

CITATION: *Aurelio Cabaron v Wallace Rockhole Community Government Council*
[2005] NTMC 070

PARTIES: AURELIO CABARON
v
WALLACE ROCKHOLE COMMUNITY
GOVERNMENT COUNCIL

TITLE OF COURT: Work Health Court

JURISDICTION: Work Health Court

FILE NO(s): 20004675 & 20113096

DELIVERED ON: 7 November 2005

DELIVERED AT: Alice Springs

HEARING DATE(s): 20 April 2005

JUDGMENT OF: Mr J Birch SM

CATCHWORDS:

DISMISSAL- WORK HEALTH ACT s. 94- WORK HEALTH RULES 7.13- WANT
OF PROSECUTION- INABILITY OR UNWILLINGNESS TO COMPLY WITH
COURT ORDERS

Consolidated Press Holdings v Phillips Morris Inc. (1992) 84 NTR 42
White v Northern Territory of Australia (1989) 97 FLR; [1989] NTSC 26 at 21
Stollznow v Calvest (1980) 2 NSWLR 749
Witten v Lombard Australia Ltd (1968) 88 WN (PTI) (NSW) 405 at 412
Lenijamar Pty Ltd and Ors v AGC (Advances) Ltd (1990) 98 ALJR 200
Adam P Brown Male Fashions Pty Ltd v Phillips Morris Inc (1981) 148 CLR 170 at
176

REPRESENTATION:

Counsel:

Worker: Unrepresented
Employer/Insurer: Ms Robertson

Solicitors:

Worker: Unrepresented
Employer/Insurer: Cridlands

Judgment category classification:	B
Judgment ID number:	[2005] NTMC 070
Number of paragraphs:	28

IN THE WORK HEALTH COURT
AT ALICE SPRINGS IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20004765 & 20113096

BETWEEN:

AURELIA CABARON
Worker

AND:

**WALLACE ROCKHOLE COMMUNITY
GOVERNMENT COUNCIL**
Employer/Insurer

REASONS FOR DECISION

(Delivered 7 November 2005)

Mr BIRCH SM:

1. This Interlocutory Application by the Employer seeks the Work Health Court to make orders pursuant to Rule 7.13 of the Work Health Rules, in the alternative, for the Court to exercise its powers under section 94 of the Work Health Act 1986, and in either case to determine these proceedings by way of dismissal.
2. The chronology set out hereunder as well as the affidavit of Allison Margaret Robertson sworn 12 January 2005, highlights the history of this matter; with the first application (file 20004675) commencing in this Court on the 22 February 2000 following the injury to the Worker at Wallace Rockhole on the 29 October 1999. The second application (file 20113096) commenced in this Court on 21 August 2001 and relates to the Workers claim for mental stress also arising out of the incident which occurred at Wallace Rockhole on the 29 October 1999. The Worker has been legally represented during two periods of this litigation. He was represented by

Donal Craig and Associates from 18 May 2000 to 1 February 2001 and subsequently by Morgan Buckley Solicitors from 12 April 2001 to 18 May 2004. The Worker has remained unrepresented on these substantive applications since the 18 May 2004 and appeared unrepresented in this Interlocutory Application. Cridlands Solicitors have always appeared for the Employer.

File 20004675

Chronology

29 October 1999	Injury occurred at Wallace Rockhole- Broken ankle
24 December 1999	Claim form handed to employer
28 December 1999	Employer information completed by Council Clerk
5 January 2000	Sections 69 and 85- Notice of Decision
17 January 2000	Medical certificate. Worker unfit to return to work until 17 February 2000
31 January 2000	Mediation Conference – Certificate of Mediation issued
22 February 2000	Application to the Work Health Court
16 March 2000	Cridlands Solicitors for Employer – Appearance filed
6 April 2000	Application to the Work Health Court served on Insurer
19 April 2000	Notice of Directions Conference – Listed 18 May 2000
18 May 2000	Conciliation Conference – orders made: <ol style="list-style-type: none">1. The Worker to file and serve Statement of Claim within 14 days.2. The Employer to file and serve Notice of Defence within 14 days of service.3. Mutual Discovery and Inspection within 28 days of serving of Notice of Defence.4. Adjourned matter to a Directions Conference for 15 minutes at 9 a.m. on 27 July 2000. Represented Party is not required to attend.

8 June 2000	Statement of Claim filed
3 July 2000	Notice of Defence filed
21 July 2000	Employers List of Documents filed
27 July 2000	Directions Conference - orders made: <ol style="list-style-type: none"> 1. Adjourned to the 14 September 2000 at 9 a.m. for Directions Conference at which time the parties to advise whether or not the matter is ready to be listed. 2. The Worker is to file and serve a List of Documents within 14 days.
14 September 2000	Directions Conference - orders made: <ol style="list-style-type: none"> 1. Adjourned to prehearing conference on 12 October 2000 at 9:30 a.m. 2. Case Management Statements to be filed and served by 5 October 2000 3. Worker to pay the Employers costs of today fixed at \$60
21 September 2000	Workers List of Documents – filed by Donal Craig and Associates
21 September 2000	Notice of Acting by Donal Craig and Associates
12 October 2000	Prehearing Conference – orders made: <ol style="list-style-type: none"> 1. By consent adjourned to 9 November 2000 at 10 a.m. for Directions Conference. Represented party is not required to attend.
9 November 2000	Donal Craig and Associates advise worker consents to the matter being set down to hearing for one-day in or about March 2001
9 November 2000	Directions Conference – orders made: <ol style="list-style-type: none"> 1. Listed for hearing for three days at a date to be fixed by Alice Springs registrar in consultation with parties 2. Adjourned to a Directions Conference at a date to be advised approximately 10 weeks prior to hearing. Leave to Mr Craig to attend by phone 3. The Worker to file and serve Case Management Statements within 21 days.
20 November 2000	Employers Case Management Statement filed

24 November 2000	Employers Solicitors request first available hearing date
11 December 2000	Employers Solicitors request that matter be listed for hearing for three days from 16 July to 18 July 2001
10 January 2001	Registrar requests Workers Solicitors to file a case management statement in accordance with order of 9 November 2000. Otherwise the matter will be listed for hearing as requested by the Employers Solicitors
23 January 2001	Letter to Registrar from Worker enclosing correspondence from Worker to his solicitors raising the issue MENTAL STRESS
29 January 2001	Letter to Registrar from Worker advising that. Donal Craig and Associates no longer acting on behalf of worker
1 February 2001	Notice of Ceasing to Act from Donal Craig and Associates
15 March 2001	Notice of Directions Conference listed 12 April 2001
12 April 2001	Directions Conference – orders made: <ol style="list-style-type: none"> 1. Morgan Buckley to file and serve Notice of Acting within seven days 2. Adjourned to 26 April 2001 at 10 a.m.
19 April 2001	Notice of Change of Solicitor – Morgan Buckley now acting for the worker
26 April 2001	Whitelum Solicitor advises Judicial Registrar psychiatric issue may arise regarding stress condition. Solicitor wants to retain the three days hearing in July. Orders made: <ol style="list-style-type: none"> 1. Matter adjourned to 10 May 2001 at 10 a.m. for Directions Conference 2. Costs of today reserved 3. Case Management Statement of Worker to be filed and served by 7 May 2001
10 May 2001	Whitelum Solicitor advises Judicial Registrar worker has psychiatric problems which will need to be included in the claim. Orders made: <ol style="list-style-type: none"> 1. The hearing dates from 16 to 18 July are vacated

2. Adjourned sine die with liberty to apply
3. Internal Review listed before Judicial Registrar on 2 August 2001 at 9 a.m.. Solicitors for parties to provide an update

16 August 2001	Whitelum Solicitor advises Judicial Registrar claim for psychiatric injury filed (See file no.20113096). Orders made: 1. Adjourned Sine die with liberty to apply.
17 August 2001	Employers Solicitor has advised arrangements made for the Worker to be examined by Doctor Kutlaca in Darwin on 13 September 2001
31 January 2002	Matter before Judicial Registrar. Files 20113096 and 20004675 adjourned to 7 March 2002 for Directions Conference. Represented parties and Insurer excused.
7 March 2002	File 20113096 mentioned before Judicial Registrar
23 May 2002	Employers Solicitor advises Judicial Registrar parties are attempting settlement. Orders made: 1. Adjourned to 20 June 2002 at 10 a.m. for Directions Conference. Represented parties excused.
20 June 2002	Adjourned to 11 July 2000 to 10:15 a.m. for Directions Conference.
11 July 2002	Parties Solicitors advised Judicial Registrar that settlement unlikely. Party seeking counsels advice in matter generally and on settlement. Orders made: 1. Adjourned to 10 October 2002 at 9:15 a.m.
10 October 2002	Adjourned to 14 November 2002 to 10:30 a.m.
14 November 2002	Adjourned for Directions Conference before Registrar Alice Springs on a date to be fixed space within four weeks.
19 November 2002	Directions Conference listed for 12 December 2002 at 10:30 a.m. in Alice Springs.
12 December 2002	Matter referred to Judicial Registrar on a date to be fixed.

3 July 2003	<p>Directions Conference before Judicial Registrar. Orders made:</p> <ol style="list-style-type: none"> 1. Leave to the parties to file and serve answers to interrogatories within 42 days. 2. Adjourned to prehearing conference on 1 August 2003 9:15 a.m. 3. Case Management Statement to be filed and served by 15 August 2003.
21 August 2003	<p>Further and Better Particulars of Employers Defence filed.</p>
21 August 2003	<p>Prehearing Conference before Judicial Registrar. Orders made:</p> <ol style="list-style-type: none"> 1. Adjourned to 4 September 2003 at 10 a.m. for prehearing conference 2. Leave to the Employer to file and serve answers to interrogatories no later than 3 September 2003
31 October 2003	<p>Litigation Guardian appointed for the worker in the proceedings</p>
27 November 2003	<p>Hearing date of 15 December 2003 is vacated. Proceedings are adjourned Sine die.</p>
22 January 2004	<p>Supreme Court order of Justice Thomas by way of Originating Motion</p>
30 September 2004	<p>Employer's solicitors request that the matter be listed for directions conference at the earliest date convenient to the court.</p>
28 October 2004	<p>Prehearing Conference before Registrar. Orders made:</p> <ol style="list-style-type: none"> 1. The worker is to advise the employer within seven days whether he will consent to a medical assessment by Dr Timney and Dr Middleton. 2. All medical materials within the workers possession are to be disclosed within 14 days. 3. Any fresh medico-legal treating doctors reports upon which the worker intends to rely are to be disclosed within six weeks. 4. Prehearing Conference is adjourned 13 January 2005 at 9 a.m.
13 January 2005	<p>Interlocutory application for dismissal filed. Prehearing Conference no order made.</p>

1 February 2005	Magistrate Little disqualifies herself from hearing any further applications in this matter. Matter remitted to Registrar to list application before another magistrate on 2 February 2005.
2 February 2005	Application adjourned to 2 March 2005 at 9:30 a.m.
2 March 2005	Work Health Court before Birch S. M. Applicant (Employer) represented by Ms Robertson and Respondent (Worker) unrepresented. Orders made: <ol style="list-style-type: none"> 1. Proceeding adjourned to 20 April 2005 at 10 a.m. for hearing of application dated 12 January 2005 for dismissal of workers application. 2. Employer to file and serve written submissions upon the worker within 14 days of hearing date. 3. Matter listed for case management inquiry 13 April 2005 at 9:15 a.m.
8 March 2005	Worker files two medical certificates for the period 19 January 2005 to 7 May 2005 respectively.
13 April 2005	Work Health Court before Cavanagh SM. The proceedings are adjourned to 20 April 2005 at 10 a.m. for a hearing of the Employer's application to dismiss the workers claim.
20 April 2005	Work Health Court before Birch SM. Ms Robertson appears for Applicant and Mr Carbaron appears unrepresented. Hearing conducted. Matter stood over to a date to be fixed for decision.

File 20113096

Chronology

21 August 2001	Application to the Work Health Court – mental stress related to work.
11 October 2001	Worker medically examined by Dr Kutlaca psychiatrist.
20 November 2001	Appearance filed by Cridlands Solicitors for the Employer.

20 November 2001	Index of Documents filed by Cridlands Solicitors for the Employer.
28 November 2001	Notice of Directions Conference listed for 31 January 2002.
6 December 2001	Employers Supplementary Index of Documents – medical report of Dr Kutlaca dated 11 October 2001.
31 January 2002	<p>Directions Conference. Parties represented. Issues of claim identified:</p> <ol style="list-style-type: none"> 1. Whether the ankle injury arises out of course of employment. 2. Whether mental stress arises out of course of employment. Orders made: <ol style="list-style-type: none"> 1. Adjourn files 20113096 and 20004675 to 7 March 2002 at 10:30 a.m. for Directions Conference.
7 March 2002	<p>Directions Conference. Parties represented. Orders made:</p> <ol style="list-style-type: none"> 1. Worker to file and serve a Statement of Claim within 28 days 2. The employer to file and serve a Notice of Defence within 21 days of service 3. Mutual discovery within 14 days of service of defence with inspection within seven days 4. Should either party elect to interrogate the other then draft of interrogatories to be filed and served no later than seven days prior to Directions Conference 5. Adjourned to 23 May 2002 at 9 a.m. to settle draft interrogatories. Represented parties excused.
23 May 2002	Employers Solicitor mentions matter for both parties. Parties attempting settlement. Adjourned to 20 June 2002 at 10 a.m. for Directions Conference. Represented parties excused.
20 June 2002	Directions Conference. Workers Solicitor attempting to obtain instructions from client regarding settlement offer. Adjourned to 11 July 2000 to 10:15 a.m. for Directions Conference. Represented parties are excused.
11 July 2002	<p>Directions Conference. Parties represented. Orders made:</p> <ol style="list-style-type: none"> 1. The worker to file and serve Statement of Claim within 28 days.

2. The employer to file and serve Notice of Defence within 28 days of service.
3. Mutual discovery within 14 days of service of defence with inspection within seven days of request.
4. Should either party elect to interrogate the other then draft interrogatories to be filed and served no later than seven days prior to the next Directions Conference.
5. Adjourned to 10 October 2002 at 9:15 a.m. for settlement of draft interrogatories. Represented parties excused.

14 August 2002	Workers Statement of Claim filed.
26 September 2002	Employers Notice of Defence and Counterclaim filed.
8 October 2002	Employers List of Documents filed.
10 October 2002	<p>Directions Conference. Parties represented. By consent agreed that two claims can be heard together. Still the chance of settlement. Orders made:</p> <ol style="list-style-type: none"> 1. The Worker to file and serve a List of Documents within 14 days. 2. Employer to file and serve any draft interrogatories by 7 November 2002. 3. Adjourned to Directions Conference on 14 November 2002 at 10:30 a.m. to settle any draft interrogatories and/or consider listing this matter for hearing.
30 October 2002	Workers List of Documents filed.
14 November 2002	<p>Directions Conference. Workers Solicitor mentions for both parties. No draft interrogatories filed. Orders made:</p> <ol style="list-style-type: none"> 1. Adjourned for Directions Conference before the Registrar at Alice Springs on a date to be fixed within four weeks. 2. Represented parties are excused.
19 November 2002	Notice of Directions Conference. Listed for 12 December 2002 at Alice Springs
12 December 2002	Parties represented. Worker wants to go to hearing. Matter referred to judicial registrar on a date to be fixed.

6 March 2003	Notice of Conciliation Conference. Listed 13 March 2003 at Alice Springs.
13 March 2003	Parties represented. Parties still negotiating awaiting counsel's advice. Orders made: <ol style="list-style-type: none"> 1. The parties to file and serve any draft interrogatories within 14 days. 2. Adjourned to Pre-hearing Conference to settle interrogatories before Judicial Registrar on 10 April 2003.
23 March 2003	Worker's interrogatories filed.
28 March 2003	Employers interrogatories filed.
10 April 2003	Pre-hearing Conference. Employer represented. Attempting to settle. Orders made: <ol style="list-style-type: none"> 1. Adjourned Sine die with liberty to apply. 2. Internal Review by Judicial Registrar on 3 July 2003.
20 May 2003	Workers Solicitor advised settlement negotiations between the parties have broken down. Request matter be relisted to deal with the issue of interrogatories and set the matter for hearing.
22 May 2003	Matter listed for Directions Conference on 3 July 2003.
3 July 2003	Judicial Registrar-Orders made: <ol style="list-style-type: none"> 1. Leave to the parties to file and serve answers to interrogatories within 42 days. 2. Case Management Statement to be filed and served by 15 August 2003. 3. Adjourned to Pre-hearing Conference on 21 August 2003.
21 August 2003	Employers Case Management Statement filed.
21 August 2003	Directions Conference Alice Springs. Judicial Registrar-Orders made: <ol style="list-style-type: none"> 1. Leave to Employer to file and serve answers to interrogatories no later than 3 September 2003. 2. Adjourned 24 September 2003 for Pre-hearing Conference.
22 August 2003	Workers Answers to Interrogatories filed.

- 25 August 2003 Workers Amended Statement of Claim and Case Management Statement filed.
- 4 September 2003 Pre-hearing Conference before Judicial Registrar. Parties represented. Orders made:
1. Leave to the Worker to file and serve Amended Statement of Claim within seven days.
 2. The Employer to file and serve Amended Notice of Defence within 14 days of service of Amended Statement of Claim.
 3. Employer to file and serve answers to interrogatories within 21 days.
 4. Leave to the parties to arrange for medical experts to give evidence by video link.
 5. Adjourned to Directions Conference before Alice Springs Registrar on 27 November 2003.
 6. Adjourned to Alice Springs for hearing (5 days) commencing on 15 December 2003.
- 8 September 2003 Worker's Amended Statement of Claim filed.
- 12 September 2003 Notice of Hearing listed for 15 December 2003.
- 29 October 2003 Workers Solicitors make Interlocutory Application for the Worker to be declared a person under a disability and the appointment of a litigation guardian.
- 30 October 2003 Work Health Court before Little SM. Employer has no objection to the appointment of a litigation guardian. Adjourned 31 October 2003 for further hearing.
- 31 October 2003 Work Health Court before Little SM. Orders made:
1. Pursuant to Rule 10.05 of the Work Health Court Rules appoint Anthony Ross Whitelum as litigation guardian for the worker in the proceedings.
 2. The file is now to be placed with another solicitor in the offices of Morgan Buckley.
 3. The proceedings before the court on 30 October 2003 and 31 October 2003 are to remain confidential as between the Court, the worker, the worker's solicitor and the litigation guardian.
 4. Exhibits 2-7 are sealed and not to be opened unless the Court otherwise orders. Exhibit 1 (letter from Cridlands) and the interlocutory application in today's order are to remain on the file, unsealed.

5. Little SM disqualified from conducting the hearing on 15 December 2003 or any other hearing date.
 6. Costs of this application are costs in the cause.
- 17 November 2003 Employers Notice of Defence to Amended Statement of Claim dated 8 September 2003 and Counterclaim filed.
- 21 November 2003 Employers Updated Further List of Documents filed.
- 27 November 2003 Directions Conference before Registrar Alice Springs. Orders made:
1. Hearing date on 15 December 2003 is vacated.
 2. Proceedings are adjourned Sine die.
- 12 December 2003 Ward Keller solicitors instructed to act by Worker in regard to the judicial review of the appointment of a litigation guardian.
- 12 May 2004 Supreme Court of the Northern Territory before Angel J. Orders made:
1. The plaintiff has liberty to substitute Melanie Little for the Work Health Court as first defendant in the proceedings.
 2. The Order of the Work Health Court in Alice Springs made 31 October 2003 appointing a litigation guardian for the plaintiff is quashed.
 3. That the third defendant pay the plaintiff's costs of and incidental to the proceedings on the standard basis, with such costs to be agreed or taxed in default of agreement. In addition, the matter is certified fit for counsel generally, and certified fit for senior counsel in relation to the substantive aspects of the proceedings other than interlocutory attendances.
- 18 May 2004 Workers solicitors Morgan Buckley file Notice of Ceasing to Act.
- 30 September 2004 Employer's solicitors request that the matter be listed for Directions Conference at the earliest date convenient to the court.
- 28 October 2004 Pre-hearing Conference before Registrar. Orders made:
1. The worker is to advise the employer within seven days whether he will consent to a medical assessment by Dr Timney and Dr Middleton.

2. All medical materials within the workers possession are to be disclosed within 14 days.
3. Any fresh medico-legal treating doctors reports upon which the worker intends to rely are to be disclosed within six weeks.
4. Pre-hearing Conference is adjourned 13 January 2005 at 9 a.m.

13 January 2005 Interlocutory application for dismissal filed. Pre-hearing Conference -no order made.

1 February 2005 Magistrate Little disqualifies herself from hearing any further applications in this matter. Matter remitted to Registrar to list application before another magistrate on 2 February 2005.

2 February 2005 Application adjourned to 2 March 2005 at 9:30 a.m.

2 March 2005 Work Health Court before Birch SM. Applicant (Employer) represented by Ms Robertson and Respondent (Worker) unrepresented. Orders made:

4. Proceeding adjourned to 20 April 2005 at 10 a.m. for hearing of application dated 12 January 2005 for dismissal of workers application.
5. Employer to file and serve written submissions upon the worker within 14 days of hearing date.
6. Matter listed for Case Management Inquiry 13 April 2005 at 9:15 a.m.

8 March 2005 Worker files two medical certificates for the period 19 January 2005 to 7 May 2005 respectively.

13 April 2005 Work Health Court before Cavanagh SM. The proceedings are adjourned to 20 April 2005 at 10 a.m. for a hearing of the Employer's application to dismiss the Worker's claim.

20 April 2005 Work Health Court before Birch SM. Ms Robertson appears for Applicant and Mr Carbaron appears unrepresented. Hearing conducted. Matter stood over to a date to be fixed for decision.

3. Throughout the course of these matters the Worker has failed to comply with a number of orders made by the Judicial Registrar and the Work Health Court. Where compliance has eventuated it has been out of time. The

instances of non-compliance have occurred when the Worker has been unrepresented and represented. The Employer submits it is in this failure by the Worker, which enlivens the Court's discretion to dismiss the applications. Furthermore, the Employer, without further assessment by Dr Timney (Psychiatrist) or Dr Middleton (Orthopaedic Surgeon), is not being given an opportunity by the Worker to adequately prepare its medical case in defence which will result in the Employer not receiving a fair trial.

4. The Employer particularly relies on the Orders made 28 October 2004 at a Prehearing Conference before the Registrar to highlight the Worker's failure. The orders made on that occasion were:
 1. The worker is to advise the employer within seven days whether he will consent to a medical assessment by Dr Timney and Dr Middleton.
 2. All medical materials within the workers possession are to be disclosed within 14 days.
 3. Any fresh medico-legal treating doctors reports upon which the worker intends to rely are to be disclosed within six weeks.
 4. Pre-hearing Conference is adjourned 13 January 2005 at 9 a.m.
5. The Worker in his statutory declaration of 27 January 2005 disclosed the medical reports of Dr Lynch (Psychiatrist) and Dr Middleton. Dr Lynch examined the Worker on 10 and 13 January 2003. It is Dr Lynch's assessment the Worker is suffering from an Adjustment Disorder with Mixed Emotional Features. It is also Dr Lynch's opinion:

“That the worker was a highly obsessional man who lacked a significant degree of appropriate interpersonal skills and understanding. It is equally clear that these personality factors played a large part in the difficulties he perceived and experienced. By the time he was referred to me it appeared that his condition had deteriorated from then outlined in previous reports by Drs Kutlaca

and Timney and Mr Sean Ryan. Specifically his depressive symptoms have worsened and there was some suggestion of a major depressive illness.....From a diagnostic point of view it was my conclusion that Mr Carbaron had been suffering from Adjustment Disorder with Promotional Features. However although his depressive symptoms had increased at the time of his presentation to me in January 2003 it appeared that the major determinants of his difficulty were highly obsessional premorbid personality structure, some paranoid traits to his personality and less than optimal interpersonal skills. In this regard from a diagnostic point of view I essentially agree with Dr Kutlaca”.

6. Dr. Middleton examined the Worker on the 14 February 2001. On examination Dr Middleton expressed the following opinion:

“the scars are well-heeled. Little swelling remains. He has regained quite a good range of movement of his left ankle, but there is some minor restriction of the extremes of movement. There is somewhat greater restriction of movement in his left subtalar joint, this being about half of the other side. I arranged x-rays of his ankle today. These show that a medial malleolar fracture has been treated by a wire fixation. His fibular fracture has been treated by a plate and screws. Fractures appear to be in good alignment, and the ankle joint surface has been well restored....it is appropriate to expect ongoing improvement with the passage of time, but it is likely that a small permanent disability will remain”.

7. The Worker in his statutory declaration of 27 January 2005 also included copies of medical certificates by Dr Barnes which indicate for the period 22 January 2003 to 22 January 2005 the worker was suffering from depression. The Worker has also filed with the court similar medical certificates for the period up to 7 May 2005. Furthermore, he has stated “I do not intend to rely on any further medical reports in these proceedings” and “do not consent to being further assessed by Dr Timney or Dr Middleton”. Therefore, for the matter to proceed to a hearing the medical evidence which would be placed before the court are opinions following examination of the worker in 2001 and 2003. I agree with the submission of the Employer, based upon the current opinions of the psychiatrists in this matter, it will be difficult to adequately prepare its medical case in defence to the claim by the Worker

for psychiatric injury. It seems a less burdensome task in regard to the physical injury to the ankle taking into account Dr Middleton's report, nevertheless, the Employer is disadvantaged.

8. Rule 7.13 States;

Failure to attend conference, obey order, &c.

- (1) If a party fails to –
 - (a) attend a directions conference, conciliation conference or prehearing conference as required by these Rules;
 - (b) prepare adequately for a directions conference, conciliation conference or prehearing conference; or
 - (c) comply with an order of the Court, including an order contained in a scheduling order,

the Court may –

- (d) if the party in default is a worker or an applicant – dismiss the proceeding;
 - (e) if the party in default is an employer or a respondent – strike out the appearance or notice of defence;
 - (f) subject to Part 23, make the orders in relation to costs it considers appropriate, including an order that a legal practitioner must pay all or part of the costs payable;
 - (g) list the proceeding before a magistrate; or
 - (h) make any other order it considers appropriate.
- (2) If the Court makes an order under subrule (1)(e), the party who commenced the proceeding may apply for default judgment under Part 21 and, if applicable, for compensation or other relief to be assessed.

9. Section 94 states;

Powers of Court

- (1) The Court has power to hear and determine –
 - (a) claims for compensation under Part V and all matters and questions incidental to or arising out of such claims; and

- (b) all other matters required or permitted by this Act to be referred to the Court for determination,

and such other powers as are conferred on it by or under this or any other Act.

(2) The Court may expand or abridge a time prescribed by or under this Part as it thinks fit.

- 10. The Work Health Court has no inherent powers, but does have powers arising by implication from the principle that a grant of power carries with everything necessary for its exercise. In *Consolidated Press Holdings Ltd v Phillip Morris Inc* (1992) 84 NTR 42, Mildren J considered the nature and extent of the power of a magistrate in the Work Health Court to dismiss an application summarily, and said (20):

“it seems to me that prima facie the Work Health Court has an incidental power to dismiss an application summarily...So far as the incidental power is concerned, s.94 confers a power in the widest terms to hear and determine applications for compensation under the Act, and s.95(4) leaves any question of practice and procedure in the discretion of the court. A power to dismiss summarily is in my opinion a matter of practice and procedure”.

- 11. As to what is a matter of practice and procedure, Mildren J in *Wheeler* (at 35) referred to *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 at 176, where Gibbs CJ, Aickin, Wilson and Brennan JJ cited *Salmond on Jurisprudence*, as to the distinction between substantive and procedural law:

“Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained. The latter regulates the conduct and relations of courts and litigants in respect of the litigation itself; the former determines their conduct and relation in respect of the matters litigated”.

On this basis, it is submitted by the Employer, the dismissal of proceedings for want of prosecution (delay) is a matter of practice and procedure, and it is therefore within the implied power of the Work Health Court to dismiss the proceedings pursuant to section 94 of the Act. The Worker made no

submissions as to the law. I accept the Employers submission that the Court does have power to dismiss the proceedings for want of prosecution.

1. In considering whether or not to dismiss the Workers claim for want of prosecution the following principles are relevant:
 - (a) It is necessary to strike a balance between the interests of a person, having a claim that is not vexatious, repetitious or totally without merit, in having that case heard and determined according to law, and a corresponding public interest that where a claim exists, the legal processes to make that claim should not be prolonged indefinitely (see *White v Northern Territory of Australia* (1989) 97 FLR;(1989)NTSC26 at 21);
 - (b) The exercise of the power to dismiss for want of prosecution is always discretionary (*Stollznow v Calvert* (1980) 2 NSW LR 749).
 - (c) Everything depends on the circumstances of the particular case. It is proper to consider whether any explanation or excuse has been offered for the delay, whether any explanation or excuse offered is credible and satisfactory, and whether or not there is any evidence or particular prejudice to the opposing party by reason of the delay (see *Witten v Lombard Australia Ltd*(1968) 88 WN(PT1)(NSW) 405 at 412);
 - (d) In general, in the absence of a credible excuse, prolonged and inordinate delay is inexcusable (see *Witten*).
12. In addition to section 94 of the Act where the Court has been given power to dismiss proceedings in instances of default, such as Rule 7.13, there are two obvious situations in which that power might be exercised. Namely, where a party's history of non-compliance indicates an inability or unwillingness to co-operate with the court, and where non-compliance was continuing and occasioning unnecessary delay, expense or other prejudice to the other party (see *Lenijamar Pty Ltd & Ors v AGC (Advances) Ltd*(1990) 98 ALR 200). In *Lenijamar* the court held that where the rules (Federal Court Rules) set up a case management system, within which the court was given specific powers, the exercise of those powers was only conditioned on those rules. Order 10

Rule 7 of the Federal Court Rules considered in *Lenijamar* is in similar terms to Rule 7.13 of the Work Health Court. In *Lenijamar*, the Court said in regard to Order 10 Rule 7:

“It is to noted that the power given by this rule is conditioned on one circumstance only: the failure of a party to comply with an order of the court directing that party to take a step in the proceeding. There is no requirement of intentional default or contumelious conduct, although the attitude of the applicant to the default and the court’s judgment as to whether or not the applicant genuinely wishes the matter to go to trial within a reasonable period will usually be important factors in weighing the proper exercise of the discretion conferred by the rule. There is no requirement of inordinate and inexcusable delay on the part of the applicant or the applicant’s lawyers, although any such delay is likely to be a significant matter. There is no requirement of prejudice to the respondent, although the existence of prejudice is also likely to be significant. And it must be remembered that, in almost every case, delay adversely affects the quality of the trial and is an additional burden on the parties”.

13. In regard to File 20004675 it is the Workers position that he still has constant pain in the left ankle. He has pain on walking, which increases with too much walking and related activity. His last medical assessment of this injury was by Dr Middleton whose opinion I have referred to at paragraph 5. The Worker does not intend to rely on further medical reports and does not consent to further medical examination of his ankle. It is the Employers position that numerous attempts have been made through Court Orders and requests to have the Worker further medically examined prior to the hearing dates in July 2001 and December 2003 (See statutory declarations Jo-Anne Mari Schatz of 19 November 2003 and Allison Margaret Robertson of 5 April 2005). The Worker has not complied with either. Apart from the Worker’s evidence, as to his current level of pain and incapacity from the injury, there will be no other evidence available to court or the Employer should the matter proceed to trial.
14. File 20113096 relates to the Workers psychiatric injury as set out in Dr. Lynch’s opinion at paragraph 4. The Worker may also seek to rely on the

opinion of his General Practitioner Dr Barnes: that he continues to suffer from depression. The same circumstances, as to further medical examinations, apply to this file as relate to file 20004675. Of course without further psychiatric examination, the Employer will be placed in a situation of not being able to test or refute the opinion expressed by Dr Barnes or any other medical expert who may be called in the Workers case at trial. Should either of the situations arise as set out in this paragraph or paragraph 13 the Employer would not receive a fair trial.

15. Although the Worker made no specific submissions as to the law applicable to his applications, he did make a number of oral submissions to the Court which, in my view, are relevant in determining the Employer's Interlocutory Applications. The Worker submits:
 - (a) a substantial part of the delay in these proceedings has been caused by the settlement negotiations which took place between June 2002 and September 2003 (see Worker Statutory Declaration of 11 April 2005).
 - (b) To dismiss the claim is "a form of violation or suppression of the worker's human rights, freedom of speech and expression" and in reaching a balance between the interests of the worker, having his matter heard and the public interest of not prolonging the litigation indefinitely, this consideration is paramount.
 - (c) The Employer has failed to provide the Worker with rehabilitation "so as to restore the Worker to the same physical, social and economic conditions as the Worker was before suffering the relevant injuries." The Worker is still under a disability and is unable to return to work or now participate in rehabilitation.
 - (d) So far as the Directions Conference held 11 December 2000 was concerned, the Worker had been given notice not to attend as the matter was to be listed for hearing on 16-18 July 2001.
 - (e) Any delay or unfairness occasioned to the Employer due to the Worker's refusal to partake in further medical examinations is;

1. A dispute between the parties and it should be mediated rather than the Worker's claims being dismissed. To support this argument the worker relies on sections 103(J), 103(D), 104(2) and 106 of the Act.
2. The Worker has been medically examined by Dr. Middleton and others on behalf of the Employer. The Employer is now not entitled to request further medical examinations. If the Worker is wrong in this submission then the Employer is not disadvantaged as compensation to the Worker was cancelled pursuant to s 91(2) of the Act.
3. If the Employer's applications are granted there is no basis to order the Worker to pay costs as the Worker "is a just complainant".

16. Section 91- Medical Examinations- provides for the examination of a Worker who has made a claim for compensation, at reasonable intervals, which envisages that more than one medical examination may be required. I am of the view the Worker's submission on this point is misconceived. Where appropriate and required by an Employer the Worker must submit to additional medical examinations. To argue that the Worker has not received compensation because of a failure to participate in further medical examinations is not to point, and certainly does not rectify the non-compliance with the Court Orders or the inability of the Employer to receive a fair trial.
17. I am also of the view that the worker's submissions, in regard to mediation, lack substance and are irrelevant for the purposes of determining the Employer's applications. I note on file 20004675 mediation took place on 31 January 2000 and on file 20113096 on 21 January 2001.
18. It is the Employer's submission that the Court takes into account the following matters-
 - (a) Facts and circumstances of the Worker's applications arose six years ago. The employer and its witnesses are being burdened with a lengthy delay on this matter.

- (b) The Worker has had two opportunities to pursue this matter at trial but was unready on each occasion. Further delay will be significant and will again affect the quality of the trial. The Employer is, in its evidence, reliant on the memories of former co-employees of the Worker, particularly in regard to alleged events which may or may not be connected to the psychiatric injury that occurred in December 1998 and in October 1999. The delay upon the Employer thus adversely affects its ability to defend the Worker's claims.
- (c) Time spent between legal representatives attempting to negotiate a settlement of the claims resulted in delay but the Employer was not acquiescing in the Worker's delay.
- (d) Certainly, by mid-2003, it was clear there was demonstrated lack of willingness on the Worker's part to cooperate with the Employer and Court to have the matter on for trial. This unwillingness on the part of the Worker is manifested in the following matters:
 - 1. Worker failed to comply with orders made 28 October 2004 within the required time and within a reasonable time
 - 2. Although orders of 28 October 2004 were eventually complied with, the Worker has affirmed his refusal to attend further medical examinations.
 - 3. Matter did not proceed to trial on 15 December 2003 due to the Worker's refusal to attend medical examinations. The Employer's legal representative was advised of the Worker's refusal on 7 November 2003.
 - 4. Non-compliance by the Worker in respect of discovery concerning medical treatment of the Worker by his sister who is a medical practitioner.
- (e) The worker asserts a continuing disability from the psychological and physical (ankle) injuries. The Employer must be entitled to have up-to-date medical evidence. This is particularly so as the Worker's medical conditions have deteriorated. For the Worker to refuse medical examination is an abuse of the process on his part. This is so, particularly as the Employer was given first notification of Dr. Lynch and Dr. Barnes' treatment of the Worker in his affidavit of 27 January 2005.

- (f) Since the removal of the litigation guardian on 12 May 2004 the Worker has taken no steps to reactivate the matter so as to move it on for trial. The Employer's legal representative on 30 September 2004 had to request the Registrar to again have the matter listed for a Directions Conference. The matter came on again on the 28 October 2004 and orders made.
- (g) The cumulative effect of the Worker's default and delay is sufficient for the Court to be satisfied that the Worker is unwilling or unable to cooperate with the Court and the Employer to have the matter ready for trial within a reasonable time.
- (h) The sensible administration of Rule 7.13, based on the history of these claims and conduct of the Worker, requires the Court to dismiss the Worker's claims. In the alternative to dismiss the Worker's claim for want of prosecution.

19. The Employer's submissions carry much weight. The Worker has refused to undergo further psychiatric or orthopaedic examination arranged by the Employer. His reasons for doing so are without foundation and his reasoning to substantiate the refusal is fundamentally flawed. It seems to me, having regard to all the matters placed before me in these applications, the Employer will never be able to prepare its case for trial without up-to-date medical evidence. In the case of the psychological injury, this would amount to the Employer having an unfair trial should the matter proceed.
20. In determining the Employer's Interlocutory Application, so far as the section 94 argument is concerned, I have considered the affidavit material placed before me as well as the written and oral submissions of the parties. The Worker is now unrepresented and has suffered an ankle injury (Employer disputes liability) as well as a psychological/ psychiatric injury and his mental health is deteriorating. There is a need for the matters to move on to trial if able and should not be prolonged any further.
21. The Worker's change of legal representation, the delay occasioned by the parties negotiating settlement, the litigation arising out of the appointment of a Litigation Guardian, do not offer any real explanation or excuse for the

delay in this matter. I am now satisfied to make further orders of discovery, attendance at medical examinations and time frames for such matters to take place, would prolong these matters further without result. The Worker has refused to submit to further medical examination and no order of this Court will make him do so.

22. I am satisfied that the Worker's position prevents the psychological/psychiatric case from moving forward and I intend to exercise my discretion to dismiss the Worker's claim for want of prosecution. If I am wrong in the orders I make pursuant to section 93 of the Act then I turn to Rule 7.13.
23. I rely on my reasons in regards to section 94 to support my view that the Worker's non-compliance demonstrates an unwillingness or inability to cooperate with the Court. This lack of cooperation is causing delay in the litigation of the claims, prejudice to the Employer and its witnesses as well as an additional expense to that party. The Worker will not comply with any Court order regarding medical examination, and to make such an order would enliven Rule 7.13 and put him in the same situation.
24. File 20004675 (the ankle injury) was taking its normal course until April 2001 when the legal representative for the Worker advised the Judicial Registrar of a possible psychiatric injury. A claim for the psychiatric injury was filed on 21 August 2001. It was Ms Robertson's observation in her submissions "that when the intention to lodge a psychiatric/psychological injury claim was notified by the Worker, the first claim went off the rails." In my view, her observation was correct. The delay since 2001 was primarily related to the issue of the psychiatric injury.
25. The medical evidence relating to the ankle injury is Dr. Middleton's report and the Worker's contention is he is still having difficulty with his ankle. The Employer denies liability, which is the primary issue of that claim. I accept that the Employer may suffer some prejudice without updated

medical reports, as will the Worker. To bring this matter back “on the rails”, it should be listed for trial without further orders of the Court.

26. I am not satisfied that I should exercise my discretion to dismiss the Worker’s Claim on file 20004675 either for want of prosecution (section 94) or because of his unwillingness or inability to comply with orders of the Court. I do so because much of the delay relates to issues arising out of the psychiatric injury, the claim for the ankle injury is not a complex one, the medical evidence as it stands is sufficient for the Court to make a determination and the Worker is unrepresented. Balancing his rights between those of the Employer and the public interest, I am satisfied that the proceedings on that matter should not be dismissed.
27. I make the following Orders:

File 20004675

1. The Employer’s Interlocutory Application is dismissed.
2. The matter is listed for mention on 13 December 2005 at 9:30am to fix a date for hearing.

File 20113096

1. The Employer’s Interlocutory Application is granted. The Worker’s claim is dismissed.
2. I will hear the parties as to costs on 13 December 2005 at 9:30am.

Dated this 7th day of November 2005.

Mr John William Arthur Birch
STIPENDIARY MAGISTRATE