CATCHWORDS

WORKERS' COMPENSATION - cancellation or reduction of weekly payments - right of appeal to the Work Health Court - avenue of appeal

PRACTICE AND PROCEDURE - stated case - limits to the questions of law to be raised by stated case - refusal to express an abstract opinion on questions not squarely arising

Work Health Act 1986, ss.64, 65, 67, 69, 80, 82, 84, 85(2), 85(3), 85(9), 87, 91, 95, 104, 111, 112, 115, 118
Work Health Court Rules, r.13, 14
Worker's Compensation Ordinance 1949, s.7A (repealed)

Truswell v. Woods (1898) 24 VLR 742
Attorney-General v. Sillem (1864) 10 H.L.C. 724
Western Australian Coastal Shipping Commission and Stevedoring Employers of Australia Ltd v. Wallner (1979) 26 ALR 591
Edgar v. Pennell (1958) VR 450
Thiess Bros Pty Ltd v. Carbone & Anor (1976) 15 ACTR 15
Anchor Donaldson Limited v. Crossland (1929) AC 297
Sargood Bros v. The Commonwealth (1910) 11 CLR 258

JUDITH DAVISON
v.
TOTALIZATOR ADMINISTRATION BOARD

No. 274A of 1988

Coram: Gallop J.
24 August 1988.
Darwin.

IN THE SUPREME COURT OF THE

NORTHERN TERRITORY OF AUSTRALIA

No. 274A of 1988

BETWEEN:

JUDITH DAVISON

Worker

AND:

TOTALIZATOR ADMINISTRATION BOARD

Employer

CORAM: Gallop J.

24 August 1988.

O R D E R

(1) The Court answers the stated case as follows:

18(a)		Not answered.
(b)		Not answered.
(c)		Yes.
(d)	(i)	Not answered.
	(ii)	Section 111.
	(iii)	Not answered.
	(iv)	Not answered.
	(v)	Not answered.
(e)		Not answered.
(f)		See (c) above.

(2) The Court orders that the employer pay the worker's costs of the proceedings in the Work Health Court and the costs of the stated case in this Court.

IN THE SUPREME COURT OF THE

NORTHERN TERRITORY OF AUSTRALIA

No. 274A of 1988

BETWEEN:

JUDITH DAVISON

Worker

AND:

TOTALIZATOR ADMINISTRATION BOARD

Employer

CORAM: Gallop J.

REASONS FOR JUDGMENT

(delivered 24 August 1988)

This is a special case stated from the Work Health Court pursuant to s.115 of the Work Health Act 1986 (the Act). The terms of the special case as amended are:

1. The worker was employed by the employer as an operations supervisor from 22nd October, 1985.
2. On 7 April, 1987 the worker was certified as being unfit for work by Dr Richard Giese.
3. By letter from the insurer of the employer dated 13th May, 1987 the worker was advised that the employer accepted liability for the payment of weekly benefits under the Work Health Act ("the Act").

4. Some short time after 13th May, 1987 the employer commenced to pay weekly benefits under the Act.

5. On 28th May, 1987 the worker was examined by Dr A.F. Bromwich who provided a medical report dated 29th May, 1987 to the employer's insurer.

6. On 23rd July, 1987 the worker was examined by Dr A.F. Bromwich who provided a medical report dated 24th July, 1987.

7. On 19th August, 1987 the worker was examined in Brisbane by Dr Martin Devereaux who provided a medical report dated 9th November, 1987.

8. On 5 November 1987 the worker was examined by Dr A.F. Bromwich who provided a medical report dated 6th, November 1987.

9. By letter dated 10th November, 1987 and by notice under regulation 13 of the Regulations under the Act, the employer purported to cancel the weekly payments paid to the worker. The said cancellation was purportedly made pursuant to section 69 of the Act.

10. On 25th November, 1987 the worker was examined in Brisbane by Dr Martin Devereaux who provided a medical report dated 17th December, 1987.

11. On 26th November, 1987 the worker was examined in Brisbane by Dr S. Coleman who provided a medical report dated 7th December, 1987.

12. The worker, by her solicitors, made an application dated 2nd December, 1987 to the Work Health Court pursuant to sections 69 and 111 of the Act. The said

application was returnable before the Work Health Court on 30th December, 1987.

13. No answer was filed or served in response to the said application.

14. On 30th December, 1987 the application came on before the Work Health Court. The appeal (sic) was allowed pursuant to Rule 14 of the said Rules. The Court ordered as follows:-

    (1) The appeal (sic) be allowed. The respondent to pay compensation payments in the sum of $333.00 gross per week commencing on and from 28/11/87 and continuing.

    (2) The respondent pay section 73 expenses in the sum of $2,224.45.

    (3) Applicant to have her costs, those costs to be as taxed or agreed. Certified the matter was proper for the attendance of Counsel.

15. By application dated 15th January, 1988 to the Work Health Court the employer sought to have the determination of 30th December, 1987 set aside pursuant to Rule 17 of the Work Health Rules.

16. The said application was served on the worker's solicitors on 27th January, 1988 and made returnable on 28th January, 1988.

17. On 28th January, 1988 the said application came on for hearing before the Work Health Court. At the outset of the hearing Counsel for the employer raised an objection to the validity and existence of the worker's

right to make any appeal under the Act against the employer's decision to cancel weekly payments under section 69 of the Act. Counsel for the worker raised an objection to the validity of the employer's determination to cancel weekly payments.

18. The questions raised for consideration by way of special case stated are as follows:-

(a) Do any or all of the statutory requirements of sections 61, 68, 75 and 76 of the Act have to be complied with by an employer before the employer can cancel the workers weekly payments? If so, which section or sections?

(b) Must the employer specify the consideration it has given to the matters outlined in sections 61, 68, 75 and 78 of the Act in the reasons it is obliged to give the worker under section 69 of the Act?

(c) Does the worker have a right to appeal against or make application to the court in respect of the decision of the employer to cancel weekly payments under section 69(c) & (d) of the Act?

(d) If the worker does have a right to appeal or apply to the Work Health Court;

(i) what is the nature of the appeal or application to the Work Health Court;

(ii) pursuant to what section of the Act may such application be made;

(iii) is there a time limit for such application;

(iv) should the application be dealt with by the court in interlocutory proceeding or final determination;

(v) should the application be dealt with by the court in a formal or informal way.

(e) In considering such an application, what factors ought to be considered by the court or in particular should the court have regard to any of the following considerations:

(i) any or all of the requirements of section 61, section 68, section 65, section 75 and section 76 of the Act;

(ii) matters subsequent to the decision by the employer to terminate or reduce payments for service of the notice or the institution of the application.

(f) If there is no appeal or application available to the worker, or such appeal or application is refused, then:

(i) is the effect of the cancellation or the refusal of the appeal a final determination of the workers right to compensate (sic);

(ii) if it is not a final determination, then, in the case of the refusal of an application what right does the worker have to bring his claim for compensation before the court for a final determination.

It is to be noted from the special case that what gave rise to the case being stated was an application by the employer to have the determination of 30 December 1987 set aside pursuant to r.17 of the Work Health Court Rules made pursuant to s.95 of the Act.

As further stated in the case the worker's application came on before the Work Health Court on 30 December 1987 and in the absence of any appearance or answer filed on behalf of the employer, the application was determined against the employer pursuant to r.14 of the said Rules.

Rule 17 provides that a determination as the result of an application under r.14(5) may be set aside by the Work Health Court on such terms as to costs or otherwise as it thinks fit.

When the application to set aside the determination came on on 28 January 1988 the employer raised an objection to the validity and existence of the worker's right to make any appeal under the Act against the employer's decision to cancel weekly payments under s.69 of the Act. It was in those circumstances that the Work Health Court agreed to state the special case to this Court.

Section 69 of the Act reads:

"69. BENEFITS NOT TO BE ALTERED EXCEPT AFTER NOTICE

Subject to this Subdivision, except where -

(a) the person receiving it;

(i) ceases to be incapacitated; or

(ii) dies; or

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

an amount of compensation under this Subdivision shall not be cancelled or reduced unless the worker to whom it is payable has been given -

(c) 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;

(d) a statement in the prescribed form setting out the reasons for the proposed cancellation or reduction and indicating that the worker has a right to appeal against the decision to cancel or reduce the compensation."

Central to the questions raised by the special case is the true operation of s.69 of the Act. That this was the central issue before the Work Health Court is reflected in questions 18(c), (d) and (f) of the special case. However, the special case raises questions for consideration which arguably did not arise on the hearing of the application before the Work Health Court on 28 January 1988.

It is important to note that the power of the Work Health Court under s.115 of the Act to reserve a question of law for the consideration of this Court only applies to a question of law arising out of a proceeding under the Act. It is not appropriate to seek this Court's advice on questions which have not squarely arisen out of the proceeding in the Work Health Court. Indeed, there is no power under the Act to reserve a question of law for the consideration of this Court which arises otherwise than out of the proceeding in the Work Health Court.

In my opinion this Court should not express an abstract opinion but should only answer such questions submitted to it as are necessary to dispose of the proceeding before the Work Health Court (Truswell v. Woods (1898) 24 VLR 742).

It is necessary to construe s.69 in its overall context. The Preamble to the Act states that it is an Act

"to promote occupational health and safety in the Territory to prevent industrial injuries and diseases, to promote the rehabilitation and maximum recovery from incapacity of injured workers, to provide financial compensation to workers incapacitated from industrial injuries or diseases and to the dependants of workers who die as the results of such injuries or diseases, to establish certain bodies and a fund for the proper administration of the Act, and for related purposes".

The Act is divided into Parts and for present purposes it is sufficient to refer to Parts V and VI. Division 1 of Part V provides certain definitions. Division 2 is general. Division 3 provides for the amount of compensation for death, total incapacity and loss of earning capacity, permanent impairment, medical, surgical and rehabilitation treatment etc., and other rehabilitation. Division 5 provides for claim procedures and determination.

"Part VI - Work Health Court" is divided into Divisions and Division 4 is headed "Claims for Compensation". Division 5 is headed "Appeals to and Review by Court". Division 6 is headed "Reservations of Points of Law and Appeals to the Supreme Court".

I turn to the questions raised by the special case and deal first with Question 18(c):

> "(c) Does the worker have a right to appeal against or make application to the Court in respect of the decision of the employer to cancel weekly payments under s.69(c) and (d) of the Act."

It was common ground that the form of the statement provided for in s.69(d) is Form 5 as prescribed by

reg.13 of the Work Health Regulations made pursuant to the Act. Despite the wording of s.69(d) to the effect that the worker is to be given a statement "setting out the reasons for the proposed cancellation or reduction and indicating that the worker has a right to appeal against the decision to cancel or reduce the compensation", the words of the prescribed form, i.e. Form 5, addressed to the worker state "You have the right to contest this decision in the Work Health Court". No right of appeal as such is expressly provided by the Act against a decision to cancel or reduce an amount of compensation under the Act.

It was common ground that "right to appeal" within the meaning of s.69(d) means right to review or to challenge the employer's decision to cancel or reduce the compensation to the worker. The agreed construction of the phrase "right to appeal" in s.69(d) is, in my opinion, correct. There is nothing in the inherent meaning of the word "appeal" more than that contained in Lord Westbury's words in Attorney-General v. Sillem (1864) 10 H.L.C. at 724, "an appeal is the right of entering a superior court and invoking its aid and interposition to redress the error of the court below". In the present context it means the right of invoking the jurisdiction of the Work Health Court to redress the error of cancelling the worker's entitlement.

It seems to me that as a matter of construction s.69 provides for two situations. First, the amount of compensation may be cancelled or reduced without any notice to the worker if the worker (a) ceases to be incapacitated or dies; or (b) the payments of compensation were obtained by fraud of the person receiving them or by other unlawful

means. Secondly, the amount of compensation may be cancelled or reduced on 14 days' notice of the intention to cancel or reduce and, where the compensation is to be reduced, a statement in the prescribed form (Form 5) has been given to the worker setting out the reasons for the proposed cancellation or reduction, and indicating that the worker has a right to appeal i.e. contest or challenge the decision to cancel or reduce the compensation. To cancel within the meaning of s.69 is to rescind ab initio or to terminate an existing entitlement to compensation. It would, for instance, be appropriate to rescind ab initio where the payments of compensation were obtained by fraud or other unlawful means. Similarly it would be appropriate to terminate compensation where the worker ceased to be incapacitated or died. To cancel has either meaning, according to circumstances.

The substantial issue raised by the case stated is not so much the question raised by 18(c) because, as stated earlier, it was common ground that the worker does have a right to contest or challenge the decision of the employer to cancel or reduce weekly payments of compensation. The substantial question raised is that set out in 18(d) as to the nature of the proceedings - call it an appeal or a challenge or an application - which the worker is admittedly entitled to bring.

It was submitted on behalf of the employer that a worker wishing to exercise his right to contest or challenge the employer's decision may proceed pursuant to s.104 of the Act. On the other hand, it was submitted on behalf of the

worker that the appropriate procedure is that prescribed by s.111.

Section 104 is contained in "Division 4 - Claims for Compensation" in "Part VI - WORK HEALTH COURT" of the Act. It reads:

"104. APPLICATION

(1) A person who claims to be entitled to compensation liability for which is disputed under section 85(1)(d) may within 28 days after receiving advice of that fact under section 85(9), commence proceedings before the Court for the recovery of that compensation.

(2) Proceedings for the recovery of compensation may be commenced before the Court by application in the prescribed manner and form or, where there is no manner or form prescribed, in such manner or form as the Court approves."

The submission on behalf of the employer was that once an application is made by the worker pursuant to s.104 the following provisions of Division 4 relating to preliminary conferences are invoked and the worker would be afforded access to the Work Health Court as if the contest or challenge to the employer's decision were in effect an initial application for compensation.

The contrary submission on behalf of the worker was that the appropriate mechanism in the circumstances contemplated by the special case is provided by s.111 of the Act. Section 111 appears in "Division 5 - Appeals to and Review by Court" and is in the following terms:

"111. APPLICATION TO COURT

(1) A person who has a right to apply to the Court for a ruling or a right of appeal under this Act, or a right of review under this Act may, within the prescribed time and in the prescribed manner and form (or, where there is no manner or form prescribed, in such manner or form as the Court approves), apply to the Court for the ruling or a determination of the appeal or matter.

(2) An application referred to in subsection (1) shall be dealt with by the Court as expeditiously as the circumstances will allow."

Counsel for the worker submitted that s.104 provides the originating process for claims to entitlement to compensation, liability for which is disputed, whereas s.111 is directed to proceedings to obtain a ruling or review by the Court where the right to apply for a ruling or right of appeal exists. The argument was that in the present case liability for compensation and even the amount of compensation had already been determined by virtue of ss.64 and 65 of the Act. Indeed, the liability had never been disputed.

An appropriate way to consider the questions raised in 18(d) of the special case is to examine the claim procedures and method of determination of such claims provided by the Act. They are set out in "Part V - WORKERS' COMPENSATION AND REHABILITATION", "Division 5 - Claim Procedures and Determination". A person claiming compensation is required to give notice of injury to the employer (s.80). The claim for compensation is to be given or served upon the employer (s.82). The employer shall, immediately on receiving a claim for compensation, complete the employer's report section of the prescribed form of claim and either forward a copy of the claim to the insurer, or if self-insured or uninsured, to the Work Health Authority (s.84). Within 7 working days after receiving a claim for compensation the employer shall accept liability for the compensation or otherwise and advise the claimant in writing of that fact (s.85(2)). There are other provisions.

When the employer disputes liability for compensation he shall immediately advise the claimant in writing of that fact and the reasons for his decision (s.85(9)). Where the employer does not dispute liability for compensation within the time specified, he shall be deemed to have accepted the claim (s.87).

"Part VI - WORK HEALTH COURT" then takes up the running for the resolution of disputed claims. The Work Health Court has power to hear and determine:

(a) claims for compensation under Part V and all matters and questions incidental to or arising out of such claims; and

(b) all other matters required or permitted by the Act to be referred to the Court for determination.

As stated earlier, s.104, which appears in "Division 4 - Claims for Compensation" provides for the commencement of proceedings before the Work Health Court for recovery of compensation by application in the prescribed manner. A prerequisite to commencing proceedings under s.104 is that the claim for compensation has been disputed by the employer under s.85(3).

In its legislative context, s.104 does not relate to the institution of an appeal against a cancellation of compensation, the right to which had previously been established either by agreement or by determination of the court. On the contrary, it provides for claims by persons claiming to be entitled to compensation, liability for which has been disputed. On the other hand, the language of s.111

is entirely appropriate for the review or appeal process in circumstances where a person receiving an amount of compensation has been given notice of the intention to cancel or reduce the compensation and been served with a statement setting out the reasons for the proposed cancellation. It expressly refers to persons who have a right to apply for a ruling or who have a right of appeal. Such persons include persons who have the right to apply to the Court for a ruling on the question whether medical, surgical and rehabilitation treatment, rehabilitation training, or the failure or refusal of a worker to undergo treatment or training, or to present himself for assessment of his employment prospects is reasonable in the circumstances, pursuant to s.67 of the Act. Section 67(3) expressly invokes the operation of s.111.

Likewise, where a worker unreasonably refuses or unreasonably obstructs an examination by a medical practitioner provided and paid for by the employer, the employer may apply pursuant to s.111 to the Court for an order suspending the worker's right to compensation until the examination takes place. The provisions of s.91 expressly invoke the application process provided by s.111. Similarly persons referred to in s.69 have access to the application process provided by s.111 as persons having the right to appeal against the decision to cancel or reduce compensation.

The words used in s.69(d) are "right to appeal" but the difference in language, i.e. "right to appeal" in s.69(d) and "right of appeal" in s.111, is probably due to a drafting aberration rather than the precise use of words.

The phrases are, in my opinion, synonymous and their common meaning is clear enough.

Application having been made under s.111, the jurisdiction of the Work Health Court to consider and determine all applications and appeals referred to in s.111 is then provided for in s.112.

It is of some assistance to consider the statutory antecedent of the provisions of the Act now under consideration. Section 7A of the Worker's Compensation Ordinance 1949 as amended in 1974 provided that an employer shall not, except in accordance with the Ordinance, an Act or a determination of the (Workers' Compensation) Tribunal, discontinue, withhold or diminish a weekly or other payment due under the Ordinance to a person.

In Western Australian Coastal Shipping Commission and Stevedoring Employers of Australia Limited v. Wallner (1979) 26 ALR 591, a Full Court of the Federal Court of Australia held that s.7A and its antecedents conferred a right to the continuation of payment of compensation due to a worker either by agreement or determination, and precluded the employer from departing unilaterally from such an agreement or determination. The Court held that if an employer wished to resile from or qualify the worker's entitlement established by agreement or determination, the section required him to seek the approval of the Tribunal or to be within an exemption which overrode the statutory obligation which s.7A superimposed upon the employer's acceptance or admission of liability.

Similar provisions in other parts of Australia and in the United Kingdom have been similarly construed (see, for example, Edgar v. Pennell (1958) VR 450; Thiess Bros Pty Ltd v. Carbone & Anor (1976) 15 ACTR 15, and Anchor Donaldson Limited v. Crossland (1929) AC 297).

The Worker's Compensation Act was repealed by the Act (s.188). However in the construction of new rights conferred by the Act one must respect the presumption against the invasion of established rights whether at common law or by statute. As O'Connor J. said in Sargood Bros v. The Commonwealth (1910) 11 CLR 258 at 279:

> "It is a well recognised rule in the interpretation of statutes that an Act will never be construed as taking away an existing right unless its language is reasonably capable of no other construction."

Applying that maxim to the construction of the relevant provisions of the Act, it could not have been the intention of the legislature to take away a worker's right, established under the antecedent legislation, to the continuation of payment of compensation until a court ruled otherwise.

Having regard to my comments earlier about expressions of opinion by this Court on only such questions of law as have squarely arisen out of a proceeding under the Act, I answer the stated case as follows:

18(a) Not answered.

(b) Not answered.

(c) Yes.

(d)(i) Not answered.

(ii) Section 111.

(iii) Not answered.

(iv) Not answered.

(v) Not answered.

(e) Not answered.

(f) See (c) above.

On the question of costs, it was submitted on behalf of the worker that she should be awarded her costs of the stated case because when the application to set aside the determination of 30 December 1987 came on before the Work Health Court on 28 January 1988, the employer raised objection to the validity and existence of the worker's right to make any appeal under the Act pursuant to s.69. On the hearing of the stated case the respondent has conceded the worker's right to apply for a ruling or a right of appeal under the Act and that the appropriate avenue to exercise the right of appeal is by the s.104 route.

Section 115(2) of the Act provides that the court may make such order, including an order as to the costs of the proceedings in the Supreme Court and in the Work Health Court, as it thinks fit. In the exercise of my discretion, I am of the opinion that the worker should have her costs because her right of appeal has been conceded on the hearing of the stated case.

I order that the employer pay the worker's costs of the proceedings in the Work Health Court and the costs of the stated case in this court.

I certify that this and the preceeding sixteen pages are a true copy of the reasons for judgment herein of his Honour Mr Justice Gallop.

Dated: 24 August 1988.

Meredith Barnes.

Associate