CITATION:	*Lee v MacMahon Contractors Pty Ltd* [2018] NTCA 7
PARTIES:	LEE, Paul Mitchell v MACMAHON CONTRACTORS PTY LTD (ABN 37 007 611 485)
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL from the SUPREME COURT exercising Northern Territory jurisdiction
FILE NO:	AP 8 of 2017 (21507050)
DELIVERED:	29 June 2018
HEARING DATES:	1 September 2017
JUDGMENT OF:	Grant CJ, Southwood J and Riley AJ

CATCHWORDS:

WORKERS' COMPENSATION – ENTITLEMENT TO AND LIABILITY FOR COMPENSATION – PROCEEDINGS TO OBTAIN COMPENSATION – PRELIMINARY REQUIREMENTS – CESSATION OF PAYMENTS

Whether notice cancelling payment of weekly benefits valid – no obligation on respondent to provide certification that appellant had ceased to be incapacitated by an injury for which payment of weekly benefits had not been instituted – assertion that secondary or consequential psychological injury was productive of incapacity post-dated the notice of cancellation – Work Health Court fell into error of law by finding that the notice was invalid – consequent error that the question of incapacity determined in accordance with the Counterclaim and that the respondent bore the onus of

establishing that incapacity referable to the psychological injury had ceased as at the date of cancellation – Supreme Court correct in finding concerning the validity of the notice but wrong in relation to the consequences of that finding – appeal allowed in part – matter remitted to Local Court for further consideration in accordance with law.

Return to Work Act (NT) s 80, s 85, s 104, s 116
Supreme Court Act (NT) s 51

AAT Kings Tours Pty Ltd v Hughes (1994) 4 NTLR 185, *Alexander v Gorey & Cole Holdings Pty Ltd* (2002) 171 FLR 31, *Australian Gas Light Company v Valuer-General* (1940) 40 SR (NSW) 126, *Canute v Comcare* (2006) 226 CLR 535, *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389, *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280, *Collins Radio Constructors v Day* (1998) 143 FLR 425, *Davison v Totalisator Administration Board* (1988) 56 NTR 8, *Disability Services v Regan* (1998) 8 NTLR 73, *Foresight Pty Ltd v Maddick* (1991) NTLR 209, *JH Constructions Pty Ltd v Davis* (unreported, SCNT, 3 November 1989), *Ju Ju Nominees Pty Ltd v Carmichael* (1999) 9 NTLR 1, *Morrisey v Conaust Ltd* (1991) 1 NTLR 183, *Newton v Masonic Homes Inc* [2009] NTSC 51, *Schell v Northern Territory Football League* (1995) 5 NTLR 1, *Tracy Village Sports & Social Club v Walker* (1992) 111 FLR 32, *Van Dongen v Northern Territory of Australia* [2009] NTSC 1, *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439, *Wilson v Lowery* (1993) 4 NTLR 79, referred to.

Gageler S, *What is a question of law?* (2014) 43 AT Rev 68.

REPRESENTATION:

Counsel:

Appellant:	K Sibley
Respondent:	W Roper

Solicitors:

Appellant:	Maurice Blackburn
Respondent:	Hunt & Hunt

Judgment category classification:	B
Number of pages:	40

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

Lee v MacMahon Contractors Pty Ltd [2018] NTCA 7
No. AP 8 of 2017 (21507050)

BETWEEN:

MITCHELL PAUL LEE
Appellant

AND:

MACMAHON CONTRACTORS PTY LTD
(ABN 37 007 611 485)
Respondent

CORAM: GRANT CJ, SOUTHWOOD J and RILEY AJ

REASONS FOR JUDGMENT

(Delivered 29 June 2018)

THE COURT:

[1] The appellant was the worker in proceedings before the Work Health Court. The respondent was the employer in those proceedings.

The facts

[2] The appellant injured his back on 21 November 2012. That injury arose out of and in the course of his employment. He submitted a claim form under the *Workers Rehabilitation and Compensation Act*

(NT)[1] on 25 February 2013 which described the injury as "L4/L5 disc irritation" to the "[l]ower back".

[3] The respondent's insurer wrote to the appellant on 15 April 2013 advising that it had accepted liability for an "Irritated Facet Joint" injury which occurred on 21 November 2012.

[4] The appellant had in the meantime participated in a return to work program and resumed full duties in January 2013, but subsequently suffered recurrences of pain and intermittent absences from work as a result. He was paid weekly compensation benefits during absences from employment. The medical certifications provided by the appellant's general practitioner in substantiation of his incapacity during those periods all stated that the appellant was suffering from "lumbar back pain". None of those certifications made reference to any psychological injury.

[5] Although no reference was made to psychological injury, the rehabilitation provider engaged by the respondent's insurer to manage the appellant's return to work program had concluded that there might be a psychological component to the appellant's presentation. That is a not unusual presentation in the management of a physiological injury in the workers compensation context. The rehabilitation provider referred the appellant to a pain management clinic and, in turn, to a

1 The *Workers Rehabilitation and Compensation Act* was renamed the *Return to Work Act* with effect from 1 October 2015.

psychologist. The appellant attended on the psychologist for four counselling sessions between April and June 2014.

[6] The respondent's insurer subsequently arranged for the appellant to be examined by an orthopaedic surgeon and a psychiatrist. By report dated 8 September 2014, the orthopaedic surgeon opined that the strain in the appellant's lumbar spine had likely resolved but that there might be psychological factors impacting on his symptoms and his ability to return to work. By report dated 15 September 2015, the psychiatrist recorded the appellant's complaints of ongoing pain and opined that the appellant suffered from an adjustment disorder with depressed mood which had mainly resolved leaving some mild residual symptoms. In the psychiatrist's opinion, that condition did not give rise to any restrictions on the appellant's duties or hours of work.

[7] The orthopaedic surgeon subsequently issued a medical certificate on 9 December 2014 certifying that the worker had ceased to be incapacitated for work as a result of the strain in his lumbar spine and that his incapacity, if any, was due to factors unrelated to the work injury. The respondent's insurer gave the appellant a notice dated 10 December 2014 cancelling payments of weekly benefits pursuant to s 69 of the *Return to Work Act* (then named the *Workers Rehabilitation and Compensation Act*). That notice was accompanied by a medical certificate prepared by the orthopaedic surgeon who had reported on the appellant's condition in September 2014.

The proceedings below

[8] The appellant commenced proceedings in the Work Health Court on 11 February 2015 challenging the decision to cancel payment of weekly benefits. His Statement of Claim alleged that he sustained a lower back injury and a psychological injury as a result of the injury to his back on 21 November 2012, and that both injuries were aggravated on 12 February 2013. The Statement of Claim pleaded in the alternative that the lower back injury caused or materially contributed to a secondary or consequential psychological injury. The pleading went on to allege that the notice was invalid on the grounds that the medical certification only addressed the physiological back injury and not the psychological injury, and that the reasons did not provide sufficient detail to enable the appellant to understand why weekly benefits for the psychological injury were cancelled.

[9] By its Defence and Counterclaim the respondent:

(a) denied the existence of any psychological injury;

(b) said that any psychological injury which did exist was not caused by and did not arise out of the appellant's employment with the respondent, and was not productive of incapacity at the time the notice of cancellation was served;

(c) said that the appellant had not given any notice of psychological injury;

(d) denied that the appellant had received compensation for anything other than the strain of the lumbar spine; and

(e) said that the appellant's lumbar spine injury had resolved by 9 December 2014 and that the respondent ceased to be incapacitated for work at or about that time.

[10] The appellant was subsequently examined by another orthopaedic surgeon engaged by his solicitors for that purpose. The report of that examination concluded that the appellant had a full range of motion in his lumbar spine, that the appellant had no impairment of the lumbar spine, and that there was no diagnosis or explanation for the ongoing lower back pain of which the appellant complained. In the proceedings before the Work Health Court the appellant did not assert any continuing incapacity as a result of the physiological injury. Rather, the appellant's case was that the notice was ineffective in relation to the secondary or consequential psychological injury.

[11] By reasons delivered on 18 March 2016, the Work Health Court made the following findings:

(a) having initially accepted the appellant's secondary or consequential psychological injury, the respondent did not validly cancel the worker's weekly payments; and

(b) the respondent had not established that the appellant did not suffer a secondary or consequential psychological injury, or that he had

ceased to be incapacitated as a result of that injury at the date his workers compensation benefits were cancelled.

[12] In pursuance of those findings the Work Health Court made orders on 28 June 2016 that:

(a) the notice of decision dated 10 December 2014 was set aside as void;

(b) the respondent was to make payments of compensation in accordance with the *Return to Work Act* (NT) from the date of cessation and continuing; and

(c) the respondent was to pay the appellant's costs.

[13] The respondent lodged an appeal in the Supreme Court. In reasons delivered on 3 May 2017, the Supreme Court allowed the appeal, set aside the decision of the Work Health Court, and entered judgment for the respondent.

The grounds of appeal

[14] The appellant now brings an appeal from that decision on the following grounds:

(a) the Supreme Court erred in law in finding that the Work Health Court had asked itself the wrong question, and the Supreme Court erred in its formulation of the correct question;

(b) the Supreme Court erred in law in finding there was no evidence upon which it could be concluded that the respondent accepted liability to pay workers compensation benefits for incapacity resulting from a consequential psychological condition;

(c) the Supreme Court erred in law in finding there was no evidence upon which it could be concluded that the appellant had ever claimed weekly benefits for a consequential psychological condition;

(d) the Supreme Court erred in law in finding that the appellant was required to give notice pursuant to s 80 of the *Return to Work Act* of a consequential psychological condition productive of incapacity;

(e) the Supreme Court erred in law in finding that the consequent psychological injury was a separate and discrete "injury";

(f) the Supreme Court erred in law in finding that the Work Health Court had failed to determine an issue on the pleadings, when no point was raised as a ground of appeal; and

(g) the Supreme Court erred in law in finding that the Work Health Court failed to give adequate reasons for decision.

The nature of this appeal

[15] It is convenient to restate at the outset the principles governing the nature of this appeal, and the nature of appeals from the Work Health

Court (now Local Court) to the Supreme Court. Appeals from the Local Court to the Supreme Court in proceedings brought under the *Return to Work Act* are restricted under the terms of s 116 of that Act to "a question of law". The effect of that restriction was described by Mildren J in *Tracy Village Sports & Social Club v Walker*[2], and repeated by this Court in *Wilson v Lowery*[3] in the following form:

> (1) In the process of arriving at an ultimate conclusion a trial judge goes through a number of stages. The first stage is to find the preliminary facts. This may involve the evaluation of witnesses who gave conflicting accounts as to those facts. If the trial judge prefers one account to another, that decision is a question of fact to be determined by him and is not reviewable on appeal. It may be that the reason given for preferring one witness to another is patently wrong. Nevertheless, no appeal lies: *R v District Court of the Metropolitan District Holden at Sydney; Ex parte White* (1966) 116 CLR 644 at 654; *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 156; *Haines v Leves* (1987) 8 NSWLR 442 at 469-470.
>
> (2) Regardless of the trial judge's reasons, if there is evidence which, if believed, would support the finding, there is no error of law: *Nicolia v Commissioner of Railways (NSW)* (1970) 45 ALJR 465.
>
> (3) If, on the other hand, 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 (for example, that injury by accident arose out of the course of the employment, or that the failure to give notice was occasioned by mistake), there is an error of law: *Nicolia v Commissioner of Railways* (supra); *Tiver Constructions Pty Ltd v Clair* (supra), per Martin and Mildren JJ (at 145-146); *Haines v Leves* (supra) (at 156).
>
> (4) But, a finding of fact cannot be disturbed on the basis that it is "perverse", or "against the evidence or the weight of the evidence or contrary to the overwhelming weight of evidence". Nor may this Court review a finding of fact

2 (1992) 111 FLR 32.

3 (1993) 4 NTLR 79.

merely because it is alleged to ignore the probative force of evidence which is all one way, even if no reasonable person could have arrived at the decision made, and even if the reasoning was demonstrably unsound: *Haines v Leves* (at 469-470).

(5) The second stage is the drawing of inferences by the trial judge from the primary facts to arrive at secondary facts. This is subject to the same limitations that apply to primary facts.

(6) If there are no primary facts upon which a secondary fact could be inferred, and the secondary fact is crucial to the ultimate finding as to whether or not the case fell within the words of the statute, there is an error of law. If there are primary facts upon which a secondary fact might be inferred, there is no error of law.

(7) It is not sufficient that an appellate court would have drawn a different inference from those facts. The question is, whether there were facts upon which the inference might be drawn. If a tribunal draws an inference which cannot reasonably be drawn, it errs in point of law and its decision can be reviewed by the courts: *Instrumatic Ltd v Supabrase Ltd* [1969] 1 WLR 519 at 521; [1969] 2 All ER 131 at 132, Lord Denning MR, with whom Edmund Davies LJ and Phillimore LJ agreed; *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14.[4]

[16] That statement of principles is concerned largely with the fact-finding process. When dealing with the distinction between questions of fact and law in the process of statutory interpretation, in *Collector of Customs v Agfa-Gevaert Ltd*[5] the High Court stated that the question whether a statute uses a word or phrase in any sense other than that which it has in "ordinary speech" is always a question of law.[6] In the course of that decision, the Court also gave general endorsement[7] to the

4 *Wilson v Lowery* (1993) 4 NTLR 79 at 84-5.

5 (1996) 186 CLR 389 at 397.

6 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 397.

7 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 396-7.

following principles from *Collector of Customs v Pozzolanic Enterprises Pty Ltd*[8]:

(a) the ordinary or non-technical meaning of a word is a question of fact;

(b) the meaning of a technical legal term is a question of law; and

(c) the question whether facts as found fall within the provision of a statutory enactment properly construed is generally a question of law.

[17] That third principle is subject to some qualification. A finding that facts come within the ordinary or non-technical meaning of a statutory word or phrase is one of fact which can be disturbed only if: (a) there is no evidence to support the findings of fact;[9] (b) if the trial court has misdirected itself in law;[10] or (c) if the finding of fact is required by the statute to be determined through the application of a correct legal process requiring, for example, procedural fairness or taking relevant considerations into account.[11]

[18] In the subsequent decision in *Vetter v Lake Macquarie City Council*[12], the High Court dealt specifically with the scope of an appeal confined

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8 (1993) 43 FCR 280.

9 *Australian Gas Light Company v Valuer-General* (1940) 40 SR (NSW) 126 at 138.

10 *Australian Gas Light Company v Valuer-General* (1940) 40 SR (NSW) 126 at 138.

11 Gageler S, *What is a question of law?* (2014) 43 AT Rev 68.

12 (2001) 202 CLR 439.

to questions of law from a trial court exercising workers compensation jurisdiction. The plurality made the following observations in that respect:

> Whether facts as found answer a statutory description or satisfy statutory criteria will very frequently be exclusively a question of law. To put the matter another way … whether the facts found by the trial court can support the legal description given to them by the trial court is a question of law. However, not all questions involving mixed questions of law and fact are, or need to be susceptible of one correct answer only. Not infrequently, informed and experienced lawyers will apply different descriptions to a factual situation.
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> ….
>
> [W]hen it is necessary to engage in a process of construction of the meaning of a word (or phrase) in a statute a question of law will be involved, but … the question may be a mixed one of fact and law … [A] question exclusively of law arises … if, on the facts found only one conclusion is open.[13]

[19] In *Wilson v Lowery* this Court considered the nature of an appeal from the Supreme Court to the Court of Appeal in a workers compensation matter. The Court observed that although s 51 of the *Supreme Court Act* (NT) governed such appeals in a general sense, and does not restrict appeals to questions of law, this Court's function on the hearing of an appeal from the Supreme Court in a workers compensation matter should be confined in the same way as an appeal from the Local Court to the Supreme Court.[14] In other words, this Court is confined to determining whether the Supreme Court was right or wrong. This Court does not enter into its own fact-finding process,

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13 *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at [24], [27].

14 *Wilson v Lowery* (1993) 4 NTLR 79 at 83-4.

or revisit findings of fact made by the Local Court except to the extent they may be infected by error of law.

The operation of s 69 of the *Return to Work Act*

[20] The notice in question was served pursuant to s 69 of the *Return to Work Act*, which provided relevantly:[15]

> **Cancellation or reduction of compensation**
>
> (1) Subject to this Subdivision, an amount of compensation under this Subdivision shall not be cancelled or reduced unless the worker to whom it is payable has been given:
>
> (a) 14 days notice of the intention to cancel or reduce the compensation and, where the compensation is to be reduced, the amount to which it is to be reduced; and
>
> (b) a statement in the approved form:
>
> (i) setting out the reasons for the proposed cancellation or reduction;
>
> (ii) to the effect that, if the worker wishes to dispute the decision to cancel or reduce compensation, the worker may, within 90 days after receiving the statement, apply to the Authority to have the dispute referred to mediation;
>
> (iii) to the effect that, if mediation is unsuccessful in resolving the dispute, the worker may appeal to the Court against the decision to cancel or reduce compensation;
>
> (iv) to the effect that, if the worker wishes to appeal, the worker must lodge the appeal with the Court within 28 days after receiving a certificate issued by the mediator under section 103J(2);
>
> (v) to the effect that the worker may only appeal against the decision if an attempt has been made to resolve the dispute by mediation and that attempt has been unsuccessful; and

15 Section 69 of the *Return to Work Act* was amended by s 16 of the *Workers Rehabilitation and Compensation Legislation Amendment Act 2015* (Act No. 9, 2015). That amendment does not bear on the issues for determination in this matter.

(vi) to the effect that, despite subparagraphs (iv) and (v), the claimant may commence a proceeding for an interim determination under section 107 at any time after the claimant has applied to the Authority to have the dispute referred to mediation.

(2) Subsection (1) does not apply where:

(a) the person receiving the compensation returns to work or dies;

(aa) the person receiving the compensation fails to provide to his or her employer a certificate under section 91A within 14 days after being requested to do so in writing by his or her employer; or

(b) the medical certificate referred to in section 82 specifies that the person receiving the compensation is fit for work on a particular date, being not longer than four weeks after the date of the injury in respect of which the claim was made, and the person fails to return to work on that date or to provide his or her employer on or before that date with another medical certificate as to his or her incapacity for work;

(c) the payments of compensation were obtained by fraud of the person receiving them or by other unlawful means; or

(d) the Court orders the cancellation or reduction of the compensation.

(3) Where compensation is to be cancelled for the reason that the worker to whom it is paid has ceased to be incapacitated for work, the statement under subsection (1) shall be accompanied by the medical certificate of the medical practitioner certifying that the person has ceased to be incapacitated for work.

(4) For the purposes of subsection (1)(b), the reasons set out in the statement referred to in that subsection shall provide sufficient detail to enable the worker to whom the statement is given to understand fully why the amount of compensation is being cancelled or reduced.

[21] Following the commencement of the legislation (originally styled as the *Work Health Act*), a considerable body of authority developed concerning the operation of the s 69 cancellation process. So far as is

relevant for these purposes, the principles expressed in that body of authority may be summarised as follows:

(a) A notice cancelling or reducing compensation for loss of earning capacity (weekly benefits) for the reason that the worker has ceased to be incapacitated for work must sufficiently state the reasons for that cancellation or reduction and be accompanied by a medical certificate in accordance with s 69(3). There must be substantial, if not strict, compliance with those requirements.[16]

(b) A worker may bring an "appeal" to the Local Court (formerly Work Health Court) against a decision to cancel or reduce weekly benefits.[17]

(c) A notice which fails to state sufficiently the reasons for the cancellation or reduction and/or which is not accompanied by a compliant medical certificate will be invalid and ineffective in terminating the worker's right to receive weekly payments of compensation.[18]

(d) It is open to an employer to guard against the contingency that a notice may be found to be invalid for formal reasons by bringing a

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16 *Collins Radio Constructors v Day* (1998) 143 FLR 425; *Ju Ju Nominees Pty Ltd v Carmichael* (1999) 9 NTLR 1.

17 *JH Constructions Pty Ltd v Davis* (unreported, SCNT, 3 November 1989); *Davison v Totalisator Administration Board* (1988) 56 NTR 8; *Morrisey v Conaust Ltd* (1991) 1 NTLR 183; *Foresight Pty Ltd v Maddick* (1991) NTLR 209.

18 *Collins Radio Constructors v Day* (1998) 143 FLR 425; *Ju Ju Nominees Pty Ltd v Carmichael* (1999) 9 NTLR 1; *Newton v Masonic Homes Inc* [2009] NTSC 51.

"counterclaim" to the worker's "appeal" asserting the substantive case for the cancellation or reduction.[19]

(e) If the notice is valid, or if it is invalid but a counterclaim asserting the same ground is made, the employer bears the onus of establishing the change of circumstances warranting the cancellation or reduction of the weekly benefits. If the notice is valid and the reason for cancellation is an assertion that the worker has ceased to be incapacitated for work, the employer assumes the burden of proving the cessation of total incapacity.[20] If the employer fails to establish the change in circumstances, it will be required to continue the payment of weekly benefits until those payments are lawfully cancelled or reduced.[21]

The formal validity of the notice of cancellation

[22] Against that background, the first issue which arose for determination in the proceedings below was the formal validity of the notice of cancellation. The first six grounds of appeal are directed to the Supreme Court's finding that the notice of cancellation was valid. That challenge resolves ultimately to the question whether the notice sufficiently stated the reasons for the cancellation and whether it was

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19 *Schell v Northern Territory Football League* [1995] NTSC 58; (1995) 5 NTLR 1 at 6.3; *Disability Services v Regan* [1998] NTCA 77; (1998) 8 NTLR 73 at 78-79 per Mildren J; *Alexander v Gorey & Cole Holdings Pty Ltd* [2002] NTCA 7; (2002) 171 FLR 31 at [30].

20 *Ju Ju Nominees Pty Ltd v Carmichael* (1999) 9 NTLR 1; *Morrisey v Conaust Ltd* (1991) 1 NTLR 183; *AAT Kings Tours Pty Ltd v Hughes* (1994) 4 NTLR 185; *Disability Services of Central Australia v Regan* (1998) 8 NTLR 73.

21 *Disability Services of Central Australia v Regan* (1998) 8 NTLR 73.

accompanied by a compliant medical certificate. A number of preliminary matters of general principle must be understood before proceeding to an examination of those issues.

[23] First, a worker will not ordinarily be required to make a further claim for workers compensation for the consequences of a secondary or consequential injury which arises from the primary injury for which a claim has already been made and accepted.[22] This is not to say that no distinction may be drawn between a primary injury and an injury consequential on that primary injury. The payment of compensation in respect of an "injury" will not necessarily be with reference to all conditions suffered by a worker following a work-related injury.[23]

[24] Secondly, although not required to make a fresh claim, a worker is required to give notice to the employer of any secondary or consequential injury which the worker says is a sequela to the original injury.[24] While an employer who receives a claim for compensation

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22 See, for example, *Van Dongen v Northern Territory of Australia* [2009] NTSC 1 at [40], [43]. It is also the case that as a matter of causation, the total condition resulting from an injury and subsequent remedial or surgical procedures is usually treated as being attributable to the original injury: see *D & W Livestock Transport v Smith* (1994) 4 NTLR 169.

23 See *Canute v Comcare* (2006) 226 CLR 535 at [9]-[10], [34]. That matter also involved an adjustment disorder secondary to or consequential on an initial back injury. The definition of "injury" in the *Return to Work Act* is in similar terms to the definition of that same term in the *Safety, Rehabilitation and Compensation Act 1988* (Cth). The worker in that case was asserting that he could make a second claim for permanent impairment arising from the psychological injury despite having already made claim and received payment for permanent impairment arising from the initial injury. It is in that sense the reverse of the contention made by the appellant in the present case, which is that the payment of weekly benefits for the first injury was properly characterised as payment with respect to the secondary or consequential injury as well.

24 See, for example, *Van Dongen v Northern Territory of Australia* [2009] NTSC 1 at [41].

shall be deemed to have been given notice of the injury to which it relates[25], the operation of that deeming provision is limited to the injury notified in the claim. Where the injury notified in the claim is a physical injury, there remains an obligation to provide notice in relation to any subsequent psychological injury said to arise from the physical injury. It was to this matter that Southwood J was adverting in *Van Dongen v Northern Territory of Australia* [26] when his Honour observed (footnotes omitted):

> The third reason why the appellant's first argument cannot be sustained, even assuming the appellant's mental injury was a sequela of his physical injuries, is the appellant was required to give notice to the employer of his mental injury in accordance with s 80 and s 81 of the Act. As the appellant's mental injury was a separate and discrete injury which resulted in him being partially incapacitated, the appellant was required to give notice to the respondent, as soon as practicable, of the date on which his mental injury occurred and the cause of his mental injury. He failed to do so. While it may not be necessary to make a further claim for workers compensation for a sequela of an injury which results in incapacity, the requirement for a worker to give notice of injury to the employer under s 80 of the Act is a continuing obligation. Notice is required to be given of any injury, including any sequela, which results in incapacity for which compensation is claimed. There is no entitlement to compensation unless such notice is given.[27]

[25] Thirdly, although an employer may make a general acceptance of liability under s 85 of the *Return to Work Act* when a claim is initially made for the primary injury, and a claim is for all compensation to

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25 *Return to Work Act*, s 80(2).

26 [2009] NTSC 1.

27 *Van Dongen v Northern Territory of Australia* [2009] NTSC 1 at [41].

which the worker may be entitled, it does not follow that the employer thereby accepts in respect of that injury a liability to make payment of every type of compensation for which the Act provides. It also does not follow that by a general acceptance of liability under s 85 of the *Return to Work Act* the employer thereby accepts a liability to make payment of a particular type of compensation for any secondary or consequential injury asserted. It was to this issue that Mildren J was adverting in *Newton v Masonic Homes Inc*[28] when his Honour observed:

> As to the psychological injury, it was submitted that the appellant was referred by the respondent's insurer to a clinical psychologist, Dr Jan Isherwood-Hicks (see the reports of Dr Isherwood-Hicks Ext W22). She continued to have treatment in the form of a number of consultations between August 2006 and February 2008 paid for by the insurer. The last report from Dr Isherwood-Hicks dated 11 February 2008 requested approval for a further five consultations and/or until settlement of her claim was finalised.
>
> The learned Magistrate found that because these issues were before the Court on the worker's application and outside the appeal under s 69, there was an "evidential burden" upon the worker to prove that these were injuries consequential upon the injury to the right hand. Further, the learned Magistrate found that the respondent employer had never accepted responsibility for these "consequential injuries" in the past. Counsel for the appellant, Ms Gearin, submitted that this was an error because the burden of proof rested upon the respondent employer. Her submission depended upon a submission that the employer had accepted the consequential injuries and paid compensation in respect of them and therefore the onus rested upon the employer to establish a change of circumstances.
>
> Counsel for the respondent, Ms Kelly SC, submitted that there was no evidence of acceptance of responsibility by the employer for the consequential injuries and, in any event, there was no plea (or even argument) that the respondent's conduct raised an estoppel against the employer. Reliance was placed upon a decision of the

28 [2009] NTSC 51.

> Work Health Court that the onus is on the worker to establish that a particular consequence is in fact a sequela of the injury.
>
> In my opinion, the Work Health Court was right as to who bore the onus of proof. The worker specifically pleaded that the injury to the left hand and the psychological injury were sequelae to the injury to the right hand and sought declarations accordingly. As such, the worker by pleading her case in this way bore both the legal and the evidentiary onus of proof. This ground of appeal is dismissed. [29]

[26] Fourthly, and as the Supreme Court at intermediate level in this matter observed, s 69 is concerned exclusively with the cancellation or reduction of weekly benefits.[30] So, an employer is not required to serve a notice pursuant to s 69 in the event that it does not intend to continue paying compensation for a particular form of medical treatment, or in the event that it rejects a claim for compensation for permanent impairment. Equally, the fact that an employer has paid weekly benefits in respect of a primary injury does not require that any cancellation or reduction of those payments must also be directed to any secondary or consequential injury regardless of whether weekly benefits have previously been paid in respect of that secondary injury. The obverse is also true. By way of example, an employer who wishes to cancel weekly benefits being paid in respect of a secondary psychological injury, in circumstances where the primary physical injury is in remission, is not required to express the reasons for cancellation with reference also to the primary physical injury.

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29 *Newton v Masonic Homes Inc* [2009] NTSC 51 at [21]-[24].

30 *MacMahon Contractors Pty Ltd v Lee* [2017] NTSC 33 at [40].

[27] Finally, s 69 is a purely procedural provision.[31] It does not confer upon a worker a right to continue to receive weekly payments beyond that period of time when the worker ceases to be incapacitated, or where the incapacity is no longer causing financial loss such as to entitle the worker to weekly compensation. In addition, the cancellation of weekly benefits by that mechanism does not preclude a worker from making a substantive application to the Local Court for a determination of his or her entitlement, including in relation to a secondary or consequential injury.

[28] The appellant's submissions concerning the operation of s 69 of the *Return to Work Act* fall to be considered having regard to those principles.

[29] There was no dispute that the notice was one cancelling the payment of weekly benefits which set out the reason for the proposed cancellation; that the compensation was cancelled for the reason that the worker had ceased to be incapacitated for work; and that the notice was accompanied by a medical certificate certifying that the worker had ceased to be incapacitated for work. The issue for determination was whether, in these circumstances, the statement of reasons (including the medical certificate) for the cancellation of weekly compensation satisfied the statutory formulation in s 69(4) of the *Return to Work Act*

31 See *Morrissey v Conaust Ltd* (1991) 1 NTLR 183 at 189.

by providing "sufficient detail to enable the worker to whom the statement is given to understand fully why the amount of compensation is being cancelled or reduced".

[30] The Work Health Court described the matter for determination in the following terms:

> The issue that needs to be considered and determined is whether the employer's acceptance of the worker's claim for the physical back injury included the psychological injury that the worker alleges he suffered as a result of the back injury. Unless the employer accepted liability for the psychological injury, the validity of the notice of decision cannot be impugned on the ground that … the notice [and] the accompanying medical certificate failed to state that the worker had ceased to be incapacitated as a result of psychological injury. If the employer's acceptance of the back injury is found not to have included the psychological injury, then the notice of decision must be found to be valid.[32]

[31] This was to misstate the question, or at least to conflate a number of discrete issues. The Work Health Court went on to observe that the issue for determination involved a question of mixed law and fact. That observation was correct in the sense that it was necessary for the resolution of the matter to find the relevant facts, and then to find whether those facts as found satisfied the formulation in the *Return to Work Act*. However, error in the second step would not necessarily, or even usually, involve a question of fact. In particular, the question will be one of law where the trial court has misdirected itself as to

32 Reasons for Decision delivered on 18 March 2016 at [29].

what is required to constitute a compliant medical certificate and an adequate statement of reasons for these purposes.

[32] While it is correct to say that a claim for compensation is a claim for all benefits available under the Act, it does not follow that injury, notice and claim entitle a worker to any particular benefit. That will depend upon the circumstances. If, following the acceptance of a claim, a worker seeks compensation for the costs of medical treatment, and the employer considers that medical treatment either unnecessary or unrelated to the injury, the worker would be required to pursue that claim by making application pursuant to s 104 of the *Return to Work Act* and proving the entitlement. Similarly, if a worker seeks compensation for the cost of medical treatment for a secondary or consequential injury, and the employer takes the view that there is no consequential injury or that it is unrelated to the injury in respect of which the claim was made, the worker would again be required to make application and prove that entitlement.

[33] The same may be said of the proposition that once a worker has established an initial incapacity for work as a result of an injury the employer is required to continue paying weekly benefits for incapacity where there is no limitation on the ability to undertake paid employment referable to the condition for which the employer recognised the incapacity and instituted the payment of weekly benefits. In circumstances where the condition for which weekly

benefits are being paid has resolved, an employer may cancel weekly benefits and express the reasons for cancellation with reference to the relevant injury. If the worker asserts an inability or limited ability to undertake paid employment referable solely to a secondary or consequential injury for which the employer has not paid weekly compensation, the employer is not required to express the reasons for cancellation with reference also to the secondary injury. The worker would be required to pursue that claim by lodging an appeal against cancellation, or by making application pursuant to s 104 of the *Return to Work Act*, and proving the entitlement.

[34] As the Supreme Court at intermediate level stated:

> … In order to decide whether the appellant was obliged to give notice under s 69 that weekly benefits were being cancelled because "the worker had ceased to be incapacitated for the secondary or consequential psychological injury", the question which needs to be answered is whether benefits had ever been paid to the respondent under s 65 for any incapacity for work as a result of a psychological injury.
>
> The answer to that question is "no". There is simply no evidence that the appellant ever accepted any liability to pay benefits under s 65 as a result of any claimed incapacity for work as a result of a psychological injury. Indeed there is no evidence that the respondent ever claimed s 65 benefits as a result of such an injury.
>
> At no stage did the appellant receive notification from the respondent that he claimed to be incapacitated from work as a result of any psychological condition. All medical certificates submitted in support of the claim for weekly benefits described the injury as "[l]umbar back pain". None of them made any reference to any incapacity for work as a result of a psychological condition.
>
> Part of his Honour's reasoning process is this:

> "Having been put on clear notice of the occurrence/existence of a secondary or consequential injury, and while continuing to pay weekly benefits in relation to the admitted claim in respect of the physical back injury, as a matter of logic and common sense the employer must be taken to have accepted liability for the second or consequential injury."
>
> As the appellant submitted, in this paragraph his Honour has conflated awareness with acceptance of liability. It does not follow as a matter of logic from the mere fact that the appellant has been put on notice of the existence of something, that the appellant has accepted liability for that thing. However, leaving that aside, as a matter of law, the appellant was obliged to continue paying weekly benefits to the respondent until it issued a notice of cancellation of such benefits under s 69 of the Act. The continuation of such payments after the appellant was aware that the respondent claimed to have a psychological injury cannot, therefore, give rise to an inference that the appellant had accepted that the respondent had suffered any incapacity for work as a result of any psychological injury for which the appellant was liable to pay compensation under s 65.[33]

[35] With respect, that analysis should be accepted as correct. The fact that various medical practitioners who had reported on the appellant's back injury questioned whether there was some "non-organic pathology" did not establish that the appellant suffered from a psychological condition which was productive of incapacity. The fact that the respondent's insurer had paid for the appellant to participate in a pain management program and counselling during the course of the mediation process did not operate as an acceptance by the respondent that there was any loss of earning capacity attributable to a secondary or consequential psychological injury. That is so even though those matters might

33 *MacMahon Contractors Pty Ltd v Lee* [2017] NTSC 33 at [40]-[44].

indicate that the employer is aware of and "on notice" of the secondary or consequential injury.

[36] So far as the statement of reasons in the notice of cancellation was concerned, the statutory requirement was that it "provide sufficient detail to enable the worker to whom the statement is given to understand fully why the amount of compensation is being cancelled or reduced".[34] The reasons given for the cancellation were in the following terms:

> 1. On 21 November 2012 you sustained an injury to your back out of or in the course of your employment.
> 2. You submitted a workers' compensation form on 25 February 2013 and liability was accepted by GIO on behalf of the Employer.
> 3. On 8 September 2014 you were examined by Associate Professor Gregory Day. A copy of his report dated 12 September 2014 is attached.
> 4. In Associate Professor Gregory Day's opinion it is likely that the strain in the lumbar spine has resolved. He further states that there is no indication for any further physical treatment (pages 6 & 5 of the report respectively).
> 5. On 9 September 2014 Associate Professor Day certified that you had ceased to be incapacitated for work as a result of your work injury on the following basis:
>   a. Your work injury has resolved;
>   b. If you are still incapacitated for work, then such incapacity is due to other factors and not related to the injury;
>   c. You do not require any further treatment for the work injury. Please see medical certificate attached.
> 6. As your work injury has resolved you are no longer entitled to medical and like expenses.

34 *Return to Work Act*, s 69(4).

[37] The test whether the notice sufficiently stated the reasons for the cancellation or reduction, and so complied with the requirement in s 69(1)(b) of the *Return to Work Act*, is an objective one. It does not depend upon the worker's level of education, and "there will be many occasions where workers will need to consult a solicitor before being able to fully understand why the compensation is being reduced or cancelled".[35] On an objective appraisal, the reasons for the cancellation are explicit. There was no obligation on the respondent to include in those reasons an examination of a secondary or consequential psychological injury which had not previously been recognised as productive of incapacity, and for which weekly benefits had never been paid.

[38] So far as the medical certificate is concerned, the statutory requirement was that the statement of reasons "shall be accompanied by the medical certificate of the medical practitioner certifying that the person has ceased to be incapacitated for work". The medical certificate served with the notice provided as follows:

> I, Associate Professor Gregory Day, Medical Practitioner, HEREBY state that I examined Mitchell Lee ("the Worker") in relation to his work-related injury, namely a strain in the lumbar spine ("the injury") that he sustained on or about 21 November 2012.
>
> As a result of my examination I CERTIFY that:

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35 *Newton v Masonic Homes Inc* [2009] NTSC 51 at [16].

The Worker has ceased to be incapacitated for work as a result of the injury.

1. The Worker's injury as referred to above has resolved.
2. If the Worker is still incapacitated for work, then such incapacity is due to other factors not related to the injury.
3. The Worker does not require any further treatment for the injury.

[39] For the same reasons given concerning the sufficiency of the statement of reasons, there was no obligation on the respondent to provide a certification that the appellant had ceased to be incapacitated by an injury for which weekly benefits had never been paid. The appellant's contention that the secondary or consequential psychological injury was productive of incapacity postdates the notice of cancellation. That assertion does not sustain a finding that the notice of cancellation was defective.

[40] Those grounds of appeal directed to the finding that the notice of cancellation was valid are dismissed.

The decision to dismiss the Counterclaim

[41] Ground 7 in the Notice of Appeal is that the Supreme Court erred in law in finding that the Work Health Court failed to give adequate reasons for decision. That ground is clearly directed to the finding that the Work Health Court failed to give proper reasons for the decision to dismiss the Counterclaim, from which an inference could be drawn that the Work Health Court failed to address the question whether the surveillance evidence and the admissions made by the appellant in

cross-examination led to the inevitable conclusion that he was not incapacitated for work at the relevant time.[36]

[42] It was assumed by the Work Health Court that the employer's Counterclaim only and necessarily fell for consideration if the court found that the notice of cancellation was invalid.[37] The Supreme Court assumed that, having allowed the appeal in relation to the validity of the notice, it was unnecessary to consider the appeal against the decision to dismiss the Counterclaim, but went on to determine that matter anyway.[38] These assumptions must be considered in the statutory context in order to determine whether it is necessary for the purposes of this appeal to go on to consider the decision to dismiss the Counterclaim.

[43] Where an employer cancels the payment of weekly compensation pursuant to s 69 of the *Return to Work Act* the worker may "appeal" against that cancellation. Although characterised as an appeal by the worker, in such an application the employer carries the onus of establishing the change of circumstances warranting the cancellation or reduction of the weekly compensation. If that change of circumstance is alleged in the notice to be that the worker has ceased to be incapacitated for work, the employer carries the burden of proving both

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36 *MacMahon Contractors Pty Ltd v Lee* [2017] NTSC 33 at [84].

37 Reasons for Decision delivered on 18 March 2016 at [30].

38 *MacMahon Contractors Pty Ltd v Lee* [2017] NTSC 33 at [59].

that there has been compliance with the procedural requirements of s 69 and that there has been a cessation of total incapacity for work[39] (subject to the qualification discussed above concerning the condition for which the weekly benefits were being paid).

[44] If the employer is successful in discharging those onera, the onus of proving any partial incapacity passes to the worker. Alternatively, if the notice is found to be invalid, or if the employer fails to establish the cessation of total incapacity, it will be required to continue to make weekly payments of compensation until lawfully permitted to cease those payments by giving a fresh notice under s 69 or by making a substantive application under s 104 of the *Return to Work Act* and procuring an order in those terms.

[45] However, under the body of authority which has built up around the operation of s 69 of the *Return to Work Act* (referred to earlier), if the worker has in the pleading widened the scope of the issues beyond an appeal against cancellation under s 69, the employer is not limited to establishing a cessation of incapacity and may raise other grounds by way of answer to the "appeal". Those matters might include, by way of example, the question whether the injury arose out of or in the course of employment in the first place. That potential to broaden the scope of the issues for determination, and the requirement for strict

39 *Ju Ju Nominees Pty Ltd v Carmichael* (1999) 9 NTLR 1.

compliance with the procedural requirements of s 69 of the *Return to Work Act*, led to a practice by which workers sought to confine appeals to a challenge to the notice.

[46] As already described above, that practice has led in turn to employers filing a counterclaim raising any other issues they seek to ventilate in the context of the proceedings. The filing of a counterclaim affords two advantages. The first is that it permits an employer to establish a cessation of incapacity even where the notice is found to be invalid for failure to comply with the formal requirements of s 69 of the *Return to Work Act*. This is a significant matter, because strict compliance is required and invalidity has the consequence that the employer will be required to reinstate weekly compensation regardless of the merits of the cancellation or reduction. The second advantage is that an employer may raise other grounds by way of answer to an appeal even if the worker has not by his or her pleadings broadened the scope of the issues in contest.

[47] The worker's "appeal" in this case was brought by way of Statement of Claim dated 15 May 2015. The document appears by paragraph 21 to restrict the challenge to the cancellation to the formal basis that the Form 5 notice was "invalid and unlawful" because it did not make reference to the secondary psychological injury. However, the Statement of Claim also pleads that both the back injury and the psychological injury arose out of or in the course of employment

(paragraphs 6 and 7), and seeks the reinstatement of weekly benefits from 10 December 2014 to date and continuing on the basis of total loss of earning capacity (paragraphs 25.1 and 25.3) and the ongoing payment of medical expenses (paragraphs 25.2 and 25.4). In accordance with the authority from this Court, a pleading in those terms will operate to broaden the scope of the issues beyond an appeal against cancellation or reduction.[40]

[48] Despite the content of the appellant's pleading, his counsel opened at the trial on the basis that the worker's case was pleaded as a strict appeal.[41] Counsel for the respondent took no issue with that proposition, and the respondent is thereby bound to that position. In any event, the respondent's Defence and Counterclaim clearly placed a number of matters in contest. The first was that the secondary or consequential psychological injury did not arise out of or in the course of employment (paragraphs 3.2, 6.2 and 13.4 of the Defence). The second was that, if the appellant sustained a secondary psychological injury, it was not incapacitating him at the date of the notice and/or did not give rise to a loss of earning capacity (paragraph 13.3 of the Defence, paragraph 5 of the Counterclaim). The third was that the appellant was no longer suffering from the physiological injury by 9 December 2014 (paragraph 2 of the Counterclaim) or, in the

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40 See, for example, *Disability Services of Central Australia v Regan* (1998) 8 NTLR 73.

41 Appeal Book 186.

alternative, the appellant was suffering from partial incapacity only on and from 9 December 2014 which was not productive of loss of earning capacity (paragraphs 3 and 4 of the Counterclaim). The Counterclaim sought various forms of relief in the alternative to give effect to those contentions.

[49] In the ordinary course, two possible outcomes would flow from those pleadings. On the first scenario, a finding that the notice was invalid would still require findings in relation to the other matters put into contest by the respondent's Counterclaim. The respondent would be required to prove the contentions in its Counterclaim that there was no incapacity and/or loss of earning capacity at the date of cancellation. On the second possible scenario, a finding that the notice was valid would require the respondent to establish that total incapacity had ceased. If the respondent was successful in establishing that, the onus would have shifted to the appellant to establish partial incapacity as at the date of the cancellation. The appellant would bear both the legal and the evidentiary onus of proof in establishing incapacity and loss of earning capacity in respect of that psychological injury.[42]

[50] The Work Health Court found that the notice was invalid, and that the respondent had not established the matters pleaded in its Counterclaim. As the Supreme Court found, and as we have confirmed, the notice was

42 See, for example, *Newton v Masonic Homes Inc* [2009] NTSC 51 at [21]-[24].

valid for the purpose we have specified; that is, for the purpose of cancelling the payment of weekly benefits in respect of incapacity attributable to the primary injury. The subsequent questions which should have presented to the Work Health Court, had it made the correct finding, were whether the respondent had established that total incapacity referable to the primary condition had ceased and, if so, whether the appellant had established partial incapacity (whether attributable to the back injury or the psychological injury). As the appellant ran his case at trial, however, he did not attempt to assert any continuing incapacity as a result of the back injury. His case was predicated entirely on the consequential psychological injury. The onus would then properly have been on the appellant to establish that the psychological injury arose out of or in the course of employment and that it was productive of incapacity at and following the date of cancellation. The appellant's application and Statement of Claim raised those issues for determination, even if it is accepted that it was restricted to a strict appeal against cancellation.

[51] However, that is not how the parties approached the matter at trial. During the course of closing submissions before the Work Health Court, counsel for the appellant submitted that:

> … if the employer's notice fails then the cancellation of benefits is invalid. So we then have to turn to the employer's

> counterclaim. Now, the employer bears the onus of proving the counterclaim as well.[43]

[52] No submission was made by the appellant concerning the position if the respondent's notice was found to be valid.

[53] During the course of the trial the respondent abandoned much of the relief sought in the Counterclaim and sought only declarations that the "accepted injury" had resolved on or about 9 December 2014 (the date of cancellation); and that the worker had ceased to be incapacitated for work as from 9 December 2014. During the course of final submissions in the Work Health Court, counsel for the respondent also submitted that it was only necessary to consider the Counterclaim in the event that the notice of decision was found to be invalid. The effect of the "pared back" Counterclaim was described in the following terms:

> Because the relief sought isn't relief that extends beyond the validity of the notice of decision, the counterclaim really is limited to declarations – is pressed in relation to these declarations – declarations as to the worker's incapacity as at the time that the notice of decision became operative. [44]

[54] Counsel for the respondent went on to say:

> So you only get to the counterclaim if you find that there is merit in the technical argument my friend advances about acceptance of the claim and therefore deficiency of the notice. When you get past that technical argument, we say the counterclaim allows you to consider the real factual merits of the case.

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43 Appeal Book 206.

44 Appeal Book 229.

> And the real factual merits of the case, and the evidence that is before your Honour, is very clear that there was absolutely nothing wrong with this fellow at the time the notice was given. He accepts that he was doing at his new job what he was doing in his old job.[45]

[55] Those submissions were based upon the shared misapprehension that the validity of the notice turned on whether the respondent had "accepted" a claim in relation to the secondary and consequential injury; and that there could be no finding that the notice was valid for the purposes of cancelling weekly benefits which left the question of incapacity to be determined in the context of the "appeal". As described above, the first issue for determination was whether in these circumstances the statement of reasons (including the medical certificate) for the cancellation of weekly compensation satisfied the statutory formulation in s 69(4) of the *Return to Work Act*. For the reasons already given, a positive answer to that question was not determinative of the live issues on the "appeal" of whether the psychological injury arose out of or in the course of employment, and whether that injury was productive of incapacity at the date of cancellation.

[56] Evidence in relation to whether the psychological injury was productive of incapacity at the date of cancellation was led during the course of the trial, and counsel for the appellant proceeded at trial on the basis that the worker was *dux litis* in those matters, but the Work

45 Appeal Book 230.

Health Court dealt with those matters on the basis that the respondent bore the onus of establishing on the balance of probabilities that the worker had ceased to be incapacitated at all as a result of that injury. Given the finding we have made in relation to the operation of the notice, that approach was in error.

[57] The Supreme Court's finding of error of law in the determination of the Counterclaim was expressed in the following terms (footnotes omitted):

> Natural justice requires a judge to give reasons for his decision, and a failure to give adequate reasons is an error of law.
>
> …
>
> There is a presumption that reasons given by a judge are all of the reasons for coming to the conclusion expressed, and inadequacy of the reasons may therefore lead to an inference that not all matters which should have been taken into account were taken into account and that the issues which were required to be addressed were not addressed.
>
> In my view, the bare statement by his Honour that "[t]here is no other evidence before the court that is sufficiently cogent … to prove that the worker had ceased to be incapacitated for work as at 9 December 2014" amounts to a failure to give proper reasons for the decision to dismiss the counterclaim from which an inference can be drawn that his Honour failed to address one of the principal contentions of the appellant at the trial – that the surveillance evidence and the admissions made by the respondent in cross-examination led to the inevitable conclusion that the respondent was not incapacitated for work at the relevant time. One can also infer that his Honour failed to take that surveillance evidence and those admissions into account except for the limited purpose of assessing the respondent's credit when determining whether the respondent had suffered a mental injury at all.[46]

46 *MacMahon Contractors Pty Ltd v Lee* [2017] NTSC 33 at [80]-[84].

[58] While it is true to say that a failure to give reasons may constitute an error of law, a failure of that type cannot be used to convert a finding of fact by a workers' compensation tribunal into a question of law susceptible to appeal. As we identified in the earlier discussion concerning the nature of an appeal of this type, regardless of the trial judge's reasons, if there is evidence which, if believed, would support the finding of fact, there is no error of law. In *Nicolia v Commissioner of Railways (NSW)*, Barwick CJ observed:

> Much has been said in argument as to the meaning of the learned [Workers' Compensation] Commission's reasons for judgment. It may be conceded that those reasons lacked clarity. But, in the first place the appeal will not turn on what his Honour said: it will turn on whether or not there was evidence before the Commission which, if believed, would support the award actually made…. The Commission's award found that the deceased died as a result of injuries received by him in the course of his employment. In my opinion there was evidence to support that award and, therefore, in my opinion, the Supreme Court, Court of Appeal Division was in error in setting aside that award.[47]

[59] Windeyer J came to a similar conclusion in the following terms:

> The judge of the Workers' Compensation Commission expressed his reasons for his conclusion in somewhat elliptical phrases, which have been subjected to critical analysis before us, but his Honour's conclusion of fact was clear enough …
>
> There was, I consider, evidence on which that decision could be based. It was not for us, as it was not for the Supreme Court to say whether it was correct in fact. To quote what was said in *St George Club Ltd v Hines* (1961), 35 ALJR 106, at p 107, that has been mentioned, "our problem is simply whether there was

47 *Nicolia v Commissioner of Railways (NSW)* (1970) 45 ALJR 465 at 466.

evidence that, if believed, was sufficient to warrant the decision of the Commission".[48]

[60] It is only where 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 that there will be an error of law. Once one proceeds beyond the finding that there was a failure to give proper reasons, the Supreme Court's criticism of the finding made by the Work Health Court on the Counterclaim was, in effect, that the finding was against the evidence or the weight of the evidence or contrary to the overwhelming weight of evidence, or that the reasoning was demonstrably unsound. Those matters do not constitute an error of law for these purposes.[49]

[61] However, for the reasons we have already given, the Counterclaim did not properly arise for consideration and the Work Health Court did fall into error of law by finding that the notice was invalid. That led to the consequent error that the question of incapacity fell to be determined in accordance with the Counterclaim and that the respondent bore the onus of establishing that incapacity referable to the psychological injury had ceased as at the date of cancellation. Although the Work Health Court heard evidence about the secondary or consequential mental injury, and the question of incapacity, its ultimate finding in that respect was confounded by the consequent error. As the Supreme

48 *Nicolia v Commissioner of Railways (NSW)* (1970) 45 ALJR 465 at 466.

49 *Haines v Leves* (1987) 8 NSWLR 442 at 469-470.

Court at intermediate level observed, the Work Health Court approached the matter on the basis that if the appellant had suffered a psychological injury then it must necessarily have resulted in an incapacity for work, and that the respondent did not get "past the post" in proving that the incapacity had ceased.[50]

[62] Once it is accepted that the notice was valid, and that the appellant did not assert any continuing incapacity by reason of the back injury, the issues which remain to be determined on the worker's application and Statement of Claim are:

(a) whether the psychological injury arose out of or in the course of employment; and

(b) if the answer to that first question is "yes", whether that injury was productive of incapacity and loss of earning capacity at the date of cancellation.

[63] The appellant bears both the legal and the evidentiary onus of proof in establishing those matters. As the Supreme Court observed, the assessment of those matters requires a consideration of the video surveillance evidence showing the appellant performing a full day's work; the appellant's admissions in cross-examination; the bearing of those matters on the substantive question of whether there was incapacity, not limited to their bearing on the appellant's credibility;

50 *MacMahon Contractors Pty Ltd v Lee* [2017] NTSC 33 at [69], [74]-[76].

and the significance of the evidence which demonstrated there was no physiological cause for the appellant's complaint of back pain.[51] It is neither possible nor appropriate for this Court to make the findings of fact necessary to resolve the questions which properly present for determination.

[64] The Supreme Court was correct in its finding concerning the validity of the notice cancelling weekly benefits, but wrong in relation to the consequences of that finding. The matter is remitted to the Local Court for further consideration in accordance with law.

Disposition

[65] The following orders are made:

1. The appeal is allowed.
2. Order (2) made by the Supreme Court on 3 May 2017 is set aside.
3. Orders 1 to 5 made by the Work Health Court on 28 June 2016 are set aside.
4. The issues remaining to be determined on the worker's application are remitted to the Local Court for further consideration in accordance with law.

[66] We will hear the parties if necessary in relation to the question of costs.

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51 *MacMahon Contractors Pty Ltd v Lee* [2017] NTSC 33 at [77], [84]-[85].