Global Insulation Contractors (NSW) P/L v Keating [2012] NTSC 4

PARTIES:	GLOBAL INSULATION CONTRACTORS (NSW) P/L v KEATING, Ronald William
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LA No 4 of 2011 (20910638)
DELIVERED:	13 January 2012
HEARING DATES:	30, 31 August 2011
JUDGMENT OF:	BLOKLAND J
APPEAL FROM:	Ms Morris SM

CATCHWORDS:

WORKERS COMPENSATION – Appeal against findings and orders made by Work Health Court – whether notice of injury was given – definition of injury – whether worker can rely on injury *simpliciter* when associated with disease – whether injury occurred in the course of employment – whether claim time barred – most profitable employment

APPEAL DISMISSED

Nature of appeal from Work Health Court – adequacy of reasons

Workers Rehabilitation and Compensation Act s 3, s 4, s 4(6A), s 4(8), s 53, s 53(1), s 64, s 65, s 65(2)(b), s 73, s 80, s 80(1), s 81, s 81(1)(c), s 81(1)(d), s 116(1), s 182(3)

Hatzimanolis v ANI Corporation (1992) 173 CLR 473; *Milmi Community v Wolstercroft (NT) Pty Ltd* [1997] NTSC; *Sun Alliance Insurance Ltd v Massoud* (1989) VR 8; applied

Kennedy Cleaning Services (Pty Ltd) v Petkoska (2000) 200 CLR 286; *Maddalozzo v Maddick* (1992) 108 FLR 159; *Thompson v Groote Eylandt Mining Co Ltd* (2003) 173 FLR 72; *Van Dongen v Northern Territory of Australia* (2005) 16 NTLR 169; *Waylexson Pty Ltd t/as Peterson Earthmoving Repairs v Clarke* (2010) 25 NTLR 168; *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310; followed

Collector of Customs v Pozzolanic Enterprises Pty Ltd (1993) 43 FCR 280; *Danvers v Commissioner for Railways (NSW)* (1969) 122 CLR 529; *Hayes v Federal Commissioner of Taxation* (1956) 96 CLR 47; *Hope v Bathurst City Council* (1980) 144 CLR 1; *Hicks v Bridgestone Australia Limited* NT(CA) 29 May 1997 (unreported) No AP 5 of 1996; *HWE Contracting Pty Ltd v Young* (2007) 20 NTLR 83; *Rothwell v BAE Systems Australia Limited* [2011] NTMC 039; *Young v HWE Contracting Pty Ltd* [2006] NTMC 63; referred to

REPRESENTATION:

Counsel:

Appellant:	Mr Crawley
Respondent:	Mr McConnel

Solicitors:

Appellant:	Cridlands MB
Respondent:	Ward Keller

Judgment category classification:	B
Judgment ID Number:	BLO 1202
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Global Insulation Contractors (NSW) P/L v Keating [2012] NTSC 4
No. LA 4 of 2011 (20910638)

BETWEEN:

GLOBAL INSULATION CONTRACTORS (NSW) P/L
Appellant

AND:

RONALD WILLIAM KEATING
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 13 January 2012)

Introduction

[1] This is an appeal by the employer Global Insulation Contractors (NSW) P/L against certain findings and orders made by the Work Health Court on 20 June 2011.

[2] The Work Health Court upheld the claim of the respondent/worker in the following terms; (the findings and orders effectively under challenge in this appeal appear in bold)

1. The applicant was a worker as defined in s 3 of the Act at the relevant time.

2. On 29 July 2007 the worker suffered an injury as defined in s 3 of the Act.

3. That this injury arose out of the course of the workers employment as defined in s 4 of the Act.

4. The worker was partially incapacitated to work as a result of the injury for the first six months after the injury from 25 July 2007 to 24 June 2008.

5. During the period referred to above the worker actually earned in employment a negligible amount.

6. During the period referred to above the workers' normal weekly earning amounted to $2664.31 per week.

7. During the period commencing from the end of the six month period referred to in 4 above:

   a. The worker was partially incapacitated for work as a result of the injury from 24 January 2008 to today

   b. The amount the worker is reasonably capable of earning in a week in work he is capable of undertaking is $349.32 plus superannuation (being 53% of the full time equivalent for a security officer)

   c. The worker is entitled therefore to compensation:

      i. pursuant to section 64 and section 65 of the Act: and

      ii. pursuant to s 73 of the Act in the amount of $5902.25.

[3] Broadly,[1] the worker commenced employment with the employer, initially as a casual scaffolder at the Alcan Gove G3 project. He was subsequently appointed a permanent employee, subject to the employer's workload; he

[1] Drawn from Her Honour's reasons. "Reasons".

generally worked in a gang of three with a scaffold supervisor. The employment was on a fly in fly out basis. While on-site, at the employer's cost, the worker was accommodated in the G3 village. Meals were provided. When not at the work site, the worker resided in Queensland.

[4] Her Honour found the worker developed severe back pain during July 2007; the worker's claim was he suffered a prolapse of his lumbar disc, which occurred over a period of days and resulted in the prolapsing disc material compressing the S1 nerve root. The symptoms of the physical ailment, (later diagnosed as the prolapsed disc compressing the nerve root), were manifest during July 2007.[2] He sought treatment and flew out of Gove on 25 July 2007. Her Honour noted the position of the parties on the diagnosis was largely agreed; that of a prolapsed disc with nerve root impingement.[3] Her Honour found the weight of medical opinion at trial supported a finding that the rupture of the disc occurred shortly before 19 July 2007.

[5] Her Honour acknowledged a lack of clarity on what precipitated the injury or the exact day and time, however, she concluded an injury was suffered by the worker at least on 19 July 2007, the day Her Honour found the worker woke to have severe pain and difficulty getting out of bed.[4] Her Honour accepted the first mention of lower back pain was documented on 13 July 2007 at the G3 clinic.

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2 Reasons, paras [10], [11].
3 Reasons, para [12].
4 Reasons, para [15].

[6] Essentially Her Honour accepted the injury was, in terms of the *Workers Rehabilitation and Compensation Act,* an injury *simpliciter* as claimed by the worker. This was notwithstanding the injury may have occurred against the backdrop of a disease. Her Honour found the evidence of pre-existing degenerative change to the worker's lumbar spine was sufficient to find "disease" as defined by the Act. Even if the injury were a "disease", (the latter requiring the worker to show the employment materially contributed to the injury), Her Honour found the Act entitled the worker to rely solely on the impairments covered by the definition of injury, without the further inclusion of "disease".

[7] After reviewing the authorities and the evidence, Her Honour concluded the injury occurred out of or in the course of employment; she referred to the circumstances of the worker living in a remote location where he was obliged to live in accommodation provided by the employer in order to complete assigned shifts and shift breaks.[5] Her Honour found the injury occurred during the period the worker was living and working in these circumstances.

[8] Her Honour then dealt with the matters of compliance with the notice provisions of the *Workers Rehabilitation and Compensation Act* (NT); whether the proceedings were time barred; the question of compensable incapacity and the level of compensation to be ordered under the Act.

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5 Reasons, paras [27], [29].

These issues will be discussed further as they bear on the particular grounds of appeal.

The Nature of An Appeal From the Work Health Court

[9] Section 116(1) *Workers Rehabilitation and Compensation Act* (NT) confines appeals from the Work Health Court to the Supreme Court to questions of law. This is of some significance in this appeal. Some of the grounds of appeal challenge various findings, said to be errors of law, but on analysis are questions of fact. A number of grounds allege inadequate reasons which if made out is an error of law.

[10] The difference between what is a question of fact and what is a question of law is not always clear.[6] An appellate court has no authority to make any findings of fact. This Court is limited to the legal effect of the facts as found by the Work Health Court.[7]

[11] To succeed on an appeal based on a question of law when the facts grounding a conclusion have been found by a Magistrate sitting in the Work Health Court, the question for determination is whether the Magistrate was bound in law to determine the case or issue in a particular way.[8] What must be demonstrated to establish an error of law, is that there

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6 *Waylexson Pty Ltd t/as Peterson Earthmoving Repairs v Clarke* (2010) 25 NTLR 168 at 176, Mildren J.

7 *Waylexson* (above), Riley J at 185.

8 *Waylexson* (above), Riley J at 186.

is really only one conclusion open, and that was a conclusion which differs from the conclusion reached by the learned Magistrate.[9]

[12] Further elaboration discussed by Mildren J in *Waylexon v Clarke* is drawn from *Hayes v Federal Commissioner of Taxation*[10] distinguishing the *factum probandum* (ultimate fact in issue) and the *facta probantia* (the facts adduced to prove or disprove the ultimate fact). When the *factum probandum* involves the application of a legal standard, the question of whether the *facta probantia* establishes the *factum probandum* will be a question of law. Where different conclusions are reasonably open, the question of which is the correct conclusion is a question of fact.

[13] The question of whether facts fully found fall within the provision of a statutory enactment is generally a question of law, however this is subject to the qualification that when the statute uses words according to their ordinary meaning and it is reasonably open to hold that the facts of the case fall within those words, the question as to whether they do or do not is one of fact.[11]

General Contentions Of The Parties On Appeal

[14] It is useful to deal with some of the general preliminary arguments and related evidence as they are relevant to a number of grounds of appeal.

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9 *Waylexson* (above), Mildren J at 177.
10 (1956) 96 CLR 47.
11 Mildren J in *Waylexon v Clarke* (above) at 176; citing *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280; amd *Hope v Bathurst City Council* (1980) 144 CLR 1 at 8.

(i) The Injury As Found By The Work Health Court – Interpretation of Findings

[15] The appellant asserts the case is unusual as Her Honour made a finding of a prolapsed disc occurring "during sleeping or upon waking" on 19 July 2007; that this was not a finding sought by either party; was not the subject of the claim for compensation or included in the statement of claim or any of the relevant pre-trial material; it was said not to be the injury reported to Doctors and not the injury on which the worker gave evidence.

[16] This submission is drawn from parts of Her Honour's reasons when read together: "a prolapsed disc with nerve root impingement and the weight of the medical opinion before me supports a finding that the rupture of the disc occurred shortly before 19 July 2007";[12] "I am satisfied that the worker suffered an injury as per its full definition of the Act. At least on 19 July 2007 the day the worker woke to have severe pain and difficulty getting out of bed";[13] and "when the worker awoke on the morning of 19 July 2007 with severe back pain, he was in the course of employment". The problem is said to be that there is lack of clarity about whether the injury found by Her Honour occurred when the worker was working for the employer and whether in those circumstances the injury found should have attracted compensation under the Act. It is said the injury was not an injury that was open on the evidence and that there are not adequate reasons as a matter of law to justify the decision.

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12 Reasons at [12].
13 Reasons at [15].

[17] In my view it would be wrong if this Court were to interpret part of the finding 'during sleeping or upon waking' to mean sleeping or waking was part of the injury or its cause. The worker suffered back pain for a number of days; a vivid description by him of one episode was found by Her Honour to have occurred on 19 July 2007. The pain that Her Honour found, manifested on that day. I do not agree the injury was not pleaded. Her Honour found a material date to be different from that pleaded. It was clear at the outset before Her Honour that there would be inconsistency in dates and the respective description of events. Her Honour's findings are clear and concise on what she found the injury to be[14].

[18] The Amended Statement of Claim refers to back pain in the relevant period, although Her Honour found that a particular manifestation of it occurred on 19 July 2007, rather than 13 July 2007 as pleaded. In short, the respondent worker argued the precise timing of the onset of symptoms was immaterial in this particular case because the whole relevant period was "the protected period of employment"; that the circumstances of this particular case were that the worker was in the course of his employment when the symptoms first manifested (primarily as back pain), whether it was found to be on 13 July or at a time between 13 July and 19 July 2007.

[19] I do not proceed on the basis that "sleeping or upon waking" was found to be part of the injury. What constitutes an injury is not defined in the Act,

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[14] Primarily in Her Honour's Reasons, paras [10] - [15]; but throughout referred to as back pain, the diagnosis being prolapse of his lumbar disc occurring over a number of days resulting in the prolapsing disc material compressing or irritating the S1 nerve root.

beyond the inclusive definition in s 3, "physical and mental injury" ... "in the course of employment" and includes "a disease" and "the aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease".

[20] "Injury" was discussed in *Hicks v Bridgestone Australia Limited*[15] where Martin (BF) CJ and Gallop J said it was not necessary that a finding of the precise physiological change be made to constitute an injury. Mildren J agreed, doubting whether it was necessary "to establish a physiological change at all in order to establish an injury". Her Honour's reasons reveal she regarded the pain manifest and episode described that she found to have occurred on 19 July 2007 constituted injury in the sense of the Act. Her Honour acknowledged she could not find the exact day and time of the physical trauma that precipitated the injury.

(ii) The problem with dates and the sequence of events

[21] A crucial finding made by Her Honour was that the worker was a poor historian;[16] however, it was found he did not deliberately attempt to mislead the Court. His evidence as to where and how the injury may have occurred was not supported by the medical records of the site medical centre. Where there were discrepancies as to dates and consultations Her Honour preferred the written evidence of the *G3 Patient Treatment Record*. These records contributed to the evidential basis of a number of her

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15 NT(CA), 29 May 1997 (unreported, No AP 5 of 1996).
16 Reasons at [13].

findings. This process required great care. In my view it was a most reasonable fact finding approach taken by Her Honour in the circumstances. It has never been suggested the worker was being untruthful.

[22] The appellant points out a number of inconsistencies in the respondent's case. For example, the date of an incident reported by the worker in the Claim Form.[17] The worker reported an incident referrable to 11 July 2007[18] as the date of the injury, referring to an incident of awkward heavy lifting while standing on a platform supporting pipes weighing approximately 20 kilos ending with the statement "I injured my back". This was pleaded in the (original) Statement of Claim, [19] (and referred to at times in these proceedings as the "scaffolding incident"); the injury pleaded was an annular tear causing the prolapsed discs in L45, L5S1. The date of the injury is given was 11 July 2007. Her Honour dismissed both the annular tear as the injury and the scaffolding incident as a cause of the injury.

[23] The Amended Statement of Claim[20] essentially repeats the same alleged injury originally said to have occurred on 11 July 2007 with the scaffolding incident pleaded as having occurred on 26 June 2007. Alternatives pleaded were that the worker woke with chronic back pain on 13 July 2007, having

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17 AB 522.

18 The date 11/7/07 is given in answer to "when did your injury happen or you first noticed the disease?"; however, "date injury reported" is filled in as 26/6/07. (Claim Form AB 522, 523).

19 AB 2.

20 AB 5.

experienced back soreness due to the annular tear and/or the disc prolapsed. A further alternative pleaded was that from on or about 19 July 2007 the worker experienced further chronic back pain radiating into his left gluteus maximus muscle due to the annular tear and/or the disc prolapsed; it is argued because of the relevant date found by Her Honour, (19 July 2007) the annular tear or disc was already manifest. It is submitted neither Her Honour's findings nor any notice accords with any of the pleaded material.

[24] The appellant submits the patient treatment notes of the *G3 Patient Treatment Record* that bear on this issue include the entry of 26 June 2007 that relates to the scaffolding incident, (noting pain in the right posterior thoracic region);[21] 11 July 2007 refers to an entry concerning a sore throat; the entry of 13 July 2007 refers to the worker "complaining of low back pain the past two days, unknown mechanism of injury". On 19 July 2007 the entry is: "presents complaining of increased exacerbation of low back pain". This last entry is the date that Her Honour found was the date the worker was in significant pain when he woke up.

[25] In his evidence, after being taken to the record of 13 July 2007, the worker is asked about the pain that day. The worker described the pain as "very very painful".[22] He said he was in bed. He said he could not get up, he had to roll out and get onto the floor and could not get up. The worker said

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21 AB 361.
22 AB 128.

he told Barrett Loraine, his supervisor. It was submitted on behalf of the appellant, this part of his history correlates more closely with 11 July 2007. In evidence the worker then describes being put on light duties over a two week period. The appellant submits that this evidence correlates with the worker flying out from Gove on 25 July 2007, therefore, the relevant date must have been 11 July.

[26] In my view this process of isolating the inconsistencies does not advance the appellant's case given what Her Honour found about the worker's unreliability as a historian and her primary reliance on the other material before her. The various internal inconsistencies pointed out on appeal in the worker's evidence, regardless of the errors on dates, and the correct sequence of events do not in my view undermine Her Honour's finding.

[27] Having determined to rely on the medical notes, (that in my view was reasonable for the purpose of fact finding in these circumstances), Her Honour would have considered the notes of 19 July 2007. That entry well grounds the finding that 19 July 2007 was the critical day of the most significant pain reported: *"presents complaining of increased exacerbation of lower back pain". "Pain score ++ this AM. Finding it difficult to get comfortable in any position. Took at least 30 minutes to put boots on this morning. Pain radiating to left glut. No neurological defect"*.

[28] That entry clearly represents an escalation from what was described on 13 July. *"Complaining of lower back pain past two days, unknown mechanism of injury. Pain bilateral lumbar spine, dull ache. Five out of 10"*. There was every reason for Her Honour to regard 19 July as a crucial date.

[29] The appellant also raises the history given by the worker to doctors as showing further vulnerability to challenge. For example, the referral letter from the respondent worker's lawyer Ward Keller to the orthopaedic surgeon Dr Shaw, refers to an injury on or about 11 July 2007. Dr Shaw's report[23] refers to the scaffolding incident on 11 July 2007 and describes a twinge of pain in the lower back region; the worker continuing to work the day with pain and the following morning experiencing significant low back pain which was referred to the right buttock. Other medical reports repeat this flawed history. These accounts given to doctors by the worker are given well after the time of the critical events. The history he gives in most instances according to the dates is not made out when the other evidence is considered. It should be noted Her Honour ruled out the scaffolding incident and acknowledged it could not be causal of a prolapsed disc. That finding was supported by the medical evidence.

[30] The respondent worker also saw Dr Curtis in relation to an income protection claim that he had lodged. Under the heading "Mechanism of Injury Sequence of Events",[24] Dr Curtis writes "During the month of July,

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23 AB 481.
24 AB 533.

possibly 11 July, although the patient cannot remember with certainty, he awakened one morning with severe low back pain ..." It was submitted by the appellant the best way to view the evidence in terms of correlating inconsistent histories with the evidence is that the date when the worker woke up with pain would have been before 13 July 2007 because that is when he saw the medical centre with the history of back pain symptoms. Once again, the worker cannot be relied on with having provided accurate dates to Dr Curtis. It is clear the *Patient Treatment Record* entry of 19 July is of a far more significant nature. Dr Curtis notes in any event the "patient cannot remember with certainty".

[31] In determining the relevant time frame in which the injury occurred, Her Honour also noted that after attending the clinic on 19 July 2007 the worker attended Gove Hospital on 20 July 2007. He was then on light duties to 25 July 2007, the date he left Gove. Similarly, for the incident given in the history to Dr Curtis in 2008: "One morning I woke up. There was no real cause but I was absolutely cast". This too maybe considered referrable to the clinical notes of 19 July 2007. In my view Her Honour satisfied herself the worker was describing that event, although the date he gives is obviously incorrect.

[32] Her Honour gave her reasons for approaching the evidence in this way. Further, although in relation to dates the worker was unreliable, (at least in part of his evidence), he was able to broadly describe the sequence of events in terms of the escalation of symptoms and treatment that occurred

after the most serious pain is experienced.[25] Her Honour was aware the 19 July incident was not the first complaint of back pain.

[33] I agree with the submission that the respondent worker's vivid recollection is about waking up in significant pain and it seems obvious that given the notes of 19 July 2007, Her Honour was satisfied the worker was describing that event. After describing the event of not being able to get out of bed the worker's oral evidence was that he told the first aid clinic at the camp and he rang Bart Loraine (the Supervisor), went to work a couple of times after that and was put on light duties. He told the Work Health Court light duties were organised either by Mr Loraine or Mr Kilgour.[26]

[34] While that evidence represents another discrepancy, in my view the discrepancies between the notes, the various histories given and the worker's evidence do not undermine Her Honour's conclusion on the timing of the injury based largely on the *G3 Patient Treatment Record*.

(iii) The Medical Evidence

[35] It is clear Her Honour made her finding on the injury based on the medical evidence she preferred together with other evidence of the pain episodes as it was relevant to the ultimate finding.[27]

[36] Before Her Honour the appellant's position was that the injury occurred on 11 July 2007 and that Her Honour should have regard to the evidence of Dr

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25 AB 127.
26 AB 21-22.
27 See for example, Reasons at [24] and [25].

Shaw (disc protrusion (at L4/5 or L5/S1) being an aggravation of a pre-existing lumbar spondylosis and subsequent sciatica);[28] Dr Curtis (annular tear superimposed upon degenerative disease (at L4/5) progressing to a prolapsed at either or both levels overnight); Dr Day (disc protrusion contacting the nerve root and causing radiculopathy);[29] Dr Cameron (lumbar strain injury and an aggravation of the underlying disc degeneration); Dr Smith (conceivable that it was aggravation of pre-existing lumbar degenerative disease); Dr Chase (inter-vertebral disc disruption (at L4/5) with some facet joint involvement); Dr Lorentz disc prolapsed (at L4/5); concluding with the submission that "prolapsed" and "protrusion" can be used interchangeably and the submission the injury occurred on 11 July 2007 "upon wakening, or during the night beforehand, sleeping".[30]

[37] It must be remembered Her Honour found the injury or impairment was a prolapsed disc with nerve root impingement, but that the weight of the evidence supported the rupture of the disc that occurred shortly before 19 July 2007.

[38] When asked what type of event would be necessary to cause the mechanism of injury of an onset of pain on waking followed by, some days later, a severe exacerbation of pain extending into the leg, Dr Shaw[31] said "it is typical to explain why it will often be present and that it was quite a

28 AB 26 at para [60].
29 AB at 27 para [62].
30 AB 27 paras [63] – [68].
31 AB 236.

common finding that patients have quite tolerable back symptoms in the evening and the next morning or when they get out of bed they have a lot of back pain". It is put on behalf of the appellant there was no history of tolerable back pain the night before.

[39] Dr Shaw goes on to explain it could be inflammatory changes associated with disc obtrusion that are more evident when the body is cooled down. He explained a small disc protrusion may cause just back pain initially and as it enlarges and inflames the nerve root it leads to leg pain. He explained that any activity while a person is awake such as sneezing, coughing, bending forwards to do a shoelace up or twisting their back could cause the enlargement that is aggravated by activities of daily living.

[40] Dr Shaw agreed from the history he obtained a further episode of symptoms had commenced sometime in July 2007. Dr Shaw agreed the symptoms and radiological evidence related to either a prolapsing of one of the discs or a further prolapsing of one of the discs.[32]

[41] Dr Shaw agreed, on being told the worker had relief of symptoms through a nerve sleeve injection that it was most likely the nerve root was the cause of the leg pain;[33] the onset of sciatic pain through nerve root compression should or can quickly follow the disc protrusion; seconds to minutes. He also explained a person may have tolerable back pain and next morning when they get out of bed they have a lot back pain, often have difficulty

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32 AB 238.
33 AB 234.

getting out of bed and putting shoes on. He then explained an enlarged disc protrusion could be caused by the activities of daily living (referred to above).

[42] Dr Curtis noted an annular tear stating "the focal change tells you he has had an annular tear hear". He explained annular tears are painful. It is pointed out on behalf of the appellant there is no evidence of a history of pain at work the day before. Dr Curtis explained that the condition of a broad based bulge need not be painful and that 30 percent of the population can have a broad based bulge. He postulated that if the worker woke with pain and there was no incident beforehand, there may be a tear the day before and overnight it progressed to a prolapse, increasing the pain the next day. The tear however would be painful. On the appellant's case that is not explained in the history or the evidence.

[43] Dr Curtis said he would expect there would be a complaint of pain at the time of the annular tear. He could not say how long it would be between the annular tear and the prolapse occurring. Dr Curtis goes on to say he would have expected that with a focal change described there would have been intermittent pain months preceding that[34]. He said these changes do not happen overnight. Dr Curtis was of the view that the precise part employment had to play was questionable. The appellant points out the lack of history of pain that would have been expected, according to Dr Curtis; it also said to be supportive of a history of months of pain.

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[34] AB 247.

[44] As noted, Her Honour did not find an annular tear. Going on from Dr Curtis' comments on the common condition of a broad based bulge (summarised above) he says "This man hasn't only got a broad based bulge, he's got a focal component in it, as they describe in the MRI. Now, my interpretation is that the focal change surmounts the broad based bulge, which for the moment we can consider the bulge to be normal; that it's the focal change that tells you he's probably had an annular tear here". Dr Curtis goes on to explain that in the worker's case the pain is specific pain that tracks the course of the sciatic nerve down the back of the leg, through the buttock first, into the foot; that the nerve roots are involved and the symptoms 'hang together'; there is consistency with the radiology, although he does not at that point express an opinion on causality. He notes it is an unusual presentation.[35]

[45] Dr Day gave examples about how the disc protrusion can evolve. He described the various categories of acute, sub acute or, chronic. When asked[36] Dr Day said he did not have enough information to give an answer as to whether this was acute, sub acute, or chronic; he did not have enough information to say which of those was the case, but, said it was probably not acute. On behalf of the appellant it is argued this supports the theory that the injury was not a sudden significant onset; it could have occurred over days, weeks or months.

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35 AB 244.
36 AB 252.

[46] Dr Day did however explain disc protrusion in the lumbar spine. He said there are chemicals within the disc and the disc protrusion, which irritate the adjacent nerve root; the protrusion can cause the pain in the distribution of the nerve root. He concluded the worker had this more common feature.[37] As to the time frame for the process by which the protrusion comes into contact with the nerves Dr Day said there were a number of scenarios; massive disc protrusion, which causes an abrupt onset, and severe back pain and sciatica almost simultaneously. The second scenario was when the protrusion protrudes a little bit slower, and usually a bit of back pain followed by leg pain over a period of the next couple of days to a week or so. The third situation was where it is chronic, usually a degenerate disc, where onset of back, then leg pain occurs over perhaps some months. He regarded the second scenario as sub-acute. Her Honour obviously drew on this evidential material with the evidence of symptoms culminating in the episode of 19 July 2007. Dr Day arranged for the administration of the nerve root block in terms of management of the condition.[38]

[47] Dr Chase agreed a disc protrusion can occur simply by way of spontaneous injury that is very common with back pain.[39] He agreed that relief of

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37 AB 251.
38 AB 503, but referred to in evidence elsewhere.
39 AB 321.

symptoms of sciatic pain through performance of nerve root block would effectively amount to a diagnosis that there was nerve root irritation.[40]

[48] Dr Cameron[41] agreed a prolapse or protrusion of a disc can lead to nerve root compression of the sciatica. He would not expect an annular tear to be associated with a process of disc protrusion. He agreed a focal protrusion that makes contact with the nerve root produces irritation. The patient will then experience pain in the leg.

[49] Dr Cameron described the injury as an annular tear.[42] He described an annular tear as a degenerative crack which has occurred in the annular fibrous band around the centre of the soft part of the disc material that tears with aging. Very occasionally it is seen in trauma. He disagreed that there would be a process of disc protrusion occurring. He said the annular tear does not necessarily mean the protrusion has occurred.

[50] Dr Chase,[43] an occupational physician, told Her Honour bulges and protrusions are extremely common in the general community and do not necessarily correlate in any way with pain and symptoms. In relation to any comment on the categories of acute, sub acute and chronic Dr Chase said the difference was between one single massive trauma or a small number of cumulative traumata over a long period of time. He said "sub

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40 AB 322.
41 AB 292.
42 AB 293.
43 AB 320.

acute" by definition is from zero to six weeks.[44] (Dr Day had suggested that subacute was from days to weeks and then chronic became months).

[51] Dr Lorentz said the majority of disc injuries are in a second category, developing sub acutely over a period of a few days or weeks rather than all at once. There is a period of irritation without inflammation, then more severe pain and the irritation bothers the patient. He agreed a person may not be aware of what might have caused the prolapsed. He said something could occur the day before, go unnoticed and then symptoms increase over time.

[52] In relation to being asked about awakening with symptoms and his employment circumstance Dr Lorentz said it "would have been just back pain from lying badly in a bad position, so it was not a severe neural, I think that you could get from a prolapsed disc". Dr Lorentz was of the view that most injuries develop sub acutely over a period of a few days or weeks. He agreed also that disc prolapse can occur from activities of daily living.

[53] In terms of pain upon waking, Dr Smith said[45] there was no correlation between the work being performed and the onset of symptoms. He said the exacerbations came on for no apparent reason. He said it is a very common occurrence with lumbar degenerative disease.

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44 AB 321.
45 AB 203.

[54] Her Honour also had before her the ongoing treatment records and reports of Dr Gaston Balanger of Seaview Healthcare (Queensland);[46] the treatment of Dr Day,[47] and the various scans and associated reports.[48]

[55] Essentially it is submitted that under no evidential basis, the worker, records or medical evidence could there have been the finding of the pain upon awakening injury on 19 July 2007 and the supporting diagnosis as found.

[56] It is submitted it is not apparent from an analysis of the evidence where it was that Her Honour found support for the ultimate conclusion of the injury. I do not with respect agree with this analysis. Her Honour was concerned with assessing the probabilities. Not every possibility that was referred to in the medical evidence was persuasive. Treating the evidence as a whole, but disregarding identified parts of the worker's history, in my view Her Honour was well entitled to make the finding that she did; namely a prolapsed disc with root impingement, the rupture of the disc occurring shortly before 19 July 2007. Her Honour specifically recorded her reliance on the evidence of Dr Day, Dr Curtis and Dr Chase.

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46 AB 527 – 530.
47 AB 531.
48 Eg. Central Queensland, Medical Imaging AB 504 – 505.

[57] Ground 1 of the Appeal: *"In finding that by reporting back pain to his supervisor and on-site medical centre, the worker notified his employer of his injury, the learned trial magistrate:*

1.1 Misdirected herself or failed to have regard to the requirements of s 81(1)(d) of the Act as to the contents of any such notice;

1.2 Erred in law in finding that notification was to an on-site employer provided medical service (there being no evidence upon which such a finding could be made), and that such notification is notification to an employer;

1.3 Erred in failing to give adequate reasons, in light of the inconsistent evidence given by the worker as to what, if any, notice of injury he gave, and the notice of injury as pleaded;

1.4 Should have held that the worker's claim was barred by failure to give notice as required by s 80 of the Act".

[58] Section 80 of the Act provides: "Subject to this Act a person shall not be entitled to compensation unless notice of the relevant injury has, as soon as practicable, been given and served on the worker's employer". Relevantly s 81(1)(d) provides: "Notice of injury shall include the date on which the injury occurred and the cause of the injury".

[59] Compliance with s 80(1) is a condition precedent to a worker's entitlement to compensation. As Mildren J held in *Maddalozzo v Maddick*,[49] the giving of proper notice is the essence of the right to compensation. Section 81 of the Act provides notice of the injury may be given orally or in writing, shall include the name and address of the person injured, the date on which the injury occurred and the cause of the injury. No other formality is required and as observed in *Maddalozzo v Maddick*, as notice may be given orally, there is no prescribed form of notice.

[60] In *Maddalozzo* the shift in focus under the *Work Health Act,* (as it was then called) towards occupational health and safety and the emphasis on rehabilitation of injured workers was highlighted. Thus s 80 along with other changes from the previous *Workers Compensation Act* should be interpreted in the light of a scheme to prevent injuries from occurring as well as to rehabilitate those who are injured and to provide monetary compensation. His Honour held the necessity for prompt notice, was in the interest of all parties. It was also observed in *Maddalozzo v Maddick* that s 80(1) does not refer to the time of injury as the reference point after which notice must be given "as soon as practicable". The date of the injury is not necessarily the appropriate reference from which the time is to be measured. His Honour went on to say that in his opinion the relevant reference point will often be the date the financial loss begins to occur.

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[49] (1992) 108 FLR 159.

The question of whether or not a worker has failed to give notice as soon as practicable is a question of law.

[61] In relation to the requirement to give notice Her Honour found "there is sufficient evidence to find that the worker notified his employer of his injury and that the employer was aware of the injury. He presented to a clinic provided by his work place and received treatment at that clinic on 13 and 14 July 2007. He notified his immediate supervisor, Mr Loraine, who observed him suffering pain. He was then taken by the worksite health officer employed by his employer for treatment. He was placed on light duties, and ultimately transferred earlier than scheduled, at his request, but organised by his employer, offsite because of his injury".[50]

[62] The appellant criticises this part of Her Honour's reasons as there are no findings as to the terms of the notice required by s 81. Given the discrepancies in dates and the non correlation of reporting to the clinic and the date of the injury actually found by Her Honour, the appellant argues notice in terms of s 81(1)(d) cannot be regarded as given.

[63] Further inconsistencies in the worker's evidence were highlighted to support this. It was submitted his evidence of speaking to his supervisor Mr Loraine on the day of awakening with low back pain and then denying that he did; his later evidence that he rang either Mr Loraine or Mr Kilgour and said that his back was sore and he could not get out of bed and was

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[50] Reasons at 34.

going to either the camp first aid or site medical centre could not be relied on as providing proper notice.

[64] The appellant disputes there was any evidence of notification by the medical clinic to the supervisor on 19 July 2007. It is submitted there is no evidence the employer received notice of an injury suffered on or about 19 July 2007. Further, the worker believed he had a claim at least by the time he claimed income protection instead of workers compensation in August 2007; hence it is argued notice as soon as practicable would be required well before the end of 2007. A finding of whether notification is actually given is a finding of fact as opposed to the question of whether a worker has failed to give notice as soon as practicable.

[65] In my view s 81, in terms of the requirements of notice is an example of a statute that uses words according to their common understanding. Whether or not the facts as determined fall within the ordinary meaning of those words is a question of law but if it is reasonably open to hold that the facts fall within those words or if different conclusions are reasonably open, the question of which is the correct conclusion is a question of fact.[51]

[66] Evidence supportive of the finding that notice had been given (subject to the Clinic being designated to receive such notice), include the G3 Patient Treatment Records generally, but particularly the notes of 19 July 2007,[52] (noted above). In addition to the treatment notes, the following is

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51 Discussed above at [13].
52 AB 364.

documented “rest of shift, supervisor and ENS advisor notified”. The record shows, in that instance, evidence of notification to the employer. The content of earlier entries have been set out above.

[67] Mr Loraine’s evidence was the respondent came into work “really crook”; that he had really bad lower back pain; that he couldn’t do much like stand up; he was given light duties; he agreed that it was not just one day that the respondent worker was “crook” with a sore back; he agreed the worker continued to have a “crook back” until the time that he flew out; he was not sure but said Amy Ross would have had a lot to do with the worker getting physiotherapy from Gove Hospital; he agreed the usual procedure was anyone who had an injury would be taken to the clinic; the reason for this was so that Global Insulation had a record of the incidents; he agreed the clinic was the only one at Alcan for all employees; he agreed all Global employees had to attend the clinic in the same way as any other employees of any other companies that were working on the plant; the process of reporting and going to the clinic and notifying supervisors was imposed on Global by the principal contractor Thiess. Mr Loraine also said that as far as he was aware the incident did not happen at work as he did not fill out an incident report. Not filling out an incident report is what he based that answer on.[53]

[68] In the light of the evidence of the clinical notes and the evidence of the supervisor Mr Loraine, it was well open to Her Honour to conclude that

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53 AB 283-285.

notification of the injury was given and that it was given as soon as practicable. It was given virtually spontaneously.

[69] Applying s 81 to the circumstances, bearing in mind the purpose of the notification provisions, (namely to ensure the employer has the information necessary to consider and respond to the notification), lead to the conclusion that here the worker has given the appropriate notice as required under the Act. The supervisor, Mr Loraine knew the worker's name and address; he knew or was informed by the worker of the date of the injury and so far as the circumstances allowed, the cause of the injury.

[70] To interpret and apply s 81 in such a way that suggests a worker who does not know the mechanism of the injury would be excluded from the Act does not accord with the principles of interpretation of the Act.[54] Here the notification was given immediately upon the worker's back pain manifesting to the serious degree that it had on, most likely, according to the medical records the 19th July 2007. The onset of symptoms occurred according to the medical records from 13 July to 19 July but the whole period was in "the protected period of employment". The date and cause of the injury can only relate to factors that are within the worker's knowledge that are capable of being conveyed at the time of giving notice. According to the medical records, the worker has given a description of events and symptoms between 13 July and 19 July well capable of fulfilling the notice requirements and that it was noticed "as soon as practicable".

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[54] As discussed for example in *Thompson v Groote Eylandt Mining Co Ltd* (2003) 173 FLR 72.

[71] The particulars of notice given to the clinic were set out in the Amended Statement of Claim[55] and specify 26 June 2007, (which can be disregarded, given the findings) the attendance on 13 July and reported lower back pain for two days; review at the clinic on 14 July 2007; attendance on 19 July 2007 complaining of an increase of lower back pain; being placed on light duties on or about 19 July until stopping work altogether on about 24 July 2007; attendance at the clinic on 20, 21 and 24 July for review; and that on or about 25 July 2007 the employer or its agent arranged for the worker's transportation back to Gladstone.

[72] Her Honour found that ultimately the worker was transferred earlier than scheduled at his request but organised by his employer offsite because of his injuries.[56] This action taken by the employer supports the conclusion of proper and timely notification.

[73] It was clear to Her Honour the medical services provided on site were for the benefit of employers and employees at that site and notifications to the medical service, (particularly where the supervisor is notified by the clinic), are capable of constituting notification to an employer.[57] This was a conclusion of fact open to Her Honour.

[74] Her Honour did not expressly refer to the requirements of s 81(1)(d) of the Act. Her Honour did however specify what action taken by the worker she

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55 AB 6.
56 Reasons at 34.
57 Evidence of Mr Loraine, summarized in para [65] above.

regarded as notice. Consistent with the accepted approach to the interpretation of the Act, (in that the words of the Act have ambulatory operation or may acquire different meanings depending on the circumstances),[58] s 81(1)(d) was not intended to be applied to exclude workers from the operation of the Act for not notifying of the specified matters that are not within their knowledge or are clearly within the knowledge of the employer. If worker's who did not possess such particular knowledge were excluded, that would lead to absurd applications of s 81(1)(d). Her Honour's reasons note also that the fact neither the worker nor the supervisor knew or realised the injury was in the course of the worker's employment does not preclude notification of the injury. I respectfully agree.

[75] The conclusion of notice having been given (including its relevant particulars, according to the circumstances), was reasonably open to Her Honour. There was in my view extensive evidence, (some of which is cited above) in support of the finding that in circumstances of this case, notification to the on-site medical service constituted notification to the employer. It was clearly regarded as a means of notifying the employer. In any event, there was the notification to Mr Loraine.

[76] Although Her Honour's reasons are succinct, it is clear what was relied on in concluding notice of the injury was made as soon as practicable. I find no error of law. I would not allow ground 1.

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58 *Thompson v Groote Eylandt Mining Co Ltd* (2003) 173 FLR 72, Martin (BR) CJ at 73.

[77] Ground 2: *"Having found*

A. That the pre-existing degenerative changes suffered by the worker were a disease;

B. The claimed injury was a relatively sudden onset of pain, being a prolapsed disc, on least on 19 July 2007 when the worker awoke with severe pain and was unable to get out of bed, Her Honour erred in failing to provide adequate reasons to explain her findings of injury in light of such findings being contrary to the evidence of the worker, and inconsistent with the reports of injury given by the worker to various medical practitioners; and misdirected herself as to whether such a development;

C. Constituted an injury simpliciter as well as a disease or aggravation of a disease;

D. And in any event was required to meet the causal constraints of s 4(6)(A) and (8) of the Act and should have found that the condition howsoever and whensoever suffered coming within the definition of "disease" or being an aggravation of disease, was not compensable on the basis that the workers employment was not the real, proximate or effective cause of same".

[78] The appellant argues reliance should not have been placed on *Zickar v MGH Plastic Industries Pty Ltd*[59] and *Kennedy Cleaning Services (Pty Ltd) v Petkoska*.[60] It is argued the statutory provisions in the Northern Territory Act differ from that relied on in *Zickar* and *Kennedy Cleaning* so as to lead to different results.

[79] In *Kennedy Cleaning*, Gleeson CJ and Kirby J referred to *Zickar v MGH Plastic Industries Pty Ltd* when discussing what was generally agreed to constitute 'injury'. It was observed an "injury" had been recognised as a sudden or identifiable physiological change, that "could nonetheless qualify within the ordinary application of that expression appearing in the worker's compensation legislation, although the change was internal to the body of the worker. It did not have to be external or necessarily produced by external causes".[61]

[80] Further, it was acknowledged characterisation of an injury occurring within the protected period of employment would ordinarily be compensable without meeting the disease pre-conditions if it is distinct from the underlying disease pathology. Their Honours held that consideration must be given to the particular facts concerning the nature and incidents of the physiological change accepted at trial:

> If this evidence amounts relevantly, to something that can be described as a sudden and ascertainable or dramatic physiological

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59 (1996) 187 CLR 310.
60 (2000) 200 CLR 286.
61 *Kennedy Cleaning* (above) at [35].

> change or disturbance of the normal physiological state, it may qualify for characterisation of an "injury" in the primary sense of that word. If such an injury happens within the protected period of employment, it is ordinarily compensable without proof of a specific casual connection within the worker's employment. If the propounded 'injury' is distinct from the underlying pathology that constitutes a "disease" that directly or indirectly caused the sudden event to occur, it is unnecessary to proceed to the alternative and additional basis whereby, in such cases, compensation may also be recovered for the disease process if the statutory preconditions are met.[62]

[81] It was concluded there was no reason to read the word "injury" down because of the alternative and additional definition of compensable disease condition. Here the appellant also acknowledges the approach of McHugh, Gummow and Hayne JJ[63] "the circumstance that a sudden physiological change has been caused or provoked by disease does not prevent it from constituting a "physical injury" for the purposes of s 7(1)". Both *Zickar* and *Kennedy Cleaning* confirm a construction of NSW and ACT Workers Compensation legislation to the effect that "injury" in the course of employment negates the need for reliance on underlying disease. "Disease" not capable of classification as "injury" must be shown to be connected to the employment to be compensable.

[82] Her Honour clearly followed the approach in *Zickar* and *Kennedy Cleaning*, paying due regard to the Northern Territory Act.[64] The appellant argues the statutory provisions considered in *Kennedy Cleaning* that make diseases compensable "deems" diseases to be personal injury where there is a

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62 *Kennedy Cleaning* (above) at [39].
63 *Kennedy Cleaning* (above) at [68].
64 In particular, Reasons paras [20] – [25].

sufficient cause or link to employment. The appellant acknowledges the definition of "disease" is the same in the Northern Territory Act but argues the structural difference in the statutes of how "disease" is treated is said to account for the result in *Zickar* and *Kennedy Cleaning*. It is pointed out that not all diseases under the NSW and ACT Act are compensable and have the additional test of whether there is a causal nexis with the employment.

[83] I do not agree that the construction of the Northern Territory Act requires an injury that has a connection to an underlying disease process to be regarded as a disease for the purpose of the Act with its attendant restrictions.

[84] The first part of the definition of injury in the Northern Territory Act is couched as "injury", "means" a physical or mental injury and then extends the definition to an inclusive definition of disease; "and includes ... a disease". The use of the word "includes", in reference to a disease, clearly signifies that not every physical injury associated with disease, requires consideration of the application of s 4(6A) of the Act. Section 4(6A) of the Act requires, (in the case of disease), that it be established the employment materially contributed to the worker's contraction of the disease or to its aggravation etc. In such a case, s 4(8) requires the employment to be the real, proximate or effective cause of the injury.

[85] One point of distinction in relation to the legislation applicable in *Kennedy Cleaning* is said to be that in *Kennedy Cleaning* there was no provision comparable to s 4(6A) of the Northern Territory Act. The Act there included within "injury" only those diseases which had the causal connection to the employment. It was argued the Northern Territory s 3 definition of injury includes all diseases, but s 4(6A) operates to impose an exclusion by virtue of the causal link being shown to employment on those injuries that are "diseases".

[86] The Northern Territory Act differs in structure, however the principles derived when properly construed are the same as those found in *Zickar* and *Kennedy Cleaning*. An injury is still an injury for the purpose of s 3 of the Northern Territory Act occurring "out of or in the course of employment" whether or not it is associated with a disease.

[87] As Her Honour held and I would respectfully agree "All disease is thus an injury, but not all injuries are diseases. Section 4(6A) and (8) add constraints to those additional circumstances. However I do not find that these constraints also then apply to injuries which may be classified as both an injury and a disease or aggravation of a disease".[65]

[88] Given the fact finding process outlined earlier in these reasons that the evidence established a prolapsed disc; the onset of pain was relatively

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[65] Reasons at 25. I note also, although not available at the time of hearing this Appeal the recent illumination of this issue by His Honour Neill SM in *Rothwell v BAE Systems Australia Limited* [2011] NTMC 039. The parties there agreed on the approach taken.

sudden, as opposed to a chronic situation with onset of pain over a period of months, the respondent worker could elect to rely on injury *simpliciter*. The findings as to the medical condition are findings of fact and not susceptible to appeal. I see no error in the conclusion that the physiological change amounted to an injury *simpliciter*. Under the principles of *Zickar*, the worker could elect to rely on injury *simpliciter* rather than the disease provisions.

[89] It was argued s 4(6A) is to be read in conjunction with s 53(1) dealing with compensation and linking the work injury to the incapacity. Section s 53(1) is however, concerned with ensuring it is an injury under the Act that is the basis of the incapacity, rather than, for example incapacity sourced in an unrelated injury.

[90] Additionally, s 4(6A) commences "subject to this section" and then applies the limitation on compensable injury that deals with disease only. Consequently it excludes injury *simpliciter* from its operation, and therefore from the exclusion.

[91] In my view Her Honour's reasons were not inadequate to support the findings as alleged in this ground of appeal. Once Her Honour's approach to fact finding is appreciated, which she explained,[66] the reasons allow this

66 As discussed previously in these reasons.

Court to comprehend the basis of the decision and provide sufficient transparency for justice to be seen to be done.[67]

[92] I would not allow Ground 2.

[93] Ground 3: *In finding that when the worker awoke in his accommodation on the morning of 19 July 2007 with severe back pain and was then "in the course of his employment",*

3.1 the learned trial magistrate erred in failing to give adequate reasons to support such findings of fact of injury on 19 July 2007, being contrary to all the evidence presented, and

3.2 misdirected herself as to the meaning of the phrase "in the course of employment"

and should have found that any condition suffered by the worker did not occur in compensable circumstances.

[94] The respondent worker was found to be injured out of or in the course of his employment, essentially because of the circumstances of being a "fly in fly out" worker in a remote location; he was obliged to live in accommodation provided by the employer and the reason for the worker being in that location, away from his normal residential address was to complete assigned shifts and shift breaks as notified by his employer.[68]

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67 *Mimli Community v Wolstercroft (NT) Pty Ltd* [1997] NTSC, Thomas J applying *Sun Alliance Insurance Ltd v Massoud* (1989) VR 8 at 18.

68 Reasons at [27].

Her Honour relied on *Hatzimanolis v ANI Corporation*.[69] Having made this finding on the evidence, the finding may only be challenged if a contrary finding was inevitable and that contrary finding differs from the Magistrate.[70]

[95] Counsel for the appellant relies on a qualification acknowledged in *Hatzimanolis* to the effect that simply being in a remote location does not in itself mean a worker is in the course of employment. What must be examined, it was argued was whether outside of the worker's duties, (and the obligations and incidents of employment), the employer has expressly or impliedly induced or encouraged the worker to engage in a particular activity in which he was injured. It is argued that inducement or encouragement was found in *Hatzimanolis* and that is why the worker succeeded. In distinguishing this matter, it is submitted on behalf of the appellant that any ailment that arose in July 2007 arose simply out of the activities of daily living, if not from the normal aging process. It is submitted it is meaningless to suggest the employer induced or engaged the worker to take part in such activities.

[96] In my view *Hatzimanolis* covers the circumstances of the respondent worker in this case, being in a remote location and sustaining an injury while resting in his accommodation unit as required. It occurred within an overall period or episode of work. I agree with the respondent's

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69 (1992) 173 CLR 473.
70 See discussion above [9] – [13].

submission that this is the effect of *Hatzimanolis*. The majority in *Hatzimanolis* held, applying *Danvers v Commissioner for Railways (NSW)*[71] that it should now be accepted that an interval or interlude within an overall period or episode of work occurs within the course of employment if, expressly or impliedly, the employer has induced or encouraged the employee to spend that interval or interlude at a particular place or in a particular way. Furthermore, an injury sustained in such an interval will be within the course of employment if it occurred at that place or while the employee was engaged in that activity unless the employee was guilty of gross misconduct taking him or her outside the course of employment. In determining whether the injury occurred in the course of employment, regard must always be had to the general nature, terms and circumstances of the employment "and not merely to the circumstances of the particular occasion out of which the injury to the employee has arisen".

[97] Further, a concession given on behalf of the employer in *Hatzimanolis* was further qualified by the High Court that would embrace the circumstances here:[72]

> Counsel for *ANI* conceded that "when a person such as the appellant has been taken to a remote part of Australia and has there performed work and is housed and fed there for the duration of the employment, the course of employment will go beyond the hours at which the appellant is engaged in his actual work". Consequently, he conceded that "the appellant would have been in the course of his employment while working at the mine, travelling to and from the mine, eating and sleeping and even enjoying recreational activity at the camp".

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71 (1969) 122 CLR 529.
72 *Hatzimanolis* at 485.

> But he contended that it did not follow that the appellant was in the course of his employment "during the whole of the time" that he spent in the Mount Newman area. This contention is correct because the appellant would not necessarily be in the course of his employment while engaged in an activity during an interval or interlude in his overall period or episode of work if ANI had not expressly or impliedly induced or encouraged him to engage in that activity during that interval.

[98] *Hatzimanolis* has previously been adopted in the circumstances of a worker in employer provided accommodation at the Tanami Granites Mine by His Honour Trigg SM in *Young v Contracting Pty Ltd.*[73] On appeal, although not on the question of whether the injury occurred in the course of employment,[74] Angel J found the respondents remained in the course of employment during the whole time they were at the Tanami Granites Mine including while at their employer provided free accommodation whilst off duty. His Honour held the off duty rests at the accommodation were not merely incidental to the performance of their work but necessary to fit them to carry out their duties whilst on shift.[75]

[99] It was not inevitable that a contrary conclusion from Her Honour's could be drawn. Her Honour applied the relevant principles to the facts as she found them.

[100] I would not allow ground 3.

[101] Ground 4: *Having found that the worker*

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73 [2006] NTMC 63, para [155].
74 *HWE Contracting v Young* (2007) 20 NTLR 83.
75 *HWE Contracting v Young* at [10]. See also Riley J with whom Martin CJ agreed; *Danvers v Commissioner for Railways NSW* (1969) 122 CLR 529 at 536, per Barwick CJ.

4.1 did not make a claim for compensation within six months of the occurrence of injury,

4.2 was aware of and chose not to make a claim for compensation,

erred in

4.3 failing to provide adequate reasons of her findings, being based upon some of the inconsistent evidence of the topic of the worker, without attempting to explain how that inconsistency was resolved:

4.4 finding that the failure was not a bar pursuant to section 182 of the Act to the commencement of proceedings and misdirect herself as to whether such failure could amount to mistake or other reasonable cause

and should have found that the worker's failure was a bar to maintaining proceedings in this case.

[102] Her Honour identified she was to have regard to the circumstances between the date of injury and the expiry of the six month period, up until January 2008.[76] Section 182(3) of the Act provides: "failure to make a claim within the six month specified period shall not be a bar to the maintenance of proceedings if it is found that the failure was occasioned by mistake, ignorance or a disease, absence from the Territory or other reasonable cause".

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[76] Reasons at [37].

[103] The appellant argues that Her Honour compounded inconsistent reasons that were given by the worker. It is argued Her Honour found initially the worker was not aware his claim was compensable;[77] that he did not turn his mind to compensation;[78] that he chose to apply for income protection rather than workers compensation;[79] that a choice was made when he claimed income protection.[80] It is argued that in the absence of findings that specifically indicate the times for the worker's varying states of knowledge or belief, (thus whether they were within or outside of the six months from injury), or to otherwise resolve the inconsistencies, the reasons are inadequate.

[104] Her Honour did not expressly refer, aside from a footnote to the terms of s 183(2) of the Act, however she did set out the factual basis of her decision in the reasons. As is noted by Gray J in *Sun Alliance Insurance Limited v Massoud*,[81] in some cases it is appropriate that the foundation of the Judge's conclusion will be indicated as a matter of necessary inference.

[105] Her Honour reviewed the possible basis for fulfilling the criteria under s 182. Her Honour considered[82] whether the worker was under a mistake of law as to his injury having occurred "in the course of employment". The worker believed the injury was not compensable because it had not occurred at the actual work site while he was physically working, but while

77 Reasons at [35], [40] and [42].
78 Reasons at [43].
79 Reasons at [42].
80 Transcript at [108].
81 (1989) VR 8 (at 18).
82 Reasons at [40].

he was in the living quarters provided near the site. I have taken Her Honour's findings to mean that within the relevant six month period the respondent worker was not aware that because of the unusual type of his employment the injury would be treated as occurring out of the course of his employment although it occurred in his accommodation unit. Her Honour also refers to the worker's submission that he thought the injury would resolve with physiotherapy and he would be able to return to work. I do not see inconsistency as such with this possibility and not knowing his true position at law. Further, it was suggested to him that if he claimed income protection insurance he could not claim workers compensation. At that time therefore, there was no cause for the respondent worker to consider if the injury was a worker's compensation injury.

[106] After reviewing the evidence Her Honour found the worker chose not to apply for workers compensation because he was concerned about future work prospects; he made that choice in the light of what he thought his condition was at the time; that it would resolve within six weeks and after that would resolve with each of the treatments.[83] Her Honour ultimately found that the worker did turn his mind to compensation and he misconceived his true position in both fact and law. Her Honour applied what Riley J (as he then was) said in *Van Dongen v NT of Australia*:[84]

> A hope or expectation that a worker may make a complete recovery may amount to a reasonable cause and may more readily do so where

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83 Reasons at [42].

84 (2005) 16 NTLR 169 at 181. (Footnotes omitted).

> the injury is latent, difficult of diagnosis or, possibly, difficulty of prognosis: *Fenton v Owners of Ship 'Kelvin'*; *Butt v John W Eaton Ltd*.
>
> Mere ignorance of the law alone will not be sufficient. However ignorance of the law when combined with other factors may amount to reasonable cause.

[107] I see no reason to disturb Her Honour's findings in the light of the evidence and her consideration of the principles.

[108] I would not allow Ground 4.

[109] Ground 5: *The learned trial magistrate erred in finding that the worker was unable to return to work as a crane operator or forklift driver at all, which finding was not supported by any view of the evidence and which failed to have any or any sufficient regard to the meaning of "most profitable employment" and the provisions of section 65(2)(b)(ii) of the Act.*

[110] Her Honour considered the issue of the work that the respondent worker could or could not do in some detail.[85] On behalf of the employer it was submitted Her Honour misapplied s 65(2)(b)(ii) of the Act. The submission is that assumed availability of suitable employment post 104 weeks under the section excludes consideration of market forces and any need to consider what many places of employment require, as distinct from the fundamental requirements of the job.

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[85] Reasons, paras [47] – [50].

[111] Although Her Honour described some of the duties of crane operator or forklift driver as ancillary, in the sense that they involved preparation of load and other duties in the context of arduous environments, this is not in my view beyond the scope of s 65(2)(b)(ii). While the section is concerned with the fundamental requirements of a job, this must be sensibly construed and applied. In my view Her Honour was entitled to consider the physical requirements of any position. That approach is in keeping with the purpose of the Act and the section. Her Honour found the evidence of Ms Coles to be significant. She commented on her extensive experience, including her knowledge of the practicalities of work offered and performed on mine sites. This showed that the worker may be unable to perform the duties required of a forklift driver. Her Honour did not erroneously consider market forces. Her Honour was considering the physical requirements. The finding as to the work that the worker could undertake is a finding of fact and not appellable. It was a finding open to Her Honour on the evidence. Her Honour made no error of law in her application of or the meaning of the term “most profitable employment”.

[112] I would not uphold ground 5.

[113] For these reasons the Appeal will be dismissed.

[114] I will hear parties on costs.

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