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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 78 of 1994

IN THE MATTER OF the Workers' Compensation Act

AND IN THE MATTER OF an appeal from a decision of the Workers' Compensation Court

BETWEEN:

NOMINAL INSURER
Appellant

AND:

SAVASTI KAMARAKIS
Respondent

CORAM: KEARNEY J

REASONS FOR DECISION

(Delivered 14 June 1995)

This is an appeal from a decision of the Workers' Compensation Court ("the Court") delivered on 26 April 1994; see pp3-5. By Notice of Appeal dated 9 May 1994 the appellant contended that to reach that decision the learned Magistrate (Mr Hannan SM) had applied -

> "- - - the 'slip-rule' to alter his reasons for decision given the 30 September 1992."

It attacked that decision, contending that in making it the Court had erred in law in -

> "1. - - - deciding that [s48B of] the Interpretation Act permitted the learned Magistrate to alter his said reasons for decision without having regard to the proper application of the "slip-rule".
>
> 2. - - - applying the "slip-rule" to alter the decision of the learned Magistrate.
>
> 3. - - - failing to provide reasons as to why the decision of the learned Magistrate ought to be altered by use of "the slip-rule"."

The appellant sought an order that the reasons for the decision of 30 September 1992 "be reinstated". None of this is very intelligible without reference to the tortuous background leading to the Court's decision of 26 April 1994; to that I now turn.

The background to the Court's decision of 26 April 1994

(a) The determination of 2 May 1991

On 28 October 1985 the respondent, claiming to have sustained personal injury by accident when travelling from her employment on 26 July 1985, filed in the Court an application for a determination under the Workers' Compensation Act (herein "the Act"). In June 1987 she entered into a s6N Agreement with her employer for lump sum compensation for that injury, but later considered that lump sum inadequate having regard to Dr Johnstone's report of 28 July 1987, and proceeded to seek a determination. By November 1990 her solicitors were ready to present her case to the Court.

Her application was heard on 22 April 1991. She appeared by counsel and adduced evidence. She claimed to be entitled to weekly payments of compensation, and sought redemption of the liability of her employer in that regard, pursuant to par(12) of the Second Schedule. She also claimed lump sum compensation for the permanent loss of the efficient use of her left leg below the knee in and for the purposes of her employment, pursuant to s10(1A) and (6) of the Act and Part II of the Third Schedule; it will be noted that this is a claim for the total loss of such use. The employer did not appear at the hearing; accordingly, the evidence of the respondent and her witnesses was not controverted. On 2 May 1991 the Court (Ms Thomas CSM) awarded the respondent compensation very similar by way of headings and amounts, and in total, to that later awarded by the Court (Mr Hannan SM) on 30 September 1992; see the Certificate of Award (annexure JS1) to Mr Stewart's affidavit of 13 December 1993 filed in the Court.

In making that award her Worship accepted the evidence of the respondent, Dr Glynatsis and Dr Johnstone and found the respondent "permanently and totally disabled". Pursuant to s10, her Worship found that the respondent had "suffered permanent loss of efficient use of her left leg below the knee for the purpose of her employment at the date of the injury"; it is clear from the amount awarded that the finding was of a total and permanent loss of such use.

(b) The Court's determination of 30 September 1992

Subsequently, when the employer failed to pay any part of the award of 2 May 1991, the respondent claimed that amount from the Nominal Insurer in June. On 9 August 1991 the Nominal Insurer applied to the Court under s17C of the Act -

> "- - - for an order re-opening the award [of 2 May 1991] under which the compensation is payable on the ground that there is reason to believe that the employer has not in good faith endeavoured to protect his own interests and taken reasonable steps to that end."

On 15 November 1991 the Court (Mr Gray SM) ordered that the award made by the Court on 2 May be re-opened.

The application for compensation came on for re-hearing before the Court (Mr Hannan SM) on 28 April 1992. Both parties were represented by counsel. The respondent testified, and called Dr Glynatsis and Dr Johnstone; the appellant called a Ms Brough who ran a domestic employment agency, and Dr Schmidt, and put in evidence certain hospital records.

On 30 September 1992 the Court delivered, orally, a reasoned judgment which when typed extended to some 16 pages of transcript. His Worship reviewed the evidence at length. At p12 he reached a conclusion as to the respondent's incapacity for work, viz:-

> "I am satisfied that her condition is uncontrived but is of physical origin and has resulted in the applicant being unfit to perform housemaid's duty and has resulted in her being permanently unable to resume those duties. - - - Before going further to deal with entitlements I will deal with the matter of the number of visits of the applicant and the periods that the applicant has spent in Greece since 1986."

This appears to have been the only part of his reasoning where his Worship may implicitly have dealt with the vital question whether the respondent was partially or totally incapacitated for work. His Worship then dealt with the respondent's visits to Greece and time she had spent there, for the purpose of dealing with submissions directed to the application of par13 of the Second Schedule. He returned to the topic of her entitlements at p13, viz:-

> "I turn now to the calculation of the entitlements of the applicant. I am satisfied that the Nominal Insurer admits in final submissions on p117 that the applicant was incapacitated for work from 26 July 1985 to March 1986 albeit a limited period. I am also satisfied that the applicant was an employee at the time of accident and that the accident arose out of the employment or in the course of the employment.
>
> The Nominal Insurer has no quibble with the calculation received by way of the exhibit from the applicant provided of course I find [for] the applicant exactly as it is contended [by the applicant] I should find. I consent [sic, consider] the average weekly earnings during employment were $185.30. I find that the injury was stabilized in the later part of 1988 after the screws were removed from the applicant's ankle. There's no evidence that these screws were to be temporary only but having done their work and being suspected of causing pain they were removed. Dr Glynatsis was of the opinion that [sic] though Dr Johnstone was vague when he examined the patient in that year."

His Worship then turned to the application for lump sum compensation under s10, viz:-

> "I'm not satisfied the injury had stabilized prior to 1 July 1986 from which period the appropriate lump sum was $61,358, and I'm satisfied that is a sum which is applicable to the percentage loss of the left limb of the applicant pursuant to section 10(5) and 10(6). Dr Johnstone reports in his latest report:

> Percentages of loss of use to the left limb for medical purposes or for - - - as an empirical 20 percent of the left lower limb.
>
> And I accept the higher figure though other figures were quoted in other of her personal medical reports and Mr Schmidt's estimate is 15 percent. But pursuant to the principles as laid down in the (inaudible) case and pursuant to 10(5) and 10(6) of the second schedule (sic, Act), I'm satisfied that on all the evidence the injury to the applicant's ankle prevents her from performing the former work as housemaid and domestic cleaner in a hotel situation.
>
> This injury has resulted in partial but permanent loss of the efficient use of the leg below the knee for the purpose of her employment at the date of the injury, or more succinctly you can say that [is] 100 percent of 65 percent of 61,358."

The dissonance between "partial" and "100 percent" in this last passage is obvious. His Worship then considered the question whether there should be redemption of any weekly compensation payments, viz:-

> "As far as redemption is concerned I've found partial and permanent incapacity exists. There is an application for redemption and I'm satisfied the applicant is very generous [sic, genuine], and [I] cannot find that [it] is against the worker's interest to do so."

Here the dissonance between the express finding of "partial incapacity" for work and the amount awarded (pp7-8), calculated on the basis of total incapacity for work throughout, may be noted. His Worship then set out reasons for rejecting submissions that two contingencies adverse to the worker should be allowed for by way of a reduction of the redemption sum. He proceeded at p16 to calculate the entitlement to weekly compensation:-

> "So that having received in evidence the calculations of the applicant in - - - exhibit 15 - - - I'm satisfied the normal weekly earnings were $184.35, as I've said. I'm satisfied that compensation under par1A of the second schedule should be as follows: (a) for the first 26 weeks at $184.35 per week, $4808.96 [sic, $4793.10]; (b) thereafter from 23 January 1986 to 1 July 1986 22.7 weeks at $184 per week, an amount of $4176.80.
>
> And leaving out the period which she worked under the conditions I've enumerated - - - at Phoenix Hotel, that's: (c) compensation under par1A of the second schedule should be continued from November 1986 to 28 April 1992, the day she returned to Darwin, namely 285 at $197 per week, that increase being that weekly payments increase as amended in the Act, a total of $56,145."

His Worship then drew together and calculated the 2 elements of compensation, the s10 lump sum award and the compensation payments for total incapacity under par(1A) of the Second Schedule as redeemed, as follows:-

> "Section 10, loss of the leg below the knee, 100 percent of 65 percent is 61,358, namely $39,882.70. Redemption is granted under paragraph 12 of the second schedule using the Luntz' table 3 percent for a female age 51 ceasing at death multiplier 995 at $197, total of $196,915 [sic, $196,015]."

I note that the Court file contains the following handwritten document:-

> "Decision 30.09.92
>
> 1. Applicant was an employee.
>
> 2. She was injured in an accident which occurred in the course of or arose out of her employment.
>
> 3. As a result of the accident she was partially and permanently disabled.
>
> 4. Compensation is payable under par(1A) Second Schedule.

(a) 1st 26 weeks @ $184.35 per week $4,808.96
[sic, $4793.10]

(b) Thereafter from 23/01/86 to 01/07/86 22.7 weeks @ $184.35 per week $4,176.80

(c) From November 1986 to 28.04.92 285 weeks @ $197.00 per week $56,145.00

5. Sect 10 W.C.A. Loss of leg below knee 100% x 65% x $61,358 $39,882.70

6. Redemption under par12 2nd Schdl. Luntz, 3% tables female aged 51 ceasing at death. $995 x 197.00 $196,015.00

(Sgd.) J. Hannan"

This appears to be the formal award of 30 September 1992. The apparent dissonance between finding 3 on the one hand (which squares with the oral findings of "partial" loss of efficient use and "partial" incapacity, at p6) and findings 4-6 on the other, may be noted; it remains unresolved.

(c) The appeal from the Court's determination of 30 September 1992

By Notice of Appeal dated 28 October 1992 the appellant appealed to the Supreme Court in proceedings 291 of 1992. The amended grounds of appeal, as far as relevant to the issues in the present appeal, were as follows:-

"2. The Court erred in law in the exercise of its discretion pursuant to clause 12A of the Second Schedule of the Act in fixing a lump sum of $196.915.00 [sic, $196.015] in redemption of the Appellant's liability to make weekly payments of compensation.

- - -

2.4 The Court erred in law in the calculation of the amount of the weekly payments to which the Respondent was entitled in that:-

2.4.1 Having found that the Respondent was permanently and partially incapacitated for work the Court calculated the amount of compensation by reference to clause 1(A) [sic, 1A] of the Second Schedule instead of clause 1(B) [sic, (1B)];

- - -

2.5 Alternatively, if the Court found that the Respondent was totally incapacitated for all employment then such finding was inconsistent and contradictory of the evidence and/or contradicted by the true and only reasonable decision on the evidence so as to constitute an error of law.

3. The Court erred in law in finding that the respondent had suffered a permanent and total loss of the lower left leg in and for the purpose of her employment.

PARTICULARS

3.1 The Appellant repeats paragraph 2.5

above."

The appeal came on for hearing before me in February and March 1993. At p21 of reasons for decision of 31 March 1993, before commencing to discuss his Worship's decision of 30 September 1992, I observed:-

> "The learned Magistrate clearly delivered his judgment orally from notes, and in considerable measure the lack of precision of expression to which that procedure frequently gives rise, lay at the root of several of the issues agitated on appeal."

Nothing that has happened since has caused me to modify that opinion. At p45 I noted the passage referred to earlier where his Worship said:-

> "I am satisfied that her condition is uncontrived but is of physical origin and has resulted in the applicant being unfit to perform housemaid's duty and has resulted in her being permanently unable to resume those duties. Before going further to deal with entitlements - - -." (emphasis mine)

I commented on this passage at p45:-

> "These are crucial findings and conclusions; it is arguable that his Worship here implicitly finds total and permanent incapacity for work as a housemaid, due to pain from soft tissue damage."

At p50 I said:-

> "Having disposed of the submission as to the effect of par(13) [relating to her visits to and time spent in Greece] his Worship then turned to "the calculation of the entitlements of the applicant". It will be recalled that arguably he had [already] made an implicit finding of total and permanent incapacity to work as a housemaid (p45)."

At pp51-52 I said:-

> "In his judgment his Worship rejected the basic submission [by the appellant] that it was "not the fact of her injury that stopped her from working". He noted that the appellant had now admitted that the respondent was incapacitated from working from 26 July 1985 to March 1986. He held:-
>
> > "I am also satisfied the applicant was an employee at the time of the accident and that the accident arose out of the employment or in the course of the employment.
> >
> > The [appellant] has no quibble with the calculation received by way of the exhibit [No.15] from the applicant provided of course I find [for] the applicant exactly as it is contended I should find. [That is, that she was totally and permanently incapacitated for work]. I consent [quaere, consider] the average weekly earnings during employment were $184.35. I find that the injury was stabilised in the later part of 1988 after the screws were

> removed from the applicant's ankle. There's no evidence that the screws were to be temporary only but having done their work and being suspected of causing pain they were removed. Doctor Glynatsis was of the opinion that [sic] though Doctor Johnstone was vague when he examined the patient in that year."

His Worship then dealt with the application for lump sum compensation under s10 and the 'Table of Maims', viz:-

> "I'm not satisfied the injury had stabilised prior to 1 July 1986 from which period the appropriate lump sum was $61,358, and I'm satisfied that is a sum which is applicable to the percentage loss of the left limb of the applicant pursuant to section 10(5) and 10(6). Doctor Johnstone reports in his latest report [of 20 November 1990]:
>
> > "Percentages of loss of use to the left limb for medical purposes or for.....as an empirical 20 per cent of the left lower limb."

I am unable to track down this precise quotation in the report; probably the transcript is defective. Dr Johnstone said in his report of 21 November 1990:-

> "I assess the degree of disablement as an empirical 20% of the left lower limb".

In his report of 28 July 1987 he had assessed it at 12%, and in his report of 27 September 1988 he considered "a range between 12% and 15% may be more accurate". His Worship continued:-

> "And I accept the higher figure [of 20%] though other figures were quoted in other of her personal medical reports and Mr Schmidt's estimate is 15 per cent. But pursuant to the principles as laid down in the (inaudible) case and pursuant to 10(5) and 10(6) of the Second Schedule, (sic, "Act") I'm satisfied that on all the evidence injury to the applicant's ankle prevents her from performing the former work as housemaid and domestic cleaner in a hotel situation." (emphasis mine)

It is tempting, with hindsight, to speculate that the "(inaudible) case" was a reference to *Stoddart v Snowy Mountains Hydro-Electric Authority* (1958) 9 FLR 145; however, such speculation is impermissible. I continued:-

> "It will be noted that s10(5) of the Act is directed to injuries causing "partial and permanent loss of the efficient use of a part of the body - - in and for the purposes of his employment at the date of the injury". His Worship continued:-
>
> > "This injury has resulted in partial but permanent loss of the efficient use of the leg below the knee for the purpose of her employment at the date of the injury, or more succinctly you can say that [is] 100 percent of 65 percent of $61,358." (emphasis mine)
>
> There is a patent contradiction in this passage; a "partial" loss cannot yield a multiplier of "100%". $61,358 was the Table of Maims sum then applicable for any of the injuries specified in Part I of the Third Schedule; 65% of that sum was the sum applicable, under Part II of the Schedule, for the loss of a leg below the knee. A claim under s10(5), if successful, meant that the respondent would be paid such percentage of (65% x $61,358) "as is equal to the percentage of the diminution of the efficient use of that part". So, for example, a partial loss of 70% of the efficient use of her lower leg in her work as a housemaid, would have yielded an entitlement to 70% x 65% x $61,358. If his Worship considered that the respondent had a total and permanent loss of the efficient use of her lower left leg in and for the purposes of her employment as a housemaid, he would have applied s10(1A) read with s10(6)(b), and arrived at an entitlement to (65% x $61,358). His Worship then turned to the claim under s7.
>
> He awarded a weekly payment."

At pp54-55 I said, in relation to the submissions in the appeal:-

> "The appellant's attack on the decision of 30 September was on two major fronts: the award of compensation for the period November 1986 - March 1988, and the order for redemption under par(12). There was also a challenge in more muted terms to

> the order for a lump sum disability payment under s10."

The appellant had attacked the order for redemption on the basis that in making it his Worship had erred in law in 3 respects. The second of these was the alleged failure to take into account certain contingencies adverse to the respondent. In dealing with this I said, inter alia, at p68:-

> "Further, his Worship concluded that this was a case of total incapacity for work; accordingly, the contingency that she might work again in light of the concession above, was not a real possibility in this case."

The "concession" had been (p68) "that the circumstances of the respondent were such that she was unlikely to be in a position to earn money in the future, at least in this jurisdiction." The third alleged error was that his Worship had applied the wrong statutory formula, par(1A) of the Second Schedule (total incapacity) instead of par(1B) (partial incapacity), to ascertain the weekly amount. As to this I said at p69:-

> "Mr Harris submitted that his Worship had failed to apply the correct statutory formula to ascertain the weekly amount consequent upon the partial incapacity he had found; the amount of the weekly payment he had arrived at was therefore wrong; and accordingly the amount of the lump sum redemption of the liability for that weekly payment was also incorrect. The submission assumes a finding of partial incapacity."

I then proceeded to consider whether the assumption that his Worship had found partial incapacity was correct, viz:-

> "His Worship stated (see p64):-
>
> > "As far as redemption is concerned I've found <u>partial and permanent incapacity exists</u>." (emphasis mine)

At p16 of his reasons his Worship set out his calculations, including the calculation of the lump sum redemption. The first step was to calculate the weekly amount of compensation pursuant to s7(1) and the Second Schedule. In that respect, par(1A) of the Second Schedule sets out the formula to determine the weekly amount where "the worker is totally incapacitated for work by injury" and par(1B) sets out the formula where the worker is "partially incapacitated". His Worship held:-

> "I'm satisfied that compensation under paragraph (1A) of the Second Schedule should be as follows;a) for the first 26 weeks at $184.35 per week, $4808.96. b) thereafter from 23 January 1986 to 1 July 1986 22.7 weeks at $184 per week, an amount of $4176.80.
>
> And leaving out the period which she worked under the conditions I've enumerated at Phoenix Hotel, - - c) compensation under paragraph (1A) of the Second Schedule should be continued from November 1986 to 28 April 1992, the day she returned to Darwin, namely 285 weeks at $197 per week, that increase being that weekly payments increase as amended in the Act, a total of $56,145. Section 10, loss of the leg below the knee, 100 percent of 65 percent of $61,358, namely $39,882.70. Redemption is granted under paragraph (12) of the Second Schedule using the Luntz' Table 3 percent for a female aged 51 ceasing at death, multiplier 995 at $197, total of $196,915 [sic; arithmetically, this should be $196,015]." (emphasis mine)

Mr Harris submitted that in determining the weekly amount by applying the formula in par(1A) of the Second Schedule, which applies where the worker is totally incapacitated, his Worship had erred in one of two ways. On the one hand, in accordance with his finding (p64) of partial (and not total) incapacity he should have applied the formula in par(1B) of the Second Schedule, which applies where the worker is partially incapacitated. On the other hand, if the words underlined on p69 are simply a typographical error, or 'slip' of the tongue in the oral judgment, and his Worship really meant to say "paragraph (1B)" instead of "paragraph (1A)", then he erred in law in that he did not in fact properly apply the formula in par(1B). Mr Harris submitted that any suggestion that there was a 'slip' in saying "partial" instead of "total" on p64 should be

rejected; this was not a case where there were two express and inconsistent findings - one of partial incapacity and one of total incapacity - where the circumstances might clearly show there had been a 'slip'. It was a case where there was an express finding of partial incapacity, while the suggested finding of total incapacity (p45) was implicit only; in such a case a conclusion that there had been such a 'slip' required great care.

The somewhat complex formula for the calculation of the weekly amount under par(1B) is set out in *Watkins Ltd v Renata* (1984) 29 NTR 38 at p44. It is clear that in terms of par(1B)(b) his Worship did not consider the value of the amount the worker "is able to earn in some suitable employment", and made no calculation of the percentage derived by dividing the loss of capacity to work by the full capacity to work. Mr Harris observed that evidence had been placed before the court by a Ms Brough, directed to the amount which the respondent might have been able to earn in some suitable employment; his Worship had not dealt with Ms Brough's evidence at all. Mr Harris noted that his Worship may have considered, for the purpose of making the calculation under par(1B), that the respondent was not capable of earning anything in some suitable employment; in that case, his Worship was obliged to calculate the effect of the proviso in par(1B), but had not done so. I consider it is very clear that his Worship made no attempt to apply the provisions of par(1B) of the Second Schedule.

Mr Harris conceded that the case put by the appellant before his Worship made no reference to partial incapacity. The appellant had contended for no incapacity while the respondent had contended for total incapacity; it was 'Sydney or the bush'. Nevertheless, he submitted, there was evidence before his Worship which showed that the incapacity of the respondent was limited; and the appellant was not bound by the way it had conducted the case before his Worship, to the extent that it could not rely on his error in not finding a partial incapacity.

Mr Reeves submitted that the reference to a finding of "partial" incapacity (p64) was a mere 'slip', and 'total' was meant. There was an implicit finding (see p45) of total incapacity for work as a housemaid, and the reference to par(1A) at p69 was wholly consistent with that finding, as was the lack of any reference to par(18) [sic, 1B] and the

> evidence of Ms Brough. He submitted that no question of law arose, as the degree of incapacity involved a question of fact. He noted that the appellant had never sought to make out a case of partial incapacity before his Worship."

I then expressed my conclusion on these competing submissions, viz:-

> "On a careful reading of the evidence and the orally delivered reasons for decision, I consider that it is clear that when his Worship referred (see p64) to "partial" incapacity he meant "total" incapacity. It was a slip of the tongue. I do not consider that there was no evidence to warrant a finding of total incapacity as from March 1988. I reject the appellant's submission."

It may be noted here in view of later events (pp18-21) that there was no reference in the submissions or by me to the 'slip rule' in r18(1)(b) of the Worker's Compensation Tribunal Rules ("the Rules"), set out at p22.

The appellant also attacked the award for lump sum disability under ss10(1A) and (6) of the Act and Part II of the Third Schedule, on the basis of error of law; see p9, ground of appeal no.3. I dealt with this at pp72-73, viz:-

> "Mr Harris submitted that the finding that the respondent had suffered a total and permanent loss of the efficient use of her lower left leg in and for the purposes of her employment at the date of the injury, was a finding contradicted by the true and only reasonable conclusion which could have been drawn on the evidence. I interpret that, as at p61, as a submission that there was no evidence to support the finding. Mr Reeves submitted that the finding of total disability at p52, implicit in "100 percent", was a finding of fact warranted by the evidence.
>
> I refer to the discussion at p53. I think it is clear from his Worship's language at p52, particularly the reference to s10(5) on two occasions and to "partial" loss of efficient use,

that the reference to "100 percent" was a 'slip', despite his satisfaction that the respondent's injury prevented her from working as a housemaid. I think it is clear that his finding was, as he expressed it to be, one of "partial but permanent loss" of use, in terms of the s10(6), [sic, 10(5)] and his quantification of "100 percent" was a slip of the tongue. In the result, the loss of use in terms of s10(6) [sic, 10(5)] remains to be quantified. In all the circumstances, I assess it at 40%. I uphold the appellant's submission on this ground."

(d) The appeal and cross-appeal from the Supreme Court decision of 31 March 1993

On 28 April 1993 the appellant appealed to the Court of Appeal in proceedings AP7 of 1993 against the Supreme Court decision of 31 March 1993. For the purposes of the present appeal the following grounds of that appeal are relevant:-

"3. The learned Judge erred in failing to hold that the wrong statutory formula had been applied to ascertain the weekly amount for the purpose of redemption under paragraph 12A of the Act [sic, Second Schedule].

3.1 The Court expressly found "partial and permanent incapacity" and the learned Judge was therefore in error to characterise this finding as a slip in the absence of any direct finding of total incapacity.

3.2 The learned Judge erred in holding that he did not consider that there was no evidence to warrant a finding of total incapacity as from March 1988. In the absence of an express finding of total incapacity the correct inference is that there has been an error not that there has been a slip and the learned Judge was in error in failing to so find."

On 12 May 1993 the respondent filed a cross-appeal against two parts of the decision of 31 March 1993. For

present purposes what is relevant is the cross-appeal against the decision on the s10 award (p15), that is:-

> "1.2 The decision to set aside the finding by the Court below that the Respondent suffered a permanent and total loss of the efficient use of her left leg below the knee for the purposes of her employment at the date of the injury."

The grounds of the cross-appeal relevant for present purposes are:-

> "2.3 The learned Judge erred in deciding that there was no evidence to support the finding of the Court below that the Respondent suffered a total and permanent loss of the efficient use of her left leg below the knee in and for the purposes of her employment at the date of the injury. (p73.3)
>
> 2.4 The learned Judge erred in deciding that the Court below found that the Respondent's permanent loss of the efficient use of her left leg below the knee in and for the purposes of her employment at the date of the injury was a partial loss. (p73.5)
>
> 2.5 The learned Judge erred in assessing that the Respondent's permanent loss of the efficient use of her left leg below the knee in and for the purposes of her employment at the date of the injury was a partial loss. (p73.6)"

The appeal and cross-appeal came on for hearing before the Court of Appeal on 9 and 10 December 1993. As to compensation for incapacity for work the appellant submitted, inter alia, that the evidence before the Court was of partial incapacity, not total incapacity. Further, the Supreme Court's decision (see p15) that the Court had found total incapacity for work was inherently inconsistent with its decision (see p16) that the Court had found partial disability only for the purposes of the claim under s10. The latter

finding was justified on the evidence and logic pointed to its being applied on the question of whether incapacity for work was total or partial. The respondent submitted that the decision (see p16) that there had been a finding of partial loss of efficient use for the purposes of s10(6)(b) was not necessarily inconsistent with the decision (p15) that there had been a finding of total incapacity for work.

As to these submissions it will be noted (see p15) that I had construed "partial" as a "slip of the tongue" for the word "total" in relation to incapacity for work. I had also construed (see p16) his Worship's oral reference to "100 percent" in the s10 award for disability, as "a slip of the tongue". Grappling in the course of argument with whether these conclusions involved an error or errors of law, the Court of Appeal stated at transcript pp71-72:-

> "- - - we have some doubts about the course adopted by his Honour in reviewing, as he did, his Worship's reasons and finding that his Worship had made a slip, and then purporting to correct it.
>
> We're minded to think, without deciding it, that's probably an error of law on the part of His Honour, as being something that wasn't within his jurisdiction to do. If we were right about that and decided that, then it is a bit difficult then to see how this matter can be further progressed and resolved to the satisfaction of the parties.
>
> It seems, unless it turns out that the rule - - - does [not] have any effect to assist the parties, then a course which we might be minded to follow would be, insofar as we need to finally determine it, proceed to find an error on the part of His Honour in relation to that aspect of it, then to indicate that, in the light of that, an appropriate course would be to take advantage of the rule - - - and go back to His Worship and say, - - - 'What did you really mean?'."

The reference in this passage to "the rule" was a reference to the 'slip rule' constituted by r18(1)(b) of the Rules; see pp19-21. Following further exchanges with counsel next day the Court of Appeal ruled as follows, at transcript pp83-85:-

> "- - - this case calls for an unusual course of action, but nevertheless one which will meet the needs of justice between these parties, which it is incumbent upon this court to ensure. Proceedings before the Workmens Compensation Tribunal led to an award being made in favour of the respondent.
>
> The award, and by that I mean the formal award taken out in accordance with the Rules, on its face, is arguably inconsistent with the reasons of the tribunal which are themselves internally arguably inconsistent.
>
> The matter went on appeal before his Honour Kearney J and cross-appeal.
>
> His Honour embarked upon a process of endeavouring, no doubt with a view to assisting the parties, of discerning what the tribunal really meant to say, and its reasons. In so doing he talked about application of the slip rule and the like, and in my view he stepped outside the jurisdiction of that court on appeal, my understanding being, and I find, that the jurisdiction to correct slips and errors and to allow for omissions and the like rests in the tribunal or court where the error or omission or slip is said to have occurred.
>
> I think that accords, with respect to His Honour, with commonsense."

I should interpose at this point to note that the first reference to any "slip rule" was by their Honours; they considered that my conclusions (pp15 and 16) that his Worship, in delivering his oral judgment, had made two 'slips of the tongue' for what he had then intended to say, involved my

having applied the "slip rule" in r18(1)(b) of the Rules.

Their Honours continued:-

> "The matter then made its way to this court on a number of grounds on both sides, on appeal from his Honour, and during the course of hearing the argument, this difficulty evolved and we have given it some consideration during the course of the proceedings.
>
> On my part, I'm prepared to hold for these purposes only, that his Honour Kearney J was in error in embarking upon the exercise of endeavouring to identify and correct the slips or omissions made by the tribunal or incorporated into the formal award and coming to a view about how they might be corrected.
>
> That is a matter which should have been done by the tribunal itself within its powers, and for this limited purpose I would uphold the appeal insofar as it attacks - takes the ground that his Honour was unable, in short, not to have embarked upon that process.
>
> I make it clear that in doing so I do not pass upon one way or the other, the result to which his Honour came when, as I've indicated, he stepped outside his jurisdiction; that is a matter I leave entirely open and would not like either the tribunal or the parties to think that I either support or do not support the conclusion to which His Honour ultimately came in that regard.
>
> The matter should have been taken up by the parties with the registrar or tribunal as soon as the reasons were published and the award taken out. It was obvious then as it is now, and as it was before his Honour, they failed to do so. They should have done so, and they should do so now. If that is not done then this Court will be left in a dilemma which [as] presently advised, I would find extremely difficult to resolve; the obligation on this court is to try and do justice to the parties and that can only be done in my view if the tribunal is given the opportunity to correct the reasons for the formal award, or both, in accordance with what the tribunal meant at the time that the reasons were given and the award was taken out.
>
> I therefore on the limited basis I've explained, allow the appeal insofar as it is against His

> Honour's exercise of jurisdiction to correct the alleged slip, and I invite the parties to return to the tribunal in accordance with the power they've always had to have the matter corrected by the tribunal.
>
> I would adjourn the hearing of this appeal with liberty to the parties to apply at any time on reasonable notice. - - -"

(e) The application to the Court under the 'slip rule'

The respondent had been content with the sum awarded by the Court, at pp7-8. Nevertheless, in accordance with the express invitation by the Court of Appeal the respondent applied to the Court by interlocutory summons dated 13 December 1993 for the following orders:-

> "1. An order that the Reasons for Decision delivered by his Worship Mr J Hannan SM on 30 September 1992 be corrected by substituting for the phrase "partial and permanent incapacity" in lines 37 and 38 of page 14, the phrase "total and permanent incapacity" [see pp6, 15].
>
> 2. An order that the Reasons for Decision delivered by his Worship Mr J Hannan SM on 30 September 1992 be corrected by substituting for the phrase "partial but permanent loss of the efficient use" in line 33 of page 14, the phrase "total and permanent loss of the efficient use"" [see pp11, 16].

The "slip rule" for the Court is Rule 18(1)(b) of the Workers' Compensation Court Rules (the Workmen's Compensation Tribunal Rules preserved by s23(4) of Act No. 47 of 1984 with changes in nomenclature effected by the Schedule to that Act). Rule 18 provides:-

"(1)(a) The award of the Tribunal on any determination shall be prepared and settled by the Registrar and shall be signed by the Chairman of the Tribunal which pronounced the award, or the Registrar, and shall be sealed and filed and a copy thereof forwarded to each of the parties.

(b) The Tribunal or a member shall have power at any time to correct any clerical mistake or error in such award arising from any accidental slip or omission."

The respondent's application for the correction of the reasons for decision of 30 September 1992 came on for hearing before the Court (Mr Hannan SM) on 17 February 1994; both parties were represented by counsel. Submissions were directed to the ambit of the slip rule, r18(1)(b). Mr Reeves of counsel for the respondent submitted that the word "award" in r18(1)(b) encompassed the reasons for the award. Mr Walsh of counsel for the appellant submitted that "such award" in r18(1)(b) meant the formal award referred to in r18(1)(a), and did not encompass the reasons for making that award; and accordingly the relief sought by the respondent (p21) - the correction of the reasons for the award - lay outside the scope of r18(1)(b). He submitted that therefore the Court lacked power to grant the relief sought by the respondent, and the parties should return to the Court of Appeal.

After the hearing on 17 February, Mr Reeves drew to his Worship's attention by letter a new provision in the Interpretation Act, s48B, which had come into force on 1 January 1994. It reads as follows:-

48B "(1) Where a decision made in proceedings before a person or body authorised by or under an Act to hear and determine a matter contains -

(a) a clerical mistake;

(b) an error arising from an accidental slip or omission;

(c) a material miscalculation of figures or a material mistake in the description of a person, thing or matter referred to in the decision; or

(d) a defect of form,

the decision maker, of his or her own motion or on application by a party to the proceeding, may correct the decision.

(2) In this section 'decision' includes a judgment, order and determination, and the reasons for a decision." (emphasis mine)

No submissions were made by the parties as to the effect of s48B.

On 26 April 1994 his Worship delivered, orally, his judgment on the application of 13 December 1993. Inter alia, his Worship said at transcript pp3-5:-

> "- - - the submissions of Mr Walsh were that - - - I would be changing my reasons for decision, and that I had not the power to alter the words as sought by the [respondent's] interlocutory summons. - - - The abstract of the award is there and according to Mr Walsh's submissions, that is the document upon which any clerical mistake or clerical error arising from an accidental slip or omission could be corrected.
>
> - - -
>
> In short, Mr Walsh says that to - - - make an order concerning the change of the words, would be to change the reasoning, and that perforce is not a matter which should, or could, be performed, taking into account the words of [r18(1)(b)].

Now, I was also [later] referred - - - by Mr Reeves, [to] a change in the law relating to the interpretation of statutes. [His Worship quoted s48B of the Interpretation Act, and continued:]

Without that change I would be satisfied that Mr Walsh's submissions concerning what 18(1)(b) of the - - - Rules sets out to do would not allow me to make the change sought. I think it is simply confined to the award; that is, the judgment; that is, the formal decree of the court.

However, the amendment under the Interpretation Amendment Act is a general power to correct minor errors - - -.

I am not satisfied in the wording used there that 'decision' is the same as 'judgment', that is, the formal part of the award, as compiled under [r18(1)(a)]. - - - It does not appear to me that 'decision' is exactly the same as 'judgment'.

I have some misgivings about this, a general interpretation statute amendment coming into force on 1 January 1994, referring to a statute - that is, the Workers Compensation Act - which, for all purposes but transitional provisions, is repealed, and those transitional provisions keep the Act on foot and alive for those Workers Compensation cases that could have arisen just before the - or, had arisen just before the repeal. Nevertheless, I think it [that is, s48B] is of a general nature.

The statute interpretation, an earlier and specific provision and a statute which codifies the law relating to workers compensation, it may be difficult to see that the later general statute would have any effect. However, it [that is, s48B] is a provision in a statute and it, though later and though general in ambit, appears to cover all statutes and may, of course, be of greater valency than a rule; that is, it may by implication destroy the effect of r18(1)(b).

- - -

- - - I am satisfied that the words which the interlocutory summons wishes me to - - - order a change in, would fall within 48B(1)(c) and is a material mistake in the description of a matter referred to in the decision. It might more easily be a material mistake in the description of a person

> because I am describing Savasti Kamarakis as 'totally and permanently incapacitated'.
>
> If it's thought that a description of a person is confined to a name, address, nationality, language, ethnic group, sex, marital status or distinguishing marks, or whatever, than that wouldn't fit; but I needn't decide whether the words aren't part of a description of a person. I think the words could be said to be included in the heading a material mistake in a matter referred to [in] the decision; that is, the decision-maker may correct a material mistake in the description of a matter in the decision.
>
> I am satisfied that 48B has effect, it does apply, and I apply it; and I am satisfied that 48B(1)(c) is the section which most gives efficacy. I am satisfied that I should make the change in the wording sought by the applicant in the interlocutory summons.
>
> My order will be I substitute [for] the phrase 'partial and permanent incapacity', in lines 37 and 38 at page 14, the phrase 'total and permanent incapacity'. And I order that I substitute for the phrase 'partial but permanent loss of efficient use', in line 33 on page 14, the phrase 'total and permanent loss of the efficient use'."

This is the decision the subject of the appeal of 9 May 1994 now before me; see pp1-2.

The submissions on the appeal of 9 May 1994

(a) A preliminary question: is the appeal competent?

The three grounds relied on by the appellant are set out at p2; the reference to the "slip-rule" is I think to the 'slip rule' constituted by s48B of the Interpretation Act (pp22-3). When the appeal came before me on 19 August for

directions Mr Reeves of counsel for the respondent contended that it was not competent.

His submissions were as follows. The appellant had no right of appeal other than that provided by s26(1) of the Act, as introduced in 1984; for that purpose the "determination" of the Court was its Determination of 30 September 1992. All that his Worship had done on 26 April 1994 was to correct a slip or error in the Determination of 1992, which was currently still on appeal before the Court of Appeal. His Worship had not made some further Determination in the claim of 28 October 1985. Accordingly, the decision of 26 April 1994 was not appealable, and the appropriate direction was that the "appeal" be listed to be heard before the Court of Appeal, to be dealt with as part of its hearing of appeal AP7 of 1993. Mr Reeves relied on Mr Stewart's affidavit of 18 August 1994 which recited the history of the litigation. He submitted that the Court of Appeal had clearly envisaged that the respondent would apply to his Worship under r18(1)(b) to identify any error and to clarify his order of 30 September 1992. Thereafter, the Court of Appeal envisaged that the matter would go back to it, in order that its hearing of the appeal and cross-appeal could continue. He submitted that the Court of Appeal had already allowed the appeal in part, on the ground that the Supreme Court lacked jurisdiction to do what it had purported to do; and it had ruled at that time, in order that the parties could apply to his Worship under r18(1)(b) and then return to the Court of Appeal.

Accordingly, the present appeal should not be entertained in this Court, but should be sent direct to the Court of Appeal.

Mr Riley of senior counsel for the appellant submitted as follows. On 10 December 1993 the Court of Appeal had not directed the parties to approach his Worship; it had invited them to do so. At the hearing before his Worship he had indicated (see p23) that he would have accepted the appellant's submission that there was no power (under r18(1)(b)) to make the changes sought by the respondent, had his attention not been drawn to the new s48B of the Interpretation Act. In the result his Worship had relied solely on s48B to empower him to make the orders sought; see p24. The appellant's contention was that he had erred in doing so. Further, when acting on the view that s48B empowered him to make the corrections sought by the respondent, his Worship had not stated the reasons he had proceeded to make those corrections. His Worship's decision of 26 April 1994 was appealable as a determination of a matter or question arising out of a claim for compensation, under ss6B(1) and 26(1) of the Act. It determined the right of the appellant to argue on appeal that there had been a finding on 30 September 1992 of partial incapacity to work, because it corrected the finding in that determination from one of partial incapacity to a "totally fresh" finding of total incapacity. It was necessarily a fresh determination, because his Worship lacked power to correct his earlier finding.

Mr Riley said that the appellant wished to challenge the existence of that alleged correction power on appeal, as well as challenging what his Worship had done in the exercise of that alleged power. The decision of 26 April 1994 was not capable of being dealt with in the Court of Appeal in the part heard appeal AP7 of 1993, as the decision was made after the hearing of that appeal had commenced, and it had not followed the required statutory course to the Court of Appeal under s51(1) of the Supreme Court Act. The parties could not by consent or otherwise vest appellate jurisdiction in the Court of Appeal outside s51(1); see *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616.

I raised with counsel the possibility that the substantive submissions on the appeal could be succinctly put, so that the Court of Appeal could have the benefit of those submissions and any ruling thereon. I indicated that it seemed inevitable that the course of proceedings thus far meant that matters in issue between the parties relating to the Court's decision of 26 April 1994 must eventually go before the Court of Appeal. Counsel concurred in this suggestion and the substantive appeal was argued on 22 August. I should say that in any event I accept Mr Riley's submissions, and consider the appeal is competent.

(b) <u>The appellant's submissions</u>

Mr Riley submitted as follows. His Worship had relied solely on s48B of the Interpretation Act as the source

of the power he had exercised. He had erred in so relying. He had rightly ruled that r18(1)(b) did not empower him to correct his reasons for decision; that 'slip rule' was limited in its terms to correcting an 'award', and no such correction had been sought or made. There was no inherent power in the Court to correct its reasons.

As to s48B of the Interpretation Act, the general rule is that an Act is presumed not to be intended to have retrospective operation; see *Maxwell v Murphy* (1957) 96 CLR 261 at 267 per Dixon CJ, *Fisher v Hebburn* (1960) 105 CLR 188 at 194 and *Geraldton Building Co Pty Ltd v May* (1976-77) 13 ALR 17. Statutory procedural provisions may constitute an exception to this rule but only in respect of proceedings pending at the time. Section 48B could have no application in this case as it came into force on 1 January 1994 when the proceedings before the Court had been completed for over a year. Whilst the authorities collected in Pearce and Geddes 'Statutory Interpretation in Australia', (1988) 3rd ed., par10.17 show that procedural provisions may have retrospective application to actions that are only part completed when the change in procedure comes into force, it has never been suggested that such provisions apply to actions which have been completed.

To contend that his Worship had power to apply s48B in this case because it is a procedural provision is akin to suggesting that he could also revisit the case if the law in relation to limitation periods or the limits on damages

changed after the date of his judgment of 30 September 1992. The law to be applied in a completed case - that is, after judgment has been given - cannot be changed by amendment thereafter.

His Worship in any event had relied (see p24) on s48B(1)(c) which in fact had no application to the corrections which he proceeded to make.

Mr Riley then turned to ground of appeal (3) on page 2, accepting for that purpose that his Worship had power under s48B to make the orders sought by the respondent. He submitted that the Court was under a duty to give reasons for its decision; see *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWR 247 at 279 per McHugh JA, *Hill v Arnold* (1976) 9 ALR 350 at 356-7, *Lloyd v Faraone*[(1989] WAR 154 and *Stojkovski v Fitzgerald* [1989] WAR 328 at 334-5. Failure to do so deprives a litigant of the capacity to determine whether the decision in question was arbitrary or made judicially. His Worship did not give any reasons for substituting the word "total" for the word "partial" in the identified locations of his reasons (see p25). His reasons of 26 April 1994 addressed the question whether there was power to make the corrections sought, but did not address the basis upon which he acceded to the respondent's request to make the corrections.

Accordingly the appellant did not know whether his Worship made his decision because of the comments of Kearney J or of one or all of their Honours in the Court of

Appeal, or because he thought he had made a genuine mistake in his oral judgment of 30 September 1992, or because having now reconsidered those reasons of 30 September 1992 he had set about resolving a genuine inconsistency in his findings. One view of what his Worship did on 26 April 1994 was that he was there solely concerned as to his powers and, once satisfied on that score, he had proceeded simply to accept without independent consideration that he had erred on 30 September 1992 in the manner the respondent suggested.

(b) The respondent's submissions

Mr Reeves submitted that the decision of 26 April 1994 was discretionary in nature, and an appeal court was subject to the usual limitations in considering such a decision; see *House v The King* (1936) 55 CLR 449 at 505.

Independently of s48B his Worship had power to correct an obvious mistake in his reasons of 30 September 1992, so as to make them consistent with the award he proceeded to make. The Court had a very broad inherent power to correct a slip or error in the reasons for its award where the award remained unchanged; see *O'Toole v Scott* (1965) AC 939 at 958-9 and *M v M* (1993) 1 VR 391 at 395. Section 6D of the Act gave the Court express power to determine its procedures.

This inherent power extends to varying an order so as to carry out its meaning, or to amend part of an order which is not the operative and substantial part, or to make a

supplemental order; see *Bailey v Marinoff* (1971) 125 CLR 529 at 539-540 per Gibbs J. I observe that the order of the Court, in the sense of its award, was not attacked by the appeal of 9 May 1994.

Mr Reeves submitted that the Court of Appeal had clearly indicated on 10 December 1993 that the parties should go back before his Worship so that pursuant to r18(1)(b) he could state what he had intended. Clearly, the Court of Appeal did not consider that his Worship was functus officio. The appellant had not approached his Worship. The actual award of 30 September 1992 remains untouched and unaffected by the decision of 26 April 1994, and is enforceable as such. It is clear from that award that his Worship proceeded on the basis of total incapacity of the worker. As to that I note finding 3 in the decision of 30 September 1992 (p7).

Mr Reeves submitted that as to the application of s48B, the claim for compensation before the Court is still potentially on foot: if the Court of Appeal sets the award of 30 September 1992 aside, the Court could reconsider the case. Because his Worship founded on s48B, he had not found it necessary to consider the submissions as to the application of the 'slip rule' in r18(1)(b). In any event, the respondent relied not merely on r18(1)(b), but on that Rule when read in conjunction with the inherent power of the Court.

Mr Reeves conceded that his Worship had a duty to give adequate reasons for his decision of 26 April 1994. He submitted that his Worship had complied with that duty; see

McAuliffe v Secretary Department of Social Security (1991-92) 28 ALD 609, on the sufficiency of reasons which are required.

Mr Reeves submitted that his Worship's reasons as amended on 26 April 1994 were fully consistent with the award of 30 September 1992. That award was itself internally consistent in that it provided for compensation for total and permanent incapacity for work, and for total and permanent loss of use in terms of s10 of the Act. Again, I draw attention to clause 3 of the award (p7).

Conclusions on the appeal

Had the question been open I would have agreed with his Worship that r18(1)(b) empowers only the correction of "any clerical mistake or error in [the] award" and does not empower the Court to alter its reasons for its award. However, it is clear from the ruling by the Court of Appeal (p20) that that is not to be taken to be the law. I consider that the effect of r18(1)(b) was not open to argument before his Worship, and he was bound by the opinion of the Court of Appeal that the Rule empowered him to correct his reasons.

In any event, I consider that his Worship was correct in his view that he was empowered by s48B of the Interpretation Act to correct an error in his reasons arising from an accidental slip or omission. I think the applicable power is to be found in s48B(1)(b) rather than in s48B(1)(c). I consider that s48B is a law "regulating the manner in which

[rights and liabilities] are to be enforced", as Dixon CJ put it in *Maxwell v Murphy* (supra) at p267.

I consider that the litigation of the respondent's claim for compensation is still "alive"; it is still pending before the Court of Appeal.

The question whether his Worship complied with his admitted duty of giving reasons for his decision of 26 April 1994 is more difficult. On the whole it seems to me that his Worship must have been of the view that he had erred on 30 September 1992 in using the words in question, and that is why he corrected them once he was satisfied that he had the power to do so. He treated s48B as giving him the power to correct "minor errors". However, the parties do not appear as yet to have adverted to finding (3) in the decision of 30 September 1992 (p7); that finding still stands unchallenged, its precise significance unargued and unresolved, and it tends to support the appellant's case.

I do not think that the Court has an inherent power to correct other than obvious accidental slips or errors in its reasons; see *Hazeltine Corporation v International Computers Ltd* (1980) F.S.R. 521. Had the course of the litigation been different, I doubt whether it would be said that the words in question in this appeal were properly the subject of correction by a 'slip rule'.

For the reasons stated I would dismiss the appeal from the Court's decision of 26 April 1994. As the Court of Appeal is clearly seised of aspects of this case, I direct

that these proceedings 78 of 1994 stand in the list of appeals to be heard before the Court of Appeal, together with proceedings AP7 of 1993. It is desirable that a Notice of Appeal be lodged against this decision, to ensure that the record is in order.

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