PARTIES:	MICHAEL CHURCHILL v ST JOHN'S COLLEGE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE COURT OF SUMMARY JURISIDICTION under the WORK HEALTH ACT
FILE NO:	LA23/97 (9605555)
DELIVERED:	6 November 1998
HEARING DATES:	9, 10 June 1998
JUDGMENT OF:	THOMAS J

REPRESENTATION:

Counsel:

Appellant:	J. Waters QC
Respondent:	I. Nosworthy

Solicitors:

Appellant:	Ward Keller Lawyers
Respondent:	Hunt & Hunt Lawyers

Judgment category classification:	C
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tho98011
IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. LA23/97 (9605555)

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

BETWEEN:

MICHAEL CHURCHILL
Appellant

AND:

ST JOHN'S COLLEGE
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 6 November 1998)

This is an appeal under the Work Health Act.

The appellant appeals from the decision of Mr J. Hannan SM that the worker is not entitled to the payment of compensation under the *Work Health Act* and appeals from the whole decision of the said learned stipendiary magistrate.

A brief summary of the relevant background to this matter is as follows.

The appellant was born in Yugoslavia on 14 February 1940. In 1969 he emigrated to Australia. In 1980 he obtained a Bachelor of Economics at La Trobe University. He subsequently obtained further qualifications and had a variety of employment as a teacher and lecturer in Darwin and other parts of Australia. On 17 February 1989, he was appointed to teach economics, legal studies and other subjects at St John's College.

On 1 November 1991, the appellant made a claim for worker's compensation claiming his injury was a mental disorder, also described as a stress disorder. He stated the reasons were (worker's compensation claim form and employer's report Exhibit 2 tendered by the worker to the Work Health Court on 7 March 1997):

> "Overload during Semester 1-1991. Was teaching seven classes plus all other duties. Inadequate teaching environment for Northern Territory (class room without airconditioning). Difficulties to manage the classes."

The respondent employer initially deferred and then subsequently accepted responsibility for payment of weekly compensation on the basis that the appellant's incapacity was caused by a stress related condition.

The appellant undertook part time employment with the respondent. In 1992 he resumed a 60% workload which increased to 70%. Both the appellant and the respondent were involved in a program in the work-place for a gradual return to a full time workload. The appellant did not return to

work after 8 December 1995 which was the conclusion of the final semester for 1995.

Under cover of letter dated 8 February 1996, the respondent employer served on the appellant a Form 5 notice advising the appellant that his employer cancels payment of weekly benefits pursuant to s69 of the *Work Health Act*.

The Form 5 that was forwarded to the appellant stated that the reasons for this decision are:

> "1. You are no longer totally incapacitated for employment as a result of your injury.
>
> 2. In the alternative, any incapacity that you now have for your employment is not materially contributed to by your injury.
>
> 3. You have failed to participate in a workplace based return to work program with your employer.
>
> 4. You have failed to present yourself for employment offered to you by your employer which said employment is within your capabilities of performing employment on the labour market generally.
>
> 5. In the further alternative, if you suffer any incapacity as a result of your injury then that incapacity does not prevent you from performing at least 80% of your duties and employment of that nature has been made available to you by your employer and you have failed to undertake such employment."

On 13 March 1996 the appellant initiated an application to the Work Health Court.

In his application to the Work Health Court, the appellant claimed to be totally incapacitated from returning to work as a teacher at St John's College since 8 December 1995 as a result of his condition and/or as a result of symptoms relating thereto arising out of or in the course of his employment with the employer.

In his application to the Work Health Court, the appellant further claimed that he continued to be totally incapacitated for his employment with the employer.

In paragraphs 15, 16 and 17 of the Statement of Claim the appellant states he received a letter dated 5 January 1996 in respect of his "Vocational Rehabilitation". Mr Churchill was at that time in Perth and advised that he would be happy to attend vocational rehabilitation in Perth as directed by Industrial Rehabilitation Service Pty Ltd. He was advised that further instructions were being sought from Catholic Insurance Limited and he would be contacted. Mr Churchill claimed he received no further communication from Industrial Rehabilitation Service Pty Ltd or anyone else in connection with vocational rehabilitation.

The respondent in its answer dated 22 April 1996, stated that it did not plead to these paragraphs of the statement of claim as they were irrelevant to the proceedings. The respondent in its answer (paragraph 11) did state that

at all times the employer had offered vocational rehabilitation and work based return to work programs and denied the balance of the allegations.

In the answer filed 22 April 1996, the respondent admits that they gave the appellant notice pursuant to s69 of the *Work Health Act* by letter dated 8 February 1996 cancelling weekly benefits to the appellant. The appellant received a facsimile copy of this letter on 13 February 1996 and payments ceased on 27 February 1996. The respondent admits that no medical certificate accompanied the s69 notice.

In his Statement of Claim which accompanied his application to the Work Health Court, the worker claimed as follows:

> "11. In or about late November 1995 and prior to the end of the St John's College School year the Worker was informed by the Principal thereof that the light duties previously undertaken by him as aforesaid would be varied in that he would no longer teach economics and accounting subjects, which subjects he was qualified to teach and had experience in teaching and would in the place of those duties be required to teach classes dealing with the planning and the running of small business, a subject or subjects for which the Worker is not qualified to teach and which the Worker has had no experience in teaching.
>
> 12. The Worker has not returned to his employment with the Employer since on or about the 8th December 1995.
>
> 13. The Worker has been incapacitated from returning to his employment with the Employer since on or about the 8th December 1995 as the result of his condition and/or as a result of symptoms relating thereto arising out of or in the course of his employment with the Employer.
>
> 14. The Worker continues to be totally incapacitated for his employment with the Employer."

The employer in its answer to the Statement of Claim, denied all these allegations except for the statement that the worker had not returned to his employment with the employer since 8 December 1995.

In his application to the Work Health Court, the appellant sought the following remedy:

> "A. A declaration that the Employer is deemed to have admitted liability for the Worker's claim.
>
> B. A declaration that the Employer's purported cessation of payment of weekly benefits to the Worker was and is of no force and effect.
>
> C. An order that the Employer pay the Worker weekly benefits in accordance with the Act from the 8th of December 1995 to date and continuing.
>
> D. An order that the Employer pay interest on arrears of weekly benefits pursuant to sections 89 and 109 of the Act.
>
> E. An order that the Employer pay the Worker's medical and related expenses pursuant to s73 of the Act.
>
> F. An order that the Employer pay the Worker's costs of and incidental to this proceeding on the standard basis or in the alternative upon the indemnity basis."

The learned stipendiary magistrate found that the cessation of weekly payments was valid and that the appellant was not entitled to the payment of compensation under the *Work Health Act*.

The learned stipendiary magistrate further found that (reasons for decision p33):

"… total incapacity in the Applicant has not been established on the balance of probabilities and that finding also carries with it the finding that an exacerbation, acceleration or aggravation of an existing illness has not been established also."

The appellant appeals from the decision on the following grounds:

"The learned stipendiary magistrate erred in law:

1. In finding that the Respondent had validly cancelled the Workers' Compensation entitlements being paid to the Appellant notwithstanding that the purported Notice of Cancellation issued pursuant to Section 69 of the Work Health Act ("the Act") did not comply with Section 69(3) of the Act in that the notice was not accompanied by a medical certificate certifying that the Appellant has ceased to be incapacitated and otherwise did not comply with the Act.

2. In that he imposed upon the Appellant the onus of establishing that his employment 'had materially contributed to the injury or disease or its aggravation, acceleration or aggravation' (sic) when the onus to disprove that proposition where the Respondent seeks to cancel payments pursuant to Section 69 of the Act rests with the Respondent.

3. In failing to find (separately from the question who bore the onus to justify the cancellation of payments following the issue of a Section 69 notice under the Act) that the onus of proving the facts to show the level of incapacity (since the incapacity was conceded by the Respondent to be partial) rested with the Respondent.

4. In failing to find as a consequence of the Respondent's failure to discharge its onus that the Appellant would be entitled to payment upon the basis of total incapacity until further order.

5. In failing to make a finding at all as to the level of the Appellant's capacity for work.

6. In finding that the employment was not contributed (sic) to the Appellant's injury or disease when the facts giving rise to the injury and the illness itself are conceded by the Respondent on its

pleadings and supported by all the evidence to have arisen out of and in the course of the Appellant's employment with the Respondent.

7. In disregarding all the medical evidence that the employment still continued to be the real, proximate or effective cause of the illness and consequent incapacity to some level even if the issues as to the Appellant's credit as raised by the Respondent and arising after 1 December 1995 were resolved (as the Learned Stipendiary Magistrate found) largely in the Respondent's favour.

8. In finding (in the absence of any evidence to that effect) that the Appellant's other academic qualifications rendered him competent to teach a course in Small Business Formation and Management.

9. In finding implicitly in the absence of any evidence at all that the Appellant had unreasonably failed to undertake a 'work place based return to work program contrary to Section 75B(2) of the Act' **and that such a program could have enabled the Appellant to under take more profitable employment** and in further finding that the assertion of such a failure was sufficient to validate the notice served pursuant to Section 69 of the Act.

10. In failing to find (notwithstanding all the evidence and the Respondent's concessions and admissions) that the Appellant continued to have an incapacity for employment and had such since 1991 at 40% or alternatively 20% and was entitled in any event to compensation equal to 40% or 20% of his 1995 average weekly earnings."

The appellant seeks the following orders:

"1. That the appeal be upheld and the Learned Stipendiary Magistrate's orders discharged.

2. That from 28 February 1996 until further order the Respondent do pay compensation to the Appellant pursuant to Section 65(1) of the Act on the basis of his
   (a) total incapacity for work as a school master;
   (b) partial incapacity for work as a school master.

3. The Appellant have his costs of the proceedings before the Work Health Court taxed if not agreed at the NT Supreme Court scale of costs.
4. The Appellant have his costs of this appeal taxed if not agreed.

5. The Appellant receive interest pursuant to Section 89 of the Act calculated from 28 February 1996 upon the arrears of compensation due until date of payment."

I will deal with each of the grounds of appeal.

Ground 1:

The learned stipendiary magistrate erred in finding that the respondent had validly cancelled the Workers' Compensation entitlements being paid to the appellant notwithstanding that the purported Notice of Cancellation issued pursuant to s69 of the Work Health Act ("the Act") did not comply with s69(3) of the Act in that the notice was not accompanied by a medical certificate certifying that the appellant has ceased to be incapacitated and otherwise did not comply with the Act.

The relevant provisions of s69 are as follows:

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

(a) 14 days notice of the intention to cancel or reduce the compensation and, where the compensation is to be reduced, the amount to which it is to be reduced; and
(b) a statement in the prescribed form setting out the reasons for the proposed cancellation or reduction and indicating that the worker has a right to appeal against the decision to cancel or reduce the compensation.

……

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

(4) For the purposes of subsection (1)(b), the reasons set out in the statement referred to in that subsection shall provide sufficient detail to enable the worker to whom the statement is given to understand fully why the amount of compensation is being cancelled or reduced."

The appellant filed an application under the provisions of s104 of the *Work Health Act* which in effect combined an application that the appellant was totally incapacitated and a claim that the employer was not entitled to cancel weekly payments pursuant to s69 of the *Work Health Act*.

In the Statement of Claim, the appellant alleged as follows: that he was employed by the respondent as a teacher. That on or about 1 November 1991, the worker became incapacitated for his employment and was absent from work for varying periods. The worker suffered a condition variously described as stress related acute depression, stress related acute anxiety state and also stress related reactive depression. The appellant claims his condition was brought about by and/or continues to be aggravated, exacerbated and/or accelerated by the worker's attendance at work with the employer and/or his continued attendance at work with the employer subsequent to 1 November 1991 and otherwise arose and arises out of or in the course of his employment with the employer. The worker made a claim for compensation which was at first deferred and subsequently accepted by the employer who paid the worker weekly and other benefits pursuant to the Act up to and including 27 February 1996. The worker further claimed that in or about late November 1995, prior to the end of the school year, he was informed by the principal that the light duties previously undertaken by him would be varied in that he would no longer teach economics and accounting

subjects which he claims he was qualified to teach but in place of those duties would be required to teach classes dealing with the planning and the running of a small business, subjects with which he had no experience and was not qualified to teach.

The appellant claimed he had been incapacitated from returning to his employment with the employer since 8 December 1995 as a result of his condition and/or as a result of symptoms relating thereto arising out of or in the course of his employment with the employer. The worker claims he continues to be totally incapacitated for his employment with the employer. The appellant further claims that on or about 7 January 1996, the worker was sent a letter from Mr Reijer Groenveld of Industrial Rehabilitation Service Pty Ltd dated 5 January 1996 requesting that the worker contact Mr Groenveld in connection with a request made to Industrial Rehabilitation Pty Ltd to assist in his "vocational rehabilitation". On or about 16 January 1996, the worker contacted Mr Groenveld and advised Mr Groenveld that he was then in Perth, Western Australia and that he would be happy to attend vocational rehabilitation in Perth as directed by Industrial Rehabilitation Service Pty Ltd. Mr Groenveld informed the worker that he would contact Ms Turnbull of the Catholic Church Insurance Limited as regards provision of vocational rehabilitation to the worker. By letter dated 15 January 1996, Mr Groenveld advised that following discussions with Ms Turnbull from the Catholic Insurance Limited he had been asked to place the worker's file on hold until further instructions were given. Mr Groenveld would await full instructions before further contacting the worker. The appellant claimed he

had received no further communication from any one in connection with vocational rehabilitation since the aforesaid letter dated 15 January 1996.

The employer, by letter dated 8 February 1996 enclosing notice pursuant to s69 of the *Work Health Act*, purported to cancel payment of weekly benefits to the worker effective from 14 days from the date thereof. The worker received a facsimile copy of this letter and notice on 13 February 1996. No medical certificate accompanied this notice and the worker was not provided with a further copy of the said notice. The worker's weekly payments ceased on and from 27 February 1996. The worker claims the employer had failed to cancel payment of weekly benefits to the worker in accordance with s69 of the Act.

The respondent filed an Answer dated 22 April 1996 in which the respondent employer admitted that it employed the appellant as a teacher and admits that on about 1 November 1991, the worker became incapacitated for his employment and was absent for varying periods as a result of a medical condition suffered by the worker. It is not in dispute that the appellant suffered anxiety and stress and that the employer accepted liability for the claim for compensation. It is agreed that the worker had undertaken light duties with the employer since the commencement of Semester 1 of the St John's College school year in 1991 up to and including on or about 8 December 1995. The respondent agrees that in November 1995, the duties to be performed by the worker were to be varied. It is agreed that the worker has not returned to his employment with the employer since on or about 8 December 1995. The respondent disputes that the worker has been

incapacitated from returning to his employment since 8 December 1995 as a result of his condition and/or as a result of symptoms relating thereto and arising out of or in the course of his employment with the employer. The respondent denies that the worker continues to be totally incapacitated for his employment with the employer. The respondent's answer asserts that the claim in respect of vocational rehabilitation is irrelevant and the respondent did not plead to paragraphs 15 to 17 (inclusive) of the Statement of Claim. The respondent states that at all times the employer had offered vocational rehabilitation and work based return to work programs and denies the allegation made in that respect by the worker. The employer agreed that weekly payments to the worker ceased on and from 27 February 1996 pursuant to s69 of the *Work Health Act*. The employer denied that the worker is entitled to the remedy sought by him in his Statement of Claim.

With respect to the failure to provide a medical certificate with the Form 5 under s69(3) of the *Work Health Act* the learned stipendiary magistrate stated that he was satisfied the employer was not required to serve a medical certificate on the applicant worker. His Worship referred to the wording of the notice to the appellant and went on to state:

> "A failure to return to work when the work was that he had been doing, that is teaching, was available to the Applicant as notified in the Form 5 does not need to be supported by a medical certificate. Under such circumstances, and as a fall back position the Employer relies on Section 75B(2) of the **Work Health Act** and its deeming provision ie where a (sic) Applicant unreasonably fails to undertake (leaving out the irrelevant parts) a work place based return work program which could enable him to undertake more profitable employment, he shall be deemed to be able to undertake such employment and his compensation subject to Section 69 of the **Work Health Act** may be cancelled.

> The failure to return to work and the defence deeming Section 75B(2) of the **Work Health Act** were not connected in the Employers submissions as clearly as I have done, but certainly the Employer relies on the Section 75B(2) 'defence' (see page 406/405 (sic) of the transcript dated 26.05.97, paragraph 3 in particular). The Employer relies on MORRISEY –V- CONAUST LTD (1991) INTR (sic) 183 (briefly I quote from head note paragraph (2) 'under Section 69 notice did not need to be served where the Applicant ceased to be incapacitated and died' etc).
>
> In the present case a notice was given but the Employer says there was no need for a notice or a medical certificate to be served. The notice that was given I am satisfied did comply with Section 69(1)(b) of the **Work Health Act** and Section 69(4) of the **Work Health Act** in that it provided sufficient detail to enable the Applicant to understand fully why the compensation was being cancelled."

From November 1991 the appellant alleged incapacity as a result of a stress related condition. The respondent provided him with part time employment on a steadily increasing basis up to 1995, gradually getting him back to almost full duties. The respondent offered the appellant work for the 1995 school year. At the conclusion of the last semester in 1995, the appellant travelled to Perth and remained there. The appellant did not return to the position offered him by the respondent. He subsequently stayed in Perth. On 29 January 1996 he delivered a Certificate of Incapacity (Exhibit 8 in the proceedings before the Work Health Court). He did not make a claim for compensation pursuant to s82 of the *Work Health Act*.

In this case the Form 5 forwarded to the appellant in accordance with s69 stated that a basis for the decision to cancel payment of weekly benefits was:

"(3) You have failed to participate in a workplace based return to work program with your employer."

The requirement to give such notice in Form 5 is so that the worker will know the reasons for the intended cancellation (*Collins Radio Constructions Inc v Day* (1997) 116 NTR 14).

It was quite clear on the face of the Form 5 notice, that weekly payments of compensation were being cancelled because the appellant had not returned to work offered by the respondent in 1996, in accordance with a previous scheme to rehabilitate the appellant back to full employment. In these circumstances I agree with the decision of the learned stipendiary magistrate, that a medical certificate was not necessary.

Ground 2:

The learned stipendiary magistrate erred in that he imposed upon the appellant the onus of establishing that his employment 'had materially contributed to the injury or disease or its aggravation, acceleration or aggravation (sic)' when the onus to disprove that proposition where the respondent seeks to cancel payments pursuant to s69 of the Work Health Act rests with the respondent.

When the appellant's application came before the Work Health Court the appellant sought to argue his claim for total incapacity on its merits. His application to the Work Health Court was not confined to the cancellation of payment under s69 of the *Work Health Act*.

I refer to the following observations by Martin CJ in *Ahearn v Wormalds Australia* (1994) 119 FLR 167 at 174:

> "An application under s104 of the Act is now the appropriate way for a worker to seek to protect his or her position by challenging the employer's cancellation of payments and, in the appropriate case, to put forward an application for compensation for determination by the Court. In some cases which have come to the notice of this Court, the practice has arisen whereby the first issue, whether or not the employer was entitled to cancel the worker's compensation payments, is dealt with as a discrete matter at the commencement of the proceedings in the worker's application. Whether the employer is successful or not in satisfying the Court that it was justified in cancelling the payments, the worker may yet wish to proceed for a determination by the Court of his or her rights to compensation, such a determination not being necessary where the employer had previously been meeting its statutory obligations without an order. …."

The application under s104 did not proceed in this manner before the learned stipendiary magistrate. The applicant worker did not seek to have the issue of whether or not the employer was entitled to cancel weekly payments dealt with first as a discrete matter at the commencement of the proceedings on the worker's application.

Rather the worker appears to have launched into his application claiming to be totally incapacitated and proceeded to call evidence on this issue. In his opening address to the learned stipendiary magistrate, counsel for the applicant, Mr Waters QC, advised the learned stipendiary magistrate the applicant was claiming to be totally incapacitated and referred to the onus being on the respondent to establish any residual or partial capacity for work.

In his opening address to the Work Health Court, counsel for the appellant stated (t/p 3.4):

"Well the statement of claim is relatively comprehensive and makes it clear …."

and at t/p 5.7:

"The live issue on the pleadings, and it stands for my friend to correct me if I've misled on this, but I'm just relying on what I understand to be a fairly well plead case on both sides, is that the respondent would say that the applicant continues to be fit for at least the level of work that he was doing during 1995. …."

and at 6.2:

"….. It does seem that the principal issue that Your Worship will be called upon to determine is whether, as at '95 and continuing, at the end of '95 and continuing, this applicant is presently fit for any form of employment."

and at t/p 6.9:

"We don't understand the onus and the circumstance to rest on us in any event. So far as any level of partial incapacity, the argument presumably being that the partial incapacity is …. that he does have a level of partial incapacity, that is to work as a teacher. The approach that the applicant intends to take is to, of course, meet that and to establish his present level of incapacity as total incapacity and in that regard we would not see it as our responsibility to assume any onus to establish a level of partial incapacity, however, we will lead evidence as to the nature of this nervous condition and the submission which will be made at the end is that …. if it is suggested that he does have some residual capacity for employment in some other areas, the reality is that his background, as I've outlined to you, would preclude that. But also, so would this anxiety condition. …."

The issue of the appellant's claim for total incapacity and the challenge to the respondent's action in stopping weekly payments proceeded together rather than being clearly defined at the hearing as two discrete issues.

Ultimately, the learned stipendiary magistrate was called on to determine:

(1) whether the appellant had established on the balance of probabilities that the appellant was totally incapacitated.

(2) whether the respondent had established on the balance of probabilities that the respondent was entitled to cancel payments of compensation to the appellant.

With respect to the cancellation of payments by an employer under s69 of the *Work Health Act*, for the reason that the worker has ceased to be incapacitated for work, I accept the argument of Mr Waters QC for the appellant that the onus is upon the respondent to disprove the proposition that the appellant's employment had materially contributed to the injury or disease or its aggravation, acceleration or exacerbation.

I adopt with respect the comments of Mildren J in *Horne v Sedco Forex Australia* (1992) 106 FLR 373 at 383-384:

> "…. There is no doubt, in my opinion, that in a case where the worker is receiving payments at a particular rate (whether for total or partial incapacity, and whether pursuant to s64 or 65 of the Act), and those

> payments were cancelled under s69, the onus rested with the employer to justify its position: see *Morrissey*, at 189; *Phillips v Commonwealth* (1964) 110 CLR 347. Likewise, it seems to me that where the employer failed to discharge that onus, and wished to claim alternatively that the worker is partially incapacitated, the onus was on the employer to establish that the appellant is partially incapacitated: cf *Phillips v Commonwealth* at 351. This is in keeping with s69 in its original form and is in accordance with *Morrissey's* case (at 189) which established that the onus of showing that a worker who was in receipt of benefits on the basis of total incapacity, but who was only partially incapacitated, rested with the employer. ……."

In this case the learned stipendiary magistrate made findings as to the appellant's credibility which were adverse to the appellant and found in essence that the appellant failed to return to work for reasons that were unrelated to his capacity for employment, namely, that the appellant failed to return to his place of employment because of his separation from his wife and the pending divorce and his desire to maintain contact with his wife who had moved to Perth. Implicit in these findings is a finding that the respondent has discharged the onus of proof that rests upon the respondent to prove on the balance of probabilities that the employment had not materially contributed to an injury or disease or to an aggravation, acceleration or exacerbation of a disease (see *Disability Services of Central Australia v Beverley Regan* Court of Appeal of the NT No. 7 of 1998 delivered 31 July 1998).

I am not persuaded the learned stipendiary magistrate imposed the onus on the appellant on this issue.

Ground of appeal number 2 is dismissed.

Ground 3:

The learned stipendiary magistrate erred in failing to find (separately from the question who bore the onus to justify the cancellation of payments following the issue of a Section 69 notice under the Act) that the onus of proving the facts to show the level of incapacity (since the incapacity was conceded by the Respondent to be partial) rested with the Respondent.

The learned stipendiary magistrate made a number of findings as to credit of the witnesses who gave evidence. The learned stipendiary magistrate found:

- that the credit of the appellant had been impugned.
- that the proximate cause for the appellant to fail to return to work was the separation and impending divorce from his wife.
- at p37 of his reasons for decision:

  "Underlying my findings concerning the Applicants relationship with his wife and what has been called a selective history which he has given to medical experts is also a conviction I formed in observing the Applicant in the witness box that he was not frank in his answers in cross examination. …"

The learned stipendiary magistrate found in his reasons for decision at p19:

> "The most significant stressor that emerged was the consistent failure of the Applicant to tell the examining experts that his wife separated from him and contemplated divorce; and that he was told on 21.12.95. Each of the experts consider the omission of this piece of information which they considered to be significant, placed them at a disadvantage when coming to the conclusions to which they came concerning the diagnosis of Major Depression and the prognosis, with the possible exception of Bill Christman."

At p32 of his reasons for decision, the learned stipendiary magistrate found that:

> "The medical experts did not have the opportunity in clinical examination to examine the effect that the separation and eventual divorce had as an indication of the presence or absence of a bearing on Applicants depressed condition. But when presented with the stressor of separation and divorce, I agree with the Employers submission that they were in doubt as to the validity of their diagnosis, though the Employer may have expressed it differently. I am satisfied that their opinions needed revision as to the degree, if any, of the presence of a depressive illness. I am not satisfied on that factor alone that the opinion of each of the medical experts can be accepted. I am further unable in the light of my findings concerning the years 1996 and the first months of 1997 in which the Applicant had a stable relationship with his ex wife though living apart from her, that his assertion that he was embarrassed and it was that and a cultural thing which made him reticent in revealing it until the early months of 1997, can be accepted."

The respondent in its answer raised the defence pursuant to s75B(1) of the *Work Health Act*. Section 75B(1) and (2) state as follows:

> "(1) Where compensation is payable under Subdivision B of Division 3 to a worker, the worker shall undertake, at the expense of the worker's employer, reasonable medical, surgical and rehabilitation treatment or participate in rehabilitation training or, as appropriate, in workplace based return to work programs, or as required by his employer, present himself at reasonable intervals to a person for assessment of his employment prospects.
>
> (2) Where a worker unreasonably fails to undertake medical, surgical and rehabilitation treatment or to participate in rehabilitation training or a workplace based return to work program which could enable him to undertake more profitable employment, he shall be deemed to be unable to undertake such employment and his compensation under Subdivision B of Division 3 may, subject to section 69, be reduced or cancelled accordingly."

The respondent had offered the appellant a program of employment over some 4½ years. The appellant was working towards a 100% rehabilitation and as at the last semester in 1995 was working at about 70% full time employment. The learned stipendiary magistrate found that the real, proximate or effective cause of the injury or disease or of the aggravation, acceleration or exacerbation of the disease, was not his employment but the separation and subsequent divorce from his wife.

The respondent had raised a defence under s75B. The learned stipendiary magistrate found that the appellant had unreasonably failed to "undertake … a workplace based return to work program which could enable him to undertake more profitable employment …" in that the learned stipendiary magistrate found that the appellant had unreasonably failed to return to the work program offered by the respondent.

The learned stipendiary magistrate found that the respondent had discharged the onus upon it that it was entitled to cancel weekly payments on the relevant ground set out in Form 5:

> "3. You have failed to participate in a workplace based return to work program with your employer."

Ground 3 of the appeal is dismissed.

Ground 4:

The learned stipendiary magistrate erred in failing to find as a consequence of the Respondent's failure to discharge its onus that the Appellant would be entitled to payment upon the basis of total incapacity until further order.

The learned stipendiary magistrate did not accept the appellant's testimony. Essentially it was the learned stipendiary magistrate's finding as to the lack of credibility of the appellant which led the magistrate to make an ultimate finding adverse to the appellant. In making these findings the learned stipendiary magistrate made certain findings of fact. There was evidence on which he based his conclusions of fact.

In his reasons for decision, the learned stipendiary magistrate analysed the evidence of the appellant. He made adverse findings with respect to the credibility of the appellant. In particular he did not accept the evidence of the appellant with regard to his involvement with the Darwin Coaching College. He made findings that the appellant had omitted telling the medical experts the important fact that he and his wife had separated after the conclusion of the final semester in 1995 and that it was the appellant's desire to be near his wife in Perth that was the real cause of his failure to return to work. The learned stipendiary magistrate did not accept the appellant's evidence that he was not qualified to teach the Small Business Formation and Management Unit if he returned to his employment with the respondent in 1996. The learned stipendiary magistrate did not accept the appellant's evidence that this was the reason he did not return to work in 1996. He did not accept the appellant's evidence that another reason for the

appellant's failure to return to work for the respondent in 1996 was because of the so called "blunders" committed by the appellant in 1995.

The appellant failed to discharge the onus upon him to satisfy the learned stipendiary magistrate on the balance of probabilities that he was entitled to payment upon the basis of total incapacity.

The learned stipendiary magistrate found implicitly that the respondent had discharged the onus upon it that it was entitled to cancel weekly payments under s69 of the *Work Health Act*.

Accordingly, the learned stipendiary magistrate was not in error in failing to make a finding that the appellant was totally incapacitated.

This ground of appeal is dismissed.

Ground 5:

The learned stipendiary magistrate erred in failing to make a finding at all as to the level of the Appellant's capacity for work.

The magistrate was called upon to make two decisions in this matter:

(1) Whether the appellant had satisfied him on the balance of probabilities that the appellant was totally incapacitated. On this issue the appellant failed to discharge the onus of proof upon him.

(2) Whether the respondent had satisfied him on the balance of probabilities that the respondent was entitled to cancel the payment of weekly benefits pursuant to s69 of the *Work Health Act*. The learned stipendiary magistrate's reasons for decision make it clear he was so satisfied.

It was not necessary for the learned stipendiary magistrate to deal specifically with the level of the appellant's capacity for work. The learned stipendiary magistrate found the work the appellant was doing, and was capable of doing, was available to him. The learned stipendiary magistrate concluded that the reason the appellant did not return to work was his wish to at least stay near his wife and maintain daily or weekly contact with her. These findings of fact were open to the learned stipendiary magistrate on the evidence before him and are not open to challenge on this appeal. If the appellant is making a claim for partial incapacity the onus is upon the appellant to establish his claim (*Phillips v Commonwealth* (1964) 110 CLR 347; *Horne v Sedco Forex Australia* (1992) 106 FLR 373).

However, this is not a case involving a claim by the appellant for partial incapacity. This case involves an appeal against the employer's decision to cancel weekly payments to the worker.

The worker had been in receipt of payments for partial incapacity. I agree with the submission made by Mr Waters QC for the appellant that this means the employer has relieved the worker of the obligation to prove

partial incapacity. This principle was expressed by Einfield J in *Barker v Australian Telecommunications Commission* (1990) 95 ALR 72 at 77:

> "A fortiori it would seem to me that where an employer alleges no entitlement to compensation at all and the worker, having received compensation for years, resists the employer's move and seeks to retain what she has, a burden must fall on the employer to prove the facts it wishes to have found."

The learned stipendiary magistrate found in favour of the respondent with respect to the respondent's defence under s75B of the *Work Health Act*. Implicit in his findings is a finding that the respondent discharged the onus of proof upon it to show that the respondent was entitled to cancel the weekly payments.

In these circumstances the learned stipendiary magistrate did not err in failing to make a finding at all as to the level of the appellant's capacity for work.

This ground of appeal is dismissed.

Ground 6:

The learned stipendiary magistrate erred in finding that the employment was not contributed (sic) to the Appellant's injury or disease when the facts giving rise to the injury and the illness itself are conceded by the Respondent on its pleadings and supported by all the evidence to have arisen out of and in the course of the Appellant's employment with the Respondent.

The existence of a work related stress condition or acute anxiety was conceded by the respondent in 1991. Since that time the respondent had offered and the appellant accepted a program of work and was working towards complete rehabilitation. The respondent was paying the appellant workers' compensation on the basis of partial incapacity up until the date specified in the Form 5 notice, being 27 February 1996. The appellant had not returned to work after 8 December 1995. The learned stipendiary magistrate found that the reason the appellant failed to return to work was not to do with his condition or any work related injury but because of the appellant's desire to remain in Perth to be near his wife. The learned stipendiary magistrate found in effect that the appellant's employment was not the real, proximate or effective cause of the injury or disease or to the aggravation, acceleration or exacerbation of the disease (s4(8) *Work Health Act*). This conclusion was open to the learned stipendiary magistrate on the evidence. The appellant has not demonstrated any error of law on the part of the learned stipendiary magistrate.

This ground of appeal is dismissed.

Ground 7:

The learned stipendiary magistrate erred in disregarding all the medical evidence that the employment still continued to be the real, proximate or effective cause of the illness and consequent incapacity to some level even if the issues as to the Appellant's credit as raised by the Respondent and arising after 1 December 1995 were resolved (as the Learned Stipendiary Magistrate found) largely in the Respondent's favour.

The opinions of Dr Christman, Dr Skerritt, Dr Kenny and Dr Mustac were based largely on information provided to them by the appellant. Under cross examination each of the doctors stated that they had not been informed about the situation between the appellant and his wife. Each of them stated that this knowledge affected their opinion. Examples of this are Dr Christman in cross examination (p175):

> "And so if we're dealing with a condition of stress related depression or some form of reactive depression which reacts to stress, then it is simply a question of whether or not the history given to each and all of you is an accurate history?---Yes."

at p183:

> "And he didn't tell you about his wife's separation?---He mentioned there'd been a bit of – some difficulties there but he didn't mention the separation, no.
>
> Do you know when the separation occurred?---No.
>
> You see, when did you first see him?---21 December '95.
>
> Would you be surprised to hear that the separation occurred three days before?---Yes, I would.
>
> A bit stunned to learn that that fact was withheld from you at the first consultation, aren't you?---It is surprising. As I said, I felt that he confined himself to the problems at St John's College etcetera. You

could say that he's got an ability to compartmentalise his feelings and just - - -"

and at p200:

"And the one thing we can say quite definitely is that you didn't then and you didn't until very recently, have an accurate history because after November 1995 his wife left him and you didn't find that out?---That's right. That fact wasn't shared with me.

And the fact of the matter is that you have sought to explain his problems by reference to a history which does not include probably the most significant item in that history, namely the separation from his wife?---I'm unsure as to what extent it is significant in terms of the current proceedings. As I said before, it would depend on his relationship with his wife, you know, and you know, maybe it was a relief to end the relationship, who knows. What I would need are details about it.

But you do know that in most cases it's the number one item on the agenda, don't you?---I recognise that for most people that it would be a significant source of concern."

Dr Skerritt's cross-examination at p212:

"You have assumed the honestly (sic) of the history that he's given you, haven't you?---Yes.

May I invite your attention to page 3 of your report. At the foot of the second last paragraph. He described a happy marriage with two grown up children?---Yes.

That was at the time of your report in September, following some three visits?---Yes.

And given what Mr Waters has said about the fact that his wife and he have separated and that he is in the throes of being divorced, that was a false history, wasn't it?---Well, it would appear so.

So, you would be the first, I think, to concede that a psychiatric opinion is only as good as the history upon which it is based?---Yes, certainly.

So that if the history is false then the opinion is unreliable?---Well, I don't know if one can generalise from one small point like that and I think it's really up to the court to decide what's the truth and what's not. But I've related all that I was told.

Yes, of course it is, but it's not exactly a small point, is it?---Well, I think – well, I would have to explore that with the patient to work out the significance of it, as to why he chose to tell something that was apparently different from the facts on that.

Well, it's as plain as day that he's capable of giving you a selective history, whatever the reasons?---Well, it appears so on that particular point.

And you would agree that one of the first things that you explore, as a treating psychiatrist, is the family environment?---Well, it's certainly one – an important part of the psychiatric assessment."

at p215:

"I guess what I'm putting to you is that when an examiner such as yourself receives a piece of information which is superficially reasonably normal, it's fairly easy for you to say. Right, well that part of his life is normal, let's concentrate on the things he's complaining about. That's really the process you go through is it not?---I think that probably sums the situation up precisely."

and p229:

"Yes, certainly. I mean, you concede and conceded quite openly, and he's given you a selective history in relation to his marriage, might it not be that there are other aspects of his history which – about, for example, the university teaching, the studies at university, matters of that sort which were equally selectively given?---Well, that's a possibility which is not within my capacity to explore.

Sure, but if you're wrong about those things and if you failed to obtain a proper history from him, then that undermines the basis for your opinions, does it not?---That first consultation was a particularly difficult one. It was difficult to get him to order his thoughts and that would possibly explain some of the inadequacies in the history taking. It's also possible, as you're suggesting, that he was deliberately keeping parts of the history from me, but the court will have to decide that.

And it is plain, I would suggest, that while you conclude that he has a resistant depression, that has assumed the honesty of his presentation to you. Isn't that the case?---Yes."

Dr Kenny's cross examination at pp248-9:

"Would you agree with me that the fact of one's wife deciding to separate and live apart is a stressor which could lead to this kind of depression?---Certainly.
Would you agree that if one were a proud man, proud academic achievement, that an inability to complete a PhD might be a stressor which would lead to this kind of depression?---Certainly.

Would you agree that if one were a migrant from Yugoslavia and were experiencing difficulty in having your qualifications in your chosen field accepted in Australia, that that might be a stressor leading to this kind of depression?---Certainly.

Would you agree that if one were to seek recognition by one's peers in an application for advanced skills acknowledgment as a teacher and that one were obliged not to go on with the application because of an inability to get evidence due to the fighting in Yugoslavia, that the failure to achieve that regrading might be a stressor leading to depression of this kind?---Certainly.

Would you agree that a subsequent application of the same kind, which was unsuccessful by reason of an inability to provide appropriate supporting information, in other words a second application failing some years later would be a stressor which might lead to a depression of this kind.

Would you agree that the fact of migrant status which led to a change of surname from Curcic to Churchill, accompanied by the knowledge that the anglicised pronunciation of Curcic in Australia was similar to a

pejorative term in the Croatian language, might produce stress leading to a depression of this kind?---Possibly, although I must say I'm not quite as impressed by that as a potential stressor, but possibly.

Would you agree that if he observed that there was a turnover of the population in Darwin so that he couldn't make permanent friends and contacts, that that might provide a stressor leading to a depression of this kind?---Certainly.

Would you agree that if his wife constantly wanted to return to Perth, that that might produce stress leading to a depression of this kind?---Certainly.

Would you agree that if he was endeavouring to establish a business as a coaching college, and that that involved correspondence with advertisers and frustration over the establishment of that college might produce as stress leading to a depression of this kind?---Certainly.

Now, did you have a history of all of those matters or any of them from this man in relation to the history that he gave you?---No.

None of them?---No.

If I asked you to accept that all of those factors were present at varying times in this man's chronological history covering, say, the period from 1990 to 1993, in other words up to a period of two years prior to when you saw him, would you agree that – perhaps I should widen it from '89 to about '93, would you agree that that might well invalidate the opinions you've expressed?---Yes, I'd have to acknowledge that."

Cross examination of Dr Mustac at p340:

"Right, and so I just want to – I don't want to misrepresent you, but it's such an important issue. Do I take it then that the fact that you'd been informed of this as being something that occurred towards the end of the history of this depressive illness is not something which you deemed significant or it would change your diagnosis?---By itself, the fact that he didn't tell me this might suggest that he's just embarrassed about it. If I just take this as a one off fact which, you know, hasn't been provided to me by him. I think your colleague mentioned to me earlier that he was ashamed or embarrassed that he had separated and, of course, people when they're seeing a psychiatrist are not entirely truthful, are (sic) the fact that he had left out this one issue doesn't

necessarily indicate anything except that he has left out something which to him is embarrassing and shameful and he didn't wish to tell a stranger. So, no, I don't place great significance on it."

The learned stipendiary magistrate was entitled to disregard the opinions of the medical experts which were based on an incomplete history given by the appellant.

Mr Waters QC submitted that the learned stipendiary magistrate applied the wrong test in finding at p34 of his reasons that:

"…. it also cannot be said that the employment materially contributed to the injury or disease or to its aggravation, acceleration or aggravation (sic). I find that the proximate cause for the applicant to fail to return to work was the separation and impending divorce."

It was submitted for the appellant that there is a "2 step consideration" required of the fact finder, namely those contained in s4(5) and (8) respectively of the *Work Health Act*:

(5) An injury shall be deemed to arise out of or in the course of a worker's employment where it occurred by way of a gradual process over a period of time and the employment in which he was employed at any time during that period materially contributed to the injury.

(8) For the purposes of this section, the employment of a worker shall not be taken to have materially contributed to an injury or disease or to an aggravation, acceleration or exacerbation of a disease unless the employment was a real, proximate or effective cause of the injury or disease or to the aggravation, acceleration or exacerbation of the disease, as the case may be."

Mr Waters QC, for the appellant, then referred to the case of *Treloar v Australian Telecommunications Commission* (1990) 97 ALR 321, regarding

the meaning of "material contribution" in s4(5), and referred to *O'Brien v Repatriation Commission* (1984) 53 ALR 477 regarding "real" in s4(8).

Mr Nosworthy, for the respondent, submitted that the learned stipendiary magistrate applied the right legal test in finding that the proximate cause of the appellant's failure to return to work was the separation and impending divorce. Mr Nosworthy distinguished the case of *Treloar v Australian Telecommunications Commission* (supra) on the basis that the relevant legislation in that case involved a lower test. I agree with the submission made by Mr Nosworthy, that the learned stipendiary magistrate applied the correct test.

This ground of appeal is dismissed.

Ground 8:

The learned stipendiary magistrate erred in finding (in the absence of any evidence to that effect) that the Appellant's other academic qualifications rendered him competent to teach a course in Small Business Formation and Management.

This ground of appeal was abandoned and not argued.

Ground 9:

The learned stipendiary magistrate erred in finding implicitly in the absence of any evidence at all that the Appellant had unreasonably failed to undertake a 'work place based return to work program contrary to Section 75B(2) of the Act' and that such a program could have enabled the Appellant to under take more profitable employment and in further finding that the assertion of such a failure was sufficient to validate the notice served pursuant to Section 69 of the Act.

Section 75B(2) has been set out under Ground 3.

I agree with the submission made by Mr Nosworthy for the respondent, that it is clear from the Form 5 served on the appellant that the appellant would know that a challenge was being made to his entitlement by reason of his failure to attend for employment which he had been performing in 1995 and which was within his capabilities.

In the course of his reasons for decision at p34 the learned stipendiary magistrate stated:

> "THE SEPARATION AND IMPENDING DIVORCE. WAS THAT WHAT CAUSED THE APPLICANT TO REFRAIN FROM RETURNING TO WORK?
>
> In other words in face of the evidence that I have outlined above which I have found that the applicant has not established to the required degree it also cannot be said that the employment materially contributed to the injury or disease or to its aggravation, acceleration, or aggravation (sic). I find that the proximate cause for the Applicant to fail to return to work was the separation and impending divorce. I find that the Applicant wanted to at least stay near his wife. ….."

This is a clear finding by the learned stipendiary magistrate that the respondent had established the onus cast upon it that the cancellation of payments was justified. This finding was supported on the evidence.

The employer bears the onus of proving that its cancellation of payments was justified (*Morrissey v Conaust Ltd* (1991) 1 NTLR 183). At p189 Gallop J stated:

> "…. the employer would carry the onus of establishing the change of circumstances which warranted the cancellation or reduction of the amount of compensation."

Mr Waters QC, on behalf of the appellant, submitted in argument that there was no evidence before the learned stipendiary magistrate from which the learned stipendiary magistrate could conclude that the elements of s75B(2) were established. I do not accept this argument.

I am satisfied that the learned stipendiary magistrate, in making the findings that he did about the appellant's failure to return to work after 8 December 1995, made an implicit finding that on the balance of probabilities the appellant had "unreasonably … failed to participate in … a workplace based return to work program which could enable him to undertake more profitable employment" (s75B(2)). There is evidence to which I have already referred on which the magistrate based his finding that the appellant failed to return to work because of his desire to be near his wife who had moved to Perth. There is also evidence, to which I have already referred, that the workplace based return to work program, that is at St John's College, was work which would enable the appellant to undertake more profitable employment. There is evidence that by 1995 the appellant was back to 70% full time employment and that there was a program in place to bring him back up to 100% full time employment. This evidence, which was accepted by the learned stipendiary magistrate, gives rise to the inference that this return to work program could enable the appellant to undertake more profitable employment.

The purpose of s75B is to ensure that the liability resting upon an employer to pay compensation in accordance with the Act is able to be alleviated where the worker unreasonably fails to "… participate in a … workplace based return to work program which could enable him to undertake more profitable employment. …" See also *Ahearn v Wormald* (1994) 119 FLR 167, Martin CJ at 176.

In dealing with the s69 Notice, the learned stipendiary magistrate made a number of findings which included findings:

(1) that the employer did not have to serve a medical certificate on the applicant.

(2) a failure to return to work does not need to be supported by a medical certificate.

(3) the employer had a defence under s75B(2) because the worker had failed to undertake a work place based return work program and he was deemed to be able to undertake such employment and subject to s69 his payments could be cancelled.

(4) the notice that was given complied with s69(1)(b) of the *Work Health Act*.

(5) the cessation of weekly payments was valid.

These findings were supported on the evidence. The appellant has not demonstrated an error of law.

This ground of appeal is dismissed.

Ground 10:

In failing to find (notwithstanding all the evidence and the Respondent's concessions and admissions) that the Appellant continued to have an incapacity for employment and had such since 1991 at 40% or alternatively 20% and was entitled in any event to compensation equal to 40% or 20% of his 1995 average weekly earnings.'

In respect of Ground 10, the only two issues the learned stipendiary magistrate was called upon to decide were:

1) Whether the respondent had satisfied the onus of proof upon the respondent that its cancellation of weekly payments was justified (s69). On this matter the learned stipendiary magistrate found for the respondent; and

2) Whether the appellant had discharged the onus of proof upon the appellant to establish his claim for total incapacity. On this issue the learned stipendiary magistrate found the appellant failed to establish total incapacity.

The hearing before the learned stipendiary magistrate did not proceed on the basis of a claim by the appellant for partial incapacity.

For the reasons already canvassed under the other grounds of appeal, the appellant has not established the learned stipendiary magistrate was in error for failing to make findings about partial incapacity.

The very clear finding he did make was that the respondent had established a defence under s75B because of the appellant's failure to participate in the workplace based return to work program which could enable him to undertake more profitable employment.

This ground of appeal is dismissed.

The order I make is that the appeal be dismissed.

———————————————