Andersfurn Pty Ltd v Banks [2015] NTSC 43

PARTIES:	ANDERSFURN PTY LTD
	v
	PHILIP BANKS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LA 14 of 2014 (21126178)
DELIVERED:	29 July 2015
HEARING DATES:	24 March, 28, 29 May 2015
JUDGMENT OF:	HILEY J

CATCHWORDS:

APPEAL – workers' compensation – practice and procedure – procedural fairness – re-opening to adduce further evidence – documents not previously disclosed – application made before final submissions and judgment – whether unfair prejudice – discretionary judgment for trial judge.

APPEAL – workers' compensation – expert evidence – major depressive episode and major depressive disorder under DSM-IV – identification of factual basis for expert's opinions – no error of law unless expert's opinion has no weight – obligation upon counsel to cross-examine.

ASIC v Rich (2005) 218 ALR 764; *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139; *Burk v Commonwealth of Australia* [2008] VSCA 29; *Hancock v East Coast Timber Products Pty Ltd* (2011) 80 NSWLR 43; *House v The King* (1936) 55 CLR 499; *McDonnell v Darwin City Council* (1997) 7 NTLR 76; *New South Wales v Seedsman* (2000) 217 ALR 583; *Peterson v Commonwealth of*

Australia [2008] VSC 166; *Smith v NSW Bar Association* (1992) 176 CLR 256; *Urban Transport Authority NSW v Nweiser* (1992) 28 NSWLR 471; applied.

Brookfield v Yevad Products Pty Ltd [2004] FCA 1164; *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134; *Hevi Lift (PNG) Ltd v Etherington* [2005] NSWCA 42; *Makita (Aust) Pty Ltd v Sprowles* (2001) 52 NSWLR 705; *Quade v Commonwealth Bank of Australia* (1991) 27 FCR 569; *Yevad Products Pty Ltd v Brookfield* [2005] FCAFC 177; *McDonald v McDonald* (1965) 113 CLR 529, distinguished.

Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175; *Brambles Industries Ltd v Bell* [2010] NSWCA 162; *Cavenett v Commonwealth* [2007] VSCA 88; *Inspector-General in Bankruptcy v Bradshaw* [2006] FCA 22; *Jones v Dunkel* (1959) 101 CLR 298, *Londish v Gulf Pacific Pty Ltd* (1993) 45 FCR 128; *Paino v Paino* [2008] NSWCA 276; referred to.

Evidence Act 1995 (Cth), s 79.
Workers Rehabilitation and Compensation Act 1986 (NT), s 116.
Work Health Court Rules 1999 (NT), r 18.

REPRESENTATION:

Counsel:

Appellant:	D McConnel
Respondent:	B O'Loughlin

Solicitors:

Appellant:	Hunt & Hunt Lawyers
Respondent:	Priestleys Lawyers

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

Andersfurn Pty Ltd v Banks [2015] NTSC 43
No. LA 14 OF 2014 (21126178)

BETWEEN:

ANDERSFURN PTY LTD
Appellant

AND:

PHILIP BANKS
Respondent

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 29 July 2015)

Introduction

[1] The respondent worker, Philip Banks, suffered a back injury as the result of an accident while moving furniture in the course of his employment with the appellant employer on or about 20 May 2008 (*the injury*). Mr Banks brought proceedings in the Work Health Court seeking a number of orders, including a declaration that he suffered a mental injury namely a Major Depressive Disorder (*MDD*) as a consequence of the injury.

[2] The evidence was heard during the week of 25 February to 1 March 2013 and the matter was adjourned for submissions. Much of the evidence related to the MDD issue. This included medical evidence from two psychiatrists: Dr Frost, who had been consulted by the respondent on various occasions, and Dr Roberts, who had been engaged by the appellant. Dr Frost had provided a report dated 6 October 2011[1] (part of Ex W15) following her interview of the respondent on 22 August 2011 for the purpose of a permanent impairment assessment.

[3] On 1 March 2013, after the worker's case had closed, the solicitors for the worker disclosed 11 documents which Dr Frost had provided to them on 21 February 2013 and sought leave to re-open the worker's case in order to tender those documents. The employer opposed that application but eventually consented to seven of the 11 documents being admitted into evidence (Ex W20). The other four documents were admitted into evidence over the objection of the employer (Ex W19).

[4] On 11 November 2014 the Work Health Court declared that the worker suffered a Major Depressive Disorder as a consequence of the injury and published its reasons (*the Reasons*).[2]

[1] AB 23.
[2] *Phillip Banks v Andersfurn Pty Ltd* [2014] NTMC 027.

[5] The appellant has appealed against that decision, pursuant to s 116 of the *Workers Rehabilitation and Compensation Act 1986 (*NT), which entitles a party aggrieved by a decision or determination of the Work Health Court to appeal to the Supreme Court on a question of law.

Grounds of appeal and relief sought

[6] The appellant relies on the following grounds:

> Ground 1.
>
> The decision by his Honour to allow the worker to tender 4 reports of Dr Mary Frost comprising exhibit W19 was a denial of procedural fairness to the employer in that:
>
> (a) the employer was entitled to prepare its case and proceed to hearing with the benefit of all relevant medical evidence being made available to it;
>
> (b) without the reports contained in exhibit W19, the only diagnosis of Major Depressive Disorder was that made by Dr Frost in her report dated 6 October 2011
>
> (c) his Honour should have refused to receive the reports into evidence or alternatively, declare a mis-trial and ordered the matter be re-heard.
>
> Ground 2.
>
> There was no evidence to support the finding at Reasons [104] that the worker suffered Major Depressive Disorder either as at 6 October 2011 or as at the date of hearing in that:
>
> (a) the diagnosis made by Dr Frost in her report dated 6 October 2011 was made without evidence of sufficient diagnostic criteria set out in DSM IV such that it was not a proper diagnosis of Major Depressive Disorder and should have been rejected;

(b) the evidence of Dr Frost relied upon by his Honour at Reasons [65] was a bare assertion unsupported by any evidence and was therefore not a proper diagnosis of Major Depressive Disorder as at the date of hearing.

Ground 3.

Alternatively to paragraph 2, his Honour's finding at Reasons [102] that Dr Frost's opinion and diagnosis accorded sufficiently with the criteria in the relevant Chapter of DSM IV to provide a proper basis for her diagnosis of Major Depressive Disorder was an error of law.

[7] The appellant asks that:

(a) the respondent worker's proceedings be dismissed;

(b) alternatively, the finding of an injury of Major Depressive Disorder be set aside and the matter be remitted to the Work Health Court for further determination of whether the worker suffered any other psychiatric or psychological injury on the evidence;

(c) alternatively, the matter be remitted for rehearing; and

(d) the respondent worker pay its costs of the original proceeding and of this appeal.

Background

[8] The appellant acknowledged that the respondent had a severe physical injury on or about 20 May 2008 which left him in constant debilitating pain, and that he has received a significant amount of treatment over the years since sustaining the injury for physical symptoms, pain and psychological management of his pain and changed levels of ability.

[9] The appellant's position was and is that as a result of the injury the respondent has experienced a range of symptoms which amount to depression, but not a permanent psychological or psychiatric impairment such as a MDD. The distinction between a temporary depressed state and a permanent psychological impairment is relevant because Dr Frost assessed the respondent's "overall whole body impairment" at the level of 25% on the basis of her "Assessment of permanent impairment (Relating to Major Depressive Disorder)."[3]

[10] At the hearing the respondent worker and his wife Tracy Banks gave evidence. The respondent also adduced expert evidence from Dr Gavin Chin (a consultant in rehabilitation medicine and pain management), Dr Jan Isherwood-Hicks (a clinical psychologist), Dr Paul Verrills (an interventional pain medical specialist, working at the Metro Spinal Clinic in Caulfield, Victoria) and Dr Mary Frost (a psychiatrist). Each of those witnesses was cross-examined about, amongst other things, the effects of the respondent's pain upon his mental condition.

[11] The appellant called Dr Roberts, a psychiatrist who had examined the respondent on behalf the appellant on 22 March 2012. His opinion was that the respondent suffered from depression as a result of the chronic

[3] AB 31.1 and 29.7.

back pain due to his physical injury, but that he did not suffer from "Major Depression" of the kind described in the DSM-IV.[4]

[12] The respondent's case relied substantially upon the expert opinions of Dr Frost. She had been consulted by the respondent on about 12 occasions since the date of the injury.[5] She corresponded with the respondent's other treating doctors and psychologist at various stages.

[13] When Dr Frost gave evidence at the hearing on 25 February 2013 her report of 6 October 2011 (Ex W15)[6] was admitted into evidence without objection. Also admitted were extracts from the DSM-IV that relate to Major Depressive Episodes and Major Depressive Disorders (Ex W16).[7] Dr Frost gave evidence to the effect that she had used the criteria set out in the DSM-IV in making her diagnosis of major depressive disorder,[8] and she explained the difference between a major depressive episode (*MDE*) and major depressive disorder.[9] Counsel for the appellant cross-examined Dr Frost at some length.[10]

[14] On 1 March 2013 his Honour adjourned the matter for the parties to prepare and provide written submissions.

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[4] Letter from Dr Roberts to Hunt & Hunt Lawyers dated 25 April 2012 (*Dr Roberts' letter*), pp 11-12. AB 86-87.
[5] AB 392.4.
[6] AB 23-31.
[7] AB 48.
[8] AB 395-396.9.
[9] AB 397.
[10] AB 398-427.

[15] Later that day the solicitors for the respondent, Priestleys Lawyers, provided to the solicitors for the appellant, Hunt & Hunt, eleven documents prepared by Dr Frost that had not previously been disclosed. Dr Frost had provided the documents to Priestleys on 21 February 2013. Although Priestleys had sent those documents to counsel the same day it appears that they were overlooked. There is no suggestion that the failures to disclose the documents were deliberate or otherwise other than inadvertent.

[16] Priestleys applied to re-open the worker's case so that the additional documents could be admitted into evidence. The employer objected to the worker re-opening his case, primarily because if the employer had it been aware of the matters contained in the documents, it would have conducted its case differently.

[17] The appellant did not object to the tender of seven of the documents.[11] Six of those seven documents pre-dated Dr Frost's report of 6 October 2011 and another document was dated 14 December 2011. The appellant maintained its objection to the other four documents, namely, letters from Dr Frost to Dr Chin dated 3 September 2012, 27 September 2012, 15 November 2012 and 5 December 2012.

[18] At a hearing on 26 April 2013 counsel for the worker spoke to a written outline of submissions that she had prepared and referred to

[11] The seven additional documents were admitted into evidence by consent (Ex W20).

Urban Transport Authority NSW v Nweiser[12] and *Inspector-General in Bankruptcy v Bradshaw (No 2)*[13] at [24]. Following further detailed submissions from counsel, the application to re-open was adjourned and his Honour made orders requiring the employer to file and serve written submissions identifying those parts of the four letters which the employer considered would require further cross-examination of any witness other than Dr Frost and which would require further evidence from Dr Roberts.[14]

[19] The employer filed written submissions on 7 May 2013.[15] The employer's primary contention was that the injustice that would flow from the admission of the four letters could not be overcome unless a rehearing was ordered. The employer asserted that if it had known the contents of the four letters, it would have cross-examined the worker, the worker's wife, Dr Frost and Dr Chin concerning particular matters that occurred in 2012. It "could have framed its case according to that evidence" and "would have been able to pursue evidence that would present the employer's case in its most favourable light."[16] The employer also submitted that it would have referred the additional material to Dr Roberts for a further report "if it had appreciated that the worker pursued a case that at a time other than at the time of

[12] (1992) 28 NSWLR 471, 476-477 (*Nweiser*).
[13] [2006] FCA 22 (Kenny J).
[14] AB 128.
[15] AB 103-5.
[16] AB 104 [4].

Dr Frost's report, namely 6 October 2011, the worker was suffering from major depressive disorder."[17]

[20] The Court reconvened on 8 May 2013. There was detailed discussion between his Honour and counsel for the employer as to the significance, if any, of the various matters referred to in the letters. Counsel stated that "the disadvantage is not because of anything detrimental to the employer in the contents of those reports. It's rather, the fact that the contents of those reports provide a platform upon which the employer could have cross-examined and had an opportunity to draw more concessions from the worker, the worker's wife or the specialists."[18]

[21] His Honour indicated preparedness to allow Dr Frost to be recalled for further cross-examination, perhaps limited to a single issue which may not have been addressed during the hearing, and not allowing the worker to adduce any further evidence in chief.[19] That single issue concerned a reference in one of Dr Frost's letters[20] to the worker having engaged in deliberate self-harm by using a "stretcher" to insert a large earring into his ear. Counsel contended that that assertion (of self-harm) could be relevant to Dr Frost's assessment of the worker

[17] AB 104 [5].
[18] AB 142.9-143.
[19] AB 147.
[20] Letter from Dr Frost to Dr Chin dated 5 December 2012 at AB 97.

being at risk of suicide.[21] I pause to note that it is not readily apparent that exploration of this issue would have assisted the employer's case.

[22] Counsel for the appellant sought and was granted a short adjournment in order to obtain further instructions. After the adjournment counsel for the appellant stated that "our position is modified somewhat" and said:

> … we oppose the tender but we oppose it on, in effect, discretionary grounds for your Honour, and in the event that your Honour is against us on that we don't seek any further orders in terms of whether there should be a rehearing or further cross-examination. [22]

Counsel did not request an opportunity to show the letters to Dr Roberts or to request that any witnesses be recalled.

[23] His Honour proceeded to admit the four letters into evidence and marked them as Exhibit W19.[23] He provided reasons. He concluded that there was "no obvious prejudice to the employer, except in the general sense which cannot be counter argued, of course, that any material tendered late after the case is closed cannot be the subject of and has not been the subject of cross-examination and that in theory at least might have led to a different approach tactically to the case had the reports been made available earlier when they should have."[24] His

[21] AB 150.3.
[22] AB 149.2.
[23] AB 90-97.
[24] AB 150.3.

Honour said that he was "satisfied that", with the possible exception of the self-harm issue raised in one of the letters, "there is nothing in the reports which is in any directly specific way prejudicial to the employer's case."[25] He held, it not having been suggested otherwise, that the letters were relevant and admissible. He was "satisfied that there will not be a miscarriage of justice adversely affecting the employer by allowing the reports to be tendered at this stage."[26]

Ground 1

[24] At the hearing of the appeal, counsel for the appellant did not press the contention that his Honour could and should have declared a mistrial and ordered a rehearing. The argument on appeal relates only to whether his Honour should have allowed the respondent to re-open his case in order to tender the four letters.

[25] Where application is made to re-open a matter before judgment has been pronounced, a court will do its best to ensure that justice continues to be provided to all parties. An important consideration will be likely embarrassment or prejudice to the party opposing the application.[27] Per Clarke JA in *Nweiser*[28] at page 478D:

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[25] AB 150.5.
[26] AB 150.7.
[27] *Smith v New South Wales Bar Association [No 2]* (1992) 176 CLR 256 at 266-267; *Londish v Gulf Pacific Pty Ltd* (1993) 45 FCR 128 at 139 and *McDonnell v Darwin City Council* (1997) 7 NTLR 76 at 88.
[28] *Urban Transport Authority NSW v Nweiser* (1992) 28 NSWLR 471.

> The principle which should guide the court in determining whether to grant an application for leave to re-open is whether the interests of justice are better served by allowing or rejecting the application as the case may be. No doubt it is relevant to take account of a number of matters such as likely prejudice to the party resisting the application and the reasons why the evidence was not led in the first place …

[26] A decision to grant or refuse an application to re-open is a discretionary one, and, like most discretions, can only be interfered with on appeal if there has been a failure to properly exercise the discretion in the sense identified in *House v The King*.[29]

[27] In most cases, any prejudice likely to be suffered by the other party can be met by endeavouring to put that party into the position that it would have been in had the evidence been adduced in the normal way at the trial. This may involve giving that party sufficient time to consider the proposed evidence and, if so advised, to seek leave for witnesses to be recalled for further cross-examination, to adduce evidence in reply and to make further submissions. Prejudice of a financial kind may be met by making orders as to payment of costs.

[28] Counsel for the appellant referred to Rule 18 of the *Work Health Court Rules 1999* (NT) and the requirement for parties to serve copies of medical reports upon each other as soon as practicable after they are received and not later than 28 days before the commencement of the

[29] See *Urban Transport Authority NSW v Nweiser* (1992) 28 NSWLR 471 at 474G and 476A, referring to *House v The King* (1936) 55 CLR 499 at 504-505.

hearing of the proceeding. Rule 18.05 also precludes a party from adducing additional evidence from a medical expert called by the party that is not disclosed in a medical report served in accordance with Rule 18, except with the leave of the court or by consent. Clearly, those rules, and similar rules in other jurisdictions, are designed to ensure that opposing parties know well in advance of the hearing what expert evidence is to be relied upon at the hearing. This is consistent with fundamental interests of justice in ensuring that parties are not unfairly taken by surprise at the hearing and have sufficient opportunity to challenge or otherwise respond to such evidence.

[29] In circumstances where provisions such as these are not complied with, the interests of justice are usually met by the court making orders that provide the non-defaulting party with appropriate remedies such as an adjournment and costs. Although such remedies are within the discretion of the trial judge, it would seldom be just for the judge to refuse leave, particularly where the failure to comply was the result of some inadvertence or unavoidable circumstance.[30]

[30] I consider this to be especially so in matters such as this which involve the application of legislation designed to compensate workers for injuries which they have sustained in the course of their employment.

[30] Indeed the NSW Court of Appeal in *Urban Transport Authority NSW v Nweiser* (1992) 28 NSWLR 471 decided that the employer should have been able to re-open its case and call a particular witness notwithstanding that counsel had deliberately decided not to call him during the hearing of the employer's witnesses.

Subject to case management considerations of the kind discussed in *Aon Risk Services Australia Ltd v Australian National University*,[31] provided that any procedural unfairness to the employer can be addressed, the interests of justice would normally require that a worker be able to adduce any and all evidence relevant to his or her application for compensation.

[31] Had counsel for the employer considered that the employer's case could have been prejudiced if the four letters were admitted into evidence, he could have requested an adjournment and the opportunity to consult Dr Roberts and others, and sought to have Dr Frost and others recalled for further cross-examination. That would be the normal way of addressing potential prejudice.

[32] Counsel chose not to seek such orders. The only basis upon which the employer could now say it was prejudiced is that counsel might have conducted the employer's case differently had the appellant's advisors been aware of the four letters earlier. Counsel for the appellant asserted that his case strategy would have been different.

[33] It is difficult to see how this could have been so. The critical issue was whether or not the respondent had a MDD following the injury and whether it was a continuing condition. That issue was the main focus of

[31] (2009) 239 CLR 175.

the evidence and of the extensive cross examination by counsel for the appellant.

[34] Most if not all of the information contained in the four letters was to the effect that the worker continued to experience symptoms relevant to his physical and mental condition in 2012, namely between the date of Dr Frost's report of 6 October 2011 and the date of the hearing. Counsel for the respondent provided a useful and detailed table containing over 50 entries which demonstrates that most of the information was already contained in or referred to in exhibits W15 (Dr Frost's records) and W4 (Dr Chin's records). The worker was also asked about some of those matters, such as his current medication,[32] symptoms in August 2012[33] and other matters[34] during the hearing.

[35] Further, all four of those letters were addressed to Dr Chin and were part of the continuing dialogue between the two of them about the respondent's ongoing medical problems. For example Dr Frost's letter dated 3 September 2012[35] was written subsequent to Dr Chin's letter to her of 3 August 2012[36] and prior to Dr Chin's letter of 30 October 2012,[37] and must have been the "formal letter to follow" referred to in

[32] AB 216.
[33] AB 22.3.
[34] AB 265, 268.
[35] AB 91.
[36] AB 455.
[37] AB 458.

Dr Frost's brief note to Dr Chin also dated 3 September 2012.[38] The appellant could have sought discovery of that "formal letter" and thus obtained it prior to the trial.

[36] It is clear from the pleadings that a major issue at trial was whether, if the respondent did sustain a MDD as a result of the injury, the condition was permanent, namely whether it continued until and beyond the time of the hearing.[39] The statement of claim alleged that the respondent suffered a MDD as a consequence of the injury and sought a declaration to that effect.[40] In its amended notice of defence dated 21 February 2013 the employer denied that the respondent suffered a MDD "as sequelae to the physical injuries" and asserted that "the worker does not suffer a Major Depressive Disorder".[41]

[37] Dr Frost stated in her report that the worker's condition would be unlikely to change substantially in the next 12 months. She could have been cross-examined about that prognosis and its basis. Both the worker and his wife gave evidence and could also have been asked further questions about this important topic during cross-examination if counsel thought appropriate.

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[38] AB 34.
[39] Indeed the appellant conceded this in the Appellant's Submissions on the Appeal filed 18 March 2015 (*Appellant's Submissions on the Appeal*) at [18].
[40] AB 1-3.
[41] AB 6, paragraph 10.4.1.

[38] I consider that the appellant's case strategy should have been broad enough to cover the ongoing nature of the worker's condition up to the time of trial. I find it difficult to see how the appellant could have conducted its case differently even if it had these four letters before trial.

[39] Counsel contended that if he had the four letters prior to the hearing, he might have been able to use some of their contents to challenge the reliability of the worker as an historian and thus to challenge the facts and assumptions underlying and the validity of Dr Frost's opinions. However I was not directed to any examples which are likely to have had any real effect upon such matters and upon the outcome of the case. As I have already noted, both the worker and Dr Frost were cross-examined at some length.

[40] Even if the appellant could have obtained some advantage by being able to cross-examine the worker and others at the trial with the assistance of material contained in the four letters, I do not see that as a reason for refusing to allow them to be tendered during re-opening. As I have noted, the appellant could have requested further time and sought leave to recall witnesses in order to carry out that same exercise, thereby reducing if not eliminating any prejudice that might otherwise have flowed from that forensic disadvantage.

[41] Counsel for the appellant was not able to cite any authority in support of the contention that leave to re-open should be refused just because counsel's "case theory" might have been different had counsel been aware of documents such as these. As I have already pointed out, most of the additional information was already available and was relevant to the main issue at trial, and counsel did cross examine the main witnesses in detail. Counsel's case theory should be sufficiently adaptable to deal with new facts that might emerge at trial, for example from a non-expert witness such as the respondent and his wife.

[42] Counsel for the appellant did refer to a number of authorities concerning the ability of a party to have a judgment set aside and or a retrial in circumstances where important documents were not disclosed before judgment.[42] I do not consider that any of those cases are relevant to the present matter. For understandable reasons, it is much more difficult to obtain a remedy in those circumstances than it is where the issue arises before judgment. Such cases involve different considerations, for example the principle of finality and the difficulty of curing prejudice by having witnesses recalled for cross-examination.

[43] Ground 1(b) asserts in effect that the respondent should not have been permitted to tender the four letters because they had the effect of

[42] *McDonald v McDonald* (1965) 113 CLR 529; *Quade v Commonwealth Bank of Australia* (1991) 27 FCR 569; *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134; *Brookfield v Yevad Products Pty Ltd* [2004] FCA 1164; and *Yevad Products Pty Ltd v Brookfield* [2005] FCAFC 177.

supplementing Dr Frost's diagnosis of a MDD. Even if, contrary to what I have just said about the content of the letters, they did provide additional and important evidence, that would not be a basis for declining the application to re-open. Indeed, the existence of additional evidence which may have a considerable impact upon the outcome of a case is more likely to result in leave been given to re-open than where the evidence could not possibly affect the outcome of the trial or is peripheral to the main issues.[43] This is because in the former situation the prejudice to the party seeking to re-open would be greater if the additional evidence was not admitted.

[44] I do not consider ground 1 is made out.

Grounds 2 and 3

[45] The appellant accepts that a conclusion as to whether the respondent suffered a MDD is a question of fact and is thus not appellable. In order to make good either of these grounds, the appellant contended that the conclusion was reached without any evidence to support it and hence was an error of law.[44]

[46] The appellant conceded that Dr Frost had the requisite expertise to be able to make a finding of a MDD and that she gave oral evidence to the effect that she could be satisfied that the respondent suffered from a

[43] *Urban Transport Authority NSW v Nweiser* (1992) 28 NSWLR 471 pp 476G, 477A and 479C.
[44] Appellant's Submissions on the Appeal [34] – [35].

MDD.[45] The appellant also conceded that Dr Frost made a diagnosis of Major Depressive Episode (MDE) in her report of 6 October 2011.[46]

[47] The appellant contended however that:

(a) Dr Frost did not make a diagnosis of a MDD in any of her written reports or letters (including those in Ex W19);

(b) although she gave oral evidence to the effect that she could be satisfied that the respondent suffered from a MDD, she did not elaborate on how she was able to arrive at that conclusion;

(c) there was no evidence to support the conclusion.

[48] The appellant also contended that his Honour wrongly "effectively substituted his own factual findings of episodes of behaviour and / or mood disturbance on the part of the respondent at various undefined times between 2009 and the trial date, to provide a factual basis for the unsupported and unexplained diagnosis made by Dr Frost. His Honour was satisfied that those facts were known to Dr Frost[47] but the lack of any specificity of the times and dates of those various symptoms means it is impossible to conclude that the diagnostic criteria for Major

[45] Appellant's Submissions on the Appeal [37] – [39].
[46] Appellant's Submissions on the Appeal [38].
[47] Citing [101] of the Reasons (AB 184).

Depressive Disorder as set out in the DSM-IV have been met."[48] This was the main basis of appeal ground 3.

[49] During oral submissions counsel for the appellant referred to the descriptions of MDE and MDD in the DSM-IV.[49]

[50] In relation to MDD, the DSM-IV includes the following under the heading "Diagnostic Features", at page 369:

> The essential feature of Major Depressive Disorder is a clinical course that is characterised by one or more Major Depressive Episodes (see p. 349) without a history of Manic, Mixed or Hypomanic Episodes.

See too pp 369-376.[50]

[51] Thus, for present purposes, the main focus was upon the description of a MDE commencing at page 349 of the DSM-IV. It was the criteria for determining a MDE that were important and relevant for the purposes of satisfying the relevant description of MDD.

[52] At page 349, under the heading "Episode Features" appears the following description of a MDE:

> The essential feature of a Major Depressive Episode is a period of at least 2 weeks during which there is either depressed mood or the loss of interest or pleasure in nearly all activities. … The individual must also experience at least four additional symptoms drawn from a list that includes changes in appetite or weight, sleep, and psychomotor activity; decreased energy;

[48] Appellant's Submissions on the Appeal [40].
[49] These were extracted from the DSM-IV and marked as Ex W16. See AB 48-63.
[50] AB 56-63.

> feelings of worthlessness or guilt; difficulty thinking, concentrating, or making decisions; or recurrent thoughts of death or suicidal ideation, plans, or attempts. To count toward a Major Depressive Episode, a symptom must either be newly present or must have clearly worsened compared with the person's pre-episode status. The symptoms must persist for most of the day, nearly every day, for at least 2 consecutive weeks. Episode must be accompanied by a clinically significant distress or impairment in social, occupational, or other important areas of functioning. For some individuals with mild episodes, functioning may appear to be normal but requires markedly increased effort.

[53] At page 356 under the heading "Criteria for Major Depressive Episode" is a list of nine symptoms, five or more of which need to "have been present during the same 2-week period and represent a change from previous functioning".

[54] A major part of the appellant's submissions was that Dr Frost did not clearly address those criteria by indicating five or more symptoms which may have been present during the same two week period. Accordingly she did not identify the factual basis for her conclusions, contrary to the principles stated by Heydon JA in *Makita (Aust) Pty Ltd v Sprowles*[51] *(Makita v Sprowles)*, as a result of which her conclusions were inadmissible or of no weight.

[55] The well-known passage at [85] of *Makita v Sprowles* includes requirements that the facts and assumptions upon which the expert's opinion is based be identified in such a way that the relevant tribunal

[51] (2001) 52 NSWLR 705.

can be satisfied that the opinion is "wholly or substantially based on [the expert's specialised] knowledge."[52] Heydon JA was rejecting "the competing view" that it was sufficient for an expert to establish only three things: that "there is a relevant field of specialised knowledge; that he or she has expertise in a relevant aspect of it; and that he or she holds opinions relevant to the establishing of one or more of the facts in issue in the litigation."[53]

[56] Although the passage in [85] of *Makita v Sprowles* concerns the admissibility of an expert opinion under s 79 of the *Evidence Act 1995* (Cth) it has been considered and applied in numerous decisions involving other legislation, including matters where the laws of evidence do not apply.

[57] In *Hancock v East Coast Timber Products Pty Ltd,*[54] a workers compensation matter, Beazley JA (Giles and Tobias JA agreeing) said at [82] – [83]:

> [82] Although not bound by the rules of evidence, there can be no doubt that the Commission is required to be satisfied that expert evidence provides a satisfactory basis upon which the Commission can make its findings. For that reason, an expert's report will need to conform, in a sufficiently satisfactory way, with the usual requirements for expert evidence. As the authorities make plain, even in evidence-based jurisdictions, that does not require strict compliance with each and every feature referred to by Heyden JA in *Makita* to be set out in each

[52] s79 *Evidence Act 1995* (Cth).
[53] See *Makita v Sprowles* (2001) 52 NSWLR 705 [62].
[54] (2011) 80 NSWLR 43 (*Hancock*).

> and every report. In many cases, certain aspects to which his Honour referred will not be in dispute. A report will not be rejected for that reason alone.
>
> [83] In the case of a non-evidence-based jurisdiction such as here, the question of the acceptability of expert evidence will not be one of the admissibility but of weight. This was made apparent in *Brambles Industries Ltd v Bell* [2010] NSWCA 162 at [19] per Hodgson JA.

[58] Her Honour referred to a number of other cases which discussed *Makita v Sprowles* where judges have referred to the importance of identifying the factual bases of opinions in order that the opinion can be properly tested.[55] At [77] her Honour quoted from what Spigelman CJ said in *ASIC v Rich*[56] at [105]:

> The focus of attention - the 'prime duty' - is to ensure that the court, as a tribunal of fact, is placed in a position where it can examine and assess the evidence presented to it. That can occur without adopting the true factual basis approach. What Heyden JA identified as the expert's 'prime duty' is fully satisfied if the expert identifies the facts and reasoning process which he or she asserts justified the opinion. That is sufficient to enable the tribunal of fact to evaluate the opinions expressed.

[59] In addition to accepting that analysis (at [78]) her Honour noted that the facts and assumed facts do not all have to be set out in the report and do not have to be itemised by the expert witness in an artificial way[57] and that "the principle in *Makita* does not require that there be an exact correspondence between the assumed facts upon which an expert

[55] See *Hancock v East Coast Timber Products Pty Ltd* (2011) 80 NSWLR 43 at [69] referring to *Paino v Paino* [2008] NSWCA 276 at [66], and [70] – [77] referring to *ASIC v Rich* (2005) 218 ALR 764.
[56] (2005) 218 ALR 764.
[57] *Hancock v East Coast Timber Products Pty Ltd* (2011) 80 NSWLR 43 at [70] – [75].

opinion is based, and the facts proved in the case."[58] Her Honour also pointed out that "a deficiency in one part of an expert's evidence may be made good by other material, either in another report or in oral evidence".[59]

[60] In matters such as this, and *Hancock,*[60]*Brambles Industries Ltd v Bell* [61]and *Hevi Lift (PNG) Ltd v Etherington,*[62] where the laws of evidence do not apply, purported non-compliance can only go to weight, and can only amount to an error of law if the evidence is therefore to be given no weight, as distinct from diminished weight. Only then could it be said that there is no evidence and thus an error of law on the part of the decision maker.[63]

[61] Counsel for the appellant contended that Dr Frost's report was defective in a number of respects, including that it did not clearly identify at least five of the criteria for MDE and did not assert that they were all present during the same two week period and represent a change from previous functioning. Counsel also took me to much of the evidence, including that of Mr Banks and his wife concerning Mr Banks' symptoms, with a view to persuading me of the lack of primary evidence that could be relied upon to support Dr Frost's

[58] [88].
[59] [92] citing *Rhoden v Wingate* [2002] NSWCA 165 at [55] – [73].
[60] (2011) 80 NSWLR 43.
[61] [2010] NSWCA 162.
[62] [2005] NSWCA 42.
[63] *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 155-6.

diagnosis. He contended that the evidence fell so far short of satisfying the DSM-IV criteria that Dr Frost's diagnosis should have been afforded no weight. Counsel also performed a similar exercise in support of the contention that there was no or little evidence of the worker continuing to suffer relevant symptoms subsequent to August 2011, when Dr Frost last saw him before she wrote her report in October.

[62] Counsel for the respondent identified references in Dr Frost's report to symptoms and other events which would fall within at least six and possibly seven of the DSM-IV criteria. Counsel also provided a detailed table summarising the evidence regarding symptoms and other events from 11 March 2009 to 28 February 2013 cross-referenced to the DSM-IV criteria. That evidence included evidence contained in various letters and reports of those treating the worker, most of which were written by or provided to Dr Frost, and oral evidence given at the hearing by the worker, his wife and the various doctors.

[63] Counsel conceded that Dr Frost did not expressly say that the respondent had displayed five or more of those symptoms within a two week period, but pointed out that she was obviously aware of the DSM-IV criteria and took them into account. For example at page 6 she said that she believed that the worker had developed a major depressive episode as a result of chronic back pain and associated disability and

that "all the other biological symptoms of which he complains, meet the DSM-IV criteria for a major depressive episode."[64] She then proceeded to discuss the symptoms in the context of a MDD before assessing the respondent's level of permanent impairment.

[64] Counsel also referred to Dr Roberts' report and oral testimony pointing out that he did not criticise Dr Frost's methodology or comment on any failure on her part to expressly address each of the criteria in the DSM-IV. His view was that the worker was depressed "as a result of difficult circumstances"[65] but this did not amount to "any formal psychological or psychiatric injury."[66]

[65] Counsel for the respondent submitted that the DSM-IV criteria are guidelines only, and not to be applied mechanically as though one were using a cookbook. I agree. In *Peterson v Commonwealth of Australia*[67] Kaye J provided a convenient summary of what had previously been stated by members of Courts of Appeal of New South Wales and Victoria:

> In *New South Wales v Seedsman*[68], the New South Wales Court of Appeal referred to extracts from DSM 4, which emphasise that the diagnostic criteria specified in that Manual are only guidelines for making diagnoses. In particular, the list of criteria set out in DSM 4 … should not be applied mechanically. The criteria are guidelines to be informed by clinical judgment,

[64] AB 28-29.
[65] *Dr Roberts' letter,* p 11, AB 86.
[66] *Dr Roberts' letter,* p 12, AB 87.
[67] [2008] VSC 166 at [266] (*Peterson*).
[68] (2000) 217 ALR 583. See [114] – [126].

> and "are not meant to be used in a cookbook fashion". In *Burk v Commonwealth of Australia*[69], Chernov and Nettle JJA equally cautioned that DSM 4 is not a "cookbook for amateurs. It is a diagnostic tool for use by mental health care professionals." Those injunctions are salutary in the present case. The Court does not have a warrant, by using the criteria specified in DSM 4, to embark on a diagnosis itself. That is very much the province of trained and skilled experts.

The extract quoted from *Burk v Commonwealth of Australia* was followed by the sentence: "And it is to be interpreted with the benefit of their insight and experience."[70]

[66] At the hearing of the appeal counsel for the appellant took me through the evidence in some detail and attempted to persuade me that some of the relevant requirements in the DSM-IV had not been satisfied. This is the kind of exercise that *Peterson* and the other authorities noted above cautioned against, and which the appellant criticises his Honour for undertaking in Ground 3 of this appeal. In my opinion, his Honour was entitled to accept Dr Frost's opinions without engaging in a cookbook exercise.

[67] After counsel for the appellant had completed his cross-examination of Dr Frost his Honour asked her about her understanding, as an expert, of the reference to "a suicide attempt" in the ninth of the criteria for MDE. Following that exchange counsel cross examined Dr Frost further and asked her whether she was satisfied that there had been a

[69] [2008] VSCA 29 at [138].
[70] [2008] VSCA 29 at [138] citing *New South Wales v Seedsman* (2000) 217 ALR 583 at 602-3 and *Cavenett v Commonwealth* [2007] VSCA 88 at [78] (Chernov JA).

suicide attempt within a particular two week period as contemplated by the DSM-IV criteria for MDE. Dr Frost responded by pointing out that as a clinician it would be wrong to ignore a suicide attempt if it did not occur within the two week period specified in the "chronological guidelines" in the DSM. In answer to counsel's question: "… If you don't have any, or more than a couple, of the other diagnostic criteria and you don't have an attempted suicide, either within the period or very close to it, you really don't have the criteria for a major depressive episode, do you?" Dr Frost said: "What you just outlined, you are absolutely correct. But that's not what I have here with Mr Banks. … that's not what I have in taking Mr Banks history."[71]

[68] Apart from that cross-examination, which only occurred after the further questioning by his Honour, it seems that counsel for the employer had decided not to cross-examine Dr Frost as to whether any of the worker's other symptoms occurred within a two week period as contemplated by the DSM-IV guidelines. During oral submissions on appeal counsel also asserted and relied upon other omissions within Dr Frost's report. These included her alleged failure to more clearly explain how her opinions regarding the worker's MDE were linked to her diagnosis of a MDD, and to explain what she meant by her use of

[71] AB 424.

"a multi-axial diagnostic classification" when assessing the worker's permanent impairment in relation to his MDD.

[69] Counsel for the appellant contended that there was no obligation upon counsel at trial to expressly identify and cross-examine on errors or omissions of the kind which the appellant now relies on and face the risk of having those errors or omissions corrected. As authority for that contention counsel relied upon the passage at [62] of *Makita v Sprowles* where Heyden JA referred to the unfair dilemma that would be faced by counsel if the expert had done no more than demonstrate that there was a relevant field of specialised knowledge, that he or she had expertise in a relevant aspect of that field, and holds opinions relevant to the establishing of one or more of the facts in issue in the litigation. However this passage related to the "competing view" concerning the admissibility of experts' opinions which his Honour rejected.

[70] More importantly, unlike the situations referred to in [62] of *Makita v Sprowles* and in cases subsequent to *Makita v Sprowles* where the expert's opinion was held to have no weight[72] (as distinct from some, even if little, weight[73]) Dr Frost's report did contain extensive information regarding the factual basis for her opinions. This was

[72] See for example *Hevi Lift (PNG) Ltd v Etherington* [2005] NSWCA 42 at [80] – [86].
[73] See for example *Brambles Industries Ltd v Bell* [2010] NSWCA 162; *Hancock v East Coast Timber Products Pty Ltd* (2011) 80 NSWLR 43.

supplemented by much of the other evidence at trial, both oral and documentary.

[71] Moreover, Dr Frost's report was tendered and admitted into evidence at the commencement of her oral evidence without any objection, qualification or complaint about its inadequacy.[74]

[72] I do not consider that the appellant was entitled to avoid dealing with those errors and omissions which it now relies on during the hearing of the matter. In particular, fairness and justice required that they be put to Dr Frost for her response, in the same way that one would normally put matters to an expert witness for the purpose of demonstrating that the witness's opinion should be disregarded.

[73] For example in *New South Wales v Seedsman*,[75] also a matter concerning the application of the DSM-IV, Spigelman CJ (Mason P and Meagher JA agreeing) said, at [124] and [125]:

> [124] … [His Honour] acted on the diagnosis of the experts who gave evidence before him … Divergences from the DSM criteria was, of course, an appropriate basis for cross examining the experts. This occurred.
>
> [125] On the expert evidence before him his Honour was, in my opinion, entitled to accept the diagnosis. Garling DCJ preferred the expert witnesses of the Respondent. He was entitled to do so.

[74] AB 393.
[75] (2000) 217 ALR 583.

[74] Further, although the appellant called its own witness, Dr Roberts, it does not appear that he was critical of Dr Frost's opinion because of her alleged failure to clearly demonstrate the existence of the five criteria within a two week period or to explain the term "multi-axial diagnostic classification". The Court would have been entitled to draw *Jones v Dunkel*[76] inferences in the process of accepting Dr Frost's opinion and preferring it to that of Dr Roberts.[77]

[75] In my view the expert evidence of Dr Frost did have probative value. His Honour was quite entitled to have regard to it in order to reach his conclusions. I reject Ground 2.

[76] Although Ground 3 is expressed as being in the alternative, this appeal must fail even if Ground 3 was otherwise made out.

[77] In any event, contrary to the appellant's submissions, I do not consider that his Honour was purporting to form his own medical opinion by relying solely upon his own assessment of the facts, which he set out in [95] of the Reasons. Rather, as is apparent from [101] and [102] of the Reasons, his Honour referred to those findings in the process of satisfying himself that Dr Frost's opinion and diagnosis had the kind of factual bases referred to in *Makita v Sprowles*.

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[76] (1959) 101 CLR 298.
[77] See for example comments in *Hancock v East Coast Timber Products Pty Ltd* (2011) 80 NSWLR 43 at [104], [125] and [140].

Conclusions and relief

[78] I do not consider that his Honour erred in law by permitting the respondent to re-open his case and tender the four letters comprising exhibit W19. Nor did his Honour err in law by finding that the respondent was suffering a Major Depressive Disorder at the relevant times.

[79] Accordingly the appeal is dismissed.
