PARTIES:	AHEARN, Barry Leslie
	v
	WORMALDS AUSTRALIA
TITLE OF COURT:	SUPREME COURT (NT)
JURISDICTION:	APPEAL FROM WORK HEALTH COURT
FILE NO:	194 of 1994
DELIVERED:	22 DECEMBER 1994
HEARING DATES:	20, 21, 28 OCTOBER 1994
JUDGMENT OF:	MARTIN CJ.

CATCHWORDS:

Workers Compensation - Proceedings to obtain compensation - Determination of claims - Application for stay -

Supreme Court Rules, r83.09, 82.10 -

Enterprise Goldmines NL v Mineral Horizons (No.1) (1987) 52 NTR 13, referred to.

Supreme Court Rules - Application for stay of proceedings - Nature of an application for stay - Nature of an adjournment *sine die* -

Supreme Court Rules, r87.10 -

Fuller & Cummings v DPP (Cth) (1994) 68 ALJR 611 at 613, considered.
Enterprise Goldmines NL v Mineral Horizons NL (No.1) (1988) 52 NTR 13, applied.

Workers Compensation - Proceedings to obtain compensation - Determination of claims - Application for stay of proceedings pending appeal from Work Health Court decision refusing adjournment to hold statutory conference -

Workers Compensation - Assessment and amount of compensation - Refusal of worker to undergo remedial treatment - Review of award - Cessation of payments -

Work Health Act, s75B

Workers Compensation - Sufficiency of evidence and onus of proof - Employer bears onus to prove cancellation is justified -

Work Health Act, s69

Morrissey v Conaust Ltd (1991) 1 NTLR 183, applied.
Phillips v Commonwealth (1964) 110 CLR 347, applied.

Workers Compensation - Proceedings to obtain compensation - Review of award - For what injuries is compensation payable - "Injury" - Original injury - Aggravation of pre-existing injury -

Statutes - Interpretation - Intention of parliament overrides narrow interpretation where result is unjust or capricious -

Work Health Act, s75B

Tickle Industries Pty Ltd v Hann & Anor (1974) 130 CLR 321 at 331, applied.

Workers Compensation - Assessment and amount of compensation - Cessation of payments - Refusal of worker to undergo remedial treatment - Onus on employer to show treatment will enable more profitable employment -

Work Health Act, ss69, 75B & 82(1)(a)

Fazlic v Milingimbi Community Inc (1982) 150 CLR 345 at 353, referred to.

Workers Compensation - Proceedings to obtain compensation - Determination of claims - Procedure - Availability of adjournment to enable conciliation and directions conference upon an amendment to the Statement of Claim - nature of "proceeding" -

Work Health Act, ss94, 95, 102, 105, 106, 107 & 110A
Work Health Court Rules, r6, 24 & 25
The Service & Execution Process Act (1901 - 1924) (Cth)

Quazi v Quazi [1979] 3 All ER 434, 429, 430, applied.
Cheney v Spooner (1929) 41 CLR 532, at 536, 537, applied.
Re Coldham & Others ex parte Australian Building Construction Employees and Builders Labourers Federation (1986) 64 ALR 215 at 219, applied

REPRESENTATION:

Counsel: *Stay applie*

Appellant: G R Clift
Respondent: S Gearin

Solicitors:

Appellant: Ward Keller
Respondent: De Silva Hebron

Counsel: *Appeal*

Appellant: J Tippet
Respondent: S Gearin

Solicitors:

Appellant: Ward Keller
Respondent: S Gearin

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 194 of 1994

BETWEEN:

BARRY LESLIE AHEARN
Appellant

AND:

WORMALDS AUSTRALIA
Respondent

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 22 December 1994)

The Proceedings

The Work Health Court held that cancellation of weekly payments to the appellant by the respondent was valid. The appellant "appeals" to this Court from that decision. Immediately after the decision was made, the learned stipendiary Magistrate, refusing the respondent's application to adjourn the hearing of the appellant's then substantive application for compensation under the *Work Health Act*, embarked upon the hearing of that application. It lasted one day before being adjourned for lack of time. One of the grounds of the respondent's application for adjournment was that consequent upon an amendment

to the Statement of Claim made at the commencement of those proceedings, the matter should first be the subject of a conference pursuant to ss106 and 107 of the *Act*. It is from his Worship's refusal to refer the parties to such a conference which is the subject of the respondent's cross-appeal to this Court. The adjourned hearing of the appellants's application to the Work Health Court was set down for late October, and as a result of an oversight in the office of the solicitors for the respondent, the appeal and cross-appeal to this Court were set down for hearing immediately thereafter. Just prior to the commencement of the adjourned hearing in the Work Health Court, the respondent applied in that Court for an adjournment of those proceedings pending the outcome of the appeal and cross appeal. Being unsuccessful in that, it then applied to this Court for a stay of those proceedings pending the outcome of the appeal and cross appeal. The application for the stay was granted with reasons to be delivered later and the appeal and cross-appeal were heard. These reasons deal with the order for the stay and in relation to the appeal and cross appeal.

Background

A detailed history of the proceedings are set out in the reasons for judgment of Mildren J. of 21 June 1994, arising from a series of appeals to do with other orders made in the Work Health Court in relation to the proceedings between these

parties. The important relevant features of that history are as follows.

In October 1993 the appellant filed an application in the Work Health Court "appealing" from the decision by the respondent to cease payments of weekly compensation to him. He alleged in his Statement of Claim that whilst he was employed by the respondent he suffered an injury arising out of or in the course of his employment, which caused him to become totally incapacitated for work on 17 October 1990. The injury pleaded was said to be a "major depressive illness". On his claim for compensation delivered to the respondent shortly after he ceased work, the appellant described his injury as being "stress - depression". The respondent accepted liability for the claim and made payments of weekly compensation until 7 October 1993 when it cancelled payments after giving notice under s69 of the *Act*. The reason given for the cancellation was:

> "That being under an obligation pursuant to section 75B of the Work Health Act to undertake reasonable medical treatment you are failing to undertake such reasonable medical treatment and in particular failing to take anti-depressant medication which has been prescribed for you thus prolonging your illness and any alleged incapacity for work arising from it".

The respondent relied upon s75B of the *Work Health Act* which provides that:

> "Where a worker unreasonably fails to undertake medical treatment ... which could enable him to

> undertake more profitable employment, he shall be deemed to be able to undertake such employment and his compensation ... may, subject to s69, be reduced or cancelled accordingly".

Appeal Against Cancellation

As now appears to be the practice, the appellant's application to the Work Health Court challenged the cancellation of payments by the respondent and sought, as well, to establish his right to compensation arising from the alleged injury of "major depressive illness". Again in accordance with the now established practice, the respondent was obliged to begin, and it bore the onus of justifying the cancellation of its payments of compensation. At the hearing, which commenced in January, the respondent called Dr Meldrum, a psychiatrist, who had examined the appellant on its behalf and tendered his report which said, in effect, that the appellant did not appear to be anxious or depressed when seen by Dr Meldrum, but he had enough symptoms and signs to diagnose a major depressive illness. Dr Meldrum said that he had been told by the appellant that the appellant's psychiatrist had prescribed an anti-depressant drug which he, the appellant, had not been taking "properly" and that he felt that had the appellant taken the prescribed drugs he ought to have improved - although whether this meant improved sufficiently to return to work was not made clear. The appellant called his own psychiatrist, Dr Marinovich, who said that he suffered from a post traumatic stress disorder, not depression, that the appellant had followed the directions he had given to

him about the drugs he had prescribed, that his condition had improved, but he was still incapable of any work. According to Dr Marinovich, the appellant's condition originated from war service for which he was receiving a TPI pension. On hearing of the pension, counsel for the respondent applied for an adjournment which was ultimately granted by the learned Magistrate. The appellant was successful in applying for an interim award of weekly payments (the appeal before Mildren J. arose out of certain orders made in the Work Health Court consequent upon alleged failures of the respondent to make payments in accordance with the interim award). The hearing was resumed before Mr Hannan SM on 28 June when Dr Meldrum continued his evidence. It will be recalled that he was the psychiatrist appointed by the respondent who had examined the appellant and upon whose report after that examination the respondent based its cancellation of weekly compensation payments. He said that post traumatic stress disorder is a separate identifiable psychiatric ailment, that major depressive illness is a condition from which a patient can suffer from time to time and that the two conditions can co-exist. Treatment for a major depressive illness can follow different lines to that for post traumatic stress disorder. As to medication, he said that if one particular anti-depressant was not effective, then after a reasonable time it could be changed to something else and that process may need to be undertaken a number of times, but that if a patient was showing significant improvement, then

the course of the prescribed treatment would be continued. He said that whether anti-depressants be for depression or for anxiety, according to all the literature they should be taken daily and in a therapeutic dose. The appellant gave evidence of his treatment at the hands of a number of psychiatrists, Dr Marinovich being the last, whom he started to consult in late February 1993. That psychiatrist gave him prescriptions as required and the appellant conceded that he took all the medication except for the anxiety tablet, saying that if he woke up and was not feeling too bad, he did not need it, but if he woke up feeling bad, then he took it. As to who made that decision, the worker was unclear, although he said that Dr Marinovich told him to take the anxiety tablets when they were required. "If I'm starting to get down to take one. And if I'm still feeling bad, after a while to take another one. But I think there was a limit of two - two a day I was allowed to have; I'm not sure". Asked if the medication sometimes caused him side effects, he replied: "Yes, sometimes. Sometimes it seems as though it wasn't doing me any good whatsoever. When it was doing things like that, I just go back to the old fashioned way and get half a dozen stubbies and go and sit in my aviary and have a few beers" . Asked if during the time that Dr Marinovich was his doctor, he had ever not followed his directions as to medication, the appellant's reply indicated that when the medication did not seem to be doing him any good he did not stick to it, although that was probably only for a day and he did not

stop taking the tablets altogether. In cross-examination, he said that he took his sleeping tablets, his depression tablets and his arthritis tablets each and every day, but "the only one I didn't take every day was my anxiety tablets". When re-examined as to why he did not take the anxiety tablets, he said that his doctor said that if he was feeling all right for that day then there was no need to take them.

His Worship held, in effect, that the respondent had accepted liability and only acted upon the basis that the appellant had suffered a major depressive illness, that over time there had been variations as to the medication prescribed, that the appellant's latest psychiatrist, Dr Marinovich, had diagnosed that he was suffering from post traumatic stress disorder, an injury for which the respondent had not accepted liability, and that he had unreasonably failed to undertake medical treatment for the major depressive illness, in particular, the anti-depressant medication prescribed.

Application for Compensation

The appellant's "appeal" from the respondent's cancellation of weekly compensation payments having failed, counsel for the appellant sought to open the appellant's case in relation to the appellant's application for compensation. He sought to amend the Statement of Claim to include allegations that during his employment with the respondent he had suffered

from the condition known as post traumatic stress disorder; his employment with the respondent caused him severe stress and strain, thereby aggravating and exacerbating his condition, and, further, or in the alternative, the aggravation and or exacerbation of his condition resulted in his suffering an injury within the meaning of the provisions of the *Work Health Act* so that he became totally incapacitated for work. Notice of the proposed application to amend had been given to those representing the respondent during the January hearings, but no application had been made to amend in the meantime. The amendment sought was not opposed. However, counsel for the respondent said that it would need to file an Answer to take into account the amended Statement of Claim. More particularly it desired that there be a conference held under the provisions of ss106 and 107 of the *Act,* upon the basis that the amendment gave rise to a new claim by the appellant and that the respondent should not be deprived of any of its rights under the *Act* in those circumstances. The thrust of the argument on behalf of the appellant in opposition to any adjournment was that he was a sick man who had come from Tasmania for the hearing, it should have been anticipated that if the Work Health Court held that the cancellation of the weekly compensation payments was valid that he would then and there continue with an application under the *Act,* and the amendment to the Statement of Claim, which had just then be granted, should cause the respondent no prejudice since it had known for some months that it was proposed.

It became tolerably clear that the time available to His Worship would only permit him to hear part of the evidence on the application for compensation and, in the result, it seems to have been accepted that the evidence of the appellant would be taken. It was treated as his evidence upon his substantive application, and in support of the oral application made on his behalf during the course of argument on the adjournment for interim payments pending determination of the respective rights of the parties. That course was adopted. (I do not find it necessary to go into the full range of arguments on both sides in relation to this adjournment issue).

The next morning his Worship announced that he was against the application for an adjournment, the appellant was called, examined and cross-examined and released from further attendance. As already mentioned, an order was made that weekly compensation payments be made to the appellant in the meantime, but after taking into account the TPI pension which he was receiving. (The issue of whether or not an employer can obtain a benefit as a result of the payment to a worker of a TPI pension has yet to be decided).

Stay of Proceedings

That brings us to 12 October, when an application was

made to the Work Health Court on behalf of the respondent seeking an adjournment of the proceedings *sine die*. Counsel then appearing on behalf of the respondent, said that it was an application to vacate the hearing dates which had been set for 24, 25 and 26 October upon the basis that the appeal and cross appeal had been listed for hearing on 27 and 28 October. During the course of extended argument, it was clear that although reference was made to the principles upon which a stay of proceedings pending appeal would be considered, neither of the parties nor his Worship treated the matter then in issue as being an application for such a stay. The application itself was not in terms an application for a stay of proceedings pending the outcome of the appeal. During the course of argument, his Worship put it to counsel for the appellant that there was nothing to prevent the respondent from coming to this Court and making an application for a stay, and counsel agreed that such an application could be made under the Rules of this Court. Reference was made to r83.09 which is not the applicable rule, it being r87.10, but, nevertheless, it was clear that his Worship did not regard the application before him as being one for a stay of proceedings. His direct reference to the decision of Kearney J. in *Enterprise Goldmines NL v Mineral Horizons (No.1)* (1987) 52 NTR 13 (to which I will return later) was for the purpose of simply indicating that the course available to the respondent was to apply for a stay of proceedings, ".... its not being done, it can be done even now, that is, a stay ought to be sought".

Even allowing that r87.10, which is the specific rule dealing with appeals from the Work Health Court, permits the Work Health Court to grant a stay, his Worship clearly did not have such power in mind. What persuaded his Worship to decline the adjournment, in particular, was the appellant's state of health. There was evidence before him that the appellant would be further distressed if there should be an adjournment, particularly as it might be some months before the hearing could be resumed. That was on 14 October, and on 20 October the parties were before me upon an application by the respondent that there be a stay of proceedings in the Work Health Court. As already indicated, the application before his Worship was for an adjournment *sine die* and arguments put on behalf of the appellant that his Worship had already refused a stay, and thus the proceedings in this Court would have to be by way of an appeal from that decision rather than an original application for a stay, were not accepted. In *Fuller & Cummings v DPP (Cth)* (1994) 68 ALJR 611, McHugh J. at p613 said that it seemed to him that in substance there is very little difference between an application for a stay and for an adjournment. Nevertheless, such differences as there are are sufficient, in a case like this, to maintain the distinction.

The rule provides that the service and filing of a notice of appeal does not operate as a stay of proceedings unless the Work Health Court or this Court or a Judge so orders (r87.10).

For a review of the considerations to be taken into account upon an application under the common form rule for a stay, such as r87.10, see the reasons of Kearney J. in *Enterprise Goldmines NL v Mineral Horizons NL (No.1)* (1988) 52 NTR 13. The respondent's case for the stay was here based upon its pending appeal from the decision of his Worship refusing its request for an adjournment to enable the holding of the statutory conference.

There was no reason to think that had the adjourned proceedings in the Work Health Court gone ahead as planned they would not have been completed prior to the commencement of the hearing of the appeal in this Court, and there was a possibility, at least, that the outcome of those proceedings would have been determined by his Worship. That the appellant had an appeal pending in this Court on his own part was a separate matter. He wished to pursue both avenues to secure the benefits payable under the *Act*. The first, to have the Work Health Court's order holding the cancellation of weekly compensation valid overturned, and secondly, to obtain a finding in the continuing proceedings in that Court that he had suffered an injury in the nature of the alleged aggravation of the post traumatic stress disorder. The outcome of his appeal to this Court would have no effect upon the continuing proceedings. In the meantime, he was receiving payment from the respondent pursuant to the order for interim weekly compensation made by his Worship, which

order was not the subject of any appeal. He had given his evidence and returned to Tasmania where he normally resided, and all in all it would seem that he would suffer little prejudice if the stay were granted, except that it appeared his psychiatric condition would be made worse if the hearing was adjourned, arising from worry about finality in the proceedings. The respondent, on the other hand, ran a real risk that success in its appeal would be rendered nugatory. It would not be possible for it to be restored to its former position, that is, being able to enforce what it claimed to be its rights to the holding of a preliminary conference. One of its purposes in endeavouring to have such a conference was that it would present it with the opportunity to negotiate with a view to settling the appellant's claims, and that could save it the expense of a hearing. Before his Worship and in this Court the bona fides of the respondent in relation to its wish to have the opportunity to negotiate for settlement of the appellant's claim was called in question. So far as I can see there was no firm foundation laid for such an attack, beyond suggestion that there have been times when the respondent had indicated that there was no prospects of a settlement, as opposed to its argument that it wished to have an opportunity to negotiate for a settlement. It is enough to say that in the course of any litigation views of parties as to the prospects of settlement and the desires of parties to take part in, or not take part in, negotiations for settlement, can, and usually do fluctuate depending upon any number of

circumstances relating to the litigation. The costs of litigation are, however, unfortunately, an ever present reality which can assume great significance.

I considered that the respondent had an arguable case in relation to its appeal and, taking into account the interests of both parties, for the reasons just given, ordered the stay of proceedings.

The Appeal

By his appeal, the appellant claims that his Worship erred in law in finding that the respondent was justified in terminating the appellant's weekly payments pursuant to s69 of the *Work Health Act* by the notice which it gave on 22 September 1993. As to this ground, counsel for the appellant, upon the hearing of the appeal, limited the generality of the ground by saying that it was directed to an error of law in that there was no evidence to support the finding of facts leading to the conclusion of law reached by his Worship. A further ground of appeal alleges that his Worship erred in law in taking into account irrelevant matters in reaching his decision, namely (i) pleadings issued subsequent to service of the notice, (ii) diagnoses of injury made in respect of the appellant, and (iii), in finding the provisions of s75B of the *Act* required that the appellant be treated for the precise condition that was set out

in the claim served by him and accepted by the respondent.

It is now well settled in this jurisdiction that the employer bears the onus of proving that its cancellation of payments was justified (*Morrissey v Conaust Limited* (1991) 1 NTLR 183; *Phillips v The Commonwealth* (1964) 110 CLR 347). The form of notice given by the respondent to the appellant was in the prescribed Form 5 and gave the reasons earlier set out, but repeated for convenience:

> "That being under an obligation pursuant to section 75B of the Work Health Act to undertake reasonable medical treatment you are failing to undertake such reasonable medical treatment and in particular failing to take anti-depressant medication which has been prescribed for you thus prolonging your illness and any alleged incapacity for work arising from it".

Section 75B, is relevant, in the following terms:

> "75B WORKER TO UNDERTAKE REASONABLE TREATMENT AND TRAINING, OR ASSESSMENT
>
> (1) Where compensation is payable under Subdivision B of Division 3 to a worker, the worker shall undertake, at the expense of the worker's employer, reasonable medical surgical and rehabilitation treatment or participate in rehabilitation training or, as appropriate, in workplace based return to work programs, or as required by his employer, present himself at reasonable intervals to a person for assessment of his employment prospects.
>
> (2) Where a worker unreasonably fails to undertake medical, surgical and rehabilitation treatment or to participate in rehabilitation training or a workplace based return to work program which could enable him to undertake more profitable employment, he shall be deemed to be able to undertake such employment and his compensation under Subdivision B of Division 3 may, subject to section 69, be reduced or cancelled accordingly."

An application under s104 of the *Act* is now the appropriate way for a worker to seek to protect his or her position by challenging the employer's cancellation of payments and, in the appropriate case, to put forward an application for compensation for determination by the Court. In some cases which have come to the notice of this Court, the practice has arisen whereby the first issue, whether or not the employer was entitled to cancel the worker's compensation payments, is dealt with as a discrete matter at the commencement of the proceedings on the worker's application. Whether the employer is successful or not in satisfying the Court that it was justified in cancelling the payments, the worker may yet wish to proceed for a determination by the Court of his or her rights to compensation, such a determination not being necessary where the employer had previously been meeting its statutory obligations without an order. That is the procedure the worker wished to pursue in this case in that the employer, having justified the cancellation, the worker wished to have his rights to compensation determined by the Court, not only upon the basis of the original injury as claimed by him, but in addition or in the alternative, upon the basis of the aggravation of the pre-existing injury about which Dr Marinovich had advised him some months previously. This Court should not venture too far into the application of the *Act,* in the circumstances arising between these parties because the worker's application is part heard before the Work Health Court. The issue before this Court

in the appellant's appeal is whether or not his Worship made an error of law in upholding the respondent's cancellation of the weekly compensation upon the grounds specified in the prescribed notice.

Subsection (1) of s75B obliges a worker to undertake at the expense of his or her employer, the treatment and training referred to therein and, if required by the employer, to present himself for assessment of his employment prospects as prescribed. Apart from the general penalty provision (s178), there does not appear to be any consequence flowing to a worker who fails to undertake the treatment, training or assessment other than as provided for in subs(2) of s75B. It will be noted that the section only applies to compensation payable under Subdivision B of Division 3, which is the subdivision dealing with loss of earning capacity. (That subdivision ceases at the end of s69, and it appears that the reprint to 10 August 1994 suffers a omission in that the reference to "Subdivision C" has been left out in relation to those provisions of the *Act* dealing with impairment). The object of s75B is to encourage a worker receiving weekly compensation to undertake treatment and participate in training and assessment so as to restore or improve his capacity to earn income. Failing that, the compensation payable under that subdivision may be reduced or cancelled by the employer (s75B(2)). If that be the object of those provisions, then there is no good reason why the words "which could enable

him to undertake more profitable employment" do not govern both the treatment and participation in training referred to. However, in the case of a totally incapacitated worker, there is a problem with the words, "undertake more profitable employment" which assume that the worker is undertaking some form of profitable employment, as opposed to not undertaking any form of profitable employment at all. This view may be borne out by the definition of "worker" (s3), which means a natural person who "under a contract or agreement of any kind ... performs work or service of any kind for another person ...". If that is so, then the subsection has no application to a person who is totally incapacitated, for if such a person is not working then he is not a "worker" within the definition, and he is not undertaking profitable employment such that his ability to undertake more profitable employment can be measured. However, that line of argument was not put before this Court. In any event to construe those provision in such a narrow way could not, I think, be in accordance with the intentions of the Parliament. To hold that the scheme of s75B only applies to a partially incapacitated "worker" who is working, as opposed to a totally incapacitated person who was previously a worker, and now not working but in receipt of weekly compensation benefits, would be "unjust or capricious", in the words of Barwick CJ. in *Tickle Industries Pty Ltd v Hann & Anor* (1974) 130 CLR 321 at 331.

There is evidence (outlined above) upon which his Worship could base a finding that the appellant had unreasonably failed to undertake reasonable medical treatment for the major depressive illness for which the respondent accepted liability. Liability was accepted upon the basis of the appellant's original claim for compensation, and until the Statement of Claim was amended, to allege an aggravation of post traumatic stress disorder, that basis of a claim for compensation had not been put to the respondent. The scheme of the *Act*, and the prescribed form of claim for compensation together with the prescribed medical certificate, oblige a worker to inform his or her employer about the alleged compensable injury (s82(1)(a)). An employer can then elect whether to accept liability or defer accepting it pending further information or to dispute it. If an employer elects to accept liability for compensation it does so upon the basis of the claim including the specified injury. The report of Dr Meldrum upon which the respondent based its decision to cancel the payments for weekly compensation asserted that the appellant had enough symptoms and signs to make a diagnosis of a major depressive illness, but that he was not taking the prescribed medication as required. That report, however, said nothing about whether if he undertook the medical treatment as prescribed it would enable him to undertake more profitable employment. Nor was there any other evidence to that effect. The respondent's notice under s69 asserted that the failure to take the anti depressant medication prescribed had prolonged

the appellant's illness and "any alleged incapacity for work arising from it". From that it might be inferred that the respondent was asserting that had the appellant taken the prescribed medication he would get better, cease to be incapacitated for work and thus be able to undertake profitable employment. It may even be taken to have been suggested that had the appellant taken his medication then he would cease to be incapacitated for work at all as a consequence of the injury.

Under s69 of the *Act*, as it was at the time this notice was given, it was required to be accompanied by a statement in the prescribed form setting out the reasons for the proposed cancellation or reduction and indicating that the worker has a right to appeal against the decision (s69(1)(b)). If the compensation was to be cancelled for the reason that the worker to whom it was paid has ceased to be incapacitated for work, the statement under that subsection was to be accompanied by a medical certificate certifying that he has ceased to be incapacitated for work (s69(3)). Clearly it was intended that a worker who is to be prejudiced in relation to weekly compensation payments is to be informed of the basis upon which that is to be done. Further, it is that which the employer must prove if the worker challenges the validity of the cancellation. The evident purpose of s75B is to ensure that the liability resting upon an employer to pay compensation in accordance with

the *Act* is able to be alleviated where the worker unreasonably fails to undertake treatment or participate in training which could enable him to undertake more profitable employment. It is his ability to undertake profitable employment that is of interest to the employer, not just whether by undertaking the treatment the worker may feel better. A worker's physical or mental condition arising from a compensable injury may well be improved, but if that does not ameliorate his loss of earning capacity, then the employer's liability remains unaffected. The test is whether the treatment or training "could" enable him to undertake more profitable employment, and the two concepts of treatment or training on the one hand and possible outcome on the other, must be read together and demonstrated before the worker will be treated as being able to undertake such employment (whether the deeming provision is rebuttable or not is not in question here). There was simply no evidence going to the employment factor in the equation. In Dr Meldrum's view expressed to his Worship on 17 January, it would be expected that someone with a major depressive illness would improve over a period of 12 months even without treatment, particularly if the person was being adequately treated. But an improvement in health is not enough to satisfy the requirements of subs(2) of s75B. The respondent took the view, in argument before his Worship and before this Court, that the deeming provision in subs(2) of s75B came into operation where it was shown that the worker had unreasonably failed to undertake the treatment, but

that overlooks the adjectival phrase relating to profitable employment. His Worship upheld the submissions made on the part of the respondent and in that he made an error of law (In *Fazlic v Milingimbi Community Inc* (1982) 150 CLR 345 at 353, the High Court identified the doctrine of mitigation of damage as being a rational basis for the rule such as to be found in s75B). For these reasons, the appeal brought by the appellant upon the grounds that his Worship erred in law in finding that the respondent was justified in terminating the appellant's weekly payments pursuant to s69 of the *Work Health Act* is allowed.

It is not necessary to deal with the other grounds of appeal.

Cross-Appeal

I turn now to the respondent's cross appeal directed to his Worship's failure to adjourn the proceedings, upon the respondent's application, when the amendment to the Statement of Claim alleging aggravation of a pre-existing injury, post traumatic stress disorder, was allowed. The circumstances in which the amendment was allowed have already been described. As to his Worship's decision to proceed forthwith to hear the evidence of the appellant, upon the clear understanding that the proceedings on the appellant's substantive application would then have to be adjourned because of lack of Court time, I would

not be prepared to hold that the discretion miscarried. However, the question of whether his Worship should have adjourned to enable a conference to be held pursuant to ss106 and 107 of the *Act* remains. Those provisions, in force at the time this matter came before his Worship (being amended by Act No 78 of 1993 which came into operation on 1 January 1994), read as follows:

> "106. CONCILIATION/DIRECTIONS CONFERENCE
>
> (1) Before proceeding to hear a matter in the Court list the Court shall, within 14 days after the particulars of the proceeding are entered under section 105(2) in the Court list or as soon as practicable thereafter, hold a conference with the parties to the application.
>
> (2) At a conference referred to in subsection (1), a party to the proceeding may appear in person or may be represented by any person.
>
> (3) At a conference referred to in subsection (1) -
>
> (a) the applicant shall, as far as practicable, be in a position to indicate the precise extent, and all the particulars, of the claim or the order or ruling being sought; and
>
> (b) the respondent shall, as far as practicable, be in a position to indicate the issues, if any, on which liability is denied and the grounds on which it is denied or the grounds for not making the order or ruling sought, as the case may be.
>
> 107. HOLDING OF CONCILIATION/DIRECTIONS CONFERENCE
>
> (1) Subject to this Part, a conference under section 106 shall be held by the Court expeditiously and informally.
>
> (2) The Court, at the holding of a conference under section 106, shall attempt to resolve by conciliation the matter and questions at issue between the parties and may -
>
> (a) subject to the agreement of the parties, determine

the matter and questions at issue on such information, evidence and material as is placed before it;

(b) give such directions as it thinks necessary for the expeditious determination of the proceedings;

(c) make, vary or revoke an interim determination of a party's entitlement to compensation on such information, evidence and material as is placed before it; or

(d) of its own motion or on application by a party -

(i) adjourn the conference and fix a date for the adjourned conference;

(ii) fix a date for a formal determination of the application; or

(iii) fix a date after which either party may apply for a formal determination of the application,

or any combination of those things, and give leave, on such terms and conditions as it thinks fit, for a party to apply.

(3) For the purposes of, but without limiting the generality of, subsection (2)(b), directions given may relate to -

(a) the service of documents;

(b) the settling of issues for the hearing of the application;

* * * *

(d) particulars of the application or answers to be provided;

(e) the attendance of the parties to give evidence, whether or not on oath, at the conference under section 106 or the hearing of an application;

(f) the facilitating of agreement between the parties;

(g) the giving of evidence and the calling of witnesses;

(h) discovery and inspection;

(j) settling interrogatories;

(k) dispensing with the requirement and delivery of pleadings, making of discovery, delivery of interrogatories and other matters of practice and procedure;

(m) the making of admissions in relation to questions involved in the action;

(n) the admission into evidence of facts or documents;

(p) expediting further hearings; and

(q) time limits for pleadings.

(4) For the purposes of attempting to resolve a matter or issue at a conference under section 106, the Court may require a party to produce at the conference all medical reports and certificates and other documents (including oral or visual recordings) on which the party intends to rely and which may assist in resolving the matter or issue."

The Work Health Court has power to hear and determine claims for compensation under Part V of the *Act*, and all matters and questions incidental to or arising out of such claims (s94(1)(a)). As to procedure, s95 provides that the Chief Magistrate may make such rules and give such practice directions not inconsistent with that part of the *Act* regulating the practice and procedure of the Court, and subject to Part VI of the *Act*, the practice and procedures of the Court in relation to a matter within its jurisdiction are in its discretion (s94(4)). The *Work Health Court Rules* provide for proceedings by a worker for the recovery of compensation to be commenced under s104 of the *Act* by filing an application in accordance with the prescribed form (r6). The *Rules of the Supreme Court* relating to pleadings, discovery and inspection with the necessary changes, apply to and in relation to matters in the Work Health Court so far as

they are capable of applying to those matters, are not inconsistent with the *Work Health Court Rules*, can be applied without injustice to a party and can be applied without unduly prejudicing the expeditious determination of the matter (r24). As to amendment, the *Work Health Court Rules* provide that that Court may at any stage of proceedings allow a party to alter or amend his pleadings in such manner and on such terms as it thinks fit, and all amendments shall be made as are necessary for the purpose of determining the real questions at issue between the parties (r25).

By s105 of the *Act*, each Assistant Registrar is obliged to keep and maintain a list for the purposes of Division 4 of the *Act* and a proceeding shall, in the first instance, be set down for hearing before the Court by the appropriate Assistant Registrar entering particulars of the proceeding in his Court list. But, by s106, it is provided that before proceeding to hear a matter in the Court list, the Court shall, within 14 days after the particulars of the proceedings are entered under section 105 in that list, or as soon as practicable thereafter, hold a conference with the parties to the application. At that conference the applicant is to be in a position to indicate the precise extent, and all the particulars, of the claim, and the respondent is to be in a position to indicate the issues, if any, for which liability is denied and the grounds on which it is denied (see s106 of the *Act* which I have abbreviated to make

it relevant to this case). A conference under s106 is to be held by the Court expeditiously and informally, s107(1)), and by subs(2) of s107, the Court is obliged to attempt to resolve by conciliation the matter and questions at issue between the parties. In that regard it has a number of powers, including the giving of directions as it thinks necessary for the expeditious determination of the proceedings, and it may of its own motion or on application by a party, adjourn the conference. Without limiting the generality of its power in relation to directions, directions may be given relating to the settling of issues, particulars, the facilitating of agreement, and a wide variety of other interlocutory steps as described in subs(3). It is apparent that Parliament intended that the Court and the Registrar, including the Judicial Registrar, should, subject to directions of the Chief Magistrate under s102, facilitate steps with a view to defining the real issues between the parties and manage the interlocutory steps with a view to achieving an expeditious determination of the proceedings. The requirement that a conference be held "informally" indicates that the Court has power to proceed without prescribed or customary forms and procedures. But there is a further objective beyond that of having the matter prepared for hearing, and that is, by conciliation, to overcome distrust or hostility between the parties and reconcile their differences, both on procedural and substantive matters.

The question that arises is whether those provisions for the holding of a conciliation and direction conference apply where there is an amendment to a Statement of Claim introducing a fresh claim against an employer, such as happened in this case. Clearly whatever else the word "proceeding" may mean in ss105, 106, it includes proceedings commenced before the Court for the recovery of compensation under Part V as referred to in s104. The word "proceedings" is general and quite imprecise (*Quazi v Quazi* [1979] 3 All ER 424 at 429, 430 see Ormrod LJ.) and has been held in context of *The Service and Execution and Process Act* (1901-1924) (Commonwealth) as "merely some method permitted by law for moving a Court or judicial officer to some authorised act" (as per Isaacs and Gavan Duffy JJ., in *Cheney v Spooner* (1929) 41 CLR 532 at 536 - 537). As the Full Court of the High Court, comprising Gibbs CJ., Wilson and Dawson JJ., said in *Re Coldham & Others ex parte Australian Building Construction Employees and Builders Labourers Federation* (1986) 64 ALR 215 at 219, the word "proceedings" has frequently been said to have a wide and general application. Placing the word in its context will often lead to the breadth of its potential meaning being delimited. In this case it is plain that the legislature intended that the word should at least encompass an application for the recovery of compensation, and that is what the amendment to the Statement of Claim amounted to in substance. It may have been an alternative basis for putting forward the appellant's claim for compensation, but it was, nevertheless, a claim

relating to a different kind of injury said to have been suffered in a different way to that in respect of which the original claim was made and for which liability was accepted. It was a separate proceeding. That being so, the amendment, once allowed, fell to be dealt with in accordance with ss105 to 107. S110A of the *Act,* which came into operation not long before this matter was before his Worship, provides that the procedure of the Court is subject to the *Act, Regulation, Rules* and Practice Directions within the discretion of the Court and are to be conducted with as little formality and technicality, and with as much expedition, as the requirements of the *Act* and the proper consideration of the matter permits. With all of the powers of the Court available it would not have been difficult to have arranged for the Registrar to comply with s105, in so far as the new application was concerned, and for the Court to then embark upon the conference procedures. That is all that the respondent sought to have implemented, and bearing in mind that there do not appear to be any provisions whereby the compulsory conference procedures can be dispensed with, it was the duty of the Court to see that it was done. The cross-appeal is allowed.