CITATION: *Monk v GEMCO* [2008] NTMC 051

PARTIES:	GRAHAM WILLIAM MONK
	v
	GEMCO
TITLE OF COURT:	Work Health Court
JURISDICTION:	Work Health
FILE NO(s):	20631586
DELIVERED ON:	1 August 2008
DELIVERED AT:	Darwin
HEARING DATE(s):	13 & 14 February 2008
JUDGMENT OF:	Mr Wallace SM

CATCHWORDS:

Workers Compensation – Work Health Act (NT) s 82 "claim" – Work Health Act (NT) s 85 & 87 acceptance of claim deemed – Work Health Act (NT) s 103B, whether claim can be deemed to be disputed – Work Health Act (NT) s 69 withdrawal of acceptance of claim – Work Health Act (NT), merger of claims, whether possible – Work Health Act (NT), estoppel.

REPRESENTATION:

Counsel:

Worker:	I Morris
Employer:	A Davis

Solicitors:

Worker:	Ward Keller
Employer:	Cridlands

Judgment category classification:	C
Judgment ID number:	[2008] NTMC 051
Number of paragraphs:	75

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

No. 20631586

[2008] NTMC 051

BETWEEN:

GRAHAM WILLIAM MONK
Worker

AND:

GEMCO
Employer

REASONS FOR DECISION

(Delivered 1 August 2008)

Mr WALLACE SM:

1. The Worker, Graham Monk ("Mr Monk") has two actions on foot against Groote Eylandt Mining Co Pty Ltd ("GEMCO"), the Employer. Matter No 20631604 relates, I am told by Mr Morris, Mr Monk's counsel, "to an allegation that the worker's psychiatric condition arises from manganese poisoning" (Transcript of proceedings 13/2/08 at p2). That would seem to accord with a claim form I have found on the file, dated 1/3/2006. That matter has not progressed to the point where a Statement of Claim has been filed, and it seems that its existence and subject matter have no relevance to the issues before me.

2. Those issues arise in matter No 20631586, in which a "Joint Memorandum of Facts and Issues" was prepared by the parties, ("the Joint Memorandum"). These were the matters agitated before me on 13/2/08. Apart from the factual matters set out in the Joint Memorandum, I was invited to have regard to some other material, namely

a) Affidavit of Mr Monk, sworn 10 January 2008.

b) Affirmation of Kerry Anne Sibley (of Messrs Ward Keller, Mr Monk's solicitors) affirmed in January 2008.

c) Affirmation of Allison Margaret Robertson (of Messrs Cridlands, GEMCO's solicitors) affirmed 1 February 2008, and

d) An item which became Ex1 comprising:

(i) A Memorandum dated Friday, 3 January 2003 to Aaron Powell (of Allianz, Gemco's work health insurer) from Sue Denton of Gemco referring to, first:

(ii) A claim form dated 24/12/02 signed by Mr Monk, attaching

(iii) An Employers report on Incident form, dated 3/1/03:

and secondly:

(iv) A memorandum from Sue Denton dated 3 January 2003 disputing the validity of Mr Monk's claim, and:

(v) A workers compensation progress medical certificate signed by Dr A McDonald on 18/12/02 and relating to a period of incapacity for work on Mr Monk's part of 5/8/01 (written over 02) to 31/1/02.

THE JOINT MEMORANDUM

3. I reproduce the text of this document as filed:

JOINT MEMORANDUM OF FACTS AND ISSUES

CLAIM NUMBER 1

FACTS

A. A claim form no. 121439 dated 22 November 2002 was completed by the Claimant and lodged with the Employer;

B. Receipt of the claim form was acknowledged by the Employer's agent by letter dated 5 December 2002;

C. The claim was allocated claim no. 991323000359;

D. By letter dated 5 December 2002 the claim was deferred pursuant to section 85(1)(b) of the *Work Health Act*;

E. No further correspondence was entered into with respect to this claim.

F. The insurer asserts, but the Worker cannot recall the fact, that the claim was referred to during the course of a mediation on 20 February 2003 when the insurer undertook, on a without prejudice basis, to merge it with the claim that was being mediated and treat them as one claim dating back to April 2001.

ISSUES

1. Whether this is a claim for compensation within the meaning of section 182 of the *Work Health Act*;

2. Whether, subject to the deferral period, the claim has been deemed to be accepted within the meaning of section 87 of the *Work Health Act*;

3. Whether, absent any other correspondence dealing with this specific claim, it could be deemed to be disputed within the meaning of section 103B of the *Work Health Act*;

4. Whether, absent a specific notice of dispute dealing with this claim, it could be referred for mediation pursuant to section 103D of the *Work Health Act*;

5. Whether, absent a specific application for mediation by the claimant, the claim for compensation could be properly brought before a mediator pursuant to section 103D of the *Work Health Act*?

6. Whether the insurer's undertaking, which the Worker cannot recall, on a without prejudice basis, to merge this claim with the claim being mediated encompassing a single period of incapacity raises an estoppel or otherwise overcomes any alleged technical deficiencies in the handling of the claim.

CLAIM NUMBER 2

FACTS

A. A claim form no. 144295 dated 24 December 2002 was completed by the Claimant and lodged with the Employer:

B. Receipt of the claim form was acknowledged by the Employer's agent by letter dated 13 January 2003;

C. The claim was allocated claim no. 99133000484;

D. By letter dated 13 January 2003 the claim was accepted pursuant to section85(1)(a) of the *Work Health Act*;

E. By letter dated 23 January 2003 the claim was purportedly disputed pursuant to section 85(1)(c) of the *Work Health Act*, on the basis that the insurer was said to have given notice of acceptance of the claim by mistake;

F. On or about 30 January 2003 the dispute was referred by the Claimant for mediation pursuant to section 103D of the *Work Health Act*;

G. A mediation occurred on or about 20 February 2003 and a Certificate of Mediation issued stating "no change";

H. In addition the Mediator noted that the Employer undertook to merge the two claims on a without prejudice basis;

I. The Claimant issued proceeding in the Work Health Court on 5 March 2003 (matter no 20303581);

J. The Claimant discontinued those proceedings on 23 August 2003;

K. No payments specifically noted as being compensation have ever been made to the Worker except for the period from 26 November 2002 to 18 March 2003.

L. The worker continued to receive payments by way of wages or sick pay from the Employer up to 2 April 2003;

ISSUES

1. Whether the Employer can withdraw acceptance of a claim in any fashion other than by Notice pursuant to section 69 of the *Work Health Act*;

2. Whether the letter of 23 January 2003 was a valid notice within the meaning of section 85 of the *Work Health Act*;

3. Whether the two claims could be merged at all;

4. Whether the two claims could be merged without the express application of the Claimant;

5. Whether the first claim could be deemed to form part of the second claim and be brought before the Mediator without the express application of the Claimant;

6. whether the insurer's undertaking, on a without prejudice basis, to merge the first claim with the claim being mediated, treating them as a single claim dating back to April 2001, given in the presence of the Claimant which the claimant cannot concede, creates any estoppel preventing the Worker from now disputing the validity of the Employer's/insurer's actions;

7. Whether the Claimant has an entitlement to compensation benefits by virtue of:

   (a) the deemed acceptance of the first claim for compensation;

   and/or

   (b) the invalidity of the notice issued with respect to the second claim for compensation;

(c) in view of the continuation of payments, whether described as Workers compensation or sick pay or otherwise, up until 2 April 2003.

8. Whether the Claimant requires leave to recommence proceedings for psychiatric injury pursuant to Rule 3.09 of the Work Health Rules.

4. For ease of reference I shall refer to the questions raised as "Issues by Claim Number 1" as 1.1, 1.2 etc: those by "Claim Number 2" as 2.1, 2.2 etc.

FURTHER BACKGROUND

5. Mr Monk states in his affidavit that he went to work for GEMCO on Groote Eylandt from 17 December 1984. He appears to have begun to suffer from some sort of psychological condition not later that the year 2000. He seems to have taken a substantial break from work duties from May 2001 until about April 2002. After that he returned to work, on different duties. In about September 2002 he went back to his old duties, and in November of that year was once again so affected by a mental condition that he was sent to Darwin for medical treatment. As I understand the material, he has not since then worked for GEMCO, which terminated his employment in April 2003.

THE FIRST SET OF ISSUES

6. The claim form no. 121439 spoken of in the Joint Memorandum is reproduced as annexure 4 to Mr Monk's affidavit. Issue 1.1 asks whether this is a claim for compensation within the meaning of s 182 of the *Work Health Act* ("the Act"). Mr Morris, counsel for Mr Monk, was of the view that the question ought to have referred not to s 182, but to s 82, and Mr Davis, counsel for GEMCO, agreed. As chance would have it the reference to s 182 is not entirely nonsensical. Section 182 sets out certain requirements which must be complied with if proceedings for recovery of

compensation are to be maintained. One of these requirements is that a "claim for compensation" must be made within certain time limits.

7. However, s 182 does nothing to define what a "claim for compensation" is or should be. Section 82 does, speaking in s 82(1)(a), of an approved form (and claim form no. 144295 appears to me to be in that form); in s 82(1)(b) of its being accompanied by a medical certificate (it is not disputed that no. 144295 was so accompanied); in s 82(1)(c), of its needing to be served on the employer (receipt of the form is an agreed fact), and in s 82(4), of the need for the worker to authorise the release of information, medical and otherwise concerning the injury (such an authorisation is signed at the end of the form by Mr Monk).

8. In the light of the parenthetical material in the proceeding paragraph it is in my opinion very clear indeed that claim form no. 144295 is a claim for compensation within the meaning of s 82 of the Act, if that is what Issue 1.1 was intended to ask: and it is a "claim for compensation" within the meaning of that phrase as used in s 182 as well – it being my opinion that the s 182 usage refers to the definition in s 82.

1.2. Whether, subject to the deferral period the claim has been deemed to be accepted within the meaning of the Act.

9. In his decision in *Spellman v Returned Services League of Australia – Alice Springs Sub-Branch Incorporated* (File No. 20118793, judgment delivered on 13 August 2004) Mr Trigg SM had cause to consider this exact question, and wrote, at paragraphs 149 and 150:

> "149. Whilst s85 and s87 are poorly drafted (and without the attention to detail that one would hope for in an Act of Parliament) I consider that the following is the interpretation that fits best with the words and the apparent intention and underlying philosophy of the Act, namely:
>
> - If an employer notifies a worker of it's decision to defer accepting liability within 10 working days of receiving a claim for

compensation (s85(1)(b)), then the 10 working day period ceases to apply, and the employer now has up to 56 days from that notification (s85(4)(a));

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

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

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

- If the employer decides to accept liability within the deferred period then, from the time that decision is notified to the worker, the weekly payments cease to be payments under ss85(4)(a) and (7) and become payments under s85(2);

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

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

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

10. Mr Trigg's conclusions are, in my opinion, correct, and I adopt, with respect, the passage cited (apart from a couple of renegade apostrophes). My answer to Issue 1.2 is, therefore, as elementary as that to 1.1: Yes.

1.3. Whether, absent any other correspondence dealing with this specific claim, is could be deemed to be disputed within the meaning of s 103B of the Act.

11. Section 103B of the Act reads:

> "**103B. Disputes**
>
> For the purposes of this Division, a dispute arises where a claimant is aggrieved by the decision of an employer-
>
> (a) to dispute liability for compensation claimed by the claimant;
>
> (b) to cancel or reduce compensation being paid to the claimant; or
>
> (c) relating to a matter or question incidental to or arising out of the claimant's claim for compensation."

12. Sections 103C, 103D, 103E, 103F, 103G and 103H provide a framework for a mediation procedure, once a dispute arises pursuant to s 103B. Section 103J makes such a mediation a pre-condition [sic] to the commencement of courts proceedings.

13. It seems to be tolerably certain that, somehow, the subject matter of claim form 121439 came to be mentioned at a mediation, on 20 February 2003. How this happened is entirely obscure. Ms Robertson in her affirmation of 1 February 2008, says at paragraphs 4 – 11:

> "4. At the time the worker's first and second claims were lodged with the employer and its insurer, Allianz, the claims officer assigned to manage the claims was Aaron Powell.
>
> 5. On 11 January 2008, I interviewed Mr Powell regarding the worker's claims. During the course of the interview Mr Powell

had the opportunity to review the original Allianz claim files for the worker's first and second claims.

6. At the time of the interview, Mr Powell told me, and I verily believe, that he was the claims officer with overall responsibility for the worker's claims up to at least 18 March 2003, save for a period in mid-January 2003 when he was on leave.

7. After reviewing the original claim files, Mr Powell told me and I verily believe, that he now has no independent recollection of the worker's claims or any events that took place during the period up to 18 March 2003.

8. I asked Mr Powell to read the certificate of mediation, issued by the Rehabilitation and Compensation section of the Work Health Authority on 20 February 2003. After reading the certificate, Mr Powell confirmed that he had attended the mediation on 30 January 2003 on behalf of Allianz.

9. I asked Mr Powell if he could provide any additional information or explanation for the notation on the mediation certificate that the insurer "undertook to … merge the two related claims, treating them as one claim dating them back to April 2001".

10. Mr Powell informed me, and I verily believe, that he had no independent recollection of the mediation and could not offer any additional information or explanation regarding the noted outcome of the mediation.

11. I made the observation to Mr Powell that the Allianz file contained no file notes in relation to the mediation, and Mr Powell confirmed that he made no file notes in respect of the mediation."

14. Mr Monk, who perhaps might be expected to have a better memory of events than Mr Powell, being personally interested in the matter, says in his affidavit of 20 January 2008:

"24. On or about 13 January 2003 I received a letter from Allianz Australia Insurance Ltd relating to my second claim. That letter advised that liability for my claim for injury on 1 March 2001 had been accepted. Annexed and marked **"GWM7"** is a

copy of the letter I received from Allianz dated 13 January 2003.

25. However on or about 23 January 2003 I received a further letter from Allianz advising that my claim had been rejected and that the letter of 13 January 2003 had been a mistake. Attached to that letter was a Notice of Decision. Annexed and marked "**GWM8**" is a copy of the letter I received from Allianz and the Notice of Decision dated 23 January 2003.

26. I referred that dispute to mediation on or about 30 January 2003. A mediation occurred on 20 February 2003 and a certificate issued stating there had been "No change". Annexed and marked "**GMW9**" is a copy of the certificate of mediation issued by Graeme Parsons and dated 20 February 2003.

27. The certificate also states that Allianz undertook to merge the 2 claims treating them as one claim dating back to April 2001. I do not have any recollection of that suggestion or offer by Allianz and do not recall any reference to my first claim during the course of that mediation. So far as I was aware my first claim had been deferred as advised by Allianz Australia in their letter of 5 December 2002.

28. However, at the time I was still receiving treatment at the Tamarind Centre and still on anti-depressant and other medications."

15. In view of the nature of Mr Monk's illness, I do not find any cause for suspicion in his forgetfulness. Of the passage from the affidavit quoted, the one matter that I doubt is the last sentence in paragraph 27, "So far as I was aware my first claim had been deferred as advised by Allianz Australia in their letter of 5 December 2002". If Mr Monk is there asserting that in January 2008 he has a positive recollection as to his state of belief during the mediation in 2003 then I would not believe him. It seems to me that he, like Mr Powell, has only the documents to go on.

16. It is clear from the documents that in the language of s 103B, the claimant (Mr Monk) was not aggrieved by any decision of the employer (GEMCO) in respect of claim no. 121439, at the time he requested the mediation (30

January 2002) or at the time the mediation took place (20 February 2003). Mr Monk was not aggrieved because, within the period of the deferral which, by happenstance I think, takes us to almost exactly 30 January 2002, he was no doubt receiving weekly payments, and liability being deemed after the 56 days of the deferral, weekly payments, I presume, continued. So no dispute had arisen from that claim form per se.

17. Issue 1.3, inquiring whether a dispute could be deemed to have arisen, is focussed upon what might follow from the entanglement of that claim with Mr Monk's second claim, no. 144295. Concerning that second claim a dispute had apparently arisen, by virtue of GEMCO's decision communicated to Mr Monk in the letter of 23 January, purporting to dispute the second claim (10 days after notifying Mr Monk that it accepted liability for it).

18. Mr Davis, counsel for GEMCO, argued that such an entanglement arose on the facts of the case. He argued that the two claim forms together put forward in effect a single claim for essentially the same injury manifesting itself at different times. The first form relates to Mr Monk's final breakdown, the second relates back to the time he had taken as sick leave etc before returning to work (on different duties). I do not accept that argument. I can see no reason not to take the Act, and particularly s 82(1) at face value. "A claim for compensation shall – (a) be in the approved form;…" One form, one claim for compensation. Two forms, two claims for compensation. Given that "injury" by definition (s 3) includes "…the aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease" it is hardly to be wondered at that two claims might share a fair amount of common ground, but if, as in this case, they relate to different periods, and where significant things have happened in between those periods, as the period Mr Monk spent working in 2002 is significant, then two claims remain two, not one.

19. Less metaphysically, Mr Davis argued that, within the meaning of s 103B(c) the first claim could properly be regarded as "relating to a matter or question incidental to or arising out of the claimants claim for compensation", i.e. Mr Monk's second claim. I do not accept that argument either. I take the phrase "claim for compensation" to mean the same thing in s 103B as it does in s 82, and although I agree with Mr Davis's submission that the words "relating to a matter or question incidental to or arising out of" is a very widely applicable formula, in my opinion one thing that escapes its broad reach is a "claim for compensation".

20. In my opinion if there is any possibility of entanglement it could more hopefully be argued to arise out of s 105B(a) and (b), where the legislature has chosen to use not "the claimant's claim for compensation" but rather "compensation claimed" by the claimant".

21. Looking at this case, it would be consistent with a liberal reading of s 103B to say that Mr Monk was aggrieved by a decision of GEMCO, and that that decision was a decision to dispute liability and/or to cancel or reduce compensation. That being the state of affairs, s 103B does not on its face limit the scope of the dispute to the single claim for compensation the subject of the employer's decision giving rise to the claimant's grievance. It would do no violence to the wording of the section to permit the "dispute" thereby arising to embroil other claims for compensation subsisting between the parties.

22. Perhaps not. However, such a reading would, in effect, mean that any grievance however small and well defined would, if taken to mediation by a worker, open everything up to mediation (and ultimately to litigation). That does not seem to me to be how the Act is supposed to work, and I note again Mr Trigg's dissatisfaction with the precision of the Act's drafting, quoted earlier. In my view reading Part VIA as a whole, the mediation spoken of in

the Act is intended to be limited to the claimant's grievance and the employer's decision, and to go no wider than that.

23. Even if I am wrong about this as a general matter of interpretation, I am firmly of the view that, consistent with s 103D, it is for the claimant, and no-one else, to refer the matter for mediation, and that neither the mediator nor the employer has standing to add to the list of the matters comprising the dispute. It is utterly unclear in this case how the matter of the first claim came to be raised at the mediation. The Certificate of Mediation records the following:

> "OUTCOME: NO CHANGE*
>
> On a without prejudice basis, the insurer undertook to;
>
> - Merge the two related claims, treating them as one dating them back to April 2001.
> - Consider medical reports already requested from Drs McDonald and Markou.
> - Consider additional medical reports if the above reports are inconclusive in relation to causation of the injury.
> - Accept and manage the claim if causation is indicated by the medical reports, subject to the insurers investigation of the seven months sick leave taken by the claimant during 2001-2002.
>
> CONFERENCE HELD: 20 February 2003
>
> ATTENDEES:
>
> Graham Monk Claimant
>
> Jamie Robertson Union Representative
>
> Aaron Powell Insurer
>
> Graeme Parsons Mediator
>
> RECOMMENDATIONS: NIL"

24. As has been seen, neither GEMCO (or rather its insurer) nor Mr Monk can remember anything useful about this aspect of the mediation. If either of them could, it would probably not be permissible to have regard to their account – see s 103K. But neither can. So, even if s 103B(a) and (b) open up the possibility of widening the mediator's agenda beyond the original grievance, if it be the law that only the worker can initiate such a widening then in this case there is no evidence that he did so.

[I should also add that in the light of my opinion in relation to the efficacy of GEMCO's letter of 23 January 2003 – as to which see the discussion of issues 2.1, 2.2, 2.7 etc below, it may be questioned whether there was, within the meaning of the Act, any decision by the employer to dispute liability or to cancel or reduce compensation.]

25. I see no scope within Part VIA of the Act for disputes to be deemed. My answer to Issue 1.3 is No. For the same reasons, my answer to Issues 1.4 and 1.5 is likewise No.

26. As for the questions raised in Issue 1.6, that concerning estoppel seems similar enough to that raised in issue 2.6 for me to postpone 1.6 until I can deal with both together.

THE SECOND SET OF ISSUES

27. There are two peculiar factual matters that lie at the root of the set of issues thrown up around Mr Monk's second claim form, no. 144295. Both seem to be irregularities according to the expected course of events following the scheme of the Act.

28. The first is the peculiarity of GEMCO's insurer, Allianz Australia Insurance Limited's advising Mr Monk that the claim had been accepted, only to purport to withdraw that acceptance on the ground that it had been a mistake, and thereafter to dispute the claim. Here are the two letters, the

first form dated 13 January 2003, the latter 23 January 2003. (The letters are before me as annuexures to Mr Monk's affidavit):

"Dear Mr Monk,

RE: Work Health Claim: Gemco

Date of Loss: 01/03/2001

Injury: Stress

Claim Number: 991323000484

We refer to your claim as detailed above and would like to advise that we have this day notified your employer that liability for your claim has been accepted for the above-mentioned injury, and that compensation payments should be commenced at your normal weekly earnings, provided your period of incapacity is covered by the prescribed medical certificate.

Should you have any medical accounts, receipts, etc relating to this matter, please forward them to this office for our consideration of payment.

Any queries that you may have in relation to accounts for this matter should be directed to Sarah on 89 828 314, any other queries should be directed to the undersigned on (08) 89 828 305, or to the Work Health Authority."

"We refer to our letter of 13 January 2003.

Please note that letter, for claim number 144295 and given to Gemco on the 2 January 2003, was written to you by mistake.

Accordingly, the Allianz letter to you of 13 January was ineffective.

As your claim was given to Gemco on 2 January 2003, Gemco was deemed liable for the claim under section 87 of the Act on 16 January 2003.

Please find attached a Notice of Decision under section 85 of the Work Health Act disputing liability for your claim. Gemco will pay you weekly compensation between the date liability was deemed (16

January 2003) and the date of the enclosed (*) Notice under section 85 of the Act.

It is a requirement under the Work Health Act that should you wish to appeal our decision in the Work Health Court you must attend a mediation conference first. After the mediation conference takes place you will receive a 'mediation certificate'. Applications to the Work Health Court must be made within 28 days from the date you receive the mediation certificate. If you do not make an application to the court within 28 days of the date you receive the mediation certificate you may lose your right to compensation.

Should you have any queries regarding the above, please contact the undersigned on (08) 89828305."

29. That letter came with various attachments, which included copies of the Notice of Decision and Rights of Appeal Form, the body of which read:

Dear Mr Graham Monk,

With regard to your claim for payment of benefits, (claim number 991323000484), as prescribed under the Work Health Act, you are hereby advised that your employer *GEMCO* acting on the advice of *Allianz Insurance* hereby:-

> Disputes liability for your claim pursuant to Section 85 of the *Work Health Act* following a deemed acceptance of your claim pursuant to Section 87 of the *Work Health Act*. Compensation payments will cease 14 days after you have been notified of this decision.

The reason for this decision are:-

> Employment was not the real, proximate or effective cause of depression.
>
> You did not sustain an injury out of or in the course of your employment.

30. The second peculiarity is a matter spoken of in the Certificate of Mediation reproduced in paragraph 25 above:

"On a without prejudice basis the insurer undertook to-

- Merge the two related claims treating them as one claim dating back to April 2001…..[my emphasis]"

31. The use of the word "merge" when speaking of claims at the time embodied in nothing more advanced than the Claim Forms, is peculiar. [Mr Monk's first Application to the Work Health Court, arising out of his second Claim Form – no. 144295 (which relates to the period first in time) – was filed on 5 March 2003, necessarily after the mediation pursuant to s 103J of the Act.]

32. The parties drafted Issue 2:1 as follows:

> "Whether the Employer can withdraw acceptance of a claim in any fashion other that by Notice pursuant to section 69 of the *Work Health Act*"

33. I must say that this drafting is unhelpful. Section 69(1) does not speak of an employer withdrawing acceptance of a claim. It reads:

> **"69. Cancellation or reduction of compensation**
>
> (1) Subject to this Subdivision, an amount of compensation under this Subdivision 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 –
>
> (i) setting out the reasons for the proposed cancellation or reduction;
>
> (ii) to the effect that, if the worker wishes to dispute the decision to cancel or reduce compensation, the worker may apply to the Authority to have the dispute referred to mediation;
>
> (iii) to the effect that, if mediation is unsuccessful in resolving the dispute, the worker may appeal to the Court against the decision to cancel or reduce compensation;

(iv) to the effect that, if the worker wishes to appeal, the worker must lodge the appeal with the Court within 28 days after receiving a certificate issued by the mediator under section 103J(2);

(v) to the effect that the worker may only appeal against the decision if an attempt has been made to resolve the dispute by mediation and that attempt has been unsuccessful; and

(vi) to the effect that, despite subparagraphs (iv) and (v), the claimant may commence a proceeding for an interim determination under section 107 at any time after the claimant has applied to the Authority to have the dispute referred to mediation."

34. If, for the purpose of argument, the cancellation or reduction spoken of there is the same thing as the withdrawal of acceptance, then one facile answer to the question posed is to refer to the language of s 69(2):

"(2) Subsection (1) does not apply where -

(a) the person receiving the compensation returns to work or dies;

(aa) the person receiving the compensation fails to provide to his or her employer a certificate under section 91A within 14 days after being requested to do so in writing by his employer;

(b) the medical certificate referred to in section 82 specifies that the person receiving the compensation is fit for work on a particular date, being not longer than 4 weeks after the date of the injury in respect of which the claim was made, and the person fails to return to work on that date or to provide his or her employer on or before that date with another medical certificate as to his or her incapacity for work;

(c) the payments or compensation were obtained by fraud of the person receiving them or by other unlawful means; or

(d) the Court orders the cancellation or reduction of the compensation."

35. No notices required in those circumstances, so perhaps the answer is "Yes, pursuant to s 69 of the *Work Health Act*."

36. More seriously, it seems to me that fully to answer the question would require a wide ranging essay on the operation of the Act, much of which would be irrelevant to the case of Mr Monk. I am of the opinion that the question is not only infelicitously phrased but also too broad, and unnecessary to answer.

Issue 2.2. Whether the letter of 23 January 2003 was a valid notice within the meaning of s 85 of the *Work Health Act*.

37. If there had been no letter of 13 January 2003, or if that letter was null and void, then, GEMCO not having notified Mr Monk of its decision among the options permitted by s 85 (accept, dispute or defer liability) within 10 working days of receipt of his claim (apparently on 2 January 2003), pursuant to s 87 GEMCO would be deemed on or about 16 January 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."

38. Paragraph (1) of s 87 was in effect added to the section as part of amending Act No 18 of 1988, subsequent to the decision of the Court of Appeal (Marbui CJ, Mildren and Thomas JJ) in *Schell v Northern Territory Football League* (1995) 5 NTLR 1, and probably in response to that decision.

39. The legislative history of s 87 makes it tolerably clear that an employer which fails to comply with the time limits of s 85, can belatedly inform the worker of its decision and suffer no more penalty than liability to pay compensation for the period when liability was deemed. The letter of 23 January was certainly belated; its annexures appear to satisfy the

requirements of s 85(8): in short, it would comply with s 87 and end the liability of GEMCO if that liability were deemed pursuant to s 87.

40. And if not, not. The letter of 13 January 2003 did exist; it was sent to Mr Monk; it did advise him that Allianz had notified GEMCO that liability for his claim had been accepted. If that letter was not null and void, then GEMCO's liability derived from the acceptance of liability, pursuant to s 85, not by being deemed pursuant to s 87.

41. Mr Davis, counsel for GEMCO, argued that the letter of 13 January 2003 wad for the purposes of s 85, ineffectual. In his outline of submissions he writes:

> "41. It is submitted that an acceptance of otherwise of a claim must be an informed and conscious decision on the part of the Employer. Upon a decision being made, it is incumbent upon the Employer to convey to the Worker that decision pursuant to section 85 *WHA*. For practical purposes the decision is in most cases conveyed by the Employer's insurer but this should not be taken to imply that the decision-making power rests with the insurer.
>
> 42. It is clear from the material that accompanied the second claim form when delivered by the Employer to the insurer that the employer's decision was to dispute liability. Allianz's actions in sending the letter of 13 January 2003 were clearly contrary to the informed decision of the Employer.
>
> 43. Whilst it may be trite, it is submitted that a letter which purports to accept liability that has actually been written in error does not represent an actual decision that was made to dispute liability. Put another way, that letter is not notifying the recipient of the actual decision that has been made. The same would apply in circumstances whereby liability is accepted however, in error, a letter is sent advising that it has been denied.
>
> 44. It is submitted that the letter itself is not the determination rather it is only a means of conveying the content of the Employer's determination. Such a letter may contain an error. It is submitted that the error in communication may be corrected. In the present matter, by the time the error was

> detected, and a further letter was sent setting out the error and advising of the actual determination, the claim had been deemed to have been accepted by virtue of section 87."

42. Mr Davis's argument is, in my opinion, sound insofar as it depends upon a literal reading of s 85, which indeed places the obligation upon the employer (not the insurer) to decide between accepting, disputing or deferring liability, and to inform the worker of that choice. As far as I know (I never practised in the Work Health jurisdiction) he is also correct when he asserts towards the end of paragraph 41 of his submissions that, "For practical purposes the decision is in most cases conveyed by the Employer's insurer…..".

43. I am, however, unable to accept the second half of that same sentence in the outline "…but this should not be taken to imply that the decision making power rests with the insurer". Section 126(4) of the Act prescribes that every policy of workers compensation insurance must be in accordance with the provisions set out in Schedule 2 of the Act: Condition No 3 in that Schedule reads:

> "The Employer shall not, without the written authority of the Insurer, incur any expense of litigation, or make a payment settlement or admission of liability in respect of an injury to or claim made by a worker".

44. That "the decision is in most cases conveyed by the Employer's insurer" comes about not only for practical purposes but also because of the legal realities of the situation. The decision is the insurer's to make. The Employer may hope to be heard by the insurer, but has no more rights that that, under the statutory terms of the policy of insurance.

45. It seems to me that GEMCO understood the realities of its relation to Allianz. On the page of the Claim Form headed "Employers Report On Incident", Ms Sue Denton, Admin Assistant of GEMCO has ticked the box "Yes" in answer to this printed command and question:

> "Give details of other circumstances which would assist the insurer to assess the claim (eg. Do you query the validity of the claim?)",

and Mrs Denton goes on to alert Allianz to the "original claim form number 121439 submitted to Allianz on 25/11/02" and "SEE ATTACHMENT "A"", which reads:

> **ATTACHMENT "A"**
>
> 03 January 2003
>
> **RE: GRAHAM MONK**
>
> Mr Monk was on paid sick leave from 18 May 2001 to 28 February 2002. Of this period only two months were taken as unpaid leave as Gemco agreed to continue his wages as a gesture of goodwill.
>
> At no time during any of the above periods did Mr Monk state that this was a work related illness. In fact, Mr Monk made it known to management that this illness was due to an addition to Marijuana and the treating physician confirmed this.
>
> Following his treatment Gemco assisted Mr Monk to return to his duties, although no obligation was present due to this not being a work health claim. Further Mr Monk is clearly out of time to be making this alleged claim as the *Work Health Act* sets out a 6 month time limit.
>
> In disputing the validity of this claim, Gemco also questions the legality of the certificate number 27865 of Dr S McDonald which purports to state Mr Monk as unfit for **past** dates. We seek the comments of Allianz in this regard.

46. It seems to me that Ms Denton is putting a case why liability should be disputed, which would be consistent with the true legal relation between GEMCO and Allianz created by the conditions of the policy, rather than instructing Allianz that liability was to be disputed, which instruction would be beyond GEMCO's power to give.

47. I conclude that the letter of 13 January 2003 emanating from Allianz, was effective to inform Mr Monk of the Employer's decision as liability pursuant to s 85. The letter of 23 January 2003 purported to vitiate the 13 January

admission of liability as a "mistake". I am not informed, on the material before me, what that mistake was. "Attachment A", quoted above, provides various possibilities by which Allianz, rethinking the matter, might be brought to change its mind. Perhaps Attachment A had not been read at all before the 13 January letter was sent. Perhaps the assessors at Allianz had misapplied one or some of Allianz's rules of decision on claims.

48. I cannot accept that any mistake of this order would entitle an insurer to escape from the admission of liability made pursuant to s 85. Such an admission however mistaken, is not final and forever: the erring insurer would have a remedy – not perhaps, a quick one – by way of an application to this Court for the Court to exercise the power created in s 69(2)(d). In my opinion it is the letter of 23 January not that of 13 January, which is ineffectual.

49. There may be cases where an admission of liability, such as the letter of 13 January, could perhaps be effectively withdrawn. If, for example, a disaffected insurance clerk send such a letter, out of malice towards his employer, knowing the case to be one where both the insurer and the employer intended to contest liability, then there might be found some scope to nullify the letter by some sort of analogy to the principles attaching to *non est factum* in the law of contract. Otherwise, it seems to me that insurers will be struck with the consequences of their mistakes.

2.3 Whether the two claims could be merged at all

50. I find this question particularly hard to address because I am far from certain what it means: in particular, what the word "merge" could mean in relation to the claims made by Mr Monk as they existed (they were then no further advanced that claim forms) at the time of the mediation out of which the word "merge" emerged. As a term of art, "merger of claims", as far as I know, can relate only to the doctrine that relates to judgments for recovery of a debt, whereby other possible claims for or actions in respect of the debt

merge in the judgment. That cannot be the usage intended here. It will be recalled that no legal practitioner was present at Mr Monk's mediation, on 20 February 2003; nor, given s 103F(2) of the Act, would one expect there to be. Mr Powell, who must have voiced the offer to merge the two claims on behalf of Allianz, is unable to remember anything of the mediation and, in particular, anything of what he may have intended to convey by "merge of the two claims".

51. As far as I can see the phrase is devoid of legal meaning. Once lodged, a claim must travel the path established by the Act. There is certainly no express provision for the paths of two claims to join, and I can see no basis for implying such a possibility. Nor, for that matter, can I see any reason why one would wish to find such an implication. There are, no doubt, cases in which a worker has more than one outstanding claim against an employer. If it suits both parties, these claims can be dealt with together, ie. at the same time and in the same forum, be it at mediation or this Court. There is no need to speak of "merger" in such cases. Nor is there anything in the Act to relieve either party from taking every prescribed step in relation to each claim.

52. I am of the opinion that the claims could not be merged at all.

53. That being so, I have no need to answer Issues 2.4 or 2.5.

Issue 2.6 reads:

> "Whether the insurer's undertaking, on a without prejudice basis, to merge the first claim with the claim being mediated, treating them as a single claim dating back to April 2001, given in the presence of the Claimant which the claimant cannot concede, creates any estoppel preventing the Worker from now disputing the validity of the Employer's/insurer's actions."

54. So phrased, one might fairly wonder how it could be supposed that an estoppel could arise against Mr Monk. Allianz makes a representation as to its future conduct. How could Mr Monk be tied down by that?

55. The argument actually advanced by Mr Davis is more complex and involves additional premises. First, in paragraph 28 of his written submission, Mr Davis alludes to a possible instance of estoppel against Mr Monk, but, correctly in my opinion, relegates it to a possible later stage in the case:

> "28. The issue of estoppel arises in two ways. Having regard to the fact that the Employer consented to the earlier discontinuance and did not seek costs associated with that discontinuance, the Employer has arguably acted to its detriment in reliance upon the actions of the Worker. This would be an argument that is perhaps more correctly directed to any subsequent argument as to whether leave should be granted not whether such leave is required."

56. In order to argue for an estoppel arising out of the mediation, and Mr Monk's conduct subsequent to it, Mr Davis argues as follows. First, he puts, in paragraph 31 of this written outline, an unobjectionable proposition of law.

> "31. In broad terms, the object of estoppel is to preclude the departure by a party from an assumption for which he or she bears some responsibility, and which has been adopted and relied upon by another party as the basis of some course of conduct, act or omission which would then operate to that parties detriment if the assumption were not to be adhered to. (see for generally, for example *Thompson v Palmer* (1933) 49 CLR 507 per Dixon J; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387)."

57. It seems to me, however, that the law needs to be considered in rather more detail than that broad proposition permits.

58. It would seem that the only type of estoppel relevant to the situation is promissory estoppel. As Mason CJ and Wilson J wrote in *Waltons Stores (Interstate) Ltd v Maher* at p 398 – 399.

> "It was pointed out in *Legione* (1983) 152 C.L.R. 406, AT P. 432 that, although in *Thompson* Dixon J. did not distinguish between an assumption founded upon a representation of existing fact and an assumption founded upon a representation as to future conduct, at the

time the doctrine of consideration was thought to be a significant obstacle to the acceptance of an assumption founded upon a representation (or promise) as to future conduct as a basis for common law estoppel by representation. That this was so appears most clearly from the judgment of Isaacs J. in *Ferrier* (1912) 15 C.L.R. 32, AT P. 44. There, his Honour observed that estoppel refers "to an existing fact, and not to a promise de futuro, which must rest, if at all, on contract". However, he went on to say: "But a person's conduct has reference t an existing fact, if a given state of things is taken as the assumed basis on which another is induced to act."

Because estoppel by representation is often treated as a separate category, it might be possible to confine the distinction between a representation as to existing fact and one as to future conduct to that category. The adoption of such a course would leave an estoppel based on an omission to correct a mistaken assumption free from that troublesome distinction. However, the result would be to fragment the unity of the common law conception of estoppel and to confine the troublesome distinction oat the price of introducing another which is equally artificial. And the result would be even more difficult to justify in a case where, as here, the mistaken assumption as to future conduct arises as a direct consequence of a representation.

If there is any basis at all for holding that common law estoppel arises where there is a mistaken assumption as to future events, that basis must lie in reversing *Jorden v. Money* and in accepting the powerful dissent of Lord St. Leonards in that case. The repeated acceptance of *Jorden v. Money* over the years by courts of the highest authority makes this a formidable exercise. We put it to one side as the respondents did not present any argument to us along these lines.

This brings us to the doctrine of promissory estoppel on which the respondents relied in this Court to sustain the judgment in their favour. Promissory estoppel certainly extends to representations (or promises) as to future conduct: *Legione* (1983) 152 C.L.R. at p. 432. So far the doctrine has been mainly confined to precluding departure from a representation by a person in a pre-existing contractual relationship that he will not enforce his contractual rights, whether they be pre-existing or rights to be acquired as a result of the representation: *Ajayi v. R. T. Briscoe (Nigeria) Ltd.* [1964] I W.L.R.1326, at p 13330; [1964] 3 AII E.R. 556, at p. 559; *Bank Negara Indonesia v. Philip Hoalim* [1973] 2 M.L.J. 3, at p. 5; *State Rail Authority of New South Wales v. Heath Outdoor Pty. Ltd.* (1986) 7 N.S.W. L.R. 170, at p. 193, per McHugh J. A. But Denning J. in

Central London Property Trust Ltd v High Trees House Ltd. [1947] K.B. 130, at pp. 134-135, treated is as a wide-ranging doctrine operating outside the pre-existing contractual relationship: see the discussion in *Legione* (1983) 152 C.L.R. at pp. 432-435. In principle there is certainly no reason why the doctrine should not apply so as to preclude departure by a person from a representation that he will not enforce a non-contractual right: *Durham Fancy Goods Ltd v. Michael Jackson (Fancy Goods) Ltd*. [1968] 2 Q.B. 839, at p. 847, per Donaldson J.; *Attorney-General (N.Z.) v. Codner* [1973] 1 N.Z.L.R. 545 at p. 553.

59. One looks accordingly for a representation by Mr Monk. Mr Davis argues in his paragraph that one can be found:

> "32. For the reasons asserted above, it is submitted that the Court would accept that the Worker had either expressly (or at least tacitly) accepted that the two claim forms were to be merged and the issues treated as one claim encompassing all issues and assertions. The Employer acted in reliance of such and accordingly continued to deal with the claim on this basis. The Worker did not act inconsistently with this. The consequence of this, however, was that in continuing to deal with the matter on this basis attention was focussed upon the combined issues for which liability had been denied.
>
> Further, subsequent to this apparent agreement or knowledge of the position to be adopted by the Employer, there was no conduct or assertion by, or on behalf of the Worker, that he retained any separate or distinct rights or entitlements by reason of the first claim form until the present matter came before the court."

60. There are many serious problems with this. First, in relation to the postulated acceptance by Mr Monk that the two claim forms were to be merged, there is no evidence at all of any express acceptance – no one can remember what happened.

61. In *Legione v Hadley* (1983) 152 CLR 406 at 436 Mason and Deane JJ wrote: "The requirement that a representation must be clear before it can found an estoppel is, in our view, applicable to any doctrine of promissory estoppel", and their Honours went on to quote with approval the judgment of Lord Hailsham LC in *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce*

Marketing Co Ltd [1972] AC 741 at p 757 and that of Lord Denning MR in the Court of Appeal's decision in that case [1971] 2 QB 23 at p 46.

62. In *Foran v Wight* (1989) CLR 385 Mason CJ spoke of the trial judge's "insistence on looking for clear evidence of waiver…" as being "…characteristic of the traditional insistence on a clear and unambiguous representation as a necessary foundation for an estoppel" (see p 410-411). Deane J wrote (p 435-436) "A representation can found an estoppel by conduct only to the extent that it is clear".

63. In the present case the conduct on the part of Mr Monk that Mr Davis points to is inertia on Mr Monk's part. In paragraph 33 of his outline Mr Davis writes:

> "…there was no conduct or assertion by, or on behalf of the Worker, that he retained any separate of distinct rights or entitlements by reason of the first claim form until the present matter came before the Court".

64. Accepting for the sake of argument that this inertia (on the part of a man of whom it was and is claimed that he was clinically depressed) could amount to, or form part of, a representation that he accepted "merger" of the claims – and I would not accept that for any other purpose – a further type of ambiguity comes into view, namely, what it is that "merger" of claims betokens. Mr Davis puts up a possible meaning namely, that the two be treated as one claim encompassing all issues and assertions. If that were the meaning, one is left to wonder what Allianz had in mind in the second part of what is recorded by the mediator in the fourth dot point:

> "Accept and manage the claim if causation is indicated by the medical records, *subject to the insurer's investigation of the seven months sick leave taken by the claimant during 2001 – 2002*".

65. That reservation appears to me to be aimed at leaving Allianz, free to treat part of the "merged" claim differently from the rest. If so, what does "merger" mean?

66. I have no clear understanding of what is it that Mr Monk's inertia is supposed to have induced Allianz to do or not do.

67. Secondly, to the extent that Mr Davis's argument depends upon Mr Monk having done or said something at the mediation, or upon its being a reasonable inference that he did or said something, there is the provision of s 105K(1) of the Act to be considered. This provides:

> "Except as expressly provided by or under this Act, anything said written or done in the course of mediation under this Division is not admissible in any other proceedings under this Act".

68. The only exception seems to be the certificate (s 103K(2)). In my opinion s 103K(1) prohibits me from going behind the certificate to infer anything about Mr Monk's actions at the mediation, (or, for that matter, those of Mr Powell who represented Allianz there).

69. Thirdly, the estoppel argument depends upon an extension of promissory estoppel, an equitable remedy, into the field of the *Work Health Act*, a statute creating precise legal rights and obligations. On the law as I know it, there is as yet no indication of lines that promissory estoppel is incapable of seeping across, but the boundaries of the *Work Health Act* may form such lines. It is to be remembered that s 186A if the Act not only nullifies any contract or agreement which purports to exclude or limit the application of the Act or the rights or entitlements of a person under the Act, but also makes it a criminal offence to induce or urge anyone to so contract or agree. It would seem incongruous, to put it mildly, if a worker could achieve through estoppel, what it would be impossible, criminal, to induce him or her to achieve by contract.

70. Fourthly, there is the problem which arises if I am correct in my discussion of issues 2.3 etc above, namely, that the thing it is argued Mr Monk is estopped from denying, to wit, the merger, is a thing not legally possible, If equity follows the law here, there can be no equitable estoppel.

71. I will not try to pretend to know whether a set of representations made, some of them to an employer, some to a workers compensation insurer, could be bundled together to found to estop the representor in an action in which only the employer and not the insurer, was a party. That such questions, of what might be analogous to privity, could arise – probably would, in the nature of things – is one more reason to suspect that there is no scope for promissory estoppel to operate in proceedings under the Act.

72. For a plethora of reasons, then, I am of the opinion that Mr Monk is not estopped by his words, actions or inaction.

Issue 2.7 (raising three questions about Mr Monk's entitlement to compensation.)

73. In respect of the first claim for compensation, for the reasons touched on above, acceptance has been deemed and nothing that has happened since has upset that. An entitlement to compensation follows. My answer to 2.7(a) is Yes.

As for 2.7(b), my opinion above is that the letter of 23 January 2003 was not a valid and effective Notice. That being so, that letter had no effect on any entitlement to compensation.

Issue 2.7(c) potentially raises questions of the enormous complexity. Mr Morris's argument seems to be that, if there is a claim in place, and if a Form 5 disputing liability is properly served, but payments continue to be made to the worker beyond the 14 day period specified in s 69(1)(a), then the continued payments cannot be ceased except pursuant to a further Form 5. I doubt whether this argument is correct. If an insurer continues payments for a while by mistake, I cannot see how that ought to give rise to an implied admission of liability, or create an estoppel against the insurer/employer, or, indeed, affect questions of liability at all.

74. As I understand issue 2.7(c), my opinion is that the continuation of payments, however described does not create or recreate an entitlement.

Issue 2.8

75. Consistent with my reasons above, this claim was on foot until the Worker discontinued these proceedings on 23 August 2003, as recited at 2J in the Joint Memorandum. That being so, it is clear that the Worker may recommence proceedings only if he has either the leave of the Court, or the consent of the Employer (Work Health Rules 3.09).

Dated this 1st day of August 2008.

_____

R J Wallace
STIPENDIARY MAGISTRATE