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| PARTIES: | WORK SOCIAL CLUB - KATHERINE INC |
| | v |
| | MALGORZATA ROZYCKI |
| TITLE OF COURT: | COURT OF APPEAL OF THE NORTHERN TERRITORY |
| JURISDICTION: | APPEALS FROM SUPREME COURT EXERCISING TERRITORY JURISDICTION |
| FILE NO: | AP4 of 1997 |
| DELIVERED: | 16 FEBRUARY 1998 |
| HEARING DATES: | 9 OCTOBER 1997 |
| JUDGMENT OF: | GALLOP ACJ, MILDREN & BAILEY JJ |

**CATCHWORDS:**

Note A recommended procedure for counsel to adopt to establish the main elements in a matter before the Work Health Court to enable the court to make crucial findings are set out by appeal court on a step by step basis

Workers Compensation – Appeal – onus of proof – whether lies with respondent – whether discharged – how to discharge

Workers Compensation – Appeal – 'partial incapacity' – does a level of incapacity create an entitlement to compensation

Workers Compensation – Appeal – 'normal weekly earnings' – when to assess

Workers Compensation – Appeal and cross-appeal – "compensation" – at what stage does entitlement begin – "payable" – "immediately before"

Legislation

*Work Health Act* (NT) 1986
s3(1) – s53 – s64(1) – s65(1); (2); (3) – s71 – s73 – s80(1) (1)(a) (1)(c) (1)(i) – s85(1) (2) (4)(b) 8

Cases

1) *Crestwood Phoenix Darwin Pty Ltd and the Nominal Insurer v Savasti Kamarakis* (Unreported NT Court of Appeal 23.12.96) not followed

2) *Arnott's Snack Products Proprietary Limited v Yacob* (1983) 155 CLR 171 followed

3) *Simpson v The Nominal Defendant* (1976) 13 ALR 218 applied

4) *Deputy Commission of Taxation (NSW) v Mutton* (1988) 79 ALR 509 applied

5) *Maddalozzo and Others v Maddick* (1992) 84 NTR 27 referred

**REPRESENTATION:**

*Counsel:*

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| Appellant: | S Southwood |
| Respondent: | J Waters |

*Solicitors:*

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| Appellant: | Ward Keller |
| Respondent: | De Silva Hebron |

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| Judgment category classification: | B |
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| Number of pages: | 31 |

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

No. AP4 of 1997

BETWEEN:

**WORK SOCIAL CLUB - KATHERINE INC**
Appellant

AND:

**MALGORZATA ROZYCKI**
Respondent

CORAM: GALLOP ACJ, MILDREN & BAILEY JJ

REASONS FOR JUDGMENT

(Delivered 16 February 1998)

GALLOP ACJ

I have had the benefit of reading the judgment of Mildren J in draft form. I agree with his conclusions and the reasons therefor. I particularly endorse his general observations about the need for care and precision in expressing the findings of the Work Health Court.

It is fundamental to the exercise of the powers set out in s94 of the *Work Health Act* that the Court identify the issues in the case and express its

findings in respect of those issues in the language of the *Work Health Act.* The exercise of jurisdiction under the *Work Health Act* is often complicated and difficult. In many parts of Australia comparable jurisdiction is exercised by courts of the Supreme Court status. In the circumstances, the complexity involved in the exercise of the jurisdiction cannot be minimised. Appeals from the Work Health Court to a single Judge of the Supreme Court of the Northern Territory would be less frequent if the Magistrates observed the admonition set out in Mildren J's reasons.

MILDREN J

Introduction - The respondent worker brought a claim for compensation in the Work Health Court following an injury to her lower back on 3 June 1989 when she lifted a bucket full of detergent whilst at work at the appellant employers' premises. She claimed for medical and rehabilitation expenses, lump sum compensation for permanent impairment pursuant to s71 of the *Work Health Act (the Act)*; weekly compensation for the period 5/2/90 to 30/5/90 and for the period commencing from 26 February 1992 to the date of the order of the Work Health Court and continuing, and costs.

The Work Health Court found that the respondent worker injured her back whilst in the course of her employment on 3 June 1989. The Court found that she was partially incapacitated for work by this injury, but that from the date of the accident until 9/10/92 when she completed a period of rehabilitation, this was not productive of financial loss, except for a period of ten weeks in 1992 when she underwent rehabilitation at Alfred Rehabilitation Centre in

Adelaide. In respect of this ten week period, when she was treated as if she were totally incapacitated, the Court awarded her $2,074.80. Implicit in this is a finding that her "normal weekly earnings" was the sum of $173.79 per week, (indexed as at 1992 in purported compliance with s65(3) of the Act, to an amount of $207.48 per week), and that the amount she "actually earned" or was "reasonably capable of earning", (depending on whether the relevant provision is s64 or s65), was nil. In addition the respondent worker was awarded an amount of $9,452.81 for past medical and rehabilitation expenses pursuant to s73 of the Act. The Court found that no other compensation could be awarded to her for reasons which are far from clearly expressed, but which seem to amount to the following propositions: (1) after completion of the rehabilitation treatment, the respondent worker did not prove, the onus being upon her, that she was unable to earn any income or obtain any employment due to incapacity; (2) in respect of the whole period under consideration, "the date on which (she) first became entitled to compensation" within the meaning of s65(3) of the Act was the date of the injury. Allowing for indexing, the maximum amount of her "normal weekly earnings" between 1992-1995 is $223.61 (see AB47). Both parties submitted that, assuming she had proved that she was incapacitated, she could earn at least $241.22 as a part-time kitchen hand (see AB107). As the amount she could earn exceeded her "normal weekly earnings", there was no loss demonstrated.

From this decision, the respondent worker appealed to the Supreme Court. Martin CJ allowed the appeal. His Honour held:

1. the appellant employer was liable to pay weekly benefits to the respondent worker pursuant to s64(1) of the Act for the period 6 April 1992 to 5 October 1992 at the rate of $275 per week, totalling $7,150.

2. the appellant employer was liable to pay weekly benefits pursuant to s65(1) of the Act upon the basis of a partial incapacity for work calculated from 5 October 1992 to the date of the order and continuing at the rate of 75% of the difference between her normal weekly earnings of $275 per week indexed and $241.22 per week.

(There were also other orders, but it is not necessary to consider them, as they are not subject to appeal).

From this decision, the appellant employer has appealed to this Court, seeking to restore the orders of the Work Health Court.

The respondent worker, at the hearing of the appeal, sought leave to cross-appeal out of time. In effect, the respondent sought to argue that his Honour erred in utilising the amount of $275 per week in his orders, and that the correct amount should be $380 per week, on the basis that, (1) the date at which the respondent "first became entitled to compensation" was, as the learned Chief Justice found, not the date of the accident, but 6 April 1992; (2) the respondent worker's "normal weekly earnings" immediately before 6 April 1992 were $380 per week (as that is the amount she earned in full-time employment between April 1991 and October 1991 with Tindal Air Base) whereas the learned Chief Justice fixed the amount by reference to part-time

employment with Sterling Properties ($275 per week) between October 1991 and February 1992.

The Reasons of the Work Health Court

The Work Health Court's findings were the subject of two separate decisions. The first decision consisted of extensive findings in a lengthy written decision published on 20 March 1995. The findings then made were that the respondent worker was partially incapacitated for work, but the court was at that stage unable to quantify "the level" of the compensation. The Work Health Court had also found that the respondent worker suffered no loss until March 1992 when she first saw a Dr Kreminski. This was because the respondent was stoical and had "a determination to triumph over the consequences" of her injury. The learned Magistrate had said that the respondent had the choice to stop seeking work and claim compensation, and "although that may seem opportunistic, ... that ... does not prevent the [respondent worker] from exercising that option." Up to March 1992, when the worker saw Dr Kreminski her unemployment was not due to her incapacity; she was still looking for work, and the conditions of the labour market were the 'predominant' cause of her lack of success.

The Work Health Court was unable to find the level of the respondent worker's incapacity because the disability the worker was suffering from was "less than the (respondent worker) would have the Court believe". The Court decided to give the respondent worker a further opportunity to argue "the level of compensation" as well as "consequential orders".

The Work Health Court found that in March 1992 the respondent worker had consulted Dr Kreminski in Adelaide as a result of seeking a sickness benefit from the Department of Social Security. "This led to some work being arranged under the auspices of the Alfred Rehabilitation Centre. This traineeship was commenced in March 1993 and was completed successfully in August 1993. Since that date the (worker) has been in receipt of social security benefits." Later the Work Health Court said that the worker's claim for compensation covered two periods, the second being from 27/2/91 to date. As to this period, the Work Health Court said "I am satisfied that opportunistic though it might have been her disabilities were not (sic) the cause of her unemployment."

After hearing further evidence in September 1995, his Worship delivered further oral reasons on 4 March 1996. On this occasion, the learned Magistrate corrected his finding as to the date on which she had seen Dr Kreminski as being 6th April 1992 and said he would "round up" the period when she had no incapacity to work to that date.

The Reasons of the learned Chief Justice

The learned Chief Justice concluded that the word "not" in the phrase "I am satisfied that opportunistic though it might have been her disabilities were not the cause of her unemployment" was included in error. He pointed to the earlier context in which the learned Magistrate had used the word

"opportunistic" and after making some pointed criticism about the way the Work Health Court had expressed its findings, concluded that:

> "When the adjourned hearing commenced, the position was that the (worker) had a finding in her favour that she had been partially incapacitated for work as a result of an injury arising out of or in the course of her employment with the (employer). That partial incapacity did not arise until about three years after the incident on 3 July 1989. She had continued employment in circumstances described by his Worship thereafter until 27 February 1992, and apart from the time she spent at the Hyatt Hotel she had not been employed since. His Worship was satisfied that she was partially incapacitated for work in circumstances in which she was entitled to weekly compensation under ss64 and 65 of the Act, but on the evidence then before him, was unable to make findings as to the 'level of compensation.'"

The learned Chief Justice, after reviewing the course of the litigation and the submissions of the parties in the Work Health Court, noted that the learned Magistrate in his oral reasons delivered on 4 March 1996, (as to which his Honour observed that "there is a remarkable falling away in the standards of the reasons on the second occasion compared with the first,") concluded that there was no evidence that the worker's failure to obtain employment after March 1992 was due to any incapacity to work. His Honour then concluded that:

> "… it can be gauged by implication that his Worship was not satisfied that there was any relevant change to the (worker's) condition which would cause him to modify or reverse the finding he made in March 1995 at the conclusion of the taking of the evidence in September that year … Both parties appear to have proceeded upon the basis that the finding of partial incapacity made in March was not disturbed by the further evidence heard in September; partial incapacity continued. Plainly, his Worship had not endeavoured to quantify the degree of incapacity by reference to the amount which the (worker) was

reasonably capable of earning in a week within the meaning of s65(2)(b) ..."

His Honour then referred to the fact that evidence was given at the resumed hearing by Dr Kreminski on behalf of the worker and Dr Schaeffer on behalf of the employer, and the fact that certain awards were tendered, and that the worker was not called to give any further evidence. His Honour then said:

"Nowhere does it appear that his Worship expressly found the degree of partial incapacity. The first ground of appeal goes to that failure. It is implicit that his Worship did not resile from his earlier findings. If he had accepted the evidence of Dr Schaeffer, or rejected the other evidence on this point, then the matter would have been resolved by a finding that, notwithstanding the injury, the (worker) was not partially incapacitated for work as a result of it. His Worship proceeded instead to consider whether or not she was entitled to weekly compensation, a question which could only arise if she was incapacitated for work as a result of the injury. There is no express finding that she was capable of working any particular number of hours or earning any particular remuneration, but again, implicitly, his Worship must have considered that he could rely upon the evidence in the (worker's) favour. The basis of rejecting the submissions of the (worker) going to the quantum of weekly compensation was not that the submissions were based upon a false premise (that is, that the (worker) was partially incapacitated) but that, by reason of the operations of the Act, the (worker) was not entitled to any weekly compensation. The (employer's) case was that the (worker) was not incapacitated for work by the injury at all. The (worker's) case, based upon her work experience at the Hyatt Hotel and Dr Kreminski's opinion, was that she was partially incapacitated for work, being able to work up to five hours per day five days per week. There was evidence which his Worship could accept in that regard, and I consider that he implicitly did so.

> If I be wrong in my conclusion that it can be discerned that his Worship implicitly made a finding as to the amount that the (worker) was from time to time reasonably capable of earning in a week within the meaning of s65(2)(b), then I think it would be open to make such a finding on the evidence under this Court's power to vary the decision or determination appealed against (s116(2))."

His Honour then proceeded to consider what were the worker's "normal weekly earnings" for the purposes of s64(1) of the Act. His Honour concluded that the period of engagement with her last employer in Katherine, Sterling Private Cleaning Services, from 22 October 1991 to 18 February 1992, (which ended only a few weeks before 6 April 1992, when her period of partial incapacity resulting in loss began) established that her "normal weekly earnings" for the purposes of s64(1) amounted to $250 per week net, plus tax of between $20 to $30. The evidence showed that she actually earned nil for the period of 26 weeks from 6 April 1992. His Honour allowed $7,150 for this period (26 weeks x $275). This compensation covered the period 6/4/92 to 5/10/92.

His Honour then considered what compensation should be paid thereafter pursuant to s65(1) of the Act. He held that "the normal weekly earnings of the (worker) for the purpose of calculating her loss of earning capacity, is to be taken as her normal weekly earnings immediately before the date upon which she first became entitled to compensation for incapacity under s65," which, consistently, with his earlier finding, was $275 per week. He also found that:

> "it is not disputed that under the ... award her earning capacity as a skilled kitchen hand able to work five hours a day seven days a week would produce a weekly income of

> $241.22. The (worker) was entitled to be paid compensation under s65(1) of the Act, up to 4 March 1966 (sic), for partial incapacity for work subsequent to the first 26 weeks of such incapacity, the difference between her normal weekly earnings of $275 per week indexed in accordance with s65(3) and $241.22."

His Honour had overlooked that s65(1) entitles the worker to receive only "compensation equal to 75% of (her) loss of earning capacity" but corrected this in the order which was subsequently made on 20 June 1997. (His Honour appears to have overlooked the fact that for a ten-week period the worker was at the Alfred Rehabilitation Service and therefore unable to earn anything, but this period was, but for a few days, covered in the period of the first 26 weeks from 6/4/92 to 5/10/92). His Honour also awarded $9,452.81 for the past medical and hospital expenses.

His Honour, in reaching his conclusions, referred to the question of onus of proof, and in particular to *Crestwood Phoenix Darwin Pty Ltd and the Nominal Insurer v Savasti Kamarakis* (unreported, N.T. Court of Appeal, 23/12/96) which adopted a passage from the judgment of Jordan CJ in *Bryer v Metropolitan Water, Sewerage and Drainage Board* (1939) 39 SR (NSW) 321 at 331, the effect of which was (as his Honour appears to have interpreted these decisions), that once the worker has established an injury and that as a result the worker has sustained some incapacity for work, the worker is entitled prima facie to compensation on the basis of total incapacity, and that it is upon the employer, if the employer wishes to establish that the worker is only partially incapacitated, to establish the level of partial incapacity and the value of it.

General Observations

Before turning to the grounds of the appeal and the cross-appeal, I consider that it is necessary to say something about the reasons for judgment given by the Work Health Court. The first set of reasons delivered on 20 March 1995 were of variable quality. At times clear findings were made by the Court; at other times, issues which the Court attempted to resolve were not clearly expressed. As the learned Chief Justice pointed out,

> "... it would lead to a significant improvement in the understanding of reasons in cases such as this if practitioners and the Courts would use the words and phrases precisely employed in the legislation, especially when making findings which may be the subject of review."

I would endorse that observation, but that is not the only matter of concern. In most workmen's compensation cases, it is not usually helpful to approach the matter by a chronological summary of the worker's life; even less useful is a summary of the evidence called by the parties. What is important to recognise is that there are a number of crucial findings which need to be made on a step-by-step basis. These findings are similar to the elements that need to be proved by the prosecution in a criminal matter. For example, in this case, the main elements which had to be established, before the worker could succeed were:

(1) the applicant was a "worker" (as defined) at the relevant time;

(2) on the relevant date the worker suffer an "injury" as defined;

(3) that injury resulted in or materially contributed to the worker's "incapacity" as defined. For the first three steps, reference should be made to s53 and the relevant definitions in s3(1) and s49(1) of the Act;

(4) the worker was totally incapacitated for work as a result of the injury from ..... to ..... and/or as the case may be, partially incapacitated for work as a result of the injury from .... to ..... (for a total period not exceeding 26 weeks: see s64(1));

(5) during the periods referred to in (4) above, the worker actually earned in employment $x per week;

(6) during the period referred to in (4) above, the worker's "normal weekly earnings" (as defined by s49(1)) amounted to $y per week;

(7) during the period commencing from the end of the period referred to in (4) above:-

(i) the worker was totally incapacitated for work as the result of the "injury" out of which his "incapacity" arose or materially contributed to it from .... to .... (see s65(1) and note that regard is to be had to s65(6) and s68) and/or;

(ii) the worker was partially incapacitated for work as a result of the "injury" out of which his "incapacity" arose or materially contributed to it from ... to ... (and continuing) (see s65(1));

(iii) the worker's "normal weekly earnings" indexed in accordance with s65(3) were:

(a) for the period ... to ....; $a per week;
(b) for the period ... to ....; $b per week, etc
(see s65(2)(a)).

(iv) the amount the worker is reasonably capable of earning in a week in work he is capable of undertaking etc (see s65(2)(b)) is:

(a) for the period ... to ....; $c per week;
(b) for the period ... to ...; $d per week, etc

(v) The worker's "loss of earning capacity" for the purposes of s65(1) is therefore:

(a) for the period ... to ...; 75% of ($a-$c) = $e per week;

(b) for the period ... to ...; 75% of ($b-$d) = $f per week, etc.

(vi) 150% of "average weekly earnings" (as defined) at the time the payment is made is $g per week (see s65(1) and s3(1)).

(vii) $e is less than $g;
$f is less than $g (or as the case may be).

(viii) Sections 65(7), (8), (9), (10), (11) and (12) do/do not apply.

(ix) the worker is entitled therefore to compensation:

(a) pursuant to s64(1) in the sum of ....
(b) pursuant to s65(1) in the sum of ....

The *Work Health Act* is an extremely complex piece of legislative drafting. In the Northern Territory magistrates are extremely busy, and neither have the time nor the resources to deal adequately with compensation claims unless given the utmost of assistance by the legal profession. It behoves counsel, especially those appearing for workers, to give magistrates assistance in analysing disputed factual and legal issues, and in arriving at appropriate and necessary findings of fact and law. Because of the complexity of this jurisdiction, magistrates would be best assisted if counsel were to set out, preferably in written form, each of the elements which has to be proved, carefully addressing the facts and legal issues with respect to each of those elements in a clear and orderly fashion, and addressing the language used by the Act. Perhaps if this were to be followed, there would be fewer appeals like this one, where the ultimate findings of the Work Health Court are only able to be discerned after a microscopic examination of reasons, sometimes poorly expressed.

As to the second set of reasons, these were delivered orally by the learned Magistrate, and were particularly difficult to follow. It would be helpful if magistrates who deliver oral reasons corrected the transcript so that the reasons are clearly expressed.

Grounds of the Appeals and Cross Appeal

Counsel for the appellant, Mr Southwood, submitted that the appeal raised five main issues:

1. Whether or not the onus was on the respondent to establish the level of her partial incapacity;

2. Whether or not the respondent discharged that onus;

3. What is the meaning to be given to the words “partial incapacity”;

4. What is the meaning to be given to “normal weekly earnings” in s65(3) of the Act; and

5. What is the meaning to be given to the word “compensation” in s65(3) of the Act.

Although these issues arise from the grounds of appeal, the appeal also raises other issues which Mr Southwood sought to support in his argument. These other issues were:

6. Did the Work Health Court decide that the respondent had failed to show that she had suffered any compensatible loss because of two reasons, being (1) the level of partial incapacity had not been proved and (2) assuming that the worker had established that the level of her partial incapacity was as submitted by her counsel, it did not entitle her to any compensation.

7. Martin CJ wrongly identified "errors" as errors of law which were findings of fact, and not appealable.

Mr Waters, counsel for the respondent, submitted that the reasoning of the Chief Justice was correct except on one point; he submitted that his Honour should have found that the appellant's "normal weekly earnings" were her earnings at the Tindal Air Base (where she had been in full-time employment between April 1991 and October 1991).

Onus of Proof

Mr Southwood submitted that the onus lay upon the worker to establish the level of her incapacity, both in the physical sense and in the sense of the amount of compensation to which that level of incapacity entitled her. In my opinion, that submission is correct. This was a primary application by the worker for compensation. The worker's case was that she was totally incapacitated for a period, and thereafter partially incapacitated. It is well

established that the worker, in such a case, bears the legal as well as the evidentiary burden: see *Horne v Sedco Forex Australia Pty Ltd* (1992) 106 FLR 373 at 383-384 and the authorities therein cited. In my opinion, the obiter remarks of this Court in *Crestwood Phoenix Darwin Pty Ltd and the Nominal Insurer v Kamarakis* (unreported, Martin CJ, Gallop and Angel JJ 23/12/96) in applying *Bryer v Metropolitan Water, Sewerage Drainage Board* cannot be followed as the passage in *Bryer* which the Court approved was over-ruled by the High Court in *J & H Timbers Proprietary Limited v Nelson* (1971-72) 126 CLR 625. The attention of the Court of Appeal in *Crestwood Phoenix* does not appear to have been drawn to that fact. To the extent that Martin CJ relied upon *Crestwood Phoenix*, his Honour's judgment cannot be supported. However, it remains to be seen whether this was crucial to his Honour's decision.

Did the Respondent Worker Discharge the Onus?

Mr Southwood submitted that "incapacity", means, "an ability or limited ability to undertake paid work because of the injury" (see s3(1)). Thus, when s64(1) and s65(1) use the expression "partially incapacitated for work", this must mean "have a limited ability to undertake paid work". This is consistent with what was decided by the High Court in *Arnott's Snack Products Proprietary Limited v Yacob* (1983) 155 CLR 171, which held that the concept of partial incapacity for work is that of a reduced physical capacity, by reason of physical disability for actually doing work in the labour market in which the

employee was working or might reasonably be expected to work. Except that the concept of incapacity is not limited to physical disability, and may include a mental disability (see the definition of "injury" in s3(1)), I agree. I consider that the Work Health Court's finding on 20/3/95 that the worker had a "partial disability" (sic) should be interpreted to mean, in the circumstances of this case, that she was "partially incapacitated for work". However the Work Health Court made no specific findings as to the extent to which this partial incapacity operated to reduce the worker's ability to undertake paid work.

The Court accepted nevertheless that the worker suffers pain in the lumbar spine, that this pain emanates from L3/4 L5/S1 levels of the lower spine, and is related to disc bulges at these levels which were caused by the way the worker lifted the bucket of suds on 3 June 1989.

The Work Health Court found that the pain was not totally disabling. Up to 6 April 1992, the Work Health Court found that the pain did not result in incapacity that was productive of financial loss. His Worship said:

> "Whatever incapacity she had it was suppressed to such a degree, or she ceased to be troubled by it to such a degree, that it was not productive of any economic loss."

Mr Southwood submitted that this was consistent with the approach in *Arnott's Snack Products*, where the High Court held that entitlement to

compensation depended not solely upon proof of partial incapacity, but also on "loss of earning power". This is supported by the language employed by s65, but there is a difference between that provision and s64(1) which makes it much easier for the worker to claim full compensation for the first period or periods of incapacity which total 26 weeks in all, pursuant to s64(1), than thereafter pursuant to s65(1). In the former case, the worker is entitled to recover compensation "equal to the difference between what he *actually earned* in employment during a week and his *normal weekly earnings*". There is no occasion to consider what he is reasonably capable of earning in a week in work he is capable of undertaking if he were to engage in the most profitable employment, if any, reasonably available to him (s65(2)) during the first 26 week period. That only arises thereafter, because s65(2) begins with the words "for the purposes of this section ...". Therefore, all that the worker has to show to be entitled to compensation under s64(1) is that the worker is totally or partially incapacitated for work as the result of the injury, in the sense explained in *Arnotts' Snack Products,* and the worker is entitled to the difference between the worker's "normal weekly earning" and what the worker *actually* earned during the first 26 weeks of incapacity. If in fact the worker earned nothing, the worker is entitled to receive the full amount of the worker's "normal weekly earnings", so long as the worker is totally or partially incapacitated for work as the result of the injury, i.e. the incapacity arises out of or is contributed to by the injury, during the relevant period, in the sense explained in *Arnotts' Snack Products*. This is of course subject to any argument pleaded and proven by the employer that the worker has failed to mitigate her loss: *Fazlic v Milingimbi Community Inc*. (1981-82) 150 CLR 345 at 353-4, but this was not raised in this case.

In my opinion, the Chief Justice was correct to conclude that the worker had established her right to compensation for the first 26 weeks after 6 April 1996, pursuant to s64(1).

The learned Magistrate had concluded in his reasons dated 20 March 1995 that the worker was partially incapacitated as a result of the injury. The learned Chief Justice correctly interpreted the Work Health Court's findings as amounting to a finding that after 6 April 1996, her incapacity was productive of financial loss. The worker had also established that after 6 April 1996 she actually earned nothing. Indeed, she had proven this in respect of earlier periods as well, but there was no appeal to this Court that the Work Health Court or Martin CJ had wrongly failed to award her compensation in respect of any earlier period. On the basis of these findings the worker was clearly entitled to an award of compensation under s64(1).

"Normal Weekly Earnings" for the Purposes of s64(1)

Mr Southwood submitted that his Honour erred in not finding that the worker's "normal weekly earnings" were to be assessed by reference to what she earned at the time of the injury on 3 June 1989. Mr Southwood suggested that the reason for this depended upon the wording of s65(3), which requires indexing of earnings. I do not accept this argument. S65(3) relates to

compensation payable under s65(1) and has nothing to do with compensation under s64(1).

The correct approach, so far as compensation vide s64(1) is concerned, is to have regard to the definition of "normal weekly earnings" in s49(1). The first step is to note that paragraph (a) of the definition reads "subject to paragraphs (b), (c) and (d)." Therefore, before reliance can be placed on paragraph (a) of the definition, the Court must eliminate paragraphs (b), (c) and (d). In this case, there was no evidence that the worker had ever entered into concurrent contracts of service with 2 or more employers. Therefore paragraphs (b) and (c) did not apply. The next question is whether the worker was "remunerated in whole or in part other than by reference to the number of hours worked". The finding of the Work Health Court was that "the work occupied 2-3 hours a day on week days and 3-4 hours on weekends ... she earned $180 per week from this work."

There is no finding that the worker was remunerated by the number of hours worked. The Work Health Court's finding is consistent with her earning $180 per week, but that the hours were not fixed. Therefore, in my opinion paragraph (d) applied. Thus, her "normal weekly earnings" fell to be calculated by reference to "the average gross weekly remuneration which, during the 12 months *immediately preceding the date of the relevant injury*, was earned by the worker during the weeks that (she) was engaged in paid employment." The "date of the relevant injury" was the 3rd of June 1989.

There is a finding that she was employed as a kitchen hand at a restaurant between August 1988 to October 1988. There is no finding as to what her earnings were with that employment. The only finding is to her earnings with the appellant.

The Chief Justice concluded that the worker's "normal weekly earnings" fell to be assessed by reference to paragraph (a) of the definition of "normal weekly earnings". I regret that I am unable to agree. His Honour further held that, for the purposes of s64(1) regard is to be had to the period of engagement with the last employer before April 1992. The language of paragraph (d) precludes that in this case. I would therefore allow the appeal on this ground, in part, and substitute an award of $180 per week for the first 26 weeks, i.e. $4,680, for the award of $7,150.

"Normal Weekly Earnings" for the Purposes of s65(1)

S65(1) entitles the worker to compensation, after the first 26 weeks, "equal to 75% of (her) loss of earning capacity" or "150% of average weekly earnings at the time the payment is made," whichever is the lesser. As it was never suggested that 150% of average weekly earnings etc was less than 75% of loss of earning capacity, that may be disregarded.

S65(2) provides:

> "For the purposes of this section, loss of earning capacity in relation to a worker is the difference between -
>
> (a) his normal weekly earnings indexed in accordance with subsection (3); and
>
> (b) the amount, if any, he is from time to time reasonably capable of earning in a week during normal working hours in work he is capable of undertaking if he were to engage in the most profitable employment, if any, reasonably available to him."

S65(2) was amended in 1995, but the amendments are of no significance in this case.

S65(3) provides:

> "The normal weekly earnings of a worker for the purpose of calculating his loss of earning capacity ... *shall be taken to be* his normal weekly earnings *immediately before the date on which he first became entitled to compensation* multiplied by the average weekly earnings at the particular date and divided by the average weekly earnings applying at the date in which he first became entitled to compensation."

Clearly s65(3) displaces the definition of "normal weekly earnings" in s49(1) - a contrary intention appears in s65(3) - so far as s65(2) and s65(3) are concerned.

Mr Southwood's primary submission was the date upon which the appellant "first became entitled to compensation" was the date of the injury.

Alternatively he submitted that it was the date she first sought and obtained medical treatment.

The learned Chief Justice considered that the word "compensation" was confined to compensation under ss64 or 65 of the Act. His Honour held that for the purposes of s65(3), the relevant time was the date upon which she first became entitled to compensation under s65(1). Therefore, the worker's "normal weekly earnings" were to be assessed by reference to the position "immediately before" then. Some of the problems of construction were discussed by me in *Loizos v Carlton and United Breweries Ltd* (1994) 94 NTR 31 at 40-43, but I did not then resolve them.

In support of his submission, Mr Southwood relied upon the definition in s3(1) of "compensation" which is as follows:

> "'compensation" means a benefit, or an amount paid or payable under this Act as the result of an injury to a worker …"

As I understand it, Mr Southwood's principle submission was that, as at the date of the accident, or at least, as at the date upon which the worker first sought medical treatment, an amount was "payable" under the Act etc. He submitted that the amount was not confined to compensation payable by virtue of s65(1); it could include any amount of compensation, including

compensation for medical benefits under s73. I agree that the defined meaning to be given to the word "compensation" is not confined to payments under s65(1). S3(1) is prefaced by the words "unless the contrary intention appears", and so the defined meaning must be applied unless that has occurred. In *Simpson v The Nominal Defendant* (1976) 13 ALR 218, Forster J said, at 222-223, that the contrary intention must be "plainly indicated" in the subsection, that it is not sufficient to conclude that the spirit of the Act may lead to the conclusion that some other meaning can be given other than the statutory definition, that a definition of this sort must be construed strictly, and the purposes of the legislation may not be looked at in order to construe the definition. At p224 his Honour observed that "apparent bad legislative drafting can hardly provide a basis for finding such an intention."

In *Deputy Commissioner of Taxation (NSW) v Mutton* (1988) 79 ALR 509, Mahoney JA, at 512-513, discussed the circumstances under which such a contrary intention may be disclosed. Without quoting his Honour at length, suffice it to say that there is no simple formula; the prime question is to decide whether it was the intention of the legislature that the statutory formula would not apply to the particular section. This may be shown, for example, if what was laid down was impossible of operation, but even that is not necessary - it is sufficient if the result of the application of the definition to a section results in the operation of the section in a way which the legislature clearly did not intend.

In my opinion, there is nothing in s65(3) to indicate that the defined meaning of "compensation" was not intended to operate.

The question then, is when did the worker "first become entitled" to "compensation", i.e. when did she first become entitled to a benefit or an amount paid or payable under the Act?

S53, confers the primary right to compensation. It provides:

> "*Subject to this Part*, where a worker suffers an injury within or outside the Territory and that injury results in a materially contributes to his -
>
> (a) death;
> (b) impairment; or
> (c) incapacity,
>
> there is payable by his employer, to the worker or the worker's dependants, in accordance with this Part, such compensation as is prescribed."

S73 provides:

> "*Subject to this Part* and the Regulations, where a worker sustains an injury, his employer is liable to pay the costs reasonably incurred by the worker as a result of that injury for -
>
> (a) medical, surgical and rehabilitation treatment;
> [(b) to (e) not relevant.]
>
> and such other costs as are prescribed."

Both of those sections are expressed to be "subject to this Part," i.e. Part V of the Act.

S80(1) provides that;

> "Subject to this Act, a person shall not be entitled to compensation unless notice of the relevant injury has, as soon as practicable, been given to or served on the worker's employer."

Compliance with s80(1) has been held to be a condition precedent to the right to compensation: *Maddalozzo and Others v Maddick* (1992) 84 NTR 27.

The Act then lays down a procedure for the making of a claim for compensation. A claim is required to be in the prescribed form: s82(1)(a) and except in exceptional cases is required to be served upon the employer: s82(1)(c). Thereafter the employer must either accept liability for the compensation, defer accepting it or dispute liability: s85(1). Where the employer accepts or defers liability, the employer is required to commence payments within three days of acceptance, or in the case of weekly payments, within 3 days of deferral: s85(2) and s85(4)(b). If the employer disputes liability, the worker can bring a claim in the Work Health Court: see s85(8). These provisions are in Part V of the Act.

On one view of s65(3), therefore, a worker is not entitled to a benefit or an amount payable under the Act until the worker has established his right by giving notice, lodging his claim with the employer, and having his claim accepted or deferred, or if it is disputed, until he has established his right by an order of the Work Health Court.

There are distinctions to be made between an *entitlement* to a benefit or an amount of compensation and that benefit or compensation becoming "payable". I consider that "payable" means "due and payable"; in other words, a worker may be entitled to a benefit, or to compensation, but the benefit or compensation may not yet be payable. The most obvious example of this is where the employer accepts liability under s85(1). The worker cannot insist upon payment until after 3 days of acceptance; i.e. the compensation is not payable until then, although the entitlement to it has already been established. The question to be determined is best expressed by asking when did the worker first become entitled to a benefit or to compensation which was either then payable or to become payable at a later time.

The question of when a worker first becomes entitled to a payment or benefit will depend on the facts of each case. As the giving of notice of the injury pursuant to s80(i) is a condition precedent to her right to compensation, her entitlement could never arise before the date of notice of injury. But, the worker may not suffer any compensatible loss giving rise to an entitlement to

weekly compensation or otherwise be entitled to a benefit at that time. In my opinion, subject to the giving of notice, a worker first becomes entitled to compensation as soon as the relevant event giving rise to the entitlement first occurs. It is not to the point that liability is disputed. If liability is subsequently established, the entitlement to compensation or to a benefit is treated as having arisen at whatever time the court so finds although the compensation or benefit may not become payable until the date of the court's order. This fits the regime contemplated by ss64 and 64 of the Act, including, as Mr Southwood pointed out, the fact that "normal weekly earnings" are to be adjusted according to the formula in s65(3).

Mr Southwood submitted that the worker first became entitled to compensation when she incurred a liability for medical treatment when she visited the Katherine Hospital on 5 June 1989. The learned Magistrate found that the worker gave notice of her injury pursuant to s80(1) of the Act on 31 January 1990, and that the notice then given had been given as soon as practicable. There is no appeal from that finding. Therefore, as of that date, the worker became entitled to a benefit pursuant to s73 of the Act in respect of medical treatment for attendances at the Katherine Hospital on 5 June 1989, and on 21 December 90 (the material in the Appeal Book does not show that expenses were incurred or claimed in respect of these visits, but Mr Southwood asserted before us that this was so, and was not challenged by Mr Waters; in any event, the entitlement to a benefit in respect of those attendances would have existed even if the worker made no claim in respect

thereof). Accordingly, on the facts as found by the learned Magistrate, the relevant date for the purposes of s65(3) is 31 January 1990.

It follows from this that I disagree with the Chief Justice on this point. I would therefore allow the appeal on this ground.

I agree with the approach of the Chief Justice as to what is meant by "immediately before" the date she first became entitled to compensation. His Honour referred to *Loizos v Carlton and United Breweries Ltd* (1993-94) 94 NTR 31 at 35, per Kearney J (with whom Angel J agreed) that this must mean "some reasonably short period of time immediately proceeding" the relevant date. This is a question of fact and degree. Up to 1st February 1990, the worker was still in the appellant's employ. Her "normal weekly earnings" (before indexation) were therefore $180 per week, which was the amount she had earned each week with the appellant since she commenced her employment on 26 March 1989. It is not disputed that the figures applicable to the formula in s65(3), are those set out at AB47. Thus the normal weekly earnings, after adjustment, are as follows:

1992 - $180 x $589.30 ÷ $493.60 = $214.90

1993 - $180 x $618.90 ÷ $493.60 = $225.69

1994 - $180 x $635.10 ÷ $493.60 = $231.60

1995 - $180 x $634.70 ÷ $493.60 = $231.45

What Amount was the Worker Reasonably Capable of Earning in a Week?

The respondent's case was that, after completion of her rehabilitation, she could earn $241.22 gross as a part time skilled kitchen-hand. As this amount exceeds the worker's normal weekly earnings indexed in accordance with s65(3), the difference is nil, and the worker was not entitled, as at the date of the hearing in the Work Health Court in 1995, to any award under s65(1). I consider therefore, that the learned Magistrate was correct to reject this part of the claim.

Conclusions

I would therefore allow the appeal and dismiss the cross-appeal. I would vary order 2 made by the Chief Justice and substitute for the amount of $7,150 the amount of $4,680 for compensation pursuant to s64(1), for the period 6/4/92 to 5/10/92. I would set aside order 3 made by the Chief Justice in relation to compensation pursuant to s65(1). As the appellant has been substantially successful I would order the respondent worker to pay the appellant's costs of the appeal to this Court, but order that each party pay their own costs of the appeal before the Court below.

BAILEY J

I have read the judgment of Mildren J in draft form. I agree with his Honour's reasons, conclusions and proposed orders.

I would only add that I am in complete agreement with his Honour's general observations about the need for magistrates presiding in the Work Health Court to address the relevant facts and legal issues in a clear and orderly fashion by reference to the precise language used by the *Work Health Act*. If magistrates adopt the guidance offered by his Honour, it would be of very real assistance in reducing the number and complexity of appeals arising under the Act.