PARTIES:	JULIE SOUTH
	v
	ROBERT HARRIS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	Appeal from the Work Health Court exercising Territory jurisdiction
FILE NO:	No 140 of 1996
DELIVERED:	4 July 1997
HEARING DATES:	13 and 14 February 1997
JUDGMENT OF:	Angel J

REPRESENTATION:

Counsel:

Appellant:	J B Waters
Respondent:	J R Withnall

Solicitors:

Appellant:	Waters James McCormack
Respondent:	Withnall Cavanagh Maley Territory Lawyers

Judgment category classification:	B
Judgment ID Number:	ang97013
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ang97013

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

No. 140 of 1996

IN THE MATTER of an appeal under the WORK HEALTH ACT 1986

BETWEEN:

JULIE SOUTH
Appellant

AND:

ROBERT HARRIS
Respondent

CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 4 July 1997)

This is an appeal by a worker from a decision in the Worker's Compensation Court at Darwin heard on the 13 May and delivered on the 26 June 1996.

The matter has a long involved history. The appellant received an injury in 1981 as a result of her work for the respondent. This led to a claim for compensation under the now repealed *Worker's Compensation Act,* in the Worker's Compensation Court. The learned Magistrate Mr McCormack SM

found that the injury was work related, but found no evidence to demonstrate any future loss of earnings. Certain ancillary declarations were given including a declaration that her injury arose out of the course of her employment and that she was an employee, a matter that had been in issue at trial. The injury was such that it did not prevent the appellant from working full time.

In 1992, her condition, as predicted by medical practitioners, worsened and she became incapacitated for work. At this stage she was no longer working for the respondent, having worked at various places since 1981 including for herself. A claim for compensation was brought in the Work Health Court under the new *Work Health Act.* This claim is part heard by Mr Trigg SM. As amended the claim relates to an alleged 1992 injury. This claim remains on foot. Further proceedings in respect of the 1981 injury were then heard before Mr Gilles SM in the Worker's Compensation Court under the *Worker's Compensation Act*. He concluded that the matter could not be brought under the *Worker's Compensation Act* as the injury was an aggravation under the *Work Health Act*. The appeal is against this decision.

The appellant's grounds of appeal are:

> "The learned Stipendiary Magistrate erred in law in finding that:
>
> 1. The appellant based her claim on an injury "occurring" after 1 January 1987 pursuant to the deeming provisions of the Work Health Act.
>
> 2. It was open to him to find the appellant's injury, giving rise to the incapacity, arose after 1 January 1987 in the absence of any pleading or submission to that effect by the respondent.

3. The appellant had suffered an aggravation of a pre existing injury after 1 January 1987 in July 1992 or at all.

4. There was a change in the appellant's symptoms "which prompted in her a chain of thought which prevented her from seeking work" and that the foregoing constituted an aggravation of her 1981 injury.

5. Change of symptoms as set out in 4 above in the absence of any allegation or pleading by the respondent of such a change could be the basis of a determination of the issues before the Court.

To the extent that the above grounds of appeal are based on 'findings of fact' the Learned Stipendiary Magistrate erred in law in that there was no evidence whatsoever upon which those findings could have been made and that itself constitutes an error of law.".

Both parties during the hearing said that ground 5 was no longer in issue.

The following orders are sought by the appellant:

"(i) The appeal be upheld.

(ii) That the appellant, since 29 July 1992, is totally and permanently incapacitated for work.

(iii) The respondent do pay to the appellant weekly payments of compensation at the rate of $197 from 29 July 1992 and continuing.

(iv) The respondent do pay to the appellant weekly payments of compensation at the rate of $25 with respect to her dependent child, Christian, from 1 July 1992 to 2 August 1993.

(v) The respondent do pay to the appellant with respect to medical and pharmaceutical costs, past and future, the amount agreed in the sum of $2,826.50.

(vi) The respondent do pay to the appellant pursuant to s10 of Part II of the Third Schedule of the Workers Compensation Act on the basis of a 5% disability to the appellant's left lower limb the sum of $2146.38.

(vii) The appellant's entitlement to future payments of weekly compensation be redeemed by payment by the respondent of a lump sum pursuant to placitum 12 of the Second Schedule of the Workers Compensation Act.

(viii) The respondent to pay the appellant's costs of these proceedings and of the proceedings before the Workers Compensation Court.

(ix) The parties have liberty to apply as to form of orders.".

The decision of the learned Magistrate was as follows at pp9-10:

> "It is clear when I consider her work history from 1985 until July 1992, the fact that the pain she experienced during 1985 until July 1992 did not stop her from working; the fact that the pain has increased; the fact that she no longer works; and the fact that she cannot point to an incident or occurrence that might have promoted the onset of the pain experienced in July 1992 that she has suffered an increasing in gravity or seriousness of the effects of the 1981 in jury. She must put her case on the basis that she has not suffered a fresh injury in the sense of the injury referred to in scenario 1) earlier.
>
> If she alleges a fresh injury in the sense of scenario 1, she must take action in the Work Health Court for the fresh injury arises after 1 January 1987 which is the date of repeal of the Workers Compensation Act. However, to be successful in this court, she must ground her action on the fact of the 1981 injury. In basing her action on the 1981 injury, she cannot discount the effects of the passage of time. Her back rendered weaker or more infirm by the 1981 injury has deteriorated or worsened over time. That deterioration manifested itself in or about July 1992 when she developed a pain in her leg. That there was a worsening is made apparent by the fact that she was able to work from 1985 until July 1992 and the pain she experienced at that time or during that time did not prevent her from working.
>
> The Workers Compensation Act defines injury as where relevant any physical injury and includes aggravation of a pre-existing injury; see section 6 of the Act. The aggravation constitutes an injury which occurred after the repeal of the Act and on the authority of the Nominal Insurer v Robinson already referred to. The employer is not liable in this court for this injury. I've considered so far in these reasons the worker's evidence.
>
> The approach I've taken is borne out by the opinion of Doctor John Lippett in his report dated 10 May 1996, exhibit 5. He states at pages 6 and 7:
>
> It is my opinion that following the operation on her back she developed nerve root fibrosis which is a recognised complication .....have been brought about by the effect of the nerve root on the worn facet joint.

> I take Doctor Lippett's expression of opinion to be conservative by his use of the words 'possible' and 'could have been' in the last sentence of his opinion that I have extracted. However, I see no reason not to accept his opinion. It reinforces the view that the worker has sustained an aggravation of her 1981 injury. That aggravation manifested its presence in or about July 1992.".

One issue argued on this appeal was whether there was an "aggravation" under the *Work Health Act*. The learned Magistrate found that there was an aggravation. Under the *Work Health Act* the definition of "injury" includes an "aggravation or acceleration of a pre-existing injury". If the worsening condition of the appellant's back can be considered an "aggravation or acceleration of a pre-existing injury" then it was said the matter must be dealt with under the *Work Health Act*. If it is not an aggravation or acceleration then it was said the matter must be dealt with under the *Workers Compensation Act*. The term 'aggravation' and 'acceleration' are not defined in the Act.

The appellant submitted that to come within the *Work Health Act* there had to be an incident or event causing the aggravation or acceleration of the pre-existing injury. It was submitted that, as was said to have occurred in this case, a gradual worsening of the condition did not amount to an aggravation or acceleration. In regard to this point, the Court in *Johnston v The Commonwealth* (1982) 150 CLR 331, made some relevant comments in the following passage at p338:

> "There is some force in the comment of his Honour in *Lucas* that 'aggravation' signifies 'making worse' rather than 'becoming worse', a comment reflected in the remarks of Brennan J. in the Federal Court in the present case. However, the comment has rather more force when applied to the transitive verb 'aggravate' than when it is applied to the noun 'aggravation', especially when it is used in a passive sense in the

> expression ‘suffers an aggravation’. ‘Aggravation’ may mean ‘An increasing in gravity or seriousness’ as well as ‘being increased, in gravity or seriousness’.”.

These comments appear to weaken the appellant’s argument, because they suggest that a steady increase in pain may amount to an aggravation. It seems that this is the law the learned Magistrate relied on in reaching his decision. However the court in *Johnston* drew attention to the facts of *Lucas* (1967) 116 CLR 537, which was summarised as not amounting to an aggravation because the relevant injury was “unrelated either to external stimuli or to neglect in treatment.” The appellant relied on these comments to support her submission that some contributory cause must be identified.

Relevant comments were also made in *Casarotto v Australian Postal Commission* (1989) 86 ALR 399 where Hill J adopted the following passage from Windeyer J in *Federal Broom Co Pty Ltd v Semlitch* (1964) 110 CLR 626 at pp639-40:

> “The words have somewhat differing meanings: one may be more apt than another to describe the circumstances of a particular case, but their several meanings are not exclusive of one another. The question that each poses is, it seems to me, whether the disease has been made worse in the sense of more grave, more grievous or more serious in its effects upon the patient. To say that a man’s sickness is worse or has deteriorated means in ordinary parlance, oddly enough, the same things as saying that his health has deteriorated. The word ‘acceleration’ probably presupposes a progressive disease, one that, running its ordinary course, increases in gravity until a climax, such as death or total invalidism, is reached - its progress to this end result not being ordinarily susceptible of being permanently arrested but susceptible of being <u>hastened by external stimuli.</u>”.

The respondent submitted that no event or causative factor must be shown to have inflamed the condition. The respondent placed reliance on *Johnston* and submitted a different view of the effect of the case. The respondent cited the following statement from *Johnston* at p343:

> "In any event, in considering the time at which the symptoms of an aggravation first became apparent, it must be remembered that the aggravation in this case did not occur once and for all at a particular point of time. The aggravation consisted of a steady worsening of the disease over a period of four years. The symptoms which were apparent at any particular time in that period could reasonably be said to be the first appearance of symptoms of the worsened state of disease.".

Reliance was also placed on *The Nominal Insurer v Robinson* (unrep) 29 May 1991 by Martin J (as he then was) at p11:

> "It is not necessary that the workman suffer an injury as the result of some definite thing he did in the course of his work, but it is in all cases a question of fact whether in substance the injury came from the disease alone, or whether the employment contributed to it. If the work and the disease together contribute to the injury, it is impossible to deny that the case is within the meaning of the act."

The respondent also submitted that it is enough if the court considers that a finding of a fresh injury was open to the Magistrate on the evidence available see: *Nominal Insurer v Robinson* (supra) and that it is irrelevant if another view could be taken. To demonstrate that there was sufficient evidence the respondent pointed to the report of Dr Blight at p4:

> "In summary this now forty six year old woman had a significant injury to her back in 1981 for which she had a discectomy. However she has continued to have recurrences of back and left leg pain and had a major aggravation in July 1992 and has not been able to work since.".

Dr Blight was asked about this during cross examination; the learned Magistrate asked the witness what she meant by 'a major aggravation' the following discussion occurred at p10:

> "She told me that in July 1992 she was working at a hotel doing bar attendant work when she developed a recurrence of her left leg pain. I presume it was from the work activity she was doing within the hotel.
>
> So you've made a presumption that that was from her work activities?---Well, yes, because she prefaced it by saying she was working in the hotel at the time.
>
> Did you question her about what she was doing at the time?---No, I haven't got that, unless I've got it in my written work. One moment. She just said that in July 1992 she was working at a hotel doing bar attendant work when she had a recurrence of the left leg pain and a CT scan showed that the disc prolapse at the same level and she had left leg pain which was worse than previously. All right? But she didn't - she didn't describe a single incident and it was a similar pain to the pain she'd had previously.
>
> That pain being back in 1982; is that your understanding?---Yes, a similar symptoms, and recurrence and - and - well. [sic] it was exacerbated or aggravated, of the same leg pain that she had previously.".

The appellant in reply submitted that Dr Blight's use of the word "aggravation" could not be understood to mean the legal meaning of "aggravation" under the Work Health Act, but its use in common parlance. I agree that it cannot be presumed that the words chosen by Dr Blight can be taken as evidence that she considered this was an aggravation in the sense that the Work Health Act requires it to be an aggravation. Indeed she seemed to stress that there was no incident that could be described as a contributing factor to the worsening of the condition. Her evidence supports the appellant's contentions.

I agree with the appellant that there is a need for something to have contributed to the worsening of a condition or injury for it to meet the requirements of "aggravation or acceleration". At least some connection between the employment at the time of the worsening of a condition or injury and the worsening must be shown. I think this is to be concluded from the case law in this area. The two main cases that the respondent relied upon both have identifiable causes, unlike the present case. In *Johnston's* case it was the lack of treatment; in *Nominal Insurer v Robinson* it was work that further contributed to the injury. In the *Work Health Act* the definition of injury refers to the "aggravation" or "acceleration", which suggests a discernible discrete event which comprises the aggravation or acceleration, not a process. Oddly, counsel did not argue that there had been a "deterioration" of the pre-existing injury. In the present case there is nothing that was pointed to as being the factor or a factor that led to the worsening of the appellant's condition, apart from the initial injury and no such argument to the contrary was put. In fact one of the motivating factors of the initial action in the Workers Compensation Court was to get a declaration stating that the initial injury arose out of the course of her work with Mr Harris, in contemplation of possible later claims. The appellant and her prudent legal advisers knew that it was likely that the condition would worsen, and that it would be difficult with the passage of time to link it back to the original source. This was the initial prognosis and so it has proved.

The respondent also challenged the appellant's request for orders as specified in their submissions, on the basis that no findings of fact in regard to

these matters were ever made by the learned Magistrate. It was submitted that as a matter of law I do not have power to make extra findings of fact. See, eg. *Tracy Village v Walker* (1992)111 FLR 32. If this submission were not to be accepted, then it was submitted that as a matter of fairness I should not make such orders without further extensive submissions from both sides. The appellant rejected this view and argued that there was power under s26 of the Workers Compensation Act as amended by Act No 47 of 1984, which is as follows:

> "(1) Where the court makes a determination under this Act, a party to the proceedings may appeal against the determination on a question of law to the Supreme Court within the time and in the manner prescribed by the Rules of the Supreme Court.
>
> (1A) Notwithstanding sub-section(1), where, in the opinion of the Supreme Court, evidence relevant to the appeal is available which was not considered by the court at the time of its determination, the Supreme Court may admit that evidence at the appeal where it is satisfied that the party seeking the admission of the evidence did not know or could not reasonably have known of the existence of the evidence at the time of the determination by the court.
>
> (2) The Supreme Court of the Northern Territory of Australia shall decide the matter of the appeal and may either dismiss the appeal or reverse or vary the determination appealed against and may make such order as to the costs of the appeal or the proceeding before the Tribunal or both as it thinks fit.".

There is power, on appeal, to receive fresh evidence and make further findings of fact. However, the act is silent as to this Court making findings of fact upon evidence before the Work Health Court and making findings of fact in the absence of fresh evidence. At all events there is no need to answer this question. The narrow ground of appeal presented before the court means that as a matter of fairness I should not make orders based on findings relating to

facts that the lower court has not determined. Further submissions from parties would be required to make any such orders.

I would allow the appeal on the ground that Ms South's present incapacity is at least arguably related to her 1981 injury and that there is nothing to preclude her from pursuing a claim pursuant to the *Workers Compensation Act*. I think this is so because of s189 of the *Work Health Act*. The appellant has not received compensation in respect of her 1981 injury. It seems to me she is not precluded from pursuing a claim in respect of it under the *Workers Compensation Act*, see s189(1) of the *Work Health Act*. She has not brought a claim in respect of that injury under the *Work Health Act*, thus electing to treat it as an injury under the *Work Health Act*. She has brought a claim under the *Work Health Act* for the alleged 1992 aggravation as an injury under the *Work Health Act*, but that, it seems to me, is not an election which precludes her pursuing the *Workers Compensation Act* claim in respect of the 1981 injury.

The appeal is allowed. I will hear the parties as to any further orders.
