

## Workplace Injuries & *2009 NJAJ Meadowlands Seminar Guide*

### Workers' Compensation Insurance for Employees Working Overseas

By Angela M. Scafuri

Perhaps more than any other social program, workers' compensation concerns itself with the relationship between employers and employees. The legislative intent behind the New Jersey Workers' Compensation Act, N.J.S.A. 34:15-1 et. seq., is remedial in nature, with the act's primary purpose being to assure an injured worker the prompt payment of benefits and competent medical care, both on a temporary and permanent basis. See Jon L. Gelman, *New Jersey Practice*, "Workers' Compensation System — Purpose," Ch. 1, Section 1.1 (West Group 2000). To receive these benefits, the injured worker must demonstrate that the disability arose out of and in the course of employment.

To the chagrin of employers throughout the state, the workers' compensation laws are liberally construed in favor of the injured employee. Typically, all

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workers who can be considered "employees" are eligible for workers' compensation benefits. An "employee" is defined under the act as one who performs services for an employer for financial consideration. N.J.S.A. 34:15-36. Thus, employees eligible for workers' compensation benefits run the gamut, from public employees (N.J.S.A. 17:36-5.29), to corporate officers (N.J.S.A. 34:15-36) and minors (N.J.S.A. 34:15-10). Interestingly, employees are entitled to benefits (replacement of lost wages) and medical care, irrespective of fault. See *Galante v. Sandoz, Inc.*, 192 N.J. Super. 403, 470 A.2d 45 (Law Div.1983), aff'd, 196 N.J. Super. 568, 483 A.2d 829 (App. Div.1984).

Notably, issues of employment and causation are often the subject of dispute. For example, it is quite logical for an employer to believe that eligibility for benefits under the act requires that an employee is a New Jersey resident working in New Jersey at the time of the accident. Most employers are shocked when presented with multi-jurisdictional issues that can give rise to benefits under

the act. In fact, a recent decision by the Appellate Division examines the various factors to consider when determining whether an employer must provide workers' compensation insurance to its employee, even if the employee happens to work overseas at the time of the accident.

In *International Schools Services, Inc. v. New Jersey Department of Labor and Workforce Development*, 408 N.J. Super. 198, 974 A.2d 433 (App.Div.2009), a New Jersey nonprofit organization brought a declaratory judgment action to determine whether it was required to provide workers' compensation insurance to its overseas employees under the act. The question of the applicability of the act to an overseas worker was one of first impression before the Court. While the Appellate Division ultimately remanded the matter back to trial court, it first undertook the responsibility to provide guidance on the analysis integral to determining whether an employer is responsible to maintain workers' compensation insurance for its overseas employees.

The facts of *International Schools* are straightforward. The employer, International Schools Systems ("ISS"), is a New Jersey nonprofit corporation. ISS employs teachers in overseas schools, under renewable contracts. The teachers: (1) are not New Jersey residents; (2) do not perform any work in New Jersey; (3) do not sign their employment contracts in New Jersey; and (4) are not supervised by ISS.

ISS, however: (1) determines salary and benefits, and issues paychecks to the overseas employees from its New Jersey offices; (2) pays payroll, unemployment taxes and temporary disability benefits for those employees who are United States citizens; and (3) retains the authority to hire and discharge its overseas employees.

ISS maintains contracts with those foreign schools where it places employees. These contracts provide that ISS will maintain all insurance required by law, including workers' compensation insurance. ISS maintained such workers' compensation insurance until 2003, at which time its insurer declined to provide coverage for overseas employees working in certain countries. Being unable to find an insurance carrier to provide workers' compensation insurance for all of its overseas employees, ISS made inquiry to two New Jersey administrative agencies with regard to whether it was even legally obligated to provide mandatory workers' compensation coverage to its overseas employees.

Specifically, ISS made inquiry to the New Jersey Compensation Rating and Inspection Bureau and the New Jersey Department of Banking and Insurance. While NJ CRIB responded to ISS' inquiry by assigning an insurer to provide coverage, the insurer claimed it was only responsible for covering risks for employees working in New Jersey and returned that portion of ISS' premium representing workers' compensation coverage for the overseas employees. When ISS reported to NJ CRIB that the insurance carrier returned the premium, NJ CRIB advised that the issue of whether an insurance carrier is required to provide mandatory workers' compensation insurance for overseas employees is a question for the court, noting that the carrier may

ultimately be responsible for the losses, regardless of whether it returned a portion of the premium. Failing to secure clarification on the issue, ISS filed a declaratory judgment action in state court. After summary judgment proceedings, the trial court determined that the Act requires a New Jersey company to provide workers' compensation insurance for all of its employees, wherever they work, where the New Jersey company hires and pays the employees who work for it.

ISS appealed the decision, arguing that the trial court erred in its determination that overseas employees are covered under the act. The Appellate Division found that the inquiry should focus on whether the overseas employees had sufficient contacts with the State of New Jersey, which would require the employer to maintain workers' compensation insurance for the overseas employees, and remanded the matter back to the trial court. To conduct the analysis, the Appellate Division turned to the factors identified in the treatise "Larson's Workers' Compensation Law" (2000 rev. ed.) which has been adopted by numerous New Jersey courts. The Court determined that a court must look to "the particular facts" of each case to compare those facts to the Larson factors to determine whether an employee has sufficient contacts with New Jersey to warrant application of the act. Thus, in this particular matter, if the overseas employees have sufficient contacts with New Jersey, then ISS is legally obligated to maintain and provide workers' compensation insurance.

The Larson analysis identifies six bases upon which the act is applicable: (1) place where the injury occurred; (2) place of the making of the contract; (3) place where the employment relation exists or is carried out; (4) place where the industry is localized; (5) place where the employee resides; or (6) place whose statute the parties expressly adopt by contract.

Larson's suggests that "it is clear that the state which was the locus of any one of the first three items — contract, injury, or employment — and probably also of the next two — employee residence and business localization — can constitutionally apply its statute..." As the Appellate Division had never addressed the applicability of the Act to an over-

seas employee, it turned to its findings in *Connolly v. Port Auth. Of New York and New Jersey*, 317 N.J. Super. 315, 722 A.2d 110 (App.Div.1998), for additional support, the seminal New Jersey case applying the Larson analysis to an extraterritorial injury. In *Connolly*, the Appellate Division determined that an employee of the Port Authority of New York and New Jersey (a bistate agency), was not entitled to New Jersey workers' compensation benefits because his employment did not have sufficient contacts with New Jersey. Specifically, the *Connolly* Court concluded that there was "virtually no New Jersey employee/employer contacts, or any other New Jersey contacts incidental to the alleged injury or the occupational loss or the employee himself."

Notably, *Connolly* set forth several factors which traditionally trigger jurisdiction in the New Jersey courts of workers' compensation: (i) the injury occurred in New Jersey; (ii) New Jersey is the place of the employment contract or hiring; (iii) the employee lives in New Jersey and there were at least some employment contacts in New Jersey; and (iv) "where there exists neither location of the injury, location of the employment contract or hiring, or residency of the employee in New Jersey, jurisdiction may still arise where the 'composite employment incidents present a[n] ... identification of the employment relationship with this State.'"

Utilizing both analyses, the *International Schools* Court ultimately concluded that if the trial court had applied the *Connolly*/Larson analysis, it could not have reached the conclusion that ISS was responsible to maintain workers' compensation coverage for its overseas employees. The Court directed remand, ordering the trial court to expand upon the record as to each of the contacts of each ISS employee and to apply the *Connolly*/Larson analysis accordingly.

What is the impact of *International Schools* on New Jersey employers that employ individuals working overseas? First, employers should take note that there is no hard and fast rule as to whether overseas employees are entitled to the benefits of the Act. The inquiry is fact specific and a *Connolly*/Larson

analysis must be applied individually to the employee. Second, although the Appellate Division did not focus on this issue, employers should remember that their insurance carriers are legally obligated to provide workers' compensation coverage, even if the carrier returns a premium. While an employer may be primarily liable for the payment of

benefits under the Act, the employer has recourse against its carrier for indemnification. Return of a premium does not negate the obligations of the carrier. Finally, *International Schools* affirms the findings of *Connolly* with regard to the application of a Larson analysis in those matters involving multiple jurisdictions, notably New York and New Jersey.

Jurisdiction over an out-of-state injury is a mixed bag choice-of-law analysis. Factors to consider to determine which state has the legitimate interest include the place of the occurrence of the injury, the place where the contract was made, the existence of the employment relationship, and possibly localization of the employers' business. ■