PARTIES:	ALAN RAYMOND WILLIAMS
	v
	AUSTRALIAN FRONTIER HOLIDAYS LIMITED
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	Appellate
FILE NO:	No 20 of 1998
DELIVERED:	18 September 1998
HEARING DATES:	10 August 1998
JUDGMENT OF:	MILDREN J

CATCHWORDS:

Workers Compensation – appeal – error of law – width of statutory definition of "workplace" – second and separate workplace finding not available when workplace consists of various buildings on and forming part of the land – injury occurred whilst the worker, on a working day, attends his workplace.

Workers' Compensation – appeal – no power to remit a matter appealed from to dispose of the matter.

Legislation

Work Health Act – s116; s4(1)(a)(i); s4(1)(b); s4(1)(ii); s4(1); s4(1)(a); s4(7)
Workers' Compensation Act (Vic) – s8(2); s8(3); s8(2)(a)

Cases

1) *Tracey Village Sports and Social Club v Walker* (1992-1993) 111 FLR 32 referred

2) *Wilson v Lowery* (1992-1993 110 FLR 142 referred

3) *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation and Others* (1997) 115 NTR 25 referred

4) *Nader Jones v A.N.Z Executors and Trustees Pty. Limited* (unreported, Asche J, (1996) 2 JSCNT 907) applied

5) *Van Oosterom v Australian Metropolitan Life Insurance Co. Ltd* [1960] VR 507 discussed

6) *Clissold v Country Roads Board* (1981) VR 259, distinguished

7) *Mason v Social Welfare Department* [1974] VR 506 discussed

8) *Wormald International (Aust) Pty Ltd v Aherne* (unreported, (1995) JSCNT 818) referred

REPRESENTATION:

Counsel:

Appellant:	Mr P Barr
Respondent:	Mr T Bryant

Solicitors:

Appellant:	Poveys
Respondent:	Cridlands

Judgment category classification:	B
Judgment ID Number:	MIL98172
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 20 of 1998

BETWEEN:

ALAN RAYMOND WILLIAMS
Appellant

AND:

AUSTRALIAN FRONTIER HOLIDAYS LIMITED
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 18 September 1998)

MILDREN J:

This appeal is brought pursuant to s116 of the *Work Health Act*.

In his amended application to the Work Health Court, the appellant worker claimed that at all material times he was employed by the respondent as the head chef at the Oasis Hotel, Alice Springs. On 16 January 1995 at 11.30 pm he finished his shift and commenced walking to the staff quarters. There had been flooding in Alice Springs and the appellant removed his shoes to walk through the water to his staff quarters. On reaching the quarters, he opened the door with his key, and put his hand inside to switch on the light. These allegations were admitted by the respondent in its answer.

The appellant further alleged that when he touched the light switch, he received an electric shock and he was stuck to the switch until he pushed himself with his knee against the wall, causing him to fall onto the ground. The allegation was denied by the respondent. The appellant claimed that as a result, he suffered injuries which arose out of or in the course of his employment with the respondent. Those allegations were also denied by the respondent. It is admitted however that on 28 March 1995 the appellant lodged a claim form with the respondent, and that this was rejected on the basis that the injury did not arise out of or in the course of his employment.

The learned Magistrate dismissed the appellant's claim. His Worship found that the injury did not arise out of or in the course of his employment.

The grounds of appeal allege that the learned Magistrate erred in law in finding that the injury did not arise out of or in the course of his employment.

Both in the Work Health Court and on appeal, the appellant submitted that the injury arose out of or in the course of his employment on the following bases:

1. The accommodation unit was part of the appellant's workplace. Accordingly, pursuant to s4(1)(a)(i) of the Act, the injury was deemed to have arisen "out of or in the course of" his employment with the respondent.

2. Alternatively, the injury was causally connected to the employment, and therefore it "arose out of the employment".

3. Alternatively, the appellant's accommodation unit situated in the staff accommodation block was an incident of his employment, and therefore the injury arose "in the course of his employment".

4. Alternatively, the injury is deemed to have arisen out of or in the course of his employment by virtue of s4(1)(b) of the Act, in that the appellant was travelling by the shortest convenient route between his place of residence and his workplace.

The learned Magistrate found against each of these contentions. His Worship found that:

1. The appellant's workplace was confined to the kitchen and its surrounds; further, the appellant had not gone to his unit (even if it was a workplace) on the day of the injury for the purpose of working. Consequently the appellant's claim based on s4(1)(a)(i) failed.

2. The injury was not causally connected with the employment. His Worship relied upon the same findings as are set out in paragraph 3 below. In addition his Worship found that at the time of the injury the appellant was not doing anything concerned with the performance

of his duties. Consequently, his Worship found that the injury did not arise out of his employment.

3. It was not a term or condition of his employment that the appellant live in the accommodation unit, nor was he encouraged to do so, although he was authorised and permitted to do so. The injury did not occur in an interval of work. The appellant was not on duty at the time of the injury. The occupation of the unit was a matter of the appellant's choice. Therefore the use of the unit was not an incident of the appellant's employment and consequently the injury did not arise in the course of his employment.

4. The injury was not a "journey injury" because it occurred at a time when the journey was complete. The journey ended at the moment the worker opened the door to his unit. Consequently the appellant could not rely on s4(1)(b) of the Act.

Was the accommodation unit part of the appellant's workplace?

s4(1)(a)(i) of the Act provides:

> (1) Without limiting the generality of the meaning of the expression, an injury to a worker shall be taken to

> arise "out of or in the course of his employment" if the injury occurs while he –
> (a) on a working day that he attends at his workplace-
> (i) is present at the workplace;

"Workplace" is defined to mean "a place, whether or not in a building or structure, where workers work."

The appellant contends that as a matter of law, the unit was part of the appellant's "workplace". It was not in contention that the unit was situated on the employer's premises at Gap Road Alice Springs where the employer's hotel was situated and where the appellant worked. Nor was it disputed that the unit was provided to the appellant for him to live in free of charge, and he was provided with a telephone.

The appellant's evidence was that he had considerable administrative and managerial duties which generated "paperwork". This was done by the appellant on his own computer which he set up in a part of the accommodation unit. Much of this "paperwork" was done after hours at the appellant's unit. His Worship accepted this evidence and made findings accordingly. His Worship also found that the respondent knew of these arrangements and did not object to them. His Worship also found, however, that the appellant was

not directed to perform this work in his unit; there was a workspace adjacent to the kitchen which was available to the appellant for this purpose and that the unit was used by the appellant "as a matter of choice". His Worship concluded that in these circumstances the workplace was confined to the kitchen and its precincts.

Counsel for the appellant, Mr Barr, submitted that the reasons for the appellant not using the workplace adjacent to the kitchen were, according to the unchallenged evidence of the appellant, because the area was unsuitable: the roof leaked, the area was used by other staff as a general staff room and it was not secure, and he did not wish to leave his computer there for security reasons (Tr. P 25-26). Although Mr Barr did not seek to challenge the finding of fact that the unit was used as a matter of choice, he submitted that the reasons for the choice were relevant to the question of whether or not the unit, or at least the room in the unit in which the computer was situated, was part of the workplace. The computer was situated on a table situated immediately to the left of the door as one entered the room; the light switch was to the right. The door entered into the lounge area of the unit.

Mr Barr submitted that, whether or not on the facts as found or not in contention, the part of the unit where the light switch was situated was part of the appellant's "workplace" is a question of law. Counsel for the respondent, Mr Bryant, submitted that this was a question of fact. Given the definition of "workplace" in the Act, *viz*., "a place where workers work", *prima facie* this is a question of fact. However, there was evidence which the learned Magistrate accepted, that the appellant worked in this area from time to time when doing his paperwork, and no evidence to the contrary. If there is no evidence to support a finding of fact, which is crucial to a finding that the case fell within or without the wording of a statute, that is an error of law: see *Tracey Village Sports and Social Club v Walker* (1992-1993) 111 FLR 32 at 37; *Wilson v Lowery* (1992-1993) 110 FLR 142 at 146. In those circumstances, the finding that the workplace was confined to the kitchen and surrounds is an error of law. The part of the unit where the appellant worked was either part of the "workplace", or it constituted a second workplace. However, this does not necessarily mean that the appeal must be allowed.

An appeal only succeeds on an error of law if the error is one upon which the decision depends and is such as to vitiate the decision appealed from: *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation and*

Others (1997) 115 NTR 25 at 35. The learned Magistrate not only found that the unit was not part of the workplace, but that even if he was wrong about that, and that it also forms a workplace within the meaning of the Act, the appellant could not bring himself within s4(1)(a)(i) unless he had attended that workplace on that day for the purpose of working. As there was no evidence of that, so his Worship held, the claim under the subsection must fail.

The problem with this line of reasoning is that it assumes that the unit was a second and separate workplace. There is no consideration of the alternative possibility that the unit may have been part of the one workplace. If the facts as found and the evidence not in dispute is sufficient for this Court to decide that question then this Court should reach its own conclusions: see *Nader Jones v A.N.Z Executors and Trustees Pty Limited* (unreported, Asche J, (1986) 2 JSCNT 907 at 933).

The respondent's contention was that the lounge room of the unit was, if anything, a second workplace. The appellant contended that it was part of "the" workplace. The respondent's argument was, that to be a part of "the" workplace the area had to be contiguous in shape and size.

I consider that the concept of "a place where workers work" is not necessarily confined to a particular desk, or room, but must include everywhere on the employer's premises where the worker is expected or permitted to go in order to perform his duties, including the means of access and egress to and from the employer's premises, and to and from the places where the duties are performed. I accept Mr Bryant's submission that theoretically there can be more than one workplace. For example, an employee may be employed as a groundkeeper to look after grounds which are located some kilometres apart from each other. But if this be so, and he was injured whilst travelling from one workplace to another, it is curious that the journeying provision of s4(1) of the Act do not provide cover in those circumstances. One answer may be that he is protected by s4(1)(ii) in that he is temporarily absent from one workplace in the course of his employment whilst journeying to the other. Another may be that he was injured in the course of his employment within the ordinary meaning of that expression. Be that as it may, it seems to me to be unnecessarily pedantic to divide the areas where the worker may be expected or permitted to go in order to perform his duties into separate workplaces if in fact he never leaves the employer's premises. In such a case, there is in my opinion only one workplace.

Mr Bryant referred me to two authorities for the proposition that a worker's workplace does not extend to the whole of the premises or land of his employer, but extends only to that part of the premises "where he actually does his work". The first case relied upon is *Van Oosterom v Australian Metropolitan Life Insurance Co. Ltd* [1960] VR 507. The Full Court in that case considered s8(2) of the *Workers' Compensation Act (Vic)* which Mr Bryant submitted is *in para materia* with s4(1)(a) of the *Work Health Act*. However, that case turned on the fact that there was no fixed place of employment: *c.f.* s4(7) of the *Work Health Act* and s8(3) of the *Workers' Compensation Act (Vic)*; the area where the worker was injured was not contiguous to, nor did it form part of the employer's premises. What the Court considered was the situation where there were several places of employment, rather than one. In those circumstances it is understandable that the Court would focus on whether he was at the place of employment at the time of the injury to do the work he was employed to do. That might also be a relevant question in this case, had the appellant left his place of employment, or begun to use it solely for purposes unconnected with his employment. There are no findings in the present case that the appellant intended to use the lounge room, when he returned to the unit, for any particular purpose, or at all. The only finding is that the appellant had completed his duties for the evening and was

returning to his unit for the purpose of retiring. The inference is that the appellant intended only to pass through the lounge on his way to the bedroom. Furthermore, as Mr Barr pointed out, s8(2)(a) of the Victorian Act includes the italicised words:

> …while the worker on any working day on which he has attended at his place of employment *pursuant to his contact of employment* -
> (i) is present at his place of employment…

which are absent from s4(1)(a)(i) of the *Work Health Act*, so that the two provisions are not strictly *in para materia*.

The second authority relied upon by Mr Bryant is *Clissold v Country Roads Board* (1981) VR 259. The facts of that case are distinguishable from the present in that the injury occurred in the house provided by the employer which was situated next door to the depot at which the employee worked, and in fact the worker had no fixed place of employment. Further, the worker occupied the house as a tenant, and apart from answering the telephone, did not perform any work on the house. In those circumstances the Court followed the decision in *Van Oosterom*. I do not consider that that decision is decisive against the appellant.

Counsel for the appellant, Mr Barr, relied on *Mason v Social Welfare Department* [1974] VR 506. In that case the worker was employed as a cook at a detention centre for offenders. The centre was situated in the country and

the worker was offered a house in the centre for which he had to pay rent. He was not obliged to live in the house offered to him but it was convenient for him to do so as it saved him from a considerable amount of travelling. On a working day, after working late in the kitchen of the centre and after assisting to escort some of the inmates to their sleeping quarters he proceeded in his car to the house he occupied. After entering the gate, he was struck by a television antenna which had blown off the house next door. The Court held that it was open to conclude that the place of employment was not confined to the kitchen but included the whole property on which the institution was carried on, as there were factors which made it:

> …impossible to carve some part of the area comprising the establishment out of the whole and identify it as the place of employment, or carve it out for a particular day and label it as the place of employment of the day.

That case too, turned on its own facts, but it is illustrative of the general principle that where an employee lives and works on the employer's premises, it is necessary to consider whether, in practical terms, it is appropriate to carve up the various areas comprising the establishment and determine whether they are to be treated as part of the one workplace or not. In the present case, there is evidence that the kitchen area and the unit were physically separated by quite some distance, (measured in metres), and there were other accommodation units occupied by guests. The appellant was not expected to be in virtually every part of the respondent's premises as in *Mason's* case, nor does the question of convenience loom as large as in other cases. Nevertheless, the evidence shows that, apart from the kitchen and the unit, he

attended at other parts of the respondent's premises from time to time in the course of his duties, such as the manager's office, the reception area and the restaurant. It appears that some of these rooms at least were in different parts of the employer's premises, albeit in the same building. I consider that on the whole of the evidence there was only one workplace, and this included the lounge room of the appellant's flat where he kept his computer. That conclusion I consider is supported by the following factors: the unit was on the same land as the hotel and formed part of that land; the appellant needed to go to the unit from time to time during normal shifts to retrieve records, such as stocktakes, kept on the computer which were not stored elsewhere; the appellant was in the habit of using the unit, not on a casual basis but on a regular basis in the performance of his duties; the respondent was aware of the use of the unit as a workplace and did not object to it. I do not see how, realistically, it could be treated as a second or separate workplace. It was no more separate than the other parts of the hotel, such as the restaurant or the reception area or the manager's office, where the appellant was required to be in the performance of his duties from time to time.

In those circumstances, the appellant is able to fulfil the second limb of s4(1)(a)(i), namely that his injury occurred "whilst he, on a working day…attends at his workplace". In this connection the observations of the Full Court in *Mason v Social Welfare Department, supra,* at 511 are apposite:

> …he had not left his place of employment…before the injury occurred. He was still present at his place of employment, albeit within the precincts of the living quarters allotted to him on the place of employment and no longer carrying on any active duties. The

> circumstances therefore satisfied the conditions of s8(2)(a)(i). No doubt the more obvious case falling within that provision is the case where a worker attends the employer's premises to carry out his work on some part of them and after ceasing work…has not gone out through the factory gates but is still on the business premises when the injury occurs…. But the language is apposite enough to deal with the case where the worker lives on the site of the employer's premises and after finishing work…makes his way to and is still in the quarters allotted to him within the business premises when the injury occurs. We see no reason for denying the application of a remedial provision such as this to such a case. The result of its application is that by virtue of the section the injury is deemed to arise out of or in the course of the employment.

That case is somewhat different in that the whole of the worker's residence was found to be part of the workplace, whereas here, only that part of the unit constituting the lounge area (including of course the pathways to the unit and the door of the unit) where the computer was kept is part of the workplace. Nevertheless, as the appellant opened the door to the unit and placed his hand on the light switch, he was still in the workplace and had not yet gone out through the hypothetical "factory gates", as he might have done once he had entered the bedroom.

It is therefore not necessary to consider the other grounds of appeal.

Conclusions

As there are no findings relating to the other issues in the case, and these issues have not even been addressed by counsel, I am not in a position to

myself dispose of this matter finally. The appellant's Notice of Appeal suggests that the matter should be remitted to the Work Health Court for determination of those issues. Whether or not I can remit the matter to the learned Magistrate is a matter about which I still entertain some doubts. In *Wormald International (Aust) Pty Ltd v Aherne* (unreported, (1995) JSCNT 818 at 820-21) I decided that there is no power to remit and that this Court must, in a proper case, make such findings, based on the transcript, which ought properly have been made. Since then, the Court of Appeal has on numerous occasions ordered a new trial (see *Alice Springs Town Counsel v Mpweteyerre Aboriginal Corporation and Others, supra,* at 35), but I am unaware of any occasion when the Court of Appeal has remitted a matter in the sense of ordering a matter to be sent back to the Magistrate appealed from to dispose of the matter. This is obviously the preferable course and one I would readily adopt if I thought I had the power to order it. Clearly s116 of the Act should be amended by the legislature to expressly confer a power to remit.

In the circumstances, I consider that all that I can do at this stage is to allow the appeal, set aside the orders of the Work Health Court and substitute a finding that the injury arose out of and in the course of the employment with the respondent. I will hear the parties on what other orders are required, and on the question of costs.