PARTIES:	RHONDA HUNT Appellant v COLLINS RADIO CONSTRUCTORS INC Respondent
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM WORK HEALTH COURT
FILE NO:	66 of 1996 (9216583)
DELIVERED:	3 December 1996
HEARING DATES:	26/9/96
JUDGMENT OF:	MILDREN, J

CATCHWORDS:

Appeal Work Health Act

Injury suffered in the course of employment - cancellation of weekly payments by notice pursuant to s 69 of the Work Health Act - denial of liability to pay compensation - specific as opposed to general denial of incapacity partial or total - proceedings not confined to the pleadings - purpose and requirements of amendment of pleadings- Court's role in the decision of new issues not incorporated in the pleadings - magistrates error in not allowing amendment of pleadings - once and for all rule s 74 of the Work Health Act - employer must continue payments unless varied by a court order - availability of work with regards to the provisions of s 65(1) and s 68 of the Work Health Act- superior

court's powers to withdraw alter or vary its judgement or order - power of the court under the slip rule - power to be used judicially - matters to be taken into account under s 68 and s 75A of the Work Health Act.

CASES

Horne v Sedco 1992 106 FLR 373 followed

Ivanhoe Gold Corporation Ltd v Sumonds (1906) CLR 642 followed

Harvey v Phillips (1956) 95 CLR 235 mentioned

Bailey v Marinoff (1971) 125 CLR 529 followed

Norman v Norman (1992) 6 WAR 372 mentioned

Pitallis v Sherefettin (1986) 2 ALL ER 227 applied

Moons Motors Ltd v Kiuan Wou [1952] 2 Lloyds Report 80 mentioned

Lawne v Lees (1881) 7 App Case 19 mentioned

Thynne v Thynne [1955] P 272 mentioned

Roxsburgh v Tully (1883) 1 Qld LJR 148 mentioned

In Re Swire; Mellor v Swire (1885) 30 Ch D 239 followed

Hargreave v Read (1914 -15) 19 CLR 29 mentioned

Coppins v Helments [1968] 3 NSWR 174 mentioned

D'angola v Rio Pioneer Gravel Co. Pty. Ltd [1977] 2 NSWLR 227 mentioned

Re Harrison's share under a settlement [1955] Ch 260 mentioned

Tak Ming Co. Ltd. v Yee Sang Co. [1978] 1 All ER 569 mentioned

L. Shaddock & Associated Pty Ltd. v Paramatta City Council [No. 2] (1982) 151 CLR 590 mentioned

Strand Nominees Pty. Ltd v Pennywise Smart Shipping Aust Pty Ltd. (1991 1 NTLR 17 followed.

LEGISLATION

Work Health Act

Work Health Rules

REPRESENTATION:

Counsel:

Appellant:	S Gearin
Respondent:	J Tippett

Solicitors:

Appellant:	Caroline Scicluna & Associates
Respondent:	Ward Keller

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

No. 66 of 1996

IN THE MATTER
of an appeal
under the
WORK HEALTH ACT

BETWEEN:

RHONDA HUNT
Appellant

AND:

COLLINS RADIO CONSTRUCTORS INC.
Respondent

CORAM: MILDREN, J

REASONS FOR JUDGMENT

(Delivered 3rd December 1996)

Introduction

This is an appeal under the *Work Health Act*.

In order to understand the issues which arise in this appeal, it is necessary to refer to the history of this unfortunate litigation in some detail.

In August 1992, the appellant commenced proceedings in the Work Health Court by way of an appeal, vide s.69 of the *Work Health Act*, from a decision by the respondent to cancel payments of her weekly benefits. The statement of claim alleged, inter alia, that the appellant, who was employed by the respondent as an executive secretary, suffered an injury in the course of her employment in June 1990; that she began to receive weekly benefits in December 1991; that the respondent cancelled her weekly payments by notice served upon her on 30 July 1992, that the appellant "continues to be incapacitated for work as a result of the injury ... and ... wishes to appeal against the decision of the respondent to cancel payment of weekly benefit ..."; that the appellant sought interim orders reinstating her payments pending the hearing of her appeal; and a final order that the respondent pay her weekly benefits until further order.

The respondent, by its answer, claimed that it had accepted her claim in error; that her medical condition was unrelated to her employment; that her condition was not an "injury" within the meaning of the Act; that accordingly, the respondent cancelled her payments by the notice served on 30 July 1992; denied its liability to pay compensation accordingly; and sought an order for the repayment of compensation previously paid. There was no specific denial in the pleadings that the appellant was incapacitated for work, as such; nor was there any allegation the appellant was only partially incapacitated for work. In paragraph 9 of the answer, the respondent merely denied the allegation in paragraph 13 of the statement of claim, that she "continues to be incapacitated for work *as a result of the injury*..."

On the face of the pleadings, there was never any issue as to the appellant's incapacity, or whether it was total or partial. A general denial, as a matter of pleading, does not put this in issue. Further, this question was apparently never relied upon as a ground for ceasing her employment, and

therefore could not be raised in a s.69 appeal, which is confined to the grounds relied upon in the s.69 notice. Despite this, it appears that for some reason orders were made on 1 March 1993, (without any amendment to the pleadings ever having been made to raise these issues) that, "on the question of ... proving that the respondent employer was not incapacitated at the time of cancellation, the respondent employer bears the legal and evidential onus and is dux litis" and "... on the question of proof of the fact and extent of present incapacity or partial incapacity, the applicant worker bears the legal and evidential onus and is dux litis." No appeal against these orders were made.

When the hearing commenced in March 1993, counsel for the respondent advised the Court that an amendment to the pleadings, (presumably by the applicant) had been mooted between the solicitors for the parties, and that the appellant would be alleging that she was permanently partially incapacitated. Counsel for the appellant said that her case was that the applicant was totally incapacitated, but in the alternative, the applicant was partially incapacitated. This lead to an exchange between counsel and the learned Magistrate (Tr pps 5-6) where counsel for the respondent said he was not prejudiced by the lack of any formal amendment to the pleadings, and the learned Magistrate left it to the appellant to amend her pleadings if she wished to.

The matter apparently being left at that, the case proceeded, and after hearing the evidence and submissions, Her Worship delivered judgement on 13 July 1994. She found that the appellant suffered from adhesive capsulitis or a frozen shoulder, by the end of 1990, and that this was materially contributed to by her employment with the respondent.

The appellant had asserted that she was partially incapacitated by her injury, but because she was unable to obtain any employment and because the employer had not taken steps to find employment for her, she should be treated

as totally incapacitated. The learned Magistrate found that she was totally incapacitated up until 1 January 1993, and thereafter partially incapacitated. She also found that she was able to undertake work as a receptionist where typing was limited and "*possibly* clerical and other office duties where she did not have to undertake excessive periods of typing" and that she would "*generally* be able to undertake secretarial work, but that the extent of that work would have to be determined by the worker herself, and it may well be that extensive periods of typing are unable to be carried out by her ... (but) it is impossible to say to what extent she would be restricted". Her Worship concluded:

> "As there is no evidence before me as to what variation there would be between her previous income as an Executive Secretary and what she could anticipate earning as a receptionist or clerical officer, I do not consider that I am able to quantify the loss currently suffered by her.
>
> I anticipate that the parties should be able to reach agreement concerning the extent of her loss based on these findings.
>
> Should they be unable to do so - liberty to apply."

As can be seen, the proceedings before Her Worship were no longer confined to the question which had been raised by the appeal under s.69. In other words, the court was not considering merely whether or not the respondent was justified in cancelling the appellant's weekly compensation at the time of the notice and for the reasons given in the notice. On the contrary, the court entertained not only these questions but the additional questions of whether or not, at times subsequent to the notice in July 1992 and up to the time of the hearing the appellant was incapacitated, and if so, whether partially or totally. Having found that after 1 January 1993 the appellant was partially incapacitated in that she could perform receptionist work, (and "*possibly*"

clerical and other types of duties) the learned Magistrate invited the parties to inform the court as to the difference between what she was able to earn as an executive secretary and what she could earn as a receptionist or clerical officer with a view to quantifying her weekly entitlement. In other words, issues were encompassed which could be determined only on a full hearing if the respondent had denied liability for the claim, and a claim had been made under s.104(1) of the Act.

From this decision both parties appealed to this Court. Angel J delivered judgement on 27 July 1995. Neither party sought to raise any ground of appeal complaining about the way the hearing expanded to encompass issues not properly before the Work Health Court. The grounds of cross-appeal by the present appellant were:

> "1. The learned magistrate erred in law in finding that the worker was capable of employment as a secretary, receptionist or counsellor when there was no evidence that such employment was reasonably available to her.
>
> 2. The learned magistrate erred in law in finding that as at 1st January 1993 the worker ceased to be permanently incapacitated and from that date is partially incapacitated only.
>
> 3. The learned magistrate erred in law in finding that the failure by employer to comply with s.75A of the Work Health Act was not prima facie evidence that the worker is unable to engage in profitable employment for the purposes of s.65 of the Work Health Act.
>
> ORDER SOUGHT:
>
> 1. That the Magistrate's decision with respect to the worker's capacity for work post 1st January 1993 be set aside and that the worker is deemed

to be totally incapacitated continuing beyond 1st January 1993.

2. That the employer pay the worker's costs of the Appeal and the costs of the proceedings before the Court below."

Angel J dismissed both the present respondent's appeal, and the present appellant's cross appeal. His Honour said, at p.17:

> "Counsel for the worker seeks an order re-instating a finding of full incapacity post-dating 1 January, 1993. To allow such would, in effect, be [to] set aside the learned Magistrate's finding of partial incapacity. The worker bears an onus of proving the extent of that present partial incapacity and that onus has not been discharged. The learned Magistrate has granted "liberty to apply" failing agreement as to financial loss occasioned by the worker's capacity."

The matter came on again in chambers before the learned Magistrate on 8 November 1995. Both parties were given leave to administer interrogatories. It is instructive to read the interrogatories delivered by the respondent employer. They canvas issues going, not merely to the question of the difference in earnings between an executive secretary and a person in full-time receptionist or clerical work, but going to the extent of the appellant's partial incapacity. Moreover, they are not limited to the period up to the date of the hearing in 1993 but cover the period thereafter as well, as if this were a claim for commutation of benefits. No objection was taken to providing the answers. The proceedings became complicated by applications to set aside orders made in 1992 for interim payments which are still in force.

Eventually the matter came on again before Her Worship on 9 April 1996. Counsel for the appellant opened her case as follows:

"MS GEARIN: Your Worship will recall that you gave a decision in this matter of 13 July 1994. The decision was appealed against and there was also a cross appeal. Both the appeal and the cross appeal were dismissed on 27 July 1994 and the matter is now back before Your Worship - 1995 sorry, and the decision was on 27 July 1995. The matter is now back before Your Worship to determine the extent of partial incapacity since January 1993. Your Worship, at page 59 of your decision you found that the applicant was totally incapacitated until January 1993 and thereafter was partially incapacitated. Your Worship was unable to determine the extent of that partial incapacity and therefore the amount in money terms that the applicant would be able to earn if she were to engage in the most profitable employment reasonably available to her.

To determine the most profitable employment reasonably available to the worker, the court's required to look at the criteria in section 68 of the legislation. Ms Hunt will give evidence of her attempts to obtain employment through the Commonwealth Employment Service and the difficulties she's had in that regard. She will also give evidence about her pain levels, the work she's able to do, the individual tasks that she can perform when those tasks are done at her own pace as opposed to what is required in a commercial environment. She will give evidence about a functional capacity assessment that she attended in March of this year and the effect that that had on pain levels. She will further give evidence that no return to work programme has been offered by the employer.

Evidence will be called in addition from her treating dermatologist, Doctor Hill, as to her condition from January 1993 until now. Doctor Hill is booked to give video evidence tomorrow, Wednesday the 10th, from 10 am until 12 pm and evidence will also be called from the specialist who conducted the functional assessment capacity, Mr Blanksby. He

> will give evidence between 2 and 4 pm by video tomorrow afternoon and evidence will be called from Mr Simon Jones, the manager from the CES in Adelaide as to the availability of work for Mrs Hunt, having regard to the section 68 criteria.
>
> It is the applicant's case that there is no employment reasonably available to her on the open labour market but that her return to the work force requires a structured return to work program which can only be and should be provided by the employer. Until that happens when you take into account the criteria set out in section 68, Mrs Hunt's case is that no employment on the open labour market is reasonably available to her, even though she does have physical capacity to do work. That's the opening."

Counsel for the respondent raised no objection to Ms Gearin's proposal to call evidence going to these newly-expanded issues. His sole objection is that certain of the reports from the appellant's medical experts were served too late and should not be admitted into evidence. Counsel for the respondent said, as to the issues to be canvassed:

> "I refer to the fact that the matter has been on foot for a long period of time and the issues have certainly been clearly, in my submission, clearly between the parties since at least July 1995 when Angel J handed down his decision dismissing the appeal and cross-appeal in relation to the matter.
>
> In His Honour's words the matter was to - the question of partial incapacity - the extent of partial incapacity was not one for His Honour. That the matter was to go back to Your Worship. His Honour noted page 17 of his decision and I'm reading from the reasons of his decision of 27 July 1995:
>
> The worker bears an onus of proving the extent of that present partial incapacity and that onus has not been discharged. The learned Magistrate has

granted “liberty to apply” failing agreement as to the financial loss occasioned by the worker’s incapacity.

And he then goes on to refer the matter back to Your Worship. And he says that: ‘The extent of that incapacity is the subject of liberty to apply to the Work Health Court.’ That’s at page 18. Thereafter he sets out part of Your Worship’s judgment and respectfully agrees with Your Worship and the matter comes back before Your Worship, the sole issue being the extent of the partial incapacity.

So it’s my submission, Your Worship, that the issue has been well known by both parties since 27 July 1995 and the question of what evidence was to be adduced in support of the issue was something that must have exercised the parties minds at least from that time onwards. I can advise Your Worship that you will hear evidence from a number of medical experts a number of whom were in fact consulted in late 1995 with a view to having the matter brought before this court. I think dates - I can’t remember as a matter of fact, Your Worship, when dates were actually obtained but they were certainly obtained - - -

HER WORSHIP: It was November last year.

MR TIPPETT: November yes, so it was prior - November. So, Your Worship, there has been plenty of notice in my submission for the preparation of material and the proper service of it and committing each party to meet it in the usual fashion. Unfortunately in relation to Mr Blanksby’s report, Your Worship, we have not been able to meet it. We simply could not, with Easter. We had Tuesday, Wednesday and Thursday to deal with this material, of last week, and we have not been able to deal with it and of course it comes to us well within the 10 day period that is set aside for its service ...

And just finally for Your Worship to highlight yet again the fact that the issues between the parties have been so clear for so long and at this final moment we are served with material which we

> simply cannot meet and I am simply not, in relation to Mr Jones on the material given to me, able to obtain any instructions whatsoever because the material, in my submission, doesn't make sense. So they're the matters I wish to raise initially at least in relation to the evidence, if it please Your Worship."

Counsel for the appellant responded, but in the result, was forced to apply for an adjournment. This was granted, but the appellant was ordered to pay the respondent's costs thrown away by reason thereof.

Subsequently the matter was relisted for hearing again on 23 September 1996. In the meantime, the order for interim payments on the basis of total incapacity remained on foot, notwithstanding applications to the Court for orders ceasing those payments, supported in part by medical reports obtained by the respondent's solicitors in late 1995 and early 1996.

Clearly up to the morning of 23 September 1996, both parties believed that the issues remaining to be determined were: (1) the extent of the appellant's partial incapacity and; (2) the amount of compensation payable, which depended upon the extent of the partial incapacity and that those issues were not to be confined to the periods up to the 1993 hearing but were to be canvassed up to the date of the September 1996 hearing (at least).

The appellant's counsel had also signalled her intention to argue that, for the purposes of the calculation of the relevant amount, the Court should find that the amount she was reasonably capable of earning was, effectively, nothing (see ss. 65(1) and (2); s.68). I should add that five days were set aside for the resumed hearing and both sides were ready to call a number of medical experts to give evidence.

At the hearing on 23 September 1996, the respondent's counsel submitted that the appellant could not reopen the question of whether or not the appellant was totally or partially incapacitated. He said:

> "... Your Worship has found that some work can be done and the issue now is what that work is and how much remuneration would obtain as a result of taking that work... The only issue is what's the remuneration for the work she can do and how many hours a week she can do and what she can be paid as a result."

Counsel for the appellant submitted to Her Worship that, the Court having found that the appellant was partially incapacitated, the Court now had to determine the extent of that incapacity. To determine that question, the Court was required to make a finding as to the amount, if any, that the worker was capable of earning if she were to engage in the most profitable employment reasonably available to her, having regard to the matters referred to in s. 68 of the Act. The question was therefore not one of physical limitation only, but how much she could earn on the open labour market. One of the matters to be taken into account under s.68 is the potential availability of employment. If the worker's incapacity prevented her from being able to sell her labour on the open labour market, the amount she was capable of earning would be nil. It was suggested also that the Court had not resolved the effect of s. 75A of that Act, (which imposes an obligation on the employer to find work for the incapacitated worker).

The learned Magistrate indicated that:

> "I would have thought from the judgement that it is clear that the only issue on which liberty to apply had been given was with respect to any financial loss as between the difference in those two

> positions, an executive secretary position and a receptionist clerical position."

Obviously Her Worship was indicating that she had intended by her findings that the appellant could work in a full time position.

Counsel for the respondent suggested, notwithstanding this intimation that:

> "… the only matter to be determined is the amount that the worker has lost. Now the worker may for example concede she can work 4 hours a day 5 days a week at the rate of $12 or $15 an hour or something of that nature and therefore provide some position (sic) as to the loss."

After hearing further submissions, the learned Magistrate said:

> "HER WORSHIP: Okay, as indicated I find it extremely difficult to try and interpret my own judgment. Having said that I don't believe that I actually need to do that. This being a matter which in a sense I suppose is part heard by me - my having given liberty to apply, if need be I consider that I can clarify or indeed elaborate on the contents of perhaps the judgment if you like to put it that way or alternatively to clarify exactly what the liberty to apply was to be for, it was certainly my intention at the time of delivering this judgment and I still believe my own views that it's clear, to make it plain that I was of the view that the worker in this case was capable of obtaining and working as a receptionist or a clerical officer on a full time basis, but that she could no longer work as an executive secretary and that the question which needed to be determined subsequent to the giving of the judgment was the actual financial loss, the difference in salaries between those two positions to enable a quantitative analysis to be made as to just what her financial loss would be if she was employed as a

> receptionist or clerical officer or a similar position, rather than an executive secretary and that the liberty to apply was a liberty to apply to the court should there be any argument as between what the financial loss would be between those two positions.
>
> Now I accept that that apparently is not the interpretation that the worker has put upon the judgment and that may no doubt be the subject of further proceedings but for the benefit of these proceedings I simply make it plain that that is in fact what liberty to apply was for."

After further submissions from the appellant's counsel were to no avail, it was submitted that the Court should hear evidence relating to the period from the date of the judgment. "because those matters have to be determined on an ongoing basis pursuant to s.65 (12)". This was opposed by counsel for the respondent because "these matters go beyond the pleadings, the manner in which the applicant has conducted the case to date and indeed Your Worship's rulings and judgment."

Her Worship then ruled:

> "I don't consider it would be appropriate at this stage to revisit the question as to the availability of work or indeed as to what her physical position may be. I consider those issues were fully canvassed at the hearing and findings made by me with respect to them. Accordingly I do not propose to allow evidence to be called with respect to the availability of employment to her at this stage as I consider that has already been canvassed or as to her current physical capabilities as I consider that was also canvassed in the evidence at the time of the hearing."

Counsel for the appellant then sought an adjournment. This was granted, and the question of costs was reserved.

Grounds of Appeal

The grounds set out in the Notice of Appeal relate to the rulings made on 23 September 1996 and are as follows:

1. That the learned Magistrate erred in law by refusing to hear evidence as to the extent of the Worker's partial incapacity.

2. That the learned Magistrate erred in law by stating that she had made findings of fact that there was work reasonably available to the Worker on a full time basis as a receptionist or clerical officer when her reasons for decision contained no such findings of fact.

3. That the learned Magistrate erred in law by purporting to make findings of fact that there was work reasonably available to this worker on a full time basis as a receptionist or clerical officer where there was no evidence on which such facts could be found.

4. In the alternative that the costs order of 9 April 1996 be reversed.

Submissions and Conclusions

A problem with this case is that it is not easy to determine precisely what issues were being litigated or were to be litigated between the parties, because neither party had adhered to the issues as disclosed by the pleadings, and no amendment to the pleadings was ever made or sought to be made. What had started as an appeal under s.69 of the Act had grafted onto it or perhaps substituted for it, what was in reality an application under s.104(1). Having regard to the conduct of the parties, it is far too late to complain of this now, a matter which Angel J commented upon in his judgement of 27 July 1995 at p

14, and with which I respectfully agree. Nevertheless I feel obliged to point out, once again, the dangers of the course which the parties undertook. The pleadings are not just scraps of paper which the parties and the court are free to ignore. Their purpose is to define the issues between the parties and to control the admission of evidence at the hearing. If it is desired to raise new issues, the pleadings must be amended, and the court ought not to decide new issues unless they are incorporated into the pleadings: see *Horne v Sedco Forex Australia Pty Ltd* (1992) 106 FLR 373 at 379-80. Magistrates would be well advised to insist upon any necessary amendments to the pleadings, if new issues are to be raised, and if necessary, to refuse to entertain new issues without the appropriate amendments. So far as the appellant's application to call evidence relating to the period after the delivery of judgement in 1994 is concerned, there was nothing to the pleadings relating to any claim in respect of that period. The respondent had no doubt led the appellant to believe by the way the respondent had prepared its case that there would be no objection to canvassing the period after 1994 at the hearing in September 1996, but there is no evidence of any formal agreement about this. The learned Magistrate could have ruled against the appellant on this ground, or granted leave to amend the pleadings, and allowed the matter to proceed. However, that was not what she did. Her Worship refused the application on the basis that that issue had been "canvassed" at the original hearing. In my opinion, the learned Magistrate fell into error. There was no application before her in 1993 for a redemption of the applicant's future entitlements. There was no finding of *permanent* partial incapacity; nor was it appropriate to make such a finding. The effect of an order, as at the date of judgement in 1994, (if one had been made) for the payment of weekly compensation, whether on the basis of total or partial incapacity, would not be to finally determine the question of the appellant's entitlements to weekly compensation thereafter. The "once and for all" rule does not apply to proceedings such as this unless the future payments are commuted by an order made pursuant to s.74 of the Act. The order for

payment of compensation nevertheless will usually operate prospectively in the sense that, unless and until it is varied or cancelled, the employer is obliged to continue to make payments accordingly, but either party can apply to the court to vary the order if there has been a change in circumstances (see ss 69, 86, 94 and 104 of the Act). It is possible that there are procedural requirements which may have to be complied with first, unless they have been waived. I make no decision on that question, as it was not argued. Consequently the court's decision not to permit the appellant to agitate the issue of total or partial incapacity or the extent and value of it in relation to the period after the delivery of its decision in 1994 is set aside, and it will be open to the appellant to renew that application before the learned Magistrate. However, I make it clear that the Magistrate is not bound to grant that application. Whether the application is granted or not will depend upon a proper evaluation of the relevant matters put to the learned Magistrate at that time. If the application is refused, the appellant may still be able to re-agitate those issues by following the procedure set out in s.86 of the Act. Whether that section would permit the appellant to make a claim for an increase in benefits in respect of a period already past, or would be limited to some other time, was not argued, and I do not decide it.

I turn now to consider the refusal of the learned Magistrate to hear further evidence in relation to the period up to the date of the judgement in 1994, (Ground 1 of the Notice of Appeal).

First, the appellant had submitted to Her Worship and before me that it was open to her to call evidence to show that although the appellant was partially incapacitated, she was not able to earn anything in any employment, having regard to the provisions of s.65(1) and (2) and s.68 of the Act.

S.65(1) provided prior to 1995 (relevantly):

"(1) Subject to this part, a worker who is totally or partially incapacitated for work ... shall be paid ... compensation equal to 75% of his loss of earning capacity ...

(2) For the purposes of this section, loss of earning capacity in relation to a worker is the difference between:

(a) his normal weekly earnings indexed in accordance with subsection (3); and

(b) the amount, if any, he is from time to time reasonably capable of earning in a week during normal working hours in work he is capable of undertaking is he were to engage in the most profitable employment, if any, reasonably available to him."

S.68 provided:

"68 ASSESSMENT OF MOST PROFITABLE EMPLOYMENT

In assessing what is the most profitable employment available to a worker for the purposes of section 65 or reasonably possible for a worker for the purposes of section 75B(3), regard shall be had to -

(a) his age;
(b) his experience, training and other existing skills;
(c) his potential for rehabilitation training;
(d) his language skills;
(e) the potential availability of such employment;
(f) the impairments suffered by the worker; and
(g) any other relevant factor."

The appellant submitted that there was no evidence that there was work available for the appellant on a full time basis as a receptionist or clerical officer. Consequently, so the argument went, the finding should have been in relation to s.65(2), that the appellant could earn nothing.

S.65(6) provided at the relevant time:

> "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."

As Mr Tippett for the respondent submitted, if the appellant's contention were right, the learned Magistrate's finding of partial incapacity from 1st January 1993 could not stand, because the appellant would be deemed to be totally incapacitated. This finding was challenged before Angel J who dismissed the appellant's cross-appeal. His Honour specifically referred to s.65(6) in his judgement and to the fact that the appellant bore the onus of proving the extent of her partial incapacity. In these circumstances, it is too late for the appellant to call evidence to show that, during the relevant period, she could not earn anything.

However, notwithstanding Mr Tippett's submission to the contrary, I am of the view that the original decision of the learned Magistrate was not clear, as to whether or not she had made a finding that the appellant could work as a receptionist or clerical officer on a full time basis.

It is apparent that Angel J and both counsel thought that it was still open to the appellant to call evidence to show the level of incapacity by reference to whether or not she could work in those fields only on a part time basis. The learned Magistrate then ruled that her intention had been to find that the

appellant could do work in those fields full time. It was conceded by counsel for the appellant that the learned Magistrate was not *functus officio* and had the power to take the course she did of clarifying her judgement.

That concession was rightly made, for a number of reasons. First, it appears that the orders of the learned Magistrate have never been taken out in accordance with Rule 31(1) of the *Work Health Rules*. In this circumstance it is well established that a superior court has the power to reconsider its decision and withdraw, alter or vary its judgement or order: *Ivanhoe Gold Corporation Ltd v Symonds* (1906) 4 CLR 642 at 670; *Harvey v Phillips* (1956) 95 CLR 235 at 242; *Bailey v Marinoff* (1971) 125 CLR 529; *Norman v Norman* (1992) 6 WAR 372; *Williams,* Supreme Court Civil Procedure - Victoria, pp 160-161 and the authorities noted in footnote 58. I see no reason why the Work Health Court should not have the same power even though it is an inferior court, and is very much the creature of the statute creating it: see *Pitallis v Sherefettin* (1986) 2 All ER 227; *Moons Motors Ltd v Kiuan Wou* [1952] 2 Lloyds Rep 80. Secondly, it is well established that courts have an inherent power as well as a power under the "slip rule", (Rule 31(2) of the *Work Health Rules,*) to clarify any ambiguity in its decision or order regardless of whether the judgement or order had been perfected or not: *Ivanhoe Gold Corporation Ltd v Symonds,* supra, at 657; *Bailey v Marinoff* supra at 539; *Lawrie v Lees* (1881) 7 App Cas. 19 at 34-35; *Thynne v Thynne* [1955] P. 272 @ 300-301; 313-317; *Roxsburgh v Tully* (1883) 1 Qld LJR 148 at 149; *In Re Swire*; *Mellor v Swire* (1885) 30 Ch D 239; *Hargreave v Read* (1914-15) 19 CLR 29; *Coppins v Helmers* [1968] 3 NSWR 174; *D'Angola v Rio Pioneer Gravel Co. Pty Ltd* [1977] 2 NSWLR 227. Mr Tippett submitted that that was the end of the matter, but although the power exists, the power in either case must be exercised judicially. The Court will not act where it would not be just to do so; *Ivanhoe Gold Corporation Ltd v Symonds,* supra at 658, 659; *In re Swire; Mellor v Swire;* supra at 247; *Re Harrison's Share Under A Settlement*

[1955] Ch 260 at 284; *Norman v Norman,* supra, at 376; *Tak Ming Co Ltd v Yee Sang Co* [1973] 1 All ER 569 at 575; *L. Shaddock & Associates Pty Ltd v Parramatta City Council* [No. 2] (1982) 151 CLR 590 or 597. Whether it is just or not includes a consideration of any circumstances which have intervened since reasons for judgement were delivered: *Strand Nominees Pty Ltd v Pennywise Smart Shopping Australia Pty Ltd* (1991) 1 NTLR 17 at 20. The nub of the appellant's submission was that no consideration had been given to a number of important matters which had intervened in the meantime. Mr Tippett submitted that no injustice was caused to the appellant.

The learned Magistrate did not, in this case, exercise her discretion judicially. It appears from her brief reasons, that no consideration at all was given to the following matters, all of which were either within her own knowledge, or made clear to her by counsel for both parties: first, Angel J considered at p 18 of his judgement that the question of the extent of the appellant's partial incapacity remained to be resolved; secondly, there had been a delay of over 2 years since her decision was handled down in 1994; thirdly, both parties at all times understood that this issue was yet to be determined, and had, in the meantime, incurred considerable expense in preparing the case for hearing on this assumption; fourthly, the learned Magistrate had herself made interlocutory orders which could only have been necessary if the assumption were true which put the parties and in particular the appellant to further trouble and expense; fifthly, the learned Magistrate had set aside five days for the hearing, which was again premised upon the same assumption; sixthly, an adjournment of the hearing had occurred on 9 April 1996 which was also premised upon the same assumption, as a result of which a costs order was made against the appellant, an appeal from which was now out of time; seventhly; the result would be likely to cause the appellant considerable hardship: she had undergone the stress and inconvenience associated with submitting herself to further unnecessary medical

examinations, answering lengthy interrogatories, and having to prepare herself to give evidence again, against a respondent who is resourced by an insurer; in addition, there would inevitably be wasted costs, irrespective or whether or not the appellant was also ordered to pay the respondent's costs, and even if, the respondent was ordered to pay the appellant's costs; finally, neither party had asked her to clarify her ruling in respect of this particular issue.

In these circumstances, I am satisfied that Her Worship erred in law, and that I should exercise the discretion which she had, as to whether or not she should have clarified her judgement. In my opinion the factors I have mentioned above show that events had intervened which materially disadvantaged the appellant, and that it would not be just to clarify the order already made. Accordingly, I am satisfied that I should correct her decision by setting aside the finding that the appellant was able to be employed full time as a receptionist or clerical officer, and declaring that liberty to apply granted on 13 July 1994 included the right of both parties to call such evidence as they may be advised on the extent of the appellant's partial incapacity up to the time of delivery of Her Worship's reasons in 1994.

I make it clear that I am not interfering with the finding below that the appellant is partially incapacitated and could perform work as a receptionist or clerical officer.

In the light of these conclusions, it is unnecessary to consider the other grounds of appeal.

Conclusions:

The appeal is allowed. I make the following orders:

1. The finding of the learned Magistrate of 23 September 1996 that the appellant is capable of obtaining and working as a receptionist or clerical officer on a full time basis is set aside;

2. Declare that the liberty to apply granted by the learned Magistrate on 13 July 1994 included the right of both parties to call such evidence as they may be advised as to the extent of the appellant's partial incapacity during the period 1 January 1993 to 13 July 1994.

3. The decision of the learned Magistrate of 23 September 1996 refusing the appellant's application to call evidence as to whether or not the appellant was, from and after 13 July 1994, totally or partially incapacitated, and if the latter, as to the extent of that incapacity, is set aside.

4. I will hear the parties on the question of costs.