CITATION: *Sharon Louise Spellman v Returned Services league of Australia Alice Springs Sub-branch Incorporated* [2004] NTMC 062

PARTIES:	SHARON LOUISE SPELLMAN v RETURNED SERVICES LEAGUE OF AUSTRALIA ALICE SPRINGS SUB BRANCH INCORPORATED
TITLE OF COURT:	Work Health Court
JURISDICTION:	Darwin
FILE NO(s):	20118793
DELIVERED ON:	13.8.04
DELIVERED AT:	Darwin
HEARING DATE(s):	12-15 July 2004
JUDGMENT OF:	D TRIGG SM

CATCHWORDS:

Work Health Act sections 85 and 87.
Deeming- where employer has deferred accepting liability under s85(1)(b) but not made or conveyed any decision on liability within the deferral period.

REPRESENTATION:

Counsel:

Worker:	Ms Gearin
Employer:	Mr Barr

Solicitors:

Worker:	Ward Keller
Employer:	Hunt & Hunt

Judgment category classification:	A
Judgment ID number:	[2004] NTMC 062
Number of paragraphs:	160

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

No. 20118793

[2004] NTMC 062

BETWEEN:

SHARON LOUISE SPELLMAN
Worker

AND:

RETURNED SERVICES LEAGUE OF AUSTRALIA – ALICE SPRINGS SUB BRANCH INCORPORATED
Employer

REASONS FOR DECISION

(Delivered 13 August 2004)

Mr D TRIGG SM:

1. It is necessary to set out the complicated history of this matter in order to understand why the evidence ceased after day two of a five day hearing and what decision I am now called upon to make and why. Whenever I refer to "the Act" hereinafter that is a reference to the Work Health Act.

2. As the worker is still in her evidence and the employer has not started his case at all the majority of the factual matters hereafter contained are mere matters of assertion and I am unable to make formal findings on questions of fact until the completion of all evidence. However, some matters appear to be not in dispute and I will summarise those later in these reasons.

3. The worker apparently commenced employment with the employer in about November 1997 as a bar attendant in Alice Springs. In addition to being a bar attendant she also attained experience and qualifications as a TAB operator, poker machine attendant and KENO operator.

4. After a period of time the worker left her employment with the employer and worked for NT Freight - Ascot Haulage for about two to three months performing office duties. She did not enjoy the work and returned to work with the employer.

5. After returning to work with the employer she continued working behind the bar and attending the other duties referred to above. In addition she would give kitchen staff a helping hand when they were busy. At some stage (according to the employer's pay records – ExP3, this was in about April 1999) the worker was transferred from bar work into the kitchen proper and she allegedly took over the running of the kitchen and being the principal cook and worker.

6. The worker alleges in her evidence that some time in about August or September of 1999 she was roasting approximately 12 kilograms of blade steak in an oven in a commercial size baking dish. She says that she went to take out the dish, which was at about knee height, to check on the meat. She says she lost power in her forearm and she almost dropped the dish and meat. She says that she called out to Jason, who was helping her in the kitchen, and he helped her put the meat back in the oven.

7. The worker described a feeling of weakness in the forearm, pain in the right elbow and a feeling like she had lost feeling in her hands, in that the strength that she normally had had gone.

8. The worker said in her evidence that Jason (who apparently is the son of the manager of the employer) and herself went immediately to see the manager (Michael Barrett) and told him of the incident.

9. I understand from the cross examination that the alleged incident in the kitchen with the roast, any knowledge of Jason of such an incident and any reporting of such an incident to Michael Barrett (in the manner described) may be matters in dispute.

10. In addition, it appears from the cross-examination and from the evidence of some of the medical providers who have given evidence to date that the worker's history of injury as given to various medical providers may not have always been in accordance with her evidence before me on all occasions. That is a matter for factual resolution at a later date.

11. In the course of the workers duties she worked two shifts throughout the day, the lunch time shift and then the evening shift for meals. On 12 October 1999 she apparently worked up to the completion of her lunchtime shift and then saw see her General Practitioner, Dr Pevie during her break and before she was due to resume the evening shift. Dr Pevie provided the worker with a medical certificate on that date certifying her unfit for her work from 12 October 1999 to 16 October 1999.

12. After receiving the medical certificate from Dr Pevie on 12 October 1999, the worker took this certificate and gave it to Michael Barrett on behalf of the employer that same day. She did not return to work the evening shift of that day and has not returned to any work with the employer since. Indeed, on the worker's evidence she has not returned to any paid employment since.

13. The medical certificate dated 12 October 1999 from Dr Pevie (which forms part of Exhibit P5) asserted that the worker was suffering from:

> "*Right lateral epicondylitis, unresponsive to conservative treatment".*

The next box in the medical certificate states as follows:

> "…which the worker states was caused by: *meat preparation and cooking/cleaning etc*. on (date of injury) *12/10/1999*". (the matters in italics are the words added to the certificate by Dr Pevie)

14. On 14 October 1999 the worker delivered a claim for compensation to the employers manager Michael Barrett. This claim for compensation became Exhibit P1.

15. In this claim for compensation (Exhibit P1) the worker made the following assertions:

- That she worked part time.
- That the injury occurred at the workplace at which she is normally based.
- That the injury occurred in the RSL bistro kitchen.
- That the injury happened or she first noticed the disease on 1/9/99, but she did not specify a time.
- The description of how the incident occurred was "*I have had pain in my right hand and elbow for over a month from continual use of knife during food preparation, heavy lifting. It has been difficult to pick up deep fried foods with tongs as my joints ache in my hand*".
- In relation to part of body affected she replied, "*right hand, forearm and elbow*".
- For persons present at the time of injury she nominated "*Jason Barrett*".
- She indicated that she reported the injury on *28/9/99 at 5pm* to "*Mick Barrett*".
- She stated that she stopped work on 12 October 1999 at 2pm.
- The worker completed and signed the authorisation for medical information.

16. The employer completed the page of employer information as required. This was completed and signed by Michael Barrett who described himself as manager. Mr Barrett signed and dated his declaration on 14 October 1999. In that portion of the form he indicated:

- That the Workers Compensation insurer was CGU Insurance.

- That the workers gross weekly wage before the injury was $375.
- That the worker normally worked 25 hours per week.
- That the worker was first employed on 21/7/99.
- In relation to the question "do you query the validity of the claim?" the word "*maybe*" has been inserted.

17. On the top of page 1 of the claim form there is provision for the insurer to make certain notations. In relation to date claim form received someone has written in *20/10/99*. In relation to date claimant notified someone has written in *21/10/99*. In relation to the option which is written as "except/reject/defer" somebody has put a circle around the word "defer".

18. On 21 October 1999 Ms Psyridis, a senior technical claims officer with CGU Insurance wrote to the worker on their letterhead. This correspondence (Exhibit P2) stated as follows:

> "21/10/99
>
> Ms SHARON L SPELLMAN
> 1 NELSON TERRACE
> ALICE SPRINGS
> NT 0870
>
> Dear Ms SPELLMAN,
>
> Insured: RETURNED SERVICES LEAGUE OF
> Policy/Claim Number: 03C 0775258 01
> Date of Loss: 01/09/99
> Type of Claim: NT WORK HEALTH CLAIM NO. 102910
>
> We refer to the above claim and confirm we are the Work Health insurers of your employer.
>
> This letter is to advise that we have deferred from making a decision to accept or reject your claim pending the receipt of further medical and other information.

> In this regard the Work Health Act allows an insurer to defer from making a final decision for up to 56 days from the date of this letter. This means that our final determination must be made by 16 December 1999, but may be made earlier if possible.
>
> In the meantime we will be writing to your medical practitioner(s) to seek information and our claim's agent, Alice Assessors, will be in touch with you soon to-discuss the matter and obtain a signed statement of circumstances. Pending the decision, you will be paid your normal weekly earnings on normal paydays, but only for periods after the date of this letter, If your claim is accepted, you will be paid any monies owing from the date your medical certificate was issued.
>
> Please do not hesitate to telephone to discuss if you have any queries. Yours faithfully,
>
> ELPI PSYRIDIS
> SENIOR TECHNICAL CLAIMS OFFICER"(emphasis added)

It is clear from this letter (Exhibit P2) that the insurer was well aware of its obligations under s85 of the Act and in particular noted "*this means that our final determination must be made by 16 December 1999, but may be made earlier if possible*" (emphasis added).

19. I do not know the date that this letter was received by the worker, but it was unlikely to have been before 22 October 1999. On my calculations this would mean that the 56 day deferral period would have ceased to remain in force on or about 17 December 1999.

20. The employer commenced paying weekly payments of compensation to the worker. I have not yet been told when these payments were commenced, but no complaint has yet been made that the commencement was late, although the worker did say that "from memory the payments didn't commence straight away". It is not alleged in the worker's pleadings that she remains unpaid for any period prior to the cancellation of payments in 2001, which I will refer to later.

21. Of significance are the words that I have underlined in ExP2. Neither counsel sought to take me to ExP3 for the purpose of the argument herein. However, I note that the worker's normal gross pay preceding her obtaining the medical certificate was $375 as disclosed by pages 1 to 3 inclusive of ExP3. On 18.10.99 the worker was apparently only paid $56.25 for 3.75 hours of work, and on 28.10.99 she was paid $150. Accordingly, it appears that the employer has acted in accordance with it's advice (that "Pending the decision, you will be paid your normal weekly earnings on normal paydays, but only for periods after the date of this letter"). Page 4 of ExP3 appears to be missing for some unexplained reason, but on page 5 (starting on 29.11.99) the weekly payments have reverted to $375 per week.

22. As noted from ExP2 it was the belief of the employer's insurer that it had until 16 December 1999 to make a decision on liability. Therefore the first pay after that date is potentially relevant. I also specifically note the other underlined assertion in ExP2 (that "If your claim is accepted, you will be paid any monies owing from the date your medical certificate was issued."). The first payment after the deferral period was on 29.12.99. There are three separate entries for that same day (pages 5 and 6 of ExP3), and these disclose that three cheques were issued on 29.12.99. These cheques disclose that the worker was paid:

    $375 by cheque number 6455

    $318.75 by cheque number 6456

    $225 by cheque number 6457.

23. The $375 was presumably her normal weekly payment of compensation. The amount of $318.75 happens to be the exact amount necessary to bring the short payment of $56.25 made on 18.10.99 up to $375. Further, the amount of $225 happens to be the exact amount necessary to bring the short payment of $150 made on 28.10.99 up to $375. This is highly unlikely to be a coincidence. Regular payments of $375 continued to be made thereafter.

These top-up amounts are consistent with the highlighted assertion set out in paragraph 22 hereof. These payments therefore may be evidence to indicate that the employer accepted the worker's claim.

24. As will become apparent later in these reasons, the employer did not (and as at the time my decision was reserved still had not) in fact ever notify the worker that it had accepted the claim for compensation.

25. The worker continued to see Dr Pevie (who has yet to be called in evidence, and from the opening by Ms Gearin does not appear to be likely to be called in the worker's case). He referred her to see Mr Schmidt (orthopaedic surgeon) and she apparently also consulted with him. Mr Schmidt (who also hasn't been called in evidence and from Ms Gearin's opening is not going to be called) apparently referred the worker for physiotherapy with Mr Mercorella.

26. Mr Mercorella did give evidence before me by video-conference on 13 July 2004. He first saw the worker on the 22nd day of November 1999 and began treating her. The history which he obtained and recorded in his notes (Exhibit P7) was:

> "*Pain in right elbow for three and a half months. Slowly got worse*".

27. According to Mr Mercorella's notes (Exhibit P7) the worker was treated by himself (or his associate on two occasions on 26/11/99 and 1/12/99) on approximately ten occasions up to and including the 22nd day of December 1999. All such treatments and complaints were related to the right side only.

28. After the Christmas – New Year period the worked attended upon Mr Mercorella on 5 January 2000 and for the first time complained of symptoms starting in the left upper limb.

29. On the workers evidence pain and disability has continued in both upper limbs up to and including the time that she gave evidence before me on 12 and 13 July 2004.

30. In the later part of April 2000 the worker left Alice Springs and moved to Queensland with her two children.

31. The worker apparently initially moved to Morayfield which is apparently just south of Caboolture in Queensland. After about two months she moved to her sisters in Yeppoon for about two months and then moved to Gracemere (which is apparently about 15 kilometres west of Rockhampton) and she continues to reside there today.

32. After moving to Queensland the worker continued to seek medical assistance and physiotherapy treatment in relation to both upper limbs.

33. The worker asserted in her evidence that she has not paid for medical and physiotherapy attendances and understood that those that have been paid were paid by the employer.

34. Matters continued with the worker continuing to receive weekly payments of compensation until late October 2001. On 25 October 2001 Hunt & Hunt (the employer's solicitors) wrote to the worker (part of ExP4) in the following terms:

> "Re: Spellman e/b RSL (Alice Springs)
>
> Work Health Claim
>
> We refer to the above matter.
>
> We enclose (*) herewith a Notice of Decision on behalf of the Employer to you dated 25 October 2001. We advise that the purpose of the notice is to advise that your payments of compensation will cease after 14 days of the receipt of the said Notice. The reasons for the cancellation are set out in the Notice and enclosed (*) medical report and certificate.

We ask you to read the notice and accompanying documents carefully, and note your rights to seek a Mediation if you are unhappy with the Employer's decision. We also enclose (*) herewith the standard Work Health Authority Bulletin regarding the Mediation process for your attention".

35. The notice of decision which was also dated 25 October 2001 and which accompanied the said letter (and formed part of Exhibit P4) was in the following terms:

"Dear Mrs Sharon Spellman:

With regard to your claim for payment of benefits as prescribed under the Work Health Act, you are hereby advised that your employer RSL Alice Springs, acting on the advice of CGU Insurance, hereby:-

- Cancels payments of weekly benefits to you pursuant to section 69 of the Work Health Act. The cancellation will be effective in 14 days from your receipt of this notice.

The reasons for this decision are:-

1. You are no longer incapacitated for work as a result of the work related injury on or about 1 September 1999.

2. Annexed to this Notice are copies of a report from Dr R Parkington dated 17 April 2001 and a certificate from Dr R Parkington dated 22 October 2001".

36. The medical certificate which accompanied the two afore mentioned documents (and also forms part of Exhibit P4) was dated 22 October 2001 and stated as follows:

"I, *Dr T R Parkington* Consultant Orthopaedic Surgeon. HEREBY state that I have examined the worker, *Sharon Spellman* on *12/4/01* in relation to her work injury. Being an injury to her right arm, namely hand, forearm and elbow on or about 1 September 1999.

As a result of that examination I CERTIFY that the worker has ceased to be incapacitated for work as a result of the work injury".

37. Included with the aforementioned documentation sent to the worker on or about 25 October 2001 was a report of Dr Parkingham dated 17 April 2001 (also forming part of Exhibit P4). It is unnecessary for me to set out the contents of that report as it does not appear to be relevant to the decision that I am presently being asked to make.

38. Apparently (as this is admitted on the pleadings) the worker sought mediation in respect of the employers decision to cancel payment of weekly benefits. Apparently the mediation took place on 22 November 2001 and the attempt was unsuccessful and a certificate of mediation apparently issued dated 22 November 2001.

39. On 30 November 2001 the worker filed a form 5A Application in this court seeking:

> "Order in respect of claim for compensation under Part V for determination of dispute between worker and employer following mediation under Part V1A: s 104".

40. On 6 December 2001 the employer filed an appearance in relation to that application.

41. On 23 April 2002 the worker filed her first Statement of Claim. In that she alleged an injury first in her right hand, forearm and elbow, and then in her left hand, forearm and elbow. In addition she alleged a psychiatric condition as well which she particularised as "mild adjustment disorder". Further, the worker specifically pleaded in paragraph 5 that:

> "The worker made a claim on or about 12 October 1999 pursuant to the Work Health Act in respect of the injury, which claim was accepted by the employer. The worker thereafter received payments of weekly and other benefits pursuant to the Work Health Act".(emphasis added)

42. Both parties now appear to accept that the underlined words did not reflect the true position. Despite this, on 9 May 2002 the employer filed a Notice of Defence to this Statement of Claim. In this the employer admitted that the

worker was employed by it as a barmaid and then as a cook (para. 1). Further, the employer admitted that the worker sustained an injury to her right hand, forearm and elbow (para. 3) and that such injury arose out of and in the course of her employment with it (para. 3 and 4). It was also admitted (para. 14) that the worker was totally and/or partially incapacitated for work from the date of the injury to about 17 April 2001. And in paragraph 5 of the particulars of defence it was clearly stated:

> "The employer admits paragraph 5 of the worker's Statement of Claim".

43. Accordingly, each of the matters alleged in paragraph 5 of the workers first Statement of Claim were admitted by the employer. The matter proceeded on the basis of the apparent erroneous pleading of "acceptance" and the erroneous admission of the same.

44. On 26 September 2003 the worker filed an Amended Statement of Claim. The Amended Statement of Claim:

- Sought to add a claim for superannuation contributions to the workers Normal Weekly Earnings,
- Pleaded that the left sided injury was a consequence of the workers injury to her right upper limb, and
- Added chronic depression /dysthymia to the particulars of psychiatric condition in paragraph 12.

45. Otherwise, there was no change. In particular the assertion in paragraph 5 of the Statement of Claim (as referred to and set out in full above) remained unchanged.

46. The next document in sequence on the court file is an Amended Notice of Defence. This document did not bear any court seal or court date stamp to indicate when it was received by the court. The document itself is dated 18

November 2003 which I note was the same date that a Pre Hearing Conference took place before Judicial Registrar Fong Lim. It may be that this document was handed over to the court at that Pre Hearing Conference. In relation to this the employer turned its mind again to paragraph 5 of the Statement of Claim (as set out in full supra) and amended its response as follows:

> "The employer admits paragraph 5 of the workers Amended Statement of Claim in relation to an injury to right hand, forearm and elbow, but denies that the workers claim as made and accepted included any injury to the left hand, forearm or elbow".

47. Accordingly, the employer was still clearly asserting that it did accept the claim as made but was seeking to dispute that any claim related to the left upper limb.

48. On 6 January 2004 Mr Neill (solicitor for the worker) and Ms Cheong (solicitor for the employer) completed and signed a Case Management Statement which was ultimately filed in court. In relation to question number 2:

> "All pleadings have been completed and delivered and pleadings are closed (Yes/No)"

both the worker and the employer have answered "*Yes*". In addition, in answer to question 9 which reads:

> "If counsel is required, counsel has been briefed (Yes/No)"

both the solicitor for the worker and employer have answered "*Yes*".

49. Accordingly, when the matter came on for Pre Hearing Conference on the 6th day of January 2004, Judicial Registrar Fong Lim set the matter down for Hearing for 5 days commencing 12 July 2004.

50. After the matter was set down for hearing there were a number of applications made to the court which seemed to relate generally to matters

of discovery, inspection and summonses to produce documents to various non parties including insurance companies.

51. There was no substantive application made by either party prior to the hearing commencing on 12 July 2004, and no suggestion by either party that the matter was other than ready for hearing.

52. The hearing commenced before me on 12 July 2004 at 10:00 am, and five days had been set aside for the hearing. At the hearing the worker was represented by Ms Gearin of Counsel who was instructed by Messrs Ward Keller (the same solicitors who had been involved from the commencement of proceedings). The employer was represented by Mr Barr of Counsel who was instructed by Messrs Hunt & Hunt (the same solicitors who had been representing the employer from the commencement of proceedings).

53. At the commencement of the hearing before me Ms Gearin handed up a Further Amended Statement of Claim. Mr Barr did not object to the amendments but did wish to be heard on the question of costs thrown away by the further amendment to the Statement of Claim, in particular he was concerned that the worker was now abandoning the psychiatric claim and the employer had been put to expense in relation to meeting that part of the claim.

54. As there was no objection to the further amendment I granted leave to the worker to file her Further Amended Statement of Claim in court. In addition to abandoning the psychiatric claim the worker made a substantial amendment to paragraph 5 and added in a new 5A, 5B and 5C. These amendments changed the pleading to now read:

> "5. The worker made a claim on or about 13 ~~12~~ October 1999 pursuant to the Work Health Act in respect of the injury, ~~which claim was accepted by the employer. The worker thereafter received payments of weekly and other benefits pursuant to the Work Health Act~~ and the employer initially deferred accepting liability for the compensation claimed.

PARTICULARS OF DEFERRAL

Letter from CGU Insurance to the worker dated 21 October 1999.

5A. The employer commenced payment of weekly benefits to the worker following giving notice that it deferred accepting liability for the claim and thereafter continued making payment of such weekly benefits to the worker up until 8 November 2001.

5B. The employer did not subsequently notify the worker that it accepted or disputed liability for the compensation claimed.

5C. As a consequence of the employers failure to notify the worker that it either accepted or disputed liability for the compensation claimed, the employer is deemed pursuant to section 87 of the Work Health Act to have accepted liability for compensation.

PARTICULARS OF DEEMED ACCEPTANCE

Letter Hunt & Hunt to Ward Keller 7 July 2004".

55. The letter from Hunt & Hunt dated 7 July 2004 was tendered and became Exhibit P9. It stated "Urgent" by facsimile, so I assume that it was sent by facsimile. The body of the letter stated as follows:

> "Re: Spellman E/B RSL Alice Springs – Work Health
>
> Claim number 20118793;
>
> Inspection of Documents
>
> We refer to our previous correspondence in respect of the above matter.
>
> We confirm that we have received instructions from our client that they have no other correspondence to the worker that hasn't already been discovered. As previously advised it appears acceptance was deemed to have occurred after the expiry of the deferral period".

56. Neither Counsel expressed any alarm or concern at this sudden change in events. It appears likely that neither Counsel turned their minds fully to what the consequences of the changed circumstances might be. Further, Mr Barr did not seek to qualify the employer's concession that it was deemed to

have accepted (although as will appear later he argued that in law this was not the case). Neither Counsel sought for the matter to be stood down or adjourned, and neither Counsel indicated that there would be any problem with the matter proceeding. Mr Barr indicated that he may need to make a consequential amendment to the Notice of Defence but both Counsel appeared to be happy that this would not cause any problems or any need to delay the matter proceeding.

57. Accordingly, Ms Gearin continued with her opening. As part of her opening Ms Gearin handed up a document headed "The court on the pleadings is required to determine the following issues". Issue 1 was stated as follows:

> "What is the effect of a deeming pursuant to section 85 when the requirements of section 87 have not been complied with.
>
> Is it optional for an employer to cease the deeming pursuant to section 69 or section 87 having regard to the specific amendment to section 87 post the full court decision in *Schell v NT Football League* (1995) 5 NTLR 1?"

58. The correctness of this formulation was not fully canvassed in the opening. As noted earlier, prior to me granting leave to the worker to file this Further Amended Statement of Claim the only objection that Mr Barr raised was on the issue of wishing to argue the question of costs of abandoning the psychiatric claim, either then or at a later date. At that point in time he did not make any suggestion that there would need to be any amendment to his pleadings and there was no suggestion of a possible need for any counterclaim.

59. As the opening continued Ms Gearin asserted that the claim of underpayment related to the whole period of payments. I pointed out to Ms Gearin that her pleadings didn't allege this and Ms Gearin accepted this and advised that she would seek leave to amend that in relation to the particulars. Mr Barr indicated that he did not envisage any difficulty with such an amendment as superannuation was raised on the pleading generally.

60. Later in the opening Ms Gearin turned to issue number 1 (supra). Her submission was that the amended s87 set out a procedure for cancellation of the deeming. She went on to say that it would be her submission that "the time specified in s85(1)", as referred to in s87 was the extended 56 day period, and there has never been a decision in relation to her clients application for compensation.

61. Ms Gearin went on to say that the case of *Schell* (supra) looked at the question under the old s87 and the Supreme Court said that you can rely on s69 procedure in the absence of any other procedure. She noted that the new s87 now had a specific procedure which says you are deemed until either you make a decision or the court orders otherwise and that was not the situation under the old s87. Ms Gearin went on to assert that it is clearly on the facts a very live issue in this case with the consequences that if the court finds s87 has not been complied with, and it's a mandatory section, then the employer is still deemed. She went on to add that she will address me further on that in submissions but she wanted at the outset to identify that issue as one that required determination in this proceeding. I trust that I have adequately summarised her opening in this regard.

62. Mr Barr did not seek to be heard at the conclusion of the opening and did not suggest that there were any problems raised by the way that the worker had opened her case.

63. Towards the end of the opening I queried with Ms Gearin whether she was really asking the court to make a ruling in accordance with paragraph G of the Further Amended Statement of Claim. She confirmed that she wasn't.

64. Ms Gearin called the worker to give evidence at about 1119 hours on 12 July 2004. The workers evidence in chief continued through to the luncheon adjournment and after lunch. At about 1414 hours Ms Gearin was asking the worker questions in relation to ExP4 and her understanding of those documents. At this stage Mr Barr made an objection and in the course of

that raised for the first time the possibility of a counterclaim. However, the issue of a potential counterclaim was limited to the notice of cancellation and any potential subjective lack of understanding by the worker of the document forming part of ExP4. The matter was left on the basis that the worker continue with her evidence and if the worker did amend her pleading to raise the issue of lack of understanding of the notice and accompanying documents based on s69(4), then this was a matter that could readily be dealt with by way of counterclaim without any prejudice to the worker.

65. In the course of discussion of the objection I indicated that whether or not s69 had a subjective component to it was only going to be an issue if I don't find that s87 makes the whole process irrelevant anyway. Mr Barr agreed that the s87 issue was one that could completely nullify any action by the employer under its notice of cancellation. I added "unless the court otherwise orders". Mr Barr went on to suggest that it was his understanding from the opening that the procedure adopted by the employer under s69 is not effective and unless the court makes an order undeeming the employer then the employer simply can't rely on s69.

66. In the course of Mr Barr's submissions Ms Gearin interrupted him each time he sought to address the s87 issue rather than the question she was about to ask the worker, which went to the s69 issue and the understanding of the worker. As such, Mr Barr did not get the opportunity to fully explain any problem that he may have had in relation to the s87 issue.

67. The effect of all this was that at no time on the 12th day of July 2004 did Mr Barr indicate any particular problem that the employer considered it had in relation to the worker's opening on the ss85 and 87 issues.

68. The worker's evidence continued and her evidence in chief was concluded and cross-examination commenced at about 1443 hours. Cross-examination continued for the remainder of the day and the matter was then adjourned over to 10.00am on 13th July 2004.

69. When the matter resumed on 13th July 2004 Ms Gearin sought leave to file a Further Amended Statement of Claim allegedly to deal with the matters raised on the previous day. Mr Barr had no objection to the filing of this further document although he reiterated that the cost issues from the previous amendment still remained to be resolved. This fourth Statement of Claim abandoned the assertion that the worker had been working "full-time" and changed this to 25 hours per week. In addition, she now claimed underpayment for the whole period rather than only after the first 26 weeks of weekly payments. Also, some amendments were made to paragraph 10, which dealt with the assertion that the purported cancellation of benefits was not in accordance with s69 of the Act. Finally, the complaint about the employer refusing to pay for surgery, and the request for a court ruling in this regard were abandoned.

70. Mr Barr then raised that it may now be appropriate to grant leave to the employer to deliver its further amended defence and, as foreshadowed the day before, a counterclaim. I asked Mr Barr when he would be in a position to deliver his pleading and he responded that it should be as soon as possible but he would try and do it over night so that it could be filed in court tomorrow morning. Ms Gearin properly noted that because she did not know what the counter claim may raise she was concerned as to the possible effect on the evidence to date and how the evidence proceeded throughout the remainder of the day.

71. I indicated that Mr Barr should place on the record what the counterclaim will cover so that the worker was not taken by surprise.

72. Mr Barr advised that the counterclaim would deal with the issue raised by Dr Parkington in his certificate and report which was served on the worker in connection with the cancellation of payments. He said that the employer would deal with ExP4 documents upon the merits. Further, he went on to say words to the effect of

> "The second issue is, and I haven't considered this as fully as perhaps I will need to pleading now on the part of the employer …there is nothing in the pleading in relation to deeming… that is in 5B and 5C… they are matters that we may need to counterclaim some relief. For example, if section 87 applies to this situation it may be necessary for the employer to get an order otherwise from the court."

73. I then asked Mr Barr to confirm that they were the two issues that the counterclaim would cover and he replied "yes". I then asked Ms Gearin if she was happy with that and she replied in effect

> "Well ones a matter of law and the other is clearly one I'm familiar with and don't cause me any trouble in relation to Dr Parkington."

74. With the benefit of hindsight alarm bells should have sounded and I should have declined to proceed further with the case until the pleadings were finalised. In this regard I note what Mildren J said in *Hunt v Collins Radio Constructors Inc* (No66 of 1996, delivered on 3.12.96) at Paragraph 29:

> "A problem with this case is that it is not easy to determine precisely what issues were being litigated or were to be litigated between the parties, because neither party had adhered to the issues as disclosed by the pleadings, and no amendment to the pleadings was ever made or sought to be made. What had started as an appeal under s69 of the Act had grafted onto it or perhaps substituted for it, what was in reality an application under s104(1). Having regard to the conduct of the parties, it is far too late to complain of this now, a matter which Angel J commented upon in his judgement of 27 July 1995 at p 14, and with which I respectfully agree. Nevertheless I feel obliged to point out, once again, the dangers of the course which the parties undertook. The pleadings are not just scraps of paper which the parties and the court are free to ignore. Their purpose is to define the issues between the parties and to control the admission of evidence at the hearing. If it is desired to raise new issues, the pleadings must be amended, and the court ought not to decide new issues unless they are incorporated into the pleadings: see *Horne v Sedco Forex Australia Pty Ltd* (1992) 106 FLR 373 at 379-80. Magistrates would well be advised to insist upon any necessary amendments to the pleadings, if new issues are to be raised, and if necessary, to refuse to entertain new issues without the appropriate amendments. So far as the appellant's application to call evidence relating to the period after the delivery of judgement in 1994 is concerned, there was nothing to the pleadings relating to any claim in

> respect of that period. The respondent had no doubt led the appellant to believe by the way the respondent had prepared its case that there would be not objection to canvassing the period after 1994 at the hearing in September 1996, but there is no evidence of any formal agreement about this. The learned Magistrate could have ruled against the appellant on this ground, or granted leave to amend the pleadings, and allowed the matter to proceed. However, that was not what she did. Her Worship refused the application on the basis that that issue had been "canvasses" at the original hearing. In my opinion, the learned Magistrate fell into error. There was no application before her in 1993 for a redemption of the applicant's future entitlements. There was no finding of permanent partial incapacity; nor was it appropriate to make such a finding".

75. However, as I had two experienced counsel in relation to Work Health matters and in the interests of trying to progress the claim we pressed on with the evidence.

76. The first evidence called on 13th July 2004 was Mr Mercorella (the worker's Alice Springs physiotherapist) who gave evidence by videoconferencing. At the conclusion of his evidence the Worker returned to the witness box and continued her cross-examination. The cross-examination was interrupted at 11.30 to enable Dr Quinn to give evidence by videoconferencing and I adjourned to enable the connection to be made. Unfortunately there was a problem with the connection and after almost an hour of efforts we had to abandon the evidence of Dr Quinn and resume with the cross-examination of the worker. This cross-examination continued both before and after lunch, and included the showing of various film taken of the worker to the worker.

77. At about 1500 hours the cross-examination of the worker was further interrupted to enable Dr Kevat (a rheumatologist) to give evidence by way of video conferencing. At the completion of Dr Kevat's evidence the worker again returned to the witness box to be shown further film. At the completion of the days evidence the matter was adjourned to 14 July 2004 at 10.00 o'clock.

78. When the hearing resumed on 14 July 2004 Ms Gearin raised the issue that paragraph 13 of her further amended Statement of Claim had been re-included in the document in error. I formally deleted it from the filed document. Mr Barr advised that he had not completed the defence or counterclaim as yet as he had problems pleading to the Statement of Claim in its present form. A discussion then took place as to whether the Statement of Claim needed to be further amended or not and what the consequences were or might be.

79. Given that two days of evidence had already occurred and the pleadings still were not closed I advised both counsel that I was unwilling to proceed further with any evidence until the pleadings were in order. I adjourned the matter at about 1038 hours until 1400 hours to enable pleadings to be finalised.

80. When court resumed at about 1405 hours Mr Barr was not in attendance although his instructing solicitor was. I continued with the matter and Mr Barr arrived at about 1415 hours.

81. Ms Gearin handed up a Further Amended Statement of Claim and this was allowed to be filed without objection. This was the fifth (and hopefully final) attempt. The worker now added a new paragraph (10A) for the first time. This paragraph stated:

> The purported cancellation of benefits was not in accordance with the requirements of the Work Health Act.
>
> PARTICULARS
>
> (a) The employer failed to notify the worker of the decision as to eligibility for compensation as required by Section 85(1).
>
> (b) The employer as a consequence was deemed to have accepted liability pursuant to Section 87.

(c) The employer has never notified the worker of a decision as to eligibility for compensation such as to cease the deeming pursuant to Section 87(a).

82. The reference to a "decision as to eligibility for compensation" appears to be misconceived. I assume that this is intended to refer to a "decision as to whether the employer accepted or disputed liability for the compensation claimed".

83. Mr Barr handed up to the Court a Further Amended Notice of Defence and a Counterclaim. I granted leave for this document to be filed in court. In relation to the new paragraph 10A the employer (in para. 10A of it's Further Amended Notice of Defence) denied that the cancellation of compensation was not in accordance with the Act, and went on to plead as follows:

.1 admits that it did not notify the worker as to her "eligibility for compensation", but denies that s85(1) *Work Health Act* so required;

.2 denies that it was deemed to have accepted liability pursuant to s87, for the reason that s87 only applies where the employer fails to notify a person of the employer's decision under s85(1) to accept, defer or dispute liability, and the employer did defer liability under s85(1)(b) *Work Health Act*;

.3 admits that it has not to date accepted or disputed liability for compensation save insofar as it paid compensation after deferring accepting liability, and continued to pay compensation until 8 November 2001.

84. In addition, the employer now pleaded a Counterclaim for the first time. This Counterclaim stated as follows:

EMPLOYER'S COUNTERCLAIM

17. The employer refers to and adopts paragraphs 5, 5A and 5B of the worker's Further Amended Statement of Claim and refers to and repeats the matters alleged in paragraph 10A hereof, and says that the deferral period under s.85(4) *Work Health Act* expired on or about 26 December 1999, that is, 56 days after the employer deferred accepting liability.

18. Within the period 21 October 1999 to 26 December 1999, the employer did not notify the worker that it accepted or disputed liability for the compensation claimed.

19. In the circumstances, the employer is not deemed liable at law for the worker's claim for compensation and any payments made by the employer under s.85(4)(b) are deemed by s.85(7) to have been made without prejudice and cannot be construed as an admission of liability.

20. The employer claims an order of determination that the employer is not deemed liable at law for the worker's claim for compensation and that the worker bears the onus of establishing that she is entitled to compensation with respect to the injury to her right upper limb and left upper limb; alternatively with respect to the injury to her left upper limb.

21. In the alternative, if the employer was liable at law for the worker's claim for compensation as at 25 October 2001 (whether deemed or otherwise) and if the employer's cancellation of compensation on 25 October 2001 was defective for any one or more of the reasons that:- there was inconsistency between the Notice of Decision dated 25 October 2001 and the reports and medical certificates of Dr Parkington dated 17 April 2001 and 22 October 2001 respectively; or for the reason of the time lapse between date of examination of the worker by Dr Parkington on 12 April 2001 and the issue of a certificate on 22 October 2001; or for the reason that the employer failed to provide reasons with sufficient detail to enable the worker to understand fully why her compensation was being cancelled or reduced; or for the reason that the worker's claim did include the alleged consequential injury to the worker's left elbow and that the certificate related only to the right-sided injury (all of which is denied) or for any other defect or invalidity which the Court may find in relation to the cancellation process, the employer counterclaims as follows.

22. The employer refers to paragraph 3 of the Particulars of Defence herein and says that the worker's injury under the *Work Health Act* arising out of or in the course of her employment with the employer was an exacerbation and/or aggravation of the worker's right sided epicondylitis, in circumstances where at some time in or about August or September 1999, the worker developed the condition of epicondylitis in her right elbow, a spontaneously arising degenerative condition of inflammation of the tendinous insertion of the extensor muscles on the lateral aspect of the right elbow, which

said condition was not caused by but was exacerbated by and/or aggravated in the course of the worker's employment.

23. As at 12 April 2001, all incapacity resulting from or materially contributed to by the injury pleaded in the preceding paragraph had ceased.

24. The employer claims an order or ruling under s.94(1)(a) read with s.104(1) *Work Health Act* that the worker had ceased to be incapacitated fro work as a result of the said injury.

The employer seeks orders as follows:

(a) The worker's application be dismissed;

(b) An order or determination that the employer is not deemed liable at law for the worker's claim for compensation and that the worker bears the onus of establishing that she is entitled to compensation with respect to the injury to her right upper limb and left upper limb; alternatively with respect to the injury to her left upper limb;

(c) An order or ruling under s.94(1)(a) read with s.104(1) *Work Health Act* that the worker had ceased to be incapacitated for work as a result of the said injury;

(d) The worker pay the employer's costs of and incidental to the proceeding at 100% of the Supreme Court Scale.

85. The matter then proceeded before me by way of legal argument as to whether the hearing was capable of proceeding further and if so on what basis. In that regard various preliminary rulings were sort from me, some of which rulings might finally determine the matter. Because of the importance of the legal argument the matter was adjourned to 1400 hours on 15 July 2004 to enable both counsel to prepare full argument. At the conclusion of argument on 15 July 2004 I adjourned the matter to a date to be fixed for decision.

86. On 19 July 2004 (by apparent agreement between the parties) the employer filed a written supplementary submission, and the worker filed a written response to this on 20 July 2004.

87. The above summation sets out the history of this matter. It is little wonder that litigants find the court processes difficult to comprehend, unwieldy and overly expensive.

88. Leaving aside the numerous facts which are still in issue between the parties there are some facts which clearly are not in issue and these are as follows:

- The worker delivered a duly completed and signed claim for compensation in accordance with s82(1) of the Act to the manager of the employer on 14/10/99,
- Whether or not the worker had given earlier notice of injury to the employer, pursuant to s80(2) of the Act the employer had notice of the alleged injury by 14/10/1999 at the latest,
- The worker had earlier delivered to the manager of the employer a medical certificate in accordance with the Act on 12/10/1999,
- In accordance with s82(2) of the Act the claim for compensation was deemed to have been made on 14/10/1999 (as the relevant certificate had already been delivered on 12/10/1999, and the second relevant document was delivered within the required 28 day period),
- The certificate and claim for compensation were both properly served upon the employer on 12/10/1999 and 14/10/1999 (respectively) in accordance with s83 of the Act;
- The employer complied at least in part with its obligations under s84(1) of the Act by immediately completing the employer's report section of the claim form, in that the manager of the employer completed and signed the same on 14/10/1999,

- I do not know whether the completed claim form was forwarded to the insurer within three working days as required by s84(1) of the Act, but I do know that the same was allegedly received by the insurer on 20/10/1999,

- By letter dated 21/10/1999 the employer (via the insurer) notified the worker of its decision to defer accepting liability for the compensation pending the receipt of further medical and other unspecified information.

- Accordingly, the employer complied with its obligations under s85(1)(b) of the Act,

- At some stage on or after 21/10/99 the employer commenced making weekly payments of compensation in accordance with s85(4)(b) of the Act, but I am unable to decided whether this was within the three working days required,

- In addition the employer has paid various (unspecified to date) medical or other expenses of the worker related to the alleged injury,

- At no time up to and including the point when I reserved my decision and adjourned the case has the employer (despite my inviting it to do so) ever expressly notified the worker of any decision that it might have taken in accordance with sections 85(1)(a) or (c) of the Act,

- Whilst I am unable to decide at this stage of the evidence whether this initial failure to notify was intentional, reckless or simply negligent, I find that as and from 7 July 2004 (at the latest) it has been deliberate,

- By notice dated 25/10/01 the employer purported to cancel payments of weekly benefits to the worker pursuant to s69 of the Act with

effect from 14 days after receipt of the said notice on the basis only that:

1. You are no longer incapacitated for work as a result of the work related injury on or about 1 September 1999.

2. Annexed to this notice are copies of a report from Dr R Parkington dated 17 April 2001 and a certificate from Dr R Parkington dated 22 October 2001,

- The Worker has received no payments of weekly compensation from the Employer since in or about early November 2001.

89. On the basis of these facts and the history as outlined above I now turn to consider the Act and the arguments herein.

90. The pre-amble to the Act is in the following terms:

> "An Act to promote occupational health and safety in the Territory to prevent workplace injuries and diseases, to protect the health and safety of the public in relation to work activities, to promote the rehabilitation and maximum recovery from incapacity of injured workers, to provide financial compensation to workers incapacitated from workplace injuries or diseases and to the dependants of workers who die as the results of such injuries or diseases, to establish certain bodies and a fund for the proper administration of the Act, and for related purposes."

91. In relation to the use that a court may make of a pre-amble Mason J observed in *Wacondo v The Commonwealth* (1981)148 CLR 1 at 23:

> "It has been said that where the enacting part of a statute is clear and unambiguous it cannot be cut down by the preamble. But this does not mean that a court cannot obtain assistance from the preamble in ascertaining the meaning of an operative provision. The particular section must be seen in it's context; the statute must be read as a whole and recourse to the preamble may throw light on the statutory purpose and object."

92. The Act is intended to be benevolent legislation. It firstly seeks to prevent workplace injuries, but if they do occur it seeks to then do two things. Firstly, to promote the rehabilitation and maximum recovery from incapacity of injured workers. Secondly, to provide financial compensation to workers incapacitated from workplace injuries. It is this second element that we are concerned with herein.

93. The starting point to an entitlement under the Act is section 53, which states as follows:

> "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."

94. On the pleadings it is admitted that the worker was a "worker"; that she suffered an injury to her right hand, forearm and elbow which arose out of or in the course of her employment with the employer as a cook; that she made a claim for that injury on 14 October 1999; and that she was totally or partially incapacitated for work from September 1999 to some time prior to 12 April 2001. Accordingly, the requirements in s53 are all (with the exception that the injury occurred in the Northern Territory, which clearly is not at issue on the evidence) admitted on the pleadings.

95. Given these admissions I find the employer's Counterclaim (which is set out in full later in these reasons) curious. The employer, who asserts that it has never "accepted liability for the compensation" claimed now seeks to take

an advantage from this (see: paragraphs 19, 20 and 24(b) of the Counterclaim). There is nothing unusual about the concept of "accepting liability". The word "accept" has it's usual meaning. In *the Concise Oxford Dictionary of Current English (eighth edition)* it's meaning includes:

> "give an affirmative answer to; regard favourably; believe, receive (an opinion, explanation etc) as adequate or valid; be willing to believe…"

96. Accordingly, in accepting liability for the compensation claimed, an employer is simply accepting that a claimant has a valid entitlement under the Act. In a claim for weekly benefits this involves an acceptance that:

- A claimant is a worker as defined in the Act;
- A claimant suffered an injury as defined in the Act;
- the injury arose out of or in the course of the worker's employment with the employer; and
- the injury results in or material contributes to the worker's incapacity as defined in the Act.

97. As noted in paragraph 94 of these reasons each of these matters is expressly admitted by the employer in it's Notice of Defence and this Notice of Defence has been served upon the worker (presumably via her solicitors). In my view, this is sufficient notice as required in s85(5) of the Act (to which I will turn in more detail later in these reasons). I therefore find that upon filing and serving the original Notice of Defence (which was filed in court on 9 May 2002) the employer did in fact "accept liability for the compensation" claimed, and there is no need for any further or better "acceptance".

98. As this aspect was not a matter canvassed by either counsel in their submissions before me, and in the event that I am wrong in this finding, I will continue to consider the arguments further.

99. Their Honours Martin CJ, Mildren and Bailey JJ considered the general scheme of the Act in the case of *Alexander v Gorey & Cole Holdings Pty Ltd* (2002)171 FLR 31 at page 36 and stated:

> "[23] The scheme of the Act is that, where a worker suffers an injury arising out of or in the course of his employment that results in or materially contributes to his impairment or incapacity, there is payable such compensation as is prescribed: see s53. The right to weekly compensation depends upon the worker establishing that his lost earning capacity resulted in loss of income: see ss64 and 65 of the Act. Before a worker becomes entitled to any compensation, notice of the injury is required to be given as soon as practicable to the worker's employer in accordance with s80. The requirement to give such notice is a condition precedent to the right to compensation: see *Maddalozzo v Maddick* (1992) 84 NTR 27; 108 FLR 159. Before any compensation becomes due and payable, the worker must lodge a claim for compensation with his employer in accordance with ss82 and 83 and wait until the employer has either accepted or deferred liability under s85 and three working days have passed since the date of either acceptance or deferral of the claim: see *Work Social Club - Katherine v Rozycki*, supra, at 236-7. In the case of a deferred claim, although payments of weekly compensation are required to be made within three working days of the decision to defer the claim, the payments are made on a without prejudice basis, are required to be continued until the employer rejects the claim and are irrecoverable by the employer, even if the employer is not liable under the Act to pay compensation: see s85(7). At the relevant time, the Act contemplated that the employee could commence proceedings for compensation in the Work Health Court within 28 days after receiving notice of the fact that the claim was disputed: see ss85(8) and 104(3)."

100. Neither counsel was able to point me to any case which had addressed the issue which falls for determination in this case. That issue is, what are the consequences under the Act when an employer defers a decision in

accordance with s85(1)(b) of the Act, but then makes no (or fails to notify the worker of any) subsequent decision.

101. I turn to consider s85 as it was worded at the relevant time. The crucial obligation is contained in s85(1), which is as follows:

> (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.

102. Accordingly, the employer has 10 working days from receipt of the claim form to make a decision. Mildren J held in *Perfect v Northern Territory* (1993) 107 FLR 428 at 435, that:

> "One of the objects of Div 5 of Pt V of the Act (ss79-91) is to ensure that a worker's claim for compensation is dealt with speedily by his employer, and to the 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 commence 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."

103. In the instant case Mr Barr argues that the employer has complied with s85(1), in that it did advise the worker of it's decision to defer (in accordance with s85(1)(b)) "within 10 working days after receiving the

claim". At first blush this argument would appear to be correct, but for reasons which appear later, the matter may not be so straight forward.

104. As noted above, the parties assert that the employer has never accepted the claim. If a claim was accepted then an employer would have been obliged to proceed under either s85(2) or (3), which states:

> (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.

105. Also, as noted above, the employer has never advised the worker that it disputes the claim (and any such advice would, in my view, be inconsistent with the employer's Further Amended Notice of Defence, and the admissions therein contained) but if it had then it would have been obliged to proceed under s85(8) and (9), which are as follows:

> (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);

(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; and

(f) to the effect that, despite paragraphs (d) and (e), the claimant may commence a proceeding for an interim determination under section 107 at any time after the claimant has applied to the Authority to have the dispute referred to mediation.

(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.

106. Whether an employer decides to accept liability under s85(1)(a), or defer accepting liability under s85(1)(b) or dispute liability under s85(1)(c) it must proceed in accordance with s85(6) in either case. That subsection is as follows:

(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.

107. When s85 is looked at in it's entirety it clearly seeks to set up a regime directed to a quick decision on liability being made and conveyed, and the earliest possible commencement of weekly payments. This is a cornerstone of the Act.

108. In the instant case where the employer was apparently unsure whether to accept the claim, and supposedly was unable to make a decision to either accept or reject the claim within the 10 working days allowed, then it was allowed to defer accepting liability, as it did. In which case subsections (4), (5) and (7) applied. Subsection (4) states as follows:

> (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;
>
> (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; and
>
> (c) where the claim is for weekly payments and relates to an injury involving mental stress – sections 75A(1) and 75B apply during the period of deferral to the employer and the person making the claim as if the employer had accepted liability for the compensation claimed. (emphasis added)

109. In my view, the "deferral" referred to in this subsection is a deferral of accepting liability for the compensation, and not a deferral of a decision whether to accept or dispute liability. This is made clear by the wording in both s85(1)(b) and the first ten words in s85(4). It therefore follows that a deferral in accepting liability remains in force for 56 days from the date the notification under subsection (1) is given (s85(4)(a)) unless during the period of the deferral the employer notifies the worker that it accepts or

disputes liability for the compensation (s85(4)(a)). Accordingly, even though the deferral is stated to be a deferral in accepting liability, it is still open to an employer to decide to dispute liability for the compensation claimed and notify the worker accordingly (ss85(4)(a) and (5)).

110. Subsection 85(5) states:

> "(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.

111. Accordingly, notice of any decision is at all stages an important requirement.

112. Subsection (7) deals specifically with what happens in relation to payments made under s85(4)(b), and states as follows:

> (7) Where payments are made to a person under subsection (4)(b) or by virtue of subsection (4)(c), or where the employer pays the costs of a worker's reasonable rehabilitation treatment or training or workplace return to work programs before accepting liability for or being found liable to pay compensation, 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) if they are made under subsection (4)(b) or by virtue of subsection (4)(c) – are to 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.

113. Accordingly, any payments made under s85(4)(b) are not in any subsequent proceeding under the Act (this present action is a proceeding under the Act) to be construed as an admission of liability. Is this limited to payments made within the 56 day deferral period, or does this continue until such time as a decision to accept or dispute liability is made and notified to the worker? Mr Barr submits that there are two arguable possibilities:

- "The payments continued to be paid on an entirely without prejudice basis, there being no liability accepted or deemed: or
- The employer accepted liability by it's conduct in continuing payments – see: *The Western Australian Coastal Shipping Commission and Another v Wallner* (1980) 144 CLR 110."

114. As will appear later I consider that there is a third possibility. The question that falls to be answered in this proceeding is what is the consequence of an employer who has deferred in accordance with s85(1)(b) who then does nothing? Or, to put it another way, what happens once the deferral period in s85(4)(a) expires if no decision to accept or dispute liability is notified to the claimant? Firstly, the employer herein may have committed an offence (see: s178 and *Perfect V Northern Territory of Australia* (supra) at page 435), but the time limit (s179(b)) for commencing any such prosecution has already expired. Secondly, such behaviour by the employer would be clearly contrary to the whole scheme of the Act.

115. In my view, the deferral only remains in force for a maximum of 56 days (unless further time is allowed by the court, which did not happen here) after the notification of deferral was given (s85(4)(a)), and therefore ceased on or shortly after 17 December 1999. My reasons for this are found within the wording of s85(4)(a) itself. Clearly, in my view, on a plain reading of that subsection the starting point is that "the deferral shall remain in force for 56 days from the date the notification under subsection (1) is given". Only two possible variations of this period are contemplated within

s85(4)(a). The first is that a period longer than 56 days may apply but only if the Court allows it. The second is that the period will be shorter than 56 days where the employer doesn't need the full 56 day period to make a decision, and therefore notifies the claimant of it's decision before the 56 day period expires. In the second of these two options clearly there is no longer any need for the deferral to continue in force once a final decision has been made and communicated to the claimant.

116. For reasons that become apparent later (see s87) the notification of decision to defer itself must be given within the initial 10 working days allowed in s85(1). In my view, if it is given outside the 10 working day time limit it is not a valid deferral, and the deeming that flows from s87 would immediately commence.

117. As noted above, if the employer is still not able to decide whether to accept liability during this extra 56 day period then it can only have further time if the court allows it. It would follow that any application for further time would have to be made before the 56 day period expired. In the instant case the employer has never applied to the court for further time within which to make a decision. Further, the employer, having deferred it's decision (to accept liability for the compensation), has apparently never notified the worker of any decision as required by s85(5).

118. What if an employer does not notify the worker of any decision within the 10 working day period prescribed in s85 (either to accept liability, defer accepting liability, or dispute liability)? The answer is to be found in section 87, which states as follows:

> 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.

119. This is s87 as it appears now, when it was inserted by Act number 18 of 1998 which commenced on 20 May 1998. The repealed section 87 was as follows:

> Where within the times specified in section 85, an employer does not comply with that section, the employer shall, until such time as the court orders otherwise, be deemed to have accepted liability for the compensation claimed so far as the claim is in respect of compensation payable under Subdivisions B and D of Division 3.

120. Hence, prior to it's amendment an employer could only be relieved of the effect of the deeming by an order of the court. The amendment now gives the employer another option as well. However, it still allows for an order of the court as one way to rebut the deeming. Prior to this amendment s87 was considered by the NT Court of Appeal (Martin CJ, Mildren and Thomas JJ) in the case of *Schell v Northern Territory Football League* (1995) 5 NTLR 1. At page 6 in a joint judgment Their Honours said:

> "Nevertheless, it would be most unlikely that the legislature intended that an employer who was deemed to have accepted liability should be in any worse position vis-à-vis the worker than an employer who had made a conscious decision to accept liability. In either case, the employer could have proceeded either by means of a substantive application to the Court pursuant to s104 (see s69(2)(d)) or by cancelling or reducing payments pursuant to s69(1). There is nothing in the language of s69 to indicate that that section could not apply to a deemed acceptance of liability. The word "deemed" does not always create an irrebuttable presumption of fact, and whether it does or not must depend upon the context, and the Act read as a whole. In this case we are satisfied that, even before the amendment in 1993 to s87, it would have been open to the employer to prove that it was not in fact liable, or no longer liable, to pay compensation."

121. In my view, these observations still remain correct (with respect) despite the amendment to s87 as referred to above.

122. When Act number 18 of 1998 was presented in Parliament on 25 November 1997 the second reading speech noted amongst other matters:

> "The Act protects workers from tardy claims management in the decisions as to eligibility for compensation. This is achieved by the deemed acceptance of a claim where the insurer, on behalf of the employer, fails to notify the worker of it's decision on a claim within the prescribed time limits. The insurer's only remedy is to seek a court order. This is both a costly and time-consuming exercise.
>
> The amendments will allow the insurer, where it wishes to dispute such a claim, to issue a notice which would then cease it's liability 14 days from the service of that notice. This will not prejudice the worker as the worker will be entitled to compensation from the date of injury until 14 days after the giving of the notice. It will also maintain incentive for the employer and insurer to manage claims within the prescribed time limits."

123. The effect of s87 is that the employer is deemed to be in the same position as if it had accepted liability under s85(1): Schell *v Northern Territory Football League* (supra) at page 6. Therefore the employer would be obliged to comply with s85(2) or (3), depending upon the type of claim being made. In respect to a claim for weekly payments the employer must commence weekly payments within 3 working days after the (deemed) accepting of liability.

124. If an employer does omit or fail to notify a worker of it's decision within the 10 working days laid down in s85(1) the employer suffers the financial penalty set out in subsections (2) or (3), but the employer does not appear to be otherwise prejudiced. S87(a) envisages an employer being able to notify a worker of it's decision after the 10 working day period. If the decision is to accept liability then it appears to have no real consequence.

125. Section 87(a) doesn't purport to place any time limit upon the employer. Accordingly, there is nothing in s87(a) to stop an employer from making no decision under s85(1) for years and then serving notice of a decision to dispute liability upon the worker. In this case however, it appears intended that the employer suffer a financial penalty, namely an obligation to pay weekly payments (in accordance with the Act) from at least the date the claim was delivered (query whether it is from the date of injury, or alleged incapacity for work, which may be an important issue if there has been a delay in making the claim) up to and including 14 days after the employer finally notifies the worker of it's decision to dispute liability.

126. In the employer's further submissions Mr Barr submits that:

- As a matter of statutory construction, s87 cannot apply to present circumstances. It is clear on it's face that s87 applies only to the situation where an employer does not notify of it's decision to accept, defer or dispute liability within the period of 10 working days specified in s85(1), which is not the case here.

- There are 3 possible decisions available under s85(1), and deferral is one. Hence the words "….and shall notify the person…..of the employer's decision within 10 working days…."

- The employer was not, as at the date of cancellation, deemed to have accepted liability for compensation under s87, because it had discharged it's statutory obligations under s85(1)."

127. A literal (or strict) reading of s87 would suggest that this argument has considerable force. If it were intended to differentiate between a s85(1)(a) or (c) decision on the one hand as opposed to a s85(1)(b) decision on the other hand then that intention could have been made clearer. On the plain reading of s85(1) and s87 neither section differentiates between the types of

decision. I agree that a decision to defer accepting liability is itself a decision under s85(1), and must be made and notified within 10 working days.

128. If s87 didn't refer to "section 85(1)", but instead referred to "sections 85(1) or (4)", or even simply referred to "section 85" the situation would be a lot clearer. Given the whole thrust of ss85 and 87 it would be a nonsense if the employer could simply do nothing after deferring it's decision herein and suffer no deeming or other effect. Mr Barr submits that there is simply a legislative hole, and it is up to parliament to fill it.

129. S85(1)(b) could have referred to "defer accepting or disputing liability for the compensation claimed", but parliament has deliberately chosen to limit the deferral to "accepting liability" only. Once deferred, if no decision is communicated to the claimant then clearly the "deferral in accepting liability" ceases to remain in force. If there is no longer any deferral in accepting liability in force, then by implication (as a matter of logic) there must be only an acceptance of liability left, as that was the only decision that was deferred. To "defer" means "to put off to a later time; postpone" (*the Concise Oxford Dictionary of Current English (eighth edition*)). If an employer was permitted to defer making a decision generally (either to accept or dispute) then at the end of the deferral period the situation would remain neutral, and in the absence of legislative assistance that is where the situation would remain. But here, where there is only one particular decision available, that is "put off to a later time", then that decision stands by presumption in the absence of any decision to dispute liability conveyed during the deferral period.

130. I therefore find that by the combination of ss85(1)(b) and (4)(a) once the deferral period has expired (and assuming no decision to dispute liability has been notified to the worker) then the deferral of accepting liability

ceases to remain in force, whereby the employer is now legislatively presumed to have accepted liability.

131. If I am wrong on this, I would hold that the employer has by it's conduct (in continuing weekly payments well beyond the 56 day deferral period) created a right in the worker to a continuation of such payments until the employer has liability determined in it's favour. For this proposition I respectfully rely upon the joint judgment of Mason, Murphy and Wilson JJ *in Wallner's case* (supra) at page 117 as follows:

> "The voluntary payment of compensation is not a binding admission of liability by the employer, but it is nevertheless proper to describe such a payment as "due under the Ordinance" because it is paid by reason of and by reference to the Ordinance. Once a payment is made, it represents the entitlement of the worker and hence he has a right to it's continuance until the issue of the employer's liability is determined in the latter's favour. The weekly payments may cease to be "due under the Ordinance" upon a finding that the worker is no longer incapacitated. It may even transpire that none of the payments that were made could properly be described as made under the Ordinance at all, much less "due" due under the Ordinance as for example if the Tribunal finds that the accident never happened at all: *Ley v Old Lodge Tinplate Co*. But none of these possibilities alters the fact that <u>if and when an employer makes weekly payments to a worker voluntarily he is doing so because he believes that the worker is entitle to such payments by virtue of the Ordinance. The fact of payment is sufficient to sustain a new right in the worker, the right to their continuance pending a determination in favour of the worker.</u>" (emphasis added)

132. S85(7)(a) makes it clear that any payments made during the deferral period are not to be construed as an admission of liability. But, in my view, once the deferral period has expired and weekly payments still continue, then from that point of time the employer should be seen to be admitting that it believes the worker is entitled to such payments under the Act.

133. Section 62A of the Interpretation Act (NT) was inserted by Act number 27 of 1998, which came into effect on 30 March 1998. This section states:

> "In interpreting a provision of an Act, a construction that promotes the purpose or object underlying the Act (whether the purpose or object is expressly stated in the Act or not) is to be preferred to a construction that does not promote the purpose or object."

134. Even before this legislative change it had been suggested by the Northern Territory Supreme Court that the purposive approach could be used even when the meaning of the statute appeared clear on it's face: *K P Welding Construction Ltd v Herbert* (1995) 102 NTR 20 at 40-1(which was a decision involving the Act); *Peninsula Group Pty Ltd v Registrar-General of the Northern Territory* (1996) 136 FLR 8 at 12.

135. Therefore, in my view, it is necessary to consider the whole of section 85 in order to ascertain the mischief that the section is aimed at, and thereby to understand s87 fully. When this is done a further possible solution, in my view, begins to appear.

136. In my view, the legislature has intended to create a system whereby (in respect to an injury, as opposed to a disease):

- A worker must give notice of an injury as soon as practicable after the injury has occurred (s80(1)) and before the worker has voluntarily left the employment in which he was injured (s182(1));

- The giving of such notice is a pre-requisite to an entitlement to compensation under the Act (s80(1) and s182(1));

- Any claim for compensation (see s82 and s83) must be made within 6 months after the occurrence of the injury (s182(1)(a)) unless the court finds that any failure to make such claim was "occasioned by mistake, … absence from the Territory or other reasonable cause" (s182(3));

- Any claim for compensation must be accompanied by (or served within 28 days of service of the claim: s82(2)) a medical certificate in the approved form (s82(1)(b)) and the worker must authorise the release of

all information concerning his injury to his employer (s82(4)), thereby ensuring that an employer has quick access to relevant medical information concerning the injury;

- armed with this information the employer has 10 working days (it used to be 7 working days, but this was amended by Act 78/93 which commenced on 1 January 1994) within which to notify a worker that it accepts or disputes liability for the compensation claimed, or that it defers making such a decision (s85(1));

- if the employer accepts liability then it must commence weekly payments within 3 working days after such acceptance (s85(3)) and continue them, and is not permitted to cancel or reduce any such payments except in accordance with the Act (s69);

- if the employer disputes liability and the worker is aggrieved by this decision the worker must apply for a mediation (ss103D(1) and 103J(1));

- the dispute must be referred to a mediator within 7 days (s103D(2)) by the Work Health Authority;

- within 14 days after receiving the referral the mediator must attempt to resolve the dispute (s103D(3)(a)) and advise the parties of the outcome (s103D(3)(b)) and issue a certificate (s103J(2));

- accordingly, the Act has compulsory mediation in an attempt to resolve a dispute without the need for court proceedings, again in an attempt to resolve matters as quickly as possible;

- if the worker is unhappy with the result of the mediation he may commence proceedings in the Work Health Court within 28 days after receiving the certificate (s104(3)) or a longer period but only if the court finds that the failure to commence proceedings was “occasioned by

mistake, … absence from the Territory or other reasonable cause" (s104(4));

- if the employer notifies a worker within the 10 working days of receipt of a claim that it defers making a decision (s85(1)(b)) it must commence making weekly payments within 3 working days (s85(4)(b)) of making the decision to defer accepting liability for the compensation claimed;

- weekly payments commenced under s85(4)(b) must continue to be made until the employer notifies the worker of it's decision under s85(5) to accept or dispute liability (s85(7)(b));

- weekly payments made under s85(4)(b) are to be taken into account in determining the amount of the employer's liability under the claim (s85(7)(c)), presumably to prevent a worker being compensated twice or "double dipping"; and

- any weekly payments made under s85(4)(b) are not able to be recovered by the employer notwithstanding that the employer may not be liable to pay the compensation claimed (s85(7)(d));

- thereby ensuring that a decision to defer is not financially attractive.

137. Ms Gearin submits that ss85(4)(b), (5) and (7)(b) create an ongoing obligation to pay weekly payments, and in her written submission the second ruling that she seeks is that:

> "The employer is liable to continue to make payments in accordance with s85(7)(b)."

138. I note that s85(7) only deals with payments that are "made" and does not deal with payments that otherwise might be due under the Act. Also, payments made under s85(4)(b) clearly refer back to s85(4)(a) and therefore, in my view, only relate to the period during which the deferral remains in force. Once a decision on liability is made and communicated during the

deferral period s85(4) ceases to have any work to do. I see no reason why it would not still be the case (as earlier noted in *Schell's case*) that "it would be most unlikely that the legislature intended that an employer who was deemed to have accepted liability should be in any worse position vis-à-vis the worker than an employer who had made a conscious decision to accept liability."

139. Further, I note the wording in s85(7)(c) which is as follows (with emphasis added):

> Where payments are made to a person under subsection (4)(b) or by virtue of subsection (4)(c), or where the employer pays the costs of a worker's reasonable rehabilitation treatment or training or workplace return to work programs before accepting liability for or being found liable to pay compensation, those payments –
>
> (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.

140. Accordingly, the legislature has clearly contemplated within s85 itself that when an employer defers accepting liability for the compensation claimed it may still be subsequently deemed to have accepted liability. Under the Act the only way that an employer may be deemed to have accepted liability is pursuant to s87 (unless the legislative presumption I have found in paragraph 130 hereof is itself a deeming). It therefore follows that the legislature has clearly contemplated that where an employer has deferred accepting liability under s85(1)(b) it may still be deemed to have accepted under s87 subsequently.

141. I have no difficulty with this as, in my view, it fits squarely within the mischief at which sections 85 and 87 are clearly aimed. As the second reading speech to the amending Act 18/98 noted:

> "The Act protects workers from tardy claims management in the decisions as to eligibility for compensation. This is achieved by the deemed acceptance of a claim where the insurer, on behalf of the

employer, fails to notify the worker of it's decision on a claim within the prescribed time limits."

142. Whilst the wording in s87 could be expressed in clearer terms, when it is read together with s85 as a whole the legislative intention becomes clear. As noted above the Act has sought to set up a regime for speedy resolution of a worker's claim. The Act has been keen to ensure that worker's are protected from lazy, uncaring, unscrupulous or tardy employers and insurers (such as this employer and/or insurer). It has done this by requiring a strict 10 working day time limit in s85(1) within which the employer must make a decision on liability and also must notify the worker of it.

143. The crucial "decision" in s85(1) is the decision to accept or dispute liability. It is that decision which dictates how the claim proceeds from that point on. It is a decision that the employer should make. The Act also contemplates that not all employer's will act responsibly, so if a decision to accept or dispute liability is not made within the 10 working days required the Act deems the employer to have accepted liability. This does not lock out the employer for ever, but rather requires the employer to either give 14 days notice of it's decision under s85(1) or seek a court order to relieve it of the deeming. Thus an employer suffers an additional 14 day financial penalty during which weekly payments must be made.

144. Further, the legislature has taken into account that there may be times when an employer is unable to decide whether to accept or dispute liability within the 10 working days allowed. In that circumstance it has permitted the employer to defer making a decision (whether to accept or dispute the compensation claimed) provided that it notifies the worker within the 10 working days that it does wish to defer. If the employer fails to notify the worker of it's wish to defer within the 10 working days allowed then it is deemed to have accepted liability and s87 applies.

145. In my view, whilst a decision to defer is itself a decision, it is not the important "decision" at which sections 85 and 87 are primarily aimed, which is a decision on liability. The Act is designed to compel an employer to decide whether to accept or dispute liability for the compensation claimed within rigid time frames. If the employer fails to do so, then the legislature has by s87 said that we will make that decision for you. All s85(1)(b) does is to allow an employer to extend the 10 working day period within which it must decide whether to accept or dispute the liability claimed by a further 56 days. By choosing to defer the employer must comply with the financial obligation imposed in s85(4)(b), which has the financial detriment spelt out in s85(7)(d). But the whole focus remains upon an employer having to make a decision to accept or dispute liability. That is the mischief that those sections of the Act are primarily aimed at.

146. Clearly, a decision to defer under s85(1)(b) is not intended to relieve an employer of it's primary obligation under s85(1), which is to decide whether to accept or dispute liability for the compensation claimed. All it does is extend the time within which such a decision may be made. The Act still expects that decision to be made, but simply allows additional time to do so.

147. Once the deferral period has expired (assuming that the court has not granted a longer period) then the employer has no further time to make and notify the worker of it's final decision as to whether to accept or dispute liability. It is inconsistent with the whole purpose of s85 that an employer can be relieved of the obligation to decide on liability altogether, without any consequence.

148. Ms Gearin submits that the consequence is that contained in s85(7)(b), namely that the employer is obliged to pay the worker indefinitely until it finally advises the worker of whether liability is accepted or disputed. I do not accept this submission. My reason for this is that s85(4)(a) makes it clear that any deferral only remains in force for 56 days (unless the court

allows a longer period). Ss85(4)(a) and (b) are joined by the word "and". Hence they are not alternatives. Both apply. Therefore, when s85(7) refers to payments made "under subsection (4)(b)" it refers to those payments during the period that the "employer defers accepting liability for the compensation claimed". And this period is limited specifically to 56 days, after which the deferral ceases to remain in force. If it were the intention that the deferral would apply indefinitely until a decision on liability was notified to the worker under s85(5) there would be no need for a specific deferral period to be specified.

149. Whilst s85 and s87 are poorly drafted (and without the attention to detail that one would hope for in an Act of Parliament) I consider that the following is the interpretation that fits best with the words and the apparent intention and underlying philosophy of the Act, namely:

- If an employer notifies a worker of it's decision to defer accepting liability within 10 working days of receiving a claim for compensation (s85(1)(b)), then the 10 working day period ceases to apply, and the employer now has up to 56 days from that notification (s85(4)(a));

- Within 3 working days of making the decision to defer the employer must commence weekly payments to the worker (s85(4)(b)) and must continue to make them until the employer notifies the worker of it's decision under s85(5) whether it is going to accept or dispute liability for the compensation claimed (s85(7)(b));

- Payments made during a deferral are not able to be recovered by the employer from the worker, even if the employer is subsequently found not to be liable to pay weekly compensation at all (s85(7)(d));

- During this additional 56 day period the employer is required to notify the worker of whether it now accepts or disputes liability(s85(4)(a) and (5));

- If the employer decides to accept liability within the deferred period then, from the time that decision is notified to the worker,

the weekly payments cease to be payments under ss85(4)(a) and (7) and become payments under s85(2);

- If the employer disputes liability within the deferred period then, from the time that decision is notified to the worker, the employer's obligations (under s85(4)(a) and (7)(b)) to make weekly payments to the worker ceases, and it is then up to the worker to decide whether she is aggrieved by that decision and wishes to take the matter further in accordance with the Act;

- If an employer does not notify a worker of it's decision to either accept or dispute liability for the compensation claimed within the deferred period then, at the expiration of the deferred period, the weekly payments cease to be payments under ss85(4)(a) and (7) and become payments under s85(2), on the basis that liability is now deemed under s87 (or by implication by the combination of ss85(1)(b) and (4)(a)).

150. In this way, an employer who elects to defer making a decision to either accept or dispute liability but then fails to do so, is in the same position as a person who failed to notify a worker in the initial 10 working day period (as required in s85(1)). The only difference is that, by deferring, all payments made during the deferral period are not recoverable from the worker under s85(7)(d).

151. It therefore follows, in the instant case, (and I find) that from or about the 17th day of December of 1999 the employer herein was deemed to have accepted liability for the compensation claimed. As the employer had not notified the worker of any decision to dispute liability as at the date my decision was reserved, the employer continued to be deemed to have accepted liability up until at least then.

152. However, the Act contemplates that an employer who has accepted liability is in the same position as one which has been deemed to have accepted liability (with some financial differences during the deferral period: s85(7)(d)). Accordingly, it was open to the employer herein to serve and seek to rely upon a notice under s69 in order to seek to cease it's obligations

under the Act. The validity of the s69 notice and the correctness of the employer's decision to cease payments are live issues on the pleadings.

153. Where an employer accepts liability for compensation claimed it does not mean that it accepts a financial liability for all time. Circumstances change. An employer may wish to assert that a worker is no longer incapacitated for work as a result of the work injury, or may wish to reduce payments based upon an alleged ability to earn some income in work that might be reasonably available to a worker. In this event it does not involve a dispute on liability ab initio. Therefore it is not necessary for the employer to (as part of any s69 notice) now seek to dispute liability in accordance with s85(1)(c). As an employer who is deemed should be in no worse position than one who has accepted liability, I see no reason why the employer herein must notify the worker of a decision at this late stage. There is, in my view, no need as the employer was deemed to have accepted liability as soon as the deferral period ceased to remain in force. If the employer now wished to dispute liability ab initio (for example on the basis that it now had information that the claim was fraudulent; or that new medical evidence now showed that the original injury was not work related) then it would have been open to the employer to notify the worker of it's intention to now dispute liability. But the pleadings herein do not suggest that the employer wishes to do that in this case. Rather, the Notice of Defence and Counterclaim make it clear that the employer does not dispute that it is liable for the initial injury to the worker's right upper limb and the incapacity that followed therefrom. However, it does dispute any ongoing liability to pay in relation to that injury, and in addition disputes that it is liable to pay any compensation for any injury to the left upper limb, which was not part of the claim for compensation.

154. In those circumstances it was appropriate for the employer to serve a notice in accordance with s69 as it did.

155. On the facts of this case, for the reasons that I have set out above, the employer was deemed to have accepted liability for the compensation claimed and therefore bears the legal and evidentiary onus to prove what it has asserted in it's s69 notice.

156. Accordingly, I find that the hearing should not have ceased as it did, but rather should have continued to a determination on the whole of the evidence. Given the submissions by Ms Gearin the hearing could not have proceeded as, if the submissions were correct (which I have found they were not), then the worker would have been entitled to immediate relief.

157. I find (as a matter of law) that the worker is not entitled to payments pursuant to s85(4)(a) and (7)(b) beyond the date that the 56 day deferred period expired (namely on or about 17 December 1999).

158. It would appear to follow from these reasons that paragraphs 19, 20 and 24(b) of the employer's Counterclaim should be struck out.

159. I will hear the parties on the form of orders that I should now make, and on the question of costs and any ancillary orders.

160. As the consequence of my decision herein is not to finally determine this proceeding there is no right of appeal at this stage (s116(3)). It is therefore desirable that the hearing resume and be finalised as soon as possible. I will hear the parties on when the trial herein can continue.

Dated this 13th day of August 2004.

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D TRIGG
STIPENDIARY MAGISTRATE