PARTIES:	BETWEEN:
	SHANE FRANCIS JOHNSTON
	Appellant
	AND:
	PASPALEY PEARLS PTY LTD
	Respondent
TITLE OF COURT:	In the Court of Appeal of the Northern Territory of Australia
JURISDICTION:	Supreme Court of the Northern Territory of Australia
FILE NO:	AP 17 of 1995
DELIVERED:	7 August 1996
HEARING DATES:	24/7/96
JUDGMENT OF:	MARTIN CJ, MILDREN AND THOMAS JJ

CATCHWORDS:

Compensation under Work Health Act

Compensable work related injury - claim not accompanied by prescribed medical certificate, s82(1)(b) of the Work Health Act - certificate not served within 28 days, s82(2) of the Work Health Act - notice by employer under s85(1) of the Work Health Act - application to recover compensation, s104(1) of the Work Health Act - proceedings not maintainable unless claim for compensation has been made within six months after the occurrence of injury, s182(1)(a) of the Work Health Act - person not entitled to compensation unless notice of injury given to employer as soon as practicable, s80(1) of the Work Health Act - compliance with the Act is a condition precedent - whether statute discloses an intention, that the failure to provide the remaining document within 28 days after first documents, results in failure to make valid claim - amendment to s82(2) requiring 28 day limit on service of documents is mandatory not directory - unless claim validly served on employer the mechanism of s85 of the Work Health Act is not triggered.

Legislation

Work Health Act

Cases

Maddalozzo v Maddick (1992) 108 FLR 159 discussed
Perfect v Northern Territory of Australia (1992) 107 FLR 428 *discussed*
Tasker and Ors v Fullwood and Ors (1978) 1 NSWLR 20 discussed
Victoria v The Commonwealth and Connor (1975) 134 CLR 81 approved

Texts

Nil

REPRESENTATION:

Counsel:

Appellant:	Mr S Southwood
Respondent:	Mr Tippett

Solicitor:

Appellant:	Cridlands
Respondent:	Ward Keller

JUDGMENT CATEGORY:	CAT A
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IN THE COURT OF APPEAL OF
THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. AP 17 of 1995

BETWEEN:

SHANE FRANCIS JOHNSTON
Appellant

AND:

PASPALEY PEARLS PTY LTD
Respondent

CORAM: **MARTIN CJ, MILDREN AND THOMAS JJ**

REASONS FOR JUDGMENT

(Delivered 7 August 1996)

This appeal raises a short question of construction of s82(2) of the *Work Health Act*.

The appellant claimed that he suffered a compensable work-related injury on 25 September 1993. He served his claim for compensation on the respondent employer on 21 March 1994 but it was not accompanied by a prescribed medical certificate as required by s82(1)(b) of the Act, nor did he serve a medical certificate in the prescribed form "within 28 days" thereafter, as permitted by s82(2), although on 30 March a medical report by a Dr McGeoch of that date, not in the prescribed form, had been faxed to the employer. On the same date the employer gave the respondent notice under s85(1) that it disputed liability for compensation on the ground, inter alia, that the claim of 21 March "was not accompanied by a prescribed (medical) certificate". Some 11 days after the 28 days allowed by s82(2) had expired, on 29 April 1994, the appellant sought to serve a second claim form accompanied by a medical certificate by a Dr Patroni in the prescribed form.

On 4 May, pursuant to s104(1), the appellant filed in the Work Health Court, an application to recover compensation. Section 182(1)(a) provides that proceedings are not maintainable, unless the claim for compensation has been made "within 6 months after the occurrence of the injury" (that is, by 25 March 1994), unless the worker brings himself within s182(3). The appellant abandoned his second claim on 13 May.

On 20 June 1994, the respondent applied to the Work Health Court to dismiss the appellant's claim of 4 May. At the hearing before the Work Health Court the appellant sought to rely on his first claim and on the medical certificate of Dr Patroni served with his abandoned second claim of 29 April as meeting the requirements of s82(2). The Work Health Court decided that the time limit provided by s82(2) was a directory provision with which the appellant had substantially complied. Accordingly, the respondent's application was dismissed. The respondent appealed to the Supreme Court. Kearney J held that the failure to comply with the 28 day period prescribed by s82(2) had the consequence that the claim for compensation had not been validly made. His Honour held that the time limit imposed by that section was mandatory and not directory. Accordingly, the appeal was allowed and the decision of the Work Health Court was set aside.

The appellant contended in this Court that on the true construction of s82(2), the time limited by that section was not mandatory. It was submitted that the provision was directory only and there were no consequences for non-compliance; alternatively, it was submitted that the claim had been validly made so long as there had been substantial compliance with the 28 day time limit provided for in s82(2).

After hearing argument this Court unanimously dismissed the appeal. We said that we would publish our reasons later; we now do so.

The *Work Health Act* provides a right of compensation to an injured worker in the circumstances contemplated by s53 of the *Work Health Act*. Section 80(1) of the *Work Health Act* provides that "a person shall not be entitled to compensation unless notice of the relevant injury has, as soon as practicable, been given to or served on the worker's employer". In *Maddalozzo v Maddick* (1992) 108 FLR 159 it was held that compliance with s80(1) of the Act is a condition precedent to a worker's entitlement to compensation. Section 81 of the Act provides that the notice of injury may be given orally or in writing and prescribes the minimum information which needs to be given.

Section 82 provides:

> "82. FORM OF CLAIM
>
> (1) A claim for compensation shall -
>
> (a) be in the prescribed form;
> (b) unless it is a claim for compensation under section 62, 63 or 73, be accompanied by a prescribed certificate from a medical practitioner or other prescribed person; and
> (c) subject to section 84(3), be given to or served on the employer.
>
> (2) If a claim for compensation and a medical certificate under subsection (1)(b) are not given or served at the same time, the remaining document shall be given or served on the employer within 28 days after the first document is given or served and the claim for compensation shall be deemed not to have been made until the day on which the remaining document is given to or served on the employer.
>
> (3) A defect, omission or irregularity in a claim for compensation or a medical certificate under subsection (1)(b) shall not affect the validity of the claim and the claim shall be dealt with in accordance with this Part unless the defect, omission or irregularity relates to information which is not within the knowledge of or otherwise ascertainable by, the employer or his insurer.

(4) A worker shall authorise the release to his employer of all information concerning the worker's injury or disease, if required to do so in the prescribed form referred to in subsection (1)(a), and the claim for compensation by the worker shall be deemed not to have been made until the authorisation is given.

(5) An authorisation under subsection (4) is irrevocable."

Section 85 of the Act provides that an employer shall, on receiving a claim for compensation, either accept liability, defer liability or dispute liability and shall notify the claimant of the employer's decision within 10 working days.

Section 87 provides that, if, within the time specified in s85, an employer does not comply with that section, the employer shall, until such time as the Court orders otherwise, be deemed to have accepted liability for the compensation claimed insofar as the claim is in respect of compensation payable under subdivisions B and D of division 3.

It was held in *Perfect v Northern Territory of Australia* (1992) 107 FLR 428 that the time limits contained in s85 of the Act are mandatory and unless liability had been disputed by the employer or the employer failed to comply with s85 by the making of payments of compensation or otherwise, no proceedings could be brought in the Work Health Court.

Section 182 of the *Work Health Act* requires a claim for compensation to be made within 6 months after the occurrence of the injury. Section 182(3) provides that the failure to make a claim within the 6 month period is not a bar to the maintenance of proceedings if it is found that the failure was occasioned by mistake, ignorance of a disease, absence from the Territory or other reasonable cause. The relationship between s182 and s82 is discussed in *Maddalozzo v Maddick*, supra, where it was held that s182 is a procedural provision

which enables the Court to entertain proceedings in respect of a claim made after the relevant period of 6 months provided that the procedure envisaged by ss81,82 and 85 had been followed. It was not contended that either *Perfect v Northern Territory of Australia* or *Maddalozzo v Maddick* was wrongly decided or that those decisions had since been affected by subsequent amendments to the Act.

It is to be noted that s82(2) was amended by Act No. 78 of 1993. In its original form s82(2) provided:

> "If a claim for compensation and a medical certificate under subsection (1)(b) are not given or served at the same time, the claim for compensation shall be deemed not to have been made until the day on which the remaining document is given to or served on the employer."

The amendment inserted the requirement that the remaining document is to be given or served within 28 days after the first document is given or served.

Mr Southwood, for the appellant, submitted that the intention of the legislature was that the 28 day time limit in s82(2) is not mandatory for the following reasons:

(1) Strict compliance would not enhance the purpose of the Act. The purpose of the Act was to confer upon a worker a statutory right to compensation against his employer in relation to work related injury or disease. The procedural requirements related to the giving of a claim accompanied by a medical certificate served the purpose of facilitating prompt resolution of claims being dealt with on their merits.

(2) There are no significant consequences to a worker if the two documents are not served within 28 days of each other. Subject to the claim being within the 6 month time limit prescribed by s182, the worker could start again.

(3) The legislature has not stated that a failure to comply with s82(2) results in the giving of an invalid claim.

(4) If the time limit is held to be mandatory it will not promote the early settlement of claims.

(5) The late giving of the medical certificate was "a defect, omission or irregularity in a claim for compensation" and s82(3) provided this would not affect the validity of the claim.

Counsel for the respondent, Mr Tippett, submitted that prior to the amendment of s82 incomplete claims could remain dormant for up to 6 months and employers were entitled to ignore a claim that did not comply with s82(1) or (2) until such time as the claim was deemed to have been made. Consequently, the incomplete claim did not trigger s85. The purpose of the amendment of s82 was to try to force the triggering of s85 at an earlier time thereby promoting earlier settlement of claims. The fact that the worker could start again by lodging a further claim was not inconsistent with holding the time limit to be mandatory. As there are no significant consequences to a worker if the time limit is required to be strictly complied with, there will be no injustice. Although the worker may start again, and this means that the consequences of failure to comply with the 28 day time limit can be easily avoided, nevertheless, in the general run of cases, strict compliance with the 28 day time limit would promote the objects of the Act. On the other hand, if it were to be held that the time limit is directory and that substantial compliance is all that is required, this would give rise to uncertainty as to whether or not the provisions of s85 had been triggered and, if so, when. Consequently, neither employee nor worker would know when the period of 10 days for the employer's response commenced to run. An employer who wrongly concluded that s85 had not been triggered

would take the risk that he had been deemed to have accepted liability pursuant to s87. It was further submitted that s82(3) did not apply to the making of a claim but only to defects, omissions or irregularities in the claim form or the medical certificate.

These submissions raise a question of a type which is not infrequently encountered. In *Tasker and Ors v Fullwood and Ors* (1978) 1 NSWLR 20, the Court of Appeal of New South Wales (Hope, Glass and Samuels JJA) said at 23-24:

> "(1) The problem is to be solved in the process of construing the relevant statute. Little, if any, assistance, will be derived from the terms of other statutes or any supposed judicial classification of them by reference to subject matter. (2) The task of construction is to determine whether the legislature intended that a failure to comply with a stipulated requirement would invalidate the act done, or whether the validity of the act would be preserved notwithstanding non-compliance: the *Franklins Stores Pty Ltd* case (1977) 2 NSWLR 955 at pp963 et seq. (3) The only true guide to the statutory intention is to be found in the language of the relevant provision and the scope and object of the whole statute: *Hatton v Beaumont* (1977) 2 NSWLR 211 at p220. (4) The intention being sought is the effect upon the validity of the act in question, having regard to the nature of the pre-condition, its place in the legislative scheme and the extent of the failure to observe its requirement: *Victoria v The Commonwealth* (1975) 134 CLR 81 at pp179,180. (5) It can mislead if one substitutes with the question thus posed an investigation as to whether the statute is mandatory or directory in its terms. It is an invitation to error, not only because the true enquiry will thereby be sidetracked, but also because these descriptions have been used with varying significations. (6) In particular, it is wrong to say that, if a statute is couched in directory terms, the act will be invalid, unless substantial performance is demonstrated: the *Franklins Stores Pty Ltd* case (1977) 2 NSWLR 955 at pp965 et seq. A statute which, on its proper construction, does not nullify the act in question, even for total non-observance of the stipulation, is also described as directory in its terms: *Victoria v The Commonwealth* (1975) 134 CLR 81 at pp118, 162, 179, 180."

The question, then, is whether the statute discloses an intention that the failure to provide the remaining document

within 28 days after the first document results in a failure to make a valid claim for compensation. The primary obligation under s82 when making a claim for compensation is to serve on the employer a claim in the prescribed form and, where required, an accompanying prescribed medical certificate. It is service of such a claim that triggers the obligations on the employer under s85. Section 82(2) provides exceptionally that where the two documents are not served simultaneously, the second document may be given or served within 28 days after the first and, if so, the claim for compensation shall be deemed to have been made on the day on which the remaining document is given or served on the employer. Given that the 28 day time limit was inserted by an amendment, it would seem strange for it not to have been the intention of the legislature that that time limit should be strictly complied with, such that a failure to give the second document (in this case the medical certificate), within that time limit did not render the claim invalid. It is difficult to see how there can be substantial compliance with this provision. Either a document is served within 28 days of another or it is not. There must therefore either be strict compliance or non-compliance. The question can be narrowed down to whether the requirement upon the worker that he serve the second document within 28 days of the first is of such importance to the object of the statute as to disclose an intention that its complete non-observance should invalidate the making of a claim. We think that the answer to this question must be yes. Until a claim has been validly given or served on the employer, the important mechanism of s85 is not triggered. One purpose of the time limit seems to have been to encourage workers to pursue their claims in a timely manner and not leave employers in doubt for periods of up to 6 months about the nature of their claims or whether they intend to pursue them. Another is so that there can be certainty as to when the 10 day time limit commences to run. Ordinarily, there are no serious consequences to a worker who fails to strictly comply with the subsection in that all he or she has

to do to remedy the position is to start afresh. This could be done, for instance, by lodging a second claim form within 28 days of the lodging of his medical certificate.

In *Victoria v The Commonwealth and Connor* (1975) 134 CLR 81, Stephen J said at 179:

> "Sometimes the stipulation which has not been complied with is, in its context, so relatively unimportant to the attainment of that general object that, although there has been total non-compliance, a directory construction may be appropriate. In such cases it may not matter that the non-compliance is complete, not partial. Indeed, the stipulation in question may be of a kind which is incapable of partial compliance; to give to such a stipulation a directory interpretation recognises that it may be wholly disregarded without prejudice to validity because of its relative unimportance in the attainment of the general statutory object and also, perhaps, because of the far-reaching and undesirable consequences of treating its non-observance as invalidatory."

Whilst the time limit fixed by s82(2) is arguably not cardinal to the attainment of the general object of the Act, in that it may be easily remedied by a worker in the manner we have discussed, there are no far reaching and undesirable consequences of treating its non-observance as invalidatory of the claim.

Accordingly, we consider that the provisions of s82(2), when considered in the light of its wording and the object of the statutory scheme to which it belongs, evinces an intention that non-observance of its requirements results in there being no valid claim.

We are supported in this conclusion by s82(3). We reject the submission that the failure to give the second document within 28 days of the first is "a defect, omission or irregularity in the claim for compensation or a medical certificate". In our opinion this subsection deals with the form or contents of the claim form or of the medical certificate. Subsection (3) provides that such a defect does not affect the validity of

the claim. This suggests that the failure to properly make the claim within time has the effect that the claim is invalid.

We should mention that in arriving at our conclusion that there are unlikely to be any significant consequences to a worker who fails to complete his claim by giving the remaining document within 28 days after the first, we have taken into account the very broad powers of the Work Health Court to excuse a failure to make a claim within 6 months after the occurrence of the injury, as set out in s182(3).

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