WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number:	**689/20**
Applicant:	**Glen Moses**
First Respondent:	**Samaritan's Purse Australia Limited**
Second Respondent:	**Samaritan's Purse (US)**
Third Respondent:	**Workers Compensation Nominal Insurer (icare)**
Date of Determination:	**27 May 2020**
Citation:	**[2020] NSWWCC 175**

The Commission determines:

1. Award for the first respondent.

2. Pursuant to section 9AA (3)(b) of the *Workers Compensation Act 1987* (the 1987 Act), the applicant is not usually based in the state of New South Wales for the purposes of his employment with the second respondent.

3. Pursuant to section 9AA (3)(c) of the 1987 Act, the second respondent's principal place of business in Australia is located in the state of New South Wales.

4. Pursuant to section 9AA (1) of the 1987 Act, compensation is payable to the applicant by the second respondent because the applicant's employment with the second respondent is connected to the state of New South Wales.

5. The applicant had no current work capacity from 1 May 2019 to 30 June 2019, and a partial incapacity for work from 1 July 2019 onwards.

6. The second respondent was not insured as required by the 1987 Act at the time of the applicant's injury.

The Commission orders:

1. The second respondent is to pay the applicant weekly payments of compensation as follows:

    (a) $2,177.40 per week from 1 May 2019 to 30 June 2019 pursuant to section 37 (1) of the 1987 Act;

    (b) $1,762.80 per week from 1 July 2019 to 30 September 2019 pursuant to section 37 (3)(b) of the 1987 Act;

    (c) $1,781.10 per week from 1 October 2019 to 31 December 2019 pursuant to section 37 (3)(b) of the 1987 Act;

    (d) $1,408.10 per week from 1 January 2020 to 31 March 2020 pursuant to section 37 (3)(b) of the 1987 Act, and

    (e) $1,436.40 per week from 1 April 2020 to date and continuing pursuant to section 37 (3)(b) of the 1987 Act.

2. This matter is remitted to the Registrar for referral to an Approved Medical Specialist (AMS) as follows:

Date of injury:	22 November 2017 and 6 December 2017
Body Part:	Lumbar spine
Method of Assessment:	Whole Person Impairment

3. The following documents are to be forwarded to the AMS:

    (a) Application to Resolve a Dispute and attached documents;

    (a) Reply and attached documents filed by the first respondent;

    (b) Reply and attached documents filed by the third respondent;

    (c) Application to Admit Late Documents filed by the applicant on 25 March 2020;

    (d) Application to Admit Late Documents filed by the applicant on 5 May 2020;

    (e) Application to Admit Late Documents filed by the first respondent on 8 May 2020;

    (f) Application to Admit Late Documents filed by the first respondent on 12 May 2020, and

    (g) Application to Admit Late Documents filed by the applicant on 13 May 2020.

4. The applicant consents to the assessment by the AMS to be conducted by video.

5. The third respondent is to pay compensation awarded against the second respondent from the Workers Compensation Insurance Fund under section 154D of the 1987 Act.

6. The second respondent is to reimburse the third respondent for:

    (a) amounts paid out of the Insurance Fund in respect of compensation awarded against the second respondent, and

    (b) the costs of the third respondent.

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

John Isaksen
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 JOHN ISAKSEN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. The applicant, Glen Moses, sustained injuries to his lumbar spine on 22 November 2017 and 6 December 2017 whilst working in a Disaster Assistance Response Team (DART) for the second respondent, Samaritan's Purse (US) (SP USA), in Puerto Rico following Hurricane Maria.

2. The applicant's term of deployment for that work in Puerto Rico was from 15 October 2017 to 14 December 2017.

3. The applicant returned to Australia on 20 December 2017. The applicant continued to suffer the effects of those injuries to his lumbar spine and on 16 August 2018 he underwent a L5/S1 fusion, performed by Dr Gambhir. The applicant underwent a left L4/5 microdiscectomy on 13 December 2018, again performed by Dr Gambhir.

4. Apart from some Uber driving between January and June 2018, the applicant has not returned to any work since the end of his deployment with SP USA in December 2017.

5. The applicant made a claim for workers compensation benefits upon the first respondent, Samaritan's Purse Australia Limited (SPAL), who had been involved in arranging the applicant's deployment to work for the DART in Puerto Rico, and was paid weekly payments of compensation and some medical expenses up until 30 April 2019.

6. The insurer of SPAL, Employers Mutual Limited, disputed liability in a notice dated 20 March 2019 on the grounds that the applicant was not a worker and that the applicant's employment was not connected to the state of New South Wales.

7. The applicant has joined the third respondent, Workers Compensation Nominal Insurer, to these proceedings on the basis that if SP USA is found to be liable for the claim made by the applicant, then SP USA has no workers insurance to cover its liability in the state of New South Wales.

8. The third respondent had issued a dispute notice dated 19 September 2019 which disputed liability to pay compensation to the applicant on the grounds that the applicant's employment was not connected to the state of New South Wales.

9. The applicant claims weekly payments of compensation from 1 May 2019 to date and continuing, and also a lump sum payment for 24% permanent impairment for the injury he has sustained to his lumbar spine.

ISSUES FOR DETERMINATION

10. The parties agree that the following issues remain in dispute:

    (a) whether the applicant's employment is connected with the state of New South Wales, so as to allow the payment of compensation to the applicant (section 9AA of the *Workers Compensation Act 1987* (the 1987 Act));

    (b) the extent of the applicant's incapacity for work and calculation of the any entitlement to weekly payments of compensation (sections 32A and 37 of the 1987 Act), and

    (c) the determination of the applicant's permanent impairment (section 66 of the 1987 Act).

PROCEDURE BEFORE THE COMMISSION

11. The parties attended a conference and hearing on 15 May 2020. 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.

12. Mr Luke Morgan appeared for the applicant, instructed by Mr Driscoll. Mr Stephen Flett appeared for SPAL and Workers Compensation Nominal Insurer, instructed by Ms Turnbull, with Ms Sadri from Workers Compensation Nominal Insurer also in attendance. There was no appearance by SP USA.

13. The hearing was conducted by telephone in accordance with the protocols set out by the Commission as a result of the coronavirus pandemic.

14. In the course of the hearing Mr Morgan conceded that the applicant at all material times was employed by SP USA.

15. The parties agreed that pre-injury average weekly earnings (PIAWE) are $5,606.98.

16. The parties agreed that if the applicant was successful in establishing an entitlement to compensation under the 1987 Act, then I could enter an award for the payment of a lump sum benefit pursuant to section 66 after consideration of the relevant evidence and legal principles. If I was not mindful to do so, then the applicant agreed that it was appropriate that an assessment could be undertaken by video by an Approved Medical Specialist (AMS).

EVIDENCE

Documentary evidence

17. The following documents were in evidence before the Commission and taken into account in making this determination:

    (a) Application to Resolve a Dispute (ARD) and attached documents;

    (b) Reply and attached documents filed by SP Australia;

    (c) Reply and attached documents filed by Workers Compensation Nominal Insurer;

    (d) Application to Admit Late Documents filed by the applicant on 25 March 2020;

    (e) Application to Admit Late Documents filed by the applicant on 5 May 2020;

    (f) Application to Admit Late Documents filed by SP Australia on 8 May 2020;

    (g) Application to Admit Late Documents filed by SP Australia on 12 May 2020;

    (h) Application to Admit Late Documents filed by the applicant on 13 May 2020, and

    (i) Affiliated Ministry Agreement between SP USA and SP Australia dated 7 August 2009 and a Master License Agreement between SP USA and SP Australia dated 27 June 2013.

Oral evidence

18. There was no application to cross-examine the applicant or to adduce oral evidence.

FINDINGS AND REASONS

Whether the applicant's employment is connected to the state of New South Wales (section 9AA of the 1987 Act)

Relevant legislative provisions

19. Section 9AA of the 1987 Act relevantly 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.
>
> ……..
>
> (5) If no State is identified by subsection (3) or (if applicable) (4), a worker's employment is connected with this State if:
>
> (a) the worker is in this State when the injury happens, and
> (b) there is no place outside Australia under the legislation of which the worker may be entitled to compensation for the same matter."

The evidence of the applicant

20. The applicant has provided statements dated 11 February 2019, 20 February 2020, 23 March 2020, and 12 May 2020.

21. The applicant states that in September 2017 he heard an advertisement on radio station Hope 103.2 from SPAL seeking expressions of interest for individuals to undertake DART training in Sydney in December 2017 so as to be part of a register to be deployed on future international disaster relief teams for Samaritan's Purse. He states that SP USA were sending their staff to Australia for that training.

22. The applicant states that he accessed information on this recruitment from the SPAL website and lodged an application.

23. The applicant states that on 9 October 2017 he received a phone call from Emma Wynn-Jones from SPAL who said his application had been received and there was an urgent need to fill a role of Airport Operations Manager in Puerto Rico to respond to the aftermath of Hurricane Maria, and that the applicant had the skills and experience for the role. She asked if the applicant could be deployed immediately and the following day he agreed.

24. The applicant states that between 9 and 12 October 2017 he communicated constantly by phone and email with Ms Wynn-Jones in the office of SPAL.

25. The applicant states that on 10 October 2017 he attended the head office of SPAL at 13 Binney Road, Kings Park, and Ms Wynn-Jones reimbursed him in cash for his immunizations, was given some Samaritan's Purse uniforms, and a compulsory deployment packing list. He states that Ms Wynn-Jones also briefed him extensively on her knowledge of the assignment in Puerto Rico.

26. The applicant states that on 12 October 2017 he received a 'Samaritan's Purse Offer of Employment' by email from SP USA. He states that he was surprised when he received this as he had not any previous dealings with them. He also states that he was proceeding to Puerto Rico on an ESTA tourist visa and not a USA work visa.

27. The email from SP USA to the applicant dated 12 October 2017 is in evidence. It states: "Congratulations! We are pleased to offer you employment with Samaritan's Purse", and attaches a Memorandum of Understanding, being the contract of employment between SP USA and the applicant.

28. There is a second email from SP USA to the applicant dated 12 October 2017, which was copied to Ms Wynn-Jones, which includes several forms which the applicant was required to sign regarding such things as Codes of Conduct, payroll information and personal details.

29. The applicant states that his airline tickets were booked and paid for through the office of SP Australia. There is an email from Ms Wynn-Jones to the applicant dated 14 October 2017 which includes: "I've attached your e-ticket for your flights and the deployment briefing notes from the field" and "If you have any further questions or need anything else, please don't hesitate to contact us."

30. The applicant states that the "entire process was incredibly rushed", given that it had been less than a week from the time Ms Wynn-Jones first rang him to the time of his departure on 15 October 2017.

31. The applicant states that within the first couple of weeks of being in Puerto Rico he was asked by a senior staff member to extend his deployment from one month to two months. He states that the only communication in regard to the approval of the extension of his deployment was an email from Ms Wynn-Jones with a revised airline ticket.

32. There is an email in evidence from Ms Wynn-Jones to Kelsey Nyce at samaritan.org, with a copy to the applicant, attaching the e-ticket for the change in the applicant's flights for his return to Australia.

33. The applicant states that his duties in Puerto Rico included loading and unloading disaster relief supplies; distributing supplies to people in need; maintenance of the helicopter; co-ordinating the handling of a DC8 plane and helicopter; and manual labour at the Samaritan's Purse warehouse.

34. The applicant states that on 22 November 2017 while working in Puerto Rico he lost control of an apparatus lever that he was using, and his back twisted violently. He states that he did not report the injury as he expected the ongoing pain in his lower back to go away. He states that he continued on with his role but on 6 December 2017 he experienced further pain in his lower back when he was pushing a battery recharging cable into a helicopter.

35. The applicant states that following the incident on 6 December 2017, he attended Doctor's Center Hospital in San Juan, Puerto Rico. This was after the Samaritan's Purse HR Manager found him collapsed on the floor in the office.

36. The applicant states that he just did some computer work in the office of Samaritan's Purse in Puerto Rico until he flew out on 14 December 2017.

37. The applicant states that following his return to Australia he underwent training with Samaritan's Purse on 6 to 8 February 2018 and from 7 to 8 March 2018. There is an email in evidence from Ms Wynn-Jones to the applicant dated 31 January 2018 which includes:

> "…we would love for you to come to the DART training next week if you're available from Tuesday….Our US office is keen for you to complete the training if possible and it's a great opportunity for you to meet the head guys from Disaster Relief from the US."

38. The applicant states that he continued to have pain in his lower back and down his right leg upon his return to Australia. He states that in mid-April 2018 he experienced an increase of pain. He states that eventually he saw Dr Gambhir, neurosurgeon, on 18 June 2018.

39. The applicant underwent a L5/S1 fusion, performed by Dr Gambhir, on 16 August 2018, and a left L4/5 microdiscectomy, again performed by Dr Gambhir, on 13 December 2018.

40. The applicant states that he has not returned to any work since the end of his deployment with the second respondent in December 2017, except for some Uber driving between January and June 2018, in which his taxable income amounted to $154.

41. The applicant states that his back is sore most of the time. He states that sitting and standing "aggravates my back", and that walking can relieve the pain in his back, but he cannot walk too far without having to take the rest of the day off to recover.

42. In his last statement dated 12 May 2020, the applicant states that he is unable to do sedentary work as he cannot sit or stand for more than 30 minutes at a time. He states that he is "permanently incapacitated" and he is "untrained" to do any work other than heavy manual labour.

The Memorandum of Understanding between the applicant and SP USA

43. The Memorandum of Understanding (MOU) was signed by the applicant on 12 October 2017 and is stated to be executed between the applicant and Samaritan's Purse, a North Carolina non-profit corporation. The applicant is named as an employee, in a position of "Disaster Assistance Response Team (DART)", with a "Host Country/Location" stated to be "Global", and "Dates of Employment" to be from 13 October 2017 to 12 October 2019.

44. The MOU states that in consideration of the performance of job duties detailed therein, the applicant will be paid compensation for "an intermittent international assignment", being $175 per day, and $120 per day if asked to participate in any US-based activities. Although not specified in the MOU, it is apparent that the payment was to be made in US dollars.

45. The MOU further states that the applicant will only be paid for days on active assignment with SP USA, which includes travel days to and from the field, but pay will be suspended during periods of non-engagement.

46. The MOU states that the rights of the parties will be governed by and construed in accordance with the laws of the State of North Carolina.

The evidence of Natalie Moses

47. Natalie Moses is the wife of the applicant and has provided statements dated 23 March 2020 and 4 May 2020.

48. Mrs Moses states that she was employed by SPAL as Head of International Projects and Disaster Relief between 2009 and 2011. She also states that prior to working for SPAL, she was a Director at Compassion Australia, and since working for SPAL her roles have included being a Director at Catholic Mission and currently as an Executive Advisor with Social Impact Institute, which involves consultation with the CEOs and Boards of many charities.

49. Mrs Moses states that her work experience means that she has an in depth understanding of international aid and how the development sector operates. She states that the organisations that she has worked for operate in much the same way as SPAL. She states that these organisations, including SPAL, have a separate legal entity in Australia but are controlled by the international head office by being able to appoint members onto the board of the Australian company and control the license agreement with the Australian company.

50. Mrs Moses states that in these organisations, including SP USA and SPAL, there is regular sharing and transfer of official resources between the international headquarters and the Australian office and regular transfer of monies. She states that while she worked for SPAL she personally authorised many internal journal transfers between SPAL and SP USA, which included international projects, ministry support and reimbursement for a whole range of different things.

51. Mrs Moses states that all funds raised by SPAL for international disaster relief activities are sent directly to SP USA to be used at the discretion of SP USA, so long as the funds are used for disaster relief in the country the funds were sought for.

The evidence of David Ingram

52. David Ingram has provided statements dated 1 May 2020 and 11 May 2020. Mr Ingram states that he is Executive Director of SPAL.

53. Mr Ingram states that SPAL is an affiliate of SP USA and refers to three agreements which confirm this. Two of those agreements, being an Affiliated Ministry Agreement between SP USA and SP Australia dated 7 August 2009 and a Master License Agreement between SP USA and SP Australia dated 27 June 2013, were admitted into evidence at the commencement of the hearing.

54. Mr Ingram states that SPAL is an independent legal entity and has its own budget and the leadership determines how it operates that budget. He states that SPAL adheres to all governance standards, including financial responsibilities, to maintain its charity status.

55. Mr Ingram states that SP USA is responsible for recruitment and hiring of DART staff and “at most” SPAL is an advertiser to recruit staff and to direct potential employees to SP USA.

56. Mr Ingram states that SP USA may ask SPAL to convey information to staff due to obvious proximity, but it is SP USA that is responsible for debriefings prior to deployment. He states that SP USA may ask that SPAL to assist employees with booking travel and SPAL does pay for the flights of DART employees but that still requires approval from SP USA.

57. Mr Ingram states that SPAL co-ordinates closely with SP USA to accomplish their shared mission and values. He states that SP USA may have some input into SPAL activities and projects because of this shared mission.

58. Mr Ingram states that SPAL raises funds from Australian donors and the funds are utilised in accordance with the donors’ wishes, including when such funds are provided to SP USA.

59. Mr Ingram states that SP USA conducts debriefs for their staff by having their trained staff travel throughout the world for this purpose, but there would be rare occasions when SPAL does this and only at the request of SP USA. He states that SPAL does not organise training sessions for DART employees but only hosts the training for employees of SP USA.

60. Mr Ingram states Mrs Moses was employed with SPAL from September 2009 to August 2011 and that the relationship that SPAL has with SP USA has changed significantly since then.

The evidence of Paula Blankenship

61. Paula Blankenship has provided a statement dated 28 February 2020. Ms Blankenship states that she is Assistant Director/Benefits for Samaritan's Purse in North Carolina. She acknowledges that Samaritan's Purse is the same entity referred to by the applicant as 'SP USA.'

62. Ms Blankenship states that SP USA and SPAL are separate legal entities, and that SP USA does not hold a workers compensation policy in Australia. She states that SP USA does not directly conduct any operational activities in Australia.

63. Ms Blankenship states that the applicant was an employee of SP USA at the time of his deployment and for the duration of his employment. She states that SP USA is responsible for making all decisions and determinations about the applicant's assignments and deployments. She states that the applicant was covered under SP USA's workers compensation benefits in North Carolina.

64. Ms Blankenship states that an applicant for a position with DART is to apply directly through the website of SP USA. She states that SP USA does permit SPAL to provide job postings in the local community and refer applicants to SP USA, but all other aspects of recruiting, hiring, training, and benefits are handled by SP USA.

65. Ms Blankenship states that SP USA does not have a principal place of business in Australia and that at the time the applicant incurred his alleged injury in December 2017, SP USA did not conduct business in Australia. She states that in December 2017 SP USA did not have any employees (excluding DART members) undertaking paid work in Australia.

66. Ms Blankenship states that email correspondence demonstrates that the applicant was interviewed by Rebecca Cooper from SP USA and that the applicant corresponded by email with a number of staff from SP USA to confirm the completion of paperwork for his deployment.

67. That correspondence is annexed to the statement of Ms Blankenship. The correspondence mostly pertains to forms to be completed by the applicant. There are notes of an interview conducted on 11 October 2017 between Ms Cooper and the applicant which is in relation to the applicant's Christian values and there is no reference in those notes to the actual disaster relief to be undertaken by the applicant in Puerto Rico.

68. Ms Blankenship states that SP USA is responsible for debriefings prior to deployment, although SP USA may ask SPAL staff to convey this due to proximity. She states that SPAL may be asked to assist with booking travel for ease of logistics, but SP USA is financially responsible for the travel of its employees. She states that post-deployment debriefs are conducted by staff from SP USA, who travel throughout the world for this purpose. She states that DART training is conducted by SP USA.

69. Ms Blankenship states that the offer of employment made to the applicant, which is set out in the Memorandum of Understanding, includes 'Global' as the employment location because SP USA does not always know where the next disaster relief response will take place.

The Affiliate Ministry Agreement between SP USA and SP Australia dated 7 August 2009 and a Master License Agreement between SP USA and SP Australia dated 27 June 2013

70. Clause 1.1 of the Master License Agreement between SP USA and SP Australia dated 27 June 2013 states:

> "…Samaritan's Purse is a nondemoninational evangelical Christian organization providing spiritual and physical aid to hurting people around the world. Since 1970, Samaritan's Purse has helped meet the needs of people of people who are victims of war, poverty, natural disasters, disease and famine with the purpose of sharing God's love through his Son, Jesus Christ. The organization serves the Church worldwide to promote the Gospel of the Lord Jesus Christ."

71. Similar wording is used in the Affiliated Ministry Agreement.

72. Both Agreements refer to a shared mission between SP USA and its Affiliate, SPAL, that is expressed in a Mission Statement and a Statement of Faith.

73. Both Agreements state that SPAL "agrees to work closely with SP to co-ordinate humanitarian SP Projects activity."

Determination

74. In the course of the hearing Mr Morgan conceded that the applicant at all material times was employed by SP USA. This part of the dispute requires a determination as to whether the applicant's employment with SP USA was connected with the state of New South Wales for compensation to be payable under the 1987 Act to the applicant (as required by section 9AA of the 1987 Act).

75. Acting President Roche in *Workers Compensation Nominal Insurer v O'Donohue* [2014] 1 (*O'Donohue*) provided an overview of the application of section 9AA as follows at [47-49] and [50-51]:

> "47. The section provides that compensation is only payable under the 1987 Act in 'respect of employment that is connected with the State'. The fact that a worker is outside this State when the injury happens does not prevent compensation being payable under the 1987 Act 'in respect of employment that is connected with this State' (s 9AA(2)).
>
> 48. To determine whether the employment is connected with New South Wales, sub-s (3) of s 9AA provides a series of cascading tests. First, a worker's employment is connected with the State 'in which the worker usually works in that employment' (s 9AA(3)(a)) (the 'usually works' test). If that test provides an answer the question, there is no need to proceed further.
>
> 49……
>
> 50. If no State, or no one State, is identified by the 'usually works' test, one applies the test in section 9AA(3)(b), which looks for the State 'in which the worker is usually based for the purposes of that employment' (the 'usually based' test). If that test provides the answer, there is no need to proceed further.
>
> 51. If no State, or no one State, is identified by the 'usually based' test, one applies the test in section 9AA(3)(c), which looks for the State 'in which the employer's principal place of business in Australia is located' (the 'principal place of business' test)."

76. Mr Morgan for the applicant concedes that the applicant cannot succeed on the application of the "usually works" test as the applicant did not usually work in New South Wales. Mr Morgan submits that the applicant satisfies the "usually based" test, but that if I am not so satisfied, then the applicant satisfies the "principal place of business" test.

77. Dealing with the "usually based" test, Mr Morgan refers to the MOU which identifies the location of the applicant's employment to be "Global", that the agreement is for two years, and that it provides for the applicant to work on disaster relief anywhere within the world, if and when required by SP USA. Mr Morgan submits that the applicant was based in the state of New South Wales for the purposes of this employment and made himself available for employment in disaster relief throughout the world for SP USA. The applicant's usual base for that employment was therefore in the state of New South Wales.

78. Mr Flett for the respondent submits that section 9AA is to cover the situation where a worker usually works or is usually based in the State of New South Wales but sustains an injury outside of New South Wales.

79. Mr Flett submits that the evidence of Mr Ingram, Ms Blankenship, and what is set out in the Affiliated Ministry Agreement between SP USA and SP Australia dated 7 August 2009, and the Master License Agreement between SP USA and SP Australia dated 27 June 2013, all confirm that SPAL was a separate legal entity to SP USA, and that SP USA had the sole responsibility for the engagement of the applicant as an employee. Mr Flett submits that the applicant's employment with SP USA has no connection with the state of New South Wales.

80. As regards the "usually based" test, Mr Flett submits the applicant's base for the purposes of that employment for which he was engaged with SP USA must be Puerto Rico, and not New South Wales.

81. In *O'Donohue,* AP Roche quoted from his previous decision in *Martin v R J Hibbens Pty Ltd* [2010] NSWWCCPD 83 (*Martin*), wherein he accepted the correct test for determining where a worker is "usually based" as that set out by Commissioner Herron in *Tamboritha Consultants Pty Ltd v Knight* [2008] WADC 78 (*Knight*). AP Roche said at [53]:

> "'usually based' can include a camp site or accommodation provided by an employer (*Knight* at [83]). 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 fact will be decisive: the work location in the contract of employment, the location of 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."

82. Acting President Roche also said at [75]:

> "It should be remembered that the 'usually based' test does not involve the application of any specific, pre-set, criteria. Each case will depend on its own facts."

83. In *O'Donohue* the employer was registered and based in Hong Kong and produced live shows that were performed in different countries in Asia, the Middle East and Australia. The worker was injured when performing a show in Bahrain. Arbitrator Foggo found that the worker was usually based in the state of New South Wales for the purposes of his employment, and this finding was not disturbed by AP Roche on appeal.

84. The main reasons for Arbitrator Foggo making this finding was that the applicant had stated at the outset of his claim that he was based in New South Wales; that the contract between the worker and the employer acknowledged that the worker was based in New South Wales; and that the worker received directions in relation to the work, and to rehearse for the role he had in the show, in New South Wales. Acting President Roche also noted that the travel route in the contract was "Sydney – Bahrain – Sydney", which confirmed the worker's base to be in Sydney.

85. I consider there are significant differences in the circumstances of *O'Donohue* compared to this dispute which I have to determine, and in the factors referred to by AP Roche to be considered in the "usually based" test, which causes me not to be satisfied that the applicant meets this particular test.

86. Firstly, there is no acknowledgement in the MOU of the applicant being based in New South Wales.

87. Secondly, the MOU reads as a standard agreement for an employee to work anywhere in the world and on an intermittent basis at the direction of SP USA. The terms of the MOU anticipate the applicant being required to perform job duties as required by SP USA. The applicant's deployment in Puerto Rico was extended for one month, consistent with the terms of the MOU. That contrasts with the situation in *O'Donohue* where AP Roche noted the worker's work duties were restricted to a finite location for a finite period of time.

88. Thirdly, although the applicant was given some initial instructions before he left Australia, the directions for the actual work he undertook occurred in Puerto Rico. The actual work undertaken by the applicant in Puerto Rico, which I have previously summarised, was varied and extensive. This is in contrast to the circumstances in *O'Donohue,* where the worker's directions for a discrete job were given in Sydney, those duties were performed in Bahrain, and then he returned to his base in Sydney.

89. The applicant refers to training which he underwent on 6 to 8 February 2018 and from 7 to 8 March 2018, which might be regarded as analogous to the rehearsals which the worker undertook in *O'Donohue.* However, the evidence does not support a finding that the applicant's ongoing employment was contingent upon this. The training was voluntary and the applicant was not paid to attend.

90. The factors identified by AP Roche in *O'Donohue* (and which are derived from *Knight*) also do not assist the applicant in succeeding with the "usually based" test.

91. The work location described in the contract of employment (the MOU) is "Global", and not in New South Wales.

92. I have already referred to the location of where the applicant attended during his employment to receive directions to undertake his work duties. That was in Puerto Rico. It was not in New South Wales.

93. The location of where the applicant reported for the work which he actually undertook was in Puerto Rico. It was not in New South Wales.

94. The applicant's wages were paid in US dollars. Bank records of the applicant which are attached to the Reply filed by SPAL indicate that wages were paid through INTL FCStone in London.

95. Mr Morgan submits that because the MOU states the applicant's work location to be "Global", the base for his employment must be in New South Wales, which is where he departs from and returns to, following assignments that he is directed to go to around the world by SP USA. However, it does not follow that there has to be a usual base for a worker's employment, least of all in a State or Territory in Australia. Section 9AA(3)(c) acknowledges that it may not be possible to identify such a State.

96. For the reasons I have given, I cannot be satisfied that the applicant was usually based in the state of New South Wales for the purposes of his employment with SP USA, and therefore the applicant cannot succeed on the "usually based" test.

97. There remains the "principal place of business" test. In *O'Donohue* AP Roche was not required to consider the "principal place of business" test because the worker had succeeded on the "usually based" test. The Acting President made observations on this issue but expressed no concluded view. Those observations include the following at [78]-[79]:

> "78. Accepting the reasoning in *Knight*, I said in *Martin* that an employer's principal place of business is not necessarily the same as its principal place of business registered with the Australian Securities and Investment Commission under the *Corporations Act* 2001. I also agreed with *Knight* 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' (*Martin* at [56]).
>
> 79. In the present case, it is important to note that s 9AA(3)(c) is concerned with the 'State in which the employer's principal place of business in Australia is located' (emphasis added). It therefore does not matter that the employer's main business, or registered office, is located overseas. The provision directs attention to the employer's principal place of business in Australia. That does not exclude the possibility that its main business activities may be based overseas."

98. AP Roche then said at [85]:

> "… What is required to establish a State of connection in s9AA(3)(c) is a place in a State in which the employer's principal place of business in Australia is located. That requires a consideration of the nature of the business concerned and the nature of the activities conducted in New South Wales to further that business."

99. In *O'Donohue* the worker undertook rehearsals for his role in a show in Sydney under the supervision of an executive producer, who had an office in Sydney. Acting President Roche stated that the evidence established that the employer conducted an integral part of its business in New South Wales and concluded at [86]:

> "…Mr O'Donohue may well also have been entitled to succeed because the State in which MEI's principal place of business in Australia was located was in the New South Wales."

100. In this dispute which I have to determine, the principal place of business of the employer, SP USA, was overseas. The available evidence indicates that the principal place of business of SP USA was in Boone, North Carolina, in the United States of America. However, as AP Roche said in *O'Donohue,* it does not matter that the employer's main business, or registered office, is located overseas or that the employer's main business activities may be based overseas. The test imposed by section 9AA (3)(c) is whether SP USA had a principal place of business in Australia.

101. I accept that SP USA and SPAL are separate legal entities. However, I do not accept the assertion made by Ms Blankenship that SP USA did not conduct business in Australia. The available evidence indicates that SP USA was conducting business in New South Wales with the assistance of SPAL. That business included the recruitment and deployment of the applicant to work for the disaster relief team which SP USA co-ordinated in Puerto Rico in response to Hurricane Maria.

102. Although SP USA was the employer of the applicant and Ms Blankenship states that SP USA was responsible for making all decisions and determinations about the applicant's assignments and deployments, the evidence discloses that business activities of SP USA in relation to the applicant's employment were conducted in New South Wales. These included the following:

    (a) the advertising for the recruitment and hiring of DART staff on a Sydney radio station and the applicant's evidence that he made an application through the website of SPAL. This is not disputed by Mr Ingram or Ms Blankenship. Mr Ingram concedes that SPAL is as an advertiser for the recruitment of DART staff. Ms Blankenship states that SP USA does permit SPAL to provide job postings in the local community. The offer made to the applicant to work in Puerto Rico was made by Ms Wynn-Jones in New South Wales, not by any officer of SP USA from the United States of America;

    (b) the co-ordination of the applicant's flight arrangements to Puerto Rico was undertaken in New South Wales. Again, there is no evidence to dispute this. Mr Ingram concedes that SPAL does assist with booking travel when requested by SP USA. Ms Blankenship states that SPAL may be asked to assist with booking travel for ease of logistics, but SP USA is financially responsible for the travel of its employees. Whatever the arrangements were between SP USA and SPAL as they applied to the applicant, the business of the co-ordination of the applicant's flights so that he could perform work for SP USA in Puerto Rico occurred in New South Wales. It was Ms Wynn-Jones in New South Wales who forwarded the applicant's e-ticket to him;

    (c) the reimbursement of the applicant for his immunisations and providing of Samaritan's Purse uniforms to the applicant occurred at the office of SPAL at Kings Park in New South Wales on 10 October 2017;

    (d) the applicant was provided with a compulsory packing list and was briefed by Ms Wynn-Jones on her knowledge of the assignment in Puerto Rico when he attended the office of SPAL at Kings Park on 10 October 2017. Ms Wynn-Jones also forwarded deployment briefing notes by email on 14 October 2017. Both Mr Ingram and Ms Blankenship state that SP USA is responsible for debriefing before deployment but Mr Ingram and Ms Blankenship both concede that that SP USA may ask SPAL to convey information to staff due to proximity. The applicant did receive correspondence from SP USA, which included forms to be completed, and undertook a phone interview with Ms Cooper in the United States regarding his Christian values. That evidence reveals that business was being conducted in regard to the applicant's deployment in both New South Wales and the United States, and

    (e) the change in airline tickets for the applicant when his period of deployment was extended was attended to by Ms Wynn-Jones in New South Wales, including an email from Ms Wynn-Jones to Kelsy Nyce at Samaritan.org confirming the change in the applicant's flights.

103. In addition to that evidence, there is the evidence of Mrs Moses who states that while she worked for SPAL she personally authorised many internal journal transfers between SPAL and SP USA, which included international projects, ministry support and reimbursement for a whole range of different things.

104. Mr Ingram observes that Mrs Moses had not worked with SPAL for some six years prior to her husband's application to DART and that the relationship that SPAL has with SP USA has changed significantly since then. However, he does not dispute that monies are transferred between SP USA and SPAL. It is consistent with his own evidence that SPAL does pay for the flights of DART employees but requires approval from SP USA. The transfer of monies between the two organisations, as part of the global reach of SP USA, is consistent with SP USA undertaking some business in the Commonwealth of Australia.

105. I would add that there is no evidence of there being any other State or Territory in Australia in which SP USA had a place to conduct its business activities.
106. I acknowledge the submissions made by Mr Flett that the Agreements between SP USA and SPAL which are in evidence, and the evidence of Mr Ingram and Ms Blankenship, support a finding that the relationship between SP USA and SPAL was separate and independent and there was no overlapping of business between the two entities. Those documents and that evidence describe what is intended to be the legal situation between the two entities.

107. However, what actually occurred in that week in October 2017 when the applicant was rushing to fill an urgent role required by SP USA in Puerto Rico, and during his two months of deployment there, was that SP USA was conducting business from a place in the state of New South Wales. SP USA was using resources in Australia, through its affiliate SPAL, to conduct business activities, at least as far as that related to the deployment of the applicant.

108. I return to the application of the "principal place of business" test that is set out by AP Roche in *O'Donohue* at [85]. The nature of the business of SP USA which is defined in the two Agreements which are in evidence and in several of its publications included in the applicant's statements, is to provide disaster relief throughout the world. Business activities were undertaken by SP USA from the office of SPAL in Kings Park, New South Wales, to further that business in the deployment of the applicant to work in Puerto Rico. The principal place of business of SP USA in Australia for business activities which SP USA conducted in Australia was in the state of New South Wales.

109. I am therefore satisfied that the applicant meets the test prescribed by section 9AA (3)(c) of the 1987 Act.

The claim for weekly payments of compensation

110. The parties agreed that PIAWE are $5,606.98.

111. The applicant was paid weekly payments of compensation until 30 April 2019, and claims weekly payments of compensation from 1 May 2019.

112. There are no Certificates of Capacity that have been issued from 1 May 2019 onwards. The applicant states that he did not obtain any more Certificates of Capacity after weekly payments of compensation ceased to be paid to him.

113. The applicant's general practitioner, Dr Godden, has provided a report to Mercer Super Trust dated 21 March 2019 wherein he records that the applicant cannot sit or stand for more than 20 minutes. Dr Godden opines that the applicant is unlikely to ever engage in gainful employment in a capacity for which he is reasonably qualified by education, training or expertise due to the injury sustained on 6 December 2017.

114. The applicant attended Dr Mastroianni, consultant occupational physician, at the request of his solicitors and Dr Mastroianni has provided a report dated 23 January 2020. Dr Mastroianni opines that the applicant sustained a lumbosacral disc lesion in the incident in November 2017 and that this condition was aggravated in the second incident in December 2017.

115. Dr Mastroianni opines that the applicant may have been able to return to part time sedentary work on a rehabilitation plan by June or July 2019, being about six months after his second operation. Dr Mastroianni further opines that by the time of his consultation with the applicant in January 2020, the applicant was fit for full time sedentary work with reduced sitting, standing and walking tolerance, but permanently unfit for heavy work.

116. The applicant attended Dr Rimmer, orthopaedic surgeon, at the request of the solicitors for SPAL and Workers Compensation Nominal Insurer, and Dr Rimmer has provided a report dated 4 March 2020. Dr Rimmer writes that the applicant did not bring any radiological investigations with him for his examination but concludes that the applicant sustained an aggravation of pre-existing spondylolisthesis at the L5/S1 level on 22 November 2017 and re-aggravated that condition on 6 December 2017.

117. In a supplementary report dated 19 March 2020, Dr Rimmer opines that from 20 February 2019 the applicant has had the capacity to work normal hours and normal days in a sedentary/office-based role, but that the applicant should not return to the workplace to do heavy manual work.

118. In my view, the assessment of the work capacity made by Dr Mastroianni is reasonable. It would be reasonable to expect that the applicant had no work capacity for some six months after the second operation while he was convalescing, and then was capable of undertaking some part time sedentary work for a further six months, before being able to return to full-time sedentary work. I consider that to be a reasonable management of the applicant's return to work.

119. I consider it unreasonable to expect, as Dr Rimmer has opined, that the applicant could have undertaken full-time office work just two months after that second operation, even though that second operation may not have been as invasive as the first operation.

120. The weight of evidence supports a finding that the applicant has the capacity to undertake sedentary work in an office. A suitable job for the applicant would be undertaking menial administrative and/or clerical work in an office. General administrative and clerical duties, which can include maintenance of basic records, filing collating and photocopying, reception duties, and mail and delivery duties, allow for different physical positions and actions to be adopted by the applicant to perform those duties. Such a job is consistent with the opinions expressed by Dr Mastroianni and Dr Rimmer.

121. I do not accept the applicant's evidence that he could not do sedentary work because he cannot sit or stand for more than 30 minutes at a time. The administrative and clerical duties which I have described would allow the applicant to change his position from time to time to relieve the ongoing pain that he experiences in his lower back.

122. I have disregarded that part of the opinion of Dr Godden which states that the applicant is unlikely to ever engage in gainful employment in a capacity for which he is reasonably qualified by education, training or expertise, as that opinion is not directed to the requirements of workers compensation legislation but in response to a claim under the applicant's superannuation policy. The record made by Dr Godden that the applicant can only sit or stand for 20 minutes still allows for the applicant to undertake clerical work in an office, consistent with the opinions of work capacity provided by Dr Mastroianni and Dr Rimmer.

123. The rate of pay since 1 July 2019 under the Clerks – Private Sector Award 2010 for a level 1 employee, whose duties can include maintenance of basic records; filing collating and photocopying; and reception duties, is $787.60 per week. The hourly rate for a 38 hour week (being the maximum hours under the award) is $20.73 per hour. Higher rates of pay under that award are payable to employees that have skills in accounting, typing, or the application of computer-based management systems, but there is no evidence that the applicant has those skills.

124. I find that the applicant had no current work capacity from 1 May 2019 to 30 June 2019. The applicant had the capacity to work 20 hours per week undertaking menial administrative and/or clerical duties in an office from 1 July 2019 to 31 December 2019. Since 1 January 2020 the applicant has had the capacity to work a full 38 hour week undertaking menial administrative and/or clerical duties in an office.

125. Those findings allow me to make the following awards of weekly payments of compensation to the applicant:

    (a) $2,177.40 per week from 1 May 2019 to 30 June 2019 pursuant to section 37 (1) of the 1987 Act;

    (b) $1,762.80 per week from 1 July 2019 to 30 September 2019 pursuant to section 37 (3)(b) of the 1987 Act;

    (c) $1,781.10 per week from 1 October 2019 to 31 December 2019 pursuant to section 37 (3)(b) of the 1987 Act;

    (d) $1,408.10 per week from 1 January 2020 to 31 March 2020 pursuant to section 37 (3)(b) of the 1987 Act, and

    (e) $1,436.40 per week from 1 April 2020 to date and continuing pursuant to section 37 (3)(b) of the 1987 Act.

The claim for permanent impairment

126. The parties agreed that if the applicant was successful in establishing an entitlement to compensation under the 1987 Act, then I could enter an award for the payment of a lump sum benefit pursuant to section 66 after consideration of the relevant evidence and legal principles. That is consistent with the decision of President Phillips in *Etherton v ISS Properties Services Pty Ltd* [2019] NSWWCCPD 53.

127. Both Dr Mastroianni and Dr Rimmer place the applicant in DRE Category IV of the lumbar spine, being 20% permanent impairment, and add a further 2% PI for a second operation. There are two differences in the assessments made by those doctors:

    (a) Dr Mastroianni makes no deduction for any pre-existing condition or abnormality, whereas Dr Rimmer makes a one-tenth deduction “for pre-existing pathology”, and

    (b) Dr Mastroianni adds 2% PI for the Activities of Daily Living, whereas Dr Rimmer adds only 1%.

128. In regard to a deduction for any pre-existing condition or abnormality as provided by section 323 of the *Workplace Injury Management and Workers Compensation Act* (the 1998 Act), Dr Mastroianni makes no reference to any radiological evidence other than to write that the various investigation reports diagnosed a L5/S1 disc herniation. Dr Mastroianni gives no consideration to whether there should be a deduction as provided by section 323.

129. Dr Rimmer states that he was unable to view the films of any scans but from the file provided to him notes a Grade 1 spondylolisthesis at L5/S1 from a CT scan dated 14 June 2018, which forms the basis for his one-tenth deduction for pre-existing pathology.

130. The applicant's treating specialist, Dr Gambhir, in his first report dated 18 June 2018, notes moderate degenerative disease in the lumbar spine from a CT scan that was performed a few days before that first consultation. He notes a left sided pars or fracture at the L5/S1 level and writes: "This pars defect/fracture on the left side could actually be from his trauma that he had in Puerto Rico."

131. In his next report dated 28 June 2018, which is after an MRI scan, Dr Gambhir notes a L5/S1 compression of the right L5 nerve root, which he opines "is likely secondary to trauma sustained in Puerto Rico" and "has resulted in accelerated degenerative disc disease in his lumbar spine and causing him back pain and right leg L5 radiculopathy."

132. The observations made by Dr Gambhir bring into question whether there should be a section 323 deduction, particularly given that he is the applicant's treating specialist and has performed two operations on the applicant's lumbar spine. Given the differences in the findings made by Dr Rimmer and Dr Gambhir, I consider that the assessment of permanent impairment should be undertaken by an AMS. There will be an order for this. Mr Morgan stated on instructions from the applicant that such an assessment could be undertaken by video given the current circumstances brought about by the coronavirus pandemic.