CITATION: *McGuiness v Chubb Security* [2005] NTMC 080

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| PARTIES: | MCGUINESS |
| | v |
| | CHUBB SECURITY |
| TITLE OF COURT: | WORK HEALTH COURT (NT) |
| JURISDICTION: | WORK HEALTH |
| FILE NO(s): | 20503261 |
| DELIVERED ON: | 4 November 2005 |
| DELIVERED AT: | Darwin |
| HEARING DATE(s): | 15.09.05 |
| JUDGMENT OF: | Dr J.A. Lowndes SM |

**CATCHWORDS:**

Workhealth – Application for Summary Judgment – Applicable Principles – Application of those Principles to the Statutory Scheme – The Requirements to Make A Claim - Workhealth Act S82 – Workhealth Rules, Rule 21.02(i)(a) – Theseus Exploration *NL v Foyster* (1972) 23 CLR 5 Applied – *Clarke v Union Bank of Australia Ltd* (1917) 21 CLR 5 Applied.

**REPRESENTATION:**

*Counsel:*

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| Plaintiff: | Mr J. Morris |
| Defendant: | Mr J.Wilton |

*Solicitors:*

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| Plaintiff: | Paul Walsh & Associates |
| Defendant: | Cridlands |

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| Judgment category classification: | B |
| Judgment ID number: | [2005] NTMC 080 |
| Number of paragraphs: | 76 |

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

No. 20503261

BETWEEN:

**MCGUINESS**
Plaintiff

AND:

**CHUBB SECURITY**
Defendant

REASONS FOR DECISION

(Delivered 4 November 2005)

DR JOHN LOWNDES SM:

**The Interlocutory Application For Summary Judgment**

1. The worker has made an application seeking, inter alia, a declaration that the cessation of payments of compensation to the worker was invalid. The worker's application is, in essence, an application for summary judgment in relation to the worker's Statement of Claim. The worker relies on the matters and circumstances set out in the affidavits of Mr Paul Walsh (the worker's solicitor) sworn 24 August 2005 and 31 August 2005. In opposing the worker's application, the employer relies upon the affidavit of John Rossiter Wilton (the employer's solicitor) sworn 12 September 2005.

2. The affidavit of Paul Walsh sworn 24 August 2005 deposes as to the following matters:

    1. The worker sustained an injury to his back on 8 March 2004 ( "the first injury");

2. The worker submitted a claim for worker's compensation in respect of "the first injury" and the employer accepted that claim and paid compensation pursuant to the *Work Health Act* (NT);

3. At that time of the "the first injury" the worker's normal weekly earnings were $702.81;

4. On or about 5 August 2004 the worker suffered an aggravation, acceleration, exacerbation, recurrence or deterioration of "the first injury" ( "the extended injury");

5. In or about October 2004 the employer commenced payments of weekly compensation. Copies of the worker's payslips showing the payment of weekly compensation were annexed to the affidavit;

6. On 20 August 2004 Mr Simon Paris, Claims Co-ordinator of Chubb Risk Management, sent an email to Mr Jamie Adams, NT Manager Operations of the employer, in relation to the worker's claim. The following is an extract from that communication:

   "I will also be requesting that the following steps take place:

   1. Independent Medical Assessment be arranged to obtain a clear diagnosis of the injury and expected recovery period.

   2. If possible, claim decision to be put on pending until the appointment has been completed and report received.

   From a claims management viewpoint, it would be very difficult to not approve this aggravation as the original problem stems from a workplace injury.

   Regardless as to whether the aggravation has occurred outside of work, the question that needs to be asked 'Would he have had an issue if he had not injured himself initially in 03/04? – I believe the case would be no.

   In any event, we will obtain further information and his time off will be classified as sick leave until determined.

7. On 29 October 2004 the employer obtained a medical report from Dr Nel Wijetunga, occupational medical consultant. Amongst other things, the doctor expressed the opinion that the worker's employment was a substantial contributing factor to his present condition.

8. By letter dated 15 December 2004 the employer purported to cease payments of weekly benefits to the worker. That letter stated as follows:

> "I refer to your claim for worker's compensation benefits and advise that liability has been denied for the following reason:
>
> Your employment is not considered to be a substantial contributing factor to your present capacity.
>
> The decision is based on the factual report of Johnson & Associates dated 9 December 2004.
>
> In view of this decision you will not be paid Workers Compensation benefits for any time lost from work and any medical expenses incurred will remain your responsibility for payment.

9. On 7 April 2005 the worker obtained a medical report from Dr George Weisz, orthopaedic surgeon. In his report Dr Weisz stated that "the mechanism of injury on 08.03.2004, as presented, is plausibly the cause of the detected pathology."

10. The worker has not returned to work and remains totally incapacitated for work.

3. In paragraph 5 of his affidavit sworn 31 August 2005 Mr Walsh stated that by letter dated 16 May 2005 the employer's solicitors provided copies of the worker's payroll records for the period ending 1 June 2003 to the period ending 7 March 2004 inclusive. A copy of those payroll records was annexed to the affidavit.

4. In paragraph 6 of his affidavit Mr Walsh repeated his earlier statement that in or about October 2004 the employer commenced payments of weekly compensation to the worker. Copies of the worker's payslips were annexed to the affidavit.

5. In relation to the employer's case, a letter from Chubb Australia to Cridlands dated 7 September 2004 was annexed to Mr Wilton's affidavit sworn 12 September 2005. That letter referred to and reviewed the two

affidavits sworn by Mr Walsh. That letter provided the following information:

1. The worker was employed by Chubb Security Holdings Pty Ltd as a security guard.

2. The worker claimed that he suffered an injury to his lower back after an incident at work on 8 March 2004.

3. The worker was certified unfit for work on 9 March 2004.

4. The worker recommenced employment on a full time basis from 10 March 2004. From this time he was performing his pre-injury duties as a security guard.

5. On 25 March 2004 Chubb caused a letter to be sent to the worker indicating accepted claim no 134061 made by the worker.

6. The worker's normal weekly earnings were calculated by Chubb to be $626.81 gross per week. The worker was paid for 9 March 2004.

7. In late July or early August 2004 the employer believed that the worker complained of an injury to his back. Such injury was claimed to be a consequence of lifting a trailer hitching onto a car. This alleged injury was not related to his employment with Chubb.

8. The worker alleged that he received a further injury whilst getting into his car at a mechanics premises in August 2004. He was not on work duties at this time.

9. It was the employer's understanding that on 7 August 2004 the worker attended Royal Darwin Hospital regarding pain in his back.

10. The worker has not returned to work with Chubb since 7 August 2004.

11. No claim for compensation was lodged with Chubb for any injury except the claim form number 134061 with respect to the injury on 8 March 2004.

12. On 25 August 2005 Chubb caused a letter to be sent to Mr McGuiness regarding the alleged work injury on 7 August 2004. Chubb was investigating the basis of the worker being off work. The worker was advised that he could take sick leave or annual leave while the investigation was pending.

13. Chubb made payments of weekly benefits to the worker from 11 October 2004 to 14 November 2004 in the amount of $626.81 per week. The employer claimed that those payments were made without prejudice in relation to the claimed injury whilst the background to the cause of the worker's current incapacity was being investigated.

14. The employer believed that the worker had been paid all medical expenses and weekly benefits in relation to the accepted injury on 8 March 2004.

15. The employer believed that the worker's alleged incapacity for work was not related to his employment.

16. The employer believed that the worker could return to work as a security guard within his alleged restrictions on a part time or full time basis.

6. A second affidavit sworn by John Rossiter Wilton on 14 September 2005 had annexed to it an index of agreed documents together with copies of the documents referred to therein.

**The Pleadings**

7. The issues to be litigated in these proceedings are relevant to the worker's application for summary judgment.

8. In his statement of Claim, the worker alleges that on 8 March 2004 he suffered an injury to his back (the first injury) which he says arose out of or in the course of his employment with Chubb. The injury was reported to the employer and the worker subsequently made a claim for compensation. The worker alleges that the employer is deemed to have accepted liability for that claim pursuant to s 87 of the Work Health Act. The worker subsequently returned to work.

9. The worker further alleges that on 5 August 2004 he suffered an aggravation, acceleration, exacerbation, recurrence or deterioration of the first injury (the "extended injury"). The worker alleges that the "extended injury" also arose out of or in the course of his employment with Chubb. The worker reported the "extended injury" to the employer. It is claimed that on or about 20 October 2004 the employer, through its worker's compensation insurer, admitted liability for the "extended injury" and commenced paying the worker weekly benefits pursuant to the Act. The worker alleges that he has been totally incapacitated for work since on or about 5 August 2004 and remains totally incapacitated for work. The worker's normal weekly earnings at the time of the first injury were $702.81. It is claimed that on or about 15 December 2004 the employer purported to cancel the worker's weekly benefits. The worker says that the purported cancellation was not in accordance with the requirements of the Act, and is therefore void and of no effect. Specifically the worker says that he was not given any notice of the purported cancellation as the letter from the employer purporting to cancel weekly benefits was sent to the wrong address. Further, the worker was not given a statement in the approved form as is required by s 69 of the Act and the notice purporting to cancel weekly benefits was not accompanied by a medical certificate as required by s 69. Finally, the reason for the cancellation was not one in accordance with s 69.

10. The worker claims a failure on the part of the employer to pay weekly benefits and medical and rehabilitation expenses payable in accordance with the Act.

11. The worker seeks a declaration that the cessation of payments to the worker was invalid and claims ongoing weekly payments and consequential orders.

12. In its Notice of Defence the employer admits the first injury and that it arose out of or in the course of the worker's employment with Chubb. It admits that the worker reported the injury and he made a claim for compensation with respect to that injury. However, the employer denies that it is deemed to have accepted liability pursuant to s 87 of the Act, save that it admits that on or about 23 March 2004 it accepted liability for claim number 130461 in accordance with s 85(1) of the *Work Health Act.*

13. The employer admits that the worker returned to work but says: (1) that on 9 March 2004 the worker attended at the Royal Darwin Hospital where he was diagnosed as having sustained a soft tissue injury to his lower back; (2) that the worker was certified unfit for work for only one day on 9 March 2004 and (3) that on 10 March 2005, the worker returned to work, performing his normal duties and hours of work for some 5 months, to on or about 6 August 2005.

14. The employer denies the "extended injury" and says: (1) that in early August 2004, the worker reported the onset of lower back pain as a result of lifting a trailer onto his vehicle at his place of residence; (2) that this incident did not occur during the worker's employment with Chubb and is unrelated to his employment with the employer; (3) that on or about 5 August 2005, the worker reported a further incident resulting in lower back pain when attempting to get into or out of his vehicle at a mechanical workshop at Palmerston; and (4) that this incident did not occur during the employer's employment with Chubb and is unrelated to the worker's employment with the employer.

15. The employer admits that the worker reported the "extended injury" to the employer. However, the employer says that the worker reported that he was unable to attend work on 7 August 2004 and unable to return to his employment because of lower back pain and symptoms. The employer also says that the worker did not make a claim for compensation in accordance

with the provisions of the Act for his back pain and symptoms occurring in early August 2004.

16. The employer denies that on or about 20 October 2004 the employer, through its insurer, admitted liability for the "extended injury" and commenced weekly payments of compensation. However, it says that it paid the worker weekly payments of compensation from on or about 11 October 2004 to on or about 14 November 2004.

17. The employer denies that the worker is totally incapacitated and says that at most he is only partially incapacitated and is fit for a graduated return to work.

18. The employer denies that on or about 15 December 2004 it purported to cancel the worker's weekly payments. It says that it did not purport to cancel payments as per s 69(1) of the Act. It asserts that the worker was not entitled to compensation under the Act. Further, it says that on or about 11 October 2004 it paid weekly compensation to the worker. The employer decided to stop weekly payments from 15 November 2004 because employment was not the real, proximate or effective cause of the worker's medical condition. The employer denies that it purported to cancel payments and that such cancellation was null and void.

19. As to the alleged failure to pay the worker weekly payments of compensation, the employer says that the worker is not entitled to compensation for the following reasons: (1) from 10 March 2004 the worker ceased to be either totally or partially incapacitated for employment by reason of the injury sustained on 8 March 2004 during his employment; (2) on 10 March 2005 the worker returned to his employment, after having had one day off work as a result of his work injury on 8 March 2004; (3) from 10 March 2004 to on or about 6 April 2004 the worker performed his normal duties and hours of work; (4) in early August 2004 the worker reported the onset of lower back pain as a result of lifting a trailer onto his

vehicle at his residence; (5) this incident did not occur during the worker's employment with Chubb; (6) on or about 5 August 2004 the worker reported a further incident resulting in lower back pain when attempting to get out of his vehicle at a mechanical workshop at Palmerston; (7) this incident did not occur during the worker's employment with the employer and (8) employment is not the real, proximate or effective cause of any incapacity from which the worker may suffer.

20. As to the alleged failure to pay any of the worker's medical and rehabilitation expenses, the employer says that it has paid medical expenses in respect of which the worker is entitled to receive in accordance with the Act. It again asserts that employment is not the real, proximate or effective cause of any incapacity from which the worker may be suffering.

21. The employer opposes the declaration and other relief sought by the worker.

22. The employer has made a counter-claim against the worker which is couched in these terms:

> " If the employer was required to serve a Notice of Decision on the worker in accordance with section 69 of the Act when it stopped payments on or about 14 November 2004 (which is denied), the employer applies by counterclaim in accordance with the Work Health Act Rules, for an order pursuant to section 69(2)(d) of the Work Health Act for an order cancelling or reducing compensation."

23. Consequent upon the various matters pleaded in that counterclaim (in particular the assertion that employment with the employer was not the real, proximate or effective cause of the alleged injury) the employer seeks the following orders: (1) that the worker has ceased to be incapacitated by the injury sustained on 8 March 2004; (2) that the employer was entitled to stop the worker's weekly payments and associated benefits under the Act on or about 15 December 2004; (3) that, in the alternative, any incapacity from the injury on 8 March 2004 or any injury sustained on 5 August 2004

is partial and the worker has suffered no loss of earning capacity or alternatively a loss of earning capacity to be determined by the Court.

**The Principles Governing Applications for Summary Judgment**

24. The worker's application is governed by the Work Health Court Rules.

Rule 21.02 provides:

> "(1) A party may apply for summary judgment on relevant grounds, including the following:
>
> (a) the other party, having filed a notice of defence, has no real defence to the claim made in the proceeding;
>
> (b) the notice of defence filed in the proceeding discloses a good defence on the merits;
>
> (c) the other party has no real cause of action;
>
> (d) the proceeding is frivolous, vexatious or an abuse of the process of Court.

25. For there to be no real defence it must be shown that there is no arguable defence: *Theseus Exploration NL v Foyster* (1972) 126 CLR 507. Summary judgment will only be granted if it is clear that there is no issue to be tried: *Clarke v Union Bank of Australia Ltd* (1917) 23 CLR 5.

26. According to Cairns *Australian Civil Procedure* (Lawbook Co 2002) p 387:

> "A defendant may show cause against summary judgment by disclosing a 'triable issue' or an 'arguably good defence'. Or, the defendant may discharge the onus by proving a 'plausible ground of defence', or show facts that lead to 'the inference that at the trial of the action [the defendant] may be able to establish a defence'. Leave to defend should be given where there is a case, either of fact or law, to be investigated."

**The Submissions**

27. Mr Morris, Counsel for the worker, submitted that because the employer's cessation of payments of compensation to the worker was invalid there should be summary judgment in favour of the worker, and the Court should make orders in terms of paragraphs 1.1 – 1.6 inclusive of the interlocutory application.

28. Mr Morris relied upon the following authorities:

1. *Collins Radio Constructions v Day* : 116 NTR 14
2. *Collins Radio Constructions v Day* : 143 FLR 425
3. *Ansett Australia v Nieuwmans* : 9 NTR 125
4. *Alexander v Gorey & Cole Holdings*: 163 FLR 227
5. *Johnstone v Paspaley Pearls* : 110 NTR 1
6. *Consolidated Press Holdings v Wheeler* : 84 NTR 43
7. Civil & Civic Pioneer Concrete : 103 FLR 198

29. Mr Morris submitted that in light of those authorities the employer had no sustainable defence to the worker's Statement of Claim and consonant with the principles governing applications for summary judgment the worker should be granted the relief sough in his interlocutory application.

30. Mr Wilton, the employer's solicitor, made written submissions. The thrust of those submissions was that the Court could not be satisfied that there was no arguable defence to the action commenced by the worker, and that the defence and counterclaim raised a number of triable issues pertaining to causation, incapacity and the operation of s 69 of the Work Health Act.

31. Mr Wilton submits:

> "Issues of causation and incapacity are significant issues of fact and law which would ordinarily be determined through the course of a substantive hearing and will require an assessment of the facts and submissions of the parties, including an assessment of the credibility of individual witnesses."[1]

[1] See p 4 of the employer's written submissions.

32. The employer places particular emphasis on the provisions of s 69(2)(a) of the Act which oust the operation of s69(1). The employer says that in the present case the circumstances set out in s69(2)(a) have been satisfied – the worker returned to work after his injury on 8 March 2004 - thereby relieving the employer of the obligation to cancel payments in the prescribed manner.

**The Statutory Scheme**

33. In order to make a ruling in relation to the worker's interlocutory application it is necessary to understand how Division 5 of Part V of the *Work Health Act*, which deals with claim procedures and determination, operates. The Act establishes a statutory regime for the management and determination of claims for compensation made by injured workers against employers.

34. The claim procedures are instigated by s 80 of the Act which provides as follows:

> "(1) Subject to this Act, a person shall not be entitled to compensation unless notice of the relevant injury has, as soon as practicable, been given to or served on the employer.
>
> (2) An employer who receives a claim for compensation shall deemed to have been given notice of the injury to which it relates."

35. Sections 81 and 82 deal respectively with the form of notice of injury and the form of claim. Section 83 sets out the requirements for service of a claim for compensation on an employer.

36. Section 85 of the Act deals with the decision as to a worker's eligibility for compensation.

37. Subsection(1) provides that an employer shall, on receiving a claim for compensation -

(a) accept liability for the compensation;
(b) defer accepting liability for compensation; or
(c) dispute liability for the compensation,

and shall notify the person making the claim of the employer's decision within 10 working days after receiving the claim.

38. Subsection (2) provides that where an employer accepts liability for the compensation claimed, the employer shall, in the case of a claim for weekly payments (whether or not other compensation is claimed), commence payments within 3 working days after accepting liability.

39. Subsection (4) sets out the procedural requirements where an employer defers accepting liability for the compensation claimed. Any deferral remains in force for 6 days from the date of notification under s 85(1) is given or such longer period the Court may allow unless, within that period the employer notifies the claimant that the employer accepts or disputes liability for the compensation. Subsection (4) (b) provides that where the claim is for weekly payments the employer shall, within 3 working days of making the decision to defer accepting liability, commence those payments.

40. Subsection (5) requires that where an employer accepts or disputes liability for compensation pursuant to s 85(4) (a), the employer shall notify the claimant of its decision.

41. Subsection (6) deals with the requirements of service of such a notice.

42. According to subsection (7) where payments are made under subsection (4)(b) or (4)(c), those payments are made on a without basis and are not, in any subsequent proceedings under the Act, to be construed as an admission of liability. Such payments are to continue until the employer under subsection (5) notifies the claimant of the employer's decision to accept or dispute liability for the compensation: see subsection (7)(b). Subsection (7) (c) provides that such payments are to be taken into account in determining

the amount of the employer's liability under the claim, where liability is accepted or deemed accepted or an order for compensation is made. Subsection (7) (d) stipulates that such payments are not to be recovered by the employer notwithstanding the employer may not be liable to pay compensation.

43. S85(8) states that at the time an employer notifies a claimant that it disputes liability it must provide the claimant with a statement in the approved from setting out, inter alia, the reasons for its decision to dispute liability. Subsection (9) provides that the reasons given in the s 85(8) notice must be sufficiently detailed to enable the claimant to understand fully why the employer disputes liability.

44. Section 87 of the Act:

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

45. The final provision of the Act which is relevant to the present application is s69(1) which provides that an amount of compensation shall not be cancelled or reduced unless the worker to whom it is payable has been given-

> (a) 14 days notice of the intention to cancel or reduce the compensation and, where the compensation is to be reduced, the amount to which it is to be reduced; and
>
> (b) a statement in the approved form which, inter alia, sets out the reasons for the proposed cancellation or reduction.

46. The reasons which are required to be given in pursuance of s69(1)(b) must provide sufficient detail to enable the worker to understand fully why the

amount of compensation is being cancelled or reduced: see subsection 69(4).

47. Subsection (2) inter alia, provides that subsection (1) does not apply where the worker returns to work or dies.

48. Subsection (3) provides that where compensation is cancelled for the reason that the worker has ceased to be incapacitated for work, the s 69(1)(b) statement must be accompanied by the medical certificate of a medical practitioner certifying that the worker has ceased to be incapacitated for work.

**The Decision**

49. Whether or not the worker is entitled to summary judgment depends upon whether the employer, by virtue of its conduct in relation to the worker's claim for compensation, is without question liable, within the statutory framework, for the compensation claimed by the worker. In other words, is it the case that the employer has no real defence to the worker's claim for compensation: see Rule 21.02 (1)(a) of the Work Health Court Rules.

50. The first matter which is not in dispute is that the worker suffered a work related injury to his back on 8 March 2004, as a consequence of which he was absent from work for one day. It is also undisputed that the worker made a claim for compensation in relation to that injury, which was accepted by the employer.

51. It is common ground that following the first injury the worker returned to work and remained in employment until the "extended injury".

52. Although the employer admits that the worker reported the "extended injury" on 5 August 2005, the employer says that the injury was not work related and, in any event, no claim for compensation was made in relation to that injury. Although the employer denies that it admitted liability for

the "extended injury" the employer paid the worker weekly payments of compensation during the period 11 October to 14 November 2004. The employer says that it decided to cease weekly payments from 15 November 2004 because employment was not the real, proximate or effective cause of the worker's medical condition. The employer says that the payments were made in relation to the "extended injury" without prejudice while the background to the cause of the worker's current incapacity was being investigated. The worker claims that by way of the letter dated 15 December 2004 the employer purported to cancel payments of compensation. The employer says that it did not purport to cancel payments pursuant to s 69(1) of the Act.

53. Do those circumstances give rise to a triable issue? Is there a case, either in fact or law, that needs to be investigated? In my opinion, the answer is clearly "yes". Indeed, the worker's application itself may well be ill – founded for the reasons that follow, and could conceivably have been the subject of an application for summary judgment brought by the employer.

54. The worker's case is that the employer wrongly, and in contravention of the statutory scheme established by the Work Health Act, terminated payments of compensation to the worker. That contention presupposes that the worker was receiving payments of worker's compensation in accordance with the statutory scheme, that is to say that the worker was, in fact, entitled to compensation.

55. As noted earlier, in order to be entitled to compensation an injured worker must not only give notice of the relevant injury but make a claim for compensation in the approved form pursuant to s 82 of the Work Health Act. The precondition is fulfilled if the worker merely makes a claim for compensation because the claim is also treated as notice of injury.

56. The worker did not make a claim for compensation in relation to the "extended injury". The requirement that a worker lodge a claim stands at

the core of the statutory scheme. It is the claim for compensation in the approved form that enables an employer to determine an injured worker's eligibility for compensation: see s 85 discussed above. Without a claim for compensation an employer is not in a position to accept liability, defer accepting liability or dispute liability. As noted above, each of those have different outcomes insofar as the payment of compensation is concerned. The Work Health Act imposes mutual obligations on a worker and an employer. On the one hand the Act requires a worker to make a claim for compensation and on the hand obliges an employer, on receiving a claim for compensation, to determine the worker's eligibility for compensation. Whether or not the worker is to receive compensation – and the period during which he or she is to receive such compensation – depends upon the course of action taken by the employer pursuant to s 85.

57. In the present case, as no claim for compensation was made, the employer did not make any determination as to the worker's eligibility for compensation.[2] The employer did not accept liability, defer accepting liability or dispute liability. None of the statutory consequences flowing from each of those courses of action applied in relation to the worker. In short, the worker was not legally entitled to payments of compensation, because the payments made by the employer were outside the statutory scheme. As to how they should be characterised, there is some evidence that they were to be treated as either sick leave or annual leave with pay: see the email sent by Mr Paris to Mr Adams dated 20 August 2004. There is also some evidence that they were "without prejudice" payments pending an investigation of the worker's alleged injury. On that count, they might be viewed as ex gratia payments – as a favour rather than from a legal obligation – pending a full investigation of the cause of the worker's incapacity for work. No matter how they might be characterised, they were

[2] It is accepted that in its letter to the worker dated 15 December 2004 the employer denied liability in relation to the worker's claim for compensation. However, it remains an objective fact that the worker failed to make a claim, in the approved form, in relation to the so called "extended injury".

certainly not payments of compensation within the meaning of the Act. Furthermore, it would be wrong to treat the payments made by the employer as being tantamount to payments consequential upon a decision to defer accepting liability pursuant to s 85(4) of the Act for the simple reason that a decision to defer accepting liability is contingent upon receipt of a claim for compensation in the approved form, and no such claim was made by the worker in relation to the "extended injury".

58. The declaration sought by the worker in his interlocutory application runs contrary to the mutual obligations created by the claim procedures contained in Division 5 of Part V of the Work Health Act. The worker cannot complain that the employer has breached its statutory obligations by denying his entitlement to payments when in fact the worker has failed to meet his statutory obligations for the purposes of establishing an entitlement to compensation.

59. I accept that there may be cases where, after a worker has made a claim for compensation in relation to an initial injury and he or she suffers a number of clearly established aggravations or exacerbations of that injury within the meaning of the Act, the worker is not required to continuously make a claim for compensation in relation to each and every aggravation or exacerbation of the initial injury. Whether the requirement to make a claim can be dispensed with will depend on all the circumstances, and is ultimately a matter of fact and degree. However, as things presently stand and at this interlocutory stage of the proceedings, it is not possible to reach a conclusion as to whether the present case falls within that exceptional class of cases.

60. First, it is not clear that the "extended injury" which was reported by the worker on 5 August 2004 was, in fact, an aggravation, exacerbation, acceleration, recurrence or deterioration of the first injury which occurred on 8 March 2004. If it were a fresh injury then clearly it would have to

have been the subject of a claim for compensation pursuant to s 82 of the Act. Of course, it would be then incumbent on the worker to establish a causal relationship between that injury and the worker's employment. On the evidence as it stands, the worker would have extreme difficulty in establishing that such a fresh injury was work related.

61. Secondly, if the "extended injury" were, in fact, an aggravation, exacerbation, acceleration, recurrence or deterioration of the first injury, then it would be necessary for the worker to establish a causal connection between that injury and his employment. Put another way, the aggravation, exacerbation, acceleration, recurrence or deterioration of an injury will be compensable if the employment is a contributing factor to that injury: it suffices if the worker can demonstrate that employment was one of the contributing factors to the injury.[3] Whether such a causal relationship exists depends upon the particular circumstances of the case and the medical evidence presented at trial.[4] Such an issue of causation involves matters of fact and law which, in the normal course of litigation, should not be investigated at an interlocutory stage, and are best left to be dealt with at the substantive hearing.

62. The state of the evidence in the present case is not such as to justify a departure from that usual course.

63. The worker seeks to rely on the contents of the email sent by Mr Paris to Mr Adams which is dealt with in Mr Walsh's affidavit sworn 24 August 2005. In particular the worker relies on the opinion expressed by Mr Paris which is to the effect that it would be very difficult to "not approve this aggravation (referring to the "extended injury") as the original problem stems from a workplace injury". The worker also relies on the following statement made by Mr Paris:

[3] CCH Australian Workers Compensation Guide [3-300], 3403.
[4] CCH Australian Workers Compensation Guide [3-300], 3403.

> "Regardless as to whether the aggravation has occurred outside of work, the question that needs to be asked 'Would he have had an issue if he had not injured himself initially in 03/04? – I believe the case would be not."

64. The worker also places reliance on the medical report of Dr Wijetunga dated 20 October 2004 wherein the doctor expressed the opinion that the worker's employment was a substantial contributing factor to his present condition.

65. The worker also relies on the report of Dr Weisz dated 7 April 2005 wherein it is stated that "the mechanism of injury on 8.3.04, as presented, is plausibly the cause of the detected pathology".

66. The state of the evidence invites the following observations.

67. The opinion expressed by Mr Paris is nothing more than a mere opinion and is not evidence. Significantly, the factual foundation for the opinion has not been established or sufficiently established.

68. Dr Wijetunga's opinion that the worker's employment was a substantial contributing factor to his present condition has not been adequately explored in his report and has not been adequately tested through the adversarial process. The latter can only be done at the substantive hearing.

69. Dr Weisz's opinion is somewhat minimal and guarded in content; and does not take the matter beyond dispute.

70. Fourthly, the employer's contention is supported by the factual report of Johnson & Associates dated 9 December 2004.

71. In my opinion the state of the evidence at the time of the hearing of the interlocutory hearing is not capable of proving to the satisfaction of this Court that the injury suffered by the worker on the 5 August 2004 was an aggravation, exacerbation, acceleration, recurrence or deterioration of the initial injury. Nor is the evidence sufficient to establish that the worker's

employment was one of the contributing factors to the alleged injury There remains a triable issue in both the factual and legal sense.

72. Thirdly, it is my opinion that now is not the appropriate time to conduct an inquiry into whether the circumstances of this case were such that a further claim for compensation was necessary as a precondition for entitlement to compensation with respect to an aggravation, exacerbation, acceleration, recurrence or deterioration of the first injury. However, I venture to express a tentative view. The first injury occurred on 8 March 2004, the worker returning to work some 2 days later. The alleged "extended injury" occurred some 5 months later, which is the subject of the present litigation. The worker's case rests on only 2 reported injuries. The history and injury profile does not appear to be such as to bring this case within the exceptional class of cases where an entitlement to compensation for an injury, in the form of an aggravation, exacerbation, acceleration, recurrence or deterioration of an earlier injury, does not depend on the making of a claim for compensation in the approved form. However, that is a matter that will have to be thrashed out at trial.

73. Although the point was not specifically argued at the interlocutory hearing, I have given consideration as to whether principles of common law or equitable estoppel can be invoked in aid of the declaration sought by the worker. Presumably the argument might run along these lines. As the employer voluntarily made payments of compensation to the worker, thereby accepting liability for the claimed injury, it is now estopped from terminating those payments unless it does so in accordance with s 69 (1) of the Act. There are a number of potential problems, both legal and factual, in relation to that argument. The first it has been doubted whether the principles of estoppel, whether at common law or in equity, apply so as to prevent a party from exercising a statutory right to worker's compensation: see *Foresight Pty Ltd v Maddick* (1991) 1 NTLR 209 at 211-212. Conversely, there must, in my opinion, be consequential doubt as to the

applicability of such principles in circumstances where a party, namely a worker, has failed to comply with prescribed claim procedures. Secondly, the estoppel argument depends upon the payments being characterised as payments of compensation. However, the payments made to the worker were not in accordance with the statutory scheme and therefore did not amount to payments of compensation. The corollary of that is that the employer did not purport to cancel payments of compensation because it was not paying the worker compensation. Thirdly, in order to rely upon estoppel a party must be able to point to some detriment. It is difficult to see how, as either a matter of fact or law, any relevant or actionable detriment arises in this case. However, whether or not there is any substance to the argument based on estoppel is best left to the substantive hearing, especially in the light of the fact that the point was not argued, or comprehensively argued, at the interlocutory hearing.

74. Although it is not strictly necessary to deal with the employer's argument that the provisions of s 69(1) do not apply in the instant case because the worker returned to his employment, I intend to express a tentative, though at this stage a fairly firmly held, opinion about the matter, with a view to limiting the issues to be litigated at trial. The exception in s 69(2)(a) operates only where the worker has returned to employment following the injury which is the subject of the claim for compensation. Although the worker in this case returned to work after the initial injury it is clear that he did not return to his employment following the "extended injury", which is the subject of the present proceedings.

75. In my opinion, the present case gives rise to a number of triable issues and I am far from convinced that the employer has no real defence to the worker's application. The worker's application is dismissed.

76. I will hear the parties in relation to the matter of costs at the earliest convenient time.

Dated this 4th day of November 2005 _____

Dr John Allan Lowndes