PARTIES:	MIM EXPLORATION
	v
	HENRY ALLAN ROBERTSON
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM WORK HEALTH COURT exercising Territory jurisdiction
FILE NO:	LA 20 of 1997
DELIVERED:	30 July 1998
HEARING DATES:	10 July 1998
JUDGMENT OF:	GRAY A/J

CATCHWORDS:

Workers compensation – appeal – abdominal hernia – previous hernia already suffered by worker – limited physical capabilities – evidence of mental injury after retrenchment – whether worker totally incapacitated under s65(6) – whether 'familiar' or 'suitable' employment was reasonably available to worker – punitive damages – costs

Work Health Act ss65(6), s89, s109(1), s109(2), s109(3)
Buyong v Readymix Concrete (NT) Pty Ltd 67 NTR 1 referred to

REPRESENTATION:

Counsel:

Appellant:	Mr A. Harris
Respondent:	Mr S. Southwood

Solicitors:

Appellant:	Hunt & Hunt
Respondent:	Cridlands

Judgment category classification:	
Judgment ID Number:	GRA98009
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GRA98009

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

No. LA 20 of 1997

IN THE MATTER of an appeal under the *Work Health Act 1986*

BETWEEN:

MIM EXPLORATION
Appellant

AND:

HENRY ALLAN ROBERTSON
Respondent

CORAM: GRAY A/J

REASONS FOR JUDGMENT

(Delivered 30 July 1998)

This is an appeal from orders made by the Work Health Court on 28 October 1997 and 14 November 1997. The Court was constituted by Mr A Gillies SM.

On 28 October 1997 the learned magistrate found that Henry Allan Robertson ("the worker") was totally incapacitated for work as a result of an injury suffered in the course of his employment by MIM Exploration ("the employer"). The learned magistrate made consequential orders for compensation. On 14 November 1997, the learned magistrate made orders against the employer in relation to costs, interest and punitive damages. The present appeal by the employer is against the orders made on both dates.

The grounds of the Notice of Appeal, as amended, are as follows:

"1. That the learned magistrate erred in law in finding that the respondent is and was totally incapacitated for work as a result of the hernia he sustained on 16 April 1993 in that the said finding was against other findings of the learned magistrate.

2. That the learned magistrate erred in law in finding that the respondent was not capable of earning any amount if he were to engage in the most profitable employment reasonably available to him from 1 December 1997 in that the said finding was against the learned magistrate's findings that the worker was capable of performing work involving the cleaning and management of a laundromat.

3. That the learned magistrate erred in law in finding without any or any sufficient evidence that the respondent suffered a mental injury as a result of the respondent being retrenched by the appellant.

4. That the learned magistrate erred in law in finding that *'It is not necessary to consider the various reasons given why Ms Dowrey's services were not continued with'* in that the learned magistrate was obliged to consider the evidence in order to make findings pursuant to s75B of the Work Health Act.

5. That the learned magistrate erred in law in finding that the respondent is and was only capable of working one to one-and-a-half hours per day when he had already found that the worker was capable of engaging in employment for three hours per day for five

to six days per week.

6. That the learned magistrate erred in law in finding that in assessing whether there was employment reasonably available to the worker that the appropriate test is to determine whether the work so available was work with which the worker was '*familiar'*.

7. That the learned magistrate erred in law in finding and applying the test that *'Only when it is decided that he is suitable for that work, is that work reasonably available to him'*.

8. That the learned magistrate erred in law in ordering penalty interest and punitive damages against the appellant without making any findings and/or giving any or any proper reasons for ordering the said penalty interest and punitive damages.

ORDERS SOUGHT:

(a) That the appeal be allowed;

(b) That the Decision of Mr Gillies SM in the Work Health Court at Darwin made 28 October 1997 be set aside;

(c) That the respondent pay the appellant's costs in this Court and below."

Mr Harris, of counsel, appeared for the employer. Mr Southwood, of counsel, appeared for the worker.

The learned magistrate found that on 16 April 1993 the worker suffered an abdominal hernia in the course of his employment. The injury occurred whilst the worker was handling heavy rock cores used for testing and research. The worker had suffered a previous hernia on 8 May 1991 in the course of his employment. It was surgically repaired in April 1992. The surgery was a failure and a further operation was done in September 1992.

Following the injury on 16 April 1993, the worker made a claim for compensation. This claim was admitted by the employer. The hernia was surgically repaired in June 1993 and the worker was off work for some months. The worker developed other health problems at this time. These included high blood pressure, a hiatus hernia and a bacterial infection of the duodenum and stomach leading to the formation of peptic ulcers.

From the time of the September 1992 operation the worker was on light duties. Before the first hernia problem the worker was employed as a grassroots prospector. He was required to go out in the field and search for ore bodies. He would take rock samples and identify the area from which they came.

After the September 1992 operation, the worker was provided with an assistant who handled any heavy lifting. After some time the worker was appointed a senior technical officer. His duties included some prospecting but was largely administrative. The worker had difficulty performing the paper work involved and was relieved of these duties. He became anxious about his future employment.

In the result, the worker was retrenched by the employer on 1 December 1996. At this time the worker was 51 years old and his retrenchment had a serious psychological effect upon him. He felt rejected as he had previously never been out of work. He told his boss that he felt suicidal and was told that he needed counselling. Nothing was done about providing such counselling.

The worker's past employment had included many different occupations and he had developed a number of skills. He had skills in prospecting, vehicle repair, plant operating, bushcraft, working stock and general rural work. In the words of the learned magistrate, "His employment history simply demonstrates a strong exercise of self discipline and responsibility. He has demonstrated by his history that if he is not in work, there must be a good reason why he is not in work".

Prior to the first hernia, the worker had engaged in very heavy work and had suffered significant crushing injuries to his left leg and right knee and injury to his right shoulder.

One area in which the worker is not skilled is in spelling and general literacy. He has limited clerical and writing skills.

Since his retrenchment in December 1996 the worker has not worked. He has made a number of applications for jobs without success. Since about May 1997, the worker has been attending his daughter's laundromat in Darwin for three hours per day six days a week. He spends one to one-and-a-half hours sweeping, mopping, moving chairs, cleaning drier filters and running errands. There is no heavy lifting involved and he spends most of his time idly talking to customers. His work, such as it is, is unpaid.

The worker has attended for an assessment at the NT Physical Rehabilitation Service. The learned magistrate summarised the result of this testing as follows:

> "I do not propose to set out the results in full. I summarise the results as follows.
>
> (1); Mr Robertson is grossly unfit. I take this to mean he is not aerobically fit.
>
> (2) He cannot safely perform the following actions and postures, namely, (i) moderate or high physical exertion; (ii) working with arms above chest height; (iii) repetitive or sustained stooping, bending forward and reaching with load or force.
>
> (3) Mr Robertson felt he could safely and repeatedly lift the weight of 5 kgs. Apply certain tests, Ms Gauten extrapolates that Mr Robertson could safely lift and carry a weight of 8.5 kgs.
>
> I find from the physical viewpoint, that the worker's capabilities are limited to what could be described as light duties. This means that he is not fit to perform which would require him to lift heavy weights or repeatedly lift light weights.
>
> He is not fit to lift a weight in excess of 8.5 kgs. He is not fit to lift a weight of less than 8.5 kgs if he is required to lift that weight repeatedly.
>
> I am unable to find what would constitute an unacceptable number of repetitions. I have in mind constant lifting work and constant load bearing, however, his true limits could only be determined by pushing Mr Robertson to his limit, with the possibly disastrous consequence of causing a recurrence with his hernia.
>
> He is not fit to work with his arms above chest height, or to work where the work involves repetitive or sustained stooping, leaning forward."

The learned magistrate found that the worker was not fit to perform eight hours of light duties because of his physical condition and general lack of confidence stemming from feelings of rejection following his retrenchment.

The learned magistrate said that the worker may become fit for light work if a gradual re-introduction to work was carried out as had been suggested as part of the worker's rehabilitation.

The learned magistrate discussed a number of aspects of the worker's employment prospects at some length. He concluded that the worker was motivated to return to work if he felt he could manage it. His Worship summarised his conclusions as follows:

> "I summarise. Mr Robertson is 52 years of age. He is not suited to writing, report writing, or clerical work. In the perfect world, if you are a fit man, you would be able to work in the bush and do heavy work. That work would be prospecting, or agricultural labouring, or mining, or perhaps being a tour guide.
>
> He is not aerobically fit. He has an abdominal wall hernia, he has high blood pressure; he is unfit. He is fit only for light duties which involve no heavy lifting and no repetitive lifting of light weight.
>
> He is fit at this stage to do what he is doing at his daughter's laundromat, about 1 to 1½ hours, six days a week. I consider, despite Mr Southwood's comment to the contrary, during Mr Cheong's submissions, that Mr Robertson considers that he is employable.
>
> I am satisfied that if Mr Robertson had the chance to go prospecting in a safe environment, that is, where an offsider would do all the lifting and carrying, he would be able to do that work when he overcame his lack of physical fitness, which I suspect would, or could occur on the job. However, he could only undertake field work when sufficiently aerobically fit.
>
> Mr Robertson does not have a prospecting job to go to, and Mr Robertson is not seeking work for the moment, because he fears he will not be fit for that work. He wants to ensure that he can do the work. It might be suggested that he can do it.
>
> He will only gain his certainty that he can do the work by testing himself pursuant to a supervised work trial, as suggested by Ms Balanto at page 5

of exhibit 5.

His work capacity, in a physical and mental sense, is dominated by the hernia injury. He cannot do work which involves heavy lifting or repetitive light lifting. He does not want to take on work until he can be satisfied it will not interfere with his health, whether it is his hernia or his high blood pressure. The injury sustained on 16 April 1993 still materially contributes to his inability to undertake paid work."

The learned magistrate then proceeded to conclude that the worker was totally incapacitated for work within the meaning of Section 65(6) of the *Work Health Act* ("the Act") for reasons which His Worship expressed as follows:

"In this case, the worker is totally incapacitated for paid employment, because

(1) there is no vacancy available to him, which he can fill, which offers him work with which he is familiar. There is, for example, no vacancy available were he to take on the position of field prospector, accompanied by an offsider to do the heavy lifting.

(2) there is no evidence before me that other vacancies for work with which the worker is not familiar, are available for the worker.

Ms Cheong submitted that Miss Balanto gave uncontradicted evidence that jobs were available for the worker. An analysis of her evidence shows that she hints that service station attendant work and casual courier work is available.

I do not accept this evidence as indicating that these jobs are available to the worker, given his current disabilities. The fact that a position exists, does not necessarily mean that a person of the worker's age, with his disabilities, would secure that job.

(3) It cannot be determined that the worker can successfully undertake the alternative work suggested. It is not enough to vaguely suggest certain work is available. That work has to be reasonably available in a sense that it can be seen or determined that the worker can perform the work. Here, the worker lacks confidence. He requires the advice of the rehabilitation people to assist to determine if he can perform the work. He does not know how the work will affect his abdominal

lining or his blood pressure, or his lack of fitness.

> The worker has to develop the knowledge that he can perform the work. This can only occur by exposure to the work and by monitoring of his work tasks. Only when it is decided that he is suitable for that work, is that work reasonably available to him."

The grounds of appeal numbered 1 to 7 allege that the learned magistrate made errors of law "in finding" various facts. This gives rise to the suspicion that what is being attempted by the draftsman is to dress up alleged mistakes of fact into errors of law, thus rendering them appealable. In this case, the suspicion is, in my view, well founded.

In reaching the conclusions he did, the learned magistrate was making findings of fact. Only one of the grounds of appeal alleges that the impugned findings were not supported by the evidence. The criticisms are largely based on suggestions that there were some internal inconsistencies in the learned magistrate's reasons for decision. These reasons, which extended over 17 pages of transcript, were subjected to a close textual examination in the hope of finding some lack of harmony between one passage and another.

Ground 1 is not informative in identifying the conflicting findings which are alleged and it is sufficient to say that the ground has not been made out.

Ground 2 alleges that the learned magistrate's finding of total incapacity for work is inconsistent with his finding that the worker was capable of performing work involving the cleaning and management of a laundromat.

However, one searches the learned magistrate's reasons in vain for the second finding alleged in the ground. This ground has not been established.

Ground 3 complains about the learned magistrate's finding that the worker suffered a mental injury by reason of his retrenchment. In my view, there was ample evidence from the worker and his wife to support this finding.

Ground 4 complains about the learned magistrate's statement in his reasons that "It is not necessary to consider the various reasons given why Ms Dowrey's services were not continued with". It was said that the learned magistrate was obliged to consider those reasons for the purpose of considering the application of Section 75B of the Act. In fact, the learned magistrate discussed over two pages of transcript the reasons why the relationship between the worker and Ms Dowrey broke down. It appears from the evidence that Ms Dowrey was the representative of Davidson & Associates who describe themselves as experts in career assessment. There is in evidence a glossy brochure expressed in largely unintelligible terms. It seems that the middle-aged prospector did not find himself in sympathy with Ms Dowrey.

Ms Dowrey did not give evidence but the worker was cross-examined about his dealings with the lady. The worker thought Ms Dowrey was a counsellor sent by the employer after the worker had expressed suicidal intentions. It turned out she was a saleswoman who was keen to teach the worker how to write a curriculum vitae which would secure him employment. As the learned magistrate said, Ms Dowrey's aim was to teach the worker how

to package himself to obtain work. The learned magistrate concluded that there never was a meeting of minds and that the worker's decision to terminate the relationship was perfectly reasonable, thus making any consideration of Section 75B(2) unnecessary. In my opinion, no error of law has been proved under this ground.

Ground 5 suffers from the same vice as Ground 3, in that the learned magistrate did not in fact make the second finding alleged.

Grounds 6 and 7 may be considered together as each ground alleges that the learned magistrate misconstrued Section 65(6) of the Act. Mr Harris placed reliance on a passage in the learned magistrate's reasons at pp15–16 of the transcript which I have already set out. It was argued that the onus of proof was on the worker to prove total incapacity *Buyong v Readymix Concrete (NT) Pty Ltd* 67 NTR 1. This means that the worker must prove that there is no work reasonably available to him.

Therefore, it was argued, where work is available it is not enough for the worker to say that he will not accept it until it is demonstrated to him by rehabilitation advisers that he can perform it or that it is "suitable" for him or "familiar" to him.

In my opinion, a reading of the whole of the learned magistrate's reasons does not support this argument. Although expressed in discursive terms, the gist of the learned magistrate's finding was that the worker is presently

unemployable in any capacity because of his physical limitations coupled with a lack of confidence stemming from his retrenchment. The learned magistrate found that the worker was not capable of earning any amount in any employment reasonably available to him. His Worship qualified this finding with the reservation that the worker may be able to be rendered capable of some employment in the future if he is suitably rehabilitated. To my mind, the learned magistrate's reservation does not invalidate his finding as to the present position.

In my opinion, Grounds 6 and 7 also fail.

Ground 8 is based upon orders made by the learned magistrate on 14 November 1997. On that day His Worship delivered judgment upon an application by the worker for costs and interest.

These matters were argued before the learned magistrate on 31 October 1997 upon the return of an interlocutory summons issued on behalf of the worker. The summons sought an order that the worker's costs be assessed at 100% of the Supreme Court Scale. It also sought orders for interest under Section 109(1), 109(2) and 109(3) of the Act. However, it appears that Mr Southwood only pressed for the costs order and an order under Section 109(1).

In support of his contention that there had been unreasonable delay on the employer's part, Mr Southwood relied upon an affidavit of Mr Roussos which exhibited a number of letters between the parties.

The correspondence thus tendered included a letter dated 13 February 1997 which contained a without prejudice offer by the employer. This letter was relied upon by counsel for the employer in resisting the application for costs. The letter contained an offer to make weekly payments of compensation to the worker from 1 December 1996 at a stated weekly rate. The letter also offered rehabilitation. The letter was expressed to be without prejudice. To that letter, the worker's solicitors replied on 15 February 1997. The letter stated that the rate of weekly payments had yet to be settled and this required consideration of wages records. It also suggested a number of other steps which should be taken before the matter could be disposed of.

During the argument before the learned magistrate regarding costs, the employer contended that the worker should not get any costs subsequent to 13 February 1997 because the letter offered the worker substantially what he obtained at the hands of the Court. I should add that the question of the appropriate rate of weekly payments remained a matter of contention between the parties as at 14 November 1997.

In giving his ruling on 14 November 1997, the learned magistrate took the view that the letter dated 13 February 1997 was inadmissible because it was without prejudice. In this, I think that the learned magistrate was in error

because it is clear that both parties acquiesced in its tender, thus waiving any privilege attaching to it.

In any event, the learned magistrate held that the letter was not a bar to the worker's claim for costs because the rates of weekly payments remained to be calculated. I think that this view is correct.

However, the learned magistrate went on to state that the letter was clearly a sham and part of "a cynical course of action by the employer".

After awarding the worker costs at 100% of the Supreme Court Scale, the learned magistrate turned his attention to the matter of interest. His Worship specified an interest rate of 20% to be paid pursuant to Section 109(1) of the Act and awarded punitive damages pursuant to Section 109(3) of 100% of the interest payable under Section 109(1).

In dealing with interest under Section 109(1), the learned magistrate is recorded as saying:

> "I turn now to section 109(3). I see no reason not to award punitive damages in this case. The employer's conduct is cynical and mean-minded. It is a disgrace. This matter should never have been litigated.
>
> There will be an award of punitive damages (1), to discourage other employers who are of such a mind as to adopt a similar disgraceful approach, and (2), to encourage the employer not to behave in a bluffing and posturing manner in future work health cases it might have. The employer should be reminded, by an award of punitive damages, that work health claims are to be resolved with expedition."

I cannot accept that the intemperate language employed by the learned magistrate was justified. The letter dated 13 February 1997 was clearly not a sham. The offer it contained, if accepted, would doubtless have been honoured. Mr Southwood did not seek to support the learned magistrate's characterisation of the letter.

Similarly, I do not consider that the learned magistrate was justified in his criticism of the employer for litigating the worker's claim. There was a bona fide issue as to the incapacity of the worker which was the subject of substantial argument and lengthy reasons for judgment.

I think that the strong view that the learned magistrate took adverse to the employer coloured his consideration of the claims under Section 109(1) and 109(3).

Section 109(1) operates when the employer "has caused unreasonable delay in accepting a claim for or paying compensation". I do not think that the evidence makes out such a case against the employer. Even less do I think that an award under Section 109(3) is supported by the evidence. There was no conduct on the employer's part which deserved punishment. The employer was entitled to litigate the question whether the worker was totally incapacitated and made a reasonable offer to settle the claim.

Since the hearing of this appeal the parties have submitted a memorandum which shows that on 31 December 1997 the employer paid the worker the

weekly payments due back to 1 December 1996. The appropriate weekly rates were apparently agreed upon or determined by the Court. The back pay amounted to $22,809.64. On the same date the employer paid the amounts of interest ordered to be paid under Section 89, 109(1) and 109(3).

For the reasons I have endeavoured to express, the appeal will be allowed in part. Under Ground 8 of the amended Notice of Appeal the orders made by the learned magistrate under Section 109(1) and 109(3) are set aside. Otherwise the orders below are confirmed. As the worker has been substantially successful in the appeal, the worker's costs of the appeal should be paid by the employer.
