CITATION:	*Piotr Fraczek v North Mining Limited [2004]* NTMC 070
PARTIES:	PIOTR FRACZEK (Worker) v NORTH MINING LIMITED (Employer)
TITLE OF COURT:	Work Health
JURISDICTION:	Darwin
FILE NO(s):	20312430
DELIVERED ON:	9 SEPTEMBER 2004
DELIVERED AT:	DARWIN
HEARING DATE(s):	20, 21, 22, 23 September 2004
DECISION OF:	D LOADMAN, SM
CATCHWORDS:	Dux Litis: application by worker for declaration of employer as Dux Litis – governing law explored – application granted.

REPRESENTATION:

Counsel:	
Worker:	Colin McDonald QC
Employer:	Michael Grant
Solicitors:	
Worker:	Ward Keller
Employer:	Hunt & Hunt
Judgment category classification:	B
Judgment ID number:	[2004] NTMC 070
Number of paragraphs:	24

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

No. 20312430

BETWEEN:

PIOTR FRACZEK
Worker

AND:

NORTH MINING LIMITED
Employer

DECISION

(Delivered 9 September 2004)

Mr David LOADMAN SM:

PRELIMINARY

1. By agreement this decision, only in relation to the disposition of paragraph 3 of the interlocutory application made on behalf of the worker and dated 3 September. The prayer is in the following terms:

> "3. That the employer be dux litis for the purposes of the hearing of these proceedings to commence before the Work Health Court ("WHC") on Monday 20 September 2004."

2. It should firstly be a matter of record that by preference this Court, in its decision, would have exhaustively categorised issues set out in the pleadings, referred to a variety of documents and incorporated the text of many documents containing communications germane to the question of compensation claimed by the worker in this matter.

3. The philosophy of expediency, having regard to the imminent commencement date of the scheduled hearing in this matter on 20 September

2004 has however dictated a brief although hopefully incisive but objectively, to the Court, a much less comprehensive exposition of the applicable facts and the law than would have been preferred.

4. In the event, these proceedings involve three discrete situations. The Court forebears from setting out the history of the proceedings and simply commences at a point where following upon acceptance of liability by the employer, the worker was in receipt of weekly benefits as for total incapacity predicated on a variety of medical opinions, referred to in the submissions by both parties and apparent from the pleadings in the proceeding, including the last amended statement of claim dated 3 September 2004 received by the Court with leave and by consent on 6 September 2004.

5. Firstly then, by letter 13 May 2003 and, purportedly pursuant to the provisions of section 91A of the *Work Health Act* ("WHA"), the employer required a certificate from the worker in terms of section 91A WHA. Without burdening this brief decision with the actual verbiage of the section, it is the stated obligation of the worker to "ensure that his … employer is provided with a certificate … certifying .. the worker is incapacitated for work for the period he .remains incapacitated for work." Subsection (2) absolves the worker from providing his employer with more than one certificate " for a period during which he remains incapacitated for work".

6. It is common ground that at least until 18 August this year or thereabouts, no certificate from any medical practitioner was provided by the worker in response to the said request. The issue it seems to the court, is whether the pre-existing certificate or certificates were such as to cover the unknown future period during which allegedly the worker remained incapacitated for work. That is an obligation of proof which in the Court's finding, reposes in

the employer. The employer must prove that there was a need for such a certificate to be provided in response to its request of 13 May 2004.

7. If no valid certificate, certifying incapacity, in essence, in perpetuity existed then section 69(2)(aa) WHA applies. It is common ground that no certificate was provided within 14 days of the request for same. The onus of establishing the cancellation is lawful on the basis of his provisions of section 69 WHA, before set out, rests squarely on the employer. That is a positive burden to be discharged by proof called by or on behalf of the employer. It more simply stated is required that the employer must prove the purported cancellation of benefits of 13 May 2003 was lawful.

8. On 3 December 2003, the employer, by notice bearing that date and handed up to the Court on 6 September, purported to cancel pursuant to section 69 WHA (for a second time) any benefit under WHA accruing to the worker such, although not so specifically stated, necessarily inferentially, was pursuant to subsection (1) of that section. By that notice, the basis of the purported cancellation, was stated to be the refusal by the worker to undertake a medical examination with a Doctor Turner, fixed for his attendance at 9.00am on 23 September 2003. After some communication between the relevant firms of solicitors representing the worker and the employer, the time for that appointment was changed to 24 September 2003 at 1.15pm. This was a time ostensibly to overcome the alleged inability on the workers solicitors' part to communicate with the worker, in relation to the earlier time. It was a time which was subsequent to the worker's own medical practitioner's examination, namely an appointment with Doctor Sale at 3.45pm on 23 September 2003. The stated reason for the ultimate non-attendance by the worker on Doctor Turner was said to be, this would have meant he could not keep an appointment to visit his elderly parents. In some of the material it seems to be further to be the case that he did not actually visit his elderly parents in any event.

9. In relation to the second matter, it is said that the right to have acted as purported by the employer is derived from the provisions of section 91 WHA, which in summary requires submission by the worker at reasonable intervals, to examination by medical practitioner(s) arranged and paid for by the employer. Where the worker (subject to section 69 WHA), "unreasonably refuses..or unreasonably obstructs, an examination under subsection (1), an employer may cancel … the compensation …". The relevance of the reference to section 69 WHA, in the Court's perception, is simply to ensure that the cancellation cannot take place, even if the grounds are validly in existence, until there has been a notice dispatched to the worker, pursuant to the provisions of section 69(1) WHA. It follows, or if it doesn't, it is the finding of this Court, that there is a positive obligation on the employer to establish that the worker has unreasonably refused or unreasonably obstructed the specified examination.

10. The third relevant aspect of the matter for the purposes of this issue is derived from paragraph 17 of the amended statement of claim dated 3 September 2003. As is apparent from what is set out above, on 13 May 2003 or shortly prior to that date, the worker was receiving benefits under WHA as for a total incapacity. That was an obligation accepted by the employer, said of course to have been supported by the relevant medical evidence as to the workers entitlement in that regard. Leaving aside any further commentary on this issue, the said paragraph 17 of the amended statement of claim purportedly introduces an alternative claim.

11. That alternative claim is to meet the contingency, which would arise if the court finds that either the "cancellation" of benefits if the employer on 13 May or alternatively the 3 December 2003 was valid and lawful. Such finding would of course mean that from 3 May the worker was entitled to no benefit under WHA.

12. To cater for that possible contingency, the worker seeks to set out an entitlement to benefits under WHA on the basis of being totally incapacitated or (and this is the novel aspect of the claim) "in the alternative partially incapacitated for work from and including 19 June 2003 to the present day and continuing".

13. Commentary by the authorities on the appropriate person to be designated "dux litis" is wide ranging and extensive. The worker's legal advisors, predominantly, canvassed a relatively large number of relevant decisions. Some of the decisions are not in the form of authorised reports, but that comment is not made by way of criticism. It is contended that the totality of the submissions referred to in support of a proposition of principle by the worker lay down the essential principle to be gleaned from all of them.

14. The principle which is contended for by the worker is that, whenever the employer seeks to rely upon a change of circumstances reducing or cancelling the benefit otherwise being lawfully paid to the worker, that ought to necessitate a declaration that the employer be decreed to be "dux litis", with all of the consequences which flow from such a declaration. Reliance is placed upon the dictum of Asche CJ in the case, SC No's 530 and 450 of 1989 between J.H. Constructions Propriety Limited and Phillip Davis. At page 13 of the judgement his Honour states:

> "I agree.. that it would be oppressive and unfair if the employer could simply allege that the worker was no longer incapacitated and leave it to the worker to establish time and again his continued entitlement."

15. In Ju Ju Nominees Pty Ltd –v- Carmichael BC 9900735 (sourced from Butterworths Online) a court of appeal decision of the Northern Territory the judgement of the court by the then Chief Justice at paragraph [15] at note 2 is in terms:-

> "The employer carries the onus of establishing the change of circumstances warranting the cancellation or reduction of the amount of weekly compensation …" and at note 3 "if the employer asserts that the worker has ceased to be incapacitated for work, then it assumes the burden of proof, …"

16. In a decision by the former Chief Justice no. 240 of 1993 between Northern Cement Pty Ltd and Uni Ioasa, he said at page 5:

> "if an employer cancels or reduces payments in purported reliance on s69, the employer acts contrary to law and ought to gain no benefit from that unlawful conduct. Hence it is upon the employer to provide that its unilateral action falls within the section."

17. In AAT Kings Tours Pty Ltd –v- Hughes 4 NTLR 185 the court stated:

> "in our opinion, Angel J, did not suggest that an employer who cancelled compensation under s69 of the Act was excused from the obligation to discharge the onus of demonstrating a change of circumstances. Far from it."

18. In the Disability Services of Central Australia v Beverley Regan, an NT Court of Appeal decision, file number AP 7 of 1998, Mildren J at page 7 states:

> "the question which has to be decided is whether upon a consideration of all of the evidence in the case, the employer has proved the facts set out in the certificate, and if so, whether as a matter of law those facts support the conclusion that the worker's weekly compensation payments should be cancelled or reduced, as the case may be, as from the relevant date, which is 14 days after service of the form 5 notice."

19. A consideration of the above collated dicta does in this court finding, support the proposition contended for on behalf of the worker. Where the employer must prove a change of circumstances has arisen which entitles it to alter the status quo, it ought, in relation to the burden of proving such, be declared dux litis.

20. The court has not set out in this decision the contrary submissions of Mr Morris on behalf of the employer. It is not the courts intention to be

disrespectful in not doing so, but not having accepted the validity of them, the court sees no benefit to the parties in the light of the urgency attaching to the delivery of the decision in this matter. Obviously the court does not uphold them, at least not wholly.

21. There is however an exception to the above general propositions by the courts. In the decision of Ju Ju Nominees Pty Ltd –v- Carmichael (Ibid) at paragraph 15 of the decision previously visited, note (4) has relevance in relation to the decision of the court. Mr Morris contended that in relation to the aspect of proving partial incapacity for work, the onus to discharge the burden of proof would fall fairly and squarely on the worker. The authority referred to is entirely in support of Mr Morris' submission and note (4) reads:

> "if the employer succeeds in proving an assertion that total incapacity for work has ceased, demonstrating a change in loss of earning capacity, the onus of proving any partial incapacity for work passes generally to the worker (authorities are then cited)."

22. As the court understood Mr Morris, that above note alone (and notwithstanding his submissions in relation to other issues have not been upheld), ought justify the court in declaring that the worker should be declared dux litis in the proceeding. The dictum relied upon by Mr Morris, even if the employer was dux litis, would not excuse or exonerate the worker from having to establish his entitlement to any benefit attributable to partial incapacity for work on the basis of the note referred and to the authorities relied upon in support of the proposition. Nevertheless that is a burden which ultimately falls to be discharged by the worker. It does not by its mere accuracy or application justify the worker being declared dux litis by the court of the entire proceeding before it.

23. In the circumstances, and in relation to the issue, this court is disposed to formally declare that on the hearing of the claim and for all purposes in relation thereto, the employer shall be declared dux litis.

24. The precise form of the order and any issue of costs remain to be resolved in the absence of agreement between the parties.

Dated: 9 September 2004

DAVID LOADMAN
STIPENDIARY MAGISTRATE