PARTIES:	ROBERT HARRIS
	v
	JULIE SOUTH
TITLE OF COURT:	THE COURT OF APPEAL OF THE NORTHERN TERRITORY OF AUSTRALIA
JURISDICTION:	APPELLATE
FILE NO:	AP1 of 1998 (9219290)
DELIVERED:	29 July 1998
HEARING DATES:	22 May 1998
JUDGMENT OF:	MILDREN, THOMAS and PRIESTLEY JJ

CATCHWORDS:

Appeal – workers compensation – election once made to commence action in Workers' Compensation Court and not Work Health Court, cannot be revoked.

Appeal – workers compensation – non-compensible aggravation of pre-existing injury does not necessarily preclude claim for compensation based on earlier compensible injury – incapacity may be due to more than one cause.

Legislation

Workers' Compensation Act – s25
Work Health Act 1987 – s188; s189

Cases

1) *Loizos v Carlton United Breweries Ltd* (1994) 94 NTR 31 referred

2) *Australian Eagle Insurance Company Limited v Federation Insurance Ltd* (1976) 15 SASR 282 applied

3) *Wardlesworth v Green* (1996) 66 SASR 421 followed

4) *Bushbey v Morris* [1980] 1 NSW 81 followed

5) *The Nominal Insurer v Robinson* (Supreme Court of the Northern Territory, unreported, 29 May 1991, Martin J) not followed

REPRESENTATION:

Counsel:

Appellant:	J.R. Withnall
Respondent:	J.B. Waters QC

Solicitors:

Appellant:	Withnall Maley & Co
Respondent:	Waters James McCormack

Judgment category classification:	A
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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. AP 1 OF 1998
(9219290)

BETWEEN:

ROBERT HARRIS
Appellant

AND:

JULIE SOUTH
Respondent

CORAM: MILDREN, THOMAS and PRIESTLEY JJ

REASONS FOR JUDGMENT

(Delivered 29 July 1998)

THE COURT: In November 1981 the respondent suffered an injury in the course of her employment with the appellant, whilst attempting to lift a 44 gallon drum of garbage. The injury sustained was a disc prolapse to her left lower back. In December 1982 a laminectomy was performed at the Royal Darwin Hospital by Dr Baddeley. After a period of time in hospital, she recovered well and in early 1983 was able to return to work. At some stage after 1983 she gave up work and cared for her two children. From 1985 to 1989 she was in work sometimes on her own account and sometimes whilst working for others. In 1988 the respondent applied to the Workers' Compensation Court established under the *Workers' Compensation Act* for a

determination of the appellant's liability in respect of the injury. She claimed total incapacity for the period 1 November 1982 to 25 May 1983, and sought weekly compensation at the rate of $230 per week, and a declaration of liability. The respondent brought the application because of concerns that her back problems were likely to deteriorate in the future. The application was heard by Mr McCormack SM who delivered his decision on 10 November 1989. Mr McCormack SM found in favour of the respondent. He found that the respondent suffered the disc prolapse in November 1981 whilst in the employ of the appellant and that the injury arose out of the course of her employment. His Worship rejected defences based on an alleged failure to give notice of the injury and found that although the applicant's claim for compensation was not made within six months as required by s25 of the Act, she was not barred from bringing the proceedings because the failure to make the claim within that time was occasioned by a reasonable cause. His Worship, although satisfied that the respondent was incapacitated for a period of time between 24 November 1982 to some time in January 1983, was unable to find that the respondent had proven that she had lost any wages during this period, and dismissed this part of her claim. There was no appeal from this decision.

From 1989 to 1990 the respondent continued working in the Northern Territory. In 1990 the respondent moved to Yeppoon in Queensland. For a time she operated an Italian restaurant there. As well, she worked for Angus Meats and for the Pacific Hotel in 1991 and 1992. She sustained no incapacity resulting in financial loss during this period as a result of her 1981 back

injury. Although she still suffered back pain throughout 1982 to 1992, it did not preclude her from working. However since 1992 the respondent claimed that her back pain had worsened and she developed pain in her left lower leg. It is not clear whether this started to occur before or after she started work with the Pacific Hotel. She consulted a doctor who prescribed bed rest, and undertook physiotherapy. Since then her pain has worsened and she has not worked since.

On 1 January 1987 the *Work Health Act* came into force. S188 of that Act repealed the former Act. We note in passing that the former Act had already been repealed when the respondent commenced her proceedings in the Workers' Compensation Court in 1988. S189 of the Act in its original form provided as follows:

> CLAIM, &., BEFORE OR AFTER THE COMMENCMENT OF ACT
>
> (1) Where a cause of action in respect of an injury to or death of a person arising out of or in the course of his employment arose before the commencement of this section, a claim or action (including a claim or action at common law) in respect of that injury or death may be made, commenced or continued after the commencement of this section as if this Act had never commenced and for that purpose the repealed Act shall be deemed to continue in force.
>
> (2) Notwithstanding subsection (1), a person may claim compensation under this Act in respect of an injury or death referred to in that subsection and on his so doing this Act shall apply as if the injury or death occurred after the commencement of this section, and subsection (1) shall have no effect.

In 1991, s189 was amended to add a new subsection (3):

> (3) Nothing in subsection (2) shall be construed as permitting a claim for compensation to be made under this Act in respect of an injury to or the death of a person arising out of or in the course of the person's employment before the commencement of this Act, where, in respect of that injury or death, compensation has been paid –
>
> (a) under the repealed Act;
>
> (b) under any other law in force in the Territory relating to the payment of compensation in respect of the injury or death of the person arising out of or in the course of the person's employment; or
>
> (c) at common law.

The amending sections commenced on 1 January 1992. There is nothing to indicate that they were intended to have retrospective effect.

The effect of s189 is that a worker who suffered a work-related injury prior to 1 January 1987, and who would have been entitled to compensation under the former Act, could either claim compensation under the former Act, or elect to claim under the *Work Health Act*: see *Loizos v Carlton United Breweries Ltd* (1994) 94 NTR 31.

In October 1992 the respondent made a further claim for compensation in respect of her injury in November 1981 in the Workers' Compensation Court, pursuant to the *Workers' Compensation Act*, claiming weekly payments for total incapacity for "various periods in 1982 and 1983" and for the period from 29 July 1992 and continuing, and for medical expenses. The respondent also sought to redeem her future entitlements to weekly payments. In 1994 the

claim was commenced to be heard before Mr Trigg SM. At the commencement of the hearing, counsel for the respondent advised that although the claim had been commenced under the *Workers' Compensation Act*, the respondent then sought to make it under the *Work Health Act*. By consent of the parties, that application was adjourned *sine die*.

On 11 April 1995, the respondent made an application for compensation to the Work Health Court pursuant to the *Work Health Act*. This claim was also based on the injury in November 1981 and is substantially in the same form as the claim in October 1992 in the Workers' Compensation Court. The appellant by its answer resisted this claim on a number of grounds including the fact that the respondent had already commenced proceedings in respect of the injury in the Workers' Compensation Court, which were still on foot. Mr Trigg SM concluded that the respondent had elected to proceed under the former Act when she commenced her proceedings in the Workers' Compensation Court in 1992, and that the action in the Work Health Court must therefore fail. However his Worship permitted the statement of claim to be amended to plead a new injury based on an allegation that the injury complained of was "a deterioration" of the 1981 injury. Strictly speaking, as the facts show, the election was made in 1988 when the respondent first commenced proceedings in the Workers' Compensation Court. No appeal was lodged against Mr Trigg's decision. The respondent did not pursue her proceedings in the Work Health Court, which were adjourned *sine die*, and are still on foot. Instead she reactivated the claim lodged in the Workers'

Compensation Court in 1992, and that matter came before Mr Gillies SM in May 1996.

At the hearing before Mr Gillies SM it was never part of the respondent's case that she suffered a fresh injury in 1992. The respondent amended her statement of claim in February 1996. One amendment pleaded alternatively to the claim that she was totally incapacitated, that the respondent was partially incapacitated. To this plea, the appellant denied that the respondent was totally incapacitated but averred that the respondent was only partially incapacitated for work. There was no plea that the respondent's incapacity was due solely to an injury in 1992. The learned Magistrate dismissed the claim on the ground that "the injury upon which the worker bases her claim for incapacity occurred after the repeal of the Workers' Compensation Act". His Worship said:

> The worker has suffered an aggravation of her 1981 injury. One of the meanings of the noun 'aggravation' is an increasing in gravity or seriousness; *see Johnston v Commonwealth of Australia* (1982) 56 ALJR 833, the relevant citation being at page 835. The experience of human nature is that the human back deteriorates with age. It is reasonable to consider the pain the worker experienced in July 1992 is a result of the effect of wear and tear over the passage of time on her back which had been damaged in the 1981 injury. The increase in pain is a worsening of the symptoms which occurs with the passage of time.
>
> …she has suffered an increasing in gravity or seriousness of the effects of the 1981 injury. She must put her case on the basis that she has not suffered a fresh injury in the sense of the injury referred to …earlier.

This was a reference to an injury sustained as the result of an incident whereby force or pressure was applied to some part of her body which resulted in an increase in pain. His Worship had already found that there was no such incident. His Worship continued:

> If she alleges a fresh injury (in this sense) she must take action in the Work Health Court… However to be successful in this court (i.e. the Workers' Compensation Court) she must ground her action on the fact of the 1981 injury. In basing her action on the 1981 injury, she cannot discount the effects of the passage of time. Her back rendered weaker or more infirm by the 1981 injury has deteriorated or worsened over time…
>
> The *Workers' Compensation Act* defines injury as where relevant any physical injury and includes aggravation of a pre-existing injury; see section 6 of the Act. The aggravation constitutes an injury which occurred after the repeal of the Act and on the authority of the *Nominal Insurer v Robinson* (unreported, Martin J 29/5/91)…The employer is not liable in this court for this injury.

From this decision, the respondent appealed to the Supreme Court. Angel J allowed the appeal. His Honour held, after considering a number of authorities, that for there to be an aggravation of a pre-existing injury,

> there was a need for something to have contributed to the worsening of the condition... At least some connection between the employment at the time of the worsening of a condition or injury and the worsening must be shown.

His Honour said that

> There is nothing that can be pointed to as being a factor, or the factor, that led to the worsening of the appellant's

> condition, apart from the initial injury, and no such argument to the contrary was put nor was it pleaded.

His Honour held that "at least arguably" the respondent's present incapacity related to her 1981 injury and that there was nothing to preclude her from pursuing a claim pursuant to the *Workers' Compensation Act* in respect of that incapacity. His Honour further held that the respondent had not elected to bring her claim for that injury in the Work Health Court; the only election she made occurred when she took the initial proceedings under the *Workers' Compensation Act*. His Honour therefore allowed the appeal, set aside the order of the Magistrate and indicated that the matter ought to be retried in the Workers' Compensation Court, and made certain costs orders.

From this decision, the appellant has appealed to this Court on two grounds. The first ground challenges his Honour's conclusion that the worker had made an election to proceed in the Workers' Compensation Court. In our opinion that ground cannot be made out. The respondent made her election in 1988 when she commenced the original proceedings in the Workers' Compensation Court. Once having made her election, it is irrelevant that she tried to proceed to change her position at a later time. An election once made cannot be revoked.

The second ground of appeal was that the respondent was bound by the unappealed ruling of Mr Trigg SM that her deterioration was a new injury and that the *Work Health Act* alone applied to that deterioration. There are at least two answers to this submission. The first is that Mr Trigg SM made no such

ruling. All his Worship decided was that if a new injury was alleged, the respondent was not precluded by the earlier proceedings from bringing fresh proceedings in the Work Health Court based on the new injury. Secondly, as was conceded by Mr Withnall in argument, even if there was an aggravation or deterioration on her 1981 injury in 1992 so as to amount to a fresh injury, by itself this did not preclude the respondent from asserting that the incapacity in 1992 was the result of the injury in 1981. Incapacity may be due to more than one cause. For the respondent to be precluded from succeeding in the Workers' Compensation Court, not only must there be a new injury in 1992, but that injury must be the sole cause of her incapacity: see *Australian Eagle Insurance Company Limited v Federation Insurance Ltd* (1976) 15 SASR 282. In that case, King J said, at 292:

> If, at the time of the second accident, the physical consequences of the first accident have stabilized to the degree that they can fairly be regarded as spent and as leaving only a vulnerability to injury from future trauma, the incapacity flowing from the second accident cannot be regarded as the result of the first accident but must be regarded as the result of the second accident only. Such a case was *La Macchia v Cockatoo Docks & Engineering Co. Pty. Ltd.* If, however, the workman's condition is still unhealed or unstable and the incapacity would not have occurred but from that unhealed or unstable condition, the incapacity must be regarded as resulting from the first accident as well as from the second accident. Moreover, where the second accident is a mere aggravation or recurrence of the injury sustained in the first accident and is brought about by ordinary and reasonable conduct on the part of the workman, the consequent incapacity must, in my opinion, be regarded as the result of the first accident as well as the result of the second accident.

King J's judgment was later approved by the South Australian Full Court in *Wardlesworth v Green* (1996) 66 SASR 421 at 432 per Doyle CJ, with whom Bollen and Nyland JJ concurred. The Privy Council in *Bushby v Morris* [1980] 1 NSWLR 81 reached the same conclusion, although their Lordships were not referred to the judgment of King J. We have no doubt that these decisions were correctly decided and should be followed.

The learned Magistrate felt that he was bound to follow *The Nominal Insurer v Robinson,* Supreme Court of the Northern Territory, unreported, 29 May 1991, where Martin J (as he was then) appears to have concluded that an aggravation amounting to a new injury of a pre-existing injury precluded a worker from bringing a claim in respect of the original injury. His Honour does not appear to have been referred to either *Australian Eagle Insurance Company Limited v Federation Insurance Ltd* or *Bushby v Morris.* To the extent that his Honour concluded that an aggravation of a pre-existing injury necessarily precluded a worker from seeking compensation based on the original injury, we think his Honour was in error, and his reasoning should not be followed.

In the circumstances, it is strictly unnecessary to consider the other grounds of appeal, which challenged Angel J's decision that there was no injury in 1992 and asserted that his Honour was wrong in deciding that the worker's case had nothing to do with any aggravation in 1992. We note that, in any event, the respondent could not have succeeded against the appellant in relation to any separate injury in 1992, as by that time, the appellant was not

her employer, and therefore it could not be said that any injury then sustained arose out of or in the course of her employment with the appellant.

But as this litigation has had an unfortunate history, we think it right to observe that the appellant could not succeed at the rehearing on the ground that the respondent's incapacity was due to a new injury in 1992 unless it was proven that the new injury was the sole cause of her incapacity. As to whether the respondent suffered a new injury in 1992, as that is in part a question of fact which may have to be determined by the Workers' Compensation Court, we make no comment. However, as a matter of law, there can be no fresh injury by way of aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing physical injury (not being a disease) unless, at the time of the acceleration etc., there is some connection between the aggravation etc., and the new employment. On the facts found by Mr Gillies SM there was no connection of any kind between the employment in 1992 and the deterioration of the respondent's condition, not even a temporal one, as all Mr Gillies SM found was that her present condition was no more than the effects of the passage of time. Whether a purely temporal connection between the employment and the aggravation etc. without more can constitute a fresh injury is unnecessary to decide.

We agree with Angel J that the proper course is that there be a new trial in the Workers' Compensation Court, and as his Honour seems to have overlooked making any formal order, there will be an order for a new trial before a differently constituted court. Otherwise, the appeal is dismissed with costs.