PARTIES:	PETER ANTHONY EDWARDS Appellant AND: AIRPOWER PTY LTD Respondent
TITLE OF COURT:	In the Supreme Court of the Northern Territory of Australia
JURISDICTION:	Justices Appeal of the Northern Territory of Australia exercising jurisdiction in Work Health Court
FILE NO:	AP 213 of 1995
DELIVERED:	8 November 1995
HEARING DATES:	7 and 8 November 1995
JUDGMENT OF:	MILDREN J

CATCHWORDS:

Appeal and New Trial - Appeal - Interference with discretion of court below - Magistrate's interlocutory ruling that appellant worker should be dux litis - Magistrate's decision not shown to have miscarried.

Workers compensation - Proceedings to obtain compensation - Preliminary requirements - Work Health Court proceedings arising out of employers decision to reduce weekly benefits to the appellant worker by Form 5 Notice pursuant to s69 of Work Health Act - Party who bears onus of proof is usually dux litis - Order of address to be determined on question of convenience - Magistrate's decision that appellant worker be dux litis not shown to have miscarried.

Legislation

Work Health Act ss65, 68, 69, 73, 95, 104

Cases

Protean (Holdings) Ltd v American Home Assurance Co (1985) VR 187 at 191, approved.
House v The King (1936) 55 CLR 499, applied.
Norbis v Norbis (1985-6) 161 CLR 513, applied.
AAT Kings Tours Pty Ltd v Hughes (1994) 99 NTR 33, referred to.

JH Constructions Pty Ltd v Davis (unreported, Asche CJ, 3 November 1989), referred to.
Ashby v Bates (1846) 153 ER 984, referred to.
Shaw v Beck (1853) 8 Exch Rep 392 at 298, 155 ER 1401 at 1403, considered.
Hart v Wrenn (unreported , Mildren J, 1995), referred to.
Beevis v Dawson [1957] 1 QB 195 at 204, approved.

REPRESENTATION:

Counsel:

Applicant:	Mr S Southwood
Respondent:	Mr J Tippett

Solicitor:

Applicant:	Cridlands
Respondent:	Ward Keller

JUDGMENT CATEGORY:	CAT B
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THE SUPREME COURT OF
THE NORTHERN TERRITORY
JUSTICES APPEAL

SC No 213 of 1995

BETWEEN:

PETER ANTHONY EDWARDS

Appellant

AND:

AIRPOWER PTY LTD

Respondent

CORAM: **MILDREN J**

REASONS FOR JUDGMENT
(Delivered 8 November 1995)

This is an appeal from the decision of Mr Trigg SM, sitting as the Work Health Court in an interlocutory matter. The appellant is the applicant in the Work Health Court proceedings which have been brought pursuant to s104 of the Act.

According to the amended statement of claim, the appellant suffered a back injury in the course of his employment on or about 30 October 1990. He claimed compensation under the Work Health Act from the respondent; the respondent accepted his claim and made payments to the applicant. By a notice in Form 5 and pursuant to s69 of the Act, on 25 March 1994 the employer reduced weekly benefits payable to the appellant on the grounds which are set out in the notice. The notice alleges that the applicant has partially recovered from his injury and is fit to resume his duties as a service manager for the respondent. The respondent did not seek to cancel payments entirely; the notice reduced the appellant's payments to an amount of $175.84 per week. The respondent admits these facts in its amended answer. The appellant has appealed this decision to the Work Health Court.

The appellant has also brought other claims in his application to the Court. These claims are, first, he seeks orders for

the respondent to take reasonable steps to provide the appellant with suitable employment and re-training, and second, he seeks orders for arrears of compensation for medical and other treatment pursuant to s73 of the Act, and for re-training expenses. The respondent has denied the appellant's entitlement to any of the relief claimed.

On 6 November of this year, His Worship heard argument as to who should be dux litus and bear the onus of proof in relation to the issues raised in the proceedings. His Worship ruled as follows, and I take it that his ruling is confined to who was dux litus, in relation to the application by appellant for an appeal against the employer's decision to reduce his payments.

His ruling was as follows:

`I rule that:

(1) The worker is dux litus on the evidence generally.

(2) At the conclusion of the evidence the employer bears the onus of proving, on the balance of probabilities, that the worker has ceased to be totally incapacitated for work.

(3) At the conclusion of the evidence the employer bears the onus of proving, on the balance of probabilities,

(a) that the worker is partially recovered from his injury;

(b) that the worker is fit to resume his duties as service manager with the employer; or

(c) that the worker's incapacity as a result of the work injury, for an unrestricted range of work is 30%; and that as a result of (a), (b), or (c) the worker has a capacity to earn at least $410.30 per week in work reasonably available to him in accordance with ss 65 and 68 of the Work Health Act'.

The appellant challenges this ruling so far as the first part of the ruling is concerned as to who should be dux litus.

This appeal has been brought on urgently because the hearing was due to start before the learned magistrate only yesterday. Accordingly I heard argument on an urgent basis and convened this court to sit at 8 in the morning. Because I had other commitments at 10 o'clock I was unable to complete the hearing at that time and I resumed hearing the appeal a little after 4.30 yesterday.

I am grateful to both counsel in this matter for the considerable efforts that they have made to apprise me fully of all of the relevant information needed to reach my decision in this matter so quickly. Counsel are to be commended for their efforts.

No transcript of what took place before His Worship was available yesterday, and although one has now been made available to me, only just 10 seconds ago, I have not yet read it. I do not think it is necessary for me to do so; I have a copy of the order which the learned magistrate made.

There is no doubt that His Worship's ruling was a discretionary one in a matter of practice and procedure: see *Protean (Holdings) Ltd v American Home Assurance Co* (1985) VR 187 at 191 per Marks J.

Section 95 of the Work Health Act provides that matters of practice and procedure are in the discretion of the court. Before this Court can interfere it must be shown that the discretion of the learned Stipendiary Magistrate has miscarried. To do this the appellant must show that a substantial wrong has occurred, or that the order made is unreasonable or plainly unjust, see *House v King* (1936) 55 CLR 499 at 505 and *Norbis v Norbis* (1985-6) 161 CLR 513, especially at 520.

It is not enough that I have a mere difference of opinion with the learned Stipendiary Magistrate. If his decision was a legitimate and reasonable one, although I would have decided

the matter differently myself, the appeal must fail.

The appellant submits that where there is an appeal to the Work Health Court from an employer's decision to cancel or reduce payments of compensation under s69 of the Act, the employer bears the onus of proving a change in circumstances and therefore becomes dux litus in the appeal: see *AAT Kings Tours Pty Ltd v Hughes* (1994) 99 NTR 33 and *J.H. Constructions Pty v Davis*, (unreported decision of Asche CJ of 3 November 1989 at page 10).

There are other authorities which the appellant has cited in support of that proposition but it is unnecessary to refer to them.

The respondent's main submission is that the appellant had raised issues in the application other than the issues concerned in the appeal, and as these issues included a claim that the appellant's incapacity was on-going, the issues were not confined to the question of the appellant's incapacity as at the date of the Form 5 notice and therefore it could not be shown that the Learned Stipendiary Magistrate's discretion miscarried.

Mr Southwood, for the appellant, submitted that even in cases where the applicant bears the onus of proof in relation to some issues, he should not be compelled to be dux litus in relation to the issues on which he does not bear the onus.

Mr Tippett, for the respondent, submitted that it is only where the burden of proof lies on the respondent on all issues that the respondent begins, and he cited in support of that *Ashby v Bates* (1846) 153 ER 984.

However in *Shaw v Beck* (1853) 8 Exchequer 392 at 398, 155 ER 1401 at 1403, Pollock CB said:

> "Where there are several issues, some of which are upon the plaintiff and some upon the defendant, the plaintiff may

> begin by proving only those which are upon him, leaving it to the defendant to give evidence in support of those issues upon which he intends to rely; and the plaintiff may then rebut the facts upon which the defendant has adduced in support of his defence."

This passage was cited with approval by Marks J in *Protean (Holdings)* at page 190. I have myself acted upon it in *Hart v Wrenn*. However the rule is not an immutable one. The practice is based on general convenience; it depends upon the issues raised as set out in the pleadings, and as Singleton LJ pointed out in *Beevis v Dawson* [1957] 1 QB 195 at 204:

> "... the question arises as to what is the most convenient way of dealing with the matter in the interests of justice, in the interests of the parties and from the point of view of the court. Those interests are really all the same. If, after hearing submissions, the Judge decides that one course is preferable to another, his decision should in general be treated as final."

In considering the question of convenience the court will usually give great weight to whether the applicant is called upon to prove a negative.

Although, technically speaking, the appellant by disputing the notice would be called upon to show that at the time of the notice there were no changed circumstances - that is, that the appellant remained totally incapacitated - that is not an unusual matter for a worker to have to prove in workmen's compensation proceedings and does not present the appellant with forensic difficulties. The grounds upon which the notice was given are known and the appellant is entitled to a copy of the opinion of Mr Schaeffer, upon which the notice is based.

The only potential injustice to the appellant is that the appellant may lose the opportunity to make a no case submission. Such submissions in civil proceedings are rarely made because the appellant can be called upon to elect, and this usually results in the submission being abandoned.

In *Protean (Holdings)*, Marks J at 191 considered the extent to which the plaintiff in that case would be called upon to prove a negative, and whether the interests of justice would best be served by calling upon the plaintiff to adduce all his evidence in disproof of a case with respect to which the plaintiff had heard no evidence.

In this case, the appellant by paragraph 5 of the statement of claim asserted, and therefore must prove, in relation to one of the other claims he raised, on-going incapacity. Mr Southwood submitted that this was not really an issue because the employer had not reduced the payments to nil. However, the respondent's reply has put that matter in issue and that question must be proved by the applicant.

Although I may not have made the same decision as the learned Stipendiary Magistrate, I do not think it has been shown that his discretion has miscarried. Mr Southwood has advised this Court that the claim upon which paragraph 5 is based will be abandoned at the hearing; that was not the position at the time of the learned Stipendiary Magistrate's decision. I must consider the position as it was at that time. If the circumstances have changed since, then the learned Stipendiary Magistrate may be asked to review his decision. About that I say nothing more.

The order of the court is that the appeal is dismissed with costs.
