PARTIES:	NICHOLAS LOIZOS v CARLTON AND UNITED BREWERIES LTD.
TITLE OF COURT:	COURT OF APPEAL (NT)
JURISDICTION:	APPEAL FROM SUPREME COURT
FILE NOS:	No. AP 14 of 1992
DELIVERED:	Darwin, 25 February 1994
HEARING DATES:	2 December 1993
JUDGMENT OF:	Kearney, Angel and Mildren JJ

CATCHWORDS:

Workers' compensation - appeal on a question of law - general principles applicable

Work Health Act (NT), s116
Victorian Stevedoring & General Contracting Co. and Meakes v Dignan (1931) 46 CLR 73, applied
Builders Licensing Board v Sperway Constructions (Syd.) Pty Ltd (1976) 135 CLR 616, applied
Wilson v Lowery (unreported, Court of Appeal (NT), 11 May 1993), applied

Workers' compensation - assessment of compensation - whether parties' common assumption that worker's loss of earning capacity could not be calculated, is correct - whether necessary to decide if the rate of compensation is 70% of 150% of average weekly earnings, or 70% of loss of earning capacity, or the minimum statutory rate

Work Health Act (NT), ss65(1), (3) and (7), 189(2)
Builders Licensing Board v BJ Lindner Pty Ltd (1982) 1 NSWLR 561, applied
George Hudson Ltd v The Australian Timber Workers' Union (1920) 32 CLR 413, applied
Fibrosa Spolka Akcyjna v Fairburn Lawson Combe Barbour Ltd [1943] AC 32, applied

Workers' compensation - construction of terms in Act - worker injured prior to commencement of Act electing to claim compensation under Act - application of Act - effect of deeming provision - whether "normal weekly earnings" confined to earnings from respondent employer - meaning of "immediately before" - meaning of "the date upon which he first became entitled to compensation"

Work Health Act (NT), ss49(1), 65(3) and 189(2)
Cunningham-Beattie v Groote Eylandt Mining Co. Pty Ltd (1989) 60 NTR 1, applied
Wainer v Rippon (1979) 29 ALR 643, referred to
The Council of the Shire of Redland v Stradbroke Rutile Pty Ltd (1974) 133 CLR 641, referred to
Coates v Commissioner for Railways (1961) 78 WN (NSW) 377, applied
Commissioner for Superannuation v Bayley (1979) 41 FLR 385, referred to
Foresight Pty Ltd v Maddick (1991) 79 NTR 17, applied
The Queen v The Justices of Berkshire (1878) 4 Q.B.D. 469, applied
In re Beaumont dec'd [1980] 1 Ch 444, referred to
Jelley v Iliffe [1981] 2 W.L.R. 801, referred to
Water Board v Moustakas (1988) 77 ALR 193, applied
Alphafield Ltd v Barratt [1984] 3 All ER 795, referred to
Secretary of State for Employment v Spence [1987] 1 QB 179, applied
Litster v Forth Dry Dock & Engineering Co Ltd (In Receivership) [1990] 1 AC 546, referred to
R v Horseferry Road Metropolitan Stipendiary Magistrate; ex p. Siadatan [1991] 1 QB 260, referred to
Perfect v Northern Territory of Australia (unreported, Supreme Court of Northern Territory (Mildren J), 29 May 1992), referred to
Hobbs v London and South Western Railway Co (1875) LR 10 QB 111, applied

REPRESENTATION:

Counsel
Appellant: J.B. Waters
Respondent: S.R. Southwood

Solicitors
Appellant: Waters James McCormack
Respondent: Ward Keller

Judgment Category classification: CAT A
Judgment ID Number: kea94003J
Number of pages: 25
General publication

kea94003.J

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

No. AP 14 of 1992

BETWEEN:

NICHOLAS LOIZOS
Appellant

AND:

CARLTON AND UNITED BREWERIES LTD.
Respondent

CORAM: KEARNEY, ANGEL and MILDREN JJ

REASONS FOR JUDGMENT

(Delivered 25th day of February 1994)

KEARNEY J:

This is an appeal from a decision by the Supreme Court (Martin J, as he then was), allowing an appeal from a decision of the Work Health Court of 8 March 1991, and varying its determination. The function of this Court is to decide whether the Supreme Court was right or wrong; see *Wilson v Lowery* (unreported, Court of Appeal, 11 May 1993) at pp5-7.

I have had the benefit of reading the opinion of Mildren J. There the relevant provisions of the Work Health Act, the facts, the history of proceedings and the issues arising in this appeal are fully set out and discussed. I need not repeat them.

His Honour has concluded that whether "normal weekly earnings" in the Act refers to earnings at the time of the injury, or to later earnings (when no immediate financial loss flowed from the injury), or whether on the proper construction and application of s65(3) the appellant had no normal weekly earnings for the purpose of calculating his loss of earning capacity, the result is the same and the appeal must be dismissed. I agree that the appeal must be dismissed but as I consider that the analysis by the learned trial Judge was correct, and that that conclusion should determine the outcome of the appeal, I should state my reasons for that approach.

A statutory fiction and its consequences

The problems which arise in applying the Act to the facts of this case ultimately stem from the words "as if" in s189(2), a deeming provision which, for the purpose of the appellant's claim under the Act, transposes the occurrence of his injury from 1961 to a date "after" 1 January 1987. The Act thereby creates a fictitious factual situation. This is not uncommon in statutes; see for example, *Wainer v Rippon* (1979) 29 ALR 643 at p650, and *The Council of the Shire of Redland v Stradbroke Rutile Pty Ltd* (1974) 133 CLR 641 at p655.

One consequence of this fiction in my opinion is that it was not open to the appellant in his application under the Act to rely in any way before the Work Health Court on the reality that his injury had occurred in 1961; s189(2) does not simply attach the benefits of the Act to a pre-existing injury. The appellant was bound to proceed on the fictional

basis which arose when he made his election under s189(2); see *Coates v Commissioner for Railways* (1961) 78 WN (NSW) 377, where Kinsella and Collins JJ said at p384:-

> "When a statute provides that something shall be deemed to be a fact, it is necessarily implicit in such a provision that the assumption shall be made if necessary contrary to fact; and it is not open to a worker against whom the provision operates that the injury shall be deemed to have happened at a certain point of time, to seek to establish that he has in fact received the injury before that time."

It follows that the appellant's 'normal weekly earnings' in 1961 were irrelevant to the calculation to be made under s65, unless they were encompassed by the words "immediately before" in s65(3). For reasons set out later, I consider they were not within the scope of those words. Insofar as the hearing before the Work Health Court proceeded on a root assumption that the appellant's 1961 earnings were relevant to the s65 calculation, the proceedings were unsoundly based and the decision erroneous.

Statutory fictions of the s189(2) type commonly result in practical difficulties; see, for example, the problems created by the "asifism" discussed at [1979] Crim. L.R. 266 and 607-8, and [1980] Crim. L.R. at 68-9. And so it is here. In other Australian jurisdictions which have reformed their workers' compensation legislation in recent years, the legislatures have not relied on the deceptively simple "asifism" approach of s189(2) to provide for compensation for pre-existing injuries, but on the techniques outlined by Asche CJ in *Cunningham-Beattie v Groote Eylandt Mining Co. Pty Ltd* (1989) 60 NTR 1 at p6. See, for example,

s124 of the Safety Rehabilitation and Compensation Act 1988 (C'th), and Schedule 6 of the Workers Compensation Act 1987 (NSW).

The construction of "immediately before" in s65(3)

As Mildren J points out, on the facts on which the Court was required to act, the appellant had no entitlement to compensation under the Act until 23 March 1989; that is "the date upon which he first became entitled to compensation", for the purposes of s65(3).

I bear in mind that the Act is a remedial statute, and accordingly its provisions should be interpreted in a benign and liberal manner, and a construction most favourable to the worker is to be preferred where any ambiguity exists; see *Foresight Pty Ltd v Maddick* (1991) 79 NTR 17 at p24. I have no real or substantial doubt that the words "immediately before" in their context in s65(3) plainly and unambiguously bear only a temporal meaning; I consider this view was also held by Martin J.

The next question is as to the time-scope encompassed by "immediately before"; in particular, does it encompass the period which elapsed since the appellant last had "normal weekly earnings" prior to 23 March 1989? It is clear that the appellant last worked in 1986 though there was no specific finding to that effect by the Work Health Court; see its earlier judgment of 24 May 1989. This stemmed from the way the case was run before that Court, the concentration being on his employment in 1961, any employment in 1986 being regarded as irrelevant. Mildren J has pointed to the

difficulties, flowing from the way the case was conducted, in now dealing with the significance of the 1986 employment; however, for present purposes, I set those to one side. Since October 1986 the appellant has been an invalid pensioner.

Different views have been expressed in the case-law as to the time-scope of the words "immediately before", in different contexts. I turn to some of the cases, by way of illustration.

Cockburn CJ said in *The Queen v The Justices of Berkshire* (1878) 4 Q.B.D. 469 at p471:-

> "It is impossible to lay down any hard and fast rule as to what is the meaning of the word "immediately" in all cases".

I respectfully agree. The meaning, however, clearly depends on the context in which the words appear. The words do not necessarily connote the instant prior to the date in question. In *In re Beaumont dec'd* [1980] 1 Ch 444, a reference in inheritance legislation to a "person - - - who immediately before the death of the deceased was being maintained" was held to require the Court to consider whether there was some settled basis or arrangement for that maintenance, and not merely the de facto position at the moment of death, though it was confined to the basis subsisting at the moment before death. That is, "a relationship of dependence which has persisted for years will not be defeated by its termination during a few weeks of mortal sickness", as Stephenson L.J. put it in *Jelley v Iliffe* [1981] 2 W.L.R. 801 at p807.

Clearly, the words "immediately before" refer to a more confined period of time than that connoted simply by

"before". See for this approach *Commissioner for Superannuation v Bayley* (1979) 41 FLR 385, a case involving the construction of a statutory provision whereby an employee formerly eligible for superannuation benefits was deemed not to have ceased to be eligible, when "immediately after so ceasing" he had again become eligible. Lockhart J considered at p401 that the deeming provision was -

> "- - - intended to ensure that a person does not lose his status as an eligible employee merely because he ceases to be one and later becomes one again, provided the gap in time is not unreasonably large". (emphasis mine)

In a number of cases in England arising from the dismissal of employees shortly prior to the transfer of a business attention focussed on the meaning of "immediately before" in regulations which transferred to the transferee the transferor's liability etc under its contract of employment with those of its employees "employed immediately before the transfer". See the discussion in *Alphafield Ltd v Barratt* [1984] 3 All ER 795 at pp798-800, where a "flexible construction" was adopted. This was overruled in *Secretary of State for Employment v Spence* [1987] 1 QB 179; see pp191-8, per Balcombe LJ. See also *Litster v Forth Dry Dock & Engineering Co Ltd (In Receivership)* [1990] 1 AC 546 at p569 per Lord Oliver of Aylmerton, affirming that a "flexible construction" could not be adopted in this context and stating, at p575, that "either the contract of employment is subsisting at the moment of the transfer or it is not- - -". I respectfully agree with some general observations by his Lordship at p567, viz:-

> "The expression "immediately before" is one which takes its meaning from its context, but in its ordinary signification it involves the notion that there is, between two relevant events, no intervening space, lapse of time or event of significance. If, for instance, the question is whether a deceased person was seized of property immediately before his death, attention is focussed upon the very instant at which the death occurred." (emphasis mine)

The meaning of "immediate" in the context of "immediate unlawful violence" in the Public Order Act 1986 (UK) was considered, and the word differently construed, in *R v Horseferry Road Metropolitan Stipendiary Magistrate; ex p. Siadatan* [1991] 1 QB 260. The Divisional Court said:-

> "It seems to us that the word "immediate" does not mean "instantaneous"; that a relatively short time interval may elapse between the act which is threatening, abusive or insulting and the unlawful violence. "Immediate" connotes proximity in time and proximity in causation; that it is likely that violence will result within a relatively short period of time and without any other intervening occurrence."

In *Perfect v Northern Territory of Australia* (unreported, Supreme Court (Mildren J), 29 May 1992) the Court considered that "immediately" in the context of "immediately advise the claimant" in s85(7) of the Act did not require that the advice be instantaneous. Mildren J said at p15:-

> "- - a literal construction of this word in a statute would, in strictness, exclude the lapse of any interval of time, and for that reason, has rarely, if ever, been preferred by the courts. - - - Whether the notice was served 'immediately' is a question of fact to be determined in the circumstances of the case. As Cockburn CJ said in *Alexiadi v Robinson* (1861) 2 F&F 679 at 684; 175 ER 1237 at 1240; the word implies 'a more stringent requisition that what is ordinarily implied in the word 'reasonable.' Still, it must receive a reasonable interpretation, so far that it cannot be considered as imposing an obligation to do what is impossible.'"

At p16 his Honour said:-

> "- - - the notion of 'immediately' must take into account that the worker may not be able to be found - he may, for instance, have gone interstate to get urgent medical treatment. In my view, the word 'immediately' means, as Kennedy LJ expressed it, in *Barker v Lewis & Peat* [1913] 3 KB 34 at 37 'as immediately as the circumstances permit.'"

The foregoing cases illustrate the different meanings in different contexts. The question is, what is the meaning of the words "immediately before" in their context in s65(3)? I consider that in s65(3) they encompass at most some reasonably short period of time immediately preceding "the date on which he first became entitled to compensation". As noted earlier, since 1986 the appellant had been unemployed and during the period to March 1989 had no weekly earnings. Accordingly, he had no 'normal weekly earnings' at the very instant before 23 March 1989. But if the words "immediately before" in s65(3) are given a more flexible construction, as I believe they should, do they embrace any period in 1986 when he was last employed? I think the answer is best expressed by adopting the approach of Blackburn J in *Hobbs v London and South Western Railway Co* (1875) LR 10 QB 111 at 121:-

> "- - - it is something like having to draw a line between night and day; there is a great duration of twilight when it is neither night nor day. But - - - though you cannot draw the precise line, you can say on which side of the line the case is - - -."

I consider that wherever the precise line limiting the period encompassed by "immediately before" in s65(3) is to be drawn, giving those words a flexible construction, the appellant is well outside that line on the facts of this case; this applies

to any earnings in 1986, or before that time. I consider that this was also the view taken by Martin J.

Conclusions

It follows from this approach that I agree with Martin J that on the facts the appellant had no 'normal weekly earnings' 'immediately before' 23 March 1989. The answer to the calculation required by s65(3) is therefore 'zero'. The appellant is admittedly totally incapacitated as from 23 March 1989. Yet application of the formulae in s65 of the Act to the fictitious factual situation created by s189(2) means that the "rate [of compensation] that would otherwise be payable" to him is zero.

I also agree with Martin J that the purpose of s65(7) is to provide a "safety net". Section 65(7) warrants the broad construction referred to in *Builders Licensing Board v BJ Lindner Pty Ltd* (1982) 1 NSWLR 561 at p565; it should be so construed "as to afford the utmost relief which the fair meaning of its language will allow", as Isaacs J put it in *George Hudson Ltd v The Australian Timber Workers' Union* (1920) 32 CLR 413 at p436. Construing the words of s65(7) - "in lieu of any payment at less than that [minimum] rate that would otherwise be payable - - - under this section" - in this manner, I consider that the appellant falls squarely within this statutory "safety net". The construction of the words "any payment" as embracing a zero amount in the particular circumstances of this case - that is, a construction which treats no payment as a "payment at less than that [minimum] rate" - promotes the purpose underlying the Act and accords in

my opinion with the legislative intention, justice and common sense. It is a construction which does not, I hope, give rise to Alice and Lord Atkins' query as to "whether you can make words mean so many different things". Its basis is that Territory law at bottom is a sensible thing; to adopt words that great Queenslander also once used, it provides an "answer that I venture to think would occur to most people, whether laymen or lawyers" (*Fibrosa Spolka Akcyjna v Fairburn Lawson Combe Barbour Ltd* [1943] AC 32 at p50).

In short, I agree with Martin J that the rate of compensation payable to the appellant is the minimum rate prescribed pursuant to s65(7), for the reasons his Honour states. For that reason I consider that the appeal should be dismissed, with costs.

ANGEL J:

I agree that the appeal should be dismissed. I agree that s189(2) of the Act operates so as to preclude any claim under the Act for weekly benefits prior to 1 January 1987. I agree with Kearney J as to the meaning of the words 'immediately before' in s65(3) of the Act.

MILDREN J:

This appeal involves the construction to be given to s65 of the *Work Health Act* ("the Act") in circumstances where the appellant worker was injured in the course of his employment prior to the commencement of the Act and after the commencement of the Act elected to pursue his rights to claim compensation under the provisions of the Act rather than the provisions of the former workers compensation legislation.

The appellant received an injury to his right wrist whilst at work in the employ of the respondent on 21 February 1961. In 1963 he received compensation under the provisions of the *Workmen's Compensation Ordinance*, later to become the *Workers' Compensation Act* (hereinafter referred to as the "former Act"). He returned to work in 1964 with another employer. Except for a brief period in 1974, he returned to Greece between 1965 - 1984 where he was also in employment. In about May 1984 he returned to Australia and again found work until 1986. In 1986 he was given an invalid pension due to continuing pain in his wrist. Since then he has not been in work. In 1989 a claim for compensation was heard in the Work Health Court for weekly payments under the Act for the period 28 October 1986 to 23 March 1989. This claim failed because the learned Chief Stipendiary Magistrate found that the appellant had unreasonably refused to undergo medical treatment which was offered to him and would have permitted him to return to work. There is no appeal from this decision. The matter was then adjourned in respect of any claims for compensation for the period thereafter. On 8 March 1991 the learned Chief Stipendiary Magistrate delivered her reasons for ruling on a preliminary issue between the parties. The respondent conceded that, as from 23 March 1989 the appellant was totally incapacitated for work and that he was entitled to payments of weekly compensation as from that date and continuing. The question which the Chief Stipendiary Magistrate was asked to decide was which was the appropriate method of calculating the quantum of the appellant's right to

weekly payments. The appellant submitted that he was entitled to be paid at the rate of 70 per cent of 150 per cent of "average weekly earnings" at the time of payment, *vide* s65(3) of the Act. The respondent submitted that the appellant was entitled only to the minimum rate of compensation calculated in accordance with s65(7) of the Act. Both submissions proceeded upon the contention that it was not possible to calculate any amount of "compensation equal to 70 per cent of [the appellant's] loss of earning capacity" within the meaning of s65(3) (hereinafter called "the assumption"). It remains to be seen whether this assumption was correct.

The Chief Stipendiary Magistrate concluded that the appellant was entitled to be paid weekly compensation at the rate of 70 per cent of 150 per cent of average weekly earnings. In arriving at this conclusion, her Worship accepted the validity of the assumption. Following this ruling, an order was made that the respondent pay the appellant $55,836.32 in respect of weekly compensation for the period 23 March 1989 to 25 March 1991 and the matter was adjourned for any further orders and for argument on the question of costs to 18 April 1991. It does not appear that the matter proceeded any further in the Work Health Court, as in the meantime the respondent had appealed to the Supreme Court. On the hearing of the appeal, Martin J (as he then was) also accepted the validity of the assumption, but his Honour held that in those circumstances the minimum rate fixed by s65(7) of the Act applied.

Section 189 of the Act provided at the time of the learned Chief Stipendiary Magistrate's decision on 8 March 1991 ("the relevant time") (see *Victorian Stevedoring & General Contracting Co v Dignan* (1931) 46 CLR 73; *Builders Licensing Board v Sperway Constructions* (1976) 135 CLR 616 at 619) as follows:

> "189. CLAIM, &c., BEFORE OR AFTER COMMENCEMENT OF ACT
>
> (1) Where a cause of action in respect of an injury to or death of a person arising out of or in the course of his employment arose before the commencement of this section, a claim or action (including a claim or action at common law) in respect of that injury or death may be made, commenced or continued after the commencement of this section as if this Act had never commenced and for that purpose the repealed Act shall be deemed to continue in force.
>
> (2) Notwithstanding subsection (1), a person may claim compensation under this Act in respect of an injury or death referred to in that subsection and on his so doing this Act shall apply as if the injury or death occurred after the commencement of this section, and subsection (1) shall have no effect."

The Act came into force on 1 January 1987. It repealed the former Act. The effect of s189 of the Act is that a worker who suffered a work-related injury prior to 1 January 1987, and who was entitled under the former Act to compensation under that Act, could either claim compensation under the former Act (s189(1)) or could elect to claim compensation under the Act (s189(2)). If the worker elected to pursue his claim under the Act, whilst he must show an entitlement to compensation under the former Act, it is the Act which provides the procedures for claiming compensation and provides for the amounts and the methods of calculation of

the compensation payable: see *Cunningham-Beattie v Groote Eylandt Mining Co Pty Ltd* (1989) 60 NTR 1. Another consequence of claiming under the Act in these circumstances is that a worker could not claim any weekly benefits in relation to the period of time prior to 1 January 1987 because s189(2) requires the injury to be treated as having occurred after that time. In this case, the appellant had no entitlement under the Act until 23 March 1989 when he became totally incapacitated for work.

Section 65 of the Act relevantly provided at the relevant time as follows:

> "65. LONG-TERM INCAPACITY
>
> (1) Subject to this Part, a worker who is totally or partially incapacitated for work as the result of an injury out of which his incapacity arose or which materially contributed to it shall be paid, in addition to any other compensation to which under this Part he is entitled, after the first 26 weeks referred to in section 64, compensation equal to 70% of his loss of earning capacity of 150% of average weekly earnings at the time the payment is made, whichever is the lesser amount, until -
>
> (a) he attains the age of 65 years; or
>
> (b) if the normal retiring age for workers in the industry or occupation in which he was employed at the time of the injury is more than 65 years - he attains the normal retiring age.
>
> (2) For the purposes of subsection (1), loss of earning capacity in relation to a worker is the difference between -
>
> (a) his normal weekly earnings indexed in accordance with subsection (3); and
>
> (b) the amount, if any, he is from time to time reasonably capable of earning in a week during normal working hours in work he is capable of undertaking if he were to

engage in the most profitable employment, if any, reasonably available to him.

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

(4) ...

(5) ...

(6) For the purposes of this section, a worker shall be taken to be totally incapacitated if he is not capable of earning any amount during normal working hours if he were to engage in the most profitable employment, if any, reasonably available to him.

(7) The Regulations may prescribe, in respect of a prescribed period, a minimum rate of compensation under this section and while a minimum rate is so prescribed a worker shall be paid compensation at that rate during that period in lieu of any payment at less than that rate that would otherwise be payable to the worker under this section."

(Both parties accepted that s64, which deals with the first twenty-six weeks of incapacity, did not apply to this case, and that whatever entitlements the appellant had, depended upon s65).

The assumption before the learned Chief Stipendiary Magistrate that the amount equal to 70 per cent of loss of earning capacity could not be calculated was based on the contention that it was not possible to obtain the "average weekly earnings" as at the date of the injury on 21 February 1961. The expression "average weekly earnings" is defined by s3(1) as follows:

"'average weekly earnings' means the Average Weekly Earnings for Full Time Adult Persons, Weekly Ordinary Time Earnings for the Northern Territory last published by the Australian Statistician before 1 January before the date in respect of which they are required under this Act to be assessed;"

It was agreed as a fact before the learned Chief Stipendiary Magistrate that there were no Average Weekly Earnings for Full Time Adult Persons, Weekly Ordinary Time Earnings for the Northern Territory published by the Australian Statistician before 1 January 1961. Therefore, it was assumed that the appellant's normal weekly earnings as at 23 March 1989 could not be calculated in accordance with ss65(2)(a) and (3). The premise upon which this assumption was based was that the words "the date upon which he first became entitled to compensation" referred to the date of the injury in 1961. In my view, that premise is demonstrably false. The definition of "compensation" contained in s3(1) of the Act requires that word to mean, unless the contrary intention appears, "a benefit, or an amount paid or payable, under this Act as the result of an injury to a worker." (Emphasis mine). It is clear that, for the reasons discussed above, no amount of weekly compensation is payable under the Act in respect of any period prior to 1 January 1987 and that the date upon which the appellant first became entitled to compensation under the Act was on 23 March 1989. Consequently, assuming that the worker's normal weekly earnings before indexation were known or ascertainable for the purposes of s65(2), the calculation of the appellant's normal weekly earnings for the purposes of s65(3) would present no difficulty. The date 23 March 1989, was both the date the appellant first became entitled to compensation as well as the first date upon which a calculation needed to be made for the purposes of the

subsection. The consequence is that for the purposes of calculating normal weekly earnings as at 23 March 1989 the figures for both the numerator and the divisor, as far as average weekly earnings is concerned, is the same and will result in a quotient of one. Consequently, whatever the worker's normal weekly earnings were immediately before 23 March 1989 will, until the Australian Statistician published further figures thereafter, remain unchanged.

Martin J, however, accepted the assumption on a different basis. His Honour observed that the appellant "apparently had no normal weekly earnings immediately before the date upon which he first became entitled to compensation, that is, at a date fixed by reference to s189(2)." It is not clear precisely why his Honour reached this conclusion. Section 49(1) of the Act provides an extensive definition of "normal weekly earnings." The most common situation covered by that definition is "the normal weekly number of hours of work calculated at his ordinary time rate of pay." The respondent had conceded in the Work Health Court that as at 21 February 1961 the appellant's normal weekly earnings with the respondent were £26.17.8 ($53.77), but there was also evidence before the learned Stipendiary Magistrate to which she referred in her reasons date 24 May 1989 that the appellant's last employment was with Milatos Quality Homes in 1986, although there were no findings made as to the amount of his normal weekly earnings with that employer. During the period 1986 to 23 March 1989 the appellant was in receipt only of an invalid pension but there is no finding as to whether or not

for any part of this period the appellant was totally incapacitated for work: see s65(3). The only reason given for the appellant's failure to recover compensation during the whole of this period between 1986 to 23 March 1989 was his unreasonable failure to undertake medical treatment, i.e. the appellant had failed to mitigate his loss: see s67(2) of the Act, which in those circumstances deemed him able to undertake employment, presumably as a labourer.

The Act does not make it entirely clear, when it uses the expression "normal weekly earnings," whether that expression is intended to be confined to the earnings a worker received from the respondent employer responsible for the payment of compensation, or whether, if the worker later returned to work the earnings earned with that employer (whether the employer be the same or a different employer) may be considered to be his normal weekly earnings if he were subsequently to become entitled to the receipt of compensation for his injury because his injury worsened to the stage where it prevented him from continuing in work. It is arguable that the intention of the legislature is that the definition of "normal weekly earnings" in s49(1) of the Act is to be considered with reference to the employer at the time of the relevant injury and not with reference to some other later employer. Support for this conclusion is to be found in the definitions of "normal weekly earnings" and "ordinary time rate of pay" contained in s49(1), both of which refer to "his employer during the 12 months <u>immediately preceding the date of the relevant injury</u>" (emphasis mine) and by para (d) of the

definition of “normal weekly earnings” which refers to the situation “where, by reason of the shortness of time during which the worker has been in the employment of his employer, or the terms of the employment, it is impracticable at the date of the relevant injury to calculate the rate or relevant remuneration in accordance with paragraph (a), (b) or (c) ...,” an average gross remuneration over the twelve month period immediately preceding the date of the relevant injury may be applicable. (Emphasis mine). If this be correct, for the purposes of the definition of “normal weekly earnings,” the relevant earnings would be what he had earned with the respondent at the time of his injury in 1961. The respondent had conceded that the amount of the appellant’s normal weekly earnings at this time was $53.77 and this concession was not disputed by the appellant. Thus it is arguable that when the legislature used the expression "immediately before the date upon which he first became entitled to compensation" it meant to cover the possibility of a worker who continued in his employment with his employer after the injury, but who later became incapacitated, so that, in such a case, the worker's normal weekly earnings with his employer at the time he became incapacitated rather than at the time of the injury would be the relevant earnings. In other words, the relevant inquiry would be what were the worker's normal weekly earnings with the person who was the employer at the time of the injury on the last occasion he was in receipt of those earnings before he became incapacitated as a result of the injury? This would give the expression "immediately before" the meaning 'on the

last occasion before' rather than 'instantly before'. Dictionary definitions of the word "immediately" include: "with no person, thing, or distance intervening in time, space, order or succession" (*Shorter Oxford Dictionary)*; "having no object or space intervening; nearest or next" (*Macquarie Dictionary)* and offer some support for this conclusion. Mr Waters, for the appellant, implicitly seems to have adopted this argument.

If the appellant's normal weekly earnings immediately before 23 March 1989 were $53.77 and that was the relevant amount for the purpose of calculating his loss of earning capacity as at 23 March 1989 after applying the indexing provisions contained in s65(3), it would be possible to calculate, for the purposes of s65(3), the appellant's normal weekly earnings in each year after 1989.

The learned Chief Stipendiary Magistrate was supplied with the relevant published average weekly earnings in 1989, 1990 and 1991 (see page 4 of her Worship’s reasons). It would therefore be possible to calculate what 70 per cent of the appellant’s loss of earning capacity amounted to, at any relevant time: see the table below -

YEAR	**NWE**	**AWE**(1)	**AWE**(2)	**70% of LEC**
1989	$53.77	$493.60	$493.60	$37.64
1990	$53.77	$515.70	$493.60	$39.32
1991	$53.77	$551.40	$493.60	$42.05

NWE = Normal Weekly Earnings immediately before 23 March 1989

AWE(1) = Average Weekly Earnings at particular date

AWE(2) = Average Weekly Earnings at 23 March 1989

$$70\% \text{ of LEC (Loss of Earning Capacity)} = 70\% \text{ of NWE} \times \frac{\text{AWE(1)}}{\text{AWE(2)}}$$

It would also be possible to calculate, in terms of s65(1), what 70 per cent of 150 per cent of Average Weekly Earnings were at the time payment is to be made by reference to the same data. It is clear that on this basis the lesser amount in each year would be the amount represented by 70 per cent of the appellant's loss of earning capacity, and that, but for s65(7), this would be the amount to which the appellant would have been entitled. However, s65(7) prescribed a minimum amount of compensation payable which in 1989 was $270.30 per week, in 1990 was $282.49 per week, and in 1991 was $302.06 per week for a man with a dependant wife. The minimum amounts exceeded the very much smaller amounts arrived at by reference to the amount ascertained by calculating the value of 70 per cent of the appellant's loss of earning capacity. (The relevant figures and calculations are accurately set out at page 3 of her Worship's reasons dated 8 March 1989). Accordingly, on this basis for the period 23 March 1989 to 11 February 1991 the appellant would be entitled to be paid at

the minimum rates of compensation prescribed by s65(7) of the Act, which I note amounts to the total sum of $27,394.69.

Alternatively, if the expression "normal weekly earnings" were to include full time earnings either with the same employer or some other employer after the date of the injury in circumstances where the injury did not immediately result in financial loss, it could be argued that the appellant's normal weekly earnings immediately before the date upon which he first became entitled to compensation were the earnings from his employment with Milatos Quality Homes. There are several difficulties with that argument in the circumstances of this case. First, no such submission was made by either party. Secondly, there are no findings, as I have already observed, as to how much those earnings may have been. Thirdly, it is not a ground of appeal that there was evidence upon which such a finding could have been made, or should have been made. Fourthly, as to the period between that employment and March 1989, there is the difficulty that s67(2) deems the appellant as being able to undertake work, but not that he was in fact in work with Milatos Quality Homes at that time. Fifthly, the problem remains whether or not the expression "immediately before" in s67(3) means proximately or next in time before the relevant date or whether it means "on the last occasion before". Finally, the way the case was run before both the Chief Stipendiary Magistrate and before Martin J, it was assumed by the parties that "there was not and could not be any evidence as to the respondent's loss of earning capacity for the purposes of s65(1)", although the

basis for the assumption seems to have changed, as I have already observed. In these circumstances it would not now be open to this Court to decide the appeal on the basis of this line of reasoning: see *Water Board -v- Moustakas (1987-8) 77 ALR 193 at 196.*

The final possible argument, and the one which Martin J accepted, is that it could not be said that he had any normal weekly earnings 'immediately' before the date upon which he first became entitled to compensation under the Act in 1989 in the sense of being proximate in time to that date. Section 189(2) requires the Act to apply as if the injury occurred after 1 January 1987. The section does not state precisely when the injury is to be treated as having occurred. The words used by the legislature are "after the commencement of this section" - not 'upon the commencement of this section.' This leads towards a view that the injury is to be treated as having occurred on the date upon which the worker first became entitled to compensation under the Act which arguably could be either the date of election to claim benefits under the Act or the date of incapacity first occurring after 1 January 1987. The effect of the previous finding that the appellant had failed to mitigate his loss and the consequent deeming effect of s67(2) is that the worker was treated as being able to undertake work until 1989, but he was not in fact deemed to be in work. Consequently it is arguable that between 1987 and March 1989 he had no normal weekly earnings, because he was neither in fact in work nor in receipt of earnings, so that, in the period "immediately"

(i.e. proximately in time) before the date he first became entitled to compensation his normal weekly earnings were nil.

If the appellant's normal weekly earnings immediately before the date on which he first became entitled to compensation in terms of s65(3) are nil, the appellant's normal weekly earnings and loss of earning capacity for the purposes of s65(2) must also be nil. Consequently, the lesser of the two amounts referred to in s65(1) would also be nil. The end result of this process of reasoning is, that unless the appellant is entitled to the minimum amount prescribed by s65(7), the appellant would not be entitled to any compensation at all. In these circumstances, as the appellant is admittedly totally incapacitated, I would agree with Martin J, for the reasons he gives, that the appellant would be entitled to compensation at the minimum rate.

I should mention out of courtesy to Mr Waters, who appeared for the appellant, that I do not accept any of the arguments which he pressed at the hearing of the appeal. Mr Waters' argument essentially depended upon the view that the words "average weekly earnings applying at the date on which he first became entitled to compensation" in s65(3) of the Act, meant 'entitled to compensation under any former Act as well as the present Act,' and that therefore this expression required the court to consider average weekly earnings in 1961. I have already rejected this submission for the reasons discussed above. Mr Waters' next argument was that, since there were no published average weekly earnings statistics in 1961 which complied with the definition of average weekly

earnings in s3(1) of the Act, this Court should hold, as the Chief Stipendiary Magistrate did, that the appellant was entitled to 70 per cent of 150 per cent of average weekly earnings. I am unable to accept this argument. Section 65(1) requires the appellant to establish which is the lesser of two amounts. If the appellant is unable to establish one of the two amounts at all, I do not see how the court is entitled to conclude that the other amount must be the lesser amount. Mr Water's alternative submission was that the court should, in the absence of published statistics, treat the worker's earnings as the average weekly earnings for the purposes of the calculation. But this would be to rewrite the definition of average weekly earnings, and simply cannot be done. I therefore reject the appellant's submissions.

In the result, the same conclusion is reached whether Martin J was correct in his assumption that the appellant had no normal weekly earnings immediately before the date upon which the appellant first became entitled to compensation, or whether the appellant's normal weekly earnings immediately before that date were $53.77. The only other possibility, i.e. that the appellant's normal weekly earnings were what he had earned with Milatos Quality Homes was not argued and in the circumstances of this case, cannot be considered. It is therefore unnecessary to decide which process of reasoning is correct, and the appeal should be dismissed with costs.
