CITATION: *Maynard v Power and Water Authority* [2002] NTMC 012

PARTIES: GORDON MAYNARD
Worker
v

POWER AND WATER AUTHORITY
Employer

TITLE OF COURT: WORK HEALTH COURT

JURISDICTION: WORK HEALTH

FILE NO(s): 20018655

DELIVERED ON: 29 April 2002

DELIVERED AT: DARWIN

HEARING DATE(s): 10 April 2002

JUDGMENT OF: D. TRIGG SM

CATCHWORDS:

Work Health Act: ss 82, 85, 87.
Deemed acceptance of liability – effect.
Medical certificate under s82(1)(b) – what required.

REPRESENTATION:

Counsel:
Worker: Mr Clift
Employer: Mr Sweet

Solicitors:
Worker: De Silva Hebron
Employer: Jackson McDonald

Judgment category classification: A
Judgment ID number: [2002] NTMC 012
Number of paragraphs: 64

IN THE WORK HEALTH COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20018655

BETWEEN:

GORDON MAYNARD
Worker

AND:

POWER AND WATER AUTHORITY
Employer

REASONS FOR JUDGMENT

(Delivered 29 April 2002)

Mr TRIGG SM:

1. This proceeding commenced on 6 November 2000 when the Worker filed an Application in the Court consequent upon receipt of a Form 5 notice of decision from the employer dated 19 September 2000. In that document the employer advised the worker that it "disputes liability for your claim pursuant to section 85" of the Act. The stated reasons for that decision were:

> "1. Any injury you may have sustained (which is not admitted) did not occur in the course of or arise out of your employment with the Power & Water Authority;
>
> 2. Any incapacity you now have for work (which is not admitted) does not arise as a result of any injury sustained in the course of your employment or arising out of your employment with the Power & Water Authority."

2. The matter came on before myself because of an Interlocutory Application by the worker dated the 22nd day of January 2002. In that application the worker sought the following Order (amongst others):

> "1. That the Employer make payment of weekly payments of compensation to the Worker at the rate of $468.50 gross per week as indexed in accordance with section 64 and 65 of the Act from 21 May 1996 until 4 October 2000."

3. Argument proceeded before me on 10 April 2002. At the commencement of the argument I was informed that:

- No issue was taken that the medical certificate dated 21 June 2000 (a copy of which is annexed to this decision and marked "C") was other than in the form approved by the Work Health Authority;

- No issue was taken that the first claim form dated 2 June 2000 (a copy of which is annexed to this decision and marked "A") and the original medical certificate dated 21 June 2000 were received by the employer by 23 June 2000;

- No issue was taken that the second claim form dated 25 July 2000 (a copy of which is annexed to this decision and marked "B") and a copy of the medical certificate dated 21 June 2000 were received by the agent of the employer for the purposes of service by no later than 27 July 2000;

- No issue was taken with the fact that the employer served the form 5, referred to in paragraph 1 hereof, on 20 September 2000.

4. There was a dispute on the pleadings in this matter as to whether notice of injury was given as alleged. However, that is a matter to be resolved in the substantive hearing based on evidence. Likewise, it is raised on the pleadings that the current claim is not maintainable pursuant to section 182 of the Act because it is alleged that notice of the injury was not given before the worker voluntarily left his employment and secondly because the claim for compensation was not made within six months after the occurrence of the injury. Again, both these matters will be matters for the substantive hearing.

5. Section 53 of the Work Health Act (hereinafter referred to as “The Act”) is the primary operative section which creates an entitlement under the Act. Section 53 is in the following terms:

> “Subject to this Part, where a worker suffers an injury within or outside the Territory and that injury results in or materially contributes to his or her -
>
> (a) death;
>
> (b) impairment; or
>
> (c) incapacity,
>
> there is payable by his or her employer to the worker or the worker's dependants, in accordance with this Part, such compensation as is prescribed. ”

6. Division 5 of Part V of The Act sets out the claim procedures by which a worker seeks entitlements under the Act. Sections 79 to 81 in the Act are in the following terms:

> “79. Definition
>
> In this Division "weekly payment" means a weekly payment of compensation.
>
> 80. Notice of injury and claim for compensation
>
> (1) Subject to this Act, a person shall not be entitled to compensation unless notice of the relevant injury has, as soon as practicable, been given to or served on the worker's employer.
>
> (2) An employer who receives a claim for compensation shall be deemed to have been given notice of the injury to which it relates.
>
> 81. Form of notice of injury
>
> (1) Notice of an injury -
>
> (a) may be given orally or in writing;
>
> (b) shall, subject to section 84(2), be given to -

> (i) the employer or, if there is more than one employer, to one of the employers;
>
> (ii) a person under whose supervision the worker is employed; or
>
> (iii) a person designated for the purpose by the employer;
>
> (c) shall include the name and address of the person injured; and
>
> (d) shall include the date on which the injury occurred and the cause of the injury.
>
> (2) Where an employer has received notice of an injury, he or she shall record that fact in records kept for that purpose."

7. In *Maddalozzo v. Maddick* (1992) 108FLR 159 it was held that compliance with section 80(1) of the Act is a condition precedent to a worker's entitlement to compensation.

8. Section 82 of the Act deals with the form of a claim for compensation and is in the following terms:

> "(1) A claim for compensation shall -
>
> (a) be in the approved form;
>
> (b) unless it is a claim for compensation under section 62, 63 or 73, be accompanied by a certificate in a form approved by the Authority from a medical practitioner or other prescribed person; and
>
> (c) subject to section 84(3), be given to or served on the employer.
>
> (2) If the claim and certificate are not given or served at the same time, the remaining document shall be given or served on the employer within 28 days after the first document is given or served and the claim for compensation shall be deemed not to have been made until the day on which the remaining document is given to or served on the employer.
>
> (3) A defect, omission or irregularity in a claim for or certificate shall not affect the validity of the claim and the claim shall be dealt with in accordance with this Part unless the defect, omission or

> irregularity relates to information which is not within the knowledge of or otherwise ascertainable by, the employer or his or her insurer.
>
> (4) A worker shall authorise the release to his or her employer of all information concerning the worker's injury or disease, if the claim form specifies that the worker is required to authorise the release of that information, and the claim for compensation by the worker shall be deemed not to have been made until the authorisation is given.
>
> (5) An authorisation under subsection (4) is irrevocable."

9. I digress to note that there appears to be an error in the December 1999 reprint of the Act, and the copy of the Act available on the internet. Section 82(3) was amended by Act number 18 of 1998 and that amendment does not appear to have been correctly transposed into the reprint. The word "for" appearing in the first line of s82(3) should not be there. The subsection should correctly read: "A defect, omission or irregularity in a claim or certificate……"

10. Pursuant to section 3(1) of the Act "approved form" means "a form approved by the Work Health Authority for the purposes of the provision in which the expression occurs".

11. I understand that no issue is taken to suggest that either of the claim forms (annexures A and B) are other than in the approved form.

12. The Work Health Act has been the subject of much judicial interpretation and comment over the years but there appears to have been no decision on the issue ventilated before me to this stage. As has been pointed out in numerous cases to date the Act is beneficial legislation and accordingly, where ambiguity or difficulty arises a construction most favourable to the worker should be adopted (see: *Foresight Pty. Ltd. (t/as Bridgestone Tyre Services) v. Maddick* (1991) 79NTR17 @24; *Loizos v. Carlton & United Breweries Ltd* (1994) 94NTR31 @33; *Rozycki v. Work Social Club Katherine Inc* (1997) 112NTR 19@30).

13. It is clear from section 82(1)(b) that unless the claim for compensation is one under section 62 (a lump sum claim in respect of the death of a worker), section 63 (amounts payable for the benefit of a prescribed child who is a dependant of a deceased worker) or section 73 (a claim for medical, surgical and other associated expenses) then the claim must be accompanied by a certificate in a form approved by the authority from a medical partitioner or other prescribed person. There is no issue taken to suggest that Dr Hague (the person who signed annexure C) is other than a medical practitioner and a person capable of signing the medical certificate.

14. Section 82(2) makes it clear that the claim and the medical certificate are both important and crucial documents to the proper making of a claim. Accordingly, if the two documents are not served at the same time then a claim for compensation shall be deemed not to have been made until the day on which the remaining document is given to or served on the employer. In addition, where the documents are not served together the remaining document must be served within 28 days after the first document is given or served.

15. The Act is silent as to what happens if the two necessary documents are not served within the required 28 days. However, if there were no consequence then the 28 day time limit would be meaningless. It therefore seems to follow that if a claim for compensation and a medical certificate are not served within 28 days of each other then no valid claim for compensation would have been made.

16. The Court of Appeal (Martin CJ, Mildren and Thomas JJ) considered section 82 of the Act in *Johnston v. Paspaley Pearls Pty Ltd* (1996) 5NTLR 199. At pages 203-205 of the Courts joint judgment Their Honours said:

> “The primary obligation under s82 when making a claim for compensation is to serve on the employer a claim in the prescribed form and, where required, an accompanying prescribed medical certificate. It is service of such a claim that triggers the obligations

on the employer under s85. Section 82(2) provides exceptionally that where the two documents are not served simultaneously, the second document may be given or served within 28 days after the first and, if so, the claim for compensation shall be deemed to have been made on the day on which the remaining document is given or served on the employer. Given that the 28 day time limit was inserted by an amendment, it would seem strange for it not to have been the intention of the legislature that that time limit should be strictly complied with, such that a failure to give the second document (in this case the medical certificate), within that time limit did not render the claim invalid. It is difficult to see how there can be substantial compliance with this provision. Either a document is served within 28 days of another or it is not. There must therefore either be strict compliance or non-compliance. The question can be narrowed down to whether the requirement upon the worker that he serve the second document within 28 days of the first is of such importance to the object of the statute as to disclose an intention that its complete non-observance should invalidate the making of a claim. We think that the answer to this question must be yes. Until a claim has been validly given or served on the employer, the important mechanism of s 85 is not triggered. One purpose of the time limit seems to have been to encourage workers to pursue their claims in a timely manner and not leave employers in doubt for periods of up to 6 months about the nature of their claims or whether they intend to pursue them. Another is so that there can be certainty as to when the 10 day time limit commences to run. Ordinarily, there are no serious consequences to a worker who fails to strictly comply with the subsection in that all he or she has to do to remedy the position is to start afresh. This could be done, for instance, by lodging a second claim form within 28 days of the lodging of his medical certificate

In *Victoria v The Commonwealth* (1975) 134 CLR 81, Stephen J said at 179:

> "Sometimes the stipulation which has not been complied with is, in its context, so relatively unimportant to the attainment of that general object that, although there has been total non-compliance, a directory construction may be appropriate. In such cases it may not matter that the non-compliance is complete, not partial. Indeed the stipulation in question may be of a kind which is incapable of partial compliance; to give to such a stipulation a directory interpretation recognises that it may be wholly disregarded without prejudice to validity because of its relative unimportance in the attainment of the general statutory object and also, perhaps, because of the far-

> reaching and undesirable consequences of treating its non-observance as invalidatory."

> Whilst the time limit fixed by s 82(2) is arguably not cardinal to the attainment of the general object of the Act, in that it may be easily remedied by a worker in the manner we have discussed, there are no far reaching and undesirable consequences of treating its non-observance as invalidatory of the claim.

> Accordingly, we consider that the provisions of s 82(2), when considered in the light of its wording and the object of the statutory scheme to which it belongs, evinces an intention that non-observance of its requirements results in there being no valid claim.

> We are supported in this conclusion by s 82(3). We reject the submission that the failure to give the second document within 28 days of the first is "a defect, omission or irregularity in a claim for compensation or a medical certificate". In our opinion this subsection deals with the form or contents of the claim form or of the medical certificate. Subsection (3) provides that such a defect does not affect the validity of the claim. This suggests that the failure to properly make the claim within time has the effect that the claim is invalid.

> We should mention that in arriving at our conclusion that there are unlikely to be any significant consequences to a worker who fails to complete his claim by giving the remaining document within 28 days after the first, we have taken into account the very broad powers of the Work Health Court to excuse a failure to make a claim within 6 months after the occurrence of the injury, as set out in s 182(3)." (emphasis added)

17. As a consequence of this decision it would appear that an employer would be able to ignore a claim in those circumstances (where a claim and medical certificate were not served within 28 days of each other) and not be required to make any decision or give any notification in accordance with section 85. Unless section 82(2) is complied with, then no proper claim for compensation has been made, and therefore the time limit in section 85 of the Act does not commence to run.

18. Where a worker serves one document but is unable to serve the other until after 28 days from the time of the first service, it would appear that the worker should then re-serve the first document at the same time as he or she

serves the second document (or within 28 days of the second document). In any event, the worker has an obligation to ensure that the two necessary documents (namely the claim form and the medical certificate) are served within 28 days of each other on the employer.

19. In the instant case the employer argues that the medical certificate (which was served within the 28 days as required) was not a valid certificate even though it was in a form approved by the Authority and appropriately signed. As such, the employer argues that no valid claim had in fact been made and accordingly the time in section 85 of the Act had not commenced to run. This argument in effect seeks to extend the reasoning in *Johnston's case* (supra). The decision of the Court of Appeal is limited to the facts then before the Court and does not touch upon the issue that I now have to determine.

20. If section 82(3) was not present in the Act, then the position would be clear and ensure that a claim was validly made and time commenced to run against an employer, under section 85(1), as soon as a claim in the approved form and a medical certificate in the approved form (and appropriately signed) were served upon an employer within 28 days of each other. In that case no defect in the contents of either document would then be relevant. I would have thought that this was the better option, but it is not what the legislature appears to intend. Section 82(3) formed a part of the original 1986 Act, and has remained virtually unchanged except for a consequential amendment (Act number 18 of 1998) when the medical certificate provisions were changed to take the form out of the regulations.

21. The effect of section 82(3) is that if there is any defect, omission or irregularity (which relates to information which is not within the knowledge of or otherwise ascertainable by the employer or his or her insurer) in either the claim form or the medical certificate then the validity of the claim is affected such that the claim may not have to be dealt with in accordance

with Part V of the Act. This position is arrived at by inverting the wording in section 82(3) in order to approach it from the opposite position. The first question that this appears to throw up is – how is the validity of the claim affected? The second question is – what, if anything, does the employer have to do?

22. It would appear from the employer's argument that they would submit that the first question should be answered – the claim is invalid; and the second question should be answered – the employer can do nothing.

23. The worker argues that the medical certificate did comply with the requirements of the Act and accordingly a claim for compensation was served on 23 June 2000 in relation to the first claim form, and by no later than 27 July 2000 in relation to the second claim form, with both claims relying upon the same medical certificate (Annexure C).

24. Section 85 of the Act is in the following terms:

> "(1) An employer shall, on receiving a claim for compensation -
>
> (a) accept liability for the compensation;
>
> (b) defer accepting liability for the compensation; or
>
> (c) dispute liability for the compensation,
>
> and shall notify the person making the claim of the employer's decision within 10 working days after receiving the claim.
>
> (2) Where an employer accepts liability for the compensation claimed, the employer shall, in the case of a claim for weekly payments (whether or not other compensation is claimed), commence those payments within 3 working days after accepting liability.
>
> (3) Where a claim for compensation is for a lump-sum payment of compensation or for a benefit other than a weekly payment, the employer shall, where liability for the compensation claimed is accepted, make the payment or provide the benefit as soon as practicable after the claim is accepted.

(4) Where an employer defers accepting liability for the compensation claimed -

(a) the deferral shall remain in force for 56 days from the date the notification under subsection (1) is given or such longer period as the Court may allow unless, within that period, the employer notifies the person making the claim that the employer accepts or disputes liability for the compensation; and

(b) where the claim is for weekly payments (whether or not other compensation is claimed), the employer shall, within 3 working days of making the decision to defer accepting liability for the compensation claimed, commence those payments.

(5) Where an employer accepts or disputes liability for compensation under subsection (4)(a), the employer shall notify the person making the claim of the employer's decision.

(6) Notification required to be given to a person under this section shall be in writing and given to the person by -

(a) delivering it personally to the person;

(b) placing it in a properly addressed envelope and leaving it with a person who has apparently attained the age of 16 years at the person's address as shown in the claim form given to or served on the employer under section 82; or

(c) sending it in a properly addressed envelope by pre-paid post to the person at the person's address as shown in the claim form given or served on the employer under section 82, and notification shall be deemed given when the envelope is posted.

(7) Where weekly payments are made to a person under subsection (4)(b), those payments -

(a) are made on a without prejudice basis and are not, in any subsequent proceedings under this Act, to be construed as an admission of liability;

(b) shall continue to be made until the employer under subsection (5) notifies the person making the claim of the employer's decision to accept or dispute liability for the compensation claimed;

(c) are to be taken into account in determining the amount of the employer's liability under the claim, where liability is accepted or deemed accepted or an order for compensation is made; and

(d) are not able to be recovered by the employer notwithstanding that the employer may not be liable under this Act to pay the compensation claimed.

(8) At the same time as an employer notifies a claimant under this section that the employer disputes liability for compensation claimed, the employer must give the claimant a statement in the approved form -

(a) setting out the reasons for the employer's decision to dispute liability;

(b) to the effect that, if the claimant is aggrieved by the employer's decision to dispute liability, the claimant may apply to the Authority to have the dispute referred to mediation;

(c) to the effect that, if mediation is unsuccessful in resolving the dispute, the claimant may commence a proceeding before the Court for the recovery of compensation to which the claimant believes he or she is entitled;

(d) to the effect that, if the claimant wishes to commence a proceeding, the claimant must lodge an application with the Court within 28 days after receiving a certificate issued by the mediator under section 103J(2); and

(e) to the effect that the claimant may only commence the proceeding if an attempt has been made to resolve the dispute by mediation and that attempt has been unsuccessful.

(9) For the purposes of subsection (8), the reasons set out in the statement referred to in that subsection shall provide sufficient detail to enable the claimant to whom the statement is given to understand fully why the employer disputes liability for the compensation claimed."

25. Mildren J considered this section (as it then was) in the case of *Perfect v. Northern Territory of Australia* (1993) 107FLR 428. At page 434 His Honour said:

> "From the nature of the information in the claim form, and the fact that it is accompanied by a medical certificate (form 4) it is possible for the employer to work out (at least in most cases) if the worker is entitled to weekly payments. The claim form and the medical certificate deal with whether the worker stopped work because of his injury or disease, whether he has yet returned to work, what the "injury" is, the alleged cause of the injury, whether the injury is consistent with the alleged cause, if he is fit for work, and if not, for what period of time he will remain unfit. <u>However, in some cases, this is not apparent. If this is so the employer can proceed either via s85(1)(b) or (c), or dispute liability."</u> (emphasis added)

26. His Honour appears to be saying that if the claim and medical certificate do not enable the employer to have the necessary information to make a final decision, then the employer should proceed by the other options in section 85(1). His Honour does not suggest that the employer can do nothing. At the time of this decision section 85 was different to how it is now. Section 85(1) as it then was gave the choice of four options to be exercised by an employer "within 7 working days", namely:

> "(a) accept liability for the compensation;
>
> (b) accept liability for the compensation subject to the condition that the claimant will, within a specified time, provide such further information relating to the claim as the employer requires;
>
> (c) require further medical information to be provided; or
>
> (d) dispute liability for the compensation."

This section was amended (after the decision in *Perfect* was published) by Act number 78 of 1993 to make the section basically (apart from some additional amendments made by Act number 18 of 1998) in the form that it is today. The second reading speech of 18 August 1993 was not particularly helpful, but said:

> "The period for initial assessment of compensation claims will be extended from 7 days to 10 working days, thus providing more time for better decision making without major disadvantage to the claimant. The existing provisions, for either deferring a claim for further medical information or conditionally accepting it subject to

> the claimant providing further information, have been abolished. They have been replaced with a paid deferral for a period of up to 28 days on a "without prejudice" basis. This will give the employer or insurer time to gain full information on any aspect of the claim without disadvantage to the claimant. At the end of the 28 days, a claim will be deemed to have been accepted if liability has not been denied."

27. In my view, the second reading speech re-enforces the importance of worker's being paid whilst a final decision on liability is pending. It would be contrary to the underlying principles in the Act if a "sharp" employer/insurer could spot a defect in a claim or certificate, and deliberately do and say nothing.

28. It may be the case that in some instances a claim form or certificate are so devoid of information as to make them virtually useless. However, that will not always be the case. For example, an injury and incapacity for work may be so self-evident that little is required to enable the employer to make a proper decision. Each case will vary depending on it's own circumstances. In the instant case given the somewhat unusual facts, and the delay in the claim the employer would no doubt have needed more information than it received. However, in my view, the Act leaves it up to the employer to decide what he or she needs to make a final decision. The one thing that is required is that the employer makes a decision under s 85(1) and informs the worker of it. The Act does not permit or allow an employer to sit on his or her hands and do nothing. If an employer does this then they face the consequences of section 87.

29. If a claim for compensation was validly made (either in relation to the first claim, the second claim or both) there is no issue that the employer did not exercise any of the three options available to it in section 85(1) of the Act. Accordingly, the worker argues that the employer then faced the consequences in section 87 of the Act. Section 87 is in the following terms:

> "If an employer fails to notify a person of his or her decision within the time specified in section 85(1), the employer is deemed to have accepted liability for compensation payable under Subdivisions B and D of Division 3 until -
>
> (a) the expiry of 14 days after the day on which the employer notifies the person of his or her decision in pursuance of that section; or
>
> (b) the Court orders otherwise."

30. In *Perfect v. Northern Territory of Australia* (supra) Mildren J went on to say at pages 435-6:

> "One of the objects of Div 5 of Pt V of the Act (ss 79-91) is to ensure that a worker's claim for compensation is dealt with speedily by his employer, and to that end, time-limits are provided within which the employer must consider the claim, and either accept it or reject it, or seek further information. In my opinion, these time-limits, as well as the procedures laid down must be strictly observed, and if they are not, s87 deems the employer to have accepted liability, with the consequence that he must <u>commence</u> making weekly payments in accordance with the Act. That the provisions are mandatory, and not directory, is apparent, not only from the scheme of the provisions taken as a whole and the objective of the scheme to which I have referred, but from the language employed by parliament in the relevant sections, where the word "shall" is universally employed, and because breaches incur penalties, either because the breach is an offence, or because of the deeming effect of s87, and because interest may become payable under s89 or pursuant to s109." (emphasis added)

31. It is not an issue between the parties that any deeming that might exist ceased on 4 October 2000, being 14 days after the service of the form 5 on 20 September 2000.

32. Accordingly, the first issue for my consideration is whether the medical certificate (Annexure C) was a certificate as required by section 82(1)(b) such that a claim for compensation was validly made.

33. Secondly, if I were of the view that there were any defect, omission or irregularity in the certificate, did it relate to information which was not in

the knowledge of or otherwise ascertainable by the employer or his or her insurer such that the validity of the claim is effected (section 82(3) of the Act).

34. Thirdly, if I decide that a valid claim for compensation was made (either in the first claim or the second claim or both) the remaining issue is what is the effect and consequence of the deeming in section 87 of the Act.

35. In my view, when the Act is looked at as a whole it is intended that a claim for compensation form and a medical certificate should be read together by an employer. The purpose of the two documents is to assist the employer in coming to a speedy decision in accordance with the options in section 85(1) of the Act. This has a number of clear benefits. Firstly, it hopefully ensures that claims are processed quickly and that injured workers receive their just entitlements in the shortest possible time. Secondly, if a claim is to be validly disputed then a worker is to be aware of his position as soon as possible so that he can take appropriate steps to proceed to the next stage if so advised.

36. It is also clear, in my view, that section 82(3) of the Act is intended to discourage (or stop) employers from sitting on their hands and trying to rely on some defect, omission or irregularity in a claim form or medical certificate. This would suggest that only important defects, omissions or irregularities should have an adverse consequence to a workers claim.

37. Mr Clift (counsel for the worker) submitted that the medical certificate (Annexure C) complied with the act. He suggested that it was in the approved form, that it was signed by a medical practitioner (as required by section 82(1)(b) and regulation 12(2) of the Work Health Regulations) and that was all that was necessary.

38. In the Concise Oxford Dictionary of current English (8th edition) the word “certificate” is defined as follows:

> "a formal document attesting a fact, esp. birth, marriage, or death, and medical condition, a level of achievement, a fulfilment of requirements, ownership of shares etc".

39. Taking Mr Clift's argument to its limit he appears to be suggesting that a medical certificate that was effectively blank would still be a valid certificate under the act provided it was on the approved form and signed. In my view, this could not be what was intended by the legislature. Mildren J in *Perfect* (supra at paragraph 25 hereof) sets out the information that one would normally expect to be included.

40. In my view, both the claim form and the medical certificate are to be looked at in the same context. To suggest that a claim form which was blank other than by being signed and with a signed release (as required by section 82(4) of the Act) would be a valid claim, may in my view make sections 82 and 85 unworkable.

41. Both the claim form and the medical certificate are forms approved by the authority from time to time. They are not forms prescribed in the regulations. A legislative requirement for the use of an approved form, even a mandatory one, requires only substantial compliance with the form (*Hamilton v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 48 FCR 20 at 32-33). Accordingly, in my view, a worker who completes a claim for compensation needs to substantially comply with the form given that a defect, omission or irregularity may be excused under section 82(3) of the Act. The same would apply to a medical certificate.

42. Regulation 12 of the Work Health Regulations is in the following form:

> "(1) [Omitted]
>
> (2) Subject to subregulation (3), a certificate for the purposes of section 82(1)(b) of the Act is to be signed by a medical practitioner.

> (3) Where because of isolation a medical practitioner is not reasonably available to sign a certificate referred to in subregulation (2), a practitioner registered under the *Health Practitioners and Allied Professionals Registration Act* in the category of Aboriginal health work or a nurse, within the meaning of the *Nursing Act*, may sign the certificate.
>
> (4) A certificate signed in pursuance of subregulation (3) has effect only in respect of –
>
> (a) where the certificate is signed after consultation by radio, telephone or other means with a medical practitioner – 14 days; and
>
> (b) in any other case – 3 days."

43. Accordingly, the regulations allow for the possibility that a worker might not even be personally examined by a medical practitioner (because of distance difficulties) in which case the medical certificate has only a limited time effect. This limited time effect would presumably be to allow time for a worker to get to a centre where he or she could be examined by a medical practitioner. Further, the limited time effect must presumably be in respect to any purported period of incapacity. It does not purport to have the effect of lapsing per se. If it did then the employer would not have to make any decision under section 85. As with most matters under the Act, the meaning is far from clear.

44. Another thing to bear in mind is that not every work injury is necessarily productive of loss of income. In those circumstances, a medical certificate is not required. So, for example, if a person in sedentary employment suffers a knee injury at work they may be able to continue to work, but they are still required to give notice of injury and make a claim within 6 months. In this way the employer is hopefully not prejudiced and a later claim is not frustrated. The worker may not have even sought medical attention, but this is irrelevant, the notice and claim provisions still must be complied with otherwise a later claim may not be maintainable. Clearly, an injury may later

deteriorate such that treatment or time off work becomes necessary and hence the provisions of sections 80, 82 and 182 need to be borne in mind.

45. As noted above, if a claim for compensation does not include a claim for weekly payments then a medical certificate is not required. Therefore, in the hypothetical example above, if a person injures a knee and requires medical or physiotherapy assistance without losing time from work, then they give notice of injury and then serve a claim form. They might also attach the medical accounts for payment, but this would not be necessary until the claim was accepted. Then the claim could be processed.

46. The employer would argue that in order for sections 82 and 85 to work properly together then there must be some minimum requirements in a claim for weekly compensation (as this claim apparently was). The worker would argue firstly that there are no minimum requirements, or in the alternative that any minimum requirements are minimal. Both of these alternative propositions have some merit.

47. Looking at the position of an employer, it would clearly assist in the proper assessment of a claim for as much material as possible to be put before the employer to enable it to make a decision under section 85(1). Therefore, an employer would need to know the name of the worker, the place and time of an injury along with a brief description of how it occurred, who it was reported to and when, when the worker stopped work, what doctor he went to and when. This would all be within the claim form, along with the signed authority. The medical certificate ideally should state the date of examination (and if none done, on what basis the certificate is issued), a brief history of how the injury is said to have occurred, a description of the injury, a statement of opinion as to whether the injury is (or is not) consistent with the stated history, and an opinion as to whether the worker is incapacitated for work as a result of the injury (and if so to what extent and for what period).

48. Looking at the position of the worker, there are cases where this amount of detail may be unnecessary as the information is already in the employer's knowledge. For example, a worker may fall at work in the presence of other employees and be admitted to hospital in a serious condition where he may remain for a lengthy period. One would hope that in those circumstances a responsible employer (or insurer on behalf of the employer) would simply commence paying weekly compensation without worrying about the paperwork at all, and admitting liability pending eventual receipt of a claim.

49. Accordingly, I do not consider that it is possible to lay down any minimum requirements as to what must be contained within a claim form or medical certificate before it becomes valid and commences time to run under section 85 of the Act. Each case will depend upon it's own facts and what the employer would reasonably be expected to know. In the instant case there was sufficient information to enable the employer to make one of the decisions that it was required to make under section 85(1).

50. The claim form and medical certificate (annexure C) were served within 28 days of each other, and it was then up to the employer to make a decision under section 85(1) on what it had before it at the time, plus whatever additional information it had within it's own knowledge. If the employer did not have enough information it still had to make a decision to take one of the 3 options under section 85(1). If the employer decided to accept liability on limited information then that would be a matter for it. An employer can always serve a form 5 subsequently to stop payments that it has commenced. The other 2 options were to defer liability pending further information, or to deny liability. The one thing that the employer could not do was to do nothing.

51. Section 91A of the Act deals with how a worker receiving payments of weekly compensation ensures a continuation of those payments. Subsection (1) states:

> “A worker receiving weekly payments of compensation because he or she is incapacitated for work shall ensure that his or her employer is provided with a certificate from a medical practitioner certifying that the worker is incapacitated for work for the periods he or she remains incapacitated for work.”

52. It would seem incongruous that less would be required before an employer was required to commence paying weekly compensation. Accordingly, in my view, a medical certificate (under s 82(1)(b)) should certify that a worker is incapacitated for work for a certain period before any obligation to commence payment of weekly compensation can be triggered. On the contrary, if this were the intention there would have been no difficulty in using the same wording in sections 82(1)(b) and 91A(1).

53. It is arguable that the medical certificate required by s 82(1)(b) is not for the purpose of commencing weekly payments, but rather for the purpose of making a decision on liability. However, given ss 85(2) and (4)(b) of the Act, it is clear, in my view, that the medical certificate has a dual purpose.

54. In the instant case the claim was handled by Mr Elrington, a solicitor with the employer’s solicitors. He must have been fully aware of the paucity of information in the claim forms and the medical certificate. Given the unusual nature of the claim, and the obvious lengthy time delay the prudent approach would have been to deny liability and then investigate the matter further. It would be open to the employer to change it’s position and accept liability subsequently. However, it appears that no decision at all was taken. It was not suggested (until it was pleaded) that the employer was not accepting the claim and certificate as a valid claim such that it did not consider itself bound by the time limits in section 85. On the contrary, the employer appears to have sought some medical clarification, but without ever making any of the three decisions under section 85(1) that were open to it.

55. In my view, an employer who is deemed to have accepted liability under s 87 should be in the same position as an employer who had accepted liability under s 85. If the employer in this case had accepted the claim (or either of them) would it have been obliged to commence payments of weekly compensation under s 85(2). In my view, the employer could have commenced payments but it would not have been legally required to do so because of s 82(3). The proper approach would have been for the employer to notify the worker (in writing) that it had accepted liability for the claim, and would commence payments of weekly compensation upon receipt of a medical certificate certifying that the worker is incapacitated for work (and the period of such incapacity). As I say it would have been open to the employer to have commenced payments of compensation even if it did not have a certification of incapacity for work. Such commencement would be an admission by the employer. Once payments commenced then the Act would oblige them to continue until such time as they were able to be cancelled or reduced in accordance with the Act.

56. In the factual scenario postulated earlier (of a worker being seriously injured in the view of others at work, and being in a hospital for some considerable time) an employer would not be able to rely upon or gain any comfort from section 82(3) if a medical practitioner had overlooked certifying incapacity for work in a circumstance where such incapacity was self-evident and the employer was well aware of it.

57. I therefore find in the instant case, that the employer, having been served with the claim (annexure A) and the medical certificate (annexure C), was obliged to comply with section 85(1) of the Act. I further find that the employer failed to do so. It follows that the employer was deemed to have accepted liability.

58. Does it necessarily follow that the employer was obliged to commence payments of weekly compensation within three working days of the deemed

acceptance? In the circumstances of the instant case I think not. If a medical certificate does not certify incapacity for work, and this is not a matter within the knowledge of the employer, I do not believe that the legislature intended that an employer would be obliged to commence weekly payments of compensation. The medical certificate (annexure C) was such that this employer would have been justified in denying liability. In the alternative it would have been justified in accepting liability but advising that it would not commence weekly payments until receipt of a proper medical certificate. The one thing that it was not justified to do was the one thing that it did do, namely nothing. Having done nothing I see no injustice in it now being precluded from doing what it could have done.

59. However, in the medical certificate herein (annexure C) Dr Hague has not certified that the worker was unfit for work (either partially or totally) for any period. All he has done is tick the box "other" and write in the words "states he is unable to work". This is no more than relaying an assertion by the worker. It is not a certification of unfitness for work by a medical practitioner. The subsequent affidavit of Dr Hague affirmed on 20 March 2002 does not and cannot expand on the certificate. It stands by itself. It is not to the point as to how Dr Hague subsequently wished he had completed the certificate. He could always have signed another one. There is nothing before me to suggest that he did so.

60. I therefore find that the employer was not liable to "commence" payments of weekly compensation within three working days of the deemed acceptance of liability. This was because there was no medical certificate certifying that the worker was unfit for work. If there had been (and none was put forward in evidence before me) then in my view, any such payments would, in the instant case, have only been for the period from the date that the first claim was served (23 June 2000) up to 4 October 2000 only.

61. I do not agree with the submission of Mr Clift that the employer would be obliged to pay for the full period of the alleged incapacity (namely from 21 May 1996) in any event. An employer may accept liability for an injury, but this does not necessarily mean that by doing so he or she also accepts liability for every day that a worker has not worked since the date of injury. In the processing of a claim it is open to an employer to dispute aspects of it. For example, a worker might submit a bill for attending upon a faith-healer. It would be wrong to suggest that an employer who had accepted liability (or been deemed to have) was obliged to pay such a bill. I see no reason why the same should not be the case in relation to a claim for weekly payments.

62. In the instant case if the claim form and medical certificate had made it clear that the worker was claiming weekly payments for the whole period, and he was certified totally unfit for this whole period (by annexure C) then the situation may have been different. However, that is not the case, and I will leave that decision for another day.

63. I would therefore propose to declare that the employer has accepted liability for a work injury (namely toxic/chemical poisoning, PCB exposure) sustained on or about 21 May 1996 for the period from 23 June 2000 until 4 October 2000.

64. I will hear the parties on the form of any Orders herein, and on the question of costs and any consequential orders or declarations.

Dated this 29th day of April 2002.

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DAYNOR TRIGG SM
STIPENDIARY MAGISTRATE