of money from Sydney.
33. I note that Mr Jones is Director of the respondent and it is his own prudent efforts to establish the business's compensation insurance position that provides the basis for the conclusion that the Australian principal place of business of the respondent is at Sydney. It is hardly surprising that in some of the correspondence that Mr Jones appears somewhat bemused by the course of events since the claim by Mr Duff.

34. As noted above, there is no evidence of a place of business in any other Australian state. In these circumstances there need only be a place of business in NSW for it to be at the same time the principal place of business in Australia. I find for the above reasons that Mr Duff's employment with the respondent was connected with NSW at the time of injury pursuant to s 9AA(3)(c) of the 1987 Act.

Weekly compensation

35. There were no submissions made as to the entitlement to weekly compensation. The applicant has provided an updated Wages Schedule with his Application to Admit Late Documents which has not been contested by the respondent, and the order is in terms of that Schedule, with leave to apply on that element.

Medical Expenses

36. It follows from the above finding that Mr Duff is entitled to s 60 medical expenses for the compensable injury.

SUMMARY

37. Mr Duff's employment was connected with New South Wales pursuant to s 9AA(3)(c) of the 1987 Act at the time of injury.
38. Mr Duff is entitled to weekly compensation in the periods claimed in accordance with the Acts.
39. Mr Duff is entitled to s 60 of the 1987 Act medical expenses.

