PARTIES:	BARLOW, Mitchell David McMillan (by his next friend BARLOW Christina) v HELI-MUSTER PTY LTD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY OF AUSTRALIA EXERCISING TERRITORY JURISDICTION
FILE NO:	No 37 of 1996
DELIVERED:	Darwin, 5 February 1997
HEARING DATES:	21 October 1996
JUDGMENT OF:	MARTIN CJ.

CATCHWORDS:

Workers' Compensation - For what injuries compensation is payable - Employment risks - "Arising out of and/or in the course of the employment" - Distinction between questions of law and questions of fact on appeal - Errors of law that may occur in the fact finding process - Decision reviewable on basis of error of law only where inference drawn could not have been reasonably drawn.

Work Health Act 1994 (NT)

Tracy Village Sports and Social Club v Walker (1992) 111 FLR 32, referred to.
Wilson v Lowery (1993) 4 NTLR 79, at 84-5, considered.

Workers' Compensation - For what injuries compensation is payable - Employment risks - "Arising out of and/or in the course of the employment" - Whether a flat at parents' home was the deceased's place of residence - "Place of residence" are not technical legal words but ordinary English words to be used in their common understanding - No fixed test or particular guiding principle -

Primary facts found did not permit of only one conclusion and conclusion reached was one of fact not law.

Work Health Act 1994 (NT)

The Australian Gas Light Company v The Valuer-General (1940) 40 SR (NSW) 126, at 137, referred to.
The Commissioner of Taxation v Miller (1946) 73 CLR 93, referred to.
Commissioners of Inland Revenue v Lysaght [1928] AC 234, at 250, referred to.
Hope v The Council of the City of Bathurst (1980) 144 CLR 1, at 7-8, referred to.
HR Products Pty Ltd v Collector of Customs (1990) 20 ALD 340, at 341-2, referred to.
Lombardo v The Federal Commissioner of Taxation (1979-80) 28 ALR 574, referred to.
TNT Skypak International (Aust) Pty Ltd v Federal Commissioner of Taxation (1988) 82 ALR 175, at 182, referred to.

Workers' Compensation - For what injuries compensation is payable - Employment risks - "Arising out of and/or in the course of the employment" - Workplace - Change in terminology used in the legislation from "employment" to "workplace" - Courts entitled to look at prior statutes dealing with same subject matter to interpret current statute - Whether a place is a "workplace" is a question of fact.

Work Health Act 1994 (NT)

The Concise Macquarie Dictionary
Pearce, Statutory Interpretation, par85.

Adcock v The Commonwealth (1959-60) 103 CLR 194, at 209, considered.
Alice Springs Abattoirs Pty Ltd & Another v Finn (1983) 48 ALR 283, referred to.
The Australian Coastal Shipping Commission v Averell (1969) 122 CLR 348, at 351, considered.
The Commonwealth v Wright (1956) 96 CLR 536, at 545 considered.
Norwest Beef Industries Ltd v Janides (1983) 77 FLR 119, referred to.

REPRESENTATION:

Counsel:

Appellant:	Mr J B Waters
Respondent:	Mr T J Riley QC

Solicitors:

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Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 37 of 1996

BETWEEN:

MITCHELL DAVID McMILLAN BARLOW (by his next friend CHRISTINA BARLOW)
Appellant

AND:

HELI-MUSTER PTY LTD
Respondent

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 5 February 1997)

Background

This appeal arises from the rejection by Ms Deland SM, sitting as the Work Health Court ("the Court") at Alice Springs, of a claim by the appellant for benefits under the *Work Health Act* 1994 (NT) ("the Act") arising from the death of his father. It is not disputed that at the time of his death the deceased was a worker within the meaning of the Act, and that the respondent was his employer. Where a worker suffers an injury within or outside the Territory,

and that injury results in or materially contributes to his death, there is payable by his employer to the worker's dependents such compensation as is prescribed (s53). A definition of "injury" is contained in s3 of the Act and means, in the circumstances of this case, a physical injury arising out of or in the course of his employment. The phrase "out of or in the course of his employment" is defined in s4(1)(b) of the Act to include circumstances where the injury occurs while the worker is travelling by the shortest convenient route between his place of residence and his work place. "Workplace" means a place, whether or not in a building or structure, where workers work" (s3(1)). The deceased had commenced his travels from his parents home near the Glasshouse Mountains in Queensland.

It appears that the deceased met his death on or about 4 March 1993 at Corella Creek Camp, Flinders Highway, Queensland, and it is not an issue before this Court as to whether he was then travelling by the shortest convenient route between the two prescribed places.

Her Worship held that the deceased was not travelling from his place of residence, and further, that he was not travelling to his "employment", (that is not the test). She had set out s4(1)(b) at the commencement of her reasons, but not the definition. The lapse is perhaps understandable given that much of the argument before her Worship arose from cases involving the meaning of the words "employment" in the former legislation, *Workers' Compensation Act* 1981 (NT). It would be of singular assistance to the parties, the Court and this Court if practitioners and Magistrates would address themselves to the words

of the legislation in question , so that questions as to whether or not the Court has addressed itself to the right question or applied the right test do not arise.

The grounds of appeal are as follows:

"The Learned Stipendiary Magistrate erred in law:

1. in that there was no evidence at all upon which the Learned Stipendiary Magistrate could find that Mark Barlow's flat at Kanowran Road, Glasshouse Mountains was not a place of residence for the purpose of the *Work Health Act*;

2. in failing to apply the legal definition of the word "residence" as determined to the facts found;

3. in failing to consider the proper test being the "real connection between the journey and the employment" and to make a determination as to the immediate purpose of the employee in making the journey contrary to the principles set out in **Australian Coastal Shipping Commission v Averell** (1969) 12 CLR 348 and **Commonwealth v Wright** (1956) CLR 536;

4. in finding that Mark Barlow's flat at Kanowran Road, Glasshouse Mountains was "holiday accommodation" in the absence of any evidence that such was the case and in the absence of that observation having any relevance to "residence" as defined for the purpose of the *Work Health Act* and similar legislation;

5. in failing to give reasons for her decision that it is impossible for an appellate court to determine whether or not the verdict was based on an error of law or fact in that it does not appear from any chain of process or reasoning how the Learned Stipendiary Magistrate determined on the balance of probabilities that Mark Barlow did not reside at Kanowran Road, Glasshouse Mountains at the time of his death or that he was not travelling from his place of residence to his place of employment at the time of his death and that he was travelling to his place of residence at the VRD at the time of his death."

(It will be noted that the error in relation to the correct description of the destination of the travel is perpetuated in ground No 5.).

Bearing in mind that appeals to this Court from the Court are limited to questions of law (s116(1)), and noting the grounds of appeal, it is not necessary to go into the evidence in detail. It is set out in her Worship's reasons and the following will suffice for present purposes. The deceased commenced work with the respondent at VRD in 1991 and worked there until Christmas 1992. The place at which he worked was Victoria River Downs Station ("VRD") where he had accommodation in a room of a house which was described as "customised", with shared bathroom facilities. His work was that of a helicopter engineer and that work was carried out in a hangar or workshop, being a separate building to the accommodation block and about two minutes walk from it. The deceased had been on holidays from his employment from December until immediately prior to commencing the journey to return to VRD. There was no date set for his return prior to his departure on holidays; he was contacted when his services were again required, and then set out to return. Whilst on leave, personal belongings were left in the room at VRD. When asked to return no date had been fixed for commencement of work. It was anticipated he would arrive on the Saturday following his departure from his parents home. In the ordinary course he would be given the opportunity to unpack and have Sunday off work before starting work on the Monday. If something urgent had happened, however, he

could well have been directed to return to work immediately upon his arrival. The accommodation at VRD was dependent upon the deceased, and others like him, having a job with the respondent. The contact telephone number, which the deceased had left with his employer, was that of his parents' home.

The deceased's father told how he and his wife had built a house at the Glasshouse Mountains in which there was incorporated a separate flat for their son to occupy. It consisted of a shower, toilet and a large room which was utilised as a bedroom and sitting room. The deceased had lived in that flat prior to commencing work with the respondent in June 1991. He had returned to the flat in November 1991 whilst he undertook a theory course and returned later that month to VRD. He was not seen again at the Glasshouse premises until just prior to Christmas 1992 when he remained for about a week. He then went to Sydney to undertake courses and returned in early February, remaining until early March when he commenced the journey to VRD in the course of which he met his death. In early 1993 the appellant and his mother, who was estranged from the deceased, had come to stay with the deceased's parents, but not in the flat. The flat had never been used by anyone other than the deceased between 1991 and the time of his death. Depending upon its nature, mail addressed to the deceased either went to VRD or to the Glasshouse Mountain property. The deceased's father also gave evidence of the deceased having lived at other properties for periods of months between 1988 and the time he came to live in the flat prior to first going to VRD.

It was not disputed on the pleadings that at the time of his death the deceased was a resident of the Territory, and that he retained at VRD his primary dwelling house and his employment (see s57(2) of the Act). It was, however, also pleaded in the Statement of Claim that he was at the time of his death travelling from his place of residence at Glasshouse Mountains. That was denied by the respondent. I do not regard the pleadings as being inconsistent nor that the assertion in the Statement of Claim that he was a resident of the Territory and had a primary dwelling house at VRD as conclusive against the interests of the appellant. There is no doubt on the authorities that a person can have more than one place of residence.

Question of Law

The difficulty in distinguishing between questions of fact and questions of law for the purposes of an appeal such as this have been adverted to on many occasions, and it is not necessary to refer to them again. In *Wilson v Lowery* (1993) 4 NTLR 79 at 84-5 the Court of Appeal adopted what was said by Mildren J. in *Tracy Village Sports and Social Club v Walker* (1992) 111 FLR 32 in relation to errors of law which may occur in the fact finding process. It noted in particular that if there is no evidence to support a finding of fact which is crucial to an ultimate finding that the case fell within the words of the statute, there is an error of law and that is so whether the fact said to have been found was a primary fact or a secondary fact. But it is not

sufficient that an Appellate Court would have drawn a different inference from the facts; the question is whether there were facts upon which the inference might be drawn, and it is only if the fact finding tribunal draws an inference which cannot reasonably be drawn that it errs in point of law such that its decision can be reviewed.

Place of Residence

Her Worship does not appear to have had reason to doubt or reject any of the evidence. It was not disputed, she discussed it, and on the question of the deceased's place of residence, concluded:

> "On the evidence before me, I am not satisfied, on the balance of probabilities, that it can be said that the worker "resided" at the premises at Kanowran Road Glasshouse Mountains at the time of his death. Those premises were a convenient place to stay when he was not working or undertaking courses and whilst visiting his parents. The fact that he had no other place of residence besides his room at Victoria River Downs does not necessarily mean that his "place of residence" was Kanowran Road, Glasshouse Mountains. The flat could be described as holiday accommodation which he used on a fairly regular basis, but not as his place of residence."

Whether or not the flat was the deceased's place of residence for these purposes is a matter to be decided by inference from the primary facts. The words "place of residence" are not technical legal words requiring to be construed before the statute can be applied to the found facts. They are ordinary English words and are used in their common understanding. It is a matter about which minds might differ involving a question of judgment or

degree; the inference drawn by her Worship may not be the only one that could be drawn, but it was not unreasonable for her to draw it. The primary facts as found by her Worship admitted several conclusions, and the conclusion she reached was one of fact not of law. One of the earlier authorities in this area is *The Australian Gas Light Company v The Valuer-General* (1940) 40 S.R. (NSW) 126 at p137 in the judgment of Jordan CJ. Reference might also be made to *Lombardo v The Federal Commissioner of Taxation* (1979-80) 28 ALR 574, and the other authorities there cited in the judgments of Bowen CJ. at 576 and Franki J. at 580-81. That case was taken up by Gummow J. in *TNT Skypak International (Aust) Pty Ltd v Federal Commissioner of Taxation* (1988) 82 ALR 175 at 182. In the High Court see *Hope v The Council of the City of Bathurst* (1980) 144 CLR 1, especially the judgment of Mason J. at pp7-8. These and other authorities in the field are referred to in the helpful summary provided by Lee J. in *HR Products Pty Ltd v Collector of Customs* (1990) 20 ALD 340 at 341-2.

The primary facts do not permit of only one conclusion. There is evidence pointing to the room at VRD as being the deceased's place of residence and other evidence pointing to it being at the flat in his parents home. Her Worship was not obliged to make a positive finding as to where his place of residence was, she expressed herself not satisfied on the balance of probabilities that it was at the flat, and in the circumstances that is a finding with which this Court must not interfere. As to the question of a residence

being a finding of fact, reference might be made to *Commissioners of Inland Revenue v Lysaght* [1928] AC 234 at 250 cited with approval and applied in *The Commissioner of Taxation v Miller* (1946) 73 CLR 93 in the judgment of Latham CJ. at pp97-8, Rich J. at pp100-1 and Dixon J. at pp103-4.

Her Worship's review of the authorities to which she had been referred (including *Michael Slobodan Buric v Transfield PBM Pty* Ltd Supreme Court, Mildren J., unreported 24 December 1992) and of the evidence shows that she was aware of the varying factors and views which might be taken into account in answering a question going to a person's place of residence. There is no fixed test, and no particular guiding principle, and thus her Worship's failure to state a definition of the word "residence" against which the facts as found would be tested was not an error of law. Ground 1 of the Grounds of Appeal is strangely worded. It was up to the appellant to produce evidence upon which the learned Stipendiary Magistrate could find that the flat was his place of residence for the purposes of the Act. That onus was not discharged.

There was evidence upon which her Worship could make a finding that the flat could be described as "holiday accommodation"; it was, after all, the place at which the deceased had stayed while he was on holidays from his work at VRD. She made a judgment that the flat did not fall within the meaning of the word "residence" for the purposes of the Act. No other place was suggested as being such a place.

Workplace

Reference has already been made to the confusion in the judgment, and elsewhere in this case, as to the use of the word "employment", from the former Act, and "workplace" as used in the Act. The definition of "workplace" is quite specific and means a place as defined. The word "work" is not defined, but as a verb in its common understanding it means "exertion directed to produce or accomplish something; labour; toil". (The Concise Macquarie Dictionary). The change in this terminology of part of the criteria to found a claim for compensation under this head is obvious; it is clearly deliberate and must have been intended by the parliament to affect a significant alteration in the law. Courts are entitled to look at prior statutes dealing with the same subject matter in order to interpret a current statute, Pearce : Statutory Interpretation par85.

The authorities relied upon by counsel for the appellant related to legislation in which the criteria for compensation was whilst travelling to or from "employment". The final word in the High Court is to be found in *The Australian Coastal Shipping Commission v Averell* (1969) 122 CLR 348 at 351.

> "In a series of cases ... the Court ... has established, not without dissent, that a worker can only be said to be travelling to or from his employment if there is a 'real connexion between the journey and the employment in

> the sense that the immediate purpose of the employee in making the journey must be either to enter upon the duties which his employment imposes upon him or to absent himself temporarily from those duties', to use the language of Fullagar J. in *The Commonwealth v Wright*. What has been found to be implicit ... is the necessity for a journey from a place of abode, permanent or temporary, to a place where the duties of employment are to be performed."

It is instructive to go to the series of cases to which reference is made. They all concerned members of the Armed Services stationed at a base or camp where the member lived or performed his duties, injury occurring whilst the member was travelling to or from that place. The claims were made under the *Commonwealth Employees' Compensation Act* 1930-1956 upon the basis that the injury was caused whilst the member was "travelling to or from ... his employment" by the Commonwealth. In no case was the serviceman successful, the fact that he lived as well as worked at the base or camp assuming some significance; the immediate purpose of the journey was not to enter upon or absent himself from the duties of his employment. The circumstances surrounding Mr Averell were different, and he was successful notwithstanding that he lived and worked upon the boat to which he was travelling. He had instructions to return to work at a particular time, and he was travelling to the boat for that immediate purpose. In the Territory cases referred to, *Alice Springs Abattoirs Pty Ltd & Another v Finn* (1983) 48 ALR 283 and *Norwest Beef Industries Ltd v Janides* (1983) 77 FLR 119, the worker was not travelling to a place where both his accommodation and employment were provided together by the employer.

The history of the Commonwealth legislation was touched upon by some of their Honours in the High Court. Earlier versions of s9A of the Commonwealth legislation referred to the "place of employment". In *The Commonwealth v Wright* (1956) 96 CLR 536 at 545 Dixon CJ. said:

> "No doubt the reason why the words "place of employment" were discarded in favour of "employment" simply, is to be found in a fear lest an employee might, fortuitously or for some purpose of his own and independently of his duties, pay a visit to his place of employment and in the course of the journey sustain an injury. But the removal of "place" seems to leave little else than some rather vague notion of purpose or cause of the man's movement. Travelling to the employment involves some movement by reason of the employment".

McTiernan J. at p547 was of the same opinion as the Chief Justice and entirely agreed with his Honour's reasons; at p551 Webb J., though disagreeing in the result, said:

> "To support a claim for compensation the accident to a civilian employee must have arisen out of or in the course of his employment, or when travelling to or from his employment, that is to say, to or from a state of activity called "employment", as distinct from the place where that activity takes place".

Fullagar J. commencing at p552:

> "Before the amendments of 1951, s.9A(1) spoke of travelling to or from the "*place* of employment". The material "travelling" was a travelling to a physical *terminus ad quem* or from a physical *terminus a quo*. The section also contained a third sub-section, which provided a special definition of the expression "place of employment" in relation to

> members of the defence force. Even when s.9A stood in that form, I am inclined to think that the purpose of the journey to or from the specified place would not have been an irrelevant consideration, and that a case where a journey to or from that place had no relation to the duties to be performed at that place might have been held to fall outside the section. It is not necessary, however, to determine that question. The section now speaks simply of travelling to or from an employment and not to or from a place of employment, and sub-s.(3) has been omitted. The object of these amendments of 1951 was most probably to widen the field in one direction and to narrow it in another. At any rate, we now have an abstract *terminus ad quem* and an abstract *terminus a quo*, and it is only by reference to the purpose or occasion of the journey in relation to duties of employment that any satisfactory meaning can, to my mind, be given to the language used."

Similarly, in *Adcock v The Commonwealth* (1959-60) 103 CLR 194 at p209, Windeyer J.:

> "The whole question is was he travelling from his employment within the meaning of s.9A? That section reflects a policy common in Australian workmen's compensation statutes. The journey that a worker has to make to get to and from his place of work is treated as being within the course of his employment. The scope of the additional protection is clear enough when the statute speaks of the journey as being between the worker's place of abode and place of employment. When first enacted in 1944 s.9A was in that form. The *terminus ad quem* and *terminus a quo* of the journey were specific; and the "shortest convenient route" between them was ascertainable. But, although the meaning of the words was then clear, the section read literally could have strange results."

His Honour went on to give examples. Whatever may have caused the Northern Territory parliament to revert to the terminology earlier used in like legislation, the fact is it has done so, and in so doing has provided a degree of certainty which was not available when the question involved travelling to or from "employment". (Described by Dixon CJ. as a "much criticised piece of

drafting" and as "this notoriously contentious statutory text" (at 198, ibid). Whether a place is a "workplace" is a question of fact.

Conclusion

In summary, there was no error in law on the part of her Worship in arriving at the view that the deceased was not travelling from his residence at the time he met his death. She did so err in relation to the question of treating the test for the destination of his travel as being his employment rather than his workplace. In the result that makes no difference. Upon the evidence he was not travelling to a place where workers work, he was travelling to a place where workers lived when they were not working.

The appeal is dismissed.
