PARTIES:	TIVER CONSTRUCTIONS PTY LTD
	v
	CLAIR, Stephen John
TITLE OF COURT:	SUPREME COURT (NT)
JURISDICTION:	APPEAL UNDER THE WORKERS' COMPENSATION ACT
FILE NOS:	No. A293 of 1991
DELIVERED:	Darwin 3 June 1994
HEARING DATES:	17 and 18 August 1993
JUDGMENT OF:	Angel J

CATCHWORDS:

Workers' Compensation - Assessment and amount of compensation - Redemption of weekly payments - Conditions for redemption - Whether redemption order in the interests of the worker -
Watkins v Renata (1984) 29 NTR 38, considered
Watkins v Renata (1985) 61 ALR 153, followed
Workers' Compensation Act, Schedule 2, paragraphs 1B, 12

REPRESENTATION:

Counsel:

Appellants: B Lander QC and S Walsh
Respondent: Hiley QC and J Reeves

Solicitors:

Appellants: Elston and Gilchrist
Respondent: Morgan Buckley

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 293 of 1991

IN THE MATTER OF AN APPEAL
UNDER THE
WORKERS' COMPENSATION ACT

BETWEEN:

TIVER CONSTRUCTIONS PTY LTD
Appellant

AND:

STEPHEN JOHN CLAIR
Respondent

CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 3 June 1994)

This matter has been remitted back to me by the Court of Appeal for further hearing and determination. It concerns an appeal from a decision of the Workers' Compensation Court. The appeal first came before me on a number of grounds, but the only issue before me now is that of redemption.

The learned Magistrate awarded a sum of $141,367.20 in redemption of weekly payments based on the finding that the worker was 60% permanently and partially incapacitated. On appeal, I held that the only attack against the learned

Magistrate's order for redemption was on the evidence and therefore affirmed the order and dismissed the appeal and cross-appeal.

On further appeal, the Court of Appeal held that the learned Magistrate failed to properly exercise her discretion in regard to assessment for redemption purposes. The Court held that such a failure was an error of law and the appeal should not have been dismissed. The matter was therefore remitted back to me for further hearing and determination.

Their Honours at p32 said:

> "Her Worship does not explain how she arrived at the decision that for the purposes of redemption the respondent had a partial and permanent incapacity which she assessed at sixty percent. Since the redemption is only available in respect of the employer's liability to make weekly payments where the worker is incapacitated for work by the injury, the assessment, on its face, relates only to the degree of that physical incapacity. It does not address the question of the employer's liability to make weekly payments. It fails to consider for example, when it was likely the respondent would return to work, the nature of the work, the amount which he would be likely to earn, what interruptions there may be to his work and the effect that may have upon his earnings, flowing from the need to have periodic hip replacement operations. It may be that her Worship had in mind some or all of those matters or others, including his physical incapacity, but that is not clear. The award of $141,367.20, although calculated by the legal representatives of the parties, was arrived at on the basis of her Worship's assessment. It does not appear how her Worship reached her assessment, but, upon all the facts as found the result appears unreasonable, and this Court may infer that in some way there has been a failure properly to exercise the discretion (*House v R* (1936) 55 CLR 499 at 505)."

The provision for redemption of future weekly payments is found in paragraph (12) of SCHEDULE 2 of the Workers' Compensation Act and is as follows:

> "(12) Subject to paragraph (12A), where, in a case of total and permanent incapacity or partial and permanent incapacity, a workman or former workman, as the case may be, is receiving or entitled to receive a weekly payment, application may be made to the Tribunal by or on behalf of -
>
> (a) the workman or former workman, as the case may be; or
>
> (b) the employer or former employer, as the case may be, and with the consent of the workman or former workman, as the case may be,
>
> to redeem the liability for that weekly payment by the payment of a lump sum."

Paragraph (12A) is not relevant in this case.

Mr Lander QC, counsel for the appellant, submitted, I think correctly, that the proper approach of the Court in estimating the employer's future liability to make weekly payments is to consider three issues, that is:

i) the probabilities of the duration of the incapacity

ii) the extent of the incapacity

iii) the financial loss caused by the incapacity.

The learned Magistrate apparently considered only the extent of the incapacity and counsel for the appellant submitted that it is therefore left to me to make the relevant findings as to duration and loss on the evidence as it was before the Workers' Compensation Court.

However, counsel for the appellant further submitted that a redemption order should not be made where it would be unjust to the worker. He referred me to *Groote Eylandt Mining Co Pty Ltd v Albantis* (1983) 24 NTR 13, which also concerned a redemption application under the Workers' Compensation Act. Nader J, after considering a number of High Court cases, said at pp20-21:

> "I conclude from the cases that a provision of the kind under examination confers a right upon a worker to a redemption when conditions of the provision are satisfied. However, that right is not absolute and the Tribunal ought not make a redemption order when it would be unjust to do so. Provided the conditions of a jurisdiction are satisfied and the workman *sui juris*, the Tribunal has no duty (indeed, no right) to refuse an order of redemption under para (12) on the ground merely that in the opinion of the Tribunal it is not in the best interest of the workman to make such an order."

See, also, *Watkins v Renata* (1985) 61 ALR 153, at 158, 159 per Toohey and Morling JJ.

Counsel for the appellant submitted that on the evidence in this case, it would be unjust to the respondent to order redemption as the uncontradicted evidence was that the respondent could successfully undergo hip replacement operations in the future leaving him free of pain and able to resume work.

The situation is that the respondent, currently 35 years of age, suffered severe injuries in a motor vehicle accident which the learned Magistrate found to arise out of or in the course of his employment. Further, she found that despite

those injuries being attributable to the respondent's serious and wilful misconduct, they resulted in serious and permanent disablement and were nonetheless compensable. This finding was not disturbed by this Court or the Court of Appeal.

At the hearing before the Workers' Compensation Court, the respondent gave evidence that he continued to suffer pain - in particular his left arm lacked strength and was painful if struck. He also continued to have pain and discomfort in his left hip, leg and knee such that he found walking and prolonged standing difficult. His left leg had also shortened and the muscle was wasting. Further, he suffered some back pain and aching in his right leg when standing for long periods.

Doctor Griffiths gave evidence for the respondent and estimated disability of the left arm at 10%. He considered the left leg was 100% disabled for the purposes of returning to his former employment and the right leg was similarly 5% disabled. The learned Magistrate accepted this evidence.

However, the evidence most relevant to redemption is that pertaining to hip replacement for the respondent. Doctor Griffiths gave evidence concerning hip replacement procedure generally, the benefits and advancement of such operations and then opined as to the respondent's situation. He recommended an operation, and indeed said at t146:

> "He's not going to get better. There's no way that hip is going to improve now but by either making it

> completely rigid, which I believe is unacceptable for a young man like this, or by replacing it, then he will lose a vast amount of his pain and get a mobile joint and walk without a limp."

Doctor Griffiths further said that a left hip replacement would remedy a lot of the right hip pain, however, he advised that it would still be undesirable to undertake "any occupation including long periods of standing, load bearing on the hip and repetitive bending and lifting effort." (t161)

Such a replacement for a person as young as the respondent would, according to Doctor Griffiths, have a life span of some seven years on current technology. Therefore, throughout the respondent's life he may have to undergo some five hip replacement operations.

Counsel for the appellant submitted that on the further evidence of Doctor Griffiths, the respondent would be eligible for redemption only during the five short periods of recuperation and rehabilitation involved after the operations.

The learned Magistrate detailed Doctor Griffiths' evidence extensively in her reasons and in regard to redemption accepted that:

> "On the evidence of Dr Griffiths the operation for a replacement would relieve the pain he presently suffers." (p18 R)

Indeed, the Court of Appeal found that (at 31-32):

> "Although unexpressed, her Worship must have considered that the benefits of the hip replacement would persuade

> the respondent to undergo the procedure sooner or later and thus his capacity to earn be improved."

However, as to timing and financial consequences, no ruling was made and again it is left to me to make some findings based on the transcript. Counsel for the appellant submitted that making such findings in relation to distant events on today's evidence, would be speculation and therefore unsatisfactory, and indeed, unjust to the worker, in which case a redemption order should not be made.

Counsel for the appellant further submitted that the burden of establishing that there is a case for redemption lies on the applicant, be it the worker or employer. In so saying he referred to a decision of the Full Industrial Court of South Australia, *Scott Bonnar Limited v Halikias* (1974) 41 SAIR 1002, drawing my attention to the headnote, which he submitted correctly set out the decision and in particular points (1), (2) and (5), which I set out in full:

> "(1) That the burden of establishing a case for redemption, as distinct from the burden of introducing evidence on this or that topic, remains throughout on the applicant, whether he be employer or worker.
>
> (2) That the applicant for redemption is obliged to prove as probabilities first, that the duration of the employer's liability to make some weekly payment can be estimated with a reasonable degree of confidence; and secondly, that the quantum of the amounts of the weekly payments which, but for redemption, would be payable during such duration, can be estimated with a reasonable degree of confidence.
>
> ...
>
> (5) It is established by J. & H. Timbers Pty. Ltd. v. Nelson (1972) 126 C.L.R. 625; 46 A.L.J.R. 152 that in a case in which the worker is claiming weekly payments in respect of partial incapacity for work, the onus of proof

> of the difference between the weekly amount which the worker would probably have been earning but for the work injury and the average weekly amount he is earning or able to earn after the injury, is on the workman. It is a misapplication of this principle to hold that in an employer's redemption application, in which there are findings of permanent disability and that the workman will be capable in six months' time of earning wages at work not involving a lot of heavy lifting, there is upon the workman a burden of introducing evidence as to what wages he would be able to earn in six months' time."

After reference to some specific parts of the judgment, which I will not cite, counsel for the appellant concluded by asserting that the case fairly stood for the proposition that:

> "My learned friends must make out (a) a permanent incapacity, (b) a partial incapacity, (c) a duration, and (d) a loss."

This, he also submitted, had to be able to be determined with reasonable certainty and if it could not be, it would be unjust to order redemption on speculation.

Counsel for the appellant submitted that the respondent/applicant could not, on the evidence, establish with any degree of certainty, duration or loss, and that the application for redemption simply failed for lack of proof. In so saying, he pointed to Doctor Griffiths' evidence as outlined previously in contending that the duration of incapacity would be intermittent and difficult to determine with any certainty.

As to financial loss, counsel for the appellant said that the respondent only called evidence to the effect that he was unable to gain employment in his present state, not his post-

operative state. The appellant had however called evidence establishing that there was work available post-operation, which was not contradicted.

Essentially then, counsel for the appellant submitted that as the learned Magistrate had failed to make relevant findings, it is left to me to make those findings and as the evidence is insufficient for me to do that with sufficient certainty, I ought not make a redemption order. Further, if I do, it would be unjust to the worker and an error of law. The respondent would not be prejudiced as he could re-apply for redemption and adduce new evidence, meanwhile still be entitled to weekly payments.

Counsel for the appellant's second and alternative argument related to paragraph 1B of SCHEDULE 2 of the Workers' Compensation Act which determines the amount of weekly compensation payable where a workman is partially incapacitated. It is as follows:

> "Where the workman is partially incapacitated for work by the injury, the amount of compensation is -
>
> (a) in respect of a week, being one of the first 26 weeks of the period of incapacity, or of the aggregate of the periods of incapacity - the amount, if any, by which the amount that he is earning, or is able to earn in suitable employment or business, is less than the workman's normal weekly earnings; and
>
> (b) in respect of a period, being a period after the expiration of the 26 weeks referred to in sub-paragraph (a) -
>
> (i) the amount, if any, per week by which the weekly amount that he is earning, or is able to earn in some suitable employment

or business is less than the amount per week that would be payable to him under paragraph (1A)(b)(i) if he had been totally incapacitated; or

(ii) the amount, if any, per week by which the weekly amount that he is earning, or is able to earn in some suitable employment or business, is less than the workman's normal weekly earnings,

whichever is the lesser, but so that the amount payable does not exceed the proportion of the amount that would have been payable to the workman under paragraph (1A)(b)(i) had he been totally incapacitated for work that his loss of capacity to work bears to what would have been his full capacity to work had he not been injured."

With respect to the application of paragraph 1B(b), counsel for the appellant referred to the decision at first instance of *Watkins v Renata* (1984) 29 NTR 38, where Kearney J dealt with paragraph 1B(b) and the effect of the proviso therein.

His Honour commented on the purpose of the proviso and algebraically set out the clause (at p44):

"The purpose of the proviso is very clear. As cl (1B) stood before the proviso was introduced in 1980, it was possible that a partially incapacitated workman could receive a higher weekly compensation payment than a totally incapacitated workman. The introduction of the proviso removed that possibility. I consider that the effect of the proviso can most clearly be shown by the use of mathematical symbols, for which I am indebted to counsel.

In cl (1B)(b), if -

$X = the amount the workman is able to earn in some suitable employment or business

$NWE = the workman's normal weekly earnings

$A = amount of weekly compensation under cl (1A)(b)(i) if totally incapacitated

and $Y\% = \frac{\text{loss of capacity to work}}{\text{full capacity to work}}$ expressed as a percentage,

> then, applying cl (1B)(b)(i) and (1B)(b)(ii) without the proviso, the workmen's weekly compensation would be either
> $A - $X or
> $NWE - $X,
> whichever is the greater.
>
> It follows that if $NWE>$A, cl(1B)(b)(ii) is the relevant provision. The proviso, however, applies an upper limit to any figure derived as above; the weekly compensation payable must not exceed Y per cent of $A in any event.
>
> Some hypothetical examples may make it clear. If $NWE is $350, $A is $120, $X is $200, and Y per cent is 40 per cent, then cl (1B)(b)(ii) is the relevant provision and, without the proviso, would result in a weekly compensation payment of $150 (which would be more than the amount of $120 payable for total incapacity). Applying the proviso, which fixes an upper limit, his compensation is in fact 40 per cent of $120, that is, $48 per week."

At the time of that decision, paragraph 1B(b) was in slightly different form: "whichever is the greater" was amended, after the decision, to "whichever is the lesser". Counsel for the appellant submitted that the amendment is material in this case to the effect that the proviso has no application. He argued that if the respondent could earn an amount in some suitable employment or business (X) that is greater than the amount set under paragraph (1A)b)i) (A ie $197), then paragraph 1B(b)i) must be the "lesser" as it will necessarily be a negative factor and therefore no compensation is payable.

By example: if $X = 200

$NWE = 400

$A = 197 then

1B(b)i) : A - X = -3

1B(b)ii) : NWE - X = +200

(i) is the lesser at -3.

Since that figure is in the negative, counsel for the appellant submitted that there is no need to go to the proviso as no compensation is payable at all. The worker is able to earn more than $197 per week and is therefore disentitled.

The learned Magistrate erred, he submitted, in that paragraphs (i) and (ii) were overlooked and percentage disability (ie the proviso) alone was considered. Further, Counsel for the appellant relied on *Buyong v Readymix Concrete (NT) Pty Ltd* (1989) 67 NTR 1 in submitting that the onus is on the worker at all times to establish the figure X. Counsel for the appellant said that the respondent discharged that onus in relation to pre-operation employment, such that he was unable to earn, but not as to post-operation employment.

However, the appellant did adduce evidence as to the respondent's ability to work and the availability of work post-operation.

I was taken to the evidence of Mr Smith, Mr Strippling and Mr Major where possible earnings ranged from $230 to $363 per week. Consequently, counsel for the appellant submitted that if paragraph 1B(b) was correctly applied, the respondent would not be entitled to any redemption post-operation. However, he would continue to be entitled to receive weekly payments until such time as they are lawfully stopped or it became evident that the respondent post-operation could not

carry out work that it was established that he could do and he could therefore re-apply for redemption.

This does not mean that future possibilities should not be taken into account; it means it is just not appropriate to do so in the manner agitated.

Counsel for the appellant finally argued that the respondent had no incapacity productive of financial loss.

In so saying, he referred me to the respondent's own evidence that he could do the work of a counter clerk at the Motor Vehicle Registry (p209-210 T) and indeed her Worship said at p8 of her reasons:

> "Mr Clair agreed he could do the work of a counter clerk at the Motor Vehicle Registry or at the Lands Branch."

Counsel for the appellant further submitted that there was evidence that the work was available. Having read the evidence of Mr Strippling of Transport and Works, I can not agree that it establishes that that work is available. Indeed, her Worship's decision would have differed if she had found that the respondent could not only do the work but that it was available.

Mr Hiley QC, counsel for the respondent, submitted in response to the appellant's final argument that it goes against the findings already established. Her Worship awarded the full amount of $197 per week, therefore inferring that she rejected the evidence counsel for the appellant referred to.

Further, counsel for the respondent submitted that to rely on evidence that was rejected two years ago was entering into the realm of speculation; speculation as to the respondent retaining the ability to do that work, that the work would still be available and that the pay would still be greater than $197 per week at some point in the future after the operation.

In reference to the appellant's 1B(b) argument, counsel for the respondent submitted that the 1B(b) formula is irrelevant. It goes, he said, to the calculation of weekly entitlements, not as to redemption, and here, he said, the weekly entitlement is settled at $197 per week. The only way it could possibly be considered is in the light of a future capacity to earn income. Therefore, counsel for the respondent submitted, rather than recalculating the weekly payment post-operation on speculation, it is sufficient if I conclude that on the balance of probabilities there will be periods of time when the worker will be able to earn income and not be entitled to $197 per week.

Indeed, counsel for the respondent submitted that this formula is not in issue before me as it has already been agitated both before myself and the Court of Appeal and the weekly payment upheld.

There appeared to be dissension between the parties as to whether the $197 per week was awarded under paragraph 1A for total incapacity or under 1B, being the maximum available for

partial incapacity. Counsel for the respondent submitted however that it mattered not which paragraph the award was made under as it still stands, and for redemption purposes is the starting point, however reached. Indeed, counsel for the respondent submitted, the respondent is entitled to that $197 per week unless and until the employer makes an application under s7A or paragraph 11 of SCHEDULE 2 of the Workers' Compensation Act to reduce or cease it.

As part of the respondent's argument, Mr Hiley QC submitted that the only live ground of appeal was 9(d) of the notice of appeal, which is as follows:

> "9. The Court erred in
> ...
> (d) failing to apply or properly apply the formula for calculation of redemption of weekly payments of compensation set down in Watkins v. Renata (1984) 29 NTR 38."

All other grounds were effectively dismissed by the Court of Appeal. Therefore, submitted counsel for the respondent, any findings of fact made by her Worship must be accepted by this Court and can not be subject to re-examination.

The issue before this Court, he said, is simply one of redemption and, as per ground 9(d) the application of the formula set down in *Watkins v Renata* (1984) 29 NTR 38.

The starting point therefore is her Worship's finding of permanent partial incapacity and an entitlement to $197 per week weekly compensation.

As to Mr Hiley QC's submission on the formula for calculation of redemption, I set out the relevant points on his outline:

> "2.1 A redemption award is calculated by ascertaining the present value of what the employer is liable to pay for weekly compensation until the likely death of the worker. Watkins v Renata 29 NTR 38 at 47-49; Watkins v Renata 61 ALR 153 at 158.7 (citing Perry) and 162.1; Blackwell at 432.1, 436.6, 437.8 and 445.9.
>
> 2.2 This is done by multiplying the present weekly entitlement by the 3% multiplier.
>
> 2.3 In some (but not all) cases it will be appropriate to vary the amount derived in order to account for contingencies - "for example, that for some period the workman might obtain employment at such a wage that his weekly compensation would be reduced". Watkins 29 NTR at 47.2, 49.5; Watkins 61 ALR at 161.5."

Counsel for the respondent submitted that any operative procedure the respondent may have that could render him able to return to work, together with the availability of suitable work should be treated as a contingency in accordance with *Watkins v Renata*, supra.

Counsel for the respondent submitted that the evidence was not conclusive as to the benefit of hip replacement operations as postulated by counsel for the appellant but that there were risks, and success was not guaranteed. Therefore, he said, it should be dealt with as a contingency as opposed to a probability that cast doubt on the permanency of the respondent's incapacity and thus disentitling him to redemption.

As to onus, counsel for the respondent submitted that the only onus on the respondent is drawn from paragraph (12) itself; that is to establish:

i) a permanent incapacity, and

ii) an entitlement to a weekly payment.

"Incapacity", submitted counsel for the respondent, means incapacity for work which may or may not be productive of financial loss, and therefore is physical incapacity as opposed to financial incapacity.

The respondent satisfied these onuses according to Mr Hiley QC, and therefore had a right to redemption, subject to it being unjust to the worker.

Counsel for the respondent submitted that the only error the learned Magistrate made was in failing to explain the basis for the 40% discount on the lump sum redemption figure and indeed the final award may have been too low.

I can not agree that the figure may be too low. The Court of Appeal clearly indicated that despite an absence of explanation as to how her Worship reached her assessment, the result appeared unreasonable on all the facts as found. Martin J (as he then was) and Mildren J proceeded to quote, at p32, Starke J in *Michaelis Hallenstein v Lewis* (1944) 68 CLR 613 at 627:

> "The ascertainment of the lump sum demands ... serious consideration of many variable factors and it should not

> be assessed by the exercise of a kindly and generous discretion at the expense of the employer or its insurer."

I think it is clear that their Honours' reference to an unreasonable result was a reference to an unreasonably high result.

It appears to me, implicit in the referral of this matter back to this Court that the whole issue of redemption has been left to me to determine. I do not consider that I am restricted to ground 9(d) of the notice of appeal as the Court of Appeal has clearly determined the existence of an error of law in her Worship's reasons and that that part of the appeal should not have been dismissed.

The Court of Appeal said at p32 that Her Worship's assessment:

> "... does not address the question of the employer's liability to make weekly payments. It fails to consider for example, when it was likely the respondent would return to work, the nature of the work, the amount which he would be likely to earn, what interruptions there may be to his work and the effect that may have upon his earnings, flowing from the need to have periodic hip replacement operations."

Therefore, these are matters that fall to me. However, in so saying, the Court of Appeal noted that "there is no statutory guidance as to the principles upon which, or any formula, by which such redemption, if awarded, is to be calculated", p31.

Clearly, the issue before me is to determine if redemption should be awarded and if so, how is it to be calculated in the circumstances.

The obvious starting point for redemption is the Worker's Compensation Act itself. The right to apply for redemption is found in paragraph (12) as set out previously. Accordingly, the respondent must be either wholly or partially permanently incapacitated and receiving or entitled to receive weekly payments to be eligible to apply.

The entitlement to redemption, however, does not automatically follow. There have been a number of decisions concerning the "absolute right" to redemption. In particular, the Federal Court in *Watkins v Renata* (1985) 61 ALR 153 dealt with the issue in relation to the Northern Territory Workers' Compensation Act. At pp 158-159, Toohey and Morling JJ considered the issue at length and I set out the relevant part below:

> "When the primary judge said that "the necessary conditions for jurisdiction were satisfied", presumably that was a reference to cl (12) which requires, as a condition for the exercise of the Tribunal's power to order redemption, a situation in which there is total or partial permanent incapacity and the receipt or entitlement to receipt of a weekly payment. The appellant contended that no express finding had been made that the respondent had a partial and permanent incapacity and the receipt or entitlement to receipt of a weekly payment. The appellant contended that no express finding had been made that the respondent had a partial and permanent incapacity. That is true, but the order of the Tribunal and the judgment of the primary judge proceeded on the basis that there was a partial and permanent incapacity. Neither order nor judgment is explicable on any other basis. And although the appellant submitted that there was doubt that the extent

of the partial incapacity could be finally determined with any real degree of accuracy, that submission seems to us to be not in point so far as redemption is concerned. What cl (12) requires is that there be a partial and permanent incapacity (which undoubtedly was the case) and the receipt or entitlement to receipt of a weekly payment (which also was undoubtedly the case). What is redeemed is the employer's liability for that weekly payment by the payment of a lump sum.

In *Perry Engineering Co Ltd v Mermingis* (1964) 112 CLR 468 at 477, Kitto J said of another provision for redemption: 'In general no harm is done by speaking as if the liability to be redeemed were the future liability to make weekly payments; but that, as I have said, is not in fact the liability to which the section refers. It speaks ... of the whole liability for the weekly payment (singular)'. The words are apposite here. Once the weekly payment is known, the assessment of an appropriate sum by way of redemption is a matter for the Tribunal.

Before these matters are reached it is necessary to deal with an issue raised by the appeal, viz whether a workman has a right or absolute right to redemption. In express terms neither cl (12) nor cl (12A) confers on a workman an absolute right to redemption. It is arguable that such a right may be inferred from the fact that an employer cannot apply to redeem his liability, except with the consent of the workman, but that workman may apply without the consent of his employer. However, in terms, that limitation goes to entitlement to make an application, not to the granting of an application. In the case of a workman applicant, the only condition for the exercise of the Tribunal's power to redeem is the existence of a situation in which there is total or partial permanent incapacity and the receipt or entitlement to receipt of a weekly payment. So far as we are aware there is no decision precisely in point on a provision in terms identical with or closely similar to cl (12). Earlier English authorities were concerned with legislation which permitted an employer to seek redemption where a weekly payment had been continued for not less than six months. In those circumstances it was held that the employer had an absolute right to redeem once the requirement of six months' payments had been met: *Kendall & Gent Ltd v Pennington* (1912) 5 BWCC 335; *Elliott Ltd v Hobbs* (1929) 22 BWCC 509. In *Michaelis, Hallenstein and Co Pty Ltd v Lewis* (1944) 68 CLR 613, the High Court accepted the correctness of those decisions and held that, under a provision: "Where any weekly payment has been continued for not less than six months, the liability therefor may, on application by or on behalf of the employer or the worker, be redeemed by the payment of a lump sum of such an amount as may in default of agreement accepted by the Board be settled by the Board ...", the worker had a right to redeem.

> In Harrington v Harrington (1981) 35 ALR 587 at 594-5; 55 ALJR 566 at 569, Gibbs CJ referred to Michaelis in these terms: 'Nevertheless, all the members of the court recognized that it was open to the board (which under the legislation there in question performed the functions which in South Australia are performed by the court) to make a declaration of liability rather than a redemption order : see (68 CLR) at pp 622, 623, 626 ... In spite of the repetition by some members of the court of the statement that there is a right to redeem, it is clear that the court rejected the notion that the board was bound to make a redemption order when it would be unjust to do so.'
>
> 'Unjust' here is, we think, a reference to injustice to the workman not to the employer: see Clawley v Carlton Main Colliery Co Ltd [1918] AC 744, referred to by Gibbs CJ (35 ALR at p 595; 55 ALJR at p 569).
>
> In our view the principle to be derived from these authorities is that, where a statute permits an employer to apply for redemption of weekly payments, unless otherwise provided the relevant Tribunal may decline to order redemption if it would be unjust to the workman to do so and instead may make a declaratory or suspensory award. The emphasis in these cases is on protection of the workman. But in the case now under appeal it was the workman who sought redemption and it was the employer who opposed it. Consistent with the authorities, and having regard to the language of cl(12) of Sch 2, we are of the opinion that once the respondent sought redemption the Tribunal was required to accede to the application unless it thought that it was against his interest to do so." (emphasis mine)

McGregor J dissented in that decision and after reference to a number of cases (including *Scott Bonnar Ltd v Halikias*, supra), said at p170:

> "The legislation with which the authorities quoted were concerned was different from cl (12). The only "absolute" right in cl (12) is to make an application following which, pursuant to cl (12A), "the Tribunal may order such amount, as may be determined by the Tribunal, to be paid or invested ...". In my view, the function then entrusted to the Tribunal and, in turn, to the primary judge does involve a discretion. Factors for and against redemption have to be weighed. I will not try to enumerate them. I do not agree that under the Workmen's Compensation Act (NT) where a workman applies for redemption then, in all circumstances, once it is shown to be to his advantage, redemption must follow

> automatically. There may be circumstances related to the case which would persuade a court, eg to adjourn, postpone or dismiss an application."

Following the decision of the majority in *Watkins v Renata*, supra, I am of the opinion that if the worker can establish a permanent incapacity and is receiving or entitled to receive a weekly payment I should accede to the application unless it is against the interest of the worker.

My discretion therefore is limited to considering whether such an order would be against the interests of the worker and whether there are relevant contingencies that may affect the employer's liability to make the weekly payment. A worker is not entitled to redemption if his incapacity is not permanent. However, redemption aside, there may be events whereby the employer or indeed the worker could apply to have the weekly payment reduced or increased (SCHEDULE 2, paragraph 11). For example, medical technology may advance such that some degree of earning capacity may be restored, or the labour market may have attained the point where the worker can actually earn an income.

Consequently, if at the time of the redemption application hearing there are such distinct possibilities, they should be taken into consideration. Kearney J, at first instance, in *Watkins v Renata* (1984) 29 NTR 38, addressed the issue of contingencies and said at p47:

> "It was submitted that the Tribunal erred in its calculations in not taking into account and providing for various contingencies of life; for example, that for some period the workman might obtain employment at such a wage that his weekly compensation would be reduced. It is correct that such contingencies must be taken into account, and appropriate allowance made."

On appeal, the majority of the Federal Court said at p161:

> "It was further argued by the appellant that, in any event, the primary judge had power to take into account under cl (12A) amounts retained by way of income tax. But there is nothing in the clause to lend any support to that proposition. Although cl (12A) speaks of "such amount, as may be determined by the Tribunal", there is nothing in the clause or elsewhere in the Act to justify a determination of a sum by way of redemption, except by reference to the liability of the employer to make a weekly payment. That is not to say that certain contingencies may not properly be taken into account, but a determination of a sum by way of redemption in terms of a workman's net weekly earnings constitutes, in our view, an error of law.
>
> ... This court has been provided with figures which permit it to make a calculation, on an actuarial basis, of the amount properly payable by way of redemption. His Honour adverted to various contingencies, favourable and unfavourable which he thought cancelled out each other. We find no error in that conclusion so that the actuarial approach is appropriate."

In dealing with contingencies, the interests of the worker must be kept in mind and any factor sought to be made relevant must be established on the balance of probabilities. In so saying, I agree with counsel for the appellant that there must be a sufficient degree of certainty, otherwise an unjust result may be imposed on the worker.

The requirement of paragraph (12), in that a worker must be permanently incapacitated, encompasses the issue of duration. If on the evidence, that incapacity can be remedied

by a medical operation or if the condition is one that may resolve itself with time, then there is no permanency and therefore no entitlement to redemption. The requirement of paragraph (12) for either 'total' or 'partial' incapacity embodies the issue of extent of incapacity. If the incapacity is not total, but partial, the degree of partiality should have been considered in the determination of weekly payments under the proviso to paragraph (1B)(b) of Schedule 2 of the Act.

As to financial loss, it also, is to be dealt with under the formula for calculation of weekly payments. Again, if partially incapacitated and able to earn, those earnings will be offset in the 1B(b) formula.

Therefore, I intend to approach the matter of redemption on the basis that there must have been established, by this respondent, a permanent incapacity and an entitlement to a weekly payment. Following that, it is appropriate to deal with the most apparent contingency, the hip operation and the resultant factors which the Court of Appeal held her Worship did not consider, that is:

> "When it was likely the respondent would return to work, the nature of the work, the amount which he would be likely to earn, what interruptions there may be to his work and the effect that may have upon his earnings." p32

In so considering, I must keep in mind the interests of the worker and ensure that any resultant award would not be unjust to him. I have regard to the findings made by the

learned Magistrate and the decision of the Court of Appeal. The learned Magistrate made a clear finding of permanent incapacity, being partial and assessed at 60%. Despite not expressing a liability on the employer to make weekly payments, the Court of Appeal said at p29:

> "It is implicit from the consideration given to the question of redemption and the awards which were made that her Worship was satisfied as to the appellant's liability to make weekly payments."

Therefore, subject to the question of unjustness, the respondent is entitled to redeem.

The Court of Appeal found at p31-32 that:

> "Although unexpressed, her Worship must have considered that the benefits of the hip replacement would persuade the respondent to undergo the procedure sooner or later and thus his capacity to earn be improved."

On the balance of probabilities, it is more likely than not that the respondent will undergo the hip replacement operation. As to when this may happen, I can not determine. At the time of the hearing (17 April 1991), the respondent was unwilling to undertake the operation and Doctor Griffiths indicated that he would not push anybody into such an operation as consent was essential.

On 17 August last, when the matter of redemption came back before me, counsel for the respondent indicated from the bar table that the operation had still not been undertaken and there was no application to adduce fresh evidence before me. There is therefore, no evidence at all upon which I can

determine when the respondent may return to work. The hip replacement operation, if and when undertaken, may or may not be successful.

It is thus speculative to attempt to determine "the nature of the work, the amount he would be likely to earn", and so on. In particular the duration of the respondent's incapacity could be intermittent and presently impossible to determine with the requisite degree of certainty. This being so, any deduction for contingencies would merely be guesswork and could only lead to a result which can not be shown to be in the interests of the worker.

I am therefore of the view that a redemption order should not have been made in the circumstances and that the appeal should be allowed.

I order accordingly and shall hear counsel on the orders which should be made and as to costs.