PARTIES:	ANTHONY PAUL SCHELL AND: NORTHERN TERRITORY FOOTBALL LEAGUE AND: BETWEEN: NORTHERN TERRITORY FOOTBALL LEAGUE AND: ANTHONY PAUL SCHELL
TITLE OF COURT:	Court of Appeal of the Northern Territory of Australia
JURISDICTION:	Appellate Civil Jurisdiction
FILE NO:	AP5 and AP6 of 1995
DELIVERED:	3 May 1995
HEARING DATES:	3 April 1995
JUDGMENT OF:	MARTIN CJ, MILDREN J AND THOMAS J

CATCHWORDS:

Workers Compensation - Interpretation - Special case stated from Work Health Court - Work Health Act 1986 (NT) s 87 - "Until such time as the Court orders otherwise" -

Workers Compensation - Work Health Court - Employer's failure to decide to accept liability with specified time - Deemed to accept liability - Work Health Act 1986 (NT) s 87

Workers Compensation - Interpretation - Work Health Act 1986 (NT) s 87 - "Until such time as the court orders otherwise - Words confer widest possible discretion upon the Court

Workers Compensation - Interpretation - Work Health Act 1986 (NT) - Object of Part V, Division 5 - To ensure claims dealt with speedily - Not intended for employer deemed to have accepted liability to be in worse position than one who has consciously accepted liability - Work Health Act 1986 (NT) ss 69(1), 104 - "Deemed" does not always create an irrebuttable presumption of fact

Workers Compensation - Work Health Court - Powers of Work Health Court to determine applications under s 87 of the Work Health Act 1986 (NT) - Work Health Court to determine its own practice and procedure - Appropriate procedure will depend on circumstances - Matters to be considered in granting relief

Workers Compensation - Form 5 Notice prescribed by Regulation 13 of the Work Health Regulations 1986 (NT) - Court has no power to compel issue of Form 5 Notice after expiry of period prescribed in s 85 - However, power to order delivery of a document with the same information as Form 5 as a condition of granting relief

Legislation

Local Court Act 1979 (NT) s 17
Work Health Act 1986 (NT) ss 69, 82(2), 85, 87, 95, 97, 104 and 115
Work Health Regulations 1986 (NT) reg 13

Cases

Perfect v Northern Territory of Australia (1993) 107 FLR 428, considered.
Morrissey v Conaust Ltd (1991) 1 NTLR 183, approved.
AAT King's Tours Pty Ltd v Hughes (1994) 99 NTR 33, approved.
Consolidated Press Holdings Ltd v Wheeler (1992) 109 FLR 241, approved.

REPRESENTATION:

Counsel:

Appellant:	J. B Waters
Respondent:	S. Walsh QC

Solicitor:

Appellant:	Messrs Waters James McCormack
Respondent:	Messrs Elston & Gilchrist

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

No. AP5 and AP6 OF 1995

IN THE MATTER of an appeal from the judgment of Kearney J in proceeding number 207 of 1994

AP5 of 1995

BETWEEN:
ANTHONY PAUL SCHELL
Appellant

AND:
NORTHERN TERRITORY FOOTBALL LEAGUE
Respondent

AND:

BETWEEN:
NORTHERN TERRITORY FOOTBALL LEAGUE
Appellant

AND:
ANTHONY PAUL SCHELL
Respondent

CORAM: MARTIN CJ, MILDREN AND THOMAS JJ

REASONS FOR JUDGMENT

(Delivered 3 May 1995)

THE COURT: The appeal and cross-appeal in this matter raise for consideration of this Court the proper interpretation to be given to s.87 of the Work Health Act. Following an amendment to that section by Act No. 78 of 1993, the section now reads:

> "87. FAILURE TO DECIDE WITHIN SPECIFIED PERIOD.
> Where, within the times specified in Section 85, an employer does not comply with that section, the employer shall, until such time as the Court orders otherwise, be deemed to have accepted liability for the compensation claimed in so far as the claim is in respect of compensation payable under Subdivisions B and D of Division 3."

The matter originally came before a single judge of this Court, Kearney J, as a special case pursuant to s.115 of the Act.

The facts and legal consequences giving rise to the questions of law may be summarised as follows. The worker, Schell, was employed by the employer, Northern Territory Football League, as an umpire at various times between 1981 to 1992. On 18 February 1994, the worker submitted a claim form for worker's compensation to the employer. On 8 March 1994, the worker submitted a workers compensation medical certificate in the prescribed form to the employer. Consequently, the worker was deemed by s.82(2) of the Act to have made his claim for compensation on 8 March 1994. The employer failed to either accept, defer acceptance or dispute liability within 10 working days thereafter as required by s.85(1) and was therefore deemed by s.87 to have accepted liability for the compensation claimed. The employer purported to reject the claim on 21 April on the grounds that the injury did not arise out of or in the course of the worker's employment. On 23 May 1994 the worker lodged an application to the Work Health Court for weekly benefits, and medical, hospital, surgical and rehabilitation costs. On 10 June 1994 the employer lodged an application for an order that the employer no longer be deemed to have accepted liability for the compensation claimed. This application was supported by various affidavits, the precise nature of which has not been explained, but which presumably raised the factual grounds upon which the employer intended to rely in support of its application. On or about 29 June 1994 at a preliminary conference held pursuant to s.106 of the Act, the court ordered that the employer's application be joined with the worker's application, and the employer's application was to be set down for hearing at a date to be fixed by the list clerk. The list clerk fixed the employer's application for hearing on 16 August 1994. At the hearing, counsel for the employer submitted that the deemed admission of liability could be set aside by the court at that hearing based on the affidavit evidence. Counsel for the worker submitted that no such

order could be made until the employer established at a substantive hearing, the burden being on it, that it was not liable to pay the worker the compensation claimed. In order to resolve that question the learned magistrate submitted a special case, which Kearney J answered as follows:

NO	QUESTION	ANSWER
1	Does the Work Health Court, pursuant to Section 87 (as amended) of the Work Health Act, have the power to order that an Employer may deliver a Form 5 notice disputing liability pursuant to Section 85(1)(c) after the time limits specified in Section 85 have expired	No
2(a)	Does Section 87 of the Work Health Act give the Employer a right to make an application to the Work Health Court for an order under that Section permitting it to deliver a Form 5 notice after the time limits specified in Section 85 have expired and if so under what section of the Work Health Act may the Employer bring such an application and how is such an application made.	No
2(b)	Can the application be dealt with as a preliminary issue supported by affidavit evidence or must it be dealt with at a substantive hearing.	The application must be dealt with at a substantive hearing of the worker's claim.

NO	QUESTION	ANSWER
3	If yes to question 1, what factors should influence the exercise of the Court's power in so permitting an Employer to deliver a Form 5 notice after the time limits specified in Section 85 have expired.	Not applicable
4	Can the Employer rebut the deeming effect of Section 87 (as amended) by establishing that: (a) there is a serious question to be tried; (b) the balance of convenience is in favour of the Employer not making payment of compensation pending the hearing of a claim to be made by the Worker; (c) its failure to comply with s.85 was due to inadvertence or mistake?	The matters relevant to the exercise of the Court's discretion to "order otherwise" under s.87 will vary from case to case.
5	For an Employee (sic Employer) to rebut the deeming effect of s.87 is it necessary for an Employer to prove on the balance of probabilities that, subject to the deeming provision of s.87, he is not liable for the claim? That is, must the Employer prove that the basis on which liability would have been rejected had liability been disputed to s.85 excludes him from liability.	No

NO	QUESTION	ANSWER
6	What is the meaning of the words "until such time as the court orders otherwise" appearing in s.87 as amended of the Work Health Act?	They have the effect that an employer deemed to have accepted liability for compensation under s.87 remains liable until it succeeds in an application under s.104(1) of the Act, to be heard as a preliminary issue in a hearing of the worker's claim for compensation, in obtaining an order from the Court that it is now no longer deemed to be so liable; if the employer's application succeeds the hearing is to continue, to determine the worker's claim for compensation, a hearing in which the worker bears the onus of proving his claim.

The first question to be answered must be question 6 because the answer to that question will largely determine the answers to be given to the other five. Counsel for the worker, Mr Waters, contended that the Court should relieve the employer of its deemed acceptance of liability only upon proof by it at a substantive hearing that the employer was not in fact liable. Counsel for the employer, Mr Walsh QC, submitted that the Court had a wide discretion, and could, in an appropriate case, relieve the employer of its deemed acceptance upon proof by it of matters sufficient to justify the Court, acting judicially, to take that course; and he submitted that the sort of factors which the Court should consider would be the same as those upon which a Court might set aside a default judgment.

We consider that the words used in the section, viz., "until such time as the Court orders otherwise," are apt to confer the widest possible discretion upon the Court. There is nothing in s.87 of the Act, or elsewhere to be found in the Act, which suggests that the discretion is to be exercised only upon proof by the employer that upon the true facts it is not liable to the worker for the compensation claimed. The worker's submission focused upon the position of the employer before s.87 was amended in 1993 when the words to which we have referred above were inserted into the section. It was submitted that the section, as it stood at that time, whilst it did not create an irrebuttable deeming of acceptance of liability, prohibited proof that the employer was not liable except by means of a substantive hearing at which the burden of proof rested upon the employer. The employer might challenge this deemed acceptance, so it was submitted, either by cancellation or reduction of payments to the worker pursuant to s.69 of the Act, or by a substantive application to the Court under which the employer bore the onus of proving that it was not in fact, or was no longer, liable. Mr Waters submitted that the purpose of amending s.87 in 1993 was to make it clear that the deemed acceptance of liability was not irrebuttable, but without clear words, this court ought not to infer a legislative intent to take away a substantive right conferred by the Act by proof of anything less.

The object of Division 5 of Part V of the Act, in which ss85 and 87 are to be found, was discussed by Mildren J in *Perfect v Northern Territory of Australia* (1993) 107 FLR 428 at 435-6 where his Honour concluded that a purpose of the provisions was to ensure that claims were dealt with speedily, and to this end, the time limits prescribed and the procedures laid down must be strictly observed. Nevertheless, it would be most unlikely that the legislature intended that an employer who was deemed to have accepted liability should be in any worse position vis-a-vis the worker than an employer who had made a

conscious decision to accept liability. In either case, the employer could have proceeded either by means of a substantive application to the Court pursuant to s.104 (see s.69(2)(d)) or by cancelling or reducing payments pursuant to s.69(1). There is nothing in the language of s.69 to indicate that that Section could not apply to a deemed acceptance of liability. The word "deemed" does not always create an irrebuttable presumption of fact, and whether it does or not must depend upon the context, and the Act read as a whole. In this case we are satisfied that, even before the amendment in 1993 to s.87, it would have been open to the employer to prove that it was not in fact liable, or no longer liable, to pay compensation to the worker. To the extent that the employer was required to rely upon s.69, it is clear that the employer would have been required to bear the onus of proof: see *Morrissey v Conaust Ltd* (1991) 1 NTLR 183; *AAT King's Tours Pty Ltd v Hughes* (1994) 99 NTR 33. We note also that s.69 is not confined to situations where there has been a change in circumstances.

In our opinion the effect of the amendments to s.87 was not confined to clarification of whether or not the deeming effect of the section was conclusive. As we have already observed, the words inserted into the section were appropriate to confer upon the Court the widest possible discretion. They are clear and unambiguous. If the legislature had intended that the employer could only be released from the effect of the section in the manner argued for by the worker, we would have expected the legislature to have said so, for example, by saying "until the Court otherwise orders upon proof by the employer that it is not liable to pay the compensation claimed." There is no injustice to the worker if the words of the section are thus construed. The employer will still bear the onus of satisfying the Court that the discretion should be exercised in its favour. In most cases this would require, as a minimum, some reasonable explanation for the delay, satisfaction that there would be no hardship or prejudice to the worker which could not be cured, and proof that the employer has a meritorious defence. If the delay is lengthy, or not explained, or if the failure to comply with s.85 was deliberate, or if the defence looks weak, the Court might not grant the employer relief unless there is actual proof that the employer is not liable at a full hearing on the merits. There may even be situations, such as impossibility of compliance with s.85 by the employer or conduct on the part of the worker upon which the employer relies for not complying with s.85, which may give rise to an exercise of discretion in the employer's favour without proof of a meritorious defence. Further, the Court could, upon the exercise of its discretion, impose conditions depending upon the circumstances, designed to relieve the worker from any injustice, for example, by

requiring the employer to make interim payments pending a full hearing on the merits, or by an award of costs. In our opinion the manner in which the Court might be called upon to exercise its discretion is expressed in the widest possible terms, and cannot be confined to rigid categories.

Nor should this Court generally compel the Work Health Court to determine how, as a matter of practice and procedure, applications of this kind should be dealt with. Much might depend upon the way in which the application comes to be made to the Court. The Act makes it clear that all matters of practice and procedure are, subject to the Act and rules of that Court, in the discretion of the Court or magistrate hearing the application: see s.95, and the observations of Mildren J in *Consolidated Press Holdings Limited v Wheeler* (1992) 109 FLR 241 at 246. The appropriate procedure to be adopted will very much depend upon the circumstances which have arisen. This will no doubt vary according to whether or not the worker has commenced any proceedings, whether those proceedings are an appeal under s.69 or an application under s.104, and if the latter, the nature of the relief sought in proceedings, the strength of the employer's application and whether or not the facts are in serious contest. In some cases it may be best to deal with the employer's application as a preliminary issue or at a preliminary conference upon affidavits. In others, for example, on application by the worker for a declaration of liability, it may be best to leave that issue if the strength of the employer's application appears weak, until there is a formal hearing of the worker's application. In such a case the worker could upon proof of service of his claim and any lack of response thereto rest upon the deeming effect of s.87, close his case thereby forcing the employer to call evidence that it is not liable, and then call his own evidence in reply.

The facts of the present case do not enable us to determine that justice cannot be achieved unless the employer's application is dealt with in a particular way.

Form 5 is the form prescribed by Regulation 13 of the Work Health Regulations to be given when an employer disputes liability under s85, or cancels or varies payments under s69. Its purpose is to inform the worker of the employers decision, provide reasons for it and inform the worker of the worker's rights under the Act. As already shown, such a notice if given under s85 must be given within 10 days of the decision. There is no provision by which that period may be extended by the Court. However, we see no reason why the Court could not, as a condition of granting relief to an employer in an appropriate

case, order the delivery to the worker of a document in the form and providing the information prescribed by Form 5 (see s97 of the Act and s17 of the Local Court Act). Whether that needs to be done will depend upon the circumstances of the case . In cases where the employer has established that it has a good defence on the merits, or where the Court decides to require proof by the employer that it is not in fact liable, there would appear to be little purpose to be served by such a course.

It follows that whilst we substantially agree with Kearney J's decision, except on questions of practice and procedure, the answers given by the Court below should be set aside and the following substituted:

1. No, but the Court may order the employer to deliver a document in the form of a Form 5 notice, as a condition of granting relief in an appropriate case.

2. (a) No. The employer's application is for an order that the employer be no longer deemed to have accepted liability.

   (b) The procedure to be adopted is, subject to the Act and the rules, in the discretion of the Court.

3. No answer required.

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

5. No, not in every case.

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

As neither party has been totally successful, each party shall bear their own costs of the appeal.
