CITATION:	*Khail v RTA Gove Pty Ltd & Anor* [2024] NTSC 9
PARTIES:	KHAIL, Sayed v RTA GOVE PTY LTD (ACN 000 453 663) and CONTITECH AUSTRALIA PTY LTD (ABN 97 000 468 780)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	IN THE MATTER of an appeal under Section 116 of the *Return to Work Act*
FILE NO:	2023-01466-SC
DELIVERED:	5 March 2024
HEARING DATES:	26 & 27 September 2023
JUDGMENT OF:	Kelly J

CATCHWORDS:

APPEAL – Section 116 of the *Return to Work Act* – appeal against decision of the Work Health Court – appeal on questions of law

Whether the trial judge erred in determining that the appellant was not suffering any loss of earning capacity at the time of the cancellation notice – insufficient findings on the extent of the appellant's incapacity to work amounted to an error of law – matter remitted to the trial judge

Whether s 69 notice can be relied on by an employer to deny liability for a previously accepted injury – whether s 69 notice can only be used to cancel or reduce benefits because of a change in circumstances – trial judge erred in limiting the application of s 69 notice – s 69 can be used for any lawful reason to cancel payments – invalid s 69 notice – employer entitled to commence proceedings for a declaration that the worker does not suffer from a compensable injury regardless of whether notice under s 69 has been validly given – cross-appeal allowed

Whether the finding that the appellant did not suffer a compensable mental injury was vitiated by errors of law – whether the appellant was denied procedural fairness – trial judge did not err in applying the onus of proof – judge is entitled to take into account matters on which she has formed the view that a witness has lied when assessing whether to believe other parts of the witness's evidence – grounds 4, 5 and 6 of appeal are dismissed.

Return to Work Act 1986 (NT), s 65, s 65(2), s 65(2)(a), s 65(2)(b)(i), s 65(2)(b)(ii), s 69, s 69(1), s 69(1)(b)(i), s 69(2), s 69(2)(D), s 85(3), s 89, s 116, s 116(1), Subdivision B of Division 3 of Part 5

Alexander v Gorey & Cole Holdings Pty Ltd (2002) 117 FLR 31; *Australian Gas Light Company v Valuer-General* (1940) 40 SR (NSW) 126; *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139; *Carlsen v AAT Kings Tours Pty Ltd 8 NTLR 114*; *Disability Services of Central Australia v Regan* (1998) 8 NTLR 73; *Edwards v R* (1993) 178 CLR 193; *Gauci v Federal Commissioner of Taxation* (1975) 135 CLR 81; *Hardy v Your Tabs Pty Ltd* [2000] NSWCA 150; *Lee v MacMahon Contractors Pty Ltd* (2018) 41 NTLR 168; *Millar v ABC Marketing and Sales Pty Ltd* [2012] NTSC 21; *Morrissey v Conaust Ltd* (1991) 1 NTLR 183; *Northern Territory of Australia v Noaks* [2023] NTCA 4; *Schell v Northern Territory Football League* (1995) 5 NTLR 1; *Steinberg v Federal Commissioner of Taxation* (1975) 134 CLR 640; *Tracy Village Sports & Social Club v Walker* (1992) 111 FLR 32, referred to

Cross on Evidence, 14th Edition by JD Heydon

REPRESENTATION:

Counsel:

Appellant:	BJ Doyle KC with MS Doyle
First Respondent:	JW Roper SC
Second Respondent:	D McConnel SC with J Nottle

Solicitors:

Appellant:	Tindall Gask Bentley
First Respondent:	Minter Ellison
Second Respondent:	Hunt & Hunt Lawyers

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

Khail v RTA Gove Pty Ltd & Anor [2024] NTSC 9
No. 2023-01466-SC

BETWEEN:

SAYED KHAIL
Appellant

AND:

RTA GOVE PTY LTD
(ACN 000 453 663)
First Respondent

AND:

CONTITECH AUSTRALIA PTY LTD
(ABN 97 000 468 780)
Second Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 5 March 2024)

[1] This is an appeal pursuant to s 116 of the *Return to Work Act 1986* (NT) ("the Act") against decisions of the Work Health Court made on 14 and 18 November 2022 with reasons delivered on 31 March 2023.

Background

[2] These background facts are taken from the judgment of the Work Health Court. Mr Khail ("the appellant") was born in war-torn Afghanistan and

among other traumas, he saw his father's body after he was shot by the Taliban in front of his house. The appellant fled that country when he was 17 years old, travelling through Pakistan, Malaysia and Indonesia, and finally making his way to Australia, by boat. It took him three attempts by boat from Indonesia before he was successful in reaching Australia. He was detained at the Christmas Island, Port Hedland and the Baxter detention centres over a period of four years. He obtained his release in Perth and immediately commenced employment.

[3] Before his back injury the appellant had worked as a belt splicer and rubber technician working on industrial conveyor belts mainly in the mining industry, obtaining work mostly through labour hire companies. Leading up to his present claim, the appellant has had other claims arising out of work injuries and an assault in 2014. From 2014 to the present day, the appellant has consulted with many doctors and psychologists with varying opinions and treatment regimens for his physical injury and mental health condition.

[4] Relevant to this proceeding, the appellant suffered an injury to his back on 5 September 2019 while in the employment of the second respondent ("Contitech"). At the time of the injury, Contitech had contracted with the first respondent ("RTA") to provide belt splicing services at the Gove mine site.

[5] The back injury occurred when the appellant and a co-worker were pulling 80-100 kilos of rubber belt off the back of a ute, and the appellant felt a

sharp pain to the left hand side of his back which radiated down through his buttocks and left leg. His claim for compensation for that back injury was accepted by RTA.

[6] After his back injury, the appellant was flown to Mackay to undertake light duties in the office of Contitech and to be closer to services for treatment on his back. On 19 November 2019 while undertaking light duties at the Mackay office, the appellant was subjected to inappropriate behaviour by his supervisor which he claims caused him a mental injury and he has not worked since that date.

[7] The appellant's claim for mental injury was originally accepted by Contitech with the proviso that they were accepting a claim for an aggravation of the appellant's post-traumatic stress disorder ("PTSD") but not his pre-existing PTSD nor for any psychological sequelae, for example adjustment disorder, or depression and anxiety, arising out of the original back injury.

[8] On 22 May 2020 RTA served on the appellant a notice pursuant to s 69 of the Act cancelling his benefits. That notice was supported by a certificate of Dr Frederick Phillips. Dr Phillips certified that the appellant was no longer incapacitated for work arising out of his back injury. That notice was followed by a letter and a s 69 notice from Contitech on 22 July 2020 cancelling the appellant's benefits attributable to his psychiatric claim.

Proceedings in the Work Health Court

[9] The appellant appealed both s 69 notices in the Work Health Court. In those proceedings the appellant claimed that he continued to be totally incapacitated for work in relation to both his back injury, a psychological/psychiatric sequela to that injury and, in the alternative, a psychiatric injury arising out of the incident on 19 November 2019.

[10] RTA filed a defence and counterclaim denying the appellant's claims against it and claiming that, no later than 15 April 2020, the appellant had ceased to be incapacitated by the original injury, or in the alternative had only partial incapacity which has not resulted in a loss of earning capacity.

[11] Contitech filed a defence and counterclaim also denying the appellant's claim and seeking declarations that:

(a) the appellant did not suffer a compensable mental injury from his employment with Contitech on 19 November 2019; and

(b) the appellant is not entitled to any or any further compensation with respect to the mental injury claim.

[12] Contitech claimed, further and in the alternative, that if the appellant did sustain an injury in the course of his employment with Contitech and continues to suffer from that injury, then the appellant has a capacity for employment.

Issues in the Work Health Court

[13] The trial judge identified the following issues raised for determination on the pleadings in the Work Health Court.

(a) Is the s 69 notice served by RTA valid and effective?

(b) Is the notice served by Contitech valid and effective?

(c) Does the appellant's back injury continue to cause an incapacity to work?

(d) Did the appellant's back injury lead to an adjustment disorder or PTSD?

(e) Do the psychological sequelae arising from the back injury result in the appellant continuing to be totally incapacitated for work?

(f) Did the incident on 19 November 2019 cause the appellant's PTSD or aggravate his pre-existing PTSD?

(g) If the appellant continues to be incapacitated for work what is his most profitable employment and does he have a limited or any ability to earn?

Decision of the Work Health Court

[14] The trial judge found:

(a) The s 69 notice served by RTA was valid.[1]

(b) The notice from Contitech to the appellant does not comply with the requirements of s 69 and is not valid as a notice to cancel benefits.[2]

(c) In relation to the physical injury, the appellant is not totally incapacitated for work and has the ability to work full time as a car park attendant.[3]

(d) The Court was not satisfied on the balance of probabilities that the appellant suffered an adjustment disorder arising from his physical injury.[4]

(e) The psychological sequelae arising from the back injury did not result in the appellant continuing to be totally incapacitated for work.

(f) In circumstances where the Court had made an unfavourable finding in relation to the appellant's credit, the Court could not be satisfied on the balance of probabilities that the appellant was being truthful in his report of his symptoms of mental health and back pain; or that he continued to suffer PTSD as a result of the work incident on 19 November 2019; or that he suffered a reoccurrence or aggravation of a pre-existing PTSD at all.

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1 Work Health Court decision [66]

2 Work Health Court decision [96]

3 Work Health Court decision [109]

4 Work Health Court decision [104]

(g) Accepting RTA's calculation of the worker's normal weekly earnings ("NWE") and the evidence of the weekly income from the identified job of a car park attendant, the appellant does not suffer any loss of earning capacity and his claim against RTA must fail (subject to any finding of a psychological injury arising out of the events of 19 November 2019).[5]

[15] The Work Health Court made the following orders:

1. The appellant's application for orders contained in 26.1 and 26.2 of his Further Amended Statement of claim is dismissed. (These were claims for declarations that the appellant suffered a compensable mental injury – either Post-Traumatic Stress Disorder[6] or Adjustment Disorder with mixed Anxiety and Depression.[7])

2. The appellant's application for declarations in 26.3.1 and 26.3.2 is dismissed. (These were claims for declarations that, as at the date of the 25 May 2020 notice of decision,[8] the appellant had not ceased to be incapacitated by the original injury and/ or the adjustment disorder;[9] and that, at the date of the 10 July 2020 notice of decision,[10] the appellant had not ceased to be incapacitated by the PTSD injury.[11])

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5 Work Health Court decision [110]

6 Paragraph 26.1

7 Paragraph 26.2

8 This is the date of the RTA notice of decision.

9 Paragraph 23.3.1

10 This is the date of the Contitech notice of decision.

11 Paragraph 26.3.2

3. The appellant's application for arrears and continuing benefits pursuant to s 65 is dismissed.

4. The appellant's application for s 89 interest is dismissed.

5. A declaration on RTA's counterclaim that there are no compensable psychological sequelae.

6. Contitech's counterclaim 35(b) is dismissed. (This was an application for a declaration that Contitech had validly disputed any further liability for the PTSD mental injury claim by the s 69 Notice on 10 July 2020.)

7. Contitech's counterclaim in paragraphs 35(a) and 35(c) is granted. (These were claims for a declaration that the appellant did not suffer a compensable mental injury from his employment with Contitech in November 2019, and a declaration that the appellant is not entitled to any or any further compensation with respect to the mental injury claim.)

8. The matter is certified fit for senior counsel.

The appeal

[16] The appellant has appealed against Orders 1 to 5 and 7 on the following grounds:

1. The learned trial judge erred in law in finding that the first respondent by its 22 May 2020 s.69 notice was entitled to cancel

weekly benefits payable to the appellant pursuant to Subdivision B of Division 3 of Part 5 of the *Return to Work Act* where:

1.1 the first respondent, having accepted, and not having subsequently put in issue, the compensability of the 5 September 2019 low back injury, was required to discharge the onus of proving that the injury was no longer causative of incapacity at the time of giving the notice of cancellation: *Northern Territory of Australia v Noaks* [2023] NTCA 4 at [49];

1.2 the learned trial judge's finding only went so far as to find that the appellant had ceased to be *totally* incapacitated as a result of the 5 September 2019 low back injury;

1.3 the learned trial judge failed to address the appellant's alternative case that at the time of the notice, and at all material times from the date of the notice, he remained *partially* incapacitated as a result of such injury;

1.4 there was no evidence capable of supporting a factual finding that the appellant had, as of 22 May 2020, ceased to be incapacitated as a result of the 5 September 2019 low back injury;

1.5 the learned trial judge failed to address whether, having found the notice technically valid, the first respondent had discharged its onus of proving that, at the relevant time, namely on 22 May 2020, the appellant had ceased to be incapacitated as a result of the 5 September 2019 low back injury;

1.6 the learned trial judge failed to give adequate reasons for such finding;

1.7 the finding was predicated on an erroneous assessment and determination (as a matter of law) of the appellant's 'loss of earning capacity' within the meaning of and for the purposes of Subdivision B of Division 3 of Part 5 of the *Return to Work Act* (refer Ground 2 hereof);

2. The learned trial judge erred in law in finding (and in giving inadequate reasons for finding) that the appellant did not "suffer any loss of earning capacity" resulting from the 5 September 2019 low back injury (or any sequelae thereto) and specifically, in so finding, the learned trial judge:

2.1 referred only to *"[the second respondent's] calculation of the worker's NWE"* (apparently) relative to *"the evidence of the weekly income from the identified job of a car park attendant"* without specifying in her reasons what were those respective amounts;

2.2 thereby inferred that the appellant's 'normal weekly earnings' (NWE) were less than the (unspecified) amount that she found that the appellant was capable of earning in the "identified job of a car park attendant" in circumstances where:

2.2.1 there was *no* evidence to support that inferential finding;

2.2.2 the learned trial judge made no reference to the agreement between the appellant and the first respondent whereby the rate of the appellant's normal weekly earnings was agreed at a rate of nearly 3 times the rate of remuneration adduced in evidence as applicable to the "identified job of a car park attendant";

2.2.3 the learned trial judge made no reference to, and gave no reasons for rejecting (as it must be inferred that she did), the admitted documentary evidence as to the rate of the appellant's normal weekly earnings;

2.2.4 the learned trial judge made no reference to, and gave no reasons for rejecting (as it must be inferred that she did), the appellant's written submissions on the rate of normal weekly earnings referable to the 5 September 2019 low back injury;

2.3. failed to refer to or apply s.65(2) of the *Return to Work Act* and specifically:

2.3.1 failed to assess the appellant's loss of earning capacity for the period 22 May 2019 to 5 September 2021, being the remainder of the first 104 week statutory period referred to in s. 65(2)(b)(i), by reference to the statutory test contained within that subsection which entailed consideration of whether the relevant employment was *reasonably available to the appellant*, when there was *no* evidence that the "identified job of a car park attendant" was reasonably available to the appellant during that period;

2.3.2 erroneously applied the statutory test contained in s. 65(2)(b)(ii) for the whole of the period from 22 May 2020.

3. The learned trial judge having found that the second respondent's 22 July 2020 section 69 notice was *not* a valid notice and that the appellant was accordingly entitled to be paid his weekly benefits by the second respondent "*until such time this Court finds otherwise"* or the second respondent "*serve(s) a valid notice"* erred in law in:

3.1 failing to make an order for weekly payments in accordance with the finding at Reasons paragraph [98] in the circumstances where

the trial judge had erred in law in finding that the appellant had not sustained a compensable mental injury as a result of the relevant work incident (which she found to have occurred) on 19 November 2019 (refer Ground 4);

3.2 purporting to grant the second respondent the relief sought by it in subparagraphs 35(a) and 35(c) of its counterclaim in the absence of a specific order for the cancellation or reduction of weekly payments given in accordance with s69(2)(d) of the *Return to Work Act.*

4. The learned trial judge erred in law in finding that the appellant did not suffer a psychiatric injury in consequence of the exchange with his supervisor on 19 November 2019. In particular the learned trial judge:

4.1 failed to refer to, or apparently apply, the relevant statutory test of compensability by reference to ss. 53(1), 3A(1), 4(6A) & 4(8) of the *Return to Work Act;*

4.2 thereby failed to give adequate reasons for such finding;

4.3 failed to have regard to the principle that it does not follow that because a witness is disbelieved on particular matters he or she ought to be disbelieved on all matters;

4.4 rejected the worker's evidence that, following the incident involving an exchange with his supervisor on 19 November 2019 (which the learned trial judge accepted had occurred), he had experienced suicidal ideation and taken certain steps towards implementation of such ideation

4.4.1 on the basis of an inference or inferences not open to be drawn according to law; and

4.4.2 notwithstanding that it was not directly put to the appellant in cross examination by the respondent(s) that this had not occurred;

4.5 failed to undertake a proper analysis of the medical evidence, and in particular the extensive medical evidence in the form of clinical records and expert medical reports which were supportive of a finding that the worker did suffer post-traumatic stress disorder or an aggravation of post-traumatic stress disorder in consequence of the aforesaid exchange with his supervisor; and in failing to undertake such analysis, the learned trial judge failed to give adequate reasons for such finding;

4.6 failed to take into account cogent evidence that provided substantial support for the appellant's case on this issue and in so doing failed to give adequate reasons for such finding;

4.7 failed, contrary to s66A of the *Evidence (National Uniform Legislation) Act 2011 (NT) S66A* to have due regard to admissible,

admitted and uncontradicted evidence, specifically the appellant's contemporaneous representations about his health, feelings, sensations, intention, knowledge or state of mind as appear in evidence comprised of:

4.7.1 email correspondence contemporaneous to the events of 19 November 2019;

4.7.2 medical records;

4.7.3 histories taken by treating and independent medical examiners;

4.8 failed to take account of the respondents' failure to observe the rule in *Brown v Dunn* in not cross-examining the appellant to challenge the correctness of relevant history given by him to various treating or independent medical experts;

4.9 based such finding to an impermissible degree on the opinion evidence of Dr Hundertmark and Professor Sahoo, to the extent that such evidence was inadmissible and wrongly admitted into evidence;

4.10 failed to give adequate reasons for such finding.

5. The learned trial judge erred in law in her credit assessment of the appellant and, in particular, the learned trial judge:

5.1 assessed the appellant's credit in isolation from all of the relevant evidence to which the learned trial judge was required by law to have regard on that question;

5.2 erred in law in the drawing of inferences adverse to the appellant's credit which were not open, as a matter of law, to be drawn on the evidence;

5.3 erred in law in reasoning that the appellant's admission of having made some untruthful statements to 3rd parties in respect of prior compensation claims and/or employments, necessitated her rejection of the appellant's evidence on all matters central to the appellant's case;

5.4 erred in law in basing her adverse assessment of the appellant's credit to a significant degree on matters which entailed no more than speculation, presumed possibilities, or possible inferences;

5.5 erred in law in basing her adverse assessment of the appellant's credit and in rejecting the appellant's uncontradicted evidence on critical issues of compensability and capacity, on reputational or propensity considerations which she erroneously ascribed to the appellant;

5.6 had regard to inadmissible (and prejudicial) hearsay and opinion evidence over objection;

5.7 failed to properly apply the 'Briginshaw Standard' in respect of the respondents' assertions of impropriety on the part of the appellant in respect of his previous claims' history;

5.8 erred in law in making adverse findings in respect of the credit of the appellant on the basis of irrelevant and largely unproven allegations or suspicions of illicit drug use;

5.9 erred in law in making adverse findings in respect of the credit of the appellant, on the basis of the appellant's in-court demeanour;

5.10 erred in law in making adverse findings in respect of the credit of the appellant by reason of his presence or absence from the courtroom during the course of the trial, including in circumstances where the appellant's absence was by reason of the interposition of expert witnesses prior to the completion of cross examination of the appellant by the respondents or for other proper reason.

5.11 made adverse findings in respect of the credit of the appellant on matters unrelated or factually peripheral to the central issues in contest between the parties, leading to the learned trial judge not accepting the truthfulness of history, and the genuineness of the symptoms and signs, presented by the appellant to the various medical experts in circumstances where it had not been put to the appellant in cross examination that the appellant had given untruthful or factually incorrect history to those medical experts or that his reported symptoms and presenting signs on examination by those experts were not genuine.

5.12 thereby denied the appellant procedural fairness.

6. The learned trial judge erred in law in failing to afford the appellant procedural fairness by:

6.1 Interrupting and then stopping the appellant's counsel's cross examination of Professor Sahoo over the appellant's counsel's protest and unnecessarily interrupting his cross examination of Dr Hundertmark;

6.2 Not giving the appellant's counsel, at any time prior to the delivery of reasons, notice that the learned trial judge was contemplating adverse credit findings against the appellant, and then vacating a date set for the hearing of oral submissions following the exchange of written submissions in which the appellant's counsel had expressed a wish to make further supplementary written or oral submissions.

[17] The appellant seeks the following orders:

1. That this appeal be allowed.

2. That Orders 1 to 5 and 7 of the Work Health Court as appearing on page 27 of the trial judge's reasons for decision delivered on 31 March 2023 be set aside.

3. A declaration that as of 22 May 2020, being the date of RTA's s 69 notice, the appellant had not ceased to be incapacitated by the 5 September 2019 injury to his low back ("the low back injury").

4. That RTA pay the appellant arrears of weekly benefits pursuant to Subdivision B of Division 3 of Part 5 and s 65 of the Act from 14 days after 22 May 2020 to date and continuing until otherwise cancelled or reduced in accordance with the Act.

5. That Contitech's s 69 notice dated 22 July 2020 be set aside.

6. A declaration that the appellant has remained partially incapacitated for work as a result of the low back injury since 22 May 2020.

7. That subject to due allowance for arrears of weekly payments payable to the appellant by RTA, Contitech pay the appellant arrears of weekly benefits pursuant to Subdivision B of Division 3 of Part 5 and s 65 of the Act on the basis of total incapacity for work, from the date such payments were ceased, to the present date and continuing until otherwise cancelled or reduced in accordance with the Act.

8. That RTA and Contitech pay the appellant interest on arrears of weekly payments in accordance with s 89 of the Act.

9. That RTA's counterclaim be dismissed.

10. In the alternative, that these proceedings be remitted to the Work Health Court for retrial before another judge of that Court.

11. That RTA and Contitech pay the appellant's costs of the trial to be taxed as between party and party in default of agreement.

12. That RTA and Contitech pay the appellant's costs of this appeal.

[18] The Notice of Appeal is both lengthy and difficult to follow. Accordingly, on the hearing of the appeal I clarified with counsel that the only grounds of appeal pressed are those dealt with in the appellant's written submissions. Counsel for the appellant summarised the appeal grounds as follows.

(a) The trial judge erred in law in determining that the appellant was not suffering any loss of earning capacity arising from his accepted 5 September 2019 low back injury at the time of the cancellation notice (and further erred in law in not making an order against RTA in favour of the appellant for arrears of weekly payments and interest from 6 June 2020 when the cancellation of weekly payments took effect pursuant to RTA's s 69 notice). (Appeal grounds 1 and 2)

(b) The trial judge erred in law in dismissing the appellant's claim against Contitech for arrears of weekly payments despite having found that Contitech's cancellation notice was invalid. The appellant contends that unless and until the judge made an order for the cessation or reduction of compensation under s 69(2)(d), the trial judge should have made an order for weekly payments and interest against Contitech (from 6 June 2020) irrespective of her Honour's finding as to whether the appellant had suffered a compensable mental injury on 19 November 2019. (Appeal ground 3) (This was described by counsel for the appellant as narrow and technical in that the appellant concedes that *Alexander v Gorey and Cole*[12] is authority for the proposition that the Work Health Court has power to make such an order "retrospectively".)

(c) The trial judge's finding that the appellant did not suffer a compensable mental injury on 19 November 2019 was vitiated by errors of law. (Appeal grounds 4, 5 and 6) There are four aspects to this group of appeal grounds:

(i) The appellant contends that the trial judge effectively reversed the onus on this issue: the onus was on Contitech to prove that the appellant did not suffer an aggravation of a pre-existing PTSD on 19 November 2019.

12 (2002) 117 FLR 31

(ii) The appellant contends that the trial judge made errors of law in assessing the credit of the appellant.

(iii) The appellant contends that the trial judge erred in law by failing to engage with the real issues that were presented by the appellant on the question of whether Contitech had proved that the appellant did not suffer from an aggravation of PTSD on 19 November, and failed to engage with the appellant's evidence on these issues.

(iv) The appellant contends that the trial judge denied the appellant procedural fairness in cutting short the appellant's cross examination of a medical witness.

[19] The respondent to Grounds 1 and 2 is RTA; the respondent to the other grounds is Contitech.

[20] On the second day of the hearing of the appeal, Contitech was given leave to file a notice of cross appeal, appealing against the trial judge's decision that its s 69 notice (disputing liability to pay weekly benefits in respect of the claim for an aggravation of the appellant's PTSD) was invalid;[13] the appellant was given leave to make any necessary amendment to its notice of appeal; and both parties were given leave to file and serve written submissions on the issues raised within seven days.

13 Contitech had previously raised the same issues in a notice of contention.

Nature of the Appeal

[21] This is an appeal under s 116 of the *Return to Work Act* and, accordingly, limited to appeal on questions of law.[14] In deciding the appeal, the Supreme Court may:

(a) confirm or vary the decision or determination; or

(b) set aside the decision or determination and substitute its own decision or determination; or

(c) set aside the decision or determination and remit the matter to the Work Health Court.

Grounds 1 and 2: low back injury and loss of earning capacity (respondent: RTA)

[22] The appellant's submissions on these grounds begin with the proposition that having found RTA's s 69 notice to be formally valid, the trial judge was required to consider:

(a) the substantive issue raised on the notice of cancellation, namely whether the appellant had ceased to be incapacitated for work by the 5 September 2019 injury at the time the notice was given; and

(b) whether, in the event of a finding that the appellant had not ceased to be incapacitated for work by the 5 September 2019 injury at the time

14 Section 116(1)

the notice was given, he had an earning capacity as asserted by the first respondent in its counterclaim.

[23] The trial judge undertook this exercise[15] and found:

(a) RTA's s 69 notice was valid;[16]

(b) the physical injury was not significant enough to render the appellant totally incapacitated for work at any material time subsequent to 16 June 2020 (the date of cancellation of his weekly benefits);[17]

(c) while there was some evidence that the appellant had some psychological issues between the time of his physical injury and the incident of 19 November 2019, the trial judge was not satisfied on the balance of probabilities that the appellant had suffered an adjustment disorder arising from his physical injury as a psychological sequela to the physical injury;[18]

(d) in relation to the physical injury the appellant was not totally incapacitated for work and had the ability to work full time as a car park attendant;[19]

(e) and hence, accepting RTA's calculation of the appellant's NWE and the evidence of the weekly income from the identified job of a car park

15 Work Health Court decision [57] to [68] and [101] to [111]

16 Work Health Court decision [66]

17 Work Health Court decision [108]

18 Work Health Court decision [104]

19 Work Health Court decision [109]

attendant, the appellant did not suffer any loss of earning capacity and his claim against RTA must fail.[20]

[24] The appellant contends that these findings were erroneous for the following reasons:

(a) The trial judge failed to distinguish between the first 104 week period following the low back injury and the subsequent period. During the remaining part of the 104 week period following the low back injury, absent a finding (which was not made) that there was in fact a full time car park attendant job "reasonably available" to the appellant at the time of the cancellation (and subsequently), the trial judge should have found that the appellant was entitled to payments of 75% of the appellant's accepted NWE[21] of $3,171.83.[22] Thereafter, the appellant was entitled to payments of 75% of the difference between the appellant's accepted NWE (indexed as necessary) and the income that could have been earned as a car park attendant[23] ($1,184 per week).[24]

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20 Work Health Court decision [110]

21 Section 65(2)(a) and 65(2)(b)(i)

22 The appellant says that this amount was accepted by the respondents as the correct figure for the appellant's NWE. (Appellant's written submissions at [89])

23 Section 65(2)(a) and 65(2)(b)(ii) of the Act

24 This is the amount given in evidence by the occupational therapist. (Appellant's written submissions [90]). It would seem from the statement in the Work Health Court decision at [110] that RTA did NOT agree and that its figure for the appellant's NWE was less than the car park attendant's wage. However, the only evidence on this was from the occupational therapist.

(b) The appellant characterizes this as a failure by the trial judge to direct herself according to law, namely s 65(2) of the Act, and thus an error of law.[25]

(c) In written submissions the appellant contends that this error can be characterized in the alternative as a finding of fact (namely that the appellant's NWE was no greater than the rate of pay able to be earned by a car park attendant) when there was no evidence capable of supporting such a finding.[26] This, it is said, would amount to an error of law.[27]

(d) In the further alternative, the appellant characterizes the error as a failure to give reasons, contending that the trial judge failed to give reasons sufficient to explain that conclusion, in a manner which amounts to an error of law.[28] The reasons do not expose the judge's reasons on points critical to the contest between the appellant and the first respondent on the issue of the assessment of the appellant's loss of earning capacity.

[25] The first respondent, RTA, submits that this contention by the appellant involves a misunderstanding of the trial judge's findings at [110] of the

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25 The appellant cited the following authorities: *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 156 (Glass JA, Samuels JA agreeing); *Lee v MacMahon Contractors Pty Ltd* (2018) 41 NTLR 168 at [17] (Grant CJ, Southwood J and Riley AJ), referring to *Australian Gas Light Company v Valuer-General* (1940) 40 SR (NSW) 126 at 138.

26 Appellant's written submissions [95]

27 *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 155 (Glass JA, Samuels JA agreeing); *Tracy Village Sports & Social Club v Walker* (1992) 111 FLR 32 (Mildren J).

28 The appellant cited *Northern Territory of Australia v Noaks* [2023] NTCA 4 at [30]-[33].

judgment at first instance and that what her Honour intended by that paragraph was to convey that:

(a) for the purposes of RTA's counterclaim;

(b) to the extent that it was necessary to consider the counterclaim given her findings as to the s 69 Notice; and

(c) consistent with the submissions that were put to her Honour below,

any ongoing partial loss of earning capacity referable to the physical injury, was subsumed by the appellant's ability to earn in alternative employment.

[26] I do not understand RTA to be saying anything different from the appellant in this contention. The problem identified by the appellant is that the appellant's "ongoing partial loss of earning capacity referable to the physical injury" cannot have been "subsumed by the appellant's ability to earn in alternative employment" because the evidence was clear that the earnings available from the identified alternative employment were less than the appellant's NWE.

[27] RTA contends further that even if the trial judge did find that the appellant's capacity to earn $1,024.00 per week as a carpark attendant eclipsed his admitted NWE of $3,194.00, and that same finding constituted an error of law so as to found an appeal to this Court under s 116(1) of the Act, it does not follow that the appellant's appeal ought be allowed. In order to succeed on this appeal, the appellant needs to satisfy the Court that there was "a real

possibility, not a mere or slight possibility, that the error" vitiated her Honour's ultimate decision, that is to say, that absent the error, there was a real possibility that the result may have been otherwise. RTA contends that the result was inevitable; there was no possibility that the trial judge would do otherwise than dismiss the appellant's claim against RTA for compensation for loss of earning capacity as a result of continuing partial incapacity from the low back injury.

[28] RTA submitted that, contrary to the appellant's interpretation of the trial judge's reasons, her Honour in fact found that the appellant was no longer incapacitated for work as at the date of RTA's s 69 notice. The trial judge said:[29]

> Given I have found there is insufficient evidence to support a finding of an adjustment disorder as a psychological sequelae (sic) to the physical injury and relying on the evidence of Ms Zenman (which is largely unchallenged), I am led to the inevitable conclusion that in relation to the physical injury the worker is not totally incapacitated from work and has the ability to work full time as a car park attendant.
>
> Accepting RTA's calculation of the worker's NWE and the evidence of the identified job of a car park attendant, I find the worker does not suffer any loss of earning capacity and his claim against RTA must fail.

[29] The appellant interpreted this as a finding by the trial judge that the appellant was suffering from a partial incapacity – ie he could work as a car park attendant but could not return to his previous (more remunerative) employment as a belt splicer.

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29 Work Health Court decision at [109]–[110]

[30] RTA interpreted these paragraphs of the judgment (in particular the comment, "I find the worker does not suffer any loss of earning capacity and his claim against RTA must fail,") as a finding that the appellant was not suffering from any incapacity for work as at the date of RTA's s 69 notice.

[31] Mr Roper for RTA relied on these paragraphs of the trial judge's reasons as an express, or at least implied, finding that as at the date of RTA's s 69 notice, the appellant was not suffering from any incapacity for work.[30]

> Following that reasoning I can be satisfied that the s 69 notice served by the first employer to be valid (sic) as it is clear read (sic) as a stand alone document with appropriate certificate that the Worker's benefits were being cancelled on the basis that the worker was no longer incapacitated for work as a consequence of his back injury.
>
> …
>
> Having found the s 69 notice was valid I must then consider the Worker's claim that he continues to be incapacitated due to his back injury, and the psychological sequelae. I must also consider RTA's counterclaim that even if the back injury (and the psychological sequelae) is still affecting the Worker and his capacity to do certain tasks, his most profitable employment equates to no loss of earning capacity.
>
> *[Her Honour then digresses to consider the validity of Contitech's s 69 notice. Thereafter, at [112] ff her Honour considers the issues in Contitech's counterclaim and does not return to the question of whether the appellant remained partially incapacitated for work.]*

[32] RTA's contention that these paragraphs expressly or impliedly find that the appellant was no longer suffering from any incapacity for work from the date of the s 69 notice, hinges on acceptance of RTA's submission that in

30 Work Health Court decision [66] and [68]

finding the s 69 notice "valid", the trial judge was referring not just to its compliance with the technical requirements in the legislation, but also finding in RTA's favour on the substantive merits of RTA's reasons for cancelling the appellant's benefits.

[33] That submission cannot be accepted. First, paragraph [66] begins, "Following that reasoning I can be satisfied that the s 69 notice served by the first employer to be valid (sic)". As counsel concedes, that must be a reference to the reasoning in the preceding paragraphs [57] to [65] under the heading VALIDITY OF THE FIRST EMPLOYERS (SIC) SECTION 69 NOTICE. All of these paragraphs concern the technical requirements for a valid notice. RTA pointed to the fact that this was preceded by a discussion of the evidence in the trial. However, that discussion was under a different heading and did not contain a finding that the appellant did not suffer from any incapacity for work.

[34] Further, in paragraph [66] the trial judge gives her reasons for finding the notice to be valid by reciting the technical requirements it is said the notice complies with:

> "as it is clear read as a stand alone document with appropriate certificate that the Worker's benefits were being cancelled on the basis that the worker was no longer incapacitated for work as a consequence of his back injury."

[35] The trial judge does not give as a reason for finding the s 69 notice valid, anything to do with the substantive merits of RTA's reasons for cancelling the appellant's benefits.

[36] The trial judge's findings in relation to the extent of the appellant's incapacity for work (if any) in paragraphs [109] – [110] are ambiguous. If the trial judge intended to find partial incapacity, in that the appellant could work as a car park attendant but not in his pre-accident employment as a belt splicer as a result of the low back injury, then her Honour was clearly in error in saying that the appellant had not suffered any loss of earning capacity as the only evidence adduced on the topic was clear - a car park attendant could earn $1,184 per week - and the agreed figure for the appellant's NWE at his previous employment was $3,171.83.

[37] This, it seems to me, was an error of law. The reasons do not expose the trial judge's reasoning process for dismissing the appellant's claim against RTA.[31] If the trial judge intended to find partial incapacity, then her Honour failed to apply the correct test in s 65 of the Act for determining whether there had been a loss of earning capacity and, if so, the amount of compensation payable. If the trial judge meant to find there was no incapacity, then her Honour failed to say so clearly and unambiguously and her Honour's reasons were deficient in this respect. Given that it is impossible to know which error the trial judge committed, it is not possible

31 *Northern Territory of Australia v Noaks* [2023] NTCA 4 at [30]-[33]

to say that the error would have made no difference to the outcome. If the error in question was the first one (ie failure to apply the correct test in s 65), as it may have been, the outcome would have been different.

[38] Section 65 of the Act provides (relevantly):

> **Long-term incapacity**
>
> (1) This section applies to a worker who is totally or partially incapacitated for work as the result of an injury out of which his or her incapacity arose or that materially contributed to his or her incapacity.
>
> (1B) A worker to whom this section applies must be paid compensation, in accordance with subsections (1BA) to (1D), equal to whichever of the following is the lesser at the time the payment is made:
>
> (a) 75% of the worker's loss of earning capacity;
>
> (b) 150% of average weekly earnings.
>
> …
>
> (2) For the purposes of this section, loss of earning capacity in relation to a worker is the difference between:
>
> (a) his or her normal weekly earnings indexed in accordance with subsection (3); and
>
> (b) the amount, if any, he or she is from time to time reasonably capable of earning in a week in work he or she is capable of undertaking if:
>
> (i) in respect of the period to the end of the first 104 weeks of total or partial incapacity – he or she were to engage in the most profitable employment (including self-employment), if any, reasonably available to him or her; and
>
> (ii) in respect of the period after the first 104 weeks of total or partial incapacity – he or she were to engage in the most profitable employment that could be undertaken by that worker, whether or not such employment is available to him or her,
>
> and having regard to the matters referred to in section 68.

[39] If the trial judge's finding was that the appellant was partially incapacitated, then it is clear that her Honour did not apply her mind to the test set out in s 65 as her Honour did not distinguish between the first 104 weeks of incapacity and the period after the first 104 weeks and did not make any of the relevant findings required by the section.

[40] Counsel for RTA attempted to show, by means of examining the trial judge's comments on the medical evidence, that RTA's interpretation of the judge's reasons was correct – ie that the appellant was not suffering any incapacity at the date of RTA's s 69 notice. However, the evidence in relation to that issue was not all one way and, having found no total incapacity, if the trial judge had turned her mind to the question of whether the appellant was partially incapacitated (as on one view of the reasons she did not), it is by no means inevitable that her Honour would have found that there was no incapacity at all.

[41] These grounds of appeal will be allowed and the matter remitted to the trial judge to make the following determinations, given her Honour's existing findings that the appellant's NWE was $3,171.83 and the amount a car park attendant could reasonably earn was $1,184 per week.

(1) Was the appellant suffering from a partial incapacity for work as at the date of RTA's s 69 notice?

(2) If the answer to (1) is yes, has RTA proved that a car park attendant's job was reasonably available to the appellant for some or all of the

balance of the 104 weeks since the beginning of appellant's incapacity/ and, if so, which part?

(3) What is the appellant's entitlement to compensation for the balance of the first 104 weeks of his incapacity applying the formulae in s 65?

(4) What is the appellant's entitlement to compensation for the period of partial incapacity after the first 104 weeks of his incapacity, applying the formulae in s 65?

Ground 3: Entitlement to arrears pending s 69(2)(d) Order and Contitech's Cross-Appeal against the finding that its s 69(1) notice was invalid (Respondent: Contitech)

[42] This ground of appeal concerns the trial judge's dismissal of a claim for arrears in relation to the non-payment of any weekly benefits by Contitech. The appeal on this ground will be dismissed and the cross-appeal allowed in part only.

Summary

[43] The appellant contends that, given the finding that Contitech's s 69(1) notice was invalid, Contitech is obliged to make payments of compensation to the appellant until the Work Health Court makes an order under s 69(2) cancelling compensation from a nominated date. It was not sufficient for the Work Health Court to make a declaration that the appellant did not sustain a compensable mental injury from his employment with Contitech in

November 2019 and a declaration that the appellant is not entitled to any further compensation with respect to his mental injury claim.[32]

[44] In its cross appeal, Contitech contends that the trial judge erred in law in finding its s 69(1) notice invalid for the expressed reasons that:

(a) an employer cannot rely on a s 69 notice to deny liability for an injury that has previously been accepted;

(b) a s 69 notice can only be used to cancel or reduce benefits because of a change of circumstances;

(c) the notice was not accompanied by a medical certificate as required by s 69(3).

Contitech submits that each of these findings was in error.

[45] The appellant contends that even if the trial judge erred in taking an unduly limited view of the purposes for which a s 69 notice could be employed, Contitech's s 69(1) notice was in any event invalid because a medical certificate was required and, in any event, Contitech's notice did not give 14 days' notice of cancellation as required by s 69(1), but purported to cancel compensation forthwith.

[46] Contitech contends that even if its s 69(1) notice was invalid, the ultimate finding of the Work Health Court that the appellant had not suffered a

32 Work Health Court decision [187] g. granting the declarations in Contitech's Counterclaim [35] a. and c.

mental injury as a result of the 19 November 2019 incident meant that no compensation was payable at all. It was not necessary for the Court to make an additional order under s 69(2) cancelling payments of compensation.

[47] The following issues fall to be determined under this ground of appeal and cross appeal.

(a) Did the trial judge err in holding that an employer cannot rely on a s 69 notice to deny liability for an injury that has previously been accepted?

(b) Did the trial judge err in holding that a s 69 notice can only be used to cancel or reduce benefits because of a change of circumstances?

(c) Did the trial judge err in holding that Contitech's s 69(1) notice was invalid because it was not accompanied by a medical certificate as required by s 69(3)?

(d) Was Contitech's s 69(1) notice invalid in any event because it failed to give 14 days' notice of cancellation?

(e) If Contitech's s 69(1) notice was invalid, and hence ineffective to cancel compensation payments, was Contitech obliged to make payments of compensation to the appellant until the Work Health Court made an order pursuant to s 69(2) cancelling payments from a specified date, or was it sufficient for the Court to make declarations, as it did, that the appellant had not suffered a compensable injury and was not

entitled to any further payments of compensation for the claimed mental injury?

[48] For the reasons which follow, the answers to these questions are as follows.

(a) The trial judge did err in holding that an employer cannot rely on a s 69 notice to deny liability for an injury that has previously been accepted.

(b) The trial judge did err in holding that a s 69 notice can only be used to cancel or reduce benefits because of a change of circumstances.

(c) The trial judge did not err in holding that Contitech's s 69(1) notice was invalid because it was not accompanied by a medical certificate as required by s 69(3).

(d) Contitech's s 69(1) notice was invalid in any event because it failed to give 14 days' notice of cancellation.

(e) However, Contitech was nevertheless not obliged to make payments of compensation to the appellant. It was not necessary for the Work Health Court to make an order pursuant to s 69(2) cancelling payments from a specified date. It was sufficient for the Court to make declarations, as it did, that the appellant had not suffered a compensable injury and was not entitled to any further payments of compensation for the claimed mental injury.

Analysis

[49] The appellant contends that it is entitled to be paid arrears of compensation based on the following findings of the trial judge:

(a) the finding that Contitech accepted the appellant's claim for a mental injury suffered on 19 November 2019, specifically an aggravation of a pre-existing post-traumatic stress disorder;[33]

(b) the finding that once Contitech's notice under s 69 became effective, Contitech had been obliged to make weekly payments by reason of its acceptance of the 19 November 2019 injury;[34]

(c) the finding that, having regard to its form and content, Contitech's s 69 notice dated 22 July 2020 was invalid.[35]

[50] The appellant contends that, having accepted the appellant's claim for compensation for a mental injury (aggravation of an existing PTSD) suffered on 19 November 2019, Contitech was obliged to begin making payments of compensation to the appellant within three working days.[36]

[51] Section 69(1) provides that, "subject to this Subdivision (ie Sub-division B of Division 3 of the Act), an amount of compensation under this Subdivision (ie compensation for total or partial incapacity for work) shall not be

33 Work Health Court decision [70]

34 Work Health Court decision [77]

35 Work Health Court decision [88] to [97]

36 Section 85(3) of the Act

cancelled or reduced unless the worker to whom it is payable has been given a notice that complies with s 69(1). Section 69(2) provides a number of exceptions to s 69(1), one of which is that the Court orders the cancellation or reduction of the compensation.[37] The appellant's contention is that, as there was no valid notice under s 69(1), and none of the other exceptions apply, Contitech was obliged to make payments commencing on a date not more than three days after the acceptance of the claim and continuing to the date nominated in a Court order under s 69(2) cancelling the compensation, and no such order has as yet been made.

[52] The trial judge appears to have accepted this, but did not order Contitech to pay arrears of benefits.

[53] The trial judge considered the validity of Contitech's cancellation of benefits from [70] to [100] of the Work Health Court decision. Her Honour recited the acceptance by Contitech of the mental injury arising out of the incident on 19 November 2019; the fact that, despite the acceptance, Contitech did not pay any benefits arising out of that injury because RTA was paying the appellant's benefits relating to the back injury up to the time of the service of RTA's s 69 notice; and the fact that Contitech did not commence payment of weekly benefits after RTA cancelled their benefits but instead sent a letter on 16 June 2020 cancelling benefits and then a Notice of Decision on 10 July 2020 which stated that Contitech: "Cancels

37 Section 69(2)(d) of the Act

payments of compensation under Subdivision B of Division 3 of Part 5 of the *Return to Work Act*".

[54] The trial judge next set out the reasons given in the s 69 Notice for the decision not to pay benefits:

> 5. The Employer by its insurers has reviewed the information available to it regarding the PTSD claim and is not satisfied that you sustained an injury in the nature of an aggravation of PTSD that arose out of or in the course of your employment with the Employer on or about 19th November 2019;
>
> 6. Further and in the alternative, if you did suffer an injury in the nature of an aggravation of PTSD the aggravation was temporary and any aggravation of PTSD materially contributed to by your employment has ceased;
>
> 7. Further and alternatively, any incapacity for work is no longer the result of the aggravation of your PTSD but is the result of:
>
> (a) the medical treatment that you are currently receiving which is contraindicated for aggravation of PTSD; and /or
>
> (b) recreational /personal illicit drug use of marijuana and methamphetamine.

[55] The trial judge then posed the following questions arising from the service of this notice:[38]

> (a) If Contitech never commenced payments to the Worker is the service of a section 69 notice the appropriate process to advise the Worker that they no longer accept liability? *[This question was answered in the negative. See [56] to [58] below]*.

38 Work Health Court decision [74]

(b) As Contitech has accepted liability should it be responsible to pay compensation until it has served a valid notice under section 69?

[Although this question was answered in the affirmative – see [59] to [60] below – the trial judge did not order Contitech to pay arrears of benefits, presumably because of the finding that the appellant had not suffered a compensable mental injury – see [61] to [63] below.][39]

[56] The trial judge then made the following finding:[40]

> On first principles once an employer accepts liability then it is liable to pay the Worker benefits' until either the benefits are cancelled or reduced through the operation of section 69, or there is an order of the Court". Once RTA ceased payment arising out of the physical injury Contitech ought to have commenced weekly benefits until it served either a valid section 69 notice, or this Court determined an application to the Court for a declaration that the Worker did not suffer a compensable injury whilst working for Contitech or no longer is incapacitated for work.

[57] The trial judge held that s 69 was not available to an employer who has accepted liability but, as in this case, has not paid benefits,[41] and that, in such a case, the only option is for the employer to make an application to the Court for a declaration that the worker did not suffer a compensable injury while in the employment of the employer, or does not continue to

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39 At this point (Decision [75]) the trial judge cited *Laminex v Catford* [2021] NTSC 92 in which Grant CJ adopted the reasoning by Mildren J in *Newton v Masonic Homes Inc* [2009] NTSC 51. However, these cases concerned a different requirement of s 69 to that under consideration in this case.

40 Work Health Court decision [77] (punctuation in original)

41 Work Health Court decision [78] to [83]

suffer an incapacity arising out of a compensable injury.[42] Her Honour noted that Contitech had made such an application.

[58] The trial judge held that "the benefits and payment of benefits is (sic) to continue until properly cancelled or reduced pursuant to section 69 of the Act"[43] and that:[44]

> Given Contitech did not commence weekly benefits as they were obliged to do once RTA ceased paying, they cannot rely on section 69 process to now deny liability for the mental injury previously accepted. They can only use section 69 to cancel or reduce benefits because of a change of circumstances.

[59] The trial judge continued:[45] "If I am wrong about that then the form of notice served on the worker needs to be scrutinised." Her Honour went on to find that Contitech's s 69 notice was invalid because the notice did not have attached a medical certificate as required by s 69.[46]

[60] Next, her Honour held:[47]

> Further, the use of the notice to deny liability once liability has been accepted is not a process available to Contitech. Once a Worker makes a claim an Employer has to either accept, defer or dispute the liability within 10 days of the claim. If an Employer fails to make a decision within the specified time (including within a deferral period) then the Employer is deemed to have accepted liability.

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42 Work Health Court decision [84]

43 Work Health Court decision [85]

44 Work Health Court decision [87]

45 Work Health Court decision [88]

46 Work Health Court decision [93] – [94]

47 Work Health Court decision [97] - [99]

> Once liability has been accepted the only avenue open to the Employer to then deny liability for payment of benefits to the Worker is by order of this Court. The Notice is therefore ineffective as a notice to deny liability and consequentially the Worker is entitled to be paid his weekly benefits by the second employer until such time this court finds otherwise.
>
> Contitech is therefore required to pay the Worker weekly benefits for his mental injury of an aggravation of his PTSD (as originally accepted by Contitech) until this Court rules otherwise or they serve a valid section 69 notice.

[61] However, the trial judge did not order Contitech to pay arrears of benefits.

Her Honour said:[48]

> Having found the worker's benefits payable by the second employer were wrongfully cancelled after liability had been accepted by Contitech, it is for the second Employer to prove to the necessary standard that the Worker did not suffer a compensable injury arising out of the incident of 19 November 2019 as they have claimed in their counterclaim.

[62] Her Honour then analysed the evidence of the appellant and the medical and other evidence and concluded:[49]

> I cannot be satisfied on the balance of probabilities that the worker is being truthful in his report of his symptoms of mental health and back pain or that he continues to suffer PTSD as a result of the work incident on 19 November 2019. Or that he suffered a reoccurrence or aggravation of a pre-existing PTSD at all.

[63] Her Honour then made orders including:[50]

> c. Worker's application for arrears and continuing benefits pursuant to section 65 is dismissed.

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48 Work Health Court decision [112] after first considering the appellant's claim against RTA at [101] to [111]

49 Work Health Court decision [185]

50 Work Health Court decision [87] c. and d.

d. Worker's application for section 89 interest is dismissed.

[64] The trial judge did not explicitly say why the appellant's application for payment of benefits was dismissed after holding[51] that Contitech was required to pay the appellant weekly benefits for his mental injury of an aggravation of his PTSD (as originally accepted by Contitech) until the Court "rules otherwise" or Contitech serves a valid s 69 notice. It may have been because the trial judge implicitly accepted the proposition contended for by Contitech on this appeal, that, regardless of the validity or otherwise of any s 69 notice served by the employer, a worker is not entitled to payment of any compensation unless it has been established that the worker suffered a compensable injury (the onus being on the employer to establish that the worker did not suffer such an injury).

[65] Alternatively, it may have been because the trial judge considered that a finding in favour of the employer on the employer's claim pursuant to s 104 of the Act for a declaration that the worker did not suffer a compensable injury in the course of the worker's employment or no longer is incapacitated for work, amounted to an order cancelling compensation for the purpose of s 69(2)(d).[52] That would appear to be what the trial judge was saying at [98] – [99] of the decision of the Work Health Court.

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51 Work Health Court decision [99]

52 It may have been a combination of both of these.

[66] The appellant contends that making such a declaration is not sufficient for the purpose of s 69(2)(b) which requires the court to specifically order the cancellation of benefits and (implicitly) to specify a date from which benefits are to cease.

[67] The appellant takes issue with the trial judge's statement of the law at [98]:

> Once liability has been accepted the only avenue open to the Employer to then deny liability for payment of benefits to the Worker is by order of this Court. The Notice is therefore ineffective as a notice to deny liability and consequentially the Worker is entitled to be paid his weekly benefits by [Contitech] until such time as this court finds otherwise.

[68] The appellant submits that the trial judge's finding that Contitech's s 69 notice was ineffective as a notice to deny liability is correct as is the finding that the appellant was entitled to be paid his weekly benefits by Contitech, but contends that her Honour was in error in saying that this was so "until such time as this court finds otherwise".

[69] The appellant contends that it is not sufficient for the Court to find that the appellant is not entitled to compensation; the effect of s 69(2)(d) is that the liability of the employer to make payments of compensation persists until there has been an order of the Court that compensation be cancelled. The appellant contends further that the making of such an order involves the exercise of a discretion and requires the fixing of a date from which compensation is cancelled. This was not done by the trial judge; hence the

trial judge lacked the jurisdiction to dismiss the appellant's claim for payment of arrears of compensation.[53]

[70] On the other hand, Contitech contends that the ultimate finding of the Work Health Court that the appellant had not suffered a mental injury as a result of the 19 November 2019 incident made the decision in relation to arrears otiose because the effect of the finding that no injury had been suffered was that no compensation was payable for any period whatsoever.

[71] Contitech contends that there is no absolute entitlement to continue to receive weekly payments of compensation until payments are validly cancelled. The underlying entitlement to compensation is dependent on proof that a worker continues to have an incapacity that is productive of a loss of earning capacity. If the underlying entitlement to compensation ceases then the Court may determine that no compensation is payable from whatever date the Court finds the entitlement ceased,[54] or, if (as in this case) there had never been a compensable injury, that no compensation had ever been payable.

[72] Contitech contends that, once the critical factual finding was made that the appellant's evidence on symptomology was unreliable, the trial judge had to consider what that meant for the appellant's claim. Any continued entitlement to compensation was contingent upon the Court being satisfied

53 Work Health Court decision [187] c.

54 *Alexander v Gorey & Cole Holdings Pty Ltd* (2002) 117 FLR 31 at [30]

that the appellant had an incapacity for work due to a compensable injury. The unreliability of the appellant's evidence meant that:

(a) the question of whether the appellant suffered a PTSD injury or an aggravation of PTSD was answered in the negative;
(b) no entitlement to compensation for a mental injury arose;
(c) the appellant was not otherwise entitled to compensation for the irregular or invalid cancellation of compensation by notice under s 69 of the Act if no injury was found to have occurred; and so
(d) the only appropriate order to be made in respect of the appellant's claim against Contitech was for it to be dismissed.

[73] In its cross-appeal, Contitech contends further that the trial judge made an error of law in construing s 69(1) of the Act, holding, erroneously,[55] that "an employer cannot rely on a s 69 notice to now deny liability for the mental injury previously accepted. They can only use s 69 to cancel or reduce benefits because of a change of circumstances". This erroneous finding led the trial judge to hold, again erroneously, that "the use of a notice to deny liability once liability has been accepted is not a process available to Contitech. … The Notice is … ineffective as a notice to deny liability and consequently the Worker is entitled to be paid his weekly benefits by the second employer until such time as this court finds otherwise".

55 Work Health Court decision [87]

[74] Contitech contends that an employer may use a s 69 notice to deny liability for a previously accepted injury and may specify any lawful reason at all for doing so. An employer is not confined to the reason that the appellant has ceased to be incapacitated, or ceased to be totally incapacitated for work as a result of the injury. Section 69(1)(b)(i) simply requires that the notice include "a statement in the approved form … setting out the reasons for the proposed cancellation or reduction".

[75] Further, Contitech contends that the requirement for a medical certificate is limited to the circumstances in which the applicable reason for cancellation of compensation is that the worker has ceased to be incapacitated for work. The inclusion of that requirement in s 69(3) does not have the effect of limiting the available scope of a notice issued under s 69(1) to only those reasons which assert a reduction or cessation of incapacity. Contitech relies on the following authorities: *Morrissey v Conaust Ltd*,[56] *Schell v Northern Territory Football League*,[57] *Carlsen v AAT Kings Tours Pty Ltd*,[58] *Alexander v Gorey & Cole Holdings Pty Ltd*,[59] and *Collins Radio Constructors v Day*.[60]

[76] In *Schell v Northern Territory Football League*, the Full Court considered the effect of s 87 of the *Work Health Act 1986 (NT)* which provided:

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56 (1991) 1 NTLR 183

57 (1995) 5 NTLR 1 at 6

58 (1998) NTCA 94; 8 NTLR 114

59 (2002) 117 FLR 31

60 (1998) 143 FLR 425

> 87. FAILURE TO DECIDE WITHIN SPECIFIED PERIOD.
>
> Where, within the times specified in Section 85, an employer does not comply with that section, the employer shall, until such time as the Court orders otherwise, be deemed to have accepted liability for the compensation claimed in so far as the claim is in respect of compensation payable under Subdivisions B and D of Division 3.

[77] The Court considered the meaning of the phrase "until such time as the court otherwise orders". The worker contended that the Court should relieve the employer of its deemed acceptance of liability only upon proof by it at a substantive hearing that the employer was not in fact liable. The court held that the words "until such time as the Court orders otherwise," are apt to confer the widest possible discretion upon the Court, and that there was nothing in s 87 or elsewhere in the Act, which suggests that the discretion was to be exercised only upon proof by the employer that it was not liable to the worker for the compensation claimed. The Court considered that whether an employer was deemed to have accepted liability or had made a conscious decision to accept liability, the employer could proceed either by means of a substantive application to the Court pursuant to s 104 or by cancelling or reducing payments pursuant to s 69(1), there being nothing in the language of s 69 to indicate that that section could not apply to a deemed acceptance of liability. The court observed:[61] "We note also that s.69 is not confined to situations where there has been a change in circumstances."

61 at p 6; See also *Carlsen v AAT Kings Tours Pty Ltd* at [18].

[78] That would appear to establish the first error of law relied on by Contitech in its cross-appeal. The appellant submitted that this sentence was both obiter and ambiguous as it could have been intended to refer to a court ordered reduction or cancellation under s 96(2)(d). I do not agree that the sentence is ambiguous. The Court cannot have intended to direct this remark only to the situation referred to in s 69(2)(d) – ie where the Court orders the cancellation or reduction of the compensation – because the observation was made in the context of the Court holding that whether an employer was deemed to have accepted liability or had made a conscious decision to accept liability, the employer could proceed either by means of a substantive application to the Court pursuant to s 104 or by cancelling or reducing payments pursuant to s 69(1).

[79] True, the observation was obiter, but it was made in a considered joint judgment of three judges, and I see no reason not to follow it, there being nothing in the words of s 69 to suggest that the section should be confined to situations where there has been a change in circumstances.

[80] Contitech also relies on the following statement of Martin CJ quoted with approval by the Court of Appeal in *Collins Radio Constructors v Day*:

> The obvious intention of s 69 is to confer rights upon an employer to cancel payments provided that, in circumstances such as this, it discloses what it believes is a lawful reason to do so. It is an alternative method to achieving the result to that envisaged in s 69(2)(d), that is, by seeking an order of the Court cancelling the obligation to pay the compensation.

[81] In my view, the learned trial judge was in error in holding that "an employer cannot rely on a s 69 notice to now deny liability for the mental injury previously accepted. They can only use s 69 to cancel or reduce benefits because of a change of circumstances". The trial judge was also in error in holding that "the use of a notice to deny liability once liability has been accepted is not a process available to Contitech". Section 69 can be used for any lawful reason to cancel payments including that the worker has not suffered a compensable injury.

[82] Contitech is also undoubtedly correct in its contention that a medical certificate is only required where the reason for cancelling payment of compensation is that the worker to whom it is paid has ceased to be incapacitated for work. So much is clear from the wording of s 69(3). However, that does not mean that Contitech's s 69 notice was valid. The trial judge found that the notice was invalid because it was not accompanied by a medical certificate. Contitech contends that a medical certificate was not required because the reason given on the notice for cancellation of the appellant's compensation was not that the appellant had ceased to be incapacitated for work. That submission cannot be accepted. As well as stating that the appellant had not suffered an aggravation of his PTSD, the notice contained the following expressed reason for cancelling the appellant's compensation:

> Further and in the alternative, if you did suffer an injury in the nature of an aggravation of PTSD the aggravation was temporary and <u>any</u>

> aggravation of PTSD materially contributed to by your employment has ceased;

This is effectively saying that the appellant is no longer incapacitated for work, and therefore a medical certificate was required.

[83] Further, as the appellant contends, Contitech's notice purported to cancel benefits immediately whereas s 69 requires the employer to give 14 days' notice of the intention to cancel the compensation. That failure to give 14 days' notice is fatal to the validity of a s 69 notice.[62] Contitech contends that I should not entertain the appellant's submission to that effect as this was outside the scope of the appellant's pleaded case, the trial judge did not make a finding of invalidity on this basis, and the appellant has not filed a notice of contention.

[84] The appellant says that there was an express agreement by senior counsel for Contitech, reflected in the transcript, that if there was a challenge to the finding of invalidity of the notice on the grounds in the cross-appeal, the appellant wished to challenge its validity on a separate ground and counsel for Contitech told the Court he would not have a difficulty with that subject to Contitech having an opportunity to respond to that argument. The appellant also contends that this ground of challenge to the validity of the s 69 notice is within the general scope of the appellant's statement of claim which alleges non-compliance with s 69 generally. Given the concession made by senior counsel for Contitech, the appellant should be permitted to

62 *Collins Radio Constructors v Day* at p431; *Ansett Australia v Van Nieuwmans* [1999] NTCA 38 at [14]

rely on this ground of invalidity. (It does not affect the result as the notice is in any case invalid for failure to include a medical certificate.)

[85] In my view, Contitech's s 69 notice was invalid for failure to provide an accompanying medical certificate and for failure to give 14 days' notice of cancellation of compensation. The question is whether the authorities support the proposition contended for by Contitech that even if an employer's s 69 notice is found to be invalid, if the employer establishes that there has been no compensable injury or that the worker's incapacity has ceased, no compensation will be payable.

[86] In *Morrissey v Conaust Ltd*, the Court of Appeal considered the proper construction of s 69 of the *Work Health Act* as it was then worded and the circumstances in which notice under that section had to be given by an employer to a worker before the employer was entitled to cancel or reduce an amount of compensation. In that case the employer's insurer had written a letter to the worker enclosing two medical reports which indicated that the doctor considered the incapacity the worker had suffered in respect of the injury in January 1988 had ceased by March 1988 and that he was no longer incapacitated by reason of that injury. The letter gave notice to the worker that future payments of weekly compensation would cease.

[87] The worker appealed to the Work Health Court and the Magistrate in the Work Health Court found that the employer should have served on the worker a notice pursuant to s 69 of the *Work Health Act* before being

entitled to cease making payments of weekly compensation and the employer was therefore liable to pay arrears of compensation and to continue making payments of benefits.

[88] On appeal to the Supreme Court, Martin J upheld the appeal holding that the magistrate had erred in finding that without a s 69 notice having been served, the employer was unable to present evidence to the Court concerning the incapacity of the worker; and in finding that without such a notice having been served the Court could not make a finding as to incapacity. On appeal to the Court of Appeal, Gallop J (with whom Asche CJ and Angel J agreed) held that Martin J had correctly construed s 69 and correctly held that notice by the employer to the worker was not required where the worker ceased to be incapacitated or died or the payments were received by fraud or other unlawful means.

[89] The appellant contends that *Morrissey v Conaust Ltd* is of no assistance in construing s 69 as it is presently worded since at the time that case was decided, s 69 specifically provided that notice was not required where the worker had ceased to be incapacitated, had died, or had received the payments by fraud or other unlawful means.

[90] However, in deciding the appeal, Gallop J said:

> It is important to note that s 69 is purely procedural. It is a provision requiring notice in a class of indeterminate reference with three specified exceptions. In my opinion it does not matter that any one of the exceptions has not been properly established at the time when

> cancellation or reduction of the amount of compensation is to take place. …
>
> As was conceded by counsel for the employer, if the premise upon which the amount of compensation has been cancelled or reduced is disputed and has not been determined, the appropriate route is s 111 and the employer would carry the onus of establishing the change in circumstances which warranted the cancellation or reduction in the amount of compensation. In my opinion that would be the position even if the ground of justification for the cancellation or reduction was such that notice was required to be given to the worker. *[emphasis added]*

[91] For present purposes, the importance of the underlined words is that they seem to indicate that, regardless of whether or not notice of cancellation of benefits is required under s 69, it is open to the employer to commence proceedings for a declaration that the worker does not suffer from a compensable injury or is no longer incapacitated for work and is therefore not entitled to compensation and, if successful, it would seem to follow, as Contitech contends, that no compensation is payable regardless of whether notice under s 69 has been validly given. That proposition, it seems to me, is also supported by the decisions of the Court of Appeal in *Carlsen v AAT Kings Tours Pty Ltd* and *Alexander v Gorey & Cole Holdings Pty Ltd*.

[92] The remaining question is whether, as the appellant contends, Contitech is liable to continue to make payments of compensation until the Court makes an order under s 69(2)(d) cancelling compensation from a given date, or whether, as Contitech contends, it is sufficient for the Court to declare, as the trial judge did, that the appellant did not suffer from the claimed compensable injury.

[93] In *Carlsen v AAT Kings Tours Pty Ltd*, the worker argued that the Court was bound to make an award of compensation, at least up to the date of the hearing, if an application was made by the employer at the hearing for the Court to "otherwise order" under s 87 and the application was successful. The Court rejected that argument and held that a decision by an employer to admit liability is not irreversible. Contitech contends that the effect of this decision is that where the Court is of the opinion that the worker is not entitled on the merits of the case to any compensation, or to less compensation than was claimed in the original claim, the Court is bound to decide the case on the merits, notwithstanding that the employer is deemed under s 87 to have accepted the claim, and the Court must do so even if no formal application is made at the hearing by the employer for the Court to "otherwise order" within the meaning of s 87 which provided, at the relevant time, that where an employer did not deal with the claim in accordance with s 85, (i.e. by admitting or denying liability or deferring acceptance of the claim within ten working days) the employer is deemed to have accepted liability for the relevant compensation "until such time as the Court otherwise orders".

[94] It seems to me that the same reasoning would apply to a consideration of s 69(2). If the Court is of the opinion that the worker is not entitled on the merits of the case to any compensation, then it must decide the case on the merits on application by the employer under s 104 for a declaration that the

worker has not suffered any compensable injury, and this is so whether the employer has accepted the claim or is deemed to have accepted the claim.

[95] The appellant concedes that *Carlsen v AAT Kings Tours Pty Ltd* contains observations, which the appellant says are not part of the ratio, which support Contitech's position, but contends that nevertheless, s 69 should not be construed as being available where the basis for cancellation of compensation is directly contrary to the basis for the admission of liability under s 85. That contention cannot be accepted. As pointed out in *Carlsen v AAT Kings Tours Pty Ltd*, a decision whether to accept liability may need to be made in a hurry and new facts may later come to light, and there is nothing in the Act which supports a construction which would effectively prevent an employer from later disputing liability after initially accepting it, any more than in the situation where the employer is deemed to have accepted liability. In *Schell* the court said:

> Nevertheless, it would be most unlikely that the legislature intended that an employer who was deemed to have accepted liability should be in any worse position vis-a-vis the worker than an employer who had made a conscious decision to accept liability. In either case, the employer could have proceeded either by means of a substantive application to the Court pursuant to s 104 (see s 69(2)(d)) or by cancelling or reducing payments pursuant to s 69(1).

[96] In *Alexander v Gorey & Cole Holdings Pty Ltd* it was found that the s 69 notice that had been issued by the employer was invalid for non-compliance with the Act. There were two proceedings dealing with substantively the same point. One was embodied in a s 69 notice, the other was embodied in

an action brought by the employer, relying upon the same matters as set out in the notice. The notice was ultimately found to be invalid but the substantive point was held in favour of the employer. The Court of Appeal held that there is no absolute right in a worker to continue to receive payments of compensation (which are provisional only), even though the employer may be obliged to continue to pay them if the employer does not invoke (or does not successfully invoke) the machinery provided by s 69(1) and that the Work Health Court can order in proceedings brought under s 69(2) that the right to receive the payments ceased at the date upon which incapacity ceased, or the date upon which the incapacity resulted in a reduction or diminution of incapacity.[63] The court held further that an employer may cease or reduce payments either upon notice under s 69(1) or by seeking an order of the Court under s 69(2) and that these are not alternative remedies requiring the employer to elect between serving a notice under s 69(1) or bringing a substantive application under s 69(2).[64]

[97] Although the Court in *Alexander v Gorey & Cole Holdings Pty Ltd* referred to an application to the Court under s 69(2), that was because of the factual circumstances of that case and the procedure there adopted. I do not take that case as supporting the appellant's contention that it is necessary for the Court to make an order under s 69(2)(d) specifying the date from which compensation is to cease before the employer's liability to make payments

63 at [30]

64 at [30]

ceases. It may be that that would be necessary in some circumstances – for example where the employer's case is that the worker ceased to be incapacitated from a certain date. In other circumstances, for example where the employer has in fact made payments, but later establishes that the worker did not suffer a compensable injury, it may be sufficient for the court to make a declaration to that effect with the result that the employer is not obliged to make any further payments. As the Court of Appeal observed in *Schell* (referring to the application of s 87): "The appropriate procedure to be adopted will very much depend upon the circumstances which have arisen." In this case, no payments had been made because compensation was being paid by RTA in relation to the physical injury. In my view, it was sufficient for the Court to declare that the appellant had not suffered a compensable mental injury and that the appellant was not entitled to compensation.

[98] Accordingly in so far as the appellant's claim is for payment of arrears of weekly benefits in relation to the alleged aggravation of the appellant's PTSD on 19 November 2019, the appellant's claim must fail and Contitech's cross-appeal must be allowed.

[99] This ground of appeal and the associated cross-appeal took up a great deal of hearing time, was the subject of a number of lengthy written submissions, and required extensive analysis, time and space to be devoted to it in this decision, and yet it has no practical effect. Under s 116 of the Act, this Court may set aside the decision or determination and substitute its own

decision or determination; or set aside the decision or determination and remit the matter to the Work Health Court. If I am wrong in finding that it was sufficient for the Work Health Court to declare that the appellant had not suffered a compensable mental injury and that the appellant was not entitled to compensation, and that an order under s 69(2)(b) was required, it would nevertheless have been open to me to make an order under that section giving effect to the trial judge's finding by cancelling compensation from the date of Contitech's notice, from the date of Contitech's acceptance of the PTSD claim, or from the date that the appellant notified Contitech of the claim. Alternatively, I could have remitted the matter to the trial judge to give effect to her evident intention that no compensation be payable by making a formal order under s 69(2) specifying the date from which compensation is to cease and her Honour would presumably have chosen one of these dates.

Grounds 4, 5 & 6: Rejection of aggravation of PTSD

[100] These grounds concern the trial judge's decision that the appellant was not entitled to benefits arising from a mental injury in consequence of the appellant's interactions with his supervisor on 19 November 2019.[65]

Onus of proof

[101] It is common ground that Contitech bore the onus of proving that the appellant did not suffer an aggravation of his PTSD as a result of the

65 *Disability Services of Central Australia v Regan* (1998) 8 NTLR 73

incident on 19 November 2019. The first complaint made by the appellant is the assertion that the trial judge wrongly reversed the onus of proof on this issue.

[102] By its defence and counterclaim, Contitech admitted that the appellant was subjected to inappropriate behaviour during his return to work program in October - November 2019, and that the appellant may have been distressed by it, but pleaded that the appellant did not suffer an aggravation of his pre-existing PTSD injury and that the appellant did not sustain a significant mental injury as a result of the inappropriate behaviour.

[103] The appellant concedes that the trial judge correctly identified the issue to be determined and the onus of proof as "whether [Contitech] had discharged its onus of proving that the appellant did not suffer a compensable injury arising out of the incident on 19 November 2019". However, the appellant contends that in the following passages from the judgment, the trial judge failed to apply the appropriate standard and effectively reversed the onus of proof:[66]

> In those circumstances I cannot be satisfied on the balance of probabilities that the Worker is being truthful in his report of his symptoms of mental health and back pain or that he continues to suffer PTSD as a result of the work incident on 19 November 2019. Or that he suffered a reoccurrence or aggravation of a pre-existing PTSD at all.
>
> I accept the Worker suffered distress at the comment made but cannot be satisfied that his reaction to that comment resulted in him attempting suicide and such that it formed the basis for the presentation of PTSD.

66 Work Health Court decision [185] – [186]

[104] Contitech concedes that this passage in the Work Health Court decision is unfortunately worded, but contends that, read fairly as a whole, the trial judge's reasons do not demonstrate that her Honour applied the incorrect onus on this issue.

[105] Contitech refers to *Millar v ABC Marketing and Sales Pty Ltd*[67]

> However, as Cross points out, the rule expressed by Bayley J is a rule of statutory interpretation confined to cases where the affirmative or negative averments are peculiarly within the knowledge of the person charged.
>
> …
>
> Thus, there is no reversal of the legal onus of proof, but a plaintiff's knowledge of essential facts may lessen the amount of evidence required to be led by the defendant to discharge an evidential burden borne by the defendant or vice versa. It may be that only slight evidence will be enough to discharge the evidentiary burden, but it is clear that the legal burden has not shifted.

The same reasoning applies and underlies the principle on *Jones v Dunkel*.

[106] Contitech also relies on the following passage from *Cross on Evidence*, contending that it is particularly apposite to this case.

> Burdens of persuasion in civil cases affect the outcomes only of cases in which the trier of fact thinks the plaintiff's and the defendant's positions are equally probable. Burdens of persuasion are, in other words, tie-breakers. If the trier of fact, having regard to all the evidence, comes to a definite conclusion, there is no occasion to invoke the burden of persuasion.

[107] Contitech contends that the trial judge was cognisant that the employer, Contitech, bore the onus of proving a negative – ie that the appellant did not

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67 [2012] NTSC 21 at [26]

suffer an aggravation of his pre-existing PTSD on 19 November 2019, but that what that boils down to, as a forensic exercise is this question: "Did the worker suffer an aggravation of PTSD as a result of the workplace incident, that is the offensive comments on 19 November?"

[108] Contitech contends that her Honour stated the onus correctly; examined the evidence; made relevant findings of credit; and then answered the question in the negative on the basis of that evidence.

[109] This case involves an onus of proof on the employer by virtue of having issued a notice on an accepted claim to make good the basis on which it disputes the liability. Contitech contends that was very clear to the trial judge. Her Honour said at [112]-[113]:

> Having found the worker's benefits payable by the second employer were wrongfully cancelled, it is for the second employer to prove to the necessary standard that the worker did not suffer.
>
> The worker's claim for psychiatric injury is particularised as PTSD or aggravation of pre-existing PTSD. Contitech impresses upon the court this claim must be considered in light of the worker's proven tendency to lie for his own advantage, which must lead the court to the conclusion that the worker is an unreliable historian.

[110] Contitech contends that these paragraphs display an understanding that Contitech was not putting the appellant to proof, it was putting a positive case for a negative finding. I agree. It does not seem to me that the appellant has established that the trial judge erred in law by misapplying the onus of proof in relation to the alleged aggravation of the appellant's PTSD.

Findings of credit

[111] The appellant also takes issue with the trial judge's findings on credibility, which formed the basis of her Honour's finding that the appellant did not suffer an aggravation of his PTSD, contending that her Honour made the following errors of law in that process:

(a) The trial judge made observations and findings critical of the appellant's credit and demeanour in Court in circumstances where the proposition underlying the criticism was not fairly put to the appellant (or his counsel), so as to accord procedural fairness.

(b) The trial judge made findings that the appellant told lies without explaining the basis upon which the judge was able to conclude that the evidence was wrong and consciously so (such that the reasons are inadequate).

(c) The trial judge reasoned that if the appellant had been dishonest (including in out of court statements which he accepted, in court, were inaccurate and wrong), he was generally dishonest and unreliable, without bearing in mind that it does not follow that because a witness is disbelieved on particular matters, he ought to be disbelieved on all matters; much less does it follow that (save where it is in the nature of

an admission against interest), disbelief of evidence does not amount to proof of the contrary of the witness's evidence.[68]

[112] Each of these three contentions must be rejected.

(a) The appellant has not identified any particular finding of fact based on evidence in relation to which counsel for the employers failed to comply with the Rule in *Brown and Dunne* and that would not, in any event, be the basis for a successful appeal on a question of law. It cannot sensibly be suggested that a judge has a duty to put to a witness each aspect of the witness's demeanour which give the judge an unfavourable impression of the witness's credibility before making findings of credit.

(b) The judge gave quite full, certainly adequate reasons for her finding that the appellant had told lies.[69]

(c) It does not necessarily follow that because a witness is disbelieved on particular matters, he ought to be disbelieved on all matters, but a trial judge is entitled to take into account matters on which she has formed

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68 The appellant cited the following authorities: *Gauci v Federal Commissioner of Taxation* (1975) 135 CLR 81 at 87 (Barwick CJ); *Steinberg v Federal Commissioner of Taxation* (1975) 134 CLR 640 at 684 (Barwick CJ); 694 (Gibbs J); *Edwards v R* (1993) 178 CLR 193 at 208 (Deane, Dawson and Gaudron JJ); *Hardy v Your Tabs Pty Ltd* [2000] NSWCA 150 at [65] (Heydon JA, Meagher JA and Foster AJA agreeing)

69 See for example [131] to [138] re lies told in relation to his VOC claim; [139] re lies told in relation to his employment application in 2018; [140] to [145] re his alleged suicide attempt and [146] to [151] in relation to several other matters, leading to the trial judge's conclusion at [151]:

> Taking into account all of the above I am of the view that the Worker is a person who is prepared to lie to gain advantage for himself and as such is a person who may very well have either exaggerated his symptoms or fabricated his symptoms to illicit support from his doctors and therapists; and when he was not happy about their responses he became distrustful and disengaged with them.

the view that a witness has lied when assessing whether to believe other parts of the witness's evidence.

(d) Disbelief of evidence does not necessarily amount to proof of the contrary of the witness' evidence, but when determining whether Contitech had proved on the balance of probabilities that the appellant had not suffered a loss of earning capacity, the judge was entitled to make findings that the appellant had lied about aspects of his evidence relating to his symptoms and to take that into account in determining whether the appellant really had suffered a compensable mental injury.

Failure to engage with the real issues

[113] The appellant contends that the trial judge erred in law by failing to engage with the real issues that were presented on the question of whether Contitech had proved that the appellant had suffered a compensable mental injury. The appellant submits that her Honour became unduly and narrowly focussed, first on the question of the appellant's general credibility and then with deciding whether she accepted that he had, in fact, attempted suicide on 19 November.

[114] The appellant contends that because the trial judge found the appellant wasn't credible - for reasons which the appellant attacks separately - her Honour wasn't satisfied that the appellant did attempt suicide and she then proceeded to find that there can't have been an aggravation of the PTSD in circumstances where she wasn't satisfied of the attempted suicide. The

appellant contends that in reasoning this, the trial judge failed to engage with the real basis of the appellant's claim and failed to "engage with" the evidence called by the appellant, particularly the medical evidence. The chief criticism of the way the trial judge dealt with the medical evidence is that her Honour, it is said, failed to note, or to appreciate, that the doctors relied upon by the appellant based their opinions on more than just the appellant's report that he had attempted suicide following the incident of 19 November; and also based their opinions on more than the self-reported history of the appellant generally.

[115] Contitech contends that the appellant's submission misrepresents and over-simplifies the trial judge's reasoning process. The suicide attempt was a reflection of the alleged severity of the appellant's reaction to the incident on 19 November, and the severity of the reaction was an important diagnostic factor in deciding whether the appellant had suffered aggravation of PTSD, or something less, or nothing at all other than distress and this was the way the trial judge treated it. Having reviewed her Honour's reasons, and in particular her Honour's reasons for finding that the appellant did not suffer from an aggravation of PTSD from the incident on 19 November at [140] to [178], I am of the view that a fair characterization of the trial judge's reasons is that her Honour formed an adverse view of the appellant's credit, giving adequate reasons for those findings. Her Honour placed some emphasis on the appellant's changing story about having attempted to commit suicide and explained that this was because "the worker's report of

the suicide attempt is a significant factor which underpins his diagnosis of PTSD."[70] This comment was made following a discussion of some of the medical evidence which supported the statement. Her Honour further explained that the severity of the appellant's reaction to the words spoken in the incident of 19 November was a relevant consideration in diagnosing PTSD;[71] attempted suicide, if it occurred, being such a severe reaction.

[116] I do not think that a fair reading of the trial judge's reasons for the finding that the appellant did not suffer from an aggravation of his PTSD as a result of the incident of 19 November bears out the criticisms levelled at the reasons by the appellant.

[117] In any event, and perhaps more fundamentally, in my view, the appellant's submissions on these grounds of appeal are a colorable attempt to characterize errors the appellant contends were made by the trial judge as errors of law when the real gravamen of the appellant's complaint is that, in the appellant's contention, the trial judge wrongly decided that the appellant lacked credibility and wrongly decided the factual question whether the appellant had suffered an aggravation of existing PTSD.

[118] This ground of appeal is dismissed.

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70 Work Health Court decision [169]

71 Work Health Court decision [145]

Further procedural fairness ground

[119] The appellant advanced as a further ground of appeal the assertion that the trial judge had denied procedural fairness to the appellant by cutting short counsel for the appellant's cross-examination of one of the medical witnesses, Dr Sahoo.[72]

[120] Having looked at the relevant transcript, I am of the view that the appellant was not denied procedural fairness. The medical witnesses gave evidence by AVL and those AVL links were booked for particular times. The appellant's counsel at trial cross-examined Dr Sahoo extensively. The cross-examination of Dr Sahoo did not finish within the time that had been indicated by the appellant's counsel. Dr Sahoo was required to return the next day and cross-examination resumed. Counsel for the appellant gave a number of estimates about how much longer he would be and none of those estimates was accurate. Eventually the trial judge said, "I am sorry, Mr Doyle, I am going to stop you, it is 3 o'clock, I will give you five more minutes and then I will let Mr Roper have his turn." Counsel continued and shortly thereafter her Honour intervened and said; "That's enough," following an objection on the form of a particular question.

[121] There is no right to cross-examine indefinitely without regard to the time constraints on the trial process. The trial judge is entitled to fix reasonable limits on the time allocated to each of the parties for submissions and also,

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72 This ground was not strongly pressed at the hearing of the appeal but was the subject of detailed written submissions.

in my view, for cross-examination, particularly when, as appears from the transcript to be the case here, counsel's cross-examination is lengthy, repetitive and disorganised[73] and counsel does not give accurate time estimates. In this case, the trial judge gave counsel for the appellant a warning and then followed through with the limitation on cross-examination that is now complained about. In my view her Honour was entitled to control the cross-examination in that fashion and that control did not result in any injustice to the appellant.

[122] These grounds of appeal are dismissed.

[123] **ORDERS:**

(a) Appeal Grounds 1 and 2 (respondent RTA):

These grounds of appeal will be allowed and the matter remitted to the trial judge to make the following determinations, given her Honour's existing findings that the appellant's NWE was $3,171.83 and the amount a car park attendant could reasonably earn was $1,184 per week.

(1) Was the appellant suffering from a partial incapacity for work as at the date of RTA's s 69 notice?

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73 One example of this is that time was wasted obtaining Dr Sahoo's letter of instruction when the questions that counsel wanted to identify and use as a premise for questions in cross-examination were, in fact, embodied in the report in any event.

(2) If the answer to (1) is yes, has RTA proved that a car park attendant's job was reasonably available to the appellant for some or all of the balance of the 104 weeks since the beginning of appellant's incapacity/ and, if so, which part?

(3) What is the appellant's entitlement to compensation for the balance of the first 104 weeks of his incapacity applying the formulae in s 65?

(4) What is the appellant's entitlement to compensation for the period of partial incapacity after the first 104 weeks of his incapacity, applying the formulae in s 65?

(b) All other grounds of appeal are dismissed.

(c) There is no need for any order on Contitech's cross appeal.
