PARTIES:	TERENCE CARMICHAEL
	v
	JU JU NOMINEES PTY LTD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPELLATE JURISDICTION OF THE WORK HEALTH COURT
FILE NO:	No 61 of 1997
DELIVERED:	7 May 1998
HEARING DATE:	27 April 1998
JUDGMENT OF:	ANGEL ACJ

REPRESENTATION:

Counsel:

Appellant:	Mr J Waters QC
Respondent:	Mr I Nosworthy

Solicitors:

Appellant:	Caroline Scicluna & Associates
Respondent:	Bowden, Turner & Deane

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

No. 61 of 1997

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

BETWEEN:

TERENCE CARMICHAEL
Appellant

AND:

JU JU NOMINEES PTY LTD
Respondent

CORAM: ANGEL ACJ

REASONS FOR JUDGMENT

(Delivered 7 May 1998)

This is an appeal pursuant to s116 of the *Work Health Act 1986* (NT) against a decision of the Work Health Court that the respondent employer was entitled to cancel the payment of compensation to the appellant worker under the Act.

The appellant was first employed as a plumber by the respondent in March 1986. In November 1990 he sustained an injury to his back. On 10 April 1992 the worker claimed compensation under the *Work Health Act* and

on 9 May 1992 the employer accepted liability under the Act and duly commenced weekly compensation payments. Approximately half way through 1994 the worker commenced working for the respondent again, but did so on less than a full time basis. The worker's contract of employment was terminated on 10 August 1994. On 8 December 1994 the worker was informed that the payment of compensation would be discontinued, on the basis that his admitted incapacity at that time was due to an underlying degenerative condition and the effects of the November 1990 accident had ceased to operate.

The learned Magistrate made two principal findings; first, the employer was under no obligation to comply with s69(1) of the *Work Health Act*; secondly, the effects of the injury suffered in November 1990 had ceased to operate by virtue of the manifestation of the worker's degenerative back condition and hence any incapacity now suffered could not be said to be work related. The worker appeals to this Court relying on three grounds of appeal, as follows:

> "1. The learned Magistrate erred in law in finding that no notice was required pursuant to section 69(1) of the *Work Health Act* where the worker returned to work for a limited number of hours and remained partially incapacitated for work.
>
> 2. The learned Magistrate erred in law in that her factual findings:
>
> (i) 'that any aggravation which was caused by the appellant's employment in November 1990 no longer exists.'

(ii) that the appellant's employment with the respondent (1985-1994) did not specifically cause any disability but that the degenerative disease was caused on 'the result of degenerative condition of the appellant's spine such degeneration being related to his age which in part would have been caused by his work over the preceding 14 years'

were made in the absence of any accepted evidence to that effect or at all.

3. The learned Magistrate erred in law in finding the Work Health Court's only function was to determine 'whether the worker continues to suffer from an incapacity as a result of an injury suffered by him in November 1990'."

I propose to deal with these in turn.

Ground 1

This ground of appeal proceeds on the basis that the worker's return to work in May 1994 did not entitle the employer to cancel compensation payments without complying with s69(1).

Section 69 relevantly provides:

"(1) Subject to this Subdivision, an amount of compensation under this Subdivision shall not be cancelled or reduced unless the worker to whom it is payable has been given

(a) 14 days notice of the intention to cancel or reduce the compensation and, where the compensation is to be reduced, the amount to which it is to be reduced; and

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

(2) Subsection (1) does not apply where

(a) the person receiving the compensation returns to work or dies;

...

(3) Where compensation is to be cancelled for the reason that the worker to whom it is paid has ceased to be incapacitated for work, the statement under subsection (1) shall be accompanied by the medical certificate of the medical practitioner certifying that the person has ceased to be incapacitated for work."

Mr Waters QC for the appellant submitted that the notice given by the employer on 8 December 1994 was defective and therefore invalid as not complying with the requirements of subsections (1) and (3). I do not think the appellant is in a position to make that submission in this Court, in view of the learned Magistrate's refusal, at first instance, to grant leave to the appellant to amend the statement of claim to incorporate a challenge to the validity of the notice on the basis of non-compliance with s69(1). The appeal must therefore proceed on the basis that the procedural requirements of s69 have been complied with by the employer.

However, much time was spent during argument on the proper construction of the phrase 'returns to work' and it is appropriate to respond to those submissions in light of the interpretation attributed to that expression by the learned Magistrate. The appellant argues that those words should be given

a narrow meaning to the effect that only where a worker returns to work and receives wages which does not leave him with any on-going entitlements under the Act can the worker properly be said to have returned to work. Counsel for the respondent did not make any submissions on this point other than submitting that the learned Magistrate dealt with the 'technical argument' in accordance with the law.

In *Morrissey v Conaust* (1991) 77 NTR 19 the Court of Appeal considered the exceptions to the requirement for a notice to cancel compensation payments as the section then provided. Where the section now reads 'returns to work' it read, at the time, 'ceases to be incapacitated'. The Court rejected the submission that the phrase should be read narrowly such that it was limited to situations where the worker has returned to his employment or is engaged in similar work. Rather, it adopted the definition attributed to that phrase by the Act itself. Counsel for the appellant submitted to this Court that *Morrisey* can be distinguished on the basis the Court in that case was concerned with an expression defined by the Act itself, whereas the phrase 'returns to work' is not so defined.

I agree with that submission. The phrase 'returns to work' ought to be given its ordinary meaning according to the English language in the context in which appears.

It was further submitted that the expression should be given a narrow meaning in accordance with the principle that rights created under beneficial

legislation will only be read down by virtue of a subsequent amendment where that amendment adopts clear language to that effect.

The construction favoured by counsel for the appellant was to the effect that the worker must return to the work that he was previously doing or at least at a level of remuneration which he was previously receiving or which does not leave him any entitlements under the Act.

However, this construction fails to recognise that s69 not only regulates the discontinuance of the payment of compensation, but also the reduction of the amount of compensation payments. The interpretation suggested by the appellant would have the effect of denying an employer the opportunity of reducing the amount of compensation payable to the worker without fourteen days notice where the latter has returned to gainful employment. Such an interpretation can not be right.

The preferable interpretation is that where a worker, who is in receipt of compensation payments, returns to gainful employment the employer is entitled to reduce or cancel those compensation payments, to take account of the worker's renewed income without complying with s69(1), provided the worker continues to receive such compensation payments, if any, as he remains entitled to under the Act taking account of his return to gainful employment.

Applying this interpretation to the facts before this Court the employer was therefore not entitled to cancel the compensation payments without complying with s69(1) by virtue of the worker's return to work. It was merely entitled to reduce the amount of such payments without complying with s69(1) such that they accorded with the worker's entitlements under the Act, assuming that the worker had such residual entitlements.

Ground 2

This ground of appeal alleges that that the learned Magistrate's findings that the aggravation caused by the November 1990 accident no longer exists and that there was no causal nexus between the appellant's employment with the respondent and the incapacity were made in the absence of any accepted evidence.

It was a source of contention before this Court as to the nature of the proceedings below. Counsel for the respondent submitted that the case before the learned Magistrate was whether the November 1990 injury continued to operate. On the other hand, counsel for the appellant submitted that the Magistrate was asked to consider the somewhat broader question of whether the incapacity currently suffered by the appellant was related to his employment with the respondent. This contention, although connected with this ground of appeal, is raised squarely in the appellant's third ground of appeal, and I do not propose to deal with it under this ground of appeal.

It should be noted from the outset that the onus was on the respondent to prove that the incapacity currently suffered by the worker is not work related. This was the subject of much of the evidence at first instance. Oral testimony was given by the worker himself, his wife, Dr Girgis, and Dr North. Written evidence was tendered to the Court in the form of medical reports of Dr Hillier, dated 30 January 1995 (Exhibit W6), Dr Girgis, dated 12 January 1996 (Exhibit W2), and Dr North, dated 22 November 1994 (Exhibit E26) and 10 October 1994 (Exhibit E27). Furthermore, a series of photographs of a block of land owned by the worker was also tendered.

Having referred to the evidence the learned Magistrate made the following findings (at 30-31):

> "Having heard all of the evidence before me, I am of the view the Worker prior to November 1990 suffered from a degenerative condition affecting the discs in his lumbar spine, that degeneration has in part been exacerbated in my view, by the lumbar fusion done in 1992. However, I consider any aggravation which was caused by his employment in November 1990 no longer exists. I consider the evidence of Dr North in which he does not say employment is not a contributing factor to the underlying degenerative condition, must be taken in the context of his plumbing employment for many years. Accordingly I am of the view the Respondent was justified in discontinuing payments on the basis of the report from Dr North at the time of issuing the notice Exhibit W6.
>
> I note the parties in these proceedings have proceeded on the basis that it is for the court to determine whether the Worker continues to suffer from an incapacity as a result of an injury suffered by him in November 1990. Evidence has been called by both parties as to what has occurred since 8 December 1994 and up to the time of his giving evidence in these proceedings the only relevance of that evidence in my view, can be to the principle [sic] question as to whether he continues to suffer from an incapacity as a result of the degenerative condition of his spine

> such degeneration being related to his age which in part would have been caused by his work over the preceding 14 years and not specifically related to his work with Logan Plumbing. In reaching these conclusions, I take into account Mr Carmichael's evidence as to what he can and cannot do, in particular work carried out by him on the block of land in Queensland and the evidence and reports of the experts which have been tended [sic] before me and given in court. Further the evidence of Mrs Carmichael as to observations of her husband of recent times. I therefore do not consider it has been established that any further payments of compensation should be made to the Worker."

It would appear from the reasons published by the learned Magistrate that she did not attach any weight to the evidence of Dr Hillier (at 30). Furthermore, the learned Magistrate refers to the evidence of Dr North as 'not saying that there was no relationship between the Worker's employment and the degeneration of his back but that the degeneration of the back is related to his overall work for many years and not specifically to the incident in 1990 ..." (at 27) and that his evidence "must be taken in the context of his plumbing employment for many years". Therefore, the learned Magistrate did not consider the evidence of Dr North being probative of the issue of whether the worker's incapacity was unrelated to the employment with respondent. The medical opinion expressed by Dr Girgis in his report is that the incapacity of the worker was in fact caused by the employment with the respondent. Consequently, none of the medical evidence, as the learned Magistrate saw it, supported a finding that the incapacity was not related to the employment with the respondent.

That leaves the evidence of the worker and his wife. Counsel for the respondent was at pains to point out the that the testimony of the worker given in evidence in chief when compared to his evidence whilst under cross-

examination suggested that the former evidence lacked credibility. Even if that submission is accepted by this Court, the evidence of the worker falls short of establishing that the incapacity is not work related. At most, this evidence is capable of supporting a finding that the worker is less incapacitated than he stated in evidence in chief. His evidence is not capable of supporting a finding that his admitted current incapacity is not work related.

It follows that there was therefore no evidence accepted by the learned Magistrate which was capable in law to support a finding that the worker's incapacity was not work related. The respondent failed to discharge the onus on it to establish the facts asserted in its s69 notice. Accordingly, the appeal is allowed and the order of the learned Magistrate is set aside. Further, as the basis for the discontinuance of the payments of compensation to the worker are not made out the worker's entitlements under the Work Health are restored with interest thereon. As to the question of costs I order that the employer pay the worker's costs of the appeal to this Court and the costs of the proceedings in the Work Health Court.

Having allowed the appeal under Ground 2 it is unnecessary to deal with Ground 3.