Australian Fuel Distributors Pty Ltd v Andros [2015] NTSC 79

PARTIES:	AUSTRALIAN FUEL DISTRIBUTORS PTY LTD v ANDROS, Tracey Ann
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LA 2 of 2015 (21239424)
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JUDGMENT OF:	BLOKLAND J
APPEAL FROM:	WORK HEALTH COURT

CATCHWORDS:

APPEAL – Work Health Court –Workers' compensation – Cancellation of compensation per s 69 of the *Workers Rehabilitation and Compensation Act* – Whether onus of proof falls on worker or employer – Employer bears onus to prove the contents of the Notice of Decision – Whether error in finding the Notice of Decision asserted that the worker had ceased to be incapacitated at all as opposed to totally incapacitated

APPEAL – Work Health Court –Workers' compensation –Whether decision contrary to agreement between parties about how case would proceed – Whether concession made by counsel for the worker – Scant evidence of any concession – Timing and nature of concession – Whether burden of proof

disposed of by concession - If concession made, ample opportunity to deal with any prejudice

APPEAL – Work Health Court –Workers' compensation – Whether onus of proof falls on worker or employer – Counterclaim of employer – Employer bears onus to prove matters pleaded in the counterclaim

Work Health Court Rules, r 3.04

Workers Rehabilitation and Compensation Act, ss 3, 65(2), 68, 69, 110A(2), 116(1)

AAT King's Tours Pty Ltd v Hughes (1994) 4 NTLR 185*;Bruce Cooper v NT Link Pty Ltd* [2012] NTMC 012; *Candy v GIO General Limited* [2013] NSWSC 810; *Disability Services of Central Australia v Regan* (1998) 8 NTLR 73; *Drabsch v Switzerland General Insurance Co Ltd* (Unreported, Supreme Court of New South Wales Equity Division, 16 October 1996); *Ju Ju Nominees Pty Ltd v Carmichael* (1999) 9 NTLR 1; *McAllister v Kormilda College* NTMC 9 July 2003; *Newton v Masonic Inc t/as Tiwi Gardens Nursing Homes* [2009] NTSC 51; *Normandy Mining Pty Ltd v Horner* [2000] NTSC 79; *Northern Cement Pty Ltd v Ioasa* [1994] NTSC 58; *The Nominal Defendant v Gabriel* (2007) 71 NSWLR 150, referred to.

REPRESENTATION:

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Appellant:	W Roper
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Australian Fuel Distributors Pty Ltd v Andros [2015] NTSC 79
No. 21239424

BETWEEN:

AUSTRALIAN FUEL DISTRIBUTORS PTY LTD
Appellant

AND:

TRACEY ANN ANDROS
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 7 December 2015)

Introduction

[1] This is an appeal brought by Australian Fuel Distributors Pty Ltd (the appellant employer) following proceedings in the Work Health Court. The principal hearing took place on 18-20 March 2014. Two sets of Reasons for Decision were delivered by the Work Health Court. The first deals with difficulties the learned Chief Magistrate perceived shortly after hearing the appeal by Tracey Andros (the respondent worker) challenging the validity of the Notice of Decision issued by the appellant employer purporting to cancel

compensation.[1] The second deals primarily with the evidence called at the hearing, taking account of amended pleadings.[2] Final orders were made on 15 January 2015.

[2] Aspects of the hearing in the Work Health Court took an unusual procedural course. Following the hearing in March 2014, and after considering the closing submissions of both parties, the learned Chief Magistrate concluded submissions made on behalf of both parties were at odds with the law relevant to the nature of an appeal against a notice purporting to cancel weekly benefits in accordance with s 69 of the *Workers Rehabilitation and Compensation Act*. This was especially so with regard to the allocation of the onus of proof when it was certified the worker had "ceased to be incapacitated for work".

[3] It will be helpful to summarise the reasoning contained in the ruling of 2 September 2014.[3] In short, the decision involved the consideration and the application of established principles concerning the onus of proof in cases where an employer asserts a worker is no longer incapacitated. The Work Health Court found the employer's assertion in the s 69 Notice was that the respondent worker was no longer incapacitated *at all*. Applying the relevant authorities, the Work Health Court held that in those circumstances, the employer is called upon to justify cancellation of the payment of weekly

[1] *Tracey Andros v Australian Fuel Distributors Pty Ltd* [2014] NTMC 030 (Delivered 2 September 2014).
[2] *Tracey Andros v Australian Fuel Distributors Pty Ltd* [2014] NTMC 029 (Delivered 19 November 2014).
[3] *Tracy Andros v Australian Fuel Distributors Pty Ltd* [2014] NTMC 030.

benefits and hence to bear the burden of establishing the change of circumstances warranting the cancellation.[4] As the Work Health Court found in this case the s 69 Notice asserted the worker had ceased to be incapacitated for work[5] (in both the total and partial sense), the employer assumed the burden to prove its assertion.[6]

[4] At the core of the appellant employer's case on appeal is the argument that the decision of the Work Health Court was contrary to concessions made by and agreed between the parties about how the case would proceed. Counsel for the appellant employer asserted there was a concession or understanding the employer was tasked to prove no more than the worker was no longer totally incapacitated for work. As a consequence it was said the employer was prepared to proceed on the basis that it was *dux litis* and forego any argument that the worker's pleading had cast the net any wider than a strict appeal against the decision to cancel benefits. By virtue of the suggested concessions made on behalf of the respondent worker, the appellant employer submitted it bore the onus to demonstrate the worker was no longer totally incapacitated for work, as opposed to being no longer incapacitated at all. If it could demonstrate the worker had capacity for work, the appellant employer argued the case was to proceed on the basis the worker would then assume the burden to prove partial incapacity. Further, it was argued the alleged concession had not at any time been

[4] Ibid, applying *Ju Ju Nominees Pty Ltd v Carmichael* [1999] NTSC 20 at [15.2]; recently applied with respect to a similar issue in *Bruce Cooper v NT Link Pty Ltd* [2012] NTMC 012.
[5] Notice of Decision and Rights of Appeal, 18 September 2012, AB 145.
[6] Applying *AAT Kings Tours Pty Ltd v Hughes* (1994) 4 NTLR 185 at 191.

withdrawn. Had the concession not been made it was submitted the employer would have conducted its case differently namely: by not accepting liability for certain injuries; by not accepting proper notification had taken place; by arguing compulsory mediation had not occurred with respect to some injuries; and by arguing that the worker had gone beyond a strict appeal against the cancellation of benefits.

[5] On behalf of the respondent worker it is argued no such concession was made, and if any concession or admission was found to have been made and relied on, it was contrary to law as reflected in the authorities on the point. Further, it was argued that if any such admission had been made by the worker, it had clearly been withdrawn at, around or shortly after the time his Honour called the matter on to communicate the concerns he had with the case.

[6] Following a directions hearing conducted on 15 October 2014 after the first reasons for decision were delivered,[7] the appellant employer filed a counterclaim, the respondent worker filed a defence to the counterclaim, and the proceedings were determined in favour of the respondent worker on 19 November 2014.[8] This was both in respect of the s 69 Notice and the proceedings due to the employer's counter claim. In the reasons of 19 November 2014, his Honour made plain that he directed the filing of those additional pleadings because of the problems that had emerged following the

[7] *Tracey Andros v Australian Fuel Distributors Pty Ltd* [2014] NTMC 030.
[8] *Tracey Andros v Australian Fuel Distributors Pty Ltd* [2014] NTMC 029.

conclusion of the hearing of 18 – 20 March 2014 in order to alleviate and accord the parties justice in all of the circumstances.[9]

[7] As his Honour found the appellant employer failed to satisfy the Court that the worker ceased to be partially incapacitated for work, failed to establish the partial incapacity was not productive of loss of earning capacity including failing to point to evidence minimising the financial consequences of a partial incapacity, the respondent worker was deemed totally incapacitated for the purposes of the Act.[10]

Medical History, Treatment and Medical Opinion Relevant to the Proceedings

[8] It is necessary to set out some of the relevant history of the proceedings, much of it is helpfully included in a chronology filed on behalf of the appellant employer. The appellant employer in part relies on the history of the proceedings to illustrate why it would have taken a different course in the proceedings before the Work Health Court, absent concessions to the effect that all the appellant employer needed to prove was that there was no longer total incapacity, not any incapacity at all.

[9] It is common ground the worker had suffered previous injuries to her back. The first record of an injury was when she was in her early twenties, some thirty years prior to the injury the subject of the proceedings.[11] The second

[9] *Tracey Andros v Australian Fuel Distributors Pty Ltd* [2014] NTMC 029 at [2].
[10] Applying *McAllister v Kormilda College* (Unreported, NTMC, 9 July 2003).
[11] AB 57.

record of an injury was in October/November 2009 when she suffered a work injury to her back. On 27 July 2011, the worker attended Dr Marcellina Martins who noted:

> Chronic back ache, worse in last one month, has been on and off for 6 months. Pain extends from mid to lower back – relieved by analgesics – hs [history] of falling off a horse in her twenties". On examination "Back – tender over L ¾" and "Back pain. [12]

[10] On the 17th November 2011, the worker suffered an injury at work when she slipped and fell. A Notification Report was lodged on a form used by the appellant employer for these purposes.[13] A Claim Form with respect to the injury was lodged on 25 November 2011.[14] The affected parts of the body noted in the Claim Form are "Left side from foot to neck, joints and muscles" and "Headaches". Under the heading "Type of Injury" the Claim Form reads "Not sure, need x rays". In answer to the question on the Claim Form, "Which injury is the most serious" it is stated "All about equal". In relation to "Previous Injury", it is stated "In 2009, October/November back smashed by fridge door". The nature of the injury was stated as "Back pain".

[11] On 29 November 2011, the worker obtained results of x-rays taken of the lumbar spine and left foot.[15] Under the sub-heading "Left Foot" in the x-ray report, Dr Sykes reported "No fracture or dislocation was visible. There was no significant bone or joint lesion". Under the sub-heading "Lumbar

[12] AB 249.
[13] AB 256.
[14] AB 140.
[15] AB 265.

Spine", Dr Sykes reported "Particular vertebral alignment was within normal limits. Moderate degenerative narrowing noted at L4/5 and L5/S1 discs. Other lumbar discs were normal. There was mild degenerative change at the lower facet joints. No fracture or bone lesion was visible and sacroiliac joints were normal".

[12] On or about the 29 November 2011, the employer accepted liability. Counsel for the appellant employer told this Court that acceptance of the injury was not the subject of evidence, given the way the case proceeded. It would appear nothing turns on this. Admission of liability for the respondent worker's claim for injuries in the nature of aggravations of her pre-existing conditions was clearly pleaded.[16]

[13] The worker had a pre-arranged holiday from 6 December 2011 until 18 December 2011[17] and returned to work four hours per day, five days a week from 19 December 2011 until 23 December 2011.[18]

[14] Dr Talbot, an orthopaedic surgeon called in the Work Health Court for the employer, included the history the worker gave him in his report of 17 January 2012. She said that immediately after the fall at 6:00pm on 17 November 2011, she felt quite significant pain in her left foot which she had twisted awkwardly and that she almost immediately became aware of pain in her left buttock and lower back, her neck and left shoulder joint.[19] At the

[16] Amended Notice of Defence to Statement of Claim, para 4, AB 10.
[17] Report of Dr Talbot AB 171, Workers Evidence, AB 89.
[18] Report of Dr Talbot, AB 171.
[19] AB 170.

time of seeing Dr Talbot she complained of pain in the left buttock, lower back, cervical spine and intermittent headaches. Left foot pain, shoulder and left arm radiating pain was also recorded. Dr Talbot also noted the history of left shoulder pain "several years ago" but that it had resolved.[20] Dr Talbot also referred to the worker's description of physiotherapy on 23 December 2011. She said she experienced a "shifting, clunking sensation in [her] neck", and an increase in low back pain.[21] As a result she said she had been unable to work since about 23 December 2011.[22] The worker gave details of this treatment and the consequences perceived by her in similar terms during cross-examination in the Work Health Court.[23]

[15] During late 2011, the worker received treatment from both Dr Ali and Dr Martins. On 24 December 2011, Dr Ali noted "co pain in back of neck after physiotherapy, had been doing it at home has neck pain and also lower back pain".[24] On 28 December 2012, Dr Ali recorded "again has lower back pain, unable to work, needs WC". Under the heading "Actions", the notes state "Letter Created – re - NT Progress Work Health Certificate".

[16] On 4 January 2012, Dr Martins recorded, "Pain – lower back, neck and left shoulder aggravated after working for 2 hours per day at work, not able to complete the 2 hours yesterday".[25]

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[20] AB 172.
[21] AB 171.
[22] Report of Dr Talbot, AB 171.
[23] 19 March 2014, AB 60.
[24] AB 250.
[25] AB 251.

[17] On 17 January 2012, during the consultation mentioned above with Dr Talbot, the worker gave details of two injuries, or two incidents giving rise to injuries. Dr Talbot's report of 23 January 2013 states the worker described two accidents but said that she did not report the first one. The first was that she stood up and struck the back of her head heavily on a hard piece of machinery above her. She needed to rest for five minutes and then continued but with "quite a bad headache". Dr Talbot's report then describes the history given in terms of slipping on a greasy floor and falling heavily onto her left side, feeling pain in her foot, left buttock, lower back, neck and left shoulder joint.[26]

[18] On behalf of the appellant employer this Court was asked to note that only one incident was described in the Claim Form. That factor is in turn said to be relevant to the question of the asserted concession and the appeal against the s 69 Notice.

[19] Dr Talbot reported there was no muscle wasting and the worker displayed a full range of movements but with complaints of pain at the extremes. The impingement test was negative.[27] His opinion was that the worker probably sustained contusions to her left buttock, lumbar spine and left shoulder and a ligamentous injury to her left foot. The appellant's counsel pointed out that the injury to the left foot did not form part of the proceedings. Dr Talbot said he could find no organic reason for the worker's presentation. He could

[26] AB 170, as noted above at [14].
[27] AB 173.

find no clear reason for the pain she reported that stopped her from undertaking the work or how the fall of 17 November 2011 was still causing pain to that degree.[28]

[20] Other parts of the medical history that are relevant include the worker's later attendance on Dr Martins of 2 February 2012. Those records note: "needs extension of W comp certificate – unable to sit or drive long distance, aggravated (sic) her backpain. Seeing doctors at job fit and also orthopaedic surgeon? Has done MRI – report pending – ongoing physiotherapy. Doing well on mersyndol. Last W comp certificate obtained from Job fit". [29] On 15 February 2012, Dr Martins recorded the worker was on light duties "however, not coping, not able to do the two days". She was advised to space out the working days.[30]

[21] The MRI report of 22 February 2012[31] refers to minimal facet joint degeneration with respect to L3/4. In relation to L4/5, moderate degenerate disc is noted with broad-based posterior disc bulge, well contained intervertebral disc with no significant disc bulge/disability or protrusion. Minimal facet joint degeneration is also noted. The comment on L5/S1 notes moderate degenerate disc with posterocentral disc annulus tear and broad-based posterior disc bulge and minor facet joint degeneration. Early degenerative change was noted at C3/4 and slightly more advanced at C5/6. At C5/6 and C6/7 levels annular bulges were noted, particularly at C6/7. At

[28] AB 174, 175, 176.
[29] AB 250.
[30] AB 251.
[31] AB 266-267.

C5/6 and C6/7, the final comment made is "appearances below this level are normal". In relation to the hips there were no observations indicating that injury or an underlying pathology were present. The indications from the MRI are that the hips were normal.[32]

[22] The worker attended Dr Martins on 28 February 2012. Dr Martins noted the history of the slipping incident and "hurt L foot and neck".[33]

[23] On 5 March 2012, the worker saw another orthopaedic surgeon, Dr Nyunt. On 21 March 2012, Dr Nyunt certified the worker unfit to work in the period 7 March 2012 to 21 March 2012. This Court was informed Dr Nyunt was originally retained by the appellant employer and subsequently by the respondent worker to provide reports. Dr Nyunt's report of 13 March 2012 states that: the worker complained of variable lower back pain; she complained of pain radiating down to the left leg; and her pain started from the lower back and was radiating to the side and the leg to the foot. [34] She also complained of pain and pins and needles in the left leg, especially at night. Dr Nyunt diagnosed lower back pain caused by degenerative disc disease at L4/L5 and L5/S1. At L5/S1 he said the cause was focal disc bulge contacting left S1 nerves root with annular tear. Dr Nyunt's opinion was that the lower back pain and causes were not related to the worker's work injury; however, he said his impression was that the worker had pre-existing degenerative disc injury and that the subject injury aggravated the

[32] AB 266 – 267.
[33] AB 251.
[34] AB 178 – 182.

pre-existing condition. Dr Nyunt certified the worker totally unfit for work from 20 to March 2012 to 5 April 2012.

[24] On 5 April 2012, Dr Martins recorded that the worker was still having lower back pain post an epidural injection as well as chronic severe headaches.[35]

[25] On 4 June 2012, Dr Ali recorded an attendance for a worker's compensation review. Those records noted that the worker had pain, that she had or was to be seen in the pain clinic and that she was having ongoing physiotherapy and hydrotherapy.[36] On 5 June 2012, an ultrasound was conducted on the worker's left shoulder. The ultrasound report by Dr Cooper states the bicep tendon appeared unremarkable and that there was a background of supraspinatus tendinosis, however no definite tear was seen. [37] Other tendons of the rotator cuff appeared unremarkable. The subacromial bursa appeared mildly thickened and there was bulging of the bursa consistent with mild impingement. Mild to moderate degenerative changes were seen associated with the AC joint.

[26] On 27 June, 31 July and 14 August 2012, the worker saw Dr Ali. The notes with respect to the 14 August attendance indicate undertaking a worker's compensation review, pain clinic management and that the worker suffered from an unrelated problem that she wanted to be covered by a worker's compensation certificate. [38] Dr Ali noted it was explained that she could not

[35] AB 251.
[36] AB 253.
[37] AB 268.
[38] AB 254.

be covered by the certificate. The notes indicate the worker was not happy, explaining she should be covered as the unrelated condition made her pain worse.

[27] After this consultation with Dr Ali, the worker attended Dr Goodhand. The worker was cross-examined with respect to her discussions with Dr Stevenson about Dr Ali's recommendation.[39] She was asked whether she agreed with anything Dr Stevenson reported about this discussion:[40]

> What – do you agree with anything that the doctor sets out at page 61 there? Yes. I agree that I and that Dr Ali had said to me that she thought that I was fit for work and that she thought I – that I – that she wasn't able to give me workers compensation certificates because I was constipated, which we've been over. It wasn't constipation, it was symptoms of my disease being brought on by the medication. Which I conveyed to this doctor that I had diverticulitis and that I was very unhappy with the way that they were handling that diverticulitis and the medication in – and its effect that it was having on me.
>
> Alright. So you agree that you relayed to this doctor – well sorry, I withdraw that. Dr Ali had said to you that you were fit enough to work, you agree with that? And I said I'm not fit enough, I'm still in pain and I'm still having all the same symptoms and I'm still getting severe diverticulitis every morning that's aggravating everything.

[28] The worker attended Dr Stevenson who prepared the s 69(3) Certificate in August 2012. His report is summarised below. The worker continued to consult Dr Goodhand.

[29] In his report of 10 October 2013, Dr Goodhand states the worker consulted him on 21 August 2012 in "an extremely distressed state" and that she

[39] AB 84-85.
[40] AB 85.

sought advice and management with respect to neck, back and shoulder pain and headaches.[41] On 4 and 24 September 2012, Dr Goodhand certified the worker fit for light duties.[42] The worker commenced proceedings in the Work Health Court on 23 October 2012. Dr Goodhand further certified the worker fit for light duties in certificates dated 11 December 2012, 14 April 2013 and 17 May 2013.[43]

[30] Dr Nyunt's supplementary report of 30 July 2013 states "in all probability that injury sustained on 17 November 2011 is resolved".[44]

[31] Dr Goodhand's report of 10 October 2013 restates the injuries as previously reported in x-ray reports.[45] He considers the continuing pain is a result of exacerbation of the underlying degenerative conditions.[46] He accepts there is a pre-existing spinal condition. In his opinion the annular tear was caused by the injury of November 2011. The injury had not resolved. He also noted that even on restricted duties in August 2012, the worker experienced pain. He did not comment on whether there was further incapacity for work. In a supplementary report of 23 February 2014, Dr Goodhand comments in a critical way on Dr Stevenson's report. [47] He confirms his opinion that the shoulder injury was precipitated by her work injury.

[41] AB 213 – 215.
[42] AB 260-261.
[43] AB 262-264.
[44] AB 212.
[45] AB 213.
[46] AB 214.
[47] AB 223.

[32] On 20 February 2014, Dr Hogan certified the worker fit for light duties.[48]

The Employer's Decision to Cancel Benefits and the Section 69(3) Certificate

[33] The consultant physician, Dr Stevenson assessed the worker on 31 August 2012 and provided a s 69(3) Certificate. The form of the s 69(3) Certificate provides for two tick boxes.[49] The form states: "Please select and complete as appropriate". Dr Stevenson ticked the first box which reads: "Ms Andros has ceased to be incapacitated for work as a result of that injury". Next to the second tick box it is stated: "Ms Andros has recovered from the injury and has the capacity to carry out her pre-injury duties". That box was not ticked. The appellant employer submitted it would have been open to the Work Health Court to find that this was certification of the cessation of any capacity for work had there been no concessions before and during the hearing to the effect the employer bore the onus of proving that the worker had ceased to be totally incapacitated for work. In the event the employer discharged that burden, on the employer's case, the worker assumed the burden of establishing any partial incapacity for work.

[34] Dr Stevenson's report of 13 September 2012[50] recorded the description of pain given by the worker to him. Under the heading "head/neck" his report states "on formal examination she had a full but slow range of movement of

[48] AB 269.
[49] AB 161.
[50] AB 151 – 160.

the neck achieving slow but full rotation to the right and left and grimaced fairly dramatically as if in pain. When the conversation moved on to issues away from the neck the grimaces disappeared". Under the heading "Upper Limbs/Shoulder Girdles" the report states "there was a similar pattern in the examination of the upper limb. She had in fact a full range of all movement complaining of pain at the extremity, particularly on the left and grimacing emphatically. I could not identify any objective painful arc".[51] Dr Stevenson found the work injury was a non-specific minor soft tissue strain which was long resolved.[52] In answer to the question as to recommended treatment for the work injury, his report states "there is no ongoing requirement for treatment. She can resume her usual work. To work or not is her own economic choice". Dr Stevenson concluded "she is fully fit and is no longer incapacitated by her injury". [53]

[35] The Notice of Decision of 18 September 2012[54] was accompanied *inter alia*, by a covering letter from the insurer advising the worker that her "entitlement to weekly compensation is to be cancelled in accordance with s 69 of the *Workers Rehabilitation* and *Compensation Act*".[55] The Notice of Decision states "[y]ou had ceased to be incapacitated for work as a result of your work injury 17 November 2011". The appellant employer argues the certificate, the covering letter and all other materials are not inconsistent

[51] AB 154.
[52] AB 157.
[53] AB 80 – 158.
[54] AB 145.
[55] AB 143.

with its case, namely that all the employer had to prove was that there was no longer total incapacity.

[36] In the circumstances, the appellant asserts it was an error for his Honour to proceed contrary to the suggested concessions. It was submitted the concessions were binding and were never withdrawn. In my view, there is scant evidence of any such concessions. In counsel for the worker's closing address in the hearing before the Work Health Court there is a reference to the shifting onus and the need for the worker to prove partial incapacity. That extract is set out below. Given the circumstances, the history of the proceedings and the context of hearing (a strict appeal against the cancellation of benefits for the reason given in the Notice), in my view it is difficult to maintain the appellant employer suffered any disadvantage as a result of that submission being made or the apparent change in the submission after his Honour called the matter on. There was ample opportunity for the appellant employer to address any prejudice or disadvantage that may have flowed from the way the case progressed.

Relevant Pleadings Filed Prior to the Hearing on 18-20 March 2014

[37] The particulars of the injury set out in the Amended Statement of Claim before the Work Health Court included: exacerbation of the degenerative disc disease, causing back pain and disability and persistent neck pain; left rotator cuff injury, causing bursitis and left shoulder pain; injury to the head, causing headaches; and pain in the left hip.

[38] Counsel for the appellant employer agreed in this Court "headache" was included in the Claim Form as were the words "not sure need x-rays". The Claim Form was wide enough to cover pain in the left hip. On appeal it was suggested there were difficulties with the left shoulder injury and any head injury being attributed to the second incident.[56] It was submitted the first injury was never part of what was accepted when the appellant employer accepted liability. The appellant employer conceded all of the injuries had been accepted for the purposes of the hearing. Acceptance of liability was pleaded.

[39] The injury arising from the first incident appears in the Statement of Claim.[57] The "Particulars of Claim" refer to the injury taking place when the worker hit her head on a steel frame. The second incident also refers to sustaining an injury to her head. The Statement of Claim of 14 January 2013 makes no mention of a shoulder injury, but rather refers to injuries of the cervical spine, left hip and back as well as headaches. The pleadings were later amended and the shoulder injury was included. On the appellant employer's case, the history of the proceedings are said to support the position that the hearing proceeded only on a strict basis of whether the worker was no longer totally incapacitated. If other issues were to intrude contrary to that understanding, and if the appeal by the worker in the Work Health Court was to be argued on any other basis, it was said the appellant wanted to have further arguments and possibly lead other evidence.

[56] As discussed in the context of Dr Talbot's report of 17 January 2011, above.
[57] AB 3, at [2].

[40] From my review of the pleadings and the general history of the matter, I cannot see evidence of concessions of the type that would support the appellant employer's case. If anything, the issues as defined in the pleadings tend to support the opposite conclusion. The particulars of injuries described in the Amended Statement of Claim[58] filed 6 December 2013 are not inconsistent with the Claim Form. The particulars relied on challenging the validity of the Notice state the worker was, at the time of service of the Notice of Decision, and remains, "totally and/or partially incapacitated for work".[59] It must have been clear the worker would argue in the alternative that the Notice of Decision was invalid because the worker remained partially incapacitated for work. The Defence filed in response, denies the worker remains totally or partially incapacitated for work.

The Work Health Court's Assessment of Witnesses

[41] When his Honour made a final assessment of the witnesses and the evidence, he was also dealing with the Amended Defence and Counterclaim and the Defence to the Counterclaim. Effectively the burden and onus of proof remained the same when dealing with the issues raised in the amended pleadings as with the appeal pursuant to s 69. That was his Honour's approach with which I agree.

[42] His Honour assessed the respondent worker as a credible witness who attempted to give an honest and accurate account of the incident of 17

[58] AB 7-8.
[59] AB 10, at 6.

November 2011 and her medical condition before and after the incident.[60] Her evidence included her description of the source of the injury, interactions with medical professionals, a denial of exaggeration of symptoms and a rejection of the suggestion that not returning to work was her own choice unrelated to her injuries. She also gave evidence with respect to her history of back pain in some detail and ongoing restrictions as a result of pain.[61] Much of the respondent worker's evidence was consistent with the various medical notes and exchanges with the doctors consulted.[62]

[43] Broadly consistent with the opinions given in their respective reports and identified from their records, doctors Nyunt, Talbot and Stevenson[63] gave evidence the worker had ceased to be incapacitated for work as a result of the work injury. All three concluded she was neither totally nor partially incapacitated as a result of the injury and that any continuing incapacity for work was due to a pre-existing condition.

[44] His Honour preferred Dr Goodhand's opinion in a number of respects. He gave detailed reasons for doing so. Dr Goodhand said the worker had an ongoing incapacity for work as a result of the workplace injury of 17 November 2011. His Honour summarised and analysed the opinions and

[60] *Tracey Andros v Australian Fuel Distributors Pty Ltd* [2014] NTMC 029 at [98]-[100].
[61] Example at AB 89.
[62] AB 53-56.
[63] Dr Stevenson's report is discussed above.

evidence of all doctors in significant detail.[64] After this extensive analysis it was concluded the preponderance of evidence led him to be reasonably satisfied on the balance of probabilities that the worker was no longer totally incapacitated for the work.[65] Accordingly, the employer had discharged the burden in accordance with its counterclaim in terms of proving that the worker had ceased to be totally incapacitated as a result of the injury. His Honour evaluated the medical evidence further to determine whether the employer, in accordance with the counterclaim, had established on the balance of probabilities that the worker had no partial incapacity as a result of the November 2011 workplace injury.

[45] In relation to Dr Nyunt's evidence, his Honour concluded the question that was left open was whether any partial incapacity for work was due to the worker's pre-existing condition.[66] In relation to Dr Talbot, it was concluded his evidence fell short of demonstrating that any continuing incapacity on the part of the worker could not be linked to the work injury of November 2011.[67]

[46] It was concluded Dr Stevenson's opinion was the firmest in terms of providing the strongest support for the case advanced by the employer. His Honour noted that in relation to the left shoulder condition, Dr Stevenson

[64] *Tracy Andros v Australian Fuel Distributors Pty Ltd* [2014] NTMC 029, particularly Dr Nyunt's evidence at [36]-[47]; Dr Talbot's evidence at [48]-[59]; Dr Stevenson's evidence at [60]-[71] and Dr Goodhand's evidence at [72]-[96]; further synthesis and analysis of the medical evidence, at [101]-[135].
[65] *Tracy Andros v Australian Fuel Distributors Pty Ltd* [2014] NTMC 029 at [102].
[66] *Tracy Andros v Australian Fuel Distributors Pty Ltd* [2014] NTMC 029 at [108].
[67] *Tracy Andros v Australian Fuel Distributors Pty Ltd* [2014] NTMC 029 at [111].

had concluded it was not due to the November 2011 incident. That opinion was based on a view that the fall was of a minor nature. In contrast, his Honour noted Dr Goodhand formed a different view as to the severity of the fall and that the worker had regarded her fall to be of a far more serious nature. Notwithstanding Dr Goodhand fully accepted the worker's pre-existing degenerative conditions, his Honour noted Dr Goodhand was firmly of the opinion that the worker's workplace injury had not resolved. Dr Goodhand disagreed the ongoing problems were solely due to the degenerative condition. After a lengthy analysis, including considering reasonable criticisms of Dr Goodhand's opinion, his Honour preferred aspects of Dr Goodhand's opinion largely because of the nature of the professional relationship between the respondent worker and Dr Goodhand.[68]

[47] His Honour's view was that because of his ongoing doctor/patient relationship with the respondent worker, Dr Goodhand enjoyed a real advantage in his clinical assessment.

[48] Dr Goodhand's first report of 10 October 2013 sets out the worker's injuries sustained as a result of hitting her head and slipping on the floor as exacerbation of degenerative disc disease, exacerbation of degenerative cervical spine and left rotator cuff injury.[69] The report states the injuries were confirmed by MRI and ultrasound through specialist referrals to

[68] *Tracy Andros v Australian Fuel Distributors Pty Ltd* [2014] NTMC 029 at [122].
[69] AB 213.

orthopaedic surgeon Dr Nyunt and pain specialist Dr Gavin Chin in 2012.[70] Further, the report states "since the injury Ms Andros has had continuing back and neck pain with disability; the result of exacerbation of underlying degenerative spinal conditions. Equally, Ms Andros has sustained a traumatic bursitis with possible exacerbation of the degenerative process in her AC joint as a result of her fall".[71] It is also stated "her current symptoms are due to exacerbation of this condition "as she was asymptomatic prior to her fall on 17 November". He also noted that even on restricted duties the worker's symptoms became more disabling.[72]

[49] His Honour also analysed in detail the evidence of the annular tear, noting that it left open the possibility of being a plausible explanation for the worker's ongoing complaints of pain and partial incapacity for work.[73] As a piece of circumstantial evidence, reliance was also placed on the two MRI reports showing no appreciable interval changes with the degenerative disc disease at both L4/5 and L5/6, as consistent with the hypothesis advanced by the respondent worker that her ongoing symptoms were due to the work injury rather than the pre-existing degenerative condition.[74]

[50] His Honour proceeded on the basis it was incumbent upon the employer to establish on the balance of probabilities that the worker had ceased to be partially incapacitated for work as result of the work injury. By this stage

[70] AB 214.
[71] AB 213.
[72] AB 216.
[73] *Tracy Andros v Australian Fuel Distributors Pty Ltd* [2014] NTMC 029 at [123]-[129].
[74] *Tracy Andros v Australian Fuel Distributors Pty Ltd* [2014] NTMC 029 at [130].

of the proceedings, the Work Health Court was dealing particularly with the matters pleaded in respondent employer's counterclaim; the s 69 Notice became a matter of little importance. On the whole of the evidence, his Honour found he could not be reasonably satisfied on the balance of probabilities that the worker had ceased to be partially incapacitated, as the evidence failed to establish that it was more likely than not that the worker had ceased to be partially incapacitated as a result of the work injury. Rather, it was equally probable that the worker continued to be partially incapacitated as a result of the work injury. It was concluded this was a case where the evidence gave rise to conflicting influences of equal degrees of probability.[75]

Was a Concession of the Type Asserted by the Appellant Made?

[51] Counsel for the appellant employer said on appeal there had been discussions leading up to the hearing in the Work Health Court between the practitioners for both parties about how the case would proceed in terms of what the employer would be required to prove. The concession or understanding was that the employer be *dux litis* and bore the onus of proving that the worker had ceased to be totally incapacitated for work and if the employer discharged that burden, the worker would assume the burden of establishing any partial incapacity for work. No concession along those lines was admitted on appeal on behalf of the respondent worker. After calling the matter on for clarification, it appears a similar state of affairs

[75] *Tracy Andros v Australian Fuel Distributors Pty Ltd* [2014] NTMC 029 at [131].

confronted his Honour. I infer this from his Honour's remarks in both decisions and the written submissions of both parties at that time.

[52] His Honour commented in the first set of reasons that the worker "no longer appears to be "ad idem" with the employer's view of the manner in which the appeal was conducted".[76] He was, however, unable to be satisfied that the hearing proceeded on the basis the Notice of Decision was confined to a rejection of any "total incapacity". There is no additional material before this Court with respect to any asserted concession. It is only possible to review the material that was before the Work Health Court, his Honour's reasons and submissions.

[53] In addition to the background and general manner in which the proceedings were conducted, the appellant employer relies particularly on the following exchange, that occurred after Dr Nyunt had given evidence in the employer's case, as evidence of a concession that the employer bore the onus only to demonstrate the respondent worker was no longer totally incapacitated:[77]

> Mr Roper: Your Honour, there was something I wanted to raise, just as a result of something that came out of my friend's opening and some of the questions that were led, led me to believe that it may still be problematic. My friend suggested – and this is in the pleading – that their argument was total or partial incapacity. We have a fundamental problem with that. The argument as we see it is whether there was a total incapacity. And in

[76] *Tracy Andros v Australian Fuel Distributors Pty Ltd* [2014] NTMC 030 at [61].
[77] AB 38 – 39.

respect of that argument we are *dux litis* and (inaudible).

His Honour: Yes, that's correct.

Mr Roper: But the moment it becomes an argument about partial incapacity.

His Honour: The onus.

Mr Roper: The onus shifts.

His Honour: Well that's what the cases say.

Mr Roper: That's right. And the difficulty we have – I didn't raise anything about it in my opening because the evidence before the court in the doctor's reports to date don't suggest any partial incapacity from the worker's camp. Their doctor, Dr Goodhand suggests that there's a total incapacity and that is the argument we thought we were going to be having.

Provided that is the – provided the case stays on that basis then we don't have any problem with being *dux litis*. We don't have any problem with the suggestion that we carry the onus. But if my friend is going to move from that or endeavour to depart from it, we may have a problem in relation to both the pleading and our ability to answer whatever that case may be.

His Honour: Did you want to say anything about that, Mr. Liveris?

Mr Liveris: No, I understand what the authorities say. I don't want to make any further comment about that. No. It's a matter my friend and I discussed earlier this morning. There's nothing more that I want to say about it.

Mr Roper: Well perhaps I can verify it because this is where it becomes a bit problematic, as we perceive it, from my friend's position. It may be answerable and it's obviously only early in the proceedings. But we now have as exhibit W3 attended (sic) by the worker a document which demonstrates that at least – I appreciate it's after the date of the decision, the notice of decision – which demonstrates at least a partial incapacity and in some respects if that's relied "upon – we would submit in the fullest of time it should be – that's really the end of the argument. There's no longer a total incapacity, it's a partial incapacity. Your Honour's not going to hear any evidence about what the partial incapacity is".

His Honour: Well that might be a problem for the worker.

Mr Liveris: Yes, I imagine it would be.

[54] This exchange was said to be consistent with an understanding between the parties that the hearing would be conducted on the basis that the employer was to demonstrate the worker was no longer totally incapacitated for work and if the employer was successful, the worker would then bear the onus to prove any continuing partial incapacity. In my opinion this exchange is too vague to justify the conclusion that counsel appearing in the Work Health Court communicated or intended to communicate such a concession. There might be said to be hints at an understanding of how counsel for the employer had anticipated the case would proceed, but no further clarification of this issue was sought by either party or his Honour at that time. The alleged concession is of a significant type if it were made. I

would expect if such a concession was intended, it would be clearly communicated.

[55] Attention was also drawn to the following parts of counsel for the worker's closing:

> I mean – and I think certainly what my friend says is right insofar as if you find that the employer has discharged totally incapacity – and as I say, without making the concession strictly, I point to the certificates which are suggestive of something and the worker's own evidence. But you then get to the partial – if you get to the partial incapacity consideration which we accept that we bear the onus...[78]
>
> What that leads to, in my submission, the written evidence, even given by the worker, that on her own case says that she has a partial ability, albeit a limited one and albeit something that's based very much it seems on a graded return to work program and that the worker will have established that the worker is no longer totally incapacitated for work but very much within that narrow window of what she's saying she's able to do and what the doctors seem to be saying that she's able to do.
>
> So the onus shifts but in my submission, there's clear evidence, albeit circumstantial, albeit inferences, that she still suffers an incapacity, an inability to completely work because of what happened to her when she slipped and fell on 17 November 2011. And in terms of what that then might or could lead to, the relevant change in circumstances, being that she was certified to be totally incapacitated and then not, then said she was no longer totally incapacitated is correct. There would be a partial incapacity, which we need to prove, which we will have proved on the evidence.[79]

[78] AB 124.
[79] AB 117.

[56] The following exchange was also relied on to illustrate the learned Chief Magistrate appreciated the nature and extent of the purported concession made in the context of a strict appeal:[80]

> His Honour: Well you see, Mr Liveris has – well he seems to be almost conceding that you've discharged your onus.
>
> Mr Roper: I don't think there's any question that that's the concession.
>
> His Honour: And if that's the case what else is there to do?
>
> Mr Roper: Well that's our submission.
>
> His Honour: What else – what remains on the pleadings?
>
> Mr Roper: Well the argument put against us is that there's a partial incapacity. So their evidence---
>
> His Honour: Yes. But normally isn't that addressed in an expansion of the pleadings?
>
> Mr Roper: Absolutely.

[57] Although the transcript of 30 June 2014 does not appear in the Appeal Book, it is common ground the learned Chief Magistrate called the parties before him on that date and advised he was troubled about the submissions that had been made concerning the shifting onus.[81] His Honour suggested it was for the employer to demonstrate that the worker was no longer incapacitated for work at all and called for further submissions on the point. The difficulty

[80] AB 122.
[81] Appellant's Written Submissions, P5 at [12].

became apparent during his Honour's consideration of the closing submissions.[82]

[58] Once the opportunity was given by his Honour to make further submissions, counsel for the worker made written submissions in the following terms: the proceedings were an appeal by the worker against a Notice of Decision which cancelled (rather than reduced) weekly payments under s 69 of the *Workers Rehabilitation and Compensation Act*.[83] The employer did not issue the Notice of Decision on the basis of partial incapacity and reduce the payments. At that stage of the proceedings there was no counterclaim filed. The employer was obliged in accordance with the authorities to prove the change of circumstances, in this instance that the worker "ceased to be incapacitated for work…." As the employer failed to prove the cessation of incapacity, no question of the onus shifting to the worker arose. The appellant employer's written submissions address particular questions canvassed as a result of the evidence in the hearing. The asserted concessions appear to be referred to in similar terms as has been submitted on appeal.[84] The precise content of any oral submissions made to his Honour as a result of calling the matter on are not before this Court.

[59] It is also relevant to consider the way counsel opened their respective cases in the Work Health Court.

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[82] *Tracy Andros v Australian Fuel Distributors Pty Ltd* [2014] NTMC 030 at [32]-[34].
[83] Worker's Further Outline of Closing submissions, 18 July 2014, annexure 'A' to Appellant's written submissions.
[84] Employer's Written Submissions 21 July 2014, handed up during the hearing of the appeal, but filed before the Work Health Court.

[60] In his opening, counsel for the employer acknowledged that the arguments on the pleadings were directed to the invalidity of the Notice of Decision, based on whether the worker was in fact incapacitated. In opening the case, counsel for the employer said: "The employer's position and indeed the medical evidence seems to agree on this at least, is that the worker had a pre-existing degenerative spinal condition and the employer's case is that that was aggravated by the fall. There was some soft tissue damage, that resolved subsequently".[85] Counsel then directed his comments to the Statement of Claim, which sought a declaration that the decision cancelling payments was invalid, pointing to "the arguments as to the invalidity of the Notice of Decision focus on whether or not the worker was in fact incapacitated".[86]

[61] It was emphasized in counsel for the employer's opening that it was not a case involving challenge to the efficacy of the Notice of Decision *per se* in its form, but was a "challenge to the underlying assumption that the incapacity or the injury had resolved".[87] The case would also concern "to the extent that there was any aggravation of that degenerative condition it has also resolved".[88] To that statement was added "And that really is the employer's case".[89]

[85] AB 24.
[86] AB 24.
[87] AB 24.
[88] AB 25.
[89] AB 25.

[62] When opening the worker's case, counsel told the Work Health Court the worker was paid benefits up to 18 September 2012 when the Notice of Decision was issued on the basis she ceased to be incapacitated. The worker's counsel stated "Her case is she remains incapacitated, that since the fall on 17 November 2011 she has by and large been unable to work and in that respect suffers from a total, if not partial incapacity".[90]

[63] There is nothing in the opening addresses to suggest the case would be conducted on an understanding as suggested by the appellant employer.

[64] It should also be acknowledged that almost three months after the filing of the Worker's Further Outline of Closing Submissions,[91] which can only be interpreted as withdrawing any suggested admission, if one was made, the appellant filed an amended Notice of Defence and a Counterclaim.[92] No significant amendment aside the counterclaim was added. Paragraph 12 of the counterclaim provides the employer's acceptance of the injury for the "limited purposes of the instant proceedings…" without admission for any other purpose and reserving its rights. "For limited purposes" again, the amended defence acknowledged acceptance of certain of the injuries but purports to claim liability for others had not been accepted and not been subject to compulsory mediation.[93] His Honour held paragraph 12 to be an improper pleading as it did not raise a justiciable matter or allege a material

[90] AB 25.
[91] Dated 18 July 2014.
[92] AB 12-17.
[93] Para 11(b)(c) of Counterclaim, AB 14.

fact.[94] It was disregarded. It is similarly disregarded here. Paragraph 13 of the counterclaim provides the worker ceased to be incapacitated for work. At paragraph 14 it is pleaded that if the worker continued to be incapacitated it was not total but partial. Paragraph 15 pleads that if found to be partially incapacitated, any partial incapacity does not lead to any loss of earning capacity.[95] The worker filed a defence to the counterclaim.[96] No further evidence was called.

[65] In my opinion if there was a concession of the kind described, and if there was a withdrawal of any such concession, his Honour gave the employer ample opportunity to deal with any issue of prejudice. The only evidence of a concession was in the worker's closing at the conclusion of the hearing.

[66] Obviously his Honour was concerned the pleadings and other material did not reflect the suggested concession, particularly with respect to the onus of proof, and in turn the suggested concession did not reflect the law. In my opinion his Honour's approach to this issue could not be said to be in error.

[67] In *Ju Ju Nominees Pty Ltd v Carmichael*,[97] the Court of Appeal emphasized the importance of pleadings in Work Health cases as the pleadings define the proper limits of the contest. A statement of claim can be amended so as to make it clear that the proceedings are being limited to an appeal against an employer's decision to cancel or reduce payments under s 69 of the Act.

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[94] *Tracey Andros v Australian Fuel Distributors Pty Ltd* [2014] NTMC 029 at [10].
[95] AB 15.
[96] AB 18-19.
[97] (1999) 9 NTLR 1

So far as can be seen on the pleadings in this case, the respondent worker confined the case taken to the Work Health Court to a strict appeal against the cancellation of benefits pursuant to s 69 of the Act. The onus of proof was therefore on the employer to justify the reasons for the cancellation of payments in accordance with the Notice of Decision.

[68] There was no indication on the pleadings that when the case was initially being heard before the Work Health Court it proceeded as anything other than an appeal against the cancellation of benefits. As *Ju Ju Nominees* makes clear, an employer is *dux litis* in an appeal against an employer's decision to cancel benefits under s 69 of the Act. His Honour Martin (BF) CJ set out the relevant principles:[98]

> 1. Where weekly compensation is to be cancelled by an employer for the reason that the worker has ceased to be incapacitated for work a notice given under s 69(1) must sufficiently state the reason and be accompanied by the medical certificate referred to in s 69(3), *Collins Radio Constructors v Day* (supra). (The appeal before his Honour proceeded on the basis that there had been compliance with the procedural requirements of s 69).
>
> 2. The employer carries the onus of establishing the change of circumstances warranting the cancellation or reduction of the amount of weekly compensation pursuant to s 69, *Morrissey v Conaust Ltd* (1991) 1 NTLR 183 at 189; *AAT Kings Tours Pty Ltd v Hughes* (1994) 4 NTLR 185 at 190-191; *Disability Services of Central Australia v Regan* (1998) 8 NTLR 73.
>
> 3. If the employer asserts that the worker has ceased to be incapacitated for work, then it assumes the burden of proof, *AAT Kings Tours Pty Ltd v Hughes* (supra) at 191.

[98] (1999) 9 NTLR 1 at 8.

4. If the employer succeeds in proving an assertion that total incapacity for work has ceased, demonstrating a change in loss of earning capacity, the onus of proving any partial incapacity for work passes generally to the worker, *Barbaro v Leighton Constructors Ply Ltd* (1980) 44 FLR 204 at 223; *AAT Kings Tours Ply Ltd v Hughes* (supra) at 191.

5. If the employer fails to establish the grounds stated in the notice, the effect of allowing the worker's appeal would be that the employer would be required by force of s 69 to continue to make weekly payments of compensation until lawfully permitted to cease or reduce those payments, either by the giving of a fresh notice or by making a substantive application under s 104, *Disability Services v Regan* (supra) at 4.

6. If the worker has widened the scope of the issues for trial beyond an appeal under s 69, then the employer is not confined to the grounds stated in the notice, but can raise by way of answer any other ground to resist the claim if it wishes, including as to whether there ever was any injury in the first place, *Disability Services v Regan* (supra) at 5. In that matter the worker had sought orders for weekly compensation from the date of cessation of payments to date of claim and continuing, and for payments under s 78 for costs of household services. It appears from p 5 that it was an issue on the appeal as to whether the learned Magistrate at trial was in error in dismissing the worker's claim. It is not suggested in that judgement that the worker's claim had not been the subject of the trial.

[69] The Notice of Decision in this matter clearly states the worker has ceased to be incapacitated for work as a result of the injury. The s 69(3) Certificate was in the same terms. "Incapacity" is defined in s 3 of the *Workers Rehabilitation and Compensation Act* as "an inability or limited ability to undertake paid work because of an injury". Having asserted a particular state of affairs in the Notice, in accordance with *Ju Ju Nominees*, in particular point (3) as set out above, the employer was obliged to prove the

worker was no longer incapacitated. If the employer does not prove what is asserted in the Notice, the onus does not shift.

[70] In my opinion, aside the closing, the exchanges referred to in the Work Health Court do not support the existence of a concession of the type asserted by the appellant employer. That would be contrary to the history of the proceedings as reflected in the pleadings.

[71] The alleged concession in the oral closing may represent a concession or admission of a type, but even that is not completely clear, especially in the context of the background and the pleadings. As noted, counsel for the worker at the time, Mr Liveris, did submit "I mean – and I think certainly what my friend says is right in so far as if you find that the employer has discharged total incapacity and, as I say without making the concessions strictly, I point to the certificates which are suggestive of something in the worker's own evidence". Counsel there appears to be speaking of the various certificates certifying the worker as fit at particular times. Then follows the statement "but if you get to the partial incapacity consideration which we accept that we bear the onus for we are required to prove that what that means in terms of loss. The arguments as I've pointed out". The transcript then notes "(inaudible)". It is unknown what was said at that point.

[72] In my view, in the context of a strict appeal, it is difficult to conclude that this represents a clear concession. It is not particularly clear what was

meant by "to prove that what means in terms of loss" given the background and the pleadings. His Honour regarded the statements in the closing as much "stronger evidence of a concession on the part of counsel for the worker" that the proceedings had been conducted on the basis that the employer's onus was to prove the worker was no longer totally incapacitated for work and if that onus was discharged, the worker carried the onus of demonstrating ongoing partial incapacity.[99]

[73] In my opinion, when read as a whole, his Honour's reasons do not disclose a clear finding that a concession was made, but rather he was unsure about the correctness of closing submissions and possibly how the case was run and so listed the matter for further submissions on the point. When those submissions were received, it was clear that what was said in the closing address by the respondent worker's counsel was corrected or not relied on. If there was an admission, and indeed if his Honour accepted it as so, especially given that it was not in accordance with law, an opportunity was given to clarify or effectively withdraw or correct it. From the way his Honour conducted the proceedings there was an opportunity given to alleviate any prejudice that may have flowed to the appellant employer. That was obviously his Honour's intention. Aside from possibly what was said in the worker's closing, there was no other indication of significance that the case would be run contrary to the pleadings and in accordance with the suggested concession.

[99] *Tracey Andros v Australian Fuel Distributors Pty Ltd* [2014] NTMC 030 at [57].

[74] If what occurred in these proceedings is that there was a genuine attempt to narrow the issues and through some aspect of the process there was miscommunication or misunderstanding about how the case was to proceed, that is a most unfortunate state of affairs. Even if that is what occurred, in my view, his Honour took appropriate steps to ensure there would be no unfairness to either party.

Grounds of Appeal

[75] I turn more specifically to the grounds in the Amended Notice of Appeal in broadly the order in which they were argued before this Court.[100]

[76] An appeal against a decision or determination of the Work Health Court is confined to questions of law.[101]

Ground Two

[77] Ground 2(a) of appeal alleges:

> (a) Error in finding the Notice of Decision constituted an assertion that the Worker had ceased to be incapacitated, at all, as a result of the work injury in circumstances where that finding was in contradiction to concessions properly made by the Respondent's Counsel and:
>
> (i) the respondent made no application for leave to withdraw the subject concessions;
>
> (ii) in the absence of any argument as to the appropriateness of any such withdrawal and without hearing from the

[100] Leave was granted at the commencement of hearing the appeal over the respondent's objection to amend the grounds of appeal. Grounds 4 and 6 in the original Notice of Appeal were not pressed.
[101] Section 116(1) *Workers Rehabilitation and Compensation Act*.

parties as to the equities involved in any such withdrawal;

(iii) without in fact granting leave to the respondent to withdraw concessions; and

(iv) where, in all the premises, the concessions remained extant.

[78] The appellant employer argues that based on the asserted concessions made by the worker, the employer had discharged its onus of proof, thus the approach of the Work Health Court was in error. As already indicated, there is scant evidence of any concession until the closing addresses.

[79] The appellant relies on what was said by Campbell JA on the consequences of failure to withdraw an admission in *The Nominal Defendant v Gabriel*:[102]

> In addition, under the common law, if counsel makes an admission at a trial, not in consequence of any agreement, and the trial thereafter proceeds on that basis, any further investigation of the matter admitted is dispensed with unless the court grants leave for the admission to be withdrawn. (citations omitted).

[80] It is accepted this is an authoritative statement of the principles. It is however important to note that an admission may be withdrawn and obviously, an admission does not become an issue until it is made. It is the "trial thereafter" (the admission) that is the focus of any assessment of the impact of the admission. In this case, an admission, if one was made with respect to what each party was required to prove, was made in the closing.

[102] (2007) 71 NSWLR 150 at [109].

[81] In *Drabsch v Switzerland General Insurance Co Ltd* Santow J summarised the principles relevant to admissions:

> "1. Where a party under no apparent disability makes a clear and distinct admission which is accepted by its opponent and acted upon, for reasons of policy and the due conduct of the business of the court, an application to withdraw the admission, especially at appeal, should not be freely granted.
>
> 2. The question is one for the receiving judge to consider in the context of each particular appeal, with the general guideline being that the person seeking on a review to withdraw a concession made should provide some good reason why the judge should disturb what was previously common ground or conceded.
>
> 3. Where a court is satisfied that admissions have been made after consideration and advice such as from the parties' expert and after a full opportunity to consider its case and whether the admissions should be made, admissions so made with deliberations and formality would ordinarily not be permitted to be withdrawn. Thus a court will not lend its approval to the withdrawal of admissions where, by analogy with the working of amendments, this activated by purely tactical reasons.
>
> 4. It will usually be appropriate to grant leave to withdrawn an admission where it is shown that the admission is contrary to the actual facts. Leave may also be appropriate where the circumstances show that the admission was made inadvertently or without due consideration of material matters. Irrespective of whether the admission has or has not been formally made, leave may be refused if the other party has changed its position in reliance upon the admission.
>
> 5. [A] court is not obliged to give decisive weight to court efficiency, such that a party who wishes to defend its claim is entitled to a hearing on the merits, with cost orders being available as a means of compensating the other party for any

> costs thereby unnecessarily incurred or not fairly visited on the other party. [103] (citations removed)

[82] Once again, the timing of any admission is of significance particularly with respect to whether the opposing party has changed its position as a result.

[83] Although no formal application was made to withdraw or correct what was said in the closing by counsel for the worker in the Work Health Court, for all intents and purposes, that is what took place when written submissions were received from not only the worker but also later from the employer. It is accepted here that the statements of principle set out in the extracts from the cases above apply. Nothing his Honour ordered contravened those principles. Further, the *Work Health Court Rules* together with the *Workers Rehabilitation and Compensation Act* encourage a less formal approach than in other settings.

[84] Rule 3.04(1) of the *Work Health Court Rules* states:

> At any stage of a proceeding the Court may, of its own motion, or an application, make orders relating to the conduct of the proceeding that the Court thinks are conducive to its fair, effective, complete, prompt and economical determination.

[85] Rule 3.04(2) allows the Court at any stage of a proceeding to make orders relating to the matters listed in Rule 3.04(2), including Rule 3.04(2)(b) relating to "admissions in relation to questions involved in the proceeding".

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[103] Unreported, Supreme Court of New South Wales Equity Division, 16 October 1996, p 3-4; applied in *Candy v GIO General Limited* [2013] NSWSC 810.

Further, s 110A(2) of the *Workers Rehabilitation and Compensation Act* provides:

> (2) The proceedings of the Court under this Division shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and the *Work Health Administration Act* and a proper consideration of the matter permits.

[86] When the learned Chief Magistrate called the matter on and heard submissions on the point that concerned him, it was clearly in accordance with both the spirit and letter of the *Workers Rehabilitation and Compensation Act* and the *Work Health Court Rules*. In as much as his Honour accepted there may have been a concession, his Honour, correctly in my view, found that such a concession would be contrary to law in any event.

[87] In the decision of 2 September 2014,[104] his Honour noted the worker confined her case to an appeal under s 69 of the *Workers Rehabilitation and Compensation Act*. He specifically distinguished the circumstances that arose in *Disability Services of Central Australia v Regan*[105] as the worker had not opened up the whole question of the merits of her claim by the way in which the case was conducted. He concluded that neither the Amended Notice of Defence nor the Amended Statement of Claim nor the manner in

[104] *Tracey Andros v Australian Fuel Distributors Pty Ltd* [2014] NTMC 030.
[105] (1998) 8 NTLR 73.

which the employer conducted its case extended the issues beyond a mere appeal under s 69 of the Act.[106]

[88] It was observed the Notice of Decision purported to cancel rather than reduce the workers weekly benefits. The Notice of Decision made it clear that payments were cancelled because the worker had ceased to be incapacitated for work as a result of her work injury on 17 November 2011 and that she no longer required treatment as a result of that work injury. By stating the worker had ceased to be incapacitated for work as result of her work injury, the employer was asserting that the worker had ceased to be incapacitated at all.[107]

[89] His Honour found he was unable to reach a state of comfortable satisfaction that the hearing proceeded on the basis that the Notice of Decision was confined to a rejection of any ongoing "total incapacity".[108] It was noted there was evidence in the worker's closing of a concession, however, it was concluded that the worker resiled from any such concession made during closing submissions. I do not agree that the fact his Honour stated that if the parties have conducted the appeal in the manner suggested by the employer it would have deviated from fundamental propositions of law means that his Honour accepted there was in fact a concession. His Honour expressed himself in the alternative.

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[106] *Tracey Andros v Australian Fuel Distributors Pty Ltd* [2014] NTMC 030 at [10]-[14].
[107] *Tracey Andros v Australian Fuel Distributors Pty Ltd* [2014] NTMC 030 at [15]-[18].
[108] *Tracey Andros v Australian Fuel Distributors Pty Ltd* [2014] NTMC 030.

[90] In fairness to both parties his Honour then listed the matter for further directions. Clearly his Honour had in mind to properly dispose of the issues that were raised in the hearing, as he was obliged to do under the *Workers Rehabilitation and Compensation Act*. As already noted, at a later directions hearing[109] the employer was directed to file and serve a counterclaim and the worker to file and serve a defence to the counterclaim.

[91] In my opinion with respect to Ground (2)(a), there was no error in the finding that the Employer's Notice of Decision constituted an assertion that the worker had ceased to be incapacitated, at all. It was not necessary for his Honour to add the words "at all", however, that is an expression making it clear that the definition of "incapacity" customarily used in this context was engaged. As mentioned already, "incapacity" is defined in s 3 of the *Workers Rehabilitation and Compensation Act* as "an inability or limited ability to engage in paid work because of an injury". The situation with respect to proof would have been different had the Notice of Decision asserted the worker had ceased to be totally incapacitated for work.

[92] In as much as this ground is directed to his Honour's interpretation of the meaning of the Notice of Decision, that interpretation was open to his Honour. As a matter of fact, it cannot be the subject of appeal. This ground of appeal is directed to impugning that finding in the face of the asserted concession. In all of the circumstances, given the timing of when the asserted concession concerning burden of proof was made in the closing,

[109] 15 October 2014.

given it was contrary to the law on the point, and given both parties had an opportunity to address the Work Health Court on the issue, I do not find this ground made out. Further, although no formal application was made to withdraw it, the written submissions made it clear counsel for the worker was not submitting that this was a case where the onus shifted.

[93] With respect to Ground (2)(a)(i), the written submissions made on behalf of the worker in response to his Honour calling the matter back on were tantamount to withdrawing the admission, if one was made, obviously so.

[94] With respect to Ground 2(a)(ii) this Court has not been provided with the transcript of what transpired on 30 June 2014 before the Work Health Court, however I have been provided with the written submissions made on behalf of both parties as a result of his Honour's intervention. Although not put in precisely the same terms as on appeal, the submissions made then appear to be in similar terms. I am satisfied the appellant employer had the opportunity to address the Work Health Court in respect of any asserted concession and any prejudice or disadvantage that may be suffered if the Court did not proceed in the manner the appellant employer said it had anticipated. The risk was that if his Honour did not take the action that he ultimately did, the claim would not have been heard according to law. Such an outcome is not in the interests of justice.

[95] With respect to Ground 2(a)(iii) and (iv) I have already outlined the procedures available in the *Work Health Court Rules* and the *Workers*

Rehabilitation and Compensation Act. Sufficient notice was given of a correction or change with respect to the submission on onus of proof. With respect to Ground 2(a)(iv), although not mentioned expressly, it must have been clear from the written content of the submissions filed on behalf of respondent worker that any concession made at the time of closing with respect to onus of proof was no longer relied on. There was insufficient evidence to find a concession of the type asserted elsewhere in the proceedings. The onus of proof could not have been disposed of by the alleged concession as asserted by the appellant employer.

[96] In summary, Ground 2(b) alleges error in finding the employer's onus was to demonstrate the worker was no longer incapacitated for work, at all. Ground 2(c) alleges the Work Health Court should have found in accordance with the concessions, the onus the employer was required to discharge was the worker was no longer totally incapacitated for work as a result of the injury. Ground 2(d) alleges the Work Health Court should have found the employer properly discharged the onus. Ground 2(e) alleges that the Work Health Court should have found the onus then passed to the worker to demonstrate what if any ongoing incapacity she suffered, referrable to the work injury and Ground 2(f) that the worker failed to discharge that onus.

[97] In relation to Grounds 2(b), (c), (d), (e) and (f), in my opinion, no error of law has been demonstrated. His Honour correctly applied the relevant authorities as already discussed. The appellant employer was obliged to prove the contents of the Notice of Decision. The Work Health Court took

an orthodox approach. The Notice of Decision did not assert that total incapacity for work had ceased, demonstrating a change in loss of earning capacity. Similarly, with respect to the matters pleaded in the counter claim, the appellant employer clearly bore the onus in respect of those matters. This clearly may be distinguished from the circumstances in dealing primarily with a worker's claim going beyond the validity of the Notice.[110]

[98] As the Work Health Court found, when a s 69 Notice is issued and served, the employer assumes the responsibility of proving the contents[111] which in this case was the cessation of incapacity in the total or partial sense for work as a consequence of the injury. The appellant employer bears the onus of proving the change in circumstances justifying the cancellation of benefits.[112] The onus does not shift to the worker unless the employer has established that particular change in circumstances warranting cancellation. It was well open to the learned Chief Magistrate on the evidence to find that the appellant employer did not discharge the onus. There was evidence available certifying the respondent worker as partially incapacitated for work as a result of the injury at the time of issuing the Notice of Decision.[113] This is not a proper matter for appeal, being a matter of a primary fact from which a reasonable conclusion was open and was drawn.

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[110] *Newton v Masonic Inc t/as Tiwi Gardens Nursing Homes* [2009] NTSC 51.
[111] *Ju Ju Nominees Pty Ltd v Carmichael* (1999) 9 NTLR 1 at 2.
[112] *Disability Services of Central Australia v Regan* (1998) 8 NTLR 73.
[113] AB 260-261.

[99] In as much as Grounds (2)(b) and (c) emphasise temporal elements, "no longer incapacitated for work at all" and "no longer totally incapacitated", there was ample evidence of the ongoing nature of the symptoms, even though that may have fluctuated from time to time. Relevant evidence has been referred to throughout these reasons with respect to the impact of the ongoing symptoms on the ability to work. Although as mentioned, one point of pleadings was disregarded, the appellant employer accepted liability for the claim as pleaded, thus accepting all liability associated with the claim unless relieved by mechanisms in the Act.

[100] There was evidence of ongoing incapacity referrable to the work injury through Dr Goodhand[114] and through the Progress Medical Certificates of 24 September 2012 and 11 December 2012.[115] There was also clear evidence from the respondent worker who was assessed as a credible witness.[116]

[101] As already summarised in part, the respondent worker gave evidence of increasing pain, constant and of a much higher level than previously, since the accident of 17 November 2011. She also gave evidence of her ability to work since November 2011 that she described as short shifts, with pain killers and mentally and emotionally dealing with pain. There was clear evidence of ongoing pain, restrictions and evidence of partial incapacity. Given the whole circumstances, the Work Health Court could not have found the employer discharged its onus.

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[114] Discussed above.
[115] AB 261-261.
[116] AB 53, 55.

[102] The question of whether the respondent worker properly discharged the onus did not arise in the circumstances of the hearing, because it was the appellant employer who carried the onus in the circumstances.[117] The authorities already discussed make this clear.

[103] Much of the discussion and argument about the onus has focussed on proceedings challenging a Notice cancelling or reducing payments. With respect to the counterclaim, the appellant employer bore the onus to prove the matters pleaded in the counterclaim. The counterclaim in part alleged the worker ceased to be incapacitated for work as a result of the injury. If found to have relevant incapacity, the incapacity was not total but partial. The appellant employer failed to prove that the respondent worker had ceased to be incapacitated for work in accordance with the definition in the Act. It also failed to prove its alternative assertion that any partial incapacity was not causative of any loss. Consistent with the approach in *Northern Cement Pty Ltd v Ioasa*,[118] having found the respondent worker was partially incapacitated for work and that there was sufficient evidence of loss of earning capacity as a result, it was for the appellant employer to prove, in the sense of pointing to evidence that showed, the financial consequences of the loss of earning capacity. His Honour found both partial incapacity and that there was sufficient evidence to determine the respondent worker had suffered loss of earning capacity, but it was for the

[117] Relevant to Grounds 2(e) and (f).
[118] [1994] NTSC 58.

appellant employer to show the financial consequences of that loss. I see no error in his Honour's approach.

Ground 3

[104] Ground three asserts that having incorrectly found that the employer bore the onus of proving the worker was no longer incapacitated for work at all, error was demonstrated by:

(a) Finding the employer had failed to discharge the onus;

(b) That the learned Chief Magistrate should have found the employer had demonstrated the worker was no longer incapacitated for work, at all, as a result of the injury;

(c) Should have found that, in the result, the onus passed to the worker to demonstrate any ongoing incapacity for work referrable to the work injury;

(d) Should have found, in the absence of any evidence from the worker as to any link between the work injury and alleged ongoing capacity for work, that the worker had failed to discharge that onus;

(e) Or otherwise:

(i) Erred in finding that the work injury contributed to any incapacity for work as at the date of the Notice of Decision or any time thereafter, in the absence of any evidence to support a finding and contrary to the evidence; and

(ii) Should have found and failed to find that the worker was not suffering from any incapacity related to the work injury as at that date of the Notice of Decision or at any time thereafter.

[105] As would be evident from these reasons thus far it is not accepted here that there was error in finding the appellant employer bore the onus of proving the worker was no longer incapacitated for work at all. In any event Grounds 3(a) and (b) challenges the finding that the employer had failed to discharge the onus.

[106] Clearly the conclusion that the employer had failed to discharge the onus was open on the facts. Without repeating all of the evidence or the careful way in which his Honour considered the evidence, it was open for his Honour to conclude the appellant employer had failed to discharge the onus. His Honour was not obliged on the basis of the evidence before the Work Health Court to find the employer had demonstrated the worker was no longer incapacitated for work at all as a result of the injury.

[107] It perhaps should be recalled that Dr Stevenson's certificate attached to the Notice of Decision states the respondent worker "had ceased to be incapacitated for work as a result of that injury". Given there had been acceptance of the injury as pleaded, to be successful, the appellant employer needed to prove there was no continuing incapacity for work.

[108] It was also submitted with respect to this ground his Honour proceeded on the mistaken assumption that the demonstration of an ongoing physical incapacity contingent upon the work injury was all that was required and that the findings show that his Honour mistakenly conflated a continuing physical incapacity with a continuing incapacity for work. That assertion

must be rejected. Clearly his Honour at a number of points throughout the judgement emphasised that the focus was on whether the worker had ceased to be partially incapacitated for work as a result of the work injury. If not express, the focus on continuing incapacity for work was strongly implied throughout. The concepts were not conflated.[119]

[109] For the reasons already given with respect to other grounds, Grounds 3(c) and (d) must fail. In any event, without repeating all of his Honour's findings with respect to the evidence, there was evidence of the link between the work injury and ongoing incapacity for work. His Honour's conclusions in this regard were open. Similarly with Ground 3(e), it was open on the evidence for his Honour to find the work injury contributed to incapacity for work as at the date of the Notice of Decision and that it continued. There was no error in those findings. Reference has already been made to Dr Goodhand's report and evidence, the worker's evidence and the way in which his Honour evaluated the medical evidence and the evidence as a whole.

Ground Five

This ground asserts that having found that the employer carried the onus of demonstrating that the worker's partial incapacity referable to the work injury was not productive of any loss of earning capacity, the Chief Magistrate erred in:

[119] For example *Tracey Andros v Australian Fuel Distributors Pty Ltd* [2014] NTMC 029 at [131], [139].

(a) Failing to give any or any proper consideration to the evidence before him as to the Worker's capacity for work;

(b) Failing to give any or any proper consideration to the evidence before him as to:

(i) The Worker's earning capacity; and/or

(ii) The monetary value of that capacity; and

(c) Failing to deliver a decision and or otherwise decide the extent of the Worker's ongoing loss of earning capacity on the evidence before him.

[110] The decision of Martin (BF) CJ in *Northern Cement Pty Ltd v Ioasa*[120] established that in the circumstances of an employer attempting to minimise exposure to any claim for compensation, the employer bears the onus of pointing to or placing evidence before the Court in relation to the ability that a worker has to do work. Essentially there must be evidence before the Court of the work the worker can do and what the worker could earn from doing that work.

[111] In *Northern Cement Pty Ltd v Ioasa*, Martin (BF) CJ explained this principle with reference to s 65(2)(b) of the *Workers Rehabilitation and Compensation Act*. Section 65(2) governs the calculation of loss of earning capacity, being the difference between the worker's normal weekly earnings indexed in accordance with the Act and the amount, if any, he or she is from time to time reasonably capable of earning in a week. This may also include consideration of s 68, the assessment of the most profitable employment. In

[120] [1994] NTSC 58.

Northern Cement Pty Ltd v Ioasa, his Honour explained the position as follows:

> there is a distinction to be made between the onus resting upon the worker to show that partial incapacity for work, in the sense of suffering some inability or limited inability to undertake paid work because of an injury, and the amount to which the worker is reasonably capable of earning within the parameters of s 65(2)(b). In respect of the quantification of loss of earning capacity, it is up to the employer to point to evidence in the case minimising his liability in monetary terms. It would be unreasonable to require the worker "to prove an open ended negative" such as that he was not capable of earning more than an amount which he chooses to rely upon. Once there is evidence to demonstrate incapacity and loss of earning capacity on the part of the worker, then minimising the financial consequences of such findings rests with the employer.[121]

[112] In this case, the learned Chief Magistrate explained that evidence in respect of loss of earning capacity would usually relate to (a) the most profitable work which, after the accident, the worker was capable of undertaking; (b) whether such work is reasonably available; and (c) the amount which the worker is reasonably capable of earning from such work.[122]

[113] On appeal counsel for the appellant employer pointed to evidence and submissions relating to the respondent worker receiving, at an earlier time, $21.47 per hour in wages. That material did not appear to be current. It clearly did cover a period when the worker was employed by the appellant employer in or about April 2010. It falls well short of material that would have informed his Honour of what work the worker could perform and what she could earn from any such work. No reason has been advanced for not

[121] *Northern Cement Pty Ltd v Ioasa* [1994] NTSC 58 at 11.
[122] *Tracey Andros v Australian Fuel Distributors Pty Ltd* [2014] NTMC 029 at [140]; applying *Normandy Mining Pty Ltd v Horner* [2000] NTSC 79.

calling evidence or presenting material relevant to this point. The Progress Medical Certificates referred to by the appellant employer[123] provide very little information in terms of capacity and potential earnings. Those Certificates covered limited periods when light duties were recommended. There was insufficient evidence for his Honour to make the findings in respect of the quantification of loss of earning capacity.

Ground One

> 1. The learned Magistrate erred in finding, in the absence of any pleading, evidence or argument to such effect and against the weight of evidence to the contrary, that the relevant medical certificate certifying that the Worker was no longer totally incapacitated for work, was not attached to the Employer's Notice of Decision.

[114] This is a curious ground. His Honour clearly refers to the accompanying medical certificate of Dr Stevenson and Dr Stevenson's report.[124] There is no suggestion in his Honour's reasons that the s 69(3) Certificate was not attached to the Notice. What his Honour did say was with respect to the argument on behalf of the appellant employer that the Notice of Decision was open to conflicting constructions, if the construction preferred by the appellant employer was correct, then, in those circumstances the Notice would fail for non-compliance with s 69(3). His Honour was simply dealing with what might be the consequences of an argument advanced on behalf of the appellant employer. In the circumstances, there is no force in the

[123] AB 257-264 and AB 269.
[124] For example at *Tracey Andros v Australian Fuel Distributors Pty Ltd* [2014] NTMC 030 at [46].

appellant employer's argument that his Honour failed to consider the absence of pleadings on the point. The respondent's pleading was to the effect that she was either totally or partially incapacitated for work at the time of the issue of the Notice. The appellant employer sought an interpretation that was not open.

[115] In my opinion, none of the grounds advanced should be allowed. The appeal will be dismissed.

[116] I will hear any issues in respect of costs at a time convenient to the parties.

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