PARTIES:	COLLINS/ANGUS & ROBERTSON PUBLISHERS PTY LTD
	V
	HOPKINS, Merle Doreen
TITLE OF COURT:	The Supreme Court of the Northern Territory
JURISDICTION:	Appeal from Work Health Court exercising Territory Jurisdiction
FILE NO:	No 203 of 1994
DELIVERED:	24 November 1995
JUDGMENT OF:	THOMAS J

CATCHWORDS:

Workers compensation - Proceedings to obtain compensation - Determination of claims - Appeal - Liability of employer - Appeal dismissed

Work Health Act 1986 (NT) s 87

Schell v Northern Territory Football League Inc (unreported, Supreme Court NT, 20 January 1995), referred to
Schell v Northern Territory Football League Inc and *Northern Territory Football League Inc v Anthony Paul Schell* (unreported, Court of Appeal, 3 May 1995), referred to
Briginshaw & Briginshaw (1938) 60 CLR 336, referred to
Cunningham-Beattie v Groote Eylandt Mining Co Pty Ltd (1989) 60 NTR 1, referred to
Perfect v Northern Territory of Australia (1992) 107 FLR 428, referred to
Morrissey v Conaust Limited (1991) 1 NTLR 183, referred to
AAT King's Tour Pty Ltd v Hughes, Court of Appeal (NT), unreported 21 October 1994), referred to
J.H. Construction v Davis, (unreported Supreme Court NT, Asche CJ, 3 November 1989), referred to
Kenny v Central Australian Aboriginal Congress Inc (unreported, Supreme Court NT, Martin CJ 13 December 1994), referred to

REPRESENTATION:

Counsel:

Appellant: J Tippett
Respondent: S Southwood

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

SC No. 203 of 1994

BETWEEN:

COLLINS/ANGUS & ROBERTSON PUBLISHERS PTY LTD
Appellant

AND:

MERLE DOREEN HOPKINS
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 24 November 1995)

This is an appeal from the decision of Mr Lowndes SM who determined the appellant employer is liable to pay compensation to the respondent worker pursuant to the provisions of the *Work Health Act*.

The grounds of appeal are:

1. The learned magistrate erred in law in finding that the appellant employer bore the onus of proving that it was not liable for the compensation claimed by the respondent worker and/or in finding that the appellant employer bore the onus of disproving the respondent worker's entitlement to the compensation claimed.

2. The learned magistrate erred in law in concluding that the rebuttable presumption established by section 87 of the *Work Health Act* has the effect of placing upon an employer the onus of proving that a worker is not entitled to compensation pursuant to the provisions of the *Work Health Act*.

The appellant seeks the following orders:

1. That this appeal be upheld.

2. That the decision of Mr Lowndes SM of 19 August 1994 be reversed.

3. That the appellant employer is not liable to pay compensation to the respondent worker pursuant to the provisions of the *Work Health Act*.

4. That the respondent worker pay the appellant employer's costs of the proceedings before the Work Health Court and of this appeal, certified fit for counsel.

5. Such further or other order or orders as this honourable Court deems fit.

The pleadings are set out in the learned stipendiary magistrates Reasons for Decision. The Reasons for Decision set out a comprehensive assessment of the evidence and the witnesses who gave that evidence. In this appeal, no issue is taken by the appellant with the magistrate's finding of fact or his assessment of the evidence.

The brief background to this matter is as follows:

The worker was employed by the employer as a company representative. Her employment involved the sale of publications produced by the employer. The worker took these publications to various bookshops and outlets for the sale of such publications for the purpose of obtaining orders for them on behalf of her employers. The worker asserted this involved carrying heavy suitcases of books from her car to the bookshop or sales outlet. She gave evidence to the Work Health Court that her work increased in intensity over a number of years. She fell ill in December 1989 and ceased employment in January 1990. In his assessment of the worker's evidence, the learned stipendiary magistrate came to the following conclusion at p104

of his Reasons for Decision:

> "Notwithstanding all the evidence to the contrary, I accept that Mrs Hopkins sustained a fall in March 1989 in the manner described by her. I accept thereafter she had increasing difficulty in coping with the demands of her job. This was against the background of a person who was highly tolerant of pain and able to manage no matter what. I find that towards the end of 1989 her condition made her cease work.
>
> These findings are consistent with the nature of Mrs Hopkins work having accelerated or aggravated her degenerative condition. However, they are equally consistent with Mrs Hopkins' problems being entirely constitutional in nature. In the final analysis, I do not consider that the totality of Mrs Hopkins evidence favours one hypothesis over the other."

The worker asserted two matters:

1. That she had made an appropriate application for compensation and the employer had failed to respond to that application within the appropriate time, and that the employer was therefore deemed to have accepted liability (s87 *Work Health Act*).

2. That she had been injured by way of aggravation, exacerbation or acceleration of back injuries or a back condition that she had by the work that she was required to perform in her employment over the years and that the condition had been so aggravated or accelerated that she was no longer able to carry out the work that she had been performing on behalf of her employer.

The application before the Work Health Court was an application by the worker pursuant to s104 of the *Work Health Act* seeking a declaration that the employer has admitted liability for her said claim. The worker sought further orders that the employer make payment of weekly payments, medical expenses, interest, damages and costs.

At the proceedings before the Work Health Court, evidence was given by the worker, the worker's husband, Ms Catherine

Philp, solicitor for the worker, and a number of medical practitioners. The respondent also called certain medical practitioners and a lay witness. The learned stipendiary magistrate found all witnesses gave their evidence honestly and truthfully. In his Reasons for Decision at pp110-111, the learned stipendiary magistrate made the following findings:

> "(c) FINAL FINDINGS
>
> In my opinion, the Court is left with two equally probable explanations for Mrs Hopkins' end condition. The first was that advanced by the respondent viz that Mrs Hopkins' condition was purely constitutional, and the result of the normal progression of a natural disease.
>
> According to the respondent any incapacity suffered by the worker was the result of that process. The second was that contended for by the worker, viz that her employment had accelerated or aggravated her degenerative condition, and that accounted for her incapacity for work.
>
> On the whole of the evidence, I am unable to be actually persuaded i.e. on the balance of probabilities that the explanation provided by the respondent is to be preferred over the explanation given by the worker. Faced with two competing explanations of equal degrees of probability, and unable to choose between them, the respondent must be found to have failed to discharge its onus of proof.
>
> That conclusion has been arrived at on the whole of the evidence without drawing, and taking into account a *Jones v Dunkel* inference in relation to the respondent's failure to explain its failure to comply with Section 85 of the Work Health Act. Clearly if such an inference had been taken into account in the Court's evaluation of the evidence, the pendulum would have swung even further against the respondent in terms of its onus of proof.
>
> As the respondent has failed to discharge the onus of proof on the question of liability to pay compensation, I find that the worker is entitled to compensation on the basis that her degenerative condition was accelerated, or, alternatively, aggravated by the nature of her employment, and in either case resulted in or materially contributed to the worker's incapacity.
>
> Having found the respondent liable to pay the worker compensation, the worker now has the onus of establishing the nature and level of her incapacity.
>
> After reading the transcript it seems that only brief submissions were made on the issue of incapacity. I invite the parties to make further and more detailed submissions on that issue."

The issue of incapacity was left for the parties to deal with at a later time and the learned stipendiary magistrate specifically invited further and more detailed submissions on that issue.

The essential question for this Court on appeal is: Was the learned stipendiary magistrate entitled to impose upon the employer, bearing in mind the operation of s87, the requirement that it disprove that the worker was entitled to compensation?

In the Amended Statement of Claim, which is set out in the learned stipendiary magistrate's Reasons for Decision (p3), the worker asserts as follows:

> "8. The Worker received a Work Health claim form from the Work Health Authority which she duly completed, and, by her solicitors, delivered the said completed form pursuant to s.82 of the Act under cover of a letter from the Worker's solicitors to the Employer dated 15 March 1990 which Worker's Compensation claim form together with a medical certificate in the prescribed form was received by the Employer no later than 26 March 1990.
>
> 9. The Employer never responded to the claim for compensation and pursuant to s.87 of the Act the Employer is deemed to have admitted liability for the Worker's claim."

There is no issue taken with the learned stipendiary magistrate's finding that the question of whether the appellant is deemed to be liable to pay compensation is to be determined by the application of s87 of the *Work Health Act* (as amended).

The amended s87 of the *Work Health Act* provides as follows:

> "87. FAILURE TO DECIDE WITHIN SPECIFIED PERIOD
>
> Where, within the times specified in section 85, 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 in so far as the claim is in respect of compensation payable under Subdivisions B and D of Division 3."

The hearing of this appeal took place on 16 and 17 February 1995. At the hearing of this appeal the parties referred to a decision of Kearney J in the matter of *Anthony Paul Schell v Northern Territory Football League Incorporated* (unreported, Supreme Court NT, 20 January 1995). The decision of Kearney J related to a case stated by the Work Health Court exercising Territory jurisdiction. The decision of Kearney J went before the Court of Appeal and the Court of Appeal delivered judgment on 3 May 1995 in the matter of *Anthony Paul Schell v Northern Territory Football League Inc* and *Northern Territory Football League Inc v Anthony Paul Schell* (unreported, Court of Appeal, 3 May 1995).

Counsel in this matter sought to make further submissions following the decision of the Court of Appeal in the abovementioned matter. Further submissions were made by counsel on 11 September 1995.

SUBMISSIONS ON BEHALF OF THE APPELLANT

Mr Tippett, counsel for the appellant, referred to the following passage from the Reasons for Decision of the learned stipendiary magistrate at p105:

> "THE EFFECT OF THE FAILURE OF THE RESPONDENT TO CALL EVIDENCE EXPLAINING ITS FAILURE TO RESPOND TO THE WORKER'S CLAIM IN ACCORDANCE WITH SECTION 85 OF THE WORK HEALTH ACT
>
> The respondent was deemed to have admitted liability by reason of its failure to take one of the courses of action prescribed by Section 85 of the Work Health Act.
>
> At the hearing the respondent called no evidence by way of explaining its failure to comply with the provisions of Section 85. In the absence of an explanation the only conclusion I can draw is that the respondent had totally disregarded its statutory obligations.
>
> Whilst I do not consider that it is imperative for an employer who is deemed to have admitted liability pursuant to Section 87 of the Act to give an explanation to the Court as to the circumstances leading up to its deemed liability, it is my opinion that an employer does not assist its case if it fails to provide an explanation for failing to dispute liability at the earlier and appropriate stage. Such explanation ought to be plausible

and consistent with an employer's belated disputation of liability. Here the employer offered no explanation whatsoever."

The learned stipendiary magistrate then found that the employer bore the onus of disproving the worker's entitlement to the compensation claimed. At p17 paragraph 1 of the Reasons for Decision the learned stipendiary magistrate stated:

"... Therefore if the employer wishes to overcome its deemed liability by availing itself of the form of relief prescribed for in the present section 87 (or by reason of the rebuttability of the previous section 87, had that section applied to the present proceedings), the employer bears the onus of proving that it is not liable for the compensation claimed, or conversely disproving the worker's entitlement to the compensation claimed. The standard of proof is the civil standard, ie the balance of probabilities."

At p26 paragraph 5:

"However, due to the fact that in these proceedings the employer is deemed to have admitted liability the employer bears the onus of establishing:

(1) that the worker did not suffer an injury ie an acceleration, aggravation or exacerbation of her pre-existing degenerative condition arising out or in the course of her employment, or alternatively,

(2) that although the worker did suffer such an injury it did not result in or materially contribute to the worker's incapacity."

At p107 paragraph 2:

"However, for the reasons that follow I do not consider that the respondent has discharged its onus, as I cannot be reasonably satisfied (in accordance with the dicta of Dixon J in Briginshaw & Briginshaw) that Mrs Hopkins' employment did not accelerate her degenerative condition."

At p109 paragraph 7:

"When all the evidence is before the Court the overall onus of establishing that Mrs Hopkins' condition was not accelerated by her employment rests with the respondent. In my opinion, the respondent has failed to discharge its

onus, and I am unable to be actually persuaded i.e. on the balance of probabilities that Mrs Hopkins' condition was not accelerated by her employment, and that such acceleration of her condition did not result in or materially contribute to her incapacity."

The learned stipendiary magistrate found the pre-conditions for the application of s87 were in place (Reasons for Decision p15):

"Whether pursuant to the previous section 87 or the new section 87 the following preconditions must be met before an employer is fixed with deemed liability:

(1) The worker must service notice of injury on the employer (s80);

(2) The worker must serve a claim for compensation on the employer (s82); and

(3) The employer must either fail to dispute liability within the prescribed time (old section 87) or fail to comply with section 85 within the prescribed time (new section 87).

A worker who seeks to rely upon the deeming provision must prove each of those three circumstances.

The first matter this Court must determine is whether the preconditions for fixing the employer with deemed liability pursuant to the current section 87 (or the old section) have been established in the present case.

I am satisfied that the preconditions for the operation of the deeming provision have been established by a combination of (1) the state of the pleadings and (b) the oral evidence of the applicant and Catherine Philp.

Paragraphs 7, 8 and 9 of the Amended Statement of Claim plead the following: (1) the giving of notice of injury; (b) service of the claim for compensation on the employer and (c) the employer's failure to respond to the claim for compensation in accordance with the provisions of section 85 of the Act."

The submission for the appellant is that rather than a consideration of whether or not the deeming provision should be lifted, the Court found that the deeming provision actually operated to alter the burden of proof and it was upon that burden that the decision ultimately came to rest.

The appellant argues that the issue of whether the deeming

provision should be lifted before matters were agitated concerning liability pursuant to s53 of the *Work Health Act* were not considered and as a consequence the employer had imposed upon it a burden that ought not to have been imposed.

The appellant submits that the learned stipendiary magistrate misconceived his function:

(1) He was not to consider the question of onus of proof but rather the lifting of the deeming provision.

(2) He was not entitled to vest the responsibility of disproving the worker's case in the employer simply because the preconditions for the application of s87 were found to be applicable in this case on the evidence.

Following the decision of the Court of Appeal in *Anthony Paul Schell v Northern Territory Football League Inc* (supra) and *Northern Territory Football League Inc v Anthony Paul Schell* (supra), counsel for the appellant made further submissions, extracts of which are as follows:

The Court of Appeal in *Schell* recognised and decided that the only issue upon which the employer has the burden of proof, where the worker relies upon the effect of s87, is in persuading the Work Health Court to exercise its discretion and order that the deeming provision no longer applies.

The question of whether an employer is deemed to have accepted liability pursuant to the operation of the provisions of the *Work Health Act* is quite different to whether, having been so deemed, the deeming provision should be lifted. The magistrate did not consider whether the employer should be relieved of the effects of s87 but rather the Work Health Court having found that the deeming provision did in fact apply to the employer went on to say that the legal onus of proof fell upon the employer to prove that it was not liable for the worker's injury.

Counsel for the appellant submits that at p16.9 to p16.10 of his Reasons for Decision, the learned stipendiary magistrate concluded that the "preconditions" for deemed liability had been established but he did not go on to exercise his discretion in relation to whether the deeming should be lifted. Rather, the learned stipendiary magistrate simply found that as the preconditions had been established, the burden of proof, both legal and evidential, shifted to the employer. That step, it was submitted, was impermissible upon the authority of *Schell*.

Counsel for the appellant submitted that once the Court has established that the preconditions fixing deemed liability have been established, the next step is to consider the evidence in support of the lifting of s87. If the Court decides to exercise its discretion and lifts the deeming provision, the Court then goes on to assess whether, on the evidence, the worker has established her claim for compensation by establishing on the balance of probabilities that she suffered an injury in the course of her employment and consequently whether a compensable incapacity has arisen because of the injury.

The deeming provision, it is submitted by counsel for the appellant, significantly protects the worker between her or his claim for compensation and the hearing upon liability if there is one. It places the worker in a position whereby he or she may require that compensation is paid and paid immediately so that real possibility of distress and discomfort by an employer's inaction are allayed. The employer who might not be liable does not get the benefit unless and until the matter is determined in the Work Health Court, or liability is formally admitted.

Counsel for the appellant submits s87 was never designed to protect a worker from an unsustainable claim at law, even a direct admission of liability by the employer does not do that. For example, where an employer has admitted liability it may at a later time serve a s69 notice cancelling payments and having

shown that it was justified in doing so the legal and evidential onus is upon the worker to prove his or her case.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

Mr Southwood, on behalf of the respondent, argues that s87 of the *Work Health Act* deems an employer who has not complied with s85 to have accepted liability for compensation claimed, in so far as the claim is in respect of compensation payable under subdivisions B and D of Division 3.

An employer caught by the deeming provision of s87 is in the same position as an employer who has accepted liability in accordance with s85(1)(a). A person who is deemed to have accepted liability has all the rights of someone who had complied with s85(1)(a). This means the employer can exercise their rights pursuant to s69 and come to Court for various rulings. What is deemed is the acceptance of liability. The deeming executed by s87 is to remain in place until such time as the Court orders otherwise. The Court should only order otherwise when the employer has proved, on the balance of probabilities, that the employer is not liable. The respondent argues this construction is supported by the scheme of the Act, the mischief that was sought to be remedied, the fact that it is the employer who is seeking to change the status quo in such circumstances, the context, the general purpose and policy of the provision, its consistency and fairness. Section 87 is not an extension of time provision.

The *Work Health Act* is a code (*Cunningham-Beattie v Groote Eylandt Mining Co Pty Ltd* (1989) 60 NTR 1). The effect and intention of the Act is that once a claim is made, it is to be dealt with quickly. The overall purpose of the Act is to get a worker compensated till he is rehabilitated and placed back at work. These provisions are mandatory (*Perfect v Northern Territory of Australia* (1992) 107 FLR 428).

In the matter, which is the subject of the present appeal, the worker sought a declaration that the deeming provisions of

s87 had come into operation. The purpose of seeking that declaration was then to go on to obtain potentially consequential relief in certain related Supreme Court proceedings. In response to this application, the employer disputed that the preconditions to a deeming had ever come into existence and then denied liability on the basis that Ms Hopkins' back conditions was the result of degenerative change, as opposed to an incident of trauma. This distinguishes the matter from *Schell's* case.

In *Schell's* case, Mr Schell made application for work health benefits to the Northern Territory Football League. Pursuant to the application, certain steps were taken by the employer and they were taken out of time. The effect of them being taken out of time was that the deeming provisions came into operation. Following consideration of the matter, the employer initially refused to pay work health benefits. That resulted in the worker making an application for compensation pursuant to s104. The application was responded to by the employer making an application to be freed of the provisions of the deeming because it, in effect, had made a mistake along the way in dealing with the claim. It gave evidence about certain "slip ups" that had taken place in the procedure set in place to deal with claims for compensation, and effectively sought to show that it did not ever intend to admit liability pursuant to the Act. It is essentially a case where an employer sought to make application to be excused from the deeming provision. It is, in that context, that statements are made as to what had to be proved.

In this matter before this Court for consideration, the learned stipendiary magistrate did a number of things.

(1) He considered whether the deeming effect had come into operation and found that it did.

(2) He considered whether the matters to be relied upon by the employer excused the deeming provision. The only matters raised were those dealing with, whether this was a

congenital situation or a naturally occurring situation as opposed to an incident of trauma.

There was no application by the employer to be excused from the deeming effect. The respondent's submission is, it was open to the learned stipendiary magistrate to have simply found the deeming and made the declaration at that point, there being no application by the employer to be excused from the deeming effect.

The employer argued this case on the basis the worker did not suffer an injury at work and denied the degenerative back condition was an incident of trauma at work.

The learned stipendiary magistrate was never asked to consider whether an explanation by the employer for the delay in denying liability amounted to an excuse, as was the position in *Schell's* case. The only matters which were relevant to the discretion the learned stipendiary magistrate was asked to exercise, were those matters set out in paragraphs (3) to (8) of the Amended Statement of Claim, which are as follows:

> "3. In the course of and throughout the said employment the worker underwent progressive degenerative changes of the lumbar and mid cervical spine which changes were aggravated and/or accelerated and/or exacerbated and/or were caused deterioration by the general incidents of her employment as well as one specific accident hereinafter particularised so that by on or about 11 December 1989 the state of the plaintiff's back and spine was such that she developed pain that rendered her unable to continue with her employment.
>
> **PARTICULARS OF STATE OF SPINE**
>
> (a) Degenerative changes, with marginal osteophytes which are quite prominent at C5/6, especially in the right unco-vertebral joint and encroaching on the intervertebral foramen of the right 6th cervical root.
>
> (b) **LUMBAR AND THORACIC SPINE**
>
> (i) Severe degenerative changes in the lower lumbar region, with changes; most conspicuous at the L4/5 and L5/S1 intervertebral discs and moderately severe at L2/3 and L3/4 discs.

(ii) Prominent posterior marginal osteophytes at L5/S1, causing indentation on the anterior aspect of the sac, with less marked posterior bulging at L4/5 and moderate annulus bulging at the L3/4 disc.

PARTICULARS OF SPECIFIC ACCIDENT

(a) In or about March 1989 the worker was carrying 2 boxes of books into a Darwin city shop when she slipped on some tape and jarred her back whereby she sustained severe pain in the centre lower back across each side of the hip area and down her legs.

PARTICULARS OF PAIN

Increase of existing low back pain with pain radiating into right buttock and poster-lateral aspect of hip; cervical spine pain radiating into right upper and lower arms.

4. The said aggravation and/or acceleration and/or exacerbation and/or deterioration (hereinafter called "the injury") constituted an injury for the purposes of the *Work Health Act* ("the Act").

5. As a result of the injury the worker has been totally and permanently incapacitated for the said employment from 11 December 1989.

6. Alternatively to paragraph 5 hereof as a result of the said injury the worker has been partially and permanently incapacitated for the purposes of the said employment from 11 December 1989.

7. Notice of the injury was given by the worker to Mr Pilbeam, the Sales Manager of the Defendant on or about 2 January 1990.

8. The Worker received a Work Health claim form from the Work Health Authority which she duly completed, and, by her solicitors, delivered the said completed form pursuant to s.82 of the Act under cover of a letter from the Worker's solicitors to the Employer dated 15 March 1990 which Worker's Compensation claim form together with a medical certificate in the prescribed form was received by the Employer no later than 26 March 1990."

In the matter of *Anthony Paul Schell v Northern Territory Football League Inc* (supra) his Honour Kearney J states at p40 his Honour:

> "I consider that a s87 application is to be determined as a preliminary issue at a hearing in which the root question for the Court is whether the employer is liable to pay compensation to the worker. If the employer fails to persuade the Court that it should have its deemed acceptance of liability "lifted", that is the end of the matter. It remains liable. If it succeeds in its application, the hearing continues on the main question: is the employer liable? On that question the worker bears the burden of proof. In other words, the disposition of an application under s87 is analogous with the disposition of a case where an employer who has accepted liability under s85(1)(a) later cancels or reduces compensation under s69 and the worker contests that cancellation or reduction; see the authorities at pp13-16. In that case the employer bears the burden of proving a change in circumstances; on a s87 application it bears the burden of establishing that the circumstances in which it failed to observe the time limits were such that it is right that it be allowed now to defend the worker's claim. In both cases, if the employer discharges its (differing) burden, the worker bears the burden of proving his case."

Counsel for the respondent points out that the failure to observe the time limits was an issue in *Anthony Paul Schell v Northern Territory Football League Inc* (supra). It was never an issue before the learned stipendiary magistrate in this case. In the case presently for consideration, the way in which the employer conducted its case, it never bothered to deal with this issue.

In *Kenny v Central Australian Aboriginal Congress Inc* (unreported, Supreme Court NT, Martin CJ 13 December 1994) at p7:

> " The basis of cancellation by the respondent of the weekly compensation was that the appellant had ceased to be incapacitated at all to undertake paid work. In the circumstances of this case the respondent thus took upon itself the onus of proving that at the time of cancellation the appellant suffered no "loss of earning capacity", (s65). It can no longer be doubted that the employer bears the onus of establishing a change of circumstances warranting cancellation of a compensation payment (*Morrissey v Conaust Limited* (1991) 1 NTLR 183 and *AAT King's Tour Pty Ltd v Hughes*, Court of Appeal (NT), unreported 21 October 1994). In a case under the Act here in question, the change in circumstances is that relied upon by the employer in any notice required to be given pursuant to s69. The clear legislative intent is that the employer should prove the basis upon which the employer relies in cancelling or reducing payments."

The approach taken by the learned stipendiary magistrate is set out on p13 of his Reasons for Decision:

> "In my opinion the rebuttability of the deeming provisions of section 87 sits comfortably with the section 69 procedure: Further the location of the onus of proof where section 69 is invoked on the premise that the injury sustained by a worker is not work-related is consistent with the location of proof if section 87 created a rebuttable presumption."

Counsel for the respondent argues the learned stipendiary magistrate in fact effectively went through the steps as outlined by Kearney J in *Anthony Paul Schell v Northern Territory Football League Inc* (supra). The employer failed to discharge the onus of proof enunciated in *AAT Kings Tours Pty Ltd v Hughes* (1994) 99 NTR 33; *Kenny v The Central Australia Aboriginal Congress* (supra); *J.H. Construction v Davis*, (unreported Supreme Court NT, Asche CJ, 3 November 1989); *Morrissey v Conaust Ltd* (1991) 1 NTLR 183.

Accordingly, this appeal must fail.

The respondent's argument is that, where the deeming provisions come into play, the status quo which is set up is that in those circumstances, pursuant to s85(2), the employer is bound to make the payments in accordance with the Act. When the employer asserts it no longer has to pay, then the status quo is being changed and the employer bears the onus of proving it is no longer liable to make the payment.

It is the submission of the respondent that the employer is seeking to change the status quo and bears the onus of disproving liability. The employer should establish there is no liability in order for the deeming effect to be set aside.

The relevant provisions of the *Work Health Act* are as follows, s82(1)(b):

> " (1) A claim for compensation shall -

(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;"

Section 85(1) & (2):

" (1) An employer shall, on receiving a claim for compensation -

(a) accept liability for the compensation;

(b) defer accepting liability for the compensation; or

(c) dispute liability for the compensation,

and shall notify the person making the claim of the employer's decision within 10 working days after receiving the claim.

(2) Where an employer accepts liability for the compensation claimed, the employer shall, in the case of a claim for weekly payments (whether or not other compensation is claimed), commence those payments within 3 working days after accepting liability."

and section 87:

" Where, within the times specified in section 85, 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 in so far as the claim is in respect of compensation payable under Subdivisions B and D of Division 3."

The amount of compensation is assessed in accordance with the prescribed medical certificate which is lodged. The claim itself makes no provision for a specific claim, as regards the quantum of compensation (*Perfect v The Northern Territory* (supra).

The respondent argues it follows that payments are to be made in accordance with the medical certificates received from the worker. The status quo is established once there is acceptance, or deemed acceptance, there is a liability to pay compensation in accordance with the Act. The quantum of

compensation is determined in accordance with the medical certificate.

Should the employer receive information on the basis of which the employer seeks to vary the quantum of payments, other than the disclosed medical certificates which are the basis of the legal status quo which the Act creates, then the employer bears the onus of proving the changed circumstances on the balance of probabilities.

Where there is an acceptance, or deemed acceptance, of liability and the employer relies on a change in circumstances, then the employer bears the onus of proof (*J.H. Constructions v Davis* (supra); *Morrissey v Conaust* (supra); *A.A.T. v Hughes* (supra); *Kenny v Central Australian Aboriginal Congress Incorporated* (supra)).

It is the submission of Mr Southwood, for the respondent, that in this matter if the employer seeks to pay the worker on any other basis than that disclosed in the various medical certificates, then the employer has the onus of establishing the changed circumstance on which it relies to ground a variation in the payments that the medical certificates would call for.

Counsel for the respondent referred to passages in the Court of Appeal's decision in *Schell* and stated this decision (pp7-8) established the following principles:

1) The words which now appear in s87, namely "until such time as the Court orders otherwise" give the Work Health Court the widest possible discretion.

2) The employer, nonetheless, will still bear the onus of satisfying the Court that the discretion should be exercised in the employer's favour.

3) When an employer seeks to rely on the relief provided in s87, most of the cases will require as a minimum:

(a) an explanation of the delay.
(b) satisfaction that there was no hardship or prejudice to the worker.
(c) proof of a meritorious defence.

4) There may be situations where it is not necessary to prove a meritorious defence.

It is the submission of counsel for the respondent that in this particular case, it was a case in which the employer would rightly be held to be required to show that it, in fact, was not liable. The decision of the learned stipendiary magistrate, in this particular case, was consistent with the ruling of the Court of Appeal in *Schell's* case.

In this case, the employer did not seek to be excused from the effect of s87. The way in which this case was conducted, the employer assumed the obligation to prove that it was not liable on the findings of the learned stipendiary magistrate, totally disregarded its statutory obligation and the learned stipendiary magistrate was correct in holding that the onus was on the employer to prove it was not liable.

The learned stipendiary magistrate in this case, considered whether the employer should be excused from the deeming provision and found that the employer should not be excused from the deeming provision. In order for the employer to be excused from the deeming provision, the employer had to prove that it was not liable.

Accordingly, the respondent supports the finding of the learned stipendiary magistrate that the employer had failed to establish on the balance of probabilities that it was not liable to pay compensation.

Counsel for the respondent submits the appeal should be dismissed.

This concludes summary of arguments submitted for the respondent.

CONCLUSION

I essentially agree with the submissions made by counsel for the respondent, which I have outlined above and will not repeat.

The summary of the proceedings before the Work Health Court, is that the employer was deemed to have accepted liability by reason of its failure to take one of the courses of actions prescribed by s85 of the *Work Health Act*.

At the hearing before the Work Health Court the employer called no evidence by way of explaining its failure to comply with the provisions of s85.

Pursuant to s87 of the *Work Health Act*, the employer was deemed to have accepted liability.

The learned stipendiary magistrate found that the presumption created by s87 is rebuttable (Reasons for Decision pp11-14).

The learned stipendiary magistrate was satisfied the worker had established the preconditions for the operation of s87, the deeming provisions (Reasons for Decision p15). I consider there is evidence to justify such a finding.

The learned stipendiary magistrate indicated he was satisfied the preconditions for the operation of the deeming provision had been established by a combination of, (1) the state of the pleadings, and (2) the oral evidence of the applicant and Catherine Philp. I consider the learned stipendiary magistrate was entitled to make this finding on the evidence. Indeed, I do not believe the parties have challenged this finding.

The way in which the appellant conducted its case before the Work Health Court, was to call evidence in respect of the application for compensation in the worker's Statement of Claim as amended. This application by the worker was issued pursuant to s104 of the *Work Health Act*.

On 31 January 1992, the worker issued an application pursuant to s104(1) of the *Work Health Act* seeking a declaration that the employer has admitted liability for her paid claim. The worker then sought consequential orders for weekly payments of compensation and other benefits under the *Work Health Act*.

My reading of the transcript of the proceedings and the Reasons for Decision of the learned stipendiary magistrate, is that the application by the worker for a declaration of liability was in effect seeking a decision from the Court in respect of the deeming provision under s87, i.e. a declaration that the deeming provision still applied.

I apply the principle expressed by the Court of Appeal in *Anthony Paul Schell v Northern Territory Football League Inc* (supra) and *Northern Territory Football League Inc v Anthony Paul Schell* (supra) at p7:

> "We consider that the words used in the section, viz., "until such time as the Court orders otherwise," are apt to confer the widest possible discretion upon the Court. There is nothing in s.87 of the Act, or elsewhere to be found in the Act, which suggests that the discretion is to be exercised only upon proof by the employer that upon the true facts it is not liable to the worker for the compensation claimed. ...."

Accordingly, I have concluded that until a Court decided otherwise, the employer was liable to pay worker's compensation benefits to the worker.

In the matter of *Anthony Paul Schell v Northern Territory Football League Inc* and *Northern Territory Football League Inc v Anthony Paul Schell* (supra), the Court of Appeal gave the following answers to questions 4 and 6 of the stated case

respectively as follows:

Questions:

"4 Can the Employer rebut the deeming effect of Section 87 (as amended) by establishing that:

(a) there is a serious question to be tried;

(b) the balance of convenience is in favour of the Employer not making payment of compensation pending the hearing of a claim to be made by the Worker;

(c) its failure to comply with s.85 was due to inadvertence or mistake?

6 What is the meaning of the words "until such time as the court orders otherwise" appearing in s.87 as amended of the Work Health Act?"

Answers:

"4. The matters relevant to the exercise of the Court's discretion to "order otherwise" under s.87 will vary from case to case.

6. They have the effect that an employer deemed to have accepted liability for compensation under s.87 remains so liable until the employer establishes, the burden being upon it, that the Court in the exercise of its discretion should order that it is no longer deemed to be so liable."

The Court of Appeal substantially agreed with the decision of Kearney J, except on the question of practice and procedure (p10).

In its Reasons for Judgment the Court of Appeal stated (at pp9-10) as follows:

"Nor should this Court generally compel the Work Health Court to determine how, as a matter of practice and procedure, applications of this kind should be dealt with. Much might depend upon the way in which the application comes to be made to the Court. The Act makes it clear that all matters of practice and procedure are, subject to the Act and rules of that Court, in the discretion of the Court or magistrate hearing the application: see s.95, and the observations of Mildren J in *Consolidated Press Holdings Limited v Wheeler* (1992) 109 FLR 241 at 246. The appropriate procedure to be adopted will very much depend

> upon the circumstances which have arisen. This will no doubt vary according to whether or not the worker has commenced any proceedings, whether those proceedings are an appeal under s69 or an application under s.104, and if the latter, the nature of the relief sought in proceedings, the strength of the employer's application and whether or not the facts are in serious contest. In some cases it may be best to deal with the employer's application as a preliminary issue or at a preliminary conference upon affidavits. In others, for example, on application by the worker for a declaration of liability, it may be best to leave that issue if the strength of the employer's application appears weak, until there is a formal hearing of the worker's application. In such a case the worker could upon proof of service of his claim and any lack of response thereto rest upon the deeming effect of s.87, close his case thereby forcing the employer to call evidence that it is not liable, and then call his own evidence in reply."

The hearing before the Work Health Court proceeded on the basis of an application by the worker for a declaration that the employer has admitted liability for her said claim and for other benefits under the *Work Health Act*. On the evidence, the learned stipendiary magistrate clearly found that the worker had established the preconditions to the operation of s87 and the employer was deemed to have accepted liability "until such time as the Court orders otherwise" under s87 *Work Health Act*. The learned stipendiary magistrate ultimately concluded that the employer bore the onus of proof, which the employer had failed to discharge. I consider the learned stipendiary magistrate's conclusion was correct, although arrived at by a different process than that suggested by the Court of Appeal in *Schell's* case.

The essential issue appears to me to be, that pursuant to s87 the employer was deemed to have accepted liability, until such time as a Court orders otherwise. The onus was upon the employer to persuade the Court to order otherwise. In this the employer failed.

Accordingly, I would dismiss the appeal. Leave is granted to the parties to apply on the question of costs.
