CITATION:	*Northern Territory of Australia v Noaks & Anor* [2022] NTSC 61
PARTIES:	NORTHERN TERRITORY OF AUSTRALIA v NOAKS, Anthony And WOODCOCK, Judge Alan
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	2022-01055-SC
DELIVERED:	3 August 2022
HEARING DATE:	6 July 2022
JUDGMENT OF:	Reeves J

CATCHWORDS:

APPEAL — Workers compensation — Appeal from Work Health Court — Worker successfully claimed compensation for mental injury under *Return to Work Act 1986* — Employer subsequently served s 69 notice — Judge found that this employer failed to prove pre-existing mental illness was the cause of his incapacity for work — Judge concluded that the worker suffered injury in course of employment and was entitled to compensation — Grounds of appeal — Failure to afford natural justice/ procedural fairness — Failure to provide adequate reasons — No evidence to support a finding of fact— No error of law established — Appeal dismissed.

Return to Work Act 1986 ss 69, 104, 116

Cases referred to:

Boyle (a pseudonym) v R [2022] SASCA 50; *DL v The Queen* [2018] 266 CLR 1; [2018] HCA 26; *Hall Contracting Pty Ltd v MacMahon Contractors Pty Ltd & Anor* (2014) 34 NTLR 17; *JKC Australia LNG Pty Ltd v INPEX Operations Australia Pty Ltd* (2018) 41 NTLR 149; *Keith v Gal* [2013] NSWCA 339*Laminex Group v Catford* [2021] NTSC 92; *Lee v MacMahon Contractors Pty Ltd* (2018) 41 NTLR 168; *Mitchell v Cullingral Pty Ltd* [2012] NSWCA 389; *Musico & Ors v Davenport & Ors* [2003] NSWSC 977; *Paridis v Settlement Agents Supervisory Board* (2007) 33 WAR 361; *Quality Plumbing & Building Contractors Pty Ltd v Schloss* [2015] 253 IR 102; *Saeed v Minister for Immigration & Citizenship* (2010) 241 CLR 252; *Walker v Walker* (1937) 57 CLR 630; *Wurramara v Blackwell* (2018) 346 FLR 391; [2018] NTSC 89; *Zurich Bay Holdings Pty Ltd v Brookfield Multiplex Engineering and Infrastructure Pty Ltd* [2014] WASC 40.

REPRESENTATION:

Counsel:

Appellant:	JW Roper SC with K Frost
First Respondent:	DA Skennar QC with J Hodge
Second Respondent:	Nil

Solicitors:

Appellant:	Hunt & Hunt
First Respondent:	Hall Payne Lawyers
Second Respondent:	Nil

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

Northern Territory of Australia v Noaks & Anor [2022] NTSC 61
No. 2022-01055-SC

BETWEEN:

NORTHERN TERRITORY OF AUSTRALIA
Appellant

AND:

ANTHONY NOAKS
First Respondent

AND:

JUDGE ALAN WOODCOCK
Second Respondent

CORAM: REEVES J

REASONS FOR DECISION

(Delivered 3 August 2022)

Introduction

[1] On 31 March 2022 a Local Court Judge determined that Mr Noaks (the Worker) had suffered an injury in the course of his employment with the Northern Territory of Australia (the Employer) and was entitled to be paid compensation under the provisions of the *Return to Work Act 1986* (the *RTW Act*). This appeal concerns that judgment.

[2] The Employer alleges that the trial judge made three errors of law in his judgment. They may be briefly summarised as follows:

(a) that he failed to afford it natural justice or procedural fairness by determining the Worker's claim on a basis that had not been pleaded or argued before him without telling the parties that he intended to take that course;

(b) that he failed to provide adequate reasons for his decision; and

(c) that there was no evidence to support the finding that the Worker was incapacitated for work from the time of his initial injury and continuing.

[3] For the reasons that follow, none of these errors of law has been made out and the Employer's appeal will be dismissed.

Section 116 of the *RTW Act*

[4] Because it is critical to the outcome of this appeal, it is important at the outset to identify the limitation that is placed on appeals of this kind by s 116 of the *RTW Act*. That section relevantly provides that "… a party to a proceeding before the Court constituted by a Local Court Judge who is aggrieved by a decision or determination of the Court may appeal against the decision or determination **on a question of law** to the Supreme Court…".

[5] The expression "on a question of law" has been held to be narrower than an appeal "that merely 'involves a question of law' ".[1]

1 *Paridis v Settlement Agents Supervisory Board* (2007) 33 WAR 361 at [53] per Buss JA (Wheeler and Pullin JA concurring).

[6] As to what constitutes an error of law, as distinct from an error of fact, the Court of Appeal in *Lee v MacMahon Contractors Pty Ltd*[2] provided the following helpful summary:

> (1) In the process of arriving at an ultimate conclusion a trial judge goes through a number of stages. The first stage is to find the preliminary facts. This may involve the evaluation of witnesses who gave conflicting accounts as to those facts. If the trial judge prefers one account to another, that decision is a question of fact to be determined by him and is not reviewable on appeal. It may be that the reason given for preferring one witness to another is patently wrong. Nevertheless, no appeal lies: *R v District Court of the Metropolitan District Holden at Sydney*; *Ex parte White* (1966) 116 CLR 644 at 654; *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 156; *Haines v Leves* (1987) 8 NSWLR 442 at 469-470.
>
> (2) Regardless of the trial judge's reasons, if there is evidence which, if believed, would support the finding, there is no error of law: *Nicolia v Commissioner of Railways (NSW)* (1970) 45 ALJR 465.
>
> (3) If, on the other hand, there is no evidence to support a finding of fact which is crucial to an ultimate finding that the case fell within the words the statute (for example, that injury by accident arose out of the course of the employment, or that the failure to give notice was occasioned by mistake), there is an error of law: *Nicolia v Commissioner of Railways (NSW)*; *Tiver Constructions Pty Ltd v Clair* at 145-146 per Martin and Mildren JJ; *Haines v Leves* at 156.
>
> (4) But, a finding of fact cannot be disturbed on the basis that it is "perverse", or "against the evidence or the weight of the evidence or contrary to the overwhelming weight of evidence". Nor may this Court review a finding of fact merely because it is alleged to ignore the probative force of evidence which is all one way, even if no reasonable person could have arrived at the decision made, and even if the reasons was demonstrably unsound: *Haines v Leves* at 469-470.
>
> (5) The second stage is the drawing of inferences by the trial judge from the primary facts to arrive at secondary facts. This is subject to the same limitations that apply to primary facts.
>
> (6) If there are no primary facts upon which a secondary fact could be inferred, and the secondary fact is crucial to the ultimate finding as to whether or not

2 (2018) 41 NTLR 168.

the case fell within the words of the statute, there is an error of law. If there are primary facts upon which a secondary fact might be inferred, there is no error of law.

(7) It is not sufficient that an appellate court would have drawn a different inference from those facts. The question is, whether there were facts upon which the inference might be drawn. If a tribunal draws an inference which cannot reasonably be drawn, it errs in point of law and its decision can be reviewed by the courts; *Instrumatic Ltd v Supabrase Ltd* [1969] 1 WLR 519 at 521; [1969] 2 All ER 131 at 132 per Lord Denning MR, with whom Edmund Davies LJ and Phillimore LJ agreed, *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14.

It should be noted that the question of inferences addressed by (5) to (7) above does not arise in this appeal.

Factual background

[7] First, it is relevant to record that, prior to his injury, the Worker had a history of psychiatric disorders and treatment dating from at least 2012.

[8] In January 2018, the Worker obtained a position as a switchboard operator with the Employer at the Alice Springs Hospital.

[9] On 29 March 2018, the Worker presented to his general practitioner in distress complaining that he had been bullied and harassed by his co-workers. As a result of that attendance, he was certified unfit for work.

[10] On 10 April 2018 the Worker made a claim for compensation under the *RTW Act* alleging that the bullying and harassment at work had caused him to sustain a psychological injury.

[11] About two weeks later, on 24 April 2018, the Employer accepted that claim and began to pay compensation to the Worker.

[12] On 11 March 2019, having obtained a medical report from Dr Hundertmark, a consultant psychiatrist, the Employer gave a notice to the Worker under s 69 of the *RTW Act* that it intended to cancel his compensation payments.

[13] On 18 September 2019, after a mediation failed to resolve the dispute raised by that notice, the Worker commenced proceedings in the Local Court under s 104 of the *RTW Act*.

[14] The trial of that proceeding occurred over four days in February 2021. As already mentioned, on 31 March 2022, the trial judge found that the Worker had suffered an injury arising out of or in the course of his employment and ordered that the Employer pay him compensation.

The Local Court Decision

[15] The trial judge began his reasons for decision (hereafter "the Reasons") by briefly setting out the history to the Worker's claim (at [1] to [4]). His Honour then reviewed the evidence before him concerning the question whether the Worker had sustained an injury in the course of his employment (at [5] to [8]). At the conclusion of that review, he made the following findings, all but one of which were in the Worker's favour (at [9]):

> I accept the Worker's evidence that Ms Pine was regularly rude and demeaning to him in the course of his employment, amounting to bullying. I accept the Worker's account that Ms Pine facilitated a mock medical emergency phone call. These findings are consistent with Ms Pine's account as quoted. I do not accept the suggestion this was invented by the Worker at a time after the initial Application. I accept the Worker's account of the mock emergency and am satisfied he was distressed as a result. I also accept Ms Pine said words to the effect that the Worker did not look Aboriginal and disparaged his ethnicity, commencing on the first day of his employment. I do not accept comments were made about the Worker's grandmother. Rather, it would seem to me this is more of a rationale as to why comments about the Worker's ethnicity hurt so much

> (he takes such insults as an insult to his grandmother who he reveres). I am satisfied that the bullying by Ms Pine of the Worker was ongoing, persistent and racist. I reject the suggestion that this behaviour is trivial.

[16] However, immediately following those findings, his Honour made the following mixed findings about the Worker's reliability as an "historian of fact" (at [10]):

> The Worker gave evidence at length and was vigorously cross-examined for some hours. It became apparent that he is a person of limited capacity and at times an indifferent historian of fact. He appears to me a person of limited literacy and bad at filling out forms as a result. He has a long history of mental health issues, of which he is in complete denial. He has over the course of various physical injuries come to use opioid medication recreationally, possibly he is or was addicted to them. He has a number of physical ailments as a result of previous injuries. He revealed himself to be a fantasist as to his usual recreational pursuits and some of his former capacities. He has a long history of threatening violence and often sexual violence to men, women and children in perusing perceived grievances with medical advisers, public servants, administrators and co-workers in various settings (not in the work place the subject of these proceedings). He has at times during his numerous historic interactions with medical advisers and service providers been dishonest and threatening.

[17] To exemplify the latter observation, his Honour noted the following comment that Dr Hundertmark had made in his report dated 22 February 2019, upon which the s 69 notice was based (at [11]):

> Mr Noaks denied earlier interactions with a counsellor, a psychologist or psychiatrist. It is again noted that he was deliberately withholding information during various portions of the interview.

[18] The trial judge then turned to the questions of the nature of the Worker's injury and any resulting incapacity for work. On those issues, his Honour first summarised the evidence of Dr Hundertmark who was called at the trial to give evidence for the Employer. He set out the following summary of Dr Hundertmark's opinions and diagnosis (at [12]):

> Dr Hundertmark diagnosed a **mixed personality disorder predominantly of the borderline type**. The Worker was said to have a range of

> personality issues including borderline and dependant issues, and accordingly no specific personality diagnosis could be made. **He opined that the Worker's lengthy absence from work was related primarily to his personality difficulties rather than being directly linked to workplace issues**. Dr Hundertmark was unable to comment on the effect of pre-existing issues due to the Worker's failure to comply with the process of assessment. He doubted the veracity of the Worker's presentation and history. He regarded the Worker as having a capacity to work. (Emphasis added).

His Honour noted (at [13]) that Dr Hundertmark "remained unmoved" about these opinions during the course of his cross-examination.

[19] The Worker called Dr Takyar, also a consultant psychiatrist, to give evidence at the trial. The trial judge reviewed his evidence (at [14] to [17]) in the course of which he summarised his diagnosis and opinions in the following terms (at [16]):

> Dr Takyar was of the opinion the Worker presented with a **DSM-5 major depressive disorder with generalised anxiety disorder**. Significant symptoms and a lack of improvement of the same were noted. **The psychological condition of the Worker arose from bullying and harassment in the work place**, he was at the time of the report incapacitated and unable to work as a result. (Emphasis added).

Similarly to Dr Hundertmark, his Honour noted that Dr Takyar remained unmoved in his diagnosis and opinions (at [18]).

[20] The trial judge also summarised the contents of several reports prepared by three other medical practitioners namely, Dr Migendra Das (at [21]); Dr Gregory White (at [22]); and Dr Achan (at [23]). However, because none of those practitioners gave evidence at the trial, his Honour gave their opinions little or no weight. With respect to Dr Achan this meant that he rejected the link the Employer had sought to make between his letter dated 11 October 2012 and Dr Hundertmark's diagnosis, as follows (at [23]):

> The Employer has pleaded that a diagnosis of acute adjustment disorder by Dr Achan in a letter of 11 October 2012 is a particular of the diagnosis by

> Dr Hundertmark as above. The letter is a two page document from Dr Achan addressed to the Worker's treating doctor outlining that after a presentation on 7 October 2012, that, "Clinically, Anthony Noaks does fit the diagnostic label of Acute Adjustment Disorder". Doctor Achan was not asked to complete a report or called in evidence. His diagnosis, like many of the historic attempts to diagnose the Worker, differs from that of the two expert witnesses (though this is something less than a diagnosis it must be said). Dr Achan was not called in evidence. I am respectfully unable to give this opinion any weight. I do not accept it makes out or assists in the process of making out a pre-existing medical condition. The pleading therefore is not made out.

[21] Ultimately his Honour was unable to accept Dr Hundertmark's diagnosis and opinions and instead accepted those of Dr Takyar. In support of the former conclusion he reasoned (at [19] to [20]):

> **Given the state of the evidence** it is not possible to make a finding that the Worker did or did not have a diagnosable mental illness prior to the events the subject of these proceedings. I am unable to accept Dr Hundertmark's opinion that the Worker's absence from work was as a result of an underlying, pre-existing mixed personality disorder or an unspecified personality disorder. He was said to have a range of personality issues including borderline and dependant issues and accordingly no specific personality diagnosis could be made. He was noted to be evasive and non-committal at the commencement of the interview. He also refused to answer some questions. There was a limited answering of the doctor's questions towards the end of the interview. Perhaps understandably given this presentation Dr Hundertmark had misgivings about the Worker's history of presenting complaints.
>
> Dr Hundertmark endeavoured to complete a report and give an opinion in the face of the uncooperative and at times non-responsive behaviour of the Worker. Frankly, Dr Hundertmark was put in an unfair position where he, in my assessment, was required to form a diagnosis without anything approaching a useful history from the Worker upon consultation. Dr Hundertmark was briefed with less source material relating to medical treatment of the Worker in the relevant period than Dr Takyar. Having the benefit of considering all of the material and all of the evidence, I do not accept the diagnosis of Dr Hundertmark. (Emphasis added).

[22] Conversely, he provided the following reasons for accepting the diagnosis and opinions of Dr Takyar (at [24]):

> I accept the diagnosis of Dr Takyar that the Worker suffered a major depressive disorder with generalised anxiety disorder. The Worker gave a history of current symptoms. Dr Takyar was briefed with a variety of source materials relating to his medical treatment. The Worker did not disclose his long history of mental health problems to Dr Takyar in circumstances where he is in denial. He believes (it would seem to me erroneously but honestly) these problems arose from anger issues. Nonetheless having closely watched the Worker give his evidence, rejected other parts of his evidence as unreliable, watched him struggle with his challenges as previously mentioned, I accept his history of ongoing **symptoms commencing in the relevant period** as outlined to Dr Takyar that substantiate his diagnosis. Though some symptoms may be akin to those suffered by the Worker previously, the magnitude and combination of symptoms described make out the diagnosis. (Emphasis added).

[23] Importantly, the trial judge expanded on his statement about "the state of the evidence" which appears in the first line of [19] of the Reasons (emphasised at [21]) above), in the following terms at ([25]):

> The Worker has suffered from mental health problems all of his adult life, his medical history makes this clear. In circumstances where he does not accept this, he has not provided his prior history to either of the expert witnesses. The documentary history of mental health problems is insufficiently cogent to draw a rational conclusion as to a definitive mental illness prior to the pleaded injury. The attempts to further investigate his mental illness historically have not been followed up by the Worker. There are previous endeavours at diagnosis that are not adequately founded in a meaningful history for reasons discussed. A broad range of different working diagnosis are made or mused upon by various treating medical service providers; they are many and varied. **The state of the evidence** is such that I am unable to reach a conclusion as to a diagnosable mental illness prior to the injury as pleaded. Though clearly he was a vulnerable person with a history of need for medical assistance and traumatic experiences, and consequently carried with him personal challenges. He was also possibly addicted to prescription opioids, but again I cannot be satisfied of a diagnosable medical condition for the same reasons. (Emphasis added).

[24] Furthermore, with respect to the commencement of the Worker's symptoms mentioned in the penultimate sentence of [24] of the Reasons (emphasised at

[22] above) his Honour made several additional observations after which he made a finding that the Worker had suffered an injury in the course of his employment with the Employer as follows (at [26]):

> The Worker was clearly a vulnerable person with challenges when he commenced employment with the Employer at the Alice Springs Hospital, an institution that provides treatment for ill or injured people in Alice Springs. However he was, until on or about 28 March 2018 of sufficiently sound health to attend work and complete his daily tasks as a switchboard operator. The Employer shows by virtue of its pleadings and cross-examination of the Worker a lack of insight into the potential effects of race based bullying in the work place. Ms Pine, under the guise of training, bullied the vulnerable special provision Worker on the basis that he was an Aboriginal person with light skin. I am satisfied for reasons previously stated that this type of comment was especially hurtful to the Worker. The mock emergency staged by Ms Pine left the Worker believing a person had died as a result of his incapacity to help. I am satisfied she regularly insulted and demeaned the Worker, including in the presence of co-workers.
>
> As a consequence of the ongoing bullying by his co-worker Ms Pine in the workplace, **I am satisfied the Worker suffered an injury in the form of Major Depressive Disorder. I am satisfied the injury arose out of or in the course of the Worker's employment with the Employer** (Emphasis added).

[25] Thereafter, the trial judge specifically rejected three matters that had been pleaded by the Employer in its amended defence and counter-claim the first and third of which reiterated the effect of the main findings he had made earlier in the Reasons as set out above. They were:

(a) At [28] that the Worker "suffered from a primary personality disorder at the time of the pleaded injury". His Honour stated that he "did not accept this diagnosis" and instead accepted that the Worker's symptoms "arose as a consequence of the injury he suffered in the workplace". It will be noted that the former accurately summarised Dr Hundertmark's diagnosis and opinion (emphasised at [18] above) and the later reflected Dr Takyar's

diagnosis and opinion about the cause of the Worker's injury (emphasised at [19] above).

(b) At [29] that the Worker had made "misrepresentations that were false and misleading". Despite repeating his findings that the Worker had fantasised about his pre-injury activities and had "been on occasion untruthful and threatening", his Honour concluded that "none of this substantiates [the] misrepresentation[s] as pleaded". It is to be noted that the ground relating to this matter was not pursued at the hearing of this appeal (see at [27] below).

(c) At [30] that the Employer "was wrong to accept liability for the Worker's injury in the first place". In rejecting this pleading, his Honour said "I have found that the injury arose out of or in the course of his employment. I have accepted the opinion of Dr Takyar that the injury caused the Worker to be incapacitated and unable to work as a result and remained so at the time of the notice".

[26] In the concluding paragraphs of the Reasons, the trial judge concluded:

(a) that the Employer had "not discharged its onus" with respect to the s 69 notice (at [31]);

(b) that it had failed to establish its counter-claim (at [32] and [33]); and

(c) that the Worker was entitled to the relief he had sought (at [34]).

These conclusions accord with well-established authority concerning an employer's procedural and substantive onus in respect of a cancellation of workers compensation payments under s 69 of the *RTW Act*[3].

The Grounds of Appeal

[27] The Employer's notice of appeal contains six grounds. At the hearing of the appeal, its counsel did not seek to pursue ground 4 which related to the misrepresentations allegedly made by the Worker (see at 25(b) above). He also indicated that ground 5 was essentially a restatement of grounds 1 to 3 inclusive and did not therefore raise any new issue. The remaining grounds of appeal are as follows:

1. The learned Judge erred in that he:

   a. mischaracterised evidence from Dr Hundertmark to the effect "no specific personality diagnosis has been made" [19] as dispositive of the Doctor's evidence:

      i. ignoring the specific diagnosis of a "*mixed personality disorder or an unspecified personality disorder coded 301.9 on the DSM-5*";

      ii. seemingly misconceiving/ignoring that for the purposes of a diagnosis of an "*unspecified personality disorder coded 301.9 on the DSM-5*" the diagnosis of any specific personality disorder constitutes a differential diagnosis that must be excluded before the Doctor's ultimate diagnosis could be properly made;

      iii. proceeded on the basis that the Doctor's necessary exclusion of any "*specified personality disorder*" as a precursor to the diagnosis of an "*unspecified personality disorder*" was the Doctor opining, contrary to the evidence itself, that no proper diagnosis could be made;

   b. mistakenly proceeded on the basis that the Doctor was propounding no diagnosis, in circumstances where:

      i. no such argument was (for obvious reasons and quite properly):

         1. pleaded by the Respondent;

3 Conveniently summarised by Grant CJ in *Laminex Group v Catford* [2021] NTSC 92 at [26].

2. raised by the Respondent during the course of the hearing; and/or

3. raised by the Respondent in the course of written submissions following the same;

ii. His Honour's characterisation and findings in respect of Dr Hundertmark's evidence could not be easily/reasonably anticipated by either party;

iii. His Honour failed to:

1. direct the Appellant's attention to the possibility of the subject characterisation/finding; and/or

2. provide the Appellant with any proper opportunity to:

1. be heard; and/or
2. otherwise correct His Honour's misconceptions,

in relation to the same.

2. In the premises and/or otherwise, the learned Judge erred in finding that it was not possible to make a finding that the Respondent "did or did not have a diagnosable mental illness prior to the events the subject of" the proceedings below in [19], in that His Honour:

a. ignored the admission contained in paragraph 3(f) of the Respondent's Reply and Defence to Counterclaim to the effect Dr Achan's opinion and consequent diagnosis was that the Respondent in fact suffered from "*an Acute Adjustment Disorder with reactive mixed mood changes complicated*" as at 11 October 2012;

b. further and notwithstanding the admission on the Respondent's pleadings, proceeded to [23]:

i. find that the Applicant's pleading at 3(1) of its Defence was not made out;

ii. find that Dr Achan's diagnosis was "something less than a diagnosis"; and

iii. notwithstanding that Dr Achan's letter of 11 October 2012 was tendered without objection, was part of the evidentiary record, was before the Court for all purposes, found that he could not accord the same any evidentiary weight;

c. should have:

i. had proper regard to the pleadings before him, particularly the admission in the Respondent's Reply and Defence to Counterclaim;

ii. in the circumstances and/or otherwise, afforded Dr Achan's letter the evidentiary weight that a proper judicial consideration of its probative value demanded; and

iii. in the result, found the Appellant's pleaded contention made out;

d. ignored and or failed to give any or any proper consideration to the evidence before him as to:

i. the Respondent's extensive history of diagnosed opioid addiction, instead finding that the Respondent was "*possibly addicted to prescription opioids, but again I cannot be satisfied of a diagnosable medical condition*" [25];

ii. the diagnosis of a "*psychotic disorder not otherwise specified*" in 1998;

iii. the Respondent's psychiatric counselling in 2005;

iv. the diagnosis of the Respondent as suffering from Cluster B personality traits as at October 2012;

v. the Respondent's lengthy history of insomnia;

vi. the Respondent's lengthy history of anti-social behaviour;

vi the Respondent's lengthy history of enforced hospitalisation as a result of:

1. self-harm;
2. attempted suicide; and
3. his antisocial and violence behaviour; and

viii. the diagnosis of the Respondent as suffering from:

1. Cluster B personality traits; and
2. Anti-social personality traits;

as at January 2017;

3. As a result of His Honour's errors the subject of Grounds 1 and 2 above or otherwise, preferred the evidence of Dr Takyar to Dr Hundertmark [24], notwithstanding:

a. finding that the Respondent had a history of dishonesty when dealing with medical advisors [10];

b. the untrammelled evidence before the Court that the Respondent lied to and/or misled Dr Takyar as to his:

i. past psychiatric history;

ii. past history of insomnia; and
iii. ability to engage in recreation and sporting pursuits both pre and post the injury;

c. the Respondent was less than honest with the Doctor concerning his past history of opioid use and addiction;

d. should have found, consistent with a proper application of the principles espoused in *Alagic v Callbar Pty Ltd* [1999] NTSC 90, that Dr Takyar's evidence and diagnosis, predicated as it was on the Respondent's self-reporting of symptomology and onset, was unreliable;

e. further and/or in the alternative, failed to provide any or any proper reasons as to why, having regard to the matters set out in subparagraphs 3(a), (b) and (c) above, Dr Takyar's evidence and diagnosis out be preferred.

6. His Honour:

a. then further erred in treating his findings in respect of the Counterclaim as dispositive of the Respondent's appeal of the Notice of Decision [31];

b. should have proceeded to consider the merits of the Respondent's appeal on the basis of the evidence before him;

c. erred in finding that and/or failed to provide any or any proper reasons as to why Dr Takyar's diagnosis of 3 February 2020 (some twelve months after the Notice of Decision) was dispositive of whether the Respondent was suffering from an incapacity for work/loss of earning capacity as at the date of the Notice of Decision [30], notwithstanding:

i. the matters the subject of Ground 3(1), (b) and (c) above;

ii. Dr Hundertmark had attended upon the Worker on 13 February 2019 and had proffered an opinion that the Respondent was not incapacitated for work/suffered no loss of earning capacity at that time, as a result of any work related injury (and irrespective of whether one was to accept the efficacy of his ultimate diagnosis);

iii. Dr Takyar's report is entirely silent as to whether the injury he diagnosed was causative of any incapacity for work or loss of earning capacity in the period preceding the Respondent's attendance upon him in January 2020;

iv. the Respondent advanced no other expert medical opinion as to incapacity/loss of earning capacity in the period between the Notice of Decision and Dr Takyar's report of 3 February 2020;

v. it was not open to His Honour, on the evidence before him (even ignoring the error the subject of Ground 1 above), to proceed to find or infer that the Respondent had any incapacity for work or loss of earning capacity in the period preceding the Respondent's attendance upon Dr Takyar in January 2020; and

d. should have proceeded to find that the Appellant had made out the change of circumstances relied upon for the foundation of the Notice of Decision and dismissed the Respondent's appeal accordingly.

[28] In his written outline of submissions the Employer's counsel stated that the "inadequacy of His Honour's written reasons" was the "real gravamen of this appeal". Further, while he conceded that the notice of appeal did not mention the expressions "natural justice" or "procedural fairness" or any similar concept, in oral argument he sought to group the remaining grounds of appeal above by reference to the following alleged errors of law:

a) failure to afford natural justice/procedural fairness - ground 1;

b) failure to provide adequate reasons - grounds 2 and 3; and

(c) making a finding without any evidence to support it - ground 6.

[29] Since the Worker's counsel appeared to accept this approach in her oral submissions, at least with respect to the first two alleged errors, I will adopt it in these reasons. However, with respect to the third alleged error, the Worker's counsel claimed that no such error was apparent from ground 6 and that the inclusion of that error in oral submissions therefore came as a surprise. While the language of ground 6 is somewhat ambiguous, it can be disposed of briefly

so I will proceed to consider it in these reasons. The three alleged errors of law set out above will therefore be dealt with in turn below.

Failure to afford natural justice/procedural fairness

The contentions

[30] This alleged error relies on ground 1 of the notice of appeal (see at [27] above). That ground identifies [19] of the Reasons as the source of the alleged error, in particular the words "no specific personality diagnosis could be made". I interpose to note that this phrase has been incorrectly quoted in paragraph 1(a) of the notice of appeal as "no specific personality diagnosis **has been** made" (Emphasis added). In his written submissions the Employer's counsel also relied upon the trial judge's observation at [19] of the Reasons that "it is not possible to make a finding that the Worker did or did not have a diagnosable mental illness prior to the events the subject of these proceedings". As well it sought to rely upon his Honour's treatment of Dr Achan's letter dated 11 October 2012, specifically in attributing no weight to the opinions expressed in it (at [23] set out at [20] above).

[31] As already mentioned, the words "natural justice" or "procedural fairness" do not appear anywhere in the notice of appeal. Nonetheless the proposition upon which this alleged error relies could, on a generous interpretation, be said to emerge from paragraph 1(b) of the notice of appeal (see at [27] above) where the Employer alleges that his Honour proceeded on the basis that Dr Hundertmark was propounding no diagnosis in circumstances where that argument had not been pleaded, nor raised in argument at the trial. In oral submissions the

Employer's counsel relied on that paragraph to contend that since that argument could not reasonably be anticipated and since his Honour did not notify the Employer that he intended to proceed to deal with the case on that footing, to proceed to do so involved a denial of natural justice or procedural fairness. As well, in his written submissions he contended that no such argument was put to Dr Hundertmark in cross-examination and that it was not argued that Dr Hundertmark's "diagnosis of an unspecified personality disorder" was anything other than a proper and open diagnosis.

[32] As for Dr Ashcan's report, the Employer's counsel pointed to the admission made in the Worker's reply to the Employer's defence and counter-claim to the effect that "the Worker admits that, on 11 October 2012, Dr Kris Achan, opined (in a letter to Dr Piyadsa) that he was suffering from an acute adjustment disorder with reactive mixed mood changes complicated" and contended that "[w]hilst the parties could not be said to be ignorant of the likelihood that [h]is Honour may prefer particular medical evidence or expert evidence to other such evidence, it could not have been in the contemplation of either party that His Honour would simply proceed to ascribe no weight at all to evidence properly before him. No litigant can be expected to proceed on the basis that a sitting Judge may abrogate their proper function".

[33] In advancing these contentions, the Employer's counsel relied on a series of judgments including *Musico & Ors v Davenport & Ors* [2003] NSWSC 977 at [108]; *Zurich Bay Holdings Pty Ltd v Brookfield Multiplex Engineering and Infrastructure Pty Ltd* [2014] WASC 40 at [10]; *Wurramara v Blackwell* (2018)

346 FLR 391 at [35]-[37]; *JKC Australia LNG Pty Ltd v INPEX Operations Australia Pty Ltd* (2018) 41 NTLR 149 at [40]; and *Hall Contracting Pty Ltd v MacMahon Contractors Pty Ltd & Anor* (2014) 34 NTLR 17 at [36]-[38] and [42].

[34] The Employer also contended that his Honour's approach constituted both an error of law and a jurisdictional error relying, respectively, on *Quality Plumbing & Building Contractors Pty Ltd v Schloss* [2015] 253 IR 102 at [34] and *Saeed v Minister for Immigration & Citizenship* (2010) 241 CLR 252 at [13].

[35] In response, the Worker contended that his Honour had not found at [19] of the Reasons that Dr Hundertmark had made "no diagnosis" but rather had accurately précised the second sentence of Dr Hundertmark's report dated 22 February 2019 as follows:

> In my opinion, the diagnosis is one of a mixed personality disorder coded 301.9 on the DSM-5. He has a range of personal issues including borderline and dependant issues, accordingly no specific personality diagnosis can be made.

Accordingly, the Worker contended that "As the learned judge did not in fact proceed on the basis that there was "no diagnosis", it cannot be said that he failed to afford the parties procedural fairness".

[36] In the alternative, the Worker contended that, if the trial judge had made that error, that conclusion was open to him on the evidence and it did not, therefore, constitute an error of law.

[37] In support of this contention, the Worker pointed to the Reasons at [19], [20] and [25] and contended that his Honour did not accept Dr Hundertmark's diagnosis after considering all of the evidence. Specifically, he contended that "His

Honour was not satisfied that the "documentary history of mental health problems" was sufficiently "cogent to draw a rational conclusion as to a definitive mental illness prior to the pleaded injury" referring to a broad range of different working diagnoses "made or mused" upon by various treating medical service providers". (Underlining per original).

[38] As for the admission in his reply to the Employer's defence and counter-claim, the Worker contended that the Employer had overstated its effect in that "… the admission is of the fact that the letter was sent and as to what is said, not the condition itself". Furthermore, the Worker pointed out that that issue was raised with him in cross-examination and that the trial judge had specifically dealt with it at [23] of the Reasons (see at [20] above).

[39] The Worker therefore contended that his Honour "was entitled to give such weight to [or Dr Achan's diagnosis] as he might think proper or as the circumstances warranted" relying upon *Walker v Walker* (1937) 57 CLR 630 per Latham CJ at 635, Dixon J at 636 and Evatt J at 638. Finally, the Worker contended that the failure to alert the parties to an intention to ascribe no weight to Dr Achan's report could not, in all the circumstances, be characterised as a failure to afford natural justice or procedural fairness.

Consideration

[40] The short answer on this alleged error is that the words "no specific personality diagnosis could be made" in [19] of the Reasons did not constitute a finding that Dr Hundertmark was propounding no diagnosis at all. Instead those words were, as the Worker's counsel correctly contended, an accurate précis of the words of

Dr Hundertmark's report (set out at [35] above). Moreover, those words were not directed to Dr Hundertmark's diagnosis as to the nature of the Worker's injury - which he had earlier identified at [12] of the Reasons (set out at [18] above) - but rather to the related issue about whether he had any resulting incapacity for work. Specifically whether, in the terms of the introductory words to [19] of the Reasons, it was possible to make a finding that the Worker had "a diagnosable mental illness prior to the events the subject of these proceedings".

[41] Hence the observations in [19] and [20] of the Reasons were directed to that issue and, in particular, to the difficulty posed by the Worker's "uncooperative and at times non-responsive" attitude to facilitating that pursuit (at [20] of the Reasons). The same theme was pursued at [25] of the Reasons. There, his Honour concluded that neither Dr Hundertmark, nor any of the other medical practitioners, including Dr Achan, was able to obtain a useful history from the Worker. As well, he earlier observed that Dr Hundertmark had the additional disadvantage of being inadequately briefed with respect to the "medical treatment of the Worker in the relevant period" (at [20] of the Reasons).

[42] Ultimately his Honour concluded that he was "unable to reach a conclusion as to a diagnosable mental illness prior to the injury as pleaded" (at [25] of the Reasons). On this basis, he rejected Dr Hundertmark's opinion that the Worker's incapacity for work was caused by that pre-existing mental illness. Instead, he accepted the Worker's pleaded case based on Dr Takyar's opinions that he "… suffered an injury in the form of Major Depressive Disorder..[which]..arose out of or in the course of [his] employment with the Employer" (at [26] of the

Reasons). That, in turn, led to him specifically rejecting the countering pleading in the Employer's amended defence and counterclaim based on Dr Hundertmark's opinions (at [28] of the Reasons, set out at [25(a)] above).

[43] There is, therefore, no basis for the Employer's claim that the trial judge dealt with the case on a basis that had not been pleaded, nor raised in argument, at the trial. In the absence of any indication that his Honour decided the matter on that basis, none of the authorities upon which the Employer has relied is relevant. In any event, most of those authorities are directed to the judicial review of administrative decision makers. Consequently, with one or two exceptions[4], they do not shed any relevant light on the obligations of a judicial decision maker to afford natural justice when determining a matter before him or her.

Disposition

[44] For these reasons this alleged error does not constitute an error on a question of law.

Failure to provide adequate reasons

The contentions

[45] This alleged error relies on grounds 2 and 3 of the notice of appeal (see at [27] above). It can be seen from those grounds that they variously identify, in order, [19] of the Reasons (see at [21] above in respect of Dr Hundertmark's opinions); [23] of the Reasons (see at [20] above in respect of Dr Achan's 2012 letter); [25] of the Reasons (see at [23] above in respect of the state of the evidence

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4 For example taking judicial notice of a matter without informing the parties of an intention to do so: *Wurramara v Blackwell* [2018] 346 FLR 391.

concerning the Worker's pre-existing condition); [24] of the Reasons (see [24] above in respect of the cause of the Worker's psychological condition in 2018); and [10] of the Reasons (see at [16] above concerning the Worker's reliability as a witness).

[46] It will be immediately apparent from the language used in those grounds of appeal that they are redolent of factual error. That includes statements such as "evidentiary weight" (ground 2(c)), "failed to give any or proper consideration to the evidence" (ground 2(d)) and "preferred the evidence of…" (ground 3). Nonetheless the crux of this alleged error does appear incidentally in the final paragraph of (3)(e) of the notice of appeal: "failed to provide any or any proper reasons".

[47] In its written and oral submissions the Employer emphasised a judge's obligation to provide proper reasons as a necessary "incident of the judicial process". It contended that his Honour "…simply bundles the documentary history of past mental health problems and discounts the same in his deliberations without purporting to provide any rational for why, how or in what respect the same were said to be "*insufficiently cogent*". Such bold, conclusory statements do not satisfy the requirements for proper reasons". Further, it contended that **"…** His Honour was bound to consider [the evidence of the Worker's past medical history"] and advance a proper articulation of the reasons he found the same "*insufficiently cogent*".

[48] Specifically in respect of his Honour's rejection of Dr Hundertmark's opinion at [19] to [20] of the Reasons, the Employer contended that "The expert evidence

of Dr Hundertmark was “required to be the subject of coherent reasoned rebuttal by [his Honour] unless it could be discounted for other good reasons”.

[49] In her written and oral submissions, the Worker’s counsel contended that his Honour was dealing with a large body of evidence and, while the Reasons were “economical”, they dealt with the “critical issues and the contest between the parties” namely, the “contesting opinions of medical practitioners and the submissions [made] in relation to the Worker’s history”. In particular, she contended that his Honour rejected Dr Hundertmark’s opinions at [19] and [20] of the Reasons for a “lack of a suitable history and the comparative lack of source material”.

Consideration

[50] Unsurprisingly, there is no dispute between the parties as to the existence of an obligation on the part of a judicial officer to give adequate reasons for his or her decision. That obligation was expressed most recently by the High Court in *DL v The Queen*[5] as follows:

> The content and detail of reasons "will vary according to the nature of the jurisdiction which the court is exercising and the particular matter the subject of the decision". In the absence of an express statutory provision, "a judge returning a verdict following a trial without a jury is obliged to give reasons sufficient to identify the principles of law applied by the judge and the main factual findings on which the judge relied". One reason for this obligation is the need for adequate reasons in order for an appellate court to discharge its statutory duty on an appeal from the decision and, correspondingly, for the parties to understand the basis for the decision for purposes including the exercise of any rights to appeal.

5 [2018] 266 CLR 1; [2018] HCA 26 at [32] per Kiefel CJ and Keane and Edelman JJ.

[51] To these principles may be added the following recent observations of the South Australian Court of Appeal in *Boyle*[6]:

> "Reasons are to be read as a whole. It is not necessary for a judge or magistrate to give extensive and elaborate reasons……. The reasons must be more than a bare statement of the principles of law applied and the findings of fact made; there must be exposed a reasoning process linking them and justifying the latter and, ultimately, the verdict that is reached……. A trial magistrate or judge will ordinarily be expected to expose their reasoning on points critical to the contest between the parties".

[52] Further, in *Mitchell v Cullingral Pty Ltd*[7] the New South Wales Court of Appeal expressed the latter point in the following terms:

> "Another way in which this has been put is that the judge must engage with, or grapple or wrestle with, the cases presented by each party….. This is not adequately done by setting out the evidence adduced by one side, setting out the evidence on the other side, and saying that the judge prefers one body of evidence to another…..".[8]

[53] For the purpose of this appeal, the issues that the trial judge had to determine were confined to matters of fact. In broad terms they revolved around the question whether the Worker was entitled to continue to receive compensation payments under the *RTW Act* following service of the cancellation notice under s 69. That notice was set out in full in the Reasons at [6]. As already noted, it was based on the opinions of Dr Hundertmark as expressed in his report dated 22 February 2019. Those opinions were summarised in the body of the s 69 notice in the following terms:

> You attended a review on 13 February 2019 with Dr James Hundertmark, psychiatrist, in Darwin. In relation to your compensable injury, Dr Hundertmark has declared the following:

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6 *Boyle (a pseudonym) v R* [2022] SASCA 50 at [119] to [120]).
7 [2012] NSWCA 389 at [116]).
8 See also *Keith v Gal* [2013] NSWCA 339 at [109] to [119].

- Clinical findings/diagnosis at this examination – Mixed Personality Disorder which is not work-related.
- "The claimant suffers from a mixed personality disorder which is not work-related".
- "The Worker's incapacity is no longer a result of the work-related injury/disease".
- "It is my opinion that his mental state and the difficulties he is currently facing are not linked to his work-based issues".

[54] It can be seen from this notice, that the critical point to the contest between the parties was the cause of the Worker's incapacity for work. On the Employer's case he had a pre-existing mental illness and that was the cause of his incapacity for work at about the time it served the s 69 notice in 2019. On the other hand, on the Worker's case, his incapacity for work was caused by the continuing effects of the psychological condition he sustained in the course of his employment with the Employer in 2018.

[55] As remarked earlier, the Employer bore the onus on this critical point (see at [26] above). In order to establish its case the Employer therefore had to prove that the Worker had such a pre-existing mental illness. That, in turn, led to the question posed by the trial judge at [19] of the Reasons: whether or not it was possible to make a finding that the Worker had a "diagnosable mental illness prior to the events the subject of these proceedings". As mentioned earlier, his Honour reviewed the evidence of Dr Hundertmark and the reports of the other medical practitioners and concluded that, based on the "state of the evidence", it was not possible to make that diagnosis.

[56] While his Honour's reasons are, as the Worker concedes, "economical" they do, in my view, sufficiently disclose the reasoning process that he employed to reach

that conclusion. That is to say he did not simply set out the evidence adduced by the Employer and the Worker and say that he preferred one over the other. Instead he gave at least two reasons why he did not consider that the employer had established Dr Hundertmark's diagnosis of a pre-existing mental illness. First, as elaborated earlier (see at [41] above), that Dr Hundertmark was unable to obtain a reliable history from the Worker. Secondly, that he was "briefed with less source material relating to medical treatment of the Worker in the relevant period than Dr Takyar" (at [20] of the Reasons, see at [21] above).

[57] His Honour also separately provided a cogent reason as to why he was not able to give any weight to the opinions expressed in the reports of the other medical practitioners concerned. Namely, that they were not called to give evidence. Furthermore, in the case of Dr Achan, he noted that he was not even asked to complete a report (at [23]) of the Reasons, set out at [20] above). On this aspect I also interpose to agree with the contention of the Worker's counsel set out earlier (see at [38] above) about the effect of the admission contained in his reply to the Employer's defence and counter-claim.

Disposition

[58] For these reasons I consider the trial judge exposed his reasoning, albeit briefly, on the critical point of contest between the parties. It follows that this alleged error does not constitute an error on a question of law.

No evidence to support finding

[59] This alleged error relies upon ground 6 of the notice of appeal. It focuses on the statements at [30] of the Reasons (see at [25(c)] above), particularly the words

"the injury caused the Worker to be incapacitated and unable to work as a result and remained so at the time of the notice".

[60] The Employer's counsel contended that this observation reflected an error of law because "nowhere in Dr Takyar's report does the doctor suggest that the incapacity on which he opines, predates the same. Moreover, and most importantly, there is no suggestion in the doctor's evidence about the incapacity he notes was prevalent as at the date of the notice".

[61] In response, the Worker's counsel referred to the following paragraphs in Dr Takyar's report dated 3 February 2020 and contended that they provided sufficient evidence upon which his Honour could draw the conclusion he did:

> **4. Advise whether Mr Noaks is currently totally or partially incapacitated for employment and state whether the incapacity is total or partial**
>
> There is total incapacitation at the current time.
>
> **5. Advise any restrictions you would place on Mr Noaks in employment including restrictions as to number of hours and types duties**
>
> He has no capacity for employment.
>
> **6. Advise any treatment you believe Mr Noaks requires including the cost of any such treatment**
>
> He requires referral to a psychiatrist at the cost of $490 per session, medication at a cost of $60 per script and psychological therapy with a clinical psychologist at the cost of $290 per session.
>
> **7. Advise whether you believe Mr Noaks's condition is stable**
>
> On balance, given the significance of his symptomatology and the lack of change in his symptomatology in my view in the recent period, I believe his condition is stable and stationary.
>
> **8. If Mr Noaks's condition is stable provide a permanent impairment assessment in accordance with the 5th Edition of the American Medical Association's Guidelines to the Evaluation of Permanent Impairment,**

as modified by the Northern Territory guidelines (a copy of the guidelines are enclosed). Please also complete the enclosed checklist; and

This has been calculated at 26% impairment.

[62] This alleged error can be disposed of briefly. When the paragraphs of Dr Takyar's report to which the Worker has referred above are read as a whole and in context, I consider they comfortably meet the criteria set out in *Lee*[9] namely that they provide evidence which, if believed, would support the finding at [30] of the Reasons. Specifically, it is implicit from the references to the Worker's incapacity being total, to his symptomatology being stable and stationary and to his impairment being permanent that his incapacity for work had continued throughout the period since he sustained his injury in the course of his employment in 2018.

[63] This alleged error does not therefore constitute an error on a question of law.

Overall disposition

[64] For these reasons the Employer has failed to establish any error "on a question of law". Accordingly, its Notice of Appeal filed 26 April 2022 is dismissed. I will hear the parties on the question of costs.

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9 *Lee v MacMahon Constructions* at [6] above (2).