CITATION: *McIntyre v Tumminello Holdings* [2004] NTMC 097

PARTIES:	JOHNATHON MCINTYRE
	v
	TUMMINELLO HOLDINGS
TITLE OF COURT:	Work Health Court
JURISDICTION:	Work Health Act
FILE NO(s):	20312425
DELIVERED ON:	1 December 2004
DELIVERED AT:	Darwin
HEARING DATE(s):	5, 6, 7 & 8 April 2004
JUDGMENT OF:	Mr Lowndes SM

CATCHWORDS:

WORK HEALTH – CONCEPT OF MORE PROFITABLE EMPLOYMENT – INTERRELATIONSHIP BETWEEN s 75B(3) & s 68 WORK HEALTH ACT

Work Health Act ss 68, 69, 75B

Anthappi v Tanner (2000) NTMC 21 January 2000 - followed

REPRESENTATION:

Counsel:

Worker:	Mr McDonald QC
Employer:	Mr Southwood QC

Solicitors:

Worker:	Ward Keller
Employer:	Hunt & Hunt

Judgment category classification:	A
Judgment ID number:	[2004] NTMC 097
Number of paragraphs:	56

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

No. 20312425

BETWEEN:

JOHNATHON MCINTYRE
Worker

AND:

TUMMINELLO HOLDINGS
Employer

FURTHER REASONS FOR JUDGMENT

(Delivered 1 December 2004)

Mr LOWNDES SM:

1. On 15 September 2004 I delivered the bulk of my decision in relation to this matter, leaving two issues for further submissions before finally determining those issues. The first of those issues related to whether it was necessary for the Court to have comparative evidence of "more profitable employment" as at the date of cancellation in the context of the employer's s69 notice.[1] The second issue related to whether each and every matter referred to in s 68 of the *Work Health Act* is to be taken into account for the purposes of s 75B(3) of the Act – in particular whether the matter referred to in s 68(e) should be part of the test for the purposes of s 75B(3).[2]

[1] See p 63-64 of my reasons for decision dated 15 September 2004.
[2] See pp 51-52 of my reasons for decision dated 15 September 2004.

Proof of more profitable employment

2. In my reasons for decision dated 15 September 2004 I expressed the tentative view that the Court does not require contemporaneous evidence of "more profitable employment", that is, comparative evidence of "more profitable employment" as at the date of cancellation.[3] In light of the further submissions received from the parties I can see that the provisional view, expressed as it was, is likely to be a source of some confusion. It wrongly suggests that, in the context of the employer's s69 notice, it is not necessary for the employer to adduce contemporaneous comparative data of "more profitable employment", and that it is sufficient if the employer adduce such comparative evidence at some date following cancellation of payments pursuant to the notice. Hence, the following observation made by me – in a purely argumentative context – in my earlier reasons for decision: "If the evidence is only referable to a date after payments were stopped, then the employer may only get the benefit of cancellation, pursuant to the deeming provision, as from that date."

3. The following submission made by Mr McDonald QC exposes the misleading character of my tentative view:

> "The tentative view expressed by the Court…appears to be overlooking that if the employer is unable to cancel payment of benefits in the absence of comparative data concerning 'more profitable employment', then it is not possible for the employer to cancel those payments at a later date when and if the comparative date becomes available, relying on the original Notice of Cancellation. The employer would have to issue a new Notice of Decision and give 14 days' notice under subparagraph 69(1)(a) of the Act of the intention to cancel such benefits from the date when the comparative data became available…

[3] See pp 63-64 of my reasons for decision dated 15 September 2004.

> The Court's tentative view expressed in paragraph 1, on page 63 of the Reasons…accordingly must be based on the Employer's Counterclaim, rather that on the s69 Notice."[4]

4. Mr Southwood QC, who appears on behalf of the employer, seemed to tacitly, if not expressly, agree with the substance of that submission, though he submitted that it was not necessary for the Court to have strictly contemporaneous comparative evidence of the "more profitable employment" as at the date of cancellation pursuant to the s 69 notice:

> "It is perfectly reasonable for the Court to infer from the available evidence that there was work reasonably available to the worker as at 27 March 2003. Where the available evidence relates to a period relatively shortly after 27 March 2003 there is no evidence to suggest that the portion was any different as at 27 March 2003 it is a matter of common sense to infer the situation was most likely to have been the same at the earlier date. No evidence was led from the worker to suggest the contrary.
>
> The sorts of positions about which there is no evidence are the sorts of positions that you would expect to find available at all times in areas such as Brisbane and the Gold Coast."[5]

5. As the court exchange between the Court and Mr Southwood reveals, Mr Southwood was submitting that the Court did not have to redirect evidence of the comparative data as at the date of cancellation: more profitable employment could be proved circumstantially by the drawing of retrospectant inferences based on comparative data referable to a date later than, but sufficiently proximate to, the date of cancellation.

6. Before proceeding to consider these submissions, and finally determining the issue of "more profitable employment" in the context of s 75B(2) of the *Work Health Act*, it is essential that I correct a patent error in my reasons for decision delivered on 15 September 2004. On page 63 of those reasons I stated: "the worker's normal weekly earnings were agreed at $583." Clearly, that statement was incorrect for the

[4] See p 9 of Mr McDonalds written submissions dated 14 October 2004.
[5] See p 2 of Mr Southwood's outline of oral submissions.

purpose of the comparative exercise required by s 75B(3) of the Act.[6] I fully agree with the submission made by Mr McDonald that "the comparison must be made with the worker's indexed weekly earnings in the relevant year, in this case 2003, when payments of weekly benefits were cancelled: see subsections 65(2)(a) and 65(3) of the Act."[7] I fully agree with the submission made by Mr McDonald that for the purposes of cancellation of benefits in March 2003 the relevant figure is $843.90 gross per week (rounded off to the nearest cent). Mr Southwood appears to agree that that figure represents indexed normal weekly earnings as at 2003.[8]

7. At page 63 of my reasons I stated:

> "…the evidence adduced by the employer shows that many of the types of employment that the worker could undertake as a result of participating in the rehabilitative process pay more than his normal weekly earnings. Accordingly, the worker's participation in the rehabilitative process could have enabled the worker to undertake more profitable employment."

8. However, that conclusion was based on a comparison with the figure of $583, being agreed weekly earnings as at 1 June 1992. In determining whether any of the employer's evidence of the value of "more profitable employment" was equal to or greater that the worker's indexed normal weekly earnings in 2003, the benchmark figure should have been $842.90. Clearly, I was in error in applying the figure of $583. I propose now to apply the proper figure for the comparative exercise, being $842.90 and accordingly to review my provisional finding in relation to the issue of "more profitable employment." My understanding is that neither counsel had any objection to that course.

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[6] See p 4 of Mr McDonald's written submissions dated 14 October 2004.
[7] See p 6 of Mr McDonald's written submissions dated 14 October 2003.
[8] See the employer's schedule in support of the outline of Mr Southwood's oral submissions.

9. Two issues fall for consideration. First, can the employer rely upon circumstantial evidence to substantiate "more profitable employment"? Secondly, if so, is the circumstantial evidence in this case sufficient to reasonably satisfy the Court on the balance of probabilities in relation to the issue of "more profitable employment"?

10. Retrospectant evidence is a species of circumstantial evidence.[9] This type of circumstantial evidence is the converse of prospectant evidence – another kind of circumstantial evidence.

11. According to the law concerning prospectant evidence "the occurrence of an act, state of mind or state of affairs in the past justifies an inference that the act was done, or state of mind or affairs existed at the moment of time into which the court in inquiring."[10] By way of classic example, "if the speed at which someone was driving at a particular time is in issue, evidence of the rate at which he was travelling a few moments earlier is admissible."[11] Reliance can also be placed upon prospectant evidence to establish a state of affairs: "in cases turning on the existence of a partnership, evidence of its existence at a time earlier than that with which the court is concerned is likewise admissible."[12]

12. In the case of retrospectant evidence – the converse of prospectant evidence – "the subsequent occurrence of an act, state of mind or state of affairs justifies an inference that the act was done, state of mind or affairs existed in the past."[13] Returning to the speeding example referred to earlier, "a driver's excessive speed may be proved to support the conclusion that he was going too fast a short distance further back: R v Dalloz [1908] 1 Cr App Rep 258."[14]

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[9] See Gobbo, Byrne and Heydon *Cross on Evidence* (2nd Ed Butterworths 1978) p35.
[10] See Gobbo, Byren and Heydon, n 9, p 35.
[11] See Gobbo Byren and Heydon, n 9, p 35.
[12] See Gobbo, Byrne and Heydon, n 9, p 35.
[13] See Gobbo, Byrne and Heydon, n 9, p 42.
[14] See Gobbo, Byrne and Heydon, n 9, p 42.

13. Similarly, retrospectant evidence can be relied upon to establish an anterior state of affairs.

14. However, as in the case of other types of evidence, the admissibility of prospectant and retrospectant evidence is governed by the test of relevance:

> "It is important to remember that there are types of relevancy when this kind of evidence is being considered. Proof of the theological beliefs entertained by a man thirty years earlier, would not support a reasonable inference concerning his beliefs at a time which the court was examining (*Attorney-General v Bradlaugh* (1885) 14 QBD 667 at 711) and neither law nor logic can specify the stage at which such evidence ceases to be of any weight – everything depends upon the facts of the particular case."[15]

15. The admissibility of both these types of circumstantial evidence and the weight to be attached to such evidence is really a matter of relevancy, depending on the common experience of mankind and what is reasonably likely to occur in the ordinary course of events.[16]

16. What needs to be considered is whether the evidence adduced by the employer in relation to comparative date of "more profitable employment" referable to a time later than the date of cancellation supports a reasonable inference that the same state of affairs existed as at the date of cancellation pursuant to the s 69 notice.[17]

17. The weight to be accorded to the employer's evidence in relation to "more profitable employment" depends upon the particular circumstances in this case. An important factor in this case is the length of time between the date of cancellation and the date to which the evidence of "more profitable employment" pertains (that is, the date on which the relevant data was extant). It would seem to me that the

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[15] See Gobbo, Byrne and Heydon, n 9, p 36.
[16] See Gobbo, Byrne and Heydon, n 9, p 36.
[17] It should be noted that no objection was made to either the tender or adducing of such comparative date. See also pp 7-7 of Mr McDonald's written submissions dated 14 October 2004.

greater the length of time between the two dates the weaker the inference sought to be drawn on the basis of circumstantial evidence (that is retrospectant evidence).[18] The length of the intervening period may be so great that the evidence sought to be relied upon ceased to be of any weight. It would also seem that the nature of the evidence may be important in determining whether the evidence adduced reasonably supports the inference sought to be drawn and relied upon in establishing the requisite fact or facts. Certain types of evidence, by their very nature, may have greater probative value in either a prospectant or retrospectant sense. For example, the probative value of evidence of the speed at which a vehicle is travelling at a particular time may be predominantly fixed in time, and only extend to fairly short periods both before and after the occasion to which the evidence pertains. On the other hand, the probative value of evidence relating to a state of affairs, such as the existence of a partnership, may have a far greater life span both anterior and posterior to the occasion to which the evidence relates. However, everything depends on the circumstances of the case.

18. In the present case, the employer relies upon evidence relating to a state of affairs, that is, the availability of "more profitable employment." I make two observations about the evidence. The first is that the evidence is referable to a period of time not too distant from the date of cancellation. The second observation is that the evidence relates to a state of affairs, which is much more likely that an act or a state of mind to remain static over a sustained period of time, especially in the case of a relatively short period of time as is the case here.

19. Having regard to those aspects of the evidence, it can be inferred, as a matter of common sense – which embraces and applies common experience and knowledge of what usually occurs in the ordinary course of events – that the prospective employment situation as at 27 March

[18] See *Axon v Axon* (1938) 59 CLR at 404 per Dixon J (as he then was).

2003 was reasonably likely to have been the same as that disclosed by the evidence adduced by the employer at the hearing. Consequently, it is entirely reasonable for the Court to infer from the circumstantial evidence that there was work reasonably available to the worker as at 27 March 2003 within the identified fields of employment and within the specified range of salaries.

20. In relation to proof of "more profitable employment" I adhere to what I said in my earlier reasons for decision: in order to prove that the worker's participation in the rehabilitative process could have enabled him to undertake more profitable employment, it is necessary for the employer to establish that the worker, without participating in the rehabilitative process envisaged by s 75B(2), had the capacity to "earn $x per week" and the rehabilitative process could enable the worker to "earn $y per week"; and that $y is more than $x."[19] However, that principle needs to be put in proper context: in order to justify cancellation of benefits pursuant to its s 69 notice, the employer must adduce sufficient evidence of more profitable employment, within the meaning of s 75B(2) of the Act, providing income equal to or greater than the worker's indexed normal weekly earnings which have been calculated at $842.90 gross per week.[20] It follows that the employer must demonstrate that without participating in the rehabilitative process the worker was capable of earning less than his indexed normal weekly earnings but had the worker participated in the process he was capable of earning an amount equal to or greater than his indexed normal weekly earnings.

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[19] See p 49 of my reasons for decision dated 15 September 2004.

[20] This proposition is agreed to by Mr McDonald: see p 6 of his written submissions dated 14 October 2004. This proposition is mirrored in paragraph 24 of the employer's counterclaim which is expressed as follows:

> "Had the worker undertaken rehabilitation treatment and/or participated in rehabilitation training, he could have undertaken more profitable employment which could have enabled him to earn an amount equal to or exceeding his indexed normal weekly earnings."

21. Mr McDonald submitted that there was "no evidence tendered or adduced of the value of the worker's capacity to earn without participating in the rehabilitation process" and that "this was an essential element of the comparative process required."[21] I do not believe that that submission can carry any weight for the reasons that follow.

22. First, prior to the establishment of and, indeed, during the rehabilitative process the worker was in receipt of income replacement payments from the TIO, at about the rate of $30,000 per annum, and that had been the arrangement since 1992 on account of the diagnosis of post traumatic disorder.[22] It follows from the employer's acceptance of the worker's claim and payment of benefits on the said basis that the worker lacked a capacity to earn an amount equivalent to his normal weekly earnings (as indexed). Contrary to the submission made on behalf of the worker, there is sufficient evidence of the value of the worker's capacity to earn without participating in the rehabilitative process, that is to say, without participating in the rehabilitative process the worker did not have the capacity to earn an amount equal to his indexed normal weekly earnings as at 2003.

23. Mr Southwood urged me to approach the "more profitable employment" issue from a different perspective. His argument was simply that the worker was in nil employment at the time the rehabilitative process was embarked upon and had the worker participated in the process he could have undertaken profitable employment providing an income of equal to or greater than his indexed normal weekly earnings. The transition from no employment to gainful employment providing the specified income

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[21] See p 9 of Mr McDonald's written submissions dated 14 October 2004.

[22] See Professor Yellowlees' report dated 23 September 2002 where he expressed opinion that the worker continues to have severe symptoms of PSTD and is permanently medically incapacitated from working in the hotel management industry and in any industries where guns and/or dangerous activities are associated. The Professor went on to say:

> "In terms of his income support I am pleased that TIO is prepared to continue to pay his present wages, and to make any wages up that he earns through another job to his present equivalent wage level for the foreseeable future."

satisfied the test of "more profitable employment" within the meaning of s 75B(2) of the *Work Health Act*. I prefer the approach articulated by Mr Trigg SM in *Anthappi v Tanner* (2000) NTMC 21 January 2000). However, in the circumstances of the present case, any conceptual or practical differences between the two approaches are, in my opinion, of no real significance.

24. The question that remains to be answered is whether, as a result of participating in the rehabilitative process, the worker could have undertaken more profitable work, generating an income equal to or greater than his indexed normal weekly earnings calculated at $842.90. In order to justify a cancellation of payments – either on the basis of the s 69 Notice or on the basis of the employer's counterclaim – the employer must establish the existence of that state of affairs.

25. Mr McDonald made the following submission in relation to the value of "more profitable employment:

> "One question therefore is whether any of the employer's evidence of the value of more profitable employment exceeded $842.89 gross per week… It is our submission that there was almost no evidence tendered or adduced of any relevant jobs offering wages that were equal to or greater than the worker's indexed wages in 2003… In the few instances where the wages were equal to or greater than the worker's indexed wages, those jobs required skills and/or experience which Mr McIntyre did not and does not have, and would not have had even if had participated in the rehabilitation process. See Schedule 'A' hereto."

26. Mr Southwood countered that submission by tendering a schedule of more profitable employment setting out "job position/description", "advertised wage per week", "indexed NEW 2003", "indexed NEW 2004" and "source exhibit no/page."

27. Having considered both counsel's submissions regarding the value of "more profitable employment" and carefully examined the schedules

prepared and submitted by them, I have, on the balance of probabilities, reached the conclusion that had Mr McIntyre participated in the rehabilitation set in train by the employer he could have earned an amount equal to or greater than his indexed wages in 2003. The evidence discloses six job positions offering wages equal to or greater than the worker's indexed wages in 2003.[23] Although I accept that the worker does not currently possess some of the skills required for those positions, I believe that had he participated in the rehabilitative process and applied himself with due diligence, his prior work experience and natural intelligence could have enabled him to undertake at least some – if not all – of the identified job positions or descriptions that offered a wage equal to or greater than his indexed wages in 2003. It is important to bear in mind that one of the purposes of the rehabilitative process envisaged by s 75B(2) of the *Work Health Act* is to retain workers who are no longer capable of performing their pre-injury employment; and by definition the process of retraining involves the development of new skills sufficient to enable a worker to assume alternative employment. Retraining also involves capitalising upon prior work experience and the rechannelling of that experience into new employment situations. It is also important to keep in mind that, for the purposes of s 75B(2) of the Act, it is only necessary that the rehabilitative process *could* – not *would* – enable the worker to undertake the particular employment, or type of employment, identified by the employer.

28. In light of the conclusions I have drawn I rule that, in accordance with s 75B(2) of the Act, the worker is deemed to be able to undertake more profitable employment than his employment at the time of the injury, and accordingly the worker's payments of compensation should be cancelled pursuant to that subsection as from 27 March 2003. I make

[23] Those positions which were identified on p 1 of Mr Southwood's schedule are sales and marketing manager, general manager Qld Volleyball Association, warehouse manager, manager FMCG company, executive assistant/administrative supervisor, club manager (licensed premises).

that ruling primarily on the basis of the s 69 Notice in the context of the worker's appeal. However, in the event that I have erred in my view as to the validity of the s 69 Notice, I make an alternative ruling based on the employer's counterclaim,[24] namely that by reason of the worker's failure to comply with this statutory obligations under s 75B(2) of the *Work Health Act* the worker is deemed to be able to undertake more profitable employment than his employment at the time of the injury and accordingly the worker's payments should be cancelled as from 27 March 2003, as he ceased to have a loss of earning capacity on that date.

The Interrelationship between section 75B(3) and section 68

29. I now turn to deal with the second main issue flowing from my reasons for decision dated 15 September 2003, namely, whether the consideration referred to in s58(e – the potential availability of the most profitable employment – must be taken into account for the purposes of s 75B(3) of the *Work Health Act*.

30. Mr Southwood argued that the potential availability of most profitable employment is not a relevant consideration for the purposes of the subsection on the following grounds:

> "30.1 The deeming provisions of subsection 75B(3) create a fictional willing worker.
>
> 30.2 The worker is deemed to be able to undertake the most profitable employment that would be reasonably possible for the fictional worker.
>
> 30.3 'Able to undertake' and 'reasonably possible' are concepts or notions going to capacity to do work not availability of work.

[24] In his written submissions in reply dated 29 July 2004, Mr Neill, on behalf of the worker, submitted that as the employer's counterclaim itself by its own terms (par 18) relied upon a valid cancellation of benefits to the worker pursuant to the Notice of Decision dated 13 March 2003, then if the notice was held to be invalid for any reason then it must also be invalid for the purposes relied on in the employer's counterclaim. In my view that submission cannot be sustained because paragraph 18 of the counterclaim is not crucial to the pleading and is mere surplusage.

30.4 To go to availability as opposed to capacity would potentially defeat the deeming effect of the provision. To ask what work is available to the fictional worker is not something required by the section.

30.5 The characteristics of the fictional worker are :

(a) he has the same work experience as the worker;

(b) he has the same skills as the worker;

(c) he has sustained a similar injury to the worker (limited PTSD)

(d) he is in similar circumstances to the worker having regard to the matters referred to in section 68 – that is the relevant matters of circumstance referred to in section 68.

30.6 The only circumstantial matters referred to in section 68 going to the ability to do work are:

(a) age

(b) training

(c) language skills

(d) impairment

(e) potential for rehabilitation training

30.7 The key phrase in subsection 75B(3) is:

'He shall be deemed to be able to undertake the most profitable employment that would be reasonably possible'.

30.8 The provision assumes that the reasonable possible work is available, how else can you be deemed to be able to undertake the work

30.9 In any event there is ample evidence to demonstrate that a considerable amount of work was reasonably available to the worker, see for example exhibit 7."

31. By way of reply, Mr McDonald submitted that Mr Southwood's submission that subparagraph 68(e) of the Act should not be part of the test for the purposes of subsection 75B(3) "defies the plain words of section 75B(3) of the Act and further could lead to anomalies or injustices to workers in individual cases."[25] By way of elaboration, Mr McDonald made the following submissions (at pp 1-11 of his further submissions dated 14 October 2004):

> "Firstly, it is submitted with respect that the Court's tentative view, dealing as it does with the plain wording of the Act, is correct. The Court's tentative view expressed at pages 36 to 37 of the Reasons takes fully into account the plain meaning of the words in subsection 75B(3) and section 68 of the Act and their intended inter-relationship."
>
> The Court's tentative approach accords with the purposive approach to statutory interpretation as set out in numerous cases including *Mills v Seeking* (1989-1990) 169 CLR 214 at 223 where Mason CJ and Toohey J (with whom Brennan J agreed at p 227) said:
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> > "But, if the language is not ambiguous or uncertain, a Court will apply its ordinary and grammatical meaning unless to do so will give the statute an operation which obviously was not intended: see *Cooper Brookes (Woolongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 304-305, 320-321; also *Catlow v Accident Compensation Commission* (1989) 167 CLR 543 at 549-552."
>
> See also the judgment of Justice McHugh at p 242 where His Honour said:
>
> > "A Court cannot depart from the literal meaning of a statutory provision because that meaning produces anomalies or injustices if no real doubt as to the intention of Parliament arises: *Cooper Brookes (Woolongong) Pty Ltd v Federal Commissioner of Taxation* (51); *Srock v Frank Jones (Tipton) Ltd* (52). But, when the literal meaning of a provision gives rise to an absurdity, injustice or anomaly, a real doubt will frequently arise as to whether Parliament intended the legal meaning to prevail. In such a case, a court may be entitled to disregard the literal meaning."

[25] See p 1 of Counsel's further submissions dated 14 October 2004.

In the language used by the legislature in sections 75B(3) and 68 of the Act there is a clear interrelationship or mirroring of those sections which expresses clearly the legislative intent. Section 68, by specific reference provides:

> "…for the purposes of section 75B(3) regard shall be had to… (my emphasis added)."

The matters which the Court is to have regard to are then set out in subparagraphs (a) to (g), including subparagraph (e) which deals with the potential availability of such employment.

It should be noted that the reference to section 68 of the Act is to that section prior to its amendment on 1 November 2002, which amendment does not apply retrospectively to workers who sustained injury before that date, as is the case with Mr McIntyre.

In this case no injustice or anomaly is produced if the Court gives the two sections 75B(3) and 68 their full and plain meaning.

Further Mr Southwood QC's submission is that the Court has to read down, we submit impermissibly, the plain words or section 68(e) of the Act. The submission runs counter to what Justices McHugh, Gummow, Kirby and Hayne said in *Project Blue Sky v Australian Broadcasting Authority* (1988) 194 CLR 355 at 382 at paragraph 71:

> "Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision (52), In *The Commonwealth v Baume* (1905) 2 CLR 405 at 414 Griffith CJ cited *R v Berchet* (54) to support the proposition that it was 'a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent."

Indeed, as the Court noted in the Reasons, the construction advanced by Mr Southwood could itself produce injustices. The example posited by the Court at page 38.3 of the reasons is one of such potential injustice. So the potential for injustice itself works against the construction advanced by the employer.

In the face of the plain statutory language, the submission that section 756B(3) is rendered redundant if reference is made to paragraph 68(e) is in conflict with binding authority that each clause, sentence and word needs to be given its intended effect, and with the mirroring words of each section 75B(3) and 68 themselves.

It is submitted that the Court's tentative view is correct on this first issue."

32. In my opinion, the submission made by Mr McDonald is to be preferred for the reasons advanced in his written submissions. Whilst I agree with Mr Southwood that the notions of "able to undertake" and "reasonably possible" refer to the capacity to undertake work – and not availability of work – the reference to s 68 of the *Work Health Act* (which contemplates that all the matters contained therein are to be considered when applying the test in s 75B(3)) ensures that the Court take into account, inter alia, the availability of work. Contrary to the submission made by Mr Southwood, the notions of capacity to undertake work and availability of work are not inconsistent concepts, at least within the operational framework of s 75B(3). For the purposes of s 75B(3) potentially for work, along with the other considerations referred to in S68 of the Act, must be read in conjunction with the notion of ability to undertake work.

33. The issue that now falls to be determined is whether pursuant to s 75B(3) the Court should make an order cancelling the workers compensation.

34. In my reasons dated 15 September 2004 I found that the worker had failed to comply with his statutory obligations pursuant to s 75B(3).[26]

35. As pointed out by Mr McDonald,[27] if it is found the worker unreasonably refused to present himself the employer must go on to show:

    (i) the most profitable employment;

    (ii) that would be reasonably possible;

    (iii) for a willing worker;

    (iv) with his experience and skill;

[26] See p 79 of those reasons for decision.
[27] See p 33 of Counsel's written submissions dated 17 May 2003.

(v) who has sustained a similar injury;

(vi) who is in similar circumstances; and having regard to the matters referred to in section 68 of the Act which were :-

(a) his age

(b) his experience, training and other existing skills;

(c) his potential for rehabilitation training;

(d) his language skills;

(e) his potentiality availability of such employment;

(f) the impairments suffered by the worker; and

(g) any other relevant factor.

36. Again, as pointed out by counsel, "all of these matters must be addressed and shown by the employer before the worker can be deemed to be able to undertake any such 'most profitable employment'."[28]

37. Mr McDonald submitted that the employer had not addressed all the statutory criteria or put all the necessary evidence relating to them before the Court.[29]

38. In particular, Mr McDonald submitted that there was no evidence of the weekly dollar value of "most profitable employment" as at 13 March 2003, the date of cancellation. This submission cannot be sustained for the same reason given in relation to "more profitable employment" in the context of subsection 75B(2).[30]

39. Mr Southwood argues that, for the purposes of subsection 75B(3), all the statutory criteria have been addressed by the employer, including potentially of employment (though it being noted that the employer

[28] See p 33 of Counsel's written submissions dated 17 May 2004.
[29] See p 24 of Counsel's written submissions dated 17 May 2003.
[30] See p 34 of Counsel's written submission dated 17 May 2004.

submitted that this factor did not form part of the statutory test in subsection (75B(3). Counsel submitted that there was "ample evidence to demonstrate that a considerable amount of work was reasonably available to the worker, for example see exhibit 7".

40. I return to consider a submission made by Mr Southwood referred at pages 43-44 of my reasons for decision dated 15 September 2004. For ease of reference, I reproduce that submission:

> "The evidence obtained by Senior Counsel for the worker during cross-examination of Jane Nearhos and Belinda Marwick about whether the various employment positions which they gave evidence were available to;
>
> - a person who had a lack of experience with computers (for example T 102.9) or who lacked other skills, or
>
> - a person who had difficulty job searching because they had been out of employment for a long time, or
>
> - a person who may not be able to tolerate certain work or workplace interactions if they were suddenly employed full-time without a graduated return to work
>
> cannot be relied on by the worker as a basis for arguing that there was not employment reasonably available to the worker. Nor can the evidence be relied on by the worker as a basis for arguing that the worker did not have a capacity for work. As the worker did not give evidence about his lack of skills or lack of capacity no foundation of evidence has been laid by the worker to enable the Court to draw any such conclusions. The answers given by the witnesses in cross-examination remain hypothetical. For example, there was no evidence led from the worker that he did not have the computer skills for the job positions identified during the course of the evidence led on behalf of the employer. Nor was there evidence led from the worker that he was incapable of working full time because he would have difficulty coping with the normal interactions at work. The fact that the worker chose not to give evidence about such matters means that the Court can be bold in drawing the conclusions of fact referred to above. As Rich J said in *Insurance Commissioner v Joyce* (1948) 77 CLR 39 at 49:

> 'When the circumstances are proved indicating a conclusion and the only party who can give direct evidence of the matter prefers the well of the Court to the witness box, a Court is entitled to be bold'.
>
> Further it has never really been doubted that when a party to litigation fails to accept an opportunity to place before the court evidence of facts within his or her knowledge if they exist at all, would explain or contradict the evidence against that party, the Court may more readily accept that evidence: *Weissensteiner v R* (1993) 178 CLR 217 at 227 see also *Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125."

41. As stated in my reasons for decision dated 15 September 2004,[31] there is considerable strength to those submissions, and accordingly I adopt the approach indicated therein in relation to the fact-finding process in these proceedings.

42. In that context, it is important to bear in mind that the worker failed to discharge his statutory obligation under subsection 75B(3) of the *Work Health Act*, that is to say, he unreasonably failed to present himself for assessment of his employment prospects. Clearly, the purpose of that assessment process – which the worker frustrated – was to ascertain the extent of the worker's vocational skills and level of capacity for work. In other words, those processes were specifically designed to determine what work was reasonably available to the worker. Accordingly, the nature and extent of the worker's skills and capacity for work remained largely within the peculiar knowledge of the worker. This reinforces the point made by Mr Southwood: not only did the worker prefer the well of the Court to the witness box but he unreasonably withheld vital information during the formative stages of the rehabilitation process. However, although the information which was provided to the vocational rehabilitation provider, or otherwise obtained by that agency, was

[31] See p 62 of my reasons for decision dated 15 September 2004.

limited due to the worker's lack o cooperation, the evidence adduced by the employer based on the information obtained was, in my opinion, sufficient to establish a prima facie case in relation to the work reasonably available to the worker. Given the state of the evidence, the worker bore a tactical burden – if not an evidential onus – of contradicting that prima facie case by adducing evidence which were his peculiar knowledge.

43. As pointed out by Mr Southwood,[32] "the deeming provisions of section 75B(3) are concerned with creating an objectively comparable worker of similar age, experience, training, skills and potential for rehabilitation training as the claimant worker".[33] By way of satisfying that objective test, the employer adduced and relied upon the following evidence.

44. Professor Yellowlees gave evidence that the worker was able to work within his range of work experience and was capable of undertaking employment in relation to the sale and marketing of fruit juices and was able to be employed as a sales and marketing manager within a hospitality agency.[34] The professor considered that the worker's enrolment in the Gold Coast TAFE Diploma of Business in Marketing to be a reasonable option that would get him back into some sort of business career in line with his pre-injury hotel management position.[35] He was of the opinion that the worker could manage such a course. Significantly, the professor stated that there are many opportunities in marketing, especially in the tourism industry in Queensland.[36]

45. Professor Yellowlees also gave evidence in the effect that the worker was an intelligent persons who had occupied a responsible management prior to his injury and expressed the opinion that the worker remained

[32] See pp 14-15 of Counsel's written submissions dated 23 June 2004. The test is a composite one, being partly objective and subjective.
[33] See p 15 of Counsel's written submissions dated 23 June 2004.
[34] See pp 54-55 of my reasons for decision 15 September 2004.
[35] See p 55 of my reasons for decision dated 15 September 2004.
[36] See p 55 of my reasons for decision dated 15 September 2004.

competent in many areas and retained significant physical and intellectual assets.[37]

46. The various reports generated by Professor Yellowlees disclosed a reasonably good prognosis in relation to the worker's return to paid employment.[38]

47. Ms Nearhos and Ms Marwick also had something probative to say about the worker's capacity for work and employment prospects.[39]

48. Mr McDonald, on behalf of the worker, sought to undermine the cogency of their evidence by cross-examining them as to their failure to ascertain whether the job positions identified by them were reasonably available to a person such as Mr McIntyre who lacked experience with computers, who had been absent from the work force for a lengthy period and who might not be able to cope with work place interactions. The challenge to their evidence cannot succeed for two reasons. First, as pointed out earlier, [40] no evidentiary foundation – referable to the area of cross-examination – was laid by the worker. Secondly, in any event, having regard to the evidence adduced by the employer as to the worker's previous experience and skills, his intellectual assets and, in particular, his potential for rehabilitation training,[41] I am reasonably satisfied, on the balance of probabilities, that the worker's hypothetical shortcomings (as identified by Mr McDonald during cross-examination of the two witnesses would not present a bar to the various job positions identified in the employer's case being reasonably available to the worker. In my view, the worker's potential for rehabilitation training – referred to in s68(c) of the Act – was such that he could acquire any necessary

[37] See p 83 of my reasons for decision dated 15 September 2004.
[38] These were discussed at pp 55-56 of my reasons for decision dated 15 September 2004.
[39] The evidence of these two witness; evidence was dealt with at pp 56-59 of my reasons for decision dated 15 September 2004.
[40] See above, pp 18-19
[41] These are relevant considerations in context of subsection 75B(3) and s68 of the Act.

expertise with computers through relevant courses[42] recommended by the vocational rehabilitation provider and overcome, through appropriate counselling and a graduated return to work program, again directed by the rehabilitation provider, his lengthy absence from the work place and any possible psychological difficulties in the context of workplace interactions. In my view, if the worker was minded to challenge that body of inferential evidence to the contrary: the worker chose not to take that course.

49. Mr McDonald's submission that some of the identified positions were not, in fact, reasonably available to the worker on the ground that Mr McIntyre lacked relevant experience, qualifications and skills seems, with due respect, to miss the point. Mr McIntyre's managerial experience was a valuable asset which, in combination with his innate intelligence could, with the benefit of rehabilitation training and counselling, make him readily adaptable to the advertised positions. Furthermore, any requisite qualifications and skills could be acquired during the retraining phrase. In applying the objective test set out in s 75B(3), the Court must put the fictional worker in the shoes of the worker both in terms of prior experience and skills but, at the same time, apply to the fictional worker the various factors set out in s68 of the Act – in particular the potential for rehabilitation training. In the latter regard, the evidence shows that the worker's prospects were reasonably good.

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[42] This Court can draw upon judicial knowledge of the fact that rehabilitation programs and return to work programs often involve workers undergoing computer courses as part of the retraining process. The Court can also draw upon judicial knowledge of the vast range of such courses and the relative ease with which one can acquire computer skills which would be sufficient to equip the worker for the job positions identified by the employer. It should be noted that some of the positions identified by the employer as being reasonably available to the worker only required *some* computer skills or *basic* computer skills: see the evidence of Ms Marwick dealt with at p 58-59 of my reasons for decision dated 15 September 2004. The point that needs to be made is that the positions did not require the worker to be a "computer whiz". They merely required some computer skills which I believe the worker could have readily acquired through rehabilitation retraining.
Most significantly, the evidence shows that retraining in terms of upgrading the worker's computer skills would have been contemplated by the vocational rehabilitation provider: see Professor Yellowlee's report to Jodie Stower of TIO dated 26 November 2002.

50. In relation to the issue of work reasonably available to the worker, it should be noted that by reason of the worker's failure to present himself for assessment of his employment prospects as required by s 75B(3), the employer was not provided with optimal information to enable it to make a proper assessment of the worker's employment prospects – in other words, a determination as to what work was reasonably available to the worker. Given those circumstances, it is, in my opinion, permissible to be bold in reaching a conclusion – on the balance of probabilities – as to the range of employment reasonably available to the worker, and to resolve any areas of uncertainty or doubt in favour of the employer.

51. In this case it is incumbent on the employer to not only demonstrate the worker's capacity to undertake a particular type of employment, but also the potential availability of that employment. I agree with Mr Southwood that ample evidence was adduced in the employer's case as to the availability of particular types of employment: see for example Exhibit 6, 7 and 10 and the evidence of Professor Yellowlees, Ms Nearhos and Marwick.[43]

52. The fact that this body of evidence was not strictly contemporaneous, that is, current as at the date of cancellation of the worker's payments is by no means fatal to the employer's case. As noted earlier,[44] in the context of "more profitable employment" (subsection 75B(2)), it is reasonable for the Court to infer from the evidence adduced that there was work reasonably available to the worker as at 27 March 2003. I again adopt the submission made by Mr Southwood:[45]

> "Where the evidence available relates to a period relatively shortly after 27 March 2003 and there is no evidence to suggest that the position was any different as at 27 March 2003. It is a matter of

[43] See pp 55-59 of my reasons for decision dated 15 September 2004 for the evidence given by Professor Yellowlees in relation to the issue. As to Ms Nearhos' evidence see pp 56-57 of those reasons for decision. For Ms Marwick's evidence see pp 57-59 of those reasons for decision.
[44] See above, pp 7-8.
[45] See p 2 of Counsel's outline of oral submissions.

common sense to infer the situation was most likely to have been the same as the earlier date. No evidence was led from the worker to suggest the contrary."

53. Furthermore, I agree with Mr Southwood that the types of positions about which evidence was adduced are the sorts of positions that one would expect to find available at all times in areas such as Brisbane and the Gold Coast.[46] Again, this is simply a matter of commonsense – a faculty which assumes a considerable role in the fact finding process.

54. Finally, subsection 75B(3) requires an assessment of the most profitable employment available to the worker. In my opinion, the employer has satisfied the Court that the worker is capable of earning, in employment reasonably available to him, more than, or equal, to his normal weekly earnings. That conclusion is based on the following job position/descriptions identified by the employer:

- General Manager, Qld Volley Ball Association - $50,000 ($962 pw) – Exhibit 7[47]
- Manager FMCG – sales and marketing of range of premium fruit juices - $45,000 ($865 pw) inc car and super – Exhibit 7.[48]
- Sales and Marketing Manager - $118 pw – Exhibit 10, Report IRS dated 28/08/03, p 5.[49]

[46] See again p 2 of Counsel's outline of oral submissions.
[47] See the evidence given by Professor Yellowlees as to the existence of future work options in the sporting field where the worker's main interests, skills and expertise lie. This evidence was discussed at p 55 of my reasons for decision dated 15 September 2004.
[48] See the evidence given by Professor Yellowlees as to the worker's ability to undertake employment in relation to the marketing of fruit juices, dealt with at p 39 of my reasons for decision dated 15 September 2004.
[49] The IRS report, which was prepared by Ms Nearhos and Ms Phillips, recommended, inter alia, that the occupation of sales and marketing manager could be explored as part of a return to work or rehabilitation plan. See also Professor Yellowlee's opinion that the worker was capable of being employed as a sales and marketing manager at p 55 of my reasons for decision dated 15 September 2004.

- Executive Assistant/Administration Supervisor – Contact 6 - $43,00 0- $45,000 plus super - $827-$865 pw – Exhibit 6, p 2 and 9.[50]

- Warehouse Manager – Contract 2 - $45,000 - $50,000 plus super - $865 - $963 – Exhibit 6, p 1 and 4.[51]

- Club Manager (Licensed Premises) - $761 - $891 pw – Exhibit 10, Report IRS dated 28/08/03 p 7.[52]

Final Orders

55. Following upon the above findings I make the following orders:

55.1 In accordance with subsection 75B(2) of the *Work Health Act* the worker is deemed to be able to undertake more profitable employment than his employment at the time of the injury.

55.2 The worker's payments of compensation are cancelled pursuant to subsection 75B(2) of the Act from 27 March 2003.

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[50] I do not consider that this position would not be reasonably available to the worker on account of it requiring computer skills. Such skills could easily be acquired during the rehabilitative process. It should be noted that the worker had had extensive managerial experience in the hotel industry and experience with maintaining business records. Mr McDonald sought to argue that this position was not reasonably available to the worker because the advertised position required 3-5 years experience within an office managerial role. The submission fails to take account of the fact that Mr McIntyre had extensive managerial experience within the hotel industry, which included hiring, supervising and managing staff, customs relations and general administrative duties. To my mind, such experience might well be treated and accepted by a prospective employer as satisfying the requirements of the position.

[51] For the reasons previously given in relation to the position of Executive Assistant/Administration Supervisor, I do not believe that the absence of requisite computer skills would present a bar to the position of warehouse manager being reasonably available to the worker. The fact that the position required a "forklift ticket" does not prevent the job position being reasonably available to the worker. The worker had driven trucks in the past. Forklift driving is an extension of the skills required for driving motor vehicles and is a skill that is easily acquired by one who has previously obtained a driver's licence. The worker could have quite easily acquired forklift qualifications during the course of a retraining program.

[52] It was put to Mr Nearhos that this position would not be suitable in light of the worker's pre-injury employment and his psychiatric injury. However, it is important to note Ms Nearhos' evidence, which was as follows (at p 111 of the transcript):

> "A club manager could fit into, I guess a lot of different kinds of work sites and the role of the club manager may vary, I suspect. As to whether it would be suitable for McIntyre, I would need to discuss that with his treating treating practitioner and Mr McIntyre in more detail."

Therefore, I do not consider that the position identified by the employer can be ruled out. A position of club manager that did not bring the worker into contact with members of the public and therefore minimised the risk of assault may well be reasonably available to the worker.

55.3 In accordance with subsection 75B(3) of the Act the worker is deemed to be able to undertake the most profitable employment that would be reasonably possible for a willing worker with his or her experience and skill and who has sustained a similar injury and who is in similar circumstances, having regard to the matters referred to in s68, and such employment is more profitable than the worker's employment at the time of the injury.

55.4 The worker's payments of compensation are cancelled in accordance with subsection 75B(3) of the Act as from 27 March 2003.

55.5 On 27 March 2003 the worker ceased to have a loss of earning capacity.

55.6 Judgement for the employer on the employer's counterclaim.

56. I will hear the parties in relation to any consequential or ancillary orders.

Dated this 1st day of December 2004.

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John Allan Lowndes SM
Managing Magistrate of the Work Health Court