PARTIES:	PLEWRIGHT, Glen William v PASSMORE, Mark trading as PASSMORE ROOFING
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	103 of 1996
DELIVERED:	4 April 1997
HEARING DATES:	14 & 15 October 1996
JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

Workers' Compensation - Assessment and amount of compensation - Weekly earnings - Northern Territory - Application of definition of 'normal weekly earnings' to circumstances of case - Refusal to interfere with findings of fact made - No fixed number of hours required to be worked by worker - Not within par(a) of definition.

Work Health Act (1986) NT, s49(1)
AAT Kings Tours v Hughes (1994) 99 NTR 33, distinguished.

Workers' Compensation - Assessment and amount of compensation - Weekly earnings - Northern Territory - Application of par(b) of definition of 'normal weekly earnings' to circumstances of case - 'Average weekly number of hours' as used in the Work Health Act (1986) NT not used in its common understanding - Words must be construed in their context, and bearing in mind the purpose of the Act - Construction is a question of law.

Work Health Act (1986) NT, s49(1)

Hope v Bathurst City Council (1980) 144 CLR 1 per Mason J. at 7, applied.

Workers' Compensation - Assessment and amount of compensation - Weekly earnings - Northern Territory - Normal weekly earnings - Average weekly number of hours - How hours worked on odd days after conclusion of last full week of work to be treated - Meaning of 'average' - Legislative intent - Odd days are not to count in calculation of average.

Work Health Act (1986) NT, s49(1)

George Pearse Pty Ltd v O'Flynn (1962) 79 WN (NSW) 328;

Flinders Shire Council v Smiles; Ex Parte Flinders Shire Council (1982) 42 LGRA 92 at 95, applied.

Workers' Compensation - Assessment and amount of compensation - Normal weekly earnings - Allowances paid after injury sustained irrelevant - Taking such allowances into account an error of law.

Work Health Act (1986) NT, s49(2)

Workers' Compensation - Assessment and amount of compensation - Cross-appeal - Weekly earnings - Northern Territory - Most profitable employment reasonably available to worker - Whether manner of application of provision of statute to facts an error of law - Operation of 'reasonably' - A narrower term than physically capable or physically possible - A question of fact - Assessment to be done in all the circumstances - Reasonable capacity a relative concept to be applied with some flexibility - Onus rests on employer to show that if worker not reasonably capable of earning in one field of work, that he was nevertheless reasonably capable of earning more than he earnt in another field of work.

Work Health Act (1986) NT, s65(1) and (2)(b), s68.

Crestwood Phoenix Darwin Pty Ltd and the Nominal Insurer v Savasti and Kamarakis, unreported, Northern Territory Court of Appeal, 23 December 1996, followed.

Workers' Compensation - Assessment and amount of compensation - Orders of court below not taken out - Had not determined compensation payable to the worker for partial incapacity for work over the relevant period - Issues unfinished and remain to be decided

by the court below - Returned to Court to enable it to proceed and make its determinations.

Work Health Court Rules (1987) NT, r31
Crestwood Phoenix Darwin Pty Ltd and the Nominal Insurer v Savasti and Kamarakis, unreported Northern Territory Court of Appeal 23 December 1996; *Rozycki v Work Social Club Katherine Inc.*, Martin CJ., unreported 5 February 1997, referred to.

Workers' Compensation - Entitlement to and liability for compensation - Persons liable to pay compensation - Failure to make payment on or before the day on which payment required - Worker entitled to interest - Calculated in accordance with s89 Work Health Act - Relevant time for payment set out in s88(1) Work Health Act.

Work Health Act (1986) NT, ss88(1) and 89.
Wormald International (Aust) Pty Ltd v Aherne, unreported, Mildren J., 21 June 1994, followed.

REPRESENTATION:

Counsel:

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Respondent:	Mr Riley QC

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Respondent:	Ward Keller

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

No. 103 of 1996

BETWEEN:

GLEN WILLIAM PLEWRIGHT
Appellant

AND:

MARK PASSMORE trading as PASSMORE ROOFING
Respondent

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 4 April 1997)

The issues in this appeal and cross appeal revolve around the application of ss49, 65 and 89 of the *Work Health Act* 1986 (NT) ("the Act") to the circumstances of the case.

Background

The evidence upon the hearing in the Work Health Court ("the Court"), accepted by the Court, as to an agreement between the appellant ("the

worker") and the respondent ("the employer") was given by the worker in these terms:

> "What were the - did you have a discussion about hours and number of days that you would work? - - Yes.
>
> What were the ... ? - - When we were in Perth we - he said it was eleven dollars an hour, seven days a week, ten hours a day if we worked at that - providing no rain and the weather - -.
>
> Did you accept the job? - - Yes I did."

The job was to work as a plumber for the employer at a station property in the Territory. The job commenced on 22 January 1988, and two months later the worker fell to the ground from the roof of a station building thereby suffering injuries to his neck, shoulder and right ankle. It was that to the ankle which gave rise to continuing work related problems. He was paid weekly compensation for total lack of capacity for work under the Act until 16 November 1988 when the employer cancelled the payments pursuant to s69. The employer had received a medical report in which the opinion was expressed that the worker was fit for work as a plumber. The worker successfully appealed, the Court finding, in reasons delivered on 4 November 1994, that the cancellation was not justified. It was further found that the worker was totally incapacitated for work as a result of the injury he sustained in the fall until 1 March 1990, and partially incapacitated for work after that time. It was held on appeal that the Court erred in law in its assessment of the weekly compensation to which the worker was entitled.

The issues on this appeal arise from the Court's decisions, upon reconsideration of the evidence in the light of the law held to apply in the first appeal.

Normal Weekly Earnings

In the circumstances, the provisions of the Act governing the quantification of workers entitlement to weekly compensation are these:

- Compensation after the first six months of incapacity is equal to 75% of the worker's loss of earning capacity (s65(1)).

- Loss of earning capacity is the difference between

  (a) the worker's normal weekly earnings (indexed in accordance with subs(3)), and

  (b) the amount, if any, he is from time to time reasonably capable of earning in a week in work he is capable of undertaking if he were to engage in the most profitable employment, if any, reasonably available to him, and having regard to the matters referred to in s68 (s65(2)).

"Normal weekly earnings" is dealt with in s49 as relevantly meaning remuneration for the worker's "normal weekly number of hours work", the latter phase being further relevantly defined as meaning:

> (a) In the case of a worker who is required by the terms of his employment to work a fixed number of hours, not being hours of overtime ... the number of hours so fixed and worked; or
>
> (b) In the case of a worker who is not required by the terms of his employment to work a fixed number of hours in each week - the average weekly number of hours, not being hours of overtime ... worked by him in the service of his employer during the twelve months immediately preceding the date of the relevant injury.

The brief exchange between the parties in Perth set out earlier, and which was not challenged upon the hearing before the Court, now becomes a focus of attention. However, there is other evidence. There is a two page record, accepted by the Court as accurate, demonstrating whether the worker worked on any particular day during the two months from commencement of employment in the Territory until he suffered the injury. The Court accepted the worker's submission that there were fifty-nine days recorded on the two sheets.

> "There were 3 days off and 9 days referred to "town"". Of the balance, and excluding days when rain stopped work (seven days) the hours ranged from 6 to 11 hours. 372 hours were worked over a total of 40 days at an average of 9.3 hours per day. When one looks at the range of hours set out in the table at p3 of the worker's written submissions (and excluding rain effected days, days off and "town" days), it is clear that although the worker worked 10 hours on 13 days, 9.5 to 10.5 hours on 11 days, and 11 hours on 4 days, there remains a significant number of days when hours worked ranged between 6 and 9 hours (15 days)".

Calculations on those sheets show earnings at the rate of $11 per hour worked.

The problem associated with applying the statutory provisions as to "normal weekly number of hours of work" in the light of those facts is arguably compounded by the evidence that the worker stated his normal weekly earnings in his claim for compensation to be $388.30, and accepted payment of compensation at that rate for the first six months of his incapacity (s64(1)), which was total.

The worker argues that par(a) of the definition of "normal weekly number of hours of work" set out above applies; it produces a result of $770 per week. He further submits that if par(b) applies, it produces a result of $533.84 per week. The employer argued that the worker's own statement of $388.30 was to be held against him; if not, then par(b) is applicable and produces a somewhat lesser figure than that calculated by the worker.

Dealing firstly with the figure of $388.30, I note that the Court made a finding of fact that the worker was to be paid $11 for each hour he worked. That was no doubt based upon the agreement said to have been struck in Perth and as confirmed on the two sheets. How the figure of $388.30 came about is not explained. There is no reason shown why this Court should interfere with the finding of fact made. (A slightly different figure of $388.50 is referred to, in a different context, later in these reasons, but in the state of the evidence it would amount to speculation to try and link the two figures together).

The Court held that par(a) did not apply in that the worker was not required by the terms of his employment to work a fixed number of hours per week. That finding involves a question of law, in contract, as to what the terms of employment required. The appellant appeals against that decision arguing that the Court was in error because the normal weekly earnings were established by reference to the agreement, and it wrongly took into account the hours actually worked in deciding that par(a) did not apply. I do not accept that the Court was wrong in the conclusion reached, although I approach the question a little differently. The terms of the agreement as to working ten hours a day, seven days a week were expressly subject to interruptions due to rain and, perhaps, other vagaries of weather. The worker was, after all, to be employed as a plumber, out of doors, commencing during the "wet" season. The record shows that rain called a halt to his work on several days prior to his completing ten hours of work. That was anticipated as between the

employer and worker. He was expected to work the stipulated hours subject to the excepting circumstances. This case is distinguishable from *AAT King Tours v Hughes* (1994) 99 NTR 33 where at p39 it was said that the worker there was required to work at least forty hours in each week and a predetermined number of overtime hours. There were no fixed number of hours which the worker was required to work in this case, and par(a) therefore does not apply. The worker's appeal based on that error is dismissed.

Consideration must now be given to the application of par(b) of the definition in the factual circumstances as found. Looking at the sheets containing details of hours worked over the period from commencement of employment to the date the worker was injured, the question is what is the average weekly number of hours worked? His employment spanned eight weeks and three days. The difference between the parties is as to how the hours worked on the odd days, after conclusion of the last full week of employment up to the date of injury, are to be treated. Are they to be included in some way in calculating the average weekly number of hours worked or not? The Court accepted the respondent's submissions which took account of the hours worked on the three days beyond the completed weeks. That submission took the eighteen hours worked over the three days preceding the injury and projected them out so as to arrive at a notional number of hours worked over five days of a notional working week, of thirty hours. On this basis the respondent calculated the average weekly number of hours worked,

over the completed eight weeks employment plus the notional week, at 46.778 hours.

The appellant contended before the Court that the correct application of par(b) restricted the Court's consideration to the hours worked in the completed eight weeks, giving a result of an average weekly number of hours worked of 48.53. The facts calling for consideration have been fully found; the words of the statute, "average weekly number of hours worked", are not used in their common understanding, they are used in a statute noted for its technical, legal language. The words must be construed in their context and bearing in mind the purpose of the Act. Their proper construction is a question of law (*Hope v Bathurst City Council* (1980) 144 CLR 1 per Mason J. at p7).

The notion of a week is not to be taken in its strict meaning of the time between midnight on Saturday and the same time on the next succeeding Saturday. The phrase used here has a connection with work, and what is a week in that context must relate to the working week for the particular worker. The information available in this case does not indicate that his working week was regarded as other than commencing on the day he started work, and proceeding at intervals of seven days thereafter. That is the way the parties approached it. They both arrived at the conclusion that he had worked for eight weeks plus three days. There is no reason to disturb that approach. As

to “average” it is “synonymous with equalling an arithmetical mean or, less strictly, approximating an arithmetical mean”, a process which usually involves a division of unequal sums or quantities (*George Pearse Pty Ltd v O’Flynn* (1962) 79 WN (NSW) 328; *Flinders Shire Council v Smiles; Ex Parte Flinders Shire Council* (1982) 42 LGRA 92 at 95).

In this case the unequal sums or quantities are the weekly hours worked. It provides a guide as to the scale of hours worked for the purposes of calculating normal weekly earnings. To take into the calculation of the average weekly number of hours worked, number of hours worked in a period of less than a week, is not within the contemplation of the provision. It may lead to distortion of the prescribed average, as this case shows. Had the legislature intended, it could have provided for a calculation based on an average number of hours worked over other periods of time, for example, daily, fortnightly or monthly. It chose to fix the criteria on the working week. Odd days are not to count in calculating the average. The Court erred in taking the hours worked during the additional three days into account in calculating the average weekly number of hours worked. It is not suggested that the appellant’s calculations, based on the correct method of calculation is in error. The average weekly number of hours worked by the appellant for these purposes was 48.53 hours. The appellant’s appeal on this ground is allowed.

It is a further ground of appeal that in calculating "normal weekly earnings" the Court accepted and applied to its calculations, a submission from the employer, based upon s49(2) which lead it to reduce the amount of those earnings by excluding from the worker's remuneration certain allowances, which are not amongst the allowances to be included in the calculation in accordance with that subsection. The allowances are of the type often encountered in industrial awards. The agreement for the payment of $11 per week per hour contains no reference to allowances of any kind, and there was no evidence to show that it was based upon or incorporated any such award. The only evidence that allowances played any part in the relationship between the worker and the employer is contained in a memorandum of 20 August 1993 to "Whom it may Concern", signed on behalf of the respondent. In that document it was confirmed that the worker was being paid $11 an hour whilst employed. It goes on:

> "Unfortunately he had an accident and then was receiving worker's compensation paid on the gross award rate of $350.70 per week.
>
> | | |
> |---|---|
> | District Allowance | $ 16.60 per week |
> | Construction Allowance | $ 13.50 per week |
> | Tool Allowance | $ 7.50 per week |
> | Total | $388.30 per week" |

This material was irrelevant to the Court's considerations. It has to do with a view taken as to the make up of an amount paid to the worker by way of

compensation after the injury was sustained. There was an error of law in taking it into account. The ground of appeal based on this error is allowed. Calculation of the worker's normal weekly earnings is to be based upon the agreement that he be paid $11 per hour for each hour worked, without any adjustment for allowances under s49(2). Normal weekly earnings based on 48.53 hours at $11 per hour equals $533.84.

Most Profitable Employment

The worker's normal weekly earnings are but one consideration in determining the loss of earning capacity. The other, is the amount, if any, he is from time to time reasonably capable of earning in a week in work he is capable of undertaking if he were to engage in the most profitable employment, if any, reasonably available to him, and having regard to the matters referred to in s68 (s65(2)(b)).

The findings contained in the two sets of reasons, summarised, are:

- Prior to 16 July 1990, the worker did spasmodic, irregular part time building site labouring work for friends at his own pace. It was not "heavy" work. He took rests when they were needed.

- He undertook a rehabilitation programme.

- From 16 July 1990 to 19 April 1991 he worked as a driver/deliverer and storeman and associated activities.

- From November 1991 to March 1992 he was employed full time as a labourer with John Holland Constructions, screeding and levelling concrete, cleaning moulds and related work. He was sometimes required, either alone or with another, to carry weights of up to 25 kilograms over a distance of seven to eight metres. He had to stand for lengthy periods. He was able to rest from time to time. He worked nine hours a day, six days a week.

- He took up employment with Delta Constructions from March 1992 until the end of July 1992. He worked six days per week up to thirteen hours a day, but was able to rest from time to time.

- In each of the jobs with John Holland and Delta, he was paid approximately $550 per week, excluding overtime. Each job was on short term contract. He did not cease work as a result of pain or physical limitation.

- Although the history suggested that he was not incapacitated in any medical sense or to any degree, it was accepted that he needed rest on both jobs. Occasions to rest arose at “normal breaks” and whilst

waiting for the cement truck to come. "Different things would happen and there was a hold up you could sit down and rest ... It didn't happen all the time, but it did happen ... sometimes we'd sit there for 2 or 3 hours waiting for concrete".

- He was taking pain killing medication to assist him to cope with pain, or at the very least, discomfort, caused by his ankle injury.

- After the job at Delta, he was engaged on and off in construction labouring work. It was spasmodic.

- In November 1993 he obtained a job as a general maintenance man at a Perth nightclub. The duties were light and involved no heavy lifting or sustained periods of weight bearing.

Importantly, the Court found, that from 16 July 1990 the worker had demonstrated a commitment to working and a capacity for work on a full time basis that did not involve heavy lifting and long periods on his feet. Pain produced that physical incapacity. There were limitations on his ability to perform work involving weight bearing and standing for sustained periods. In addition, he was concerned about falling if on an angle on a roof. All those things were related to the injuries sustained. In addition to all that, he had intellectual (literacy and numeracy) limitations unrelated to those injuries.

Those are findings of fact and can not be called in question in these proceedings. What is said to be an error of law, however, is the manner in which the Court applied the provisions of the statute to the facts as found.

The employer had submitted that the same work as performed by the worker with each of John Holland Constructions and Delta had been available since that time, indeed with the same two employers and remained available. The employer submitted that the worker was capable of performing that work and remained so capable. Accordingly the rate of pay applicable to that work was that which should be applied in determining loss of earning capacity. There was evidence before the Court dealing with the availability of that type of work from each of those former employers. The Court, looking at that evidence, noted that each of the companies "currently" employed people in the same capacity and to perform the same duties as the worker, but that neither dealt with the issue of whether such positions were held on short or long term contract, and neither dealt with the continuity of work available with either company in respect of those employment duties since 1992. Those factors do not appear to have had any influence on the outcome, however. The Court posed the question "What is he reasonably capable of earning?" The submission from the employer was, and remains, that so long as the jobs were within his capacities and there was no prohibiting factor by virtue of his injuries, then the Court should take into account the maximum figure that he

could earn as being that which he was capable of earning. The question was to be resolved not by looking at what the worker was earning, but what he was capable of earning, and the measure of what the worker was capable of earning was to be gauged from his employment with the two construction companies. He had worked there for eight and a half months, almost continuously. The Court observed that the evidence in support of that argument suggested that the worker was fully capable of undertaking the duties performed without pain or other limiting factors, and reminded itself that the worker worked when other men worked and rested when they did - as a matter of work routine and rhythm - "nonetheless I've accepted that these rests (taken for whatever reasons) were in fact relied upon by this worker as a means of coping with the required duties and either pain, or at the very least, aching in his ankle". The Court accepted evidence from a Dr Fine that although the worker was able to perform the work at John Holland and Delta, he was helped by being able to rest in the way that he described, and that he was taking pain relieving medication during that period to assist him to cope with the pain or the discomfort. At p9 of the second set of reasons, the Court sought to apply the facts as found to the statute, and said:

> "I am not satisfied that this worker is reasonably capable of earning the amounts referred to in the ... affidavit. I am not satisfied that he is capable of performing the work they describe unless he continues to use pain relieving medication as he did earlier. He should not be required to do so. To place such a requirement upon him would in my opinion be unreasonable. As a matter of logic it follows that I find that he is not "reasonably capable" of earning income at John Holland or Delta in the performance of the duties described in the two ... affidavits. ...

> Ultimately, I am not satisfied that the employer has proven, as it is obliged to do, that it would be reasonable for this worker to undertake the work at either John Holland or Delta, described in the ... affidavits, and earn the income referred to in them."

and later:

> "... The two limbs of s65(2)(b) are not severable and the employer has failed to establish the requirements of the limb - the reasonable capacity for earning. In reaching this conclusion I take into account s68. The only directly relevant and disqualifying s68 factor for the purposes of employment at John Holland or Delta would be 68(f) "the impairments suffered by the worker"".

In conclusion, the Court fixed the amount received by the worker in his employment at the nightclub, $336.30, as the "MPE" (most profitable employment).

The only evidence before the Court as to the work which the worker was capable of undertaking related to that in which he was engaged when working for the two construction companies, and that which he was doing at the nightclub. The former produced a significantly higher income than the latter and produced the effect that the worker would not be entitled to any compensation under s65(1). The latter, however, produced a result which could entitle the worker to payment of compensation calculated in accordance with that subsection. The Court's approach was that since the worker could only obtain the higher income by engaging in work which produced pain consequent upon the injury, and that he was only able to cope with the work because of the rest periods available and the relief obtained from taking the pain killing medication, then he was not reasonably capable of earning any

amount in a week in that work. It was not reasonable to say that he was capable of earning in a week any amount in that work when it could only be earnt in those circumstances.

The word "reasonably" is part of the phrase "reasonably capable of earning in a week in work he is capable of undertaking …". It does not govern the question of the amount which the worker is from time to time capable of earning. The statute does not speak of the "reasonable amount", it speaks of reasonable capacity to earn. It is to the capability of earning in work that the worker is capable of undertaking that the question is to be directed, and that is what it appears the Court did. Was he reasonably capable of earning in a week, in work he was capable of undertaking, any amount? Reasonably capable is a narrower term than physically capable or even physically possible, and what the worker is reasonably capable of earning necessarily depends on the circumstances. It is a question of fact. It involves an assessment in all the circumstances, and on that minds may well differ. Reasonable capacity is a relative concept and designed to be applied with some flexibility. Although differently expressed, it is abundantly clear that the Court took the view that the worker was not reasonably capable of doing the labouring work because, although he had the physical capacity to do the work, that capacity could only be fulfilled when there were adequate rest periods available and his pain could be relieved by medication. That is, the work produced pain, and although it could be relieved in the manner found, that was not in accordance with reasonable good sense or sound judgment. Considerations such as those clearly fall within the boundaries of questions of fact. The respondent's cross-

appeal that the Court erred in law in failing to properly apply the provisions of subp(b) of subs65(2) of the *Work Health Act* based upon these considerations is dismissed.

There was no evidence before the Court as to any amount which the worker was reasonably capable of earning within the meaning of that provision, other than as a labourer or maintenance person in the nightclub. The only evidence remaining then, after excluding that relating to work as a labourer, was that as a maintenance person in a nightclub. The employer did not seek to show that if the worker was not reasonably capable of earning as a labourer, he nevertheless was reasonably capable of earning more than he was earning at the nightclub. The onus is that regard rested on it. (*Crestwood Phoenix Darwin Pty Ltd & the Nominal Insurer v Savasti and Kamarakis,* unreported, Court of Appeal of the Northern Territory, 23 December 1996)

In its summary of findings and orders, at the conclusion of the later reasons, the Court fixed the MPE at $336.30, based upon evidence of earnings at the nightclub, and the parties were invited to address further: "On the question of costs, and, if necessary, on the calculations and interest". I understand that it is not unusual for the Court, having found the figures upon which compensation is to be calculated, to leave the calculations to the parties, but of course remaining available to resolve any disputes arising and, in any event, to make orders accordingly.

There is no evidence before this Court of the decisions or determinations of the Court having been taken out in accordance with r31 of the *Work Health Court Rules* 1987 (NT). In *Kamarakis* and *Rozycki v Work Social Club Katherine*, unreported, Supreme Court of the Northern Territory, Martin CJ. 5 February 1997, attention was drawn to the difficulties which can arise when that is not done. The failure may prove costly to the parties, both in terms of professional fees and delay. This is another such case. The Court had not completed its task on this aspect of the matter, that is, to determine the compensation payable to the worker for partial incapacity for work over the relevant period; it invited the parties to come back; and they apparently did not do so. It is more than likely that had the Court's invitation been taken up, or some attempt made to take out, by way of order, the decisions and determinations made by the Court, the unfinished issues would have been highlighted and attempts made to resolve them by agreement or by further reference to the Court. The appeal based on the alleged error of law in simply fixing the MPE at $336.30 is dismissed. The issue as to the application of that finding, and other relevant findings, remains to be decided by the Court. This issue must be returned to the Court to enable it to proceed and make its determinations.

Interest

Where a person liable to make a weekly payment of compensation to a worker, fails to make it on or before the day on which he is required to do so, the worker is entitled to be paid interest calculated in accordance with the

formula set out in s89. In its later reasons, the Court dealt with the issue of interest by saying that the cancellation of payments on 16 November 1988 was not justified, but that liability to make payments was not determined until 4 November 1994, the date upon which the first determination was made. Applying an approach adopted in that Court, interest was ordered to be paid on all payments due to the worker after 4 November 1994, that is, the date upon which the Court determined that the employer was liable, and thus, in the view of the Court, required to make the weekly payments of compensation.

As was pointed out by Mildren J. in *Wormald International (Aust) Pty Ltd v Aherne* (unreported 21 June 1994), s89 applies where a person is liable under Part V of the Act to make weekly payments for compensation. No order is necessary, interest is payable by force of the section if a payment is not made on time. The question is what is the relevant time? When was the employer required to make the payment, or payments, to which it is sought to attract interest under s89? A number of times might be considered. For example, s53 provides that where a worker suffers an injury and the injury results in incapacity, there is payable by the employer to the worker, in accordance with Part V, such compensation as is prescribed. There is no qualification upon the fixing of liability, other than the statutory preconditions. Particularly, there is no qualification upon that liability based upon any determination being made by the Court. Sections 64 and 65 provide, in the circumstances there described, that a worker shall be paid weekly compensation in accordance with the act. Again, the operation of those sections are not dependent upon any determination being made. Indeed, it is provided in s85(2) that where an

employer accepts liability for compensation claimed in accordance with the Act, the employer shall, in the case of a claim for weekly payments, commence those payments within three working days after accepting liability. If 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 (s87). The Court has power to hear and determine claims for compensation under Part V, and all matters and questions incidental to or arising out of such claims, s94(1)(a). Where a determination is made awarding an amount of money to a person and the amount of the award is not satisfied, judgment may be entered in the Local Court (s97). That being achieved, the judgment could be enforced in accordance with the procedures of that Court.

Each of these provisions might be seen as requiring the payment of compensation, the imposition of the liability, the acceptance of liability, the obligation to pay weekly compensation, a determination by the Court and the enforcement of the judgment. However, in my opinion, s89 is not directed to any of those provisions, it relates back to what is provided for in subs(1) of s88. Unless otherwise agreed in writing by the worker, a weekly payment shall be made to the worker before the expiration of seven days after the end of the week in respect of which it is payable or, where the worker is normally paid at intervals greater than one week, before the expiration of seven days after the end of the period in respect of which he is normally paid. Other subsections relate to the manner in which the weekly payments may be made. A person liable to make a weekly payment of compensation to a worker fails to make the weekly payment, if it fails to do that on or before the day he is

required to do so under s88(1). The other provisions of the Act fix liability for payment and provide for enforcement in default by way of determination and execution, but it is s88 that fixes the day on or before which the weekly payments are required. Interest runs in default of payment in accordance with that requirement. By definition, in s79: "weekly payment" means a weekly payment of compensation and obviously refers to the compensation payable for incapacity for work as a result of an injury allowed for in ss64 and 65. His Worship erred in law in fixing the date he did in respect of the payment of interest. Interest is payable on each weekly payment due to be paid to the worker in accordance with the formula in s89, taking into account the period of grace allowed under s88.

Orders

1. That the determination of the Work Health Court fixing the normal weekly number of hours worked be varied to 48.53 hours.

2. That the determination of the Court fixing normal weekly earnings be varied to $533.83.

3. That the respondent's cross-appeal, regarding the application of s65(2)(b) of the *Work Health Act* be dismissed as not showing an error of law.

4. That the determination of the Court fixing the date upon which the respondent was required to make weekly payments of compensation, for the purposes of calculation of interest pursuant to s88 of the Act, at 4 November 1994 be set aside.

5. That the interest payable pursuant to s89 be calculated upon the basis that the day on which the respondent was required to make a weekly payment of compensation was fixed by s88.

The question of costs is reserved.
