PARTIES:	TRACY VILLAGE SPORTS AND SOCIAL CLUB v WALKER
TITLE OF COURT:	In the Supreme Court of the Northern Territory of Australia
JURISDICTION:	APPEAL from the Workers' Compensation Court exercising Territory Jurisdiction
FILE №:	SCC 54 of 1992
DELIVERED:	Delivered at Darwin 10 November 1992
HEARING DATES:	Heard at Darwin 10 July 1992
JUDGMENT OF:	Mildren J

CATCHWORDS:

APPEAL AND NEW TRIAL - Appeal - General principles - In general and right of appeal - Appeal from Workers' Compensation Court - Notice of injury - Claim for compensation - Appeal on questions of law only - Reasonable cause as question of law - Mistake - Whether findings are questions of law or fact - Options where course of trial judge unclear

Workers' Compensation Act (NT),ss25,26
Fenton v Owners of Ship Kelvin [1925] 2 KB 473, applied.
Nicolia v Commissioner of Railways [1972] ALR 185 (High Court),referred to.
Pettitt v Dunkley [1971] 1 NSWLR 376, referred to.
R v District Court of the Metropolitan District Holden at Sydney, Ex parte White (1966) 116 CLR 644 at 654, referred to.
Tiver Constructions Pty Ltd v Clair (unreported, Court of Appeal, Gallop J, 22/10/92), referred to.
Turnbull v New South Wales Medical Board [1976] 2 NSWLR 281 at 297, referred to.
Zuijs v Wirth Brothers Pty Ltd [1953] 93 CLR 561 at 574, referred to.
Azzopardi v Tasman UEB Industries Ltd (1985) 4 NSWLR 139 at 156, discussed.
Instrumatic Ltd v Supabrase Ltd [1969] 1 WLR 519 at 521, discussed.

APPEAL AND NEW TRIAL - New trial - In general and particular grounds - Matters constituting reasonable cause - Failure to give notice and claim- Ignorance of law - Mistake - Misconception of true position

Workers' Compensation Act (NT),ss25,26
Butt v John W Eaton Ltd (1920) 29 CLR 126, applied.
Commonwealth of Australia v Connors (1989) 86 ALR 247, applied.
Fenton v Owners of Ship Kelvin [1925] 2 KB 473 at 490, applied.
Murray v Baxter (1914) 18 CLR 622, applied.
Nicolia v Commissioner of Railways [1972] ALR 185 (High Court), applied.
Stevenson v Metropolitan Meat Industry Commission (1937) SR(NSW) 109 at 118, referred to.
Dietrich v Dare (1978) 21 ALR 210, not followed.

COURTS AND JUDGES - Judges - Function - Find primary facts - Inferences giving rise to secondary facts - Application of facts to law - Options where course of trial judge unclear

Azzopardi v Tasman UEB Industries Ltd (1985) 4 NSWLR 139 at 156, referred to.
Humphrey Earl Ltd v Speechley (1951) 84 CLR 126, referred to.
Pettitt v Dunkley [1971] 1 NSWLR 376, referred to.
Turnbull v New South Wales Medical Board [1976] 2 NSWLR 281 at 297, referred to.
Zuijs v Wirth Brothers Pty Ltd [1953] 93 CLR 561 at 574, referred to.

MISTAKE - Miscellaneous cases of mistake - Workers Compensation - Time for giving notice and making claim - "Mistake"

Workers'Compensation Act (NT),s25
Black v City of South Melbourne [1963] VR 34, applied.
Murray v Baxter (1914) 18 CLR 622, applied.
Stevenson v Metropolitan Meat Industry Commission (1937) SR(NSW) 109 at 118, applied.
Commonwealth of Australia v Connors (1989) 86 ALR 247, referred to.
Dietrich v Dare (1978) 21 ALR 210, not followed.

STATUTES - Operation and effect of statutes - Workers compensation - Notice of injury - Claim - "Reasonable cause" - "Mistake"

Workers'Compensation Act (NT),ss25,26
Commonwealth of Australia v Connors (1989) 86 ALR 247, applied.
Fenton v Owners of Ship Kelvin [1925] 2 KB 473 at 490, applied.
Melbourne and Metropolitan Tramways Board v Witton [1963] VR 417, applied
Murray v Baxter (1914) 18 CLR 622, applied.
Nicolia v Commissioner of Railways [1972] ALR 185 (High Court), applied.
Stevenson v Metropolitan Meat Industry Commission (1937) SR(NSW) 109 at 118, applied.
Dietrich v Dare (1978) 21 ALR 210, not followed.

WORKERS COMPENSATION - Proceedings to obtain compensation - Preliminary requirements - Notice of injury - Making of claim - "Reasonable cause" - "Mistake" - Ignorance of law

Workers' Compensation Act (NT), ss25, 26
Butt v John W Eaton Ltd (1920) 29 CLR 126, applied.
Commonwealth of Australia v Connors (1989) 86 ALR 247, applied.
Fenton v Owners of Ship Kelvin [1925] 2 KB 473 at 490, applied.
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Stevenson v Metropolitan Meat Industry Commission (1937) SR(NSW) 109 at 118, referred to.
Dietrich v Dare (1978) 21 ALR 210, not followed.

REPRESENTATION:

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Respondent: D Trigg

Solicitors
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Respondent: Ward Keller

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

№ 54 of 1992

IN THE MATTER of an appeal under the *Workers' Compensation Act*

BETWEEN:

TRACY VILLAGE SPORTS AND SOCIAL CLUB
Applicant

AND:

PAMELA MAVIS WALKER
Respondent

CORAM: Mildren J

REASONS FOR DECISION
(Delivered 10 November 1992)

Preliminary

This is an appeal from the Workers' Compensation Court pursuant to s26 of the *Workers' Compensation Act*.

The respondent claimed weekly payments of compensation pursuant to s7 of the Act, medical and hospital expenses pursuant to s11 of the Act, and a lump sum payment for permanent loss of function of both legs pursuant to s10 of the Act, as the result of an accident arising out of or in the course of her employment with the appellant on 7 June 1979. It is convenient to refer to the respondent as the 'worker' and the appellant as the 'employer.' The accident occurred when the worker suffered an injury to her lower back whilst moving beer kegs with the aid of a trolley from the storeroom to the cold room at the employer's premises during the course of her employment.

No notice of the injury was given by the worker until 1986. A claim for compensation was not lodged with the employer until 1988. The proceedings were not commenced in the court

until January 1991. The employer claimed that the worker was, by reason of the lack of any notice of the injury as soon as practicable after the injury, and by reason of the failure of the worker to make a claim for compensation within six months from the date of the injury, precluded from bringing proceedings to enforce her claims.

Sections 25(1), (1A) and (1B) of the *Workmen's Compensation Act* provided at the relevant time as follows:

> "25. TIME FOR TAKING PROCEEDINGS
>
> (1) Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the injury has been given as soon as practicable after it has happened, and before the workman has voluntarily left the employment in which he was injured and unless the claim for compensation has been made -
>
> (a) within 6 months after the occurrence of the injury; or
>
> (b) in the case of death - within 6 months after advice of the death has been received by the claimant;
>
> provided that -
>
> (i) the want of notice or any defect or inaccuracy in the notice shall not be a bar to the maintenance of the proceedings if it is found in the proceedings for the settling of the claim, that the employer is not, or would not if a notice or an amended notice were then given and the hearing postponed, be prejudiced in his defence by the want, defect or inaccuracy, or that the want, defect or inaccuracy was occasioned by mistake, absence from the Territory or other reasonable cause; and
>
> (ii) the failure to make a claim within the period above specified shall not be a bar to the maintenance of the proceedings if it is found that the failure was occasioned by mistake, absence from the Territory or other reasonable cause.
>
> (1A) For the purposes of sub-section (1), where a workman left his employment only by reason of the fact that, because of injury received in that employment, he was unable to continue in that employment, he shall be deemed not to have voluntarily left that employment.

(1B) Without limiting the generality of the meaning of the expression 'reasonable cause' in sub-section (1) -

(a) the making of a payment to a workman which he believes to be a payment of compensation under this Act; or

(b) any conduct on the part of the employer or his insurer or agent, or on the part of an employee of any of them purporting to act on behalf of the employer, by which the workman is led to believe that compensation under this Act will or will probably be paid to him or by which he is led to believe that he is not entitled to compensation,

shall be deemed to be a reasonable cause within the meaning of that expression."

The learned magistrate found that the delay in giving notice of the injury caused prejudice to the employer in its defence of the claim, but that the failure to give the notice and to make the claim within the prescribed period was due to a reasonable cause. Accordingly, the claim was not barred; and the learned magistrate made awards for past weekly compensation, medical and hospital expenses, and for lump sum payments in respect of the loss of function to both legs.

The first ground of appeal was that the learned magistrate erred in law in finding that there was a reasonable cause for the failure to give notice and make a claim within the relevant period. The employer further contends that, as a matter of law, the learned magistrate ought to have found that the claim was not maintainable by reason of s25 of the Act.

No finding was made by the learned magistrate as to when notice ought to have been given. The worker submitted in the court below that notice had in fact been given on the day of the accident. Although the learned magistrate did not specifically address that submission in her reasons, it is implicit in her findings that she accepted the employer's submission that no notice was given until 1986.

No submission was made by the respondent during the hearing of this appeal that that finding was in error. Further, no finding was made as to whether or not failure to comply with s25 could be excused on the ground of mistake or absence from the Territory. The respondent did not submit during the hearing of the appeal that absence from the Territory was a relevant consideration, but the submission was made that if I were to find that the court below had erred in finding that there was reasonable cause, I should find that the failure to comply with s25 was due to mistake. Counsel for the employer conceded that it was necessary for me to consider that issue notwithstanding that no notice of contention had been given by the worker.

The facts as found by the learned magistrate

The learned magistrate found that the worker injured her back on 7 June 1979, whilst moving a keg of beer in the course of her employment. She suffered continual pain following the injury although she continued to work in the hope and expectation that her back condition would improve. Approximately three weeks later, she resigned for three reasons: her back injury; she had suffered two broken fingers whilst at work as a result of another separate accident; and she was frustrated by the effects of a strike that had occurred at her place of employment.

The learned magistrate found that the worker was a credible witness whose evidence she accepted as true and correct. In her reasons for judgment, the learned magistrate did not set out all of the factual findings upon which she based her ultimate conclusions. She did, however, set out a summary of the plaintiff's evidence, as well as a summary of the evidence of Dr Bromwich whose evidence she accepted. It is plain that, to the extent necessary to support her ultimate conclusions, the learned magistrate relied upon these summaries, as well as Dr Bromwich's reports, as if they were her own findings. The following additional facts are taken from those summaries and from Dr Bromwich's reports, as well as from the other findings made in the

judgment in relation to other issues. After the worker had given up work her back was still sore, but she kept thinking it would get better and did not seek medical attention. On 8 July 1979, whilst making a bed at home, she bent over and suffered excruciating pain in her lower back and could not get up. She went to see a chiropractor the next morning, but the pain was so bad that she was taken to hospital by ambulance. At the hospital, she was seen by Dr Bromwich who admitted her on 9 July 1979 and treated her initially with bed rest and traction. She was subsequently advised to have an operation by a neurosurgeon, Mr Yaksich, to whom she had been referred. Mr Yaksich performed an operation (a laminectomy) on 24 July 1979. She remained in hospital until 2 August 1979. She saw Dr Bromwich thereafter on a number of occasions, and was also seen by Mr Yaksich as an outpatient. She did not make a claim upon her employer at that time because she had left work and did not know that she could do anything as she was no longer in employment there.

On 28 October 1979, she commenced work with Woolworths Limited, "working on the floor and [doing] some work in the cashier's department." She worked full time, with difficulty, until 7 November 1989. She resigned because her back was too sore to enable her to keep standing and for her to work.

On 11 February 1980 she was re-admitted by Mr Yaksich to the Darwin Hospital for epidural and intrathecal steroid injections. She was discharged on 22 February.
In May 1980, as she was leaving Darwin, Mr Yaksich referred her to another neurosurgeon, Mr Scott-Charleton, who re-explored her back in 1980, performed a lumbosacral spinal fusion in 1981, as well as a further operation in 1983.

In 1982, she commenced part-time work as a colour consultant, and has continued in part-time work in various capacities on and off since then.

The learned magistrate's findings as to the reasons why the worker did not comply with s25 are as follows:

> "Mrs Walker stated that in 1979 she did not specifically know anything about Workers Compensation in the Northern Territory. In 1979 she did not believe that Workers Compensation was applicable in relation to her injury at work. This was because she had stopped work when it really went wrong and she did not think about it. She just hoped it would get better. She had an operation in July, 1979 and anticipated she would get back to full duties. Further operations were necessary in 1980 continuing on into 1983. She did not know anything about having to give notice to her employer within six months of an injury or of having to make a claim within six months.
>
> My analysis of the reason why Mrs Walker did not give notice or make a claim earlier was that although she was aware that worker's compensation existed she did not appreciate that it may be applicable to her circumstances. I do also accept her whole attitude was that she hoped and expected to make a complete recovery. She underwent a series of operations over a number of years none of which resulted in resolving her disability and some years after the initial injury she has had to accept the reality that she is still disabled and this condition has now stabilised.
>
> At this point Mrs Walker obviously obtained advice and subsequently instituted a claim for compensation.
>
> Worker's compensation is social legislation designed to facilitate not to prevent a genuine and lawful claim for compensation.
>
> For these reasons I find there was a reasonable cause for the failure by Mrs Walker to give notice and make a claim within the prescribed period.
>
> I do not consider Mrs Walker is precluded from pursuing her claim because of her failure to comply with section 25."

The nature of the appeal

Except where fresh evidence exists, an appeal to this Court is limited to questions of law: s26(1). In *Fenton v Owners of Ship Kelvin* [1925] 2 KB 473 at 490, Atkin LJ said:

> "... what is or is not reasonable cause is plainly, I think, on the authorities a question of law. But having determined the question of law whether a cause could exist which might be a reasonable cause, then obviously it is for the County Court judge to find on the facts whether they bring the case within that reasonable cause."

It is necessary to bear in mind the limited powers of this Court on an appeal of this nature. The supervisory jurisdiction of this Court is limited to the question of whether or not there is an error of law. This Court has no jurisdiction to correct factual errors. Whilst the borderline between errors of law and errors of fact is notoriously difficult to delineate, as Gallop J observed in *Tiver Constructions Pty Ltd v Clair* (unreported, Court of Appeal, 22/10/92), certain principles have become well accepted. In the process of arriving at an ultimate conclusion a trial judge goes through a number of stages. The first stage is to find the primary facts. This may involve the evaluation of witnesses who give conflicting accounts as to those facts. If the trial judge prefers one account to another, that decision is a question of fact to be determined by him, and is not reviewable on appeal. It may be that the reason given for preferring one witness to another is patently wrong. Nevertheless, no appeal lies: *R v District Court of the Metropolitan District Holden at Sydney, Ex parte White* (1966) 116 CLR 644 at 654; *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 156; *Haines v Leves* (1987) 8 NSWLR 442 at 469-70. Regardless of the trial judge's reasons, if there is evidence which, if believed, would support the finding, there is no error of law: *Nicolia v Commissioner of Railways* [1972] ALR 185 (High Court). If, on the other hand, there is no evidence to support a finding of fact which is crucial to an ultimate finding that the case fell within the words of the statute (for example, that injury by accident arose out of the course of the employment, or that the failure to give notice was occasioned by mistake), there is an error of law: *Nicolia v Commissioner of Railways, supra*; *Tiver Constructions Pty Ltd v Clair, supra,* per Martin and Mildren JJ at 10-11; *Haines v Leves, supra,* at 476; *Azzopardi v Tasman UEB Industries Ltd, supra,* at 156. But, a finding of fact cannot be disturbed on the basis that it is "perverse," or "against the evidence or the weight of the evidence or contrary to the overwhelming weight of evidence." Nor may this Court review a finding of fact

merely because it is alleged to ignore the probative force of evidence which is all one way, even if no reasonable person could have arrived at the decision made, and even if the reasoning was demonstrably unsound: *Haines v Leves, supra,* at 469-70. The second stage is the drawing of inferences by the trial judge from the primary facts to arrive at secondary facts. This is subject to the same limitations that apply to primary facts. If there are no primary facts upon which a secondary fact could be inferred, and the secondary fact is crucial to the ultimate finding as to whether or not the case fell within the words of the statute, there is an error of law. If there are primary facts upon which a secondary fact might be inferred, there is no error of law. It is not sufficient that this Court would have drawn a different inference from those facts. The question is, whether there were facts upon which the inference might be drawn. In *Instrumatic Ltd v Supabrase Ltd* [1969] 1 WLR 519 at 521; [1969] 2 All ER 131 at 132, Lord Denning MR, with whom Edmund Davies LJ and Phillimore LJ agreed, said that "if a tribunal draws an inference which cannot reasonably be drawn, it errs in point of law, and its decision can be reviewed by the courts. That was settled, once and for all, in *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14." (Emphasis mine). The word "reasonably" suggests that this Court could interfere if it thought the inference drawn was unreasonable. With respect, I think difficulty of understanding may arise by the use of pejorative words such as "perverse," "unreasonable," "illogical" and the like expressions which by their nature indicate only that in the opinion of the user, the decision ought not to have been made, and the user holds that opinion rather strongly. It is better not to use such words. In the context of this discussion, if an inference cannot reasonably be drawn, it will be because the inference cannot be drawn from the primary facts. However, if the inference is one about which minds might differ, it being a question of judgment or degree, the inference not only can be drawn but it would not be unreasonable to draw it. Properly understood, I am

unable to see any difference on this question between the position of the Court of Appeal in England and the majority of the Court of Appeal in *Azzopardi*.

The third stage is when the trial judge directs himself to the law. Obviously, if he makes a mistake at this stage, there will be an error of law. The final stage, is when the trial judge applies the facts to the law to arrive at his ultimate conclusion. In *Azzopardi v Tasman UEB Industries Ltd, supra,* at 157, the majority noted that "it is only in marginal cases that the statutory test is satisfied or not satisfied as a matter of law, because no other application is reasonably open." This is similar to the passage in *Humphrey Earl Ltd v Speechley* (1951) 84 CLR 126 at 134 where Dixon J observed that "... in a matter of degree ... it is not open to a court to make any but one finding."

But, all of this assumes that the trial judge has gone through this process of finding facts, directing himself to the law, and arriving at an ultimate conclusion by application of the facts to the law, and sometimes the judgment appealed from does not disclose if or how this has occurred. What then? In some cases, if the court has power to do so, the proper approach may be to remit the matter back to the trial judge to determine the issue in question or to order that he provide proper reasons if that has not been done: *Turnbull v New South Wales Medical Board* [1976] 2 NSWLR 281 at 297; *Donges v Ratcliffe* [1975] 1 NSWLR 501. Alternatively, the failure to provide proper reasons may in itself be an error of law, necessitating an order for a new trial: *Pettitt v Dunkley* [1971] 1 NSWLR 376. Either of these courses may be taken if the facts, or the facts as are found, are equivocal as to what result should have been reached: *Zuijs v Wirth Brothers Pty Ltd* [1953] 93 CLR 561 at 574; *Pettitt v Dunkley, supra,* at 383. On the other hand, sufficient facts may have been found (or the facts may not have been in contest) for the court to decide whether or not, as a matter of law, the ultimate conclusion may have been open, or whether the opposite conclusion is

that which should have been reached. In its consideration of the facts, there may be a situation where the facts are, as Lord Radcliffe observed in *Edwards (Inspector of Taxes) v Bairstow, supra,* at 36, "neutral in themselves and only ... take their colour from the combination of circumstances in which they are found to occur," and from which the only conclusion to be drawn is one that "contradicts the determination," in which case, the inference will be drawn that there has been "some misconception of the law."

For a general discussion on the nature of an appeal on a question of law only, see Mills *Workers Compensation (New South Wales)* 2nd ed Butterworths (1979) at 423-4; Hill and Bingeman *Principles of the Law of Workers' Compensation* at 183-192.

Is the finding that there was reasonable cause in error?

The employer's first submission was that the facts relied upon by the learned magistrate could not amount to a reasonable cause within the meaning of the Act.

It was submitted that the finding that the worker "did not appreciate that [the right to compensation] was applicable to her circumstances" amounted to a finding that the worker failed to comply with s25 through ignorance and that this cannot amount to a reasonable cause within the meaning of the Act.

There is no finding by the learned magistrate that the failure to comply with s25(1) was due to a mistake, whether of fact or law, or both. If such a finding had been made, no question would have arisen as to whether the mistake was reasonable or not: *Murray v Baxter* (1914) 18 CLR 622 at 629, and consequently the question of whether there was a reasonable cause would not have arisen. Whether such a finding should have been made is another question which I will deal with later. As no such finding was made, I conclude that the learned magistrate's finding that the worker did not appreciate that the Act was applicable to

the worker's circumstances is no more than a finding that the worker was ignorant, that is, did not know of her right to make a claim for compensation: cf *Commonwealth of Australia v Connors* (1989) 86 ALR 247 per Northrop and Ryan JJ. Further, I note in this connection that there was no finding by the learned magistrate that the worker had applied her mind with the information in her possession and knowledge to the question of the application of the law as she knew it to the facts of her case and misconceived her true position in law or fact or both : cf *Stevenson v Metropolitan Meat Industry Commission* (1937) SR(NSW) 109 at 118. Nor was there any finding that the worker did not connect the injury and the consequences thereof of the back strain which occurred at home on 8 July 1979 to the back strain which occurred at work on 7 June 1979: cf *Fenton v Owners of Ship Kelvin, supra*.

The next matter that the learned magistrate mentions is that the worker's "whole attitude was that she hoped and expected to make a complete recovery." The learned magistrate does not specifically say that this attitude prevailed throughout the whole of the relevant period, nor that it was the cause, or even a cause, of her failure to give notice or make the application within the relevant period, but I infer that this is what the learned magistrate must have meant.

There was no specific finding or concession by the worker that she had "voluntarily left the employment" within the meaning of s25(1). The facts as found by the learned magistrate are that the worker left the employment for three reasons: "because she had hurt her back, hurt her fingers and was tired of all the industrial troubles that had been occurring." Section 25(1A) deems a worker who leaves the employment "only by reason of the fact that, because of the injury received in that employment," she was unable to continue, not to have voluntarily left the employment. On these findings, no other conclusion is possible but that the worker voluntarily left the

employment. This occurred, according to the learned magistrate's findings, about three weeks after the injury. Accordingly, the question of any excuse for the failure to give notice was limited to the circumstances during that period, and it was not necessary to consider the circumstances thereafter: cf *Murray v Baxter, supra,* at 632-33.

I consider that there was evidence upon which the learned magistrate might have concluded that the failure to give notice before voluntarily leaving the employment was occasioned by a reasonable cause. The worker continued in her employment up to then and did not leave the employment solely due to her back injury. The worker's evidence, which the magistrate accepted, was that she thought it was a strain and whilst it was still sore, she thought it would get better.

A hope and expectation that a worker might make a complete recovery may amount to reasonable cause as a matter of law. In *Fenton v Owners of Ship Kelvin, supra,* Pollock MR said, at 481:

> "Efforts have been made from time to time to give some sort of indication of what is 'reasonable cause.' It is impossible, of course, to give an inclusive definition of it, but in *Webster v Cohen Brothers* 6 BWCC 92, 97, to which our attention has been drawn, Buckley LJ says: 'We must distinguish between two different sets of facts: in the one the workman says, "If things continue as they are, I shall never require to give notice of any claim for compensation" ; that might be reasonable cause for not giving notice. The other state of facts is this; the workman says to himself, "I have had an accident, the results of which are serious, but I think they will alter for the better. I shall not give my employer notice of the accident, because if, as I hope, the results alter for the better, I shall never have to give notice of a claim for compensation at all." That is not reasonable cause for the failure to give notice of the accident.'"

The learned Master of the Rolls went on to say that there could be difficulty in appreciating the line of demarcation between these two contrasted statements, but that, in cases

where the injury is latent, difficulty of diagnosis and perhaps of prognosis, it is easier to find that there was reasonable cause. Later (at 483) he concluded:

> "A belief that the injury is trivial is a good excuse for not giving notice. The cases supporting that are to be found in Willis's Workmen's Compensation, 23rd ed., p.122. If we start with this fact, and take the other cases, such as *Egerton v Moore* [1912] 2 KB 308 or *Webster v Cohen Brothers* 6 BWCC 92, I think it is plain there may be a number of graduations, questions of degree, as to whether or not the workman was apprised so clearly of his condition, its origin and its future, as to compel him or throw upon him the duty of giving notice. When, however, the true measure of the situation is only arrived at by lapse of time and by the confidence in the diagnosis which arises from the progress of the disease, particularly where the injury is what may be called latent, then I think that the workman is more readily excused. But the measure of these degrees, the estimate of these graduations are questions of fact which are for the learned county court judge. It appears to me that in this case the learned county court judge had materials before him on which he could estimate, and did estimate, in accordance with the cases cited and summarised by Buckley LJ, and he has come to a conclusion which he might legitimately come to, and we ought not to interfere."

Atkin LJ (at 490-291) similarly considered that a back strain, not thought to be serious, might be a reasonable cause for delaying the giving of notice.

A similar finding was upheld by the High Court in *Butt v John W Eaton Ltd* (1920) 29 CLR 126, the court also holding that there was evidence to support the finding.

There is also authority for the proposition that ignorance of the law, when combined with other factors, may be enough to amount to "reasonable cause": *Melbourne and Metropolitan Tramways Board v Witton* [1963] VR 417.

In these circumstances, I do not think that the finding in relation to the failure to give notice can be disturbed: *Nicolia v Commissioner of Railways, supra*.

This leaves the question of whether there was evidence to support a similar conclusion in respect of the failure to make the claim within six months. The relevant time frame for this inquiry is that period of time commencing upon the date when the worker left her employment, and expiring on 7 December 1979 (six months after the date of the injury). No other period of time is relevant for the purposes of the proviso: *Murray v Baxter, supra*.

The test of reasonableness, it is to be noted, is an objective one. In *Commonwealth of Australia v Connors, supra,* at 252, Northrop and Ryan said:

> "As was said by the court in *Black's* case (at 38), when considering 'reasonable cause': 'The inquiry here appears to be of a much wider kind justifying a more liberal attitude. The expression "reasonable cause" appears to us to mean some act or omission which operated to prevent the giving of notice, and which was an act or omission which was in the circumstances reasonable. In *Quinlivan v Portland Harbour Trust* [1963] VR 25 at 28, Sholl J, used these words: "The sub-section means to refer to a cause which a reasonable man would regard as sufficient, a cause consistent with a reasonable standard of conduct, the kind of thing which might be expected to delay the giving of notice by a reasonable man.""

The further injury on 8 July could not be said to have been trivial. There was no finding that it was trivial. It was a serious injury which resulted in the worker being hospitalised and having a significant operation to her back on 24 July. Thereafter the worker apparently recovered sufficiently to return to work for a week in October, but by 7 November it was plain to her that she could not continue. She might have thought, up to the time she recommenced work, that her back might be getting better, and being ignorant of her rights, decided to do nothing about it. The learned magistrate found that she did not consult a solicitor until years later. By late October she had not been able to work at all for nearly four months, she had been hospitalised for a little over three weeks, and had continued to seek medical treatment in the meantime. After 7 November she had to give up work again.

There is no suggestion by the learned magistrate or in the evidence that the worker was hoping for her injury to stabilise before bringing any claim. The learned magistrate did not consider the state of affairs as they were by 7 November and ask herself the questions: what were the reasons why the worker did nothing at all after 7 November, and were those reasons reasonable? It may well have been that even in November the worker expected to get better eventually, but the questions still have to be answered (1) was that a reason why the worker did nothing at the time and (2) if so, was that reason, combined with her state of ignorance, reasonable in an objective sense, given her state of knowledge about her medical condition at that time?

The learned magistrate did not approach the matter in this way, and, if the decision rested solely on the facts as found, and the learned magistrate's approach, I would find that no reasonable cause had been established. But the question is not limited to the facts as found. The question is whether there was any evidence which, if believed, would support that finding, regardless of her Worship's reasoning. In my opinion, no such evidence existed.

The evidence shows that the worker had a serious back problem. She knew this at the latest, by 8 July 1979. This was confirmed by her experiences thereafter. Assuming that up to then it had been reasonable for her to hope to eventually make a full recovery, she must have known by then that the injury was not trivial. She obviously knew about her own period of hospitalisation. By the time of her discharge from hospital, it must have been apparent to her that her recovery would, at best, take some weeks, or even months. By 7 November 1979, she obviously knew that she still had not recovered sufficiently to return to work, at least full time. She was ignorant of her rights, but sought no advice. There was no evidence that her medical advisers had at any time told her that she would make a full recovery. The source of her belief that she would make a

full recovery eventually was not stated. There is no evidence that the worker was illiterate, or suffering from any mental infirmity. The worker was then nearly thirty-six years of age, and so not an immature person. There was no evidence that at any time during the relevant six months' period, up to 7 December 1979, the worker ever intended to make a claim and was simply waiting for her claim to stabilise: cf *Melbourne and Metropolitan Tramways Board v Witton, supra*. There is no evidence that the reason for her optimism was based on anything other than hope, and there is therefore no factual basis for concluding that her failure to bring a claim at that time was based on anything other than ignorance. In these circumstances, there are no facts upon which it could have been concluded that the failure was reasonable according to any objective criteria, as all the facts were either neutral or pointed in the opposite direction. Accordingly, the only finding open to the learned magistrate was that the worker, who bore the onus of proving that her failure to comply with s25 of the Act was occasioned by a reasonable cause, had failed to discharge that onus. The learned magistrate's finding on this issue has no factual basis, and therefore I am satisfied that the employer has established that an error of law was made.

Mistake

The next question is whether the learned magistrate should have found that the failure to comply with s25 of the Act was occasioned by mistake.

If the failure to so comply was occasioned by mistake, it is immaterial to consider whether it is reasonable or otherwise: *Murray v Baxter, supra,* at 629. In order to come within the proviso to s.25(1), a mistake may be one of fact, or of law, or of mixed fact and law: *Murray v Baxter, supra,* at 629-632. For there to be a mistake, there must be evidence from which a conclusion can be drawn that the person concerned misconceived the true position: for example, erroneously thought that one set of facts existed,

or erroneously thought that the law provided for a particular right or remedy in certain circumstances when in fact another set of facts existed, or the circumstances under which the law provided for the right or remedy, were different from that envisaged. Such a mistake might arise through an absence of information, if, for example, the worker did not know that his medical condition was due to a back strain at work, he thinking it was due to some other cause. But, for there to be mistake, there must be evidence that the worker knew that in some circumstances he is entitled to compensation, applied his mind to the circumstances of his position as he knew them to be, to the law as he understood it and misconceived his true position in either fact or law or both: *Stevenson v Metropolitan Meat Industry Commission, supra,* at 118. This is to be contrasted with the position of a person who does not think about the matter at all, who is in a state of passivity of thought owing to the absence of any conception of the matter, or who is not acting upon any misconception of law or facts or both. Such a person's state of mind is one of ignorance, not mistake: *Murray v Baxter, supra,* at 630; *Stevenson v Metropolitan Meat Industry Commission, supra,* at 117-118. A person who gives evidence that he knew that in given circumstances he may have a right to compensation (about which he is not mistaken), but who did not know that the right was subject to procedural requirements that he give notice as soon as practicable and make a claim within six months, is not mistaken, but ignorant: *Murray v Baxter, supra,* at 632; *Black v City of South Melbourne* [1963] VR 34 at 37. *Dietrich v Dare* (1978) 21 ALR 210 at 221 is to the contrary, and in my opinion should not be followed on this point. Similarly, a person who was not aware of the Act at all, is ignorant, not mistaken: *Roles v Pascall & Sons* [1911] 1 KB 982; as may be a person who simply did not know of the existence of a right to claim under the Act in the given circumstances and who thought no more about it: *Commonwealth of Australia v Connors, supra,* at 250-52. And, of course, if mistake exists, the mistake must occasion the relevant failure to comply with s25.

It was submitted by Mr Trigg, counsel for the worker, that on the facts of this case as found by the learned magistrate, or which were not in issue, the proper conclusions to be drawn were that the worker was mistaken, and that this mistake occasioned the worker's failure to comply with the section.

I have already mentioned that there is an absence of findings of fact by the learned magistrate bearing on these questions.

In order to be able to find that the learned magistrate should have found that there was a mistake, there must be facts found by the learned magistrate, or at least undisputed evidence, from which, as a matter of law, such a conclusion must be drawn. If those facts are equivocal, i.e. capable of supporting either conclusion, I am not in a position to find that there was a mistake, and I shall have to consider whether or not there is power for me to remit the case to the Workers' Compensation Court for rehearing. There are authorities in favour of concluding that such a power exists (for example, *Turnbull v New South Wales Medical Board, supra; Pettitt v Dunkley, supra; Zuijs v Wirth Brothers Pty Ltd, supra*) but, as these authorities are not binding upon me, and no submissions have been made on that question, I shall, in that event, need to hear from the paries further. If on the other hand, there are no such facts from which such a conclusion might be drawn, the appeal must be allowed.

In my opinion, there is no evidence upon which the conclusion might have been drawn let alone must have been drawn, that the failure to make the claim was occasioned by mistake of any kind. An examination of the evidence does not advance the matter any further. Firstly, there is no evidence that the worker misconceived her true position in law in the relevant sense. On the contrary, in her claim for compensation declared on 5 November 1987 (Ext 1) the worker was asked the following question:

"QUESTION 6:
If this claim is made more than six months after the occurrence for the accident or incapacity, give reasons for failure to make the claim within that period."

Her answer was:

"ANSWER TO 6: The nature and extent of my injuries and subsequent general physical condition was such that I travelled interstate for treatment. I was ignorant of the provisions of the *Workers' Compensation Act*, my entitlements and obligations under it."

The travel interstate did not occur in the relevant period and may be ignored, but the second part of the answer shows only ignorance, not mistake. There is no evidence from which it might be inferred that, for example, the worker thought that the Act did not provide for compensation in the circumstances of her case, she having applied her mind *bona fide* to that question. The worker did say in evidence that she did not make a claim because she had left her work and did not know that she could do anything, but this is not evidence of misconception, only of ignorance: *Commonwealth of Australia v Connors, supra*. At no stage did the worker say that she held a belief that the Act granted compensation only if she had remained at work. At best, the worker's position was that she did not know one way or the other. This is not evidence of mistake.

Nor is there any evidence of any mistake of fact. Nowhere does it appear that the worker, for example, thought that her injury on 8 July was unconnected to her injury at work, and that because of this, she did not make a claim in the relevant period. No such reason was ever proffered. At one stage in her evidence it was put to the worker in cross-examination that at the time of her admission to hospital she made no mention to the hospital doctors that she had been injured at work. She responded by saying that her reason for this was because she was not working then and did not even think about it. Again, this is not evidence of a mistake of fact. At best it amounts to passivity of thought. In any event, there is simply no evidence that,

whatever her state of mind may have been at that time, she remained in the same state of mind thereafter. Given that the learned magistrate found that the pain had been constant throughout the whole period from the date of her injury at work onwards and that the pain was, at the time of the incident at home, in precisely the same site and area as it had been following the accident at work, it would have been surprising if the worker had mistakenly believed that the two incidents were unconnected. However, as I have already said, she never maintained that this was her state of mind.

Accordingly, I consider that I am left with no alternative but to allow the appeal and to 'reverse' the determination of the learned magistrate (see s26(2) of the Act) by ordering that the claim for compensation be dismissed with costs.

Claim under s10

It was also submitted by the employer that the learned magistrate erred in the award she made pursuant to s10 of the Act. In case I am wrong in the conclusions I have so far reached I shall deal with that submission briefly.

The foundation upon which the attack was based was that "her Worship incorrectly found that the claimant was a barmaid at the time of the accident," when "in fact she was a supervisor." It is only if there was no evidence to support the magistrate's finding that this ground can possibly succeed. In para 1 of the Statement of Claim, the worker pleaded that she was employed by the employer at all relevant times as a bar manageress. By para 1 of the Answer, this allegation was admitted. In addition, there was evidence that the worker was employed in a supervisory capacity: see the magistrate's summary at p5 of her reasons.

The learned magistrate does not explain in her reasons how it was that she concluded that the worker was employed as a

barmaid at the time of her injury. However, there was evidence that during the strike, her duties changed and she was required to do a lot of duties that one might think had been ordinarily done by bar staff. There is evidence from which an inference might be drawn that the injury occurred during the strike, although there is no finding to this effect. There was also evidence that the worker served behind the bar during this period, cleaned and stocked the refrigerators and shelves, put beer kegs into fridges, counted the money in the tills, restocked the bar with potato chips, as well as supervised and organised the other staff who were still working during the strike and who were under her charge. There was no specific evidence as to what the duties of a barmaid were at the employer's premises at the time, although there was evidence of the fact that the worker, when employed as a barmaid on another occasion, poured drinks, sold drinks, carried trays of glasses, stacked fridges, polished glasses, moved trays of drinks around, and gave out change. I am unable to see how, on these facts which the learned magistrate accepted, there was any evidence that at the time of the injury, the worker was employed as a barmaid, although her duties at the time no doubt included some, if not all, of the duties of a barmaid. The finding that the worker was employed as a barmaid was crucial to the ultimate finding by the learned magistrate that the worker's loss of function in her legs was in the percentages she found "for the purposes of her employment as a barmaid" (see s10(6)(b) of the Act). In those circumstances I consider that the employer has established that an error of law was made by the learned magistrate on this issue as well.

If this had been the only error disclosed, I do not see how, in the absence of any findings of fact by the learned magistrate relevant to the question of an assessment of loss of function as a supervisor, I could myself make any findings of my own as to the extent of the loss, as it is impossible to say that any particular figure arrived at must be correct. In those circumstances, it seems to me

that I would have had to refer that issue back to the Workers' Compensation Court for rehearing. However, before doing so, I would have invited further submissions from the parties as to my power to do so.

Finally, Mr Trigg for the worker very fairly pointed out that at the hearing before the learned magistrate, little assistance was given by either counsel on the questions raised by the appeal. The learned magistrate was referred to none of the authorities on the s25 point by the employer's counsel, whose submissions did not analyse the provisions of the section and address all the relevant issues of fact or law. Counsel for the worker did refer the learned magistrate to *Murray v Baxter* and to *Dietrich v Dare, supra,* but no mention was made of the other numerous authorities to which I was referred at the hearing of the appeal. The problems raised by s25 of the Act did not deserve, in my respectful opinion, cursory submissions. The argument before me took a full day, most of which was devoted to the s25 point; yet the submissions by both counsel before the learned magistrate occupy but a few pages of the transcript. It is this standard of advocacy which is very likely to lead any magistrate or judge into error. It is the duty of counsel to draw to the court's attention all of the leading relevant authorities, and to properly address the court on the relevant issues of fact and law. Judges and magistrates depend heavily upon the help of the bar in order to reach the right conclusion. A high level of assistance from the bar is the norm in this Court. I have no reason to doubt that it is the norm in the lower courts. For some reason, that norm did not prevail before the learned magistrate. However, as there may have been circumstances at the time of the hearing of which I am unaware and which may provide an explanation for what had occurred, I refrain from criticising or attributing any blame to either of the counsel involved.

In conclusion, the formal orders are:

1. The appeal is allowed.

2. The determination in favour of the worker is set aside and in lieu thereof I substitute an order that the application be dismissed with costs.
3. The worker to pay the employer's costs of the appeal to be taxed.