CITATION:	*[2011] NTMC 016*
PARTIES:	MICHAEL MARTYN DONNELLY
	v
	CHARLES DARWIN UNIVERSITY
TITLE OF COURT:	Work Health
JURISDICTION:	Work Health
FILE NO(s):	20929849
DELIVERED ON:	23 May 2011
DELIVERED AT:	Darwin
HEARING DATE(s):	3 May 2011
JUDGMENT OF:	Mr Daynor Trigg SM

CATCHWORDS:

Work Health Act: sections 70, 71, 72, 111, 113, 94, 104.
"permanent impairment" – Courts role in assessment.
HELD:

1. the Work Health Court has no power to make it's own assessment of the level of permanent impairment;
2. the level of permanent impairment must be assessed in the first instance by a medical practitioner;
3. any re-assessment of that permanent appointment must be performed by a panel in accordance with the Act;
4. the Work Health Court has no power to "review" any decision of the Work Health Authority under Part 5 of the Act – sections 111 &113;

Ogilvie v Woolworths (SA) Ltd (Trigg SM 6.12.94)
Clayton v Top End Wholesale Distributors (Trigg SM 22.3.96)
Pengilly v NTA (Bradley CM 11.6.99) not followed

Morrison v Mayne Nickless Ltd (Trigg SM 11.5.00)
Hand v Alcan Gove Pty Ltd [2007] NTMC 041
Taylor Enterprises (NT) Pty Ltd v Pointon [2009] NTMC 029
Larsen-Smith v Perkins Shipping Pty Ltd (Lowndes SM 31.3.11)
Kirk & Anor v Industrial Court of NSW & Anor (2010) 239 CLR 531

REPRESENTATION:

Counsel:

Worker:	Mr J Tippett QC
Employer:	Mr W Roper

Solicitors:

Worker:	Ward Keller
Employer:	Hunt & Hunt

Judgment category classification:	A
Judgment ID number:	[2011] NTMC 016
Number of paragraphs:	52

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

No. 20929849

BETWEEN:

MICHAEL MARTYN DONNELLY
Worker

AND:

CHARLES DARWIN UNIVERSITY
Employer

REASONS FOR DECISION

(Delivered 23 May 2011)

Mr Daynor Trigg SM:

1. This proceeding commenced on 3 September 2009. Throughout these reasons, when I refer to "the Act" I am referring to the *Work Health Act,* or the *Workers Rehabilitation and Compensation Act* (as it has now been renamed).

2. On 18 December 2009 the worker filed a Statement of Claim which contained the following Particulars of Claim:

    1. The Worker was born on 9 September 1965 and is currently aged 44 years.

    2. At all material times the Worker was employed by the Employer as the Director/Associate Dean of the Northern Territory Rural College located on the Stuart Highway approximately 16 km north of Katherine in the Northern Territory of Australia ("the employment").

NORMAL WEEKLY EARNINGS

3. At all material times the Worker was remunerated in the employment in whole or in part other than by reference to the number of hours worked.

4. At all material times the Worker was paid an annual salary of $80,000.00 in the employment, irrespective of the number of hours he worked.

5. At all material times, as part of the Worker's remuneration in the employment the Employer paid the Worker's annual Qantas Club membership.

6. At all material times as part of the Worker's remuneration in the employment the Employer provided him with free accommodation in a modern 4 bedroom house in Katherine.

7. At all material times as part of the Worker's remuneration in the employment the Employer contributed $100.00 per month towards the Worker's electricity costs incurred in living in the 4 bedroom house in Katherine provided by the Employer to the Worker.

8. At all material times as part of the Worker's remuneration in the employment the Employer provided to the Worker a motor vehicle with all running costs paid, including petrol, with free personal use of the motor vehicle by the Worker.

9. The value to the Worker of the various remunerations provided to him by the Employer in the employment and identified in the preceding paragraphs 4 to 8 inclusive or any one or more of them, made up the Worker's normal weekly earnings in the employment within the meaning of the *Workers Rehabilitation and Compensation Act* ("the Act") on or about 22 January 2003.

10. The Worker and Employer or their representatives have never agreed on a figure representing the Worker's normal weekly earnings in the employment as 22 January 2003.

THE INJURIES

11. On or about 23 January 2003 the Worker was driving in the course of employment when he suffered injuries in a motor vehicle accident ("the first injury").

Particulars Of The First Injury

(a) Comminuted fractures to the tibia and fibular in the right lower leg/ankle;

(b) comminuted fracture of the right calcaneus (heel bone);

(c) fracture of the left humerus;

(d) closed head injury;

(e) fractures to the ribs on the left side;

(f) extensive bruising;

(g) extensive lacerations over various parts of the body; and

(h) contusion of the orbit of the left eye and haemorrhage of the sub-conjunctival area of the left eye.

12. The Worker underwent treatment for the first injury and has suffered consequential disabilities as a result of the first injury ("the consequences").

Particulars

(a) The Worker was an inpatient in hospital for approximately 3 months suffering osteomyelitis of the right ankle owing to infection by a hospital based antibiotic resistant staphylococcus organism.

(b) The Worker was on crutches and not permitted to weight bear on his right leg for a further period of 5 months after being released from hospital.

(c) In November 2003 the Worker underwent arthrodesis (fusing) of the right sub talar joint following which he remained non weight bearing for a further 2 months and subsequently had to wear a surgical boot and also received local injections of stereoids into his right ankle and heel area.

(d) In November 2006 the Worker underwent an excision of a lateral boney mass on the right foot.

(e) The Worker was left with a 12 mm (1.2 cm or approximately half an inch) shortening of the right leg when compared with the left leg.

(f) The Worker has left with more or less permanent oedema (swelling) of the right lower leg and foot.

(g) The Worker has reduced dorsiflexion and plantarflexion of the right foot with a stiff sub talar joint and limitations of movements of intertarsal and tarsometatarsal joints of the toes.

(h) The Worker has decreased touch sensation in the skin over the dorsum of this right foot.

(i) The Worker has wasting of the right leg and calf muscles.

(j) The Worker's right ankle jerk reflex is permanently absent.

(k) The Worker limps when he walks as a consequence of his right ankle and calcaneal fractures and the shortening of his right leg.

(l) The Worker's left arm is permanently weakened as a consequence of the fracture of the left humerus and he suffers pain in the left arm when attempting to lift heavy items.

(m) The Worker can wear a shoe on his right foot only with great difficulty and most of the time is able to wear a thong or open sandal or other footwear which does not aggravate symptoms of pain and discomfort in his right foot or lower leg.

(n) The Worker suffered impaired cognitive function arising from the closed head injury in the original motor vehicle accident.

13. As a result of the first injury and the consequences the Worker has developed chronic pain in his right lower leg/ankle/foot which has been diagnosed as Complex Regional Pain Syndrome Type 1 affecting the right lower limb causing symptoms of spontaneous and constant neuropathic pain ("the second injury").

14. From about late 2005 the Worker has developed and continues to experience pain in his lower back which is mechanically consequential upon the first injury associated with his abnormal gait and the shortening of the right leg ("the third injury").

15. As a consequence of the first injury and/or the second injury and/or the third injury or any one or more of them, the Worker has developed a psychological illness ("the fourth injury").

Particulars of the Fourth Injury

(a) Depression and anxiety;

(b) Adjustment disorder;

(c) Post Traumatic Stress Disorder

16. From about mid 2008 to date and continuing, the Worker has developed pain and discomfort affecting his left knee ("the fifth injury").

17. The fifth injury has been caused by the Worker's favouring his right leg and putting weight and stress on his left leg as a consequence of the first injury and/or the second injury and/or the third injury or any one or more of them.

THE CLAIM

18. The Worker made a claim under the *Work Health Act* (as it then was) which was accepted by the Employer's Work Health insurer Allianz Australia Insurance Limited ("Allianz") in respect of the first injury.

19. Subsequently, the Employer accepted the fourth injury in respect of the Worker's psychological illness.

20. The Employer has not accepted the second, third or fifth injuries as consequential upon the first injury.

CAPACITY

21. As a consequence of the first injury and/or the second injury and/or the third injury and/or the fourth injury and/or the fifth injury or any one or more of them, the Worker was initially totally incapacitated for work until he returned to work performing restricted duties on a date in 2004.

22. As a consequence of the first injury and/or the second injury and/or the third injury and/or the fourth injury and/or the fifth injury or any one or more of them, the Worker was partially incapacitated for work from the date he returned to work performing restricted duties in 2004 until about 12 June 2009 or such other date as this Honourable Court might determine.

23. As a consequence of the first injury and/or the second injury and/or the third injury and/or the fourth injury and/or the fifth injury or any one or more of them, the Worker has been prescribed various medications to control his pain and his mood, and the Worker's capacity for employment has been adversely affected by the side effects of these medications or any one or more of them in various combinations ("the medication effects").

Particulars of Medications

(a) Brufen as an anti-inflammatory;

(b) Esipram – a mood stabiliser;

(c) Lyrica to help the control of neurogenic pain;

(d) Panadol to help pain control

(e) Pindolol for depression;

(f) Quinine sulfate to assist in the control of muscle cramping;

(g) Temazepam to assist with sleep;

(h) Seroquel for depression.

Particulars of Effects of Medications on Capacity to Work

As a consequence of taking these medications or any one or more of them in combination, the Worker's concentration is moderately to severely impaired and he is sedated to varying degrees.

24. As a consequence of the first injury and/or the second injury and/or the third injury and/or the fourth injury and/or the fifth injury or any one or more of them, and of the medication effects, the Worker has been totally or in the alternative partially incapacitated for work from 13 June 2009 or such other date as this Honourable Court might determine to the present time and continuing.

25. In the alternative to the preceding paragraph, as a consequence of the first injury and/or the second injury and/or the third injury and/or the fourth injury and/or the fifth injury or any one or more of them, and of the medication effects, the Worker is to be taken to be totally incapacitated for any work pursuant to sub-section 65(6) of the Act and having regard to section 68 of the Act, from and including 13 June 2009 or such other date as this Honourable Court might determine to the present time, and continuing.

CANCELLATION/REDUCTION OF BENEFITS

26. By Notice of Decision and Right of Appeal dated 12 June 2009 the Employer purported to reduce payments of the Worker's weekly benefits from a date 14 days thereafter for the reasons listed in that document ("the Notice of Decision").

Particulars of the Notice of Decision

The reasons listed in the Notice of Decision were:

"1. You suffered work related injuries in a motor vehicle accident on or about 23 January 2003.

2. Your indexed normal weekly earnings for 2009 are $1,975.94 gross per week.

3. You have returned to work with suitable duties with Mick & Bill Donnelly Pty Ltd trading as Big Dad's Pies.

4. In your employment with the employer as referred to in paragraph 3 above, you have an earning capacity of $557.87 gross per week (this is your average earning capacity for the period from 25 November 2008 to 12 May 2009). At this stage, this is the most profitable employment that could be undertaken by you.

5. Pursuant to section 65(2)(b)(ii) of the Act, you therefore have an earning capacity of $557.87 gross per week.

6. Therefore your weekly compensation entitlement pursuant to section 65(2)(b)(ii) of the Act is reduced to 75% of the difference between your indexed normal weekly earnings and your earning capacity, namely $1,048.13 gross per week".

27. The Notice of Decision was invalid because it did not provide a medical certificate pursuant to section 69(3) of the Act.

28. The Notice of Decision was further invalid because the reasons it provided for the reduction of weekly benefits did not provide sufficient detail to enable the Worker to whom the statement was given to understand fully why the amount of compensation was being reduced, as required pursuant to sub-section 69(4) of the Act.

Particulars

Based on the figures identified by the Employer in numbered paragraphs 2, 4 and 5 of the Notice of Decision, the calculation arrived at in numbered paragraph 6 of $1,048.13 gross per week is incorrect. 75% of the difference between $1,975.94 and $557.87 is $1,063.55 and not $1,048.13 and neither the Worker nor his solicitor on his behalf is able to understand from the Notice of Decision how the Employer or its insurer arrived at the figure of $1,048.13.

29. The Worker sought mediation of the dispute created by the reduction of weekly benefits and as a result of that mediation was

"no charge" as set out in a Certificate of Mediation dated 6 August 2009.

PERCENTAGE PERMANENT IMPAIRMENT

30. By a report dated 13 September 2007 of consultant occupational physician Dr David Douglas to Allianz, the Worker was assessed as having a 15% permanent impairment of the whole person as a result of the first injury ("the Douglas assessment").

31. On or about 20 February 2009 the Employer paid to the Worker the sum of $33,022.08 in respect of his percentage permanent impairment of the whole person arising from the first injury on the basis of the Douglas assessment.

32. The Douglas assessment did not comply with the Guides prescribed pursuant to section 70 of the Act and Regulation 9 of the Work Health Regulations, being the 4th Edition of the American Medical Associations Guides to the Evaluation of Permanent Impairment ("the prescribed Guides").

Particulars

The Douglas assessment provided no details of how he assessed the Worker's impairment or applied any part of the prescribed Guides in arriving at the 15% permanent impairment figure.

33. The Worker was subsequently reassessed by a panel of three medical practitioners in respect of his percentage permanent impairment arising from the first injury and this resulted in a report dated 4 August 2008 prepared by Dr Philip Haynes as the panel chairman, which arrived at an 11% permanent impairment of the whole person ("the Haynes panel reassessment").

34. The Haynes panel reassessment did not comply with the prescribed Guides.

Particulars

The Haynes reassessment provided no details of how the panel reassessed the Worker's impairment or applied any part of the

prescribed Guides in arriving at the 11% permanent impairment figure.

35. By a report dated 16 September 2008 of Melbourne psychiatrist Dr Lester Walton addressed to Ward Keller Lawyers, the Worker was assessed as having 30% permanent impairment of the whole person as a result of the fourth injury ("the Walton assessment").

36. The Walton assessment complied with the prescribed Guides.

37. The Worker was subsequently reassessed in respect of the fourth injury involving the psychological illness by a reassessment panel which resulted in a report being prepared by consultant psychiatrist Dr Eric De Leacy as panel chairman dated 11 May 2009 in which there was an assessment of 10% permanent impairment of the whole person as a result of the Worker's psychological illness ("the De Leacy panel reassessment").

38. The De Leacy panel reassessment did not comply with the prescribed Guides.

Particulars

The De Leacy panel reassessment provided no details of how the panel reassessed the Worker's impairment or applied any part of the prescribed Guides in arriving at the 10% permanent impairment figure.

39. The combined values of the 11% found by the Hayes panel reassessment and the 10% found by the De Leacy panel reassessment is 20% on the basis of the Combined Values Chart in the prescribed Guides.

40. On or about 24 June 2009 the Employer paid to the Worker the sum of $13,228.80 which was arithmetically correct additional payment payable by the Employer to the Worker by way of the Worker's percentage permanent impairment of the whole person for the first and fourth injuries if the Haynes panel reassessment and the De Leacy panel reassessment were valid.

41. On or about 7 February 2008 the Worker was examined by Brisbane specialist consultant occupational physician Dr Johnn Olsen who provided a report dated 23 April 2008 which found that the Worker had a percentage permanent impairment of the whole person of 28% arising from the first, second and third injuries ("the Olsen assessment").

42. The Olsen assessment complied with the prescribed Guides.

43. The Employer has never paid the Worker the full amount in respect of his percentage permanent impairment of the whole person calculated on the basis of the Olsen assessment when combined with the Walton assessment, or when combined with the De Leacy panel reassessment.

44. The Worker sought mediation of the disputes in respect of the calculation of normal weekly earnings, the second, third and fifth injuries, the medication effects and the issues arising from the assessments and reassessments of his percentage permanent impairments, and the result of that mediation was “no change” as set out in a Certificate of Mediation dated 7 October 2009.

45. And the Worker seeks the following remedies:

    45.1 a ruling as to the Worker’s normal weekly earnings as at the date of the first injury;

    45.2 an Order that the Employer pay to the Worker within 14 days any arrears of weekly benefits calculated from and including 23 January 2003 to the date of Order;

    45.3 an Order that the Employer pay to the Worker interest pursuant to section 89 of the Act calculated at 20% per annum on any arrears of weekly benefits calculated from and including 30 January 2003 to the date of payment of such arrears within 14 days of the payment of such arrears;

    45.4 a ruling that the second injury is consequential upon the first injury;

    45.5 a ruling that the third injury is consequential upon the first injury;

    45.6 a ruling that the fifth injury is consequential upon the first injury;

    45.7 a ruling that the Notice of Decision dated 12 June 2009 was invalid;

    45.8 a ruling that the Worker has been totally incapacitated for work, or in the alternative is to be taken to be totally incapacitated for work pursuant to sub-section 65(6) of

the Act, from 12 June 2009 or such other date as this Honourable Court might determine to date and continuing;

45.9 in the alternative to the preceding Order, a ruling as to the Worker's most profitable employment within the meaning of the sub-section 65(2)(b)(ii) of the Act, having regard to the matters prescribed in section 68 of the Act;

45.10 an Order that the Employer pay weekly benefits to the Worker from the date of Order in accordance with the Act;

45.11 an Order that the Employer pay arrears within the meaning of section 73 of the Act of medical expenses arising out of the first, second, third, fourth and/or fifth injuries to or on behalf of the Worker in an amount to be determined by this Honourable Court, within 14 days.

45.12 an Order that the Employer pay future medical expenses arising out of the first, second, third, fourth and/or fifth injuries in accordance with the Act;

45.13 a ruling that the Douglas assessment did not comply with the prescribed Guides and as a consequence the Haynes panel reassessment was a nullity;

45.14 a ruling that the Haynes reassessment panel did not comply with the prescribed Guides;

45.15 a ruling that the De Leacy panel reassessment did not comply with the prescribed Guides;

45.16 a ruling that the Olsen assessment did not comply with the prescribed Guides;

45.17 a ruling that the Walton assessment did not comply with the prescribed Guides;

45.18 an Order that the Employer pay to the Worker within 14 days the balance of monies outstanding to him by way of his percentage permanent impairment of the whole person as determined by the Olsen assessment and the Walton assessment;

45.19 an Order that the Employer pay to the Worker within 14 days expenses associated with the Worker's respective assessments by Dr Olsen and Dr Walton, including but

not limited to travel, accommodation, meals and the costs of those doctors' reports, pursuant to sub-section 72(5) of the Act in an amount to be determined by this Honourable Court;

45.20 an Order that the Employer pay the Worker's cost of and incidental to these proceedings and of and incidental to the disputes giving rise to these proceedings to be taxed in default of agreement at 100% of the Supreme Court scale.

3. On 2 February 2010 the employer filed a Notice of Defence which contained the following particulars:

1. The employer admits paragraph 1 of the worker's Statement of Claim.

2. The employer admits paragraph 2 of the worker's Statement of Claim.

3. The employer does not admit paragraph 2 of the worker's Statement of Claim.

4. Save that the employer admits that the worker was paid an annual salary of $78,379 per annum in his employment with the employer, the employer does not admit the remainder of the allegations set out in paragraph 4 of the worker's Statement of Claim.

5. The employer denies paragraph 5 of the worker's Statement of Claim.

6. The employer admits paragraph 6 of the worker's Statement of Claim.

7. The employer denies paragraph 7 of the worker's Statement of Claim. Further the employer states that the worker was allowed usage of 1500kW's of electricity per month free of charge as part

of his accommodation referred to in paragraph 6 of the worker's Statement of Claim. However any usage of electricity by the worker over 1500kW's is billed to the worker at the commercial rate. At all material times while the worker was in the said accommodation, the rate charges for excess electricity charges was $0.1630 per kW and payment of such excess charges is the responsibility of the worker.

8. Save that the employer admits that it provided the worker with the use of a motor vehicle, namely a Holden Commodore Station Wagon as alleged by the worker in paragraph 8 of the worker's Statement of Claim, the employer does not admit the remainder of allegations set out in paragraph 8 of the worker's Statement of Claim. Further, the employer states that the worker has limited private use of the said vehicle, and when the vehicle was available to other employees of the employer during working hours as it was pool vehicle if required.

9. The employer does not admit paragraph 9 of the worker's Statement of Claim.

10. The employer admits paragraph 10 of the worker's Statement of Claim. Further the employer states that the worker had previously raised the issue in relation to his normal weekly earnings in about September 2003, discussion took place between the parties between about September 2003 and through to 2004, however the worker did not persue this issue further or to any conclusion.

11. Save that the employer admits that the worker suffered multiple injuries in a motor vehicle accident on or about 23 January 2003, the employer otherwise does not admit the remainder of the allegations set out in paragraph 11 of the worker's Statement of Claim or the particulars set out therein.

12. The employer does not admit paragraph 12 of the worker's Statement of Claim and the particulars set out therein.

13. The employer does not admit paragraph 13 of the worker's Statement of Claim.

14. The employer does not admit paragraph 14 of the worker's Statement of Claim.

15. The employer admits paragraph 15 of the worker's Statement of Claim.

16. The employer does not admit paragraph 16 of the worker's Statement of Claim.

17. The employer does not admit paragraph 17 of the worker's Statement of Claim.

18. The employer admits paragraph 18 of the worker's Statement of Claim.

19. The employer admits paragraph 19 of the worker's Statement of Claim.

20. The employer admits paragraph 20 of the worker's Statement of Claim.

21. The employer admits paragraph 21 of the worker's Statement of Claim however states that the worker has been performing restricted duties since a date in 2003.

22. The employer does not admit paragraph 22 of the worker's Statement of Claim and denies that the worker has been totally incapacitated for work since he returned to work and has the ability to perform restricted duties in 2003 to date. Further the employer states that the worker continues to have some level of

partial incapacity for work since the injuries he sustained on or about 22 January 2003.

23. The employer does not admit paragraph 23 of the worker's Statement of Claim and the particulars set out therein.

24. The employer denies paragraph 24 of the worker's Statement of Claim.

25. The employer does not admit paragraph 25 of the worker's Statement of Claim and in particular, denies that the worker has been totally incapacitated for work from and including 13 June 2009 to date and continuing.

26. The employer admits paragraph 26 of the worker's Statement of Claim.

27. The employer denies paragraph 27 of the worker's Statement of Claim.

28. The employer denies paragraph 28 of the worker's Statement of Claim. Further the employer states that it advised the worker, through his solicitor (by letter dated 9 July 2009) following service of the said Notice of Decision of the reduced level of his weekly benefits and the worker has been paid at the level of benefits, namely in the sum of $1,063.55 at all times since service of the said Notice of Decision.

29. The employer admits paragraph 29 of the worker's Statement of Claim.

30. The employer admits paragraph 30 of the worker's Statement of Claim.

31. The employer denies paragraph 31 of the worker's Statement of Claim. However the employer states that on or about 20 February 2008, the employer paid to the worker the sum of $33,022.08 in respect of his percentage permanent impairment of the whole person arising from the injury on the basis of the Douglas assessment.

32. The employer denies paragraph 32 of the worker's Statement of Claim.

33. The employer admits paragraph 33 of the worker's Statement of Claim.

34. The employer denies paragraph 34 of the worker's Statement of Claim.

35. The employer admits paragraph 35 of the worker's Statement of Claim.

36. The employer does not admit paragraph 36 of the worker's Statement of Claim.

37. The employer admits paragraph 37 of the worker's Statement of Claim.

38. The employer denies paragraph 38 of the worker's Statement of Claim.

39. The employer admits paragraph 39 of the worker's Statement of Claim.

40. The employer admits paragraph 40 of the worker's Statement of Claim.

41. The employer admits paragraph 41 of the worker's Statement of Claim.

42. The employer does not admit paragraph 42 of the worker's Statement of Claim.

43. The employer denies paragraph 43 of the worker's Statement of Claim.

44. The employer admits paragraph 44 of the worker's Statement of Claim.

45. The employer denies that the worker is entitled to the relief sought in paragraph 45 of the worker's Statement of Claim or at all.

AND THE EMPLOYER SEEKS:

(a) the worker's application to be dismissed

(b) the worker pay the employer's cost of and incidental to the application.

A. The worker suffered multiple injuries as a result of a motor vehicle accident that occurred in the course of his employment with the employer on or about 22 January 2003 ("the injuries").

B. The worker has submitted a claim ("the claim") for compensation for the injuries.

C. Liability for the worker's claim was accepted by the employer.

D. Since the injuries, the worker has been and continues to be partially incapacitated for work since about September 2003.

E. On or about 12 June 2009, the employer served on the worker a Notice of Decision advising him of a reduction in the level of his weekly compensation payments based on his partial incapacity and earning capacity as a result of the same.

F. The worker's indexed normal weekly earnings for 2009 was $1,975.94.

G. From about November 2008 through to June 2009, the worker was certified fit to undertake suitable duties, with restrictions with Mick & Bill Donnelly Pty Ltd trading as Big Dad's Pies.

H. From about November 2008 to about June 2009, the worker was working at Big Dad's Pies. The worker's average earning capacity for this period of employment was $557.87 gross per week.

I. From about November 2008 to June 2009, and in about June 2009, the worker had an average earning capacity of $557.87 gross per week.

J. The worker's entitlement to weekly compensation from the employer, taking into account the worker's earning capacity in his employment with Big Dad's Pies was therefore reduced to $1,063.55 gross per week.

K. At the expiration of the 14 days period after service of the Notice of Decision on the worker as referred to in paragraph E hereof, the employer has and continues to pay the worker's weekly entitlements to compensation for the balance of 2009 in the sum of $1,063.55 gross per week.

L. The employer continues to pay the worker weekly compensation benefits as indexed for 2010, taking into account his earning capacity as referred to in paragraph H and I above.

M. The worker has an earning capacity that exceeds the average earning capacity as referred to in paragraphs H and I above. The worker has the capacity to work more hours, possibly on a full time basis in an administrative or sedentary type position /

employment. In particular, prior to his employment at Big Dad's Pies, the worker returned to work and undertook various return to work in suitable positions on a part time and / or full time basis.

(ma) From about 19 June 2003, the worker returned to work with the employer as a TAFE Lecturer Category III. The worker commenced this gradual return to work on reduced hours and ultimately returned to full time employment with the employer;

(mb) The worker was employed in a full time administrative, sedentary position / employment for a 12 month period or more from about September 2003 to September 2004;

(mc) following the worker's resignation from his employment with the employer in about October 2005, and on or about 4 November 2005 the worker gained full time employment as an Education Manager and subsequently Business Improvement Manager with the Gold Coast Institute of TAFE

AND THE EMPLOYER SEEKS:

(i) a declaration of the extent of the worker's partial incapacity as a result of the injuries;

(ii) a declaration of the extent of the worker's earning capacity;

(iii) a declaration that the worker had as June 2009, an earning capacity of at least $557.87 gross per week, if not more;

(iv) an order that the employer had a validly reduced the level of worker's weekly compensation payments based on his

earning capacity pursuant to section 65(2)(b)(ii) of the Worker's Rehabilitation and Compensation Act.

(v) The worker pays the employer's costs of and incidental to the Counterclaim.

4. On 15 December 2010 this matter was set down for a 5 day hearing commencing on 7 March 2011. However, on 14 February 2011 these hearing dates were vacated and the parties were given liberty to obtain fresh hearing dates. On 15 March 2011 the matter was set down for a 6 day hearing commencing on 1 June 2011. Just before I departed on leave I was advised that the matter had been allocated to myself to conduct the hearing. Accordingly, I asked the court co-ordinator to list the matter before myself on 10 May 2011 for a CMI. However, on 24 March 2011 the employer filed an Application seeking the following Orders:

> 1. paragraphs 30 to 43 and 45.13 to 45.19 inclusive of the Worker's Statement of Claim filed 18 December 2009 be struck out;
>
> 2. Judgment in favour of the Employer in respect of the claims advanced and relief sought in the paragraphs referred to in paragraph 1 above;
>
> 3. the Worker pay the Employer's costs of and incidental to this application and the Worker's applications numbered 20929849 and 20934517 so far as they relate to the claims and relief sought in the paragraphs referred to in paragraph 1 above, such costs to be at 100% of the Supreme Court Scale to be agreed or taxed in default of Agreement.

5. This Application came on before me on 4 April 2011, at which time the parties indicated that a half day argument would be required. Accordingly, I vacated the CMI listed for 10 May 2011 and listed the

argument before myself on my first day back from leave, on 3 May 2011.

6. Argument proceeded on 3 May 2011, and at the end of the argument I reserved my decision, which I now deliver.

7. The issue of compensation for permanent impairment is dealt with in *Subdivision C of Division 3 of Part 5* the Act, and is in the following terms:

> **70 Definition**
>
> In this Subdivision permanent impairment means an impairment or impairments assessed, in accordance with the prescribed guides, as being an impairment, or combination of impairments, of not less than 5% of the whole person.
>
> **71 Compensation for permanent impairment**
>
> (1) In addition to any other compensation payable under this Part, a worker who suffers permanent impairment assessed at a percentage of the whole person equal to not less than 15% shall, subject to subsection (2), be paid compensation equal to that assessed percentage of 208 times average weekly earnings at the time the payment is made.
>
> (2) In addition to any other compensation payable under this Part, a worker who suffers permanent impairment assessed at not less than 85% of the whole person shall be paid compensation of 208 times average weekly earnings at the time the payment is made.
>
> (3) In addition to any other compensation payable under this Part, where a worker suffers permanent impairment assessed at a percentage of the whole person equal to less than 15%, the worker shall be paid compensation equal to the percentage specified in column 2 of the Table to this section of the relevant assessed percentage of permanent impairment specified opposite in column 1 of 208 times average weekly earnings at the time the payment is made.
>
> TABLE

Column 1	Column 2
Degree of permanent impairment	Percentage of compensation payable
not less than 5%	
but less than 10%	2
10%	3
11%	4
12%	6
13%	8
14%	12

(4) Compensation payable under this section is to be paid to the worker:

(a) if no application is made under section 72(3) for a reassessment of the level of the worker's permanent impairment – not later than 14 days after the end of the 28 day period allowed for that application; or

(b) if an application is made under section 72(3) for a reassessment of the worker's level of permanent impairment – not later than 28 days after the applicant is notified of the reassessment.

72 Assessment of permanent impairment

(2) The level of permanent impairment for the purposes of section 71 shall be assessed in the first instance by a medical practitioner.

(3) Where a person is aggrieved by the assessment of the level of permanent impairment by a medical practitioner, the person

may, within 28 days after being notified of the assessment, apply to the Authority for a reassessment of that level.

(3A) Subject to subsection (3B), the Authority must, as soon as practicable after receiving an application, refer the application to a panel of 3 medical practitioners to reassess the level of permanent impairment.

(3B) The Authority is not required to refer an application to a panel unless satisfied that the assessment was properly conducted and is in accordance with the guides prescribed for the purposes of the definition of permanent impairment in section 70.

(3C) The panel to whom an application is referred:

(a) must include at least one medical practitioner appearing to the Authority to have specialist knowledge of the type of impairment in question; and

(b) must not include the medical practitioner who originally assessed the level of impairment.

(4) An assessment made by a panel under subsection (3A) as to the degree of permanent impairment of a worker:

(a) is taken to be the level of permanent impairment suffered by the worker for the purposes of section 71; and

(b) is not subject to review.

(5) The costs incurred in carrying out an assessment or reassessment under this section shall be paid by the employer.

(underlining added)

8. *Regulation 9 of the Workers Rehabilitation and Compensation Regulations* states:

(1) For the purposes of the definition of permanent impairment in section 70 of the Act, the American Medical Association Guides to the Evaluation of Permanent Impairment (4th edition) are the prescribed guides.

9. These provisions have been considered a number of times by myself and other judicial officers. I first considered these provisions in *Ogilvie v Woolworths (SA) Ltd,* in a decision that I published on 6 December 1994. In that decision I was dealing with a different question, namely whether permanent impairment could form part of a *section 108* agreement. However, I also stated (omitting irrelevant parts) as follows:

> **Can permanent impairment be the subject of or dealt with in a Section 108 agreement?**
>
> Permanent impairment is dealt with in Sections 70, 71 and 72 of the Act.
>
> Permanent impairment under the Act replaces the Section 10 (read in conjunction with the Third Schedule) compensation under the Workers Compensation Act.
>
> There is no need for the actual impairment to cause any incapacity for work or loss of earnings in order to found a claim. It is what used to be colloquially referred to as a "maims table". The level of permanent impairment in the first instance can only be assessed by a medical practitioner (Section 72(2)).
>
> Where the worker or employer is aggrieved by the particular assessment of permanent impairment then they may within 28 days after being notified of such assessment apply to the Work Health Authority for a reassessment (Section 72(3)). Upon receipt of such an application, the Work Health Authority is obliged to refer the matter to a panel of three medical practitioners to reassess the level of permanent impairment (Section 72(3)).
>
> The assessment made by the panel "shall be taken to be the degree of permanent impairment for the purposes of section 71(1)" (Section 72(4)).
>
> Once this level of permanent impairment has been thus arrived at, the amount of compensation to be paid to the worker (provided the level of permanent impairment is not less than 5% of the whole person) is calculated in accordance with the formula in Section 71(1) (and by reference to Section 71(3) if the degree of permanent impairment is assessed to be between 5%

and 14% inclusive). In my view, the Work Health Court has no power to hear and determine any matter relating to the assessment of or fixing the amount of permanent impairment. It was, in my view, the intention of the legislature to remove this aspect of compensation from the jurisdiction of the Work Health Court, and it has done so.

I note that “note 3” to form 10 of the Work Health Court Rules appears in its face to contemplate inclusion of a Section 71 payment in an agreement under Section 108.

The definition of “compensation” in Section 3(1) is wide enough to cover an amount under Section 71 and Section 71(1) itself refers to such payments as being compensation.

The parties cannot avoid the procedures for assessing the level of permanent impairment as laid down in the Act and the Work Health Court cannot intervene in the process or review any of the assessments made.

Once the level of impairment has been assessed by the panel under Section 72(3) then there is nothing left to agree (except the average weekly earnings at the time the payment is made). Once a level of impairment has been assessed at first instance under Section 72(2), it is possible that the parties may agree to accept that assessment and not avail themselves of Section 72(3). Accordingly, even though the Court has no dispute resolution role in the assessment of permanent impairment, I see no reason why Section 71 matters could not form part of a Section 108 agreement provided the procedure laid down in Section 72 has been followed. However, it is not necessary that they be included.

It follows, in my view, that if there has been an unreasonable delay in the payment of the permanent impairment compensation, the Work Health Court has jurisdiction to entertain the matter and has power to make orders under Section 109(1) in an appropriate case.

Once the level of permanent impairment has been arrived at in accordance with Section 72, if there is default by the employer for more than one month then arguably the worker can either make a claim against the approved insurer of the employer (Section 132(1)) or against the nominal insurer (Section 167(2)). It is not necessary for me to finally determine this matter herein.

> I would answer this question: Yes, but only where there has been proper assessment made under Section 72(2) (and that assessment is in writing and before the Court).
>
> (underlining added)

10. As noted (briefly in this decision), prior to the *Act* commencing on 1 January 1987, the previous law in this area was governed by the *Workmen's Compensation Act (*later known as the *Workers Compensation Act),* which was in force from 1 January 1951. In that legislation percentage payments for loss of a limb etc were dealt with in *section 10 and the third schedule.* The assessment was undertaken by the Court, and it was simply one part of the Court's function. However, when the Act commenced *sections 70-72* were a clear departure from the pre-existing situation. However, I have been unable to find anything helpful in the second reading speeches (their was more than one, as the original Bill was amended a number of times before finally passing into Law).

11. It was my view, at the time of my decision in *Ogilvie v Woolworths (SA) Ltd*, that the Act had intentionally removed the assessment role (on this distinct area) from the Court and placed it into the hands of medical practitioners.

12. I next considered these provisions in the case of *Clayton v Top End Wholesale Distributors* in a decision that I delivered on 22 March 1996. Again, that decision was on a different issue, but I made the following obiter dicta findings at pages 29-30:

> However, for the reasons stated herein I have come to the clear conclusion that to give section 72 it's ordinary meaning would lead to a result which is contrary to <u>the purpose and intent of Subdivision C of Part V of the Act, namely to remove the assessment of permanent impairment from the jurisdiction of the Work Health Court</u>.....
>
> .....

It is clear that there may be other issues in dispute between parties other than the level of permanent impairment under section 71. These disputes can cover such matters as:

- Whether the permanent impairment relates to an "injury" under the Act;
- Whether a person was notified of the assessment of the level of permanent impairment on a particular date;
- Whether the permanent impairment has already been assessed (and no application to re-assess has been made within the 28 days required) and therefore is not open to be further assessed, or re-assessed;
- Whether the permanent impairment assessment was obtained by fraud or other unlawful means.

This list is not intended to be exhaustive, but simply an indication that the process is not necessarily always straight forward. Where disputes of this type occur then, in my view, the Work Health Court has power under section 94(1)(a) to hear and determine these type of disputes. Further, it would seem to be open (in an appropriate case) for the Court to expand the 28 day requirement laid down in section 72(3) (section 94(2)) where the justice of the case required. (underlining added)

13. I remain of the view (as underlined above) that the purpose and intent of Subdivision C of Part 5 (as it is now headed) of the Act, was and is to remove the assessment of permanent impairment from the jurisdiction of the Work Health Court, and place it solely in the hands of medical practitioners (initially a single medical practitioner, but if challenged then by a panel of three). In order to avoid "medical practitioner shopping" the panel of three is chosen by the Work Health Authority. Further, in order to bring finality to the process *section 72(4)(b) of the Act* clearly states that "an assessment made by a panel……is not subject to review".

14. Accordingly, in my view, it was the clear intention of the legislature to oust the jurisdiction of the Work Health Court from any assessment of

permanent impairment, and leave that decision in the hands of medical practitioners alone. The Act does not directly allow (or contemplate) any right of appeal (or review) from the panels decision, and it appears that the intention was that the panels decision was to be final. There is nothing in the Act which directly contemplates the Court being able to review or reconsider a Panel's decision. Likewise, there is nothing in the Act which contemplates the Court having power to substitute it's own decision for that of the panel. Nor is there any specific power to set aside any decision of the panel, or refer matters back to the panel for reconsideration. If it were the intention of the Legislature that the Court could do some or all of these things, then I would have expected that to be specifically spelt out.

15. Mr Roper (counsel for the employer) referred me to the case of *Kirk and Another v Industrial Court of NSW and Another (2010) 239 CLR 531*, which was a decision of the High Court. In that case *section 179* of the *Industrial Relations Act 1996 (NSW)* provided that a decision of the Industrial Court was final and might not be appealed against, reviewed, quashed or called into question by any court or tribunal, and extended to proceedings for any relief or remedy, whether by order in the nature of prohibition, certiorari or mandamus, by injunction, declaration or otherwise. Accordingly, *section 179* was an "ouster" clause, in that it attempted to oust any right of appeal or review. However, the High Court held that *s 179* precluded the grant of orders in the nature of certiorari for error of law on the face of the record but not for jurisdictional error. It should be construed not to include a decision of the Industrial Court made outside the limits of its power. Further the High Court held (per curiam) that State legislation which would take from a State Supreme Court power to grant relief for jurisdictional error on the part of inferior courts and tribunals is beyond State legislative power. *Chapter III of the Commonwealth*

Constitution requires that there be a body fitting the description of "the Supreme Court of a State" and its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power is a defining characteristic of such a body (*Colonial Bank of Australasia v Willan* (1874) (1874) LR 5 PC 417 at 440; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 applied).

16. Mr Roper submitted that the Work Health Court was not a superior court of record, and accordingly the power to review a decision of the panel could be removed from it, but it could not be removed from the Northern Territory Supreme Court. I accept this submission (and I do not understand that Mr Tippett QC argued against it).

17. It is clear that the decision in *Kirk* is based upon a “State” Supreme Court, whereas we are not a “State” but a “Territory”. However, this distinction was not argued before me, and I doubt that it has any effect herein. Clearly, by *section 12 of the Supreme Court Act*, the Supreme Court “shall be the superior court of record of the Territory”.

18. Hence, it follows from the decision in *Kirk*, that if a party is aggrieved by a panel’s decision then that party may still seek a review (notwithstanding *section 72(4)*) of such a decision if there is a “jurisdictional error”.

19. As I understand Mr Tippett’s argument (and since there was no written submissions, I must rely upon my notes) he agreed that a party cannot challenge the medical panel’s application of the relevant guides, or the ultimate decision arrived at. But he then submitted that a party can dispute, before the Work Health Court, whether the percentage of permanent impairment has been applied in accordance with the guides. I am not sure that the two submissions don’t overlap. But later he appears to have qualified (or explained) this by further submitting that the first thing was that any assessment must be

purported to be made in accordance with the prescribed guides, and if it appears to be, then section 72(4) ousts the jurisdiction of the Work Health Court. I accept that submission. However, he then went on to suggest that if it appeared the prescribed guides had not been applied (and it is not clear that he was not also suggesting “or applied properly”) then the Work Health Court still had a role to play. This is the situation where Mr Roper says that the Supreme Court then has a role (based upon the decision in *Kirk*).

20. Mr Tippett QC relied upon the decision of *Pengilly v Northern Territory of Australia,* a decision of Mr Bradley CM delivered on 11 June 1999. The background to that matter was (as summarised by Mildren J on appeal, *[1999] NTSC 131*) as follows:

> [2] The appellant worker was employed as a cleaner by the respondent. In 1993 she sustained an injury to her right arm in the course of her employment. Following surgery, the worker contracted dermatitis. Liability for compensation under the Act for the injury and the dermatitis was accepted by the employer. In December 1993, an attempted return to work program was commenced. This proved to be unsuccessful. The worker ceased work in July 1994, and has not worked since.
>
> [3] In 1996, the worker's solicitors raised the question of a payment of compensation for permanent impairment under Subdivision C of Part V Division 3 of the Act, commonly referred to as "lump sum" compensation - a misleading description as the entitlement is not paid by way of redemption of weekly compensation, but as compensation for permanent impairment additional to that otherwise payable under the Act . "Impairment" is defined by s3(1) of the Act to mean "a temporary or permanent bodily or mental abnormality or loss caused by an injury", and "permanent impairment" is defined by s70 of the Act to mean "an impairment or impairments assessed, in accordance with the prescribed guides, as being an impairment, or combination of impairments, of not less than five percent of the whole person".
>
> [4] Following an exchange of correspondence between the solicitors for the appellant and the respondent's insurer, a negotiated settlement of this claim was reached, based on an

assessment of the physiological impairment assessed by a Dr Butcher, and a dermatological assessment of impairment by a Dr Simmons, which resulted in a payment of $60,685:04 to the appellant. The dermatological assessment arrived at by Dr Simmons was one of 10-24 percent of the whole person, 24 percent being adopted by the parties for the purposes of calculating the settlement figure.

[5] Subsequent to the settlement and payment by the employer of the settlement sum, the worker's solicitors received a medical report from the employer which indicated that there was a possibility of a larger degree of impairment for the dermatological injury than that which had been relied upon for the purposes of the settlement. The worker's solicitors wrote to the insurer seeking a reassessment of the lump sum settlement, but this request was denied, and the worker brought an application in the Work Health Court seeking to have the matter of her entitlement under s71 of the Act resolved by the Court. A number of issues were raised in the Work Health Court by the employer which, if successful, were designed to prevent the Court from determining the issues on the merits. It is not necessary to mention them all, but they included, as may be expected, a claim by the employer that the matter having been settled and payment made could not now be reopened.

21. Accordingly, the facts were somewhat unusual. As part of the case before Mr Bradley CM, the employer argued that the provisions of *s 72* precluded an alternate method of determination. Mr Bradley CM said the following in paragraph 28:

28. The question then still to be determined is the issue of whether it is possible to bring an application to the Court for the assessment of lump sum compensation. I have reached the view that the Act does not preclude a worker from making an application under s 104 to the Court to exercise its jurisdiction under s 94 to determine the amount of "permanent impairment" that the worker has suffered and thus the monetary entitlements. I have reached this view for the following reasons:

28.1 The matters referred to by Mr Trigg SM in his judgement in *Clayton's* case. This is because it becomes clear for the reasons identified by Mr Trigg that s 72 cannot be a

complete code for the determination of rights to compensation for “permanent impairment”.

28.2 s 70-72 do not specifically exclude alternative procedure which are separately provided for under the Act.

28.3 s 94 and s 104 specifically entitle a claim to be brought before the Court for compensation under Pt V and thus for compensation for permanent impairment.

28.4 That s 70-72 are drawn, in my view, to provide an administrative process which the parties may agree to follow for the determination of questions as to permanent impairment, but not a code for the determination of questions of entitlement.

28.5 That the welfare nature of the legislation is such that it would be inappropriate to interpret the Act in a restrictive way to prevent dispute such as the one before the Court now to be finally determined by a curial process.

(underlining added)

22. It is clear that Mr Bradley CM was referring to what I noted at pages 10-11 in *Ogilvie,* as reproduced by him (but only in part) in paragraph 18 of his decision. However, with respect I have some reservations about Mr Bradley CM’s “view that the Act does not preclude a worker from making an application under *s 104* to the Court to exercise its jurisdiction under *s 94* to determine the amount of “permanent impairment” that the worker has suffered and thus the monetary entitlements”. Mr Bradley CM took a pragmatic approach (in my respectful view) to the problem that confronted him.

23. It has often been noted (and found) that the Act is poorly drafted beneficial legislation. This is another example of it perhaps raising more questions that it answers.

24. I agree that *sections 94 and 104,* do not specifically exclude issues of permanent impairment. However, His Honour’s view doesn’t address (in my view) what he says the Court’s role is in the process. If His

Honour is suggesting that the procedures in *sections 71 and 72* are just one option available, with the other option being to have the Work Health Court determine the issue rather than a medical practitioner or medical panel, then I would respectfully be unable to agree with that. In my view, this would be contrary to the clear intention of those sections and doesn't address *section 72(4*).

25. His Honour's decision went on appeal to the Supreme Court. Mildren J heard the appeal and his decision is reported in *[1999] NTSC 131.* It does not appear to have been argued on appeal that Mr Bradley CM did not have power to deal with the issue of assessing "permanent impairment", and accordingly that decision does not assist me in the instant case (save to note that Mildren J, did not raise any reservations that this may have been an issue).

26. Subsequently, Pengilly obtained a subsequent assessment of "permanent impairment" from a medical panel due to a deterioration of her dermatitis. This determination was for 60%, and it does not appear that this was ever sought to be challenged. A dispute then arose as to how the entitlement was to be calculated having regard to monies already paid to her for the earlier assessment. This matter also went on appeal to Mildren J in the NT Supreme Court, and his judgment is reported as *[2003] NTSC 91.* This judgement does not address the issues herein.

27. On 11 May 2000 I delivered ex tempore reasons in the matter of *Morrison v Mayne Nickless Limited,* which reasons were typed up on transcript. At pages 2-11 of the transcript (as now edited by me, but only to correct spelling, grammatical or typographical errors) I stated as follows:

> This proceeding was commenced by the worker on 7 May 1999 when he filed an application for compensation. The worker's

Statement of Claim contains some 14 paragraphs. I won't read the statement of claim onto the transcript but the Statement of Claim should be read as forming part of my reasons.

The Statement of Claim is silent as to whether the panel has in fact made an assessment of the worker's level of permanent impairment, and if so what this assessment was. It seems implicit in the pleading that some assessment has been made by the panel, but in my view this should have been specifically pleaded. I think at this stage nothing turns upon that.

Paragraph 12 of the Statement of Claim seems to be a pleading that would be more at home in a judicial review matter. This impression is confirmed by the relief sought in paragraphs 14(a) and (c). This Court was initially being asked to set aside any assessment by the panel (see the relief sought in paragraph 14(a)), assuming one has been made, and then either substitute its own assessment (see the relief sought in paragraph 14(b)), or remit the matter back to the panel (see the relief sought in paragraph 14(c)), for reassessment, supposedly with some findings or directions. There is no express power in the Act for this Court to do any of those things.

In the course of argument Mr Southwood abandoned his submission in paragraph 19 of his written submission. Paragraph 19 said:

"The Work Health Court could clearly review the workings of the medical panel, quash its decision and refer.....the assessment according to law."

That part of paragraph 19 in the submission was withdrawn by Mr Southwood, and I think correctly so. It seems to follow from that that the relief sought in paragraph 14(c) of the statement of claim appears to have been, by implication, abandoned.

That still leaves the relief in paragraphs 14(a) and 14(b) as the relief that is sought. There is no express power in the Act for this Court to do either of those things. This Court is a Court of statue and has no inherent power, therefore Mr Southwood appears to be relying on some implied power. In my view a power should only be applied where it is necessary to give effect to an express power.

The worker's Statement of Claim raises some very important issues concerning the role of this Court in assessments of

permanent impairment under Part 5 Division 3 Subdivision C of the Work Health Act, hereinafter referred to as 'the Act'. A substantive hearing of the claim herein, along with a claim involving a section 69 notice by the employer, is listed to commence on 15 May 2000.

As a consequence I listed this matter for legal argument on 24 March 2000 to argue the preliminary issue, as to whether the proceedings should go to hearing or whether it should be struck out as incompetent. At the completion of the argument on that day I reserved my decision. I then went on leave immediately for 2 weeks and so there has been some difficulty in trying to get a decision in time.

Subdivision C of Division 3 of Part 5 of the Act is in the following terms. I won't read that onto the transcript but clearly that whole subdivision forms part of my reasons in this matter as it is the sections which this decision is primarily involved with.

In paragraph 4 of the worker's written submissions Mr Southwood submits: 'what Subdivision C appears to provide is compensation for permanent impairment, the assessment of which is a peculiar medical assessment'. I agree with that submission. He goes on to say: 's70 provides permanent impairment means impairment assessed in accordance with the prescribed guides', and I agree with and accept that submission.

In paragraph 5 he goes on to say: 's72(4) of the Work Health Act provides an assessment made by a panel under subsection (3A) as to the degree of permanent impairment of a worker is taken to be the degree of permanent impairment for the purposes of s71'. I agree with and accept that submission.

In paragraph 6 he says: 'that the above is so, it does not necessarily preclude the Work Health Court from having jurisdiction in relation to such claims for compensation, nor reviewing a determination of the panel. Nor does it preclude judicial review of the panel's determinations by the Supreme Court.' I agree with the last sentence, it is the first sentence of paragraph 6 which seems to be the matter for decision by me today.

I agree that s72(4) of the Act on its face is not in such clear language that it expressly precludes this Court from having

jurisdiction in relation to permanent impairment matters. The legislation has to be looked at as a whole to see if the legislative intent can be ascertained. The preamble of the Act states that it is:

"An Act to promote occupation health and safety in the Territory, to prevent work place injuries and diseases, to protect the health and safety of the public in relation to work activities ..... proper administration of the Act and for related purposes."

It is obvious that not all of the aims as stipulated in the preamble are within the jurisdiction of this Court. This Court was established by s93 of the Act. For example, the Act also establishes the Work Health Authority in s6 with the functions set out in s10 and the power set out in s11.

It is clear that the Work Health Authority and the Work Health Advisory Council and the Scheme Monitoring Committee and the Nominal Insurer are bodies which have a number of functions, a lot of which are largely administrative in nature, and that these bodies are independent of and separate from this Court.

In particular this Court, under the Act, has no general supervisory jurisdiction over the way that any of these bodies perform their functions. It would therefore follow that this Court has no general power to direct any of these bodies to perform or not to perform any of their functions in a particular way unless there was some particular power granted in the Act.

As for the Work Health Authority, s111, read with s113, clearly suggest that the Court does have a role in relation to determinations of the Work Health Authority, but only where a right to apply has been granted. It's noted that s111 expressly does not apply to anything under Part 5.

The right to appeal or apply to this Court from a decision of the Work Health Authority appears, from my going through the Act, to be limited to s43 of the Act which deals with improvement or prohibition notices. In particular I note that as Part 5 is expressly excluded from s111 matters, any decision of the Work Health Act, under Part 5, cannot be the subject of review under s111.

Therefore any decision of the Work Health Authority not to refer an assessment of permanent impairment to a panel under s72(3)(a), or indeed a decision to refer an assessment to a panel for reassessment, cannot be the subject of a review under s111. Therefore this Court cannot exercise any of the options or powers or remedies under s113 of the Act in relation to any such decision.

The Act has repeatedly been referred to as beneficial legislation, which I agree that it is, and often and regularly referred to as legislation that is poorly drafted. I think that is somewhat self-evident. The poor drafting has never been properly addressed and the myriad of amendments have only, in some cases, compounded rather that alleviated the drafting flaws.

It is often difficult, and sometimes impossible, to try and ascertain a clear meaning or legislative intent from reading the Act. The Act as a whole does not necessary fit together well; there is a lack of consistency in language use throughout the Act. Some simple examples of these are, for example, s85(8), which says: 'at the same time as an employer notifies a claimant under this section that the employer dispute liability for compensation claimed, the employer must give the claimant a statement in the approved form, (a) setting out the reasons etc, (b) to the effect that if the claimant is aggrieved by the employer's decision to dispute liability the claimant may apply' – and I understand the words 'may apply' – 'to the authority to have the dispute referred to mediation'.

Then in s69(1)(b) of the Act the language there is that:

Subject to this Subdivision an amount of compensation under this Subdivision shall not be cancelled or reduced unless the worker.....to have the dispute referred to mediation.

But when one compares those sections with s86(2)(b) which is where the worker applies to increase or decrease the level of weekly payments under ss(1), all the employer has to do, if the application is rejected, is advise the worker of the decision and the reason for the decision. There is no need to advise of any right to apply; no need to advise of any right to appeal. On that the section is silent. One wonders why.

The Supreme Court has held that in relation to the previous s69, which used to deal with the right to appeal, that the word

‘appeal’ didn’t mean appeal in the strict sense. The section as now – the word ‘appeal’ still exists in s69, because it’s the worker, after going through mediation, may then appeal.

No actual right to appeal is created, but one has been implied by the courts on the basis that it would be a nonsense to advise a party of a right to appeal if one in fact does not exist. So it’s an example of where the courts have had to interpret the Act in such a way as to give it some force and meaning, and where they have implied a power to appeal because otherwise the wording in those sections would be a nonsense, and the court are reluctant to turn Acts into a nonsense.

This Court clearly has jurisdiction over matters in Part 5. In addition this Court seems to have jurisdiction over some matters in Part 4, for example s43 appeals, and also there are some matters in Part 6A and Parts 7, 8 and 9 which directly relate to the Court and relate to how the Court performs its functions.

Therefore there are some sections in those parts which also attract the jurisdiction of the Court and affect the way the Court exercises its jurisdiction. But it’s not purely Part 5 which the Court has exclusive jurisdiction over.

It appears that this Court was not intended to have primary jurisdiction on all matters arising under the Act. I say that this is evinced by the fact that the Act creates numerous offences throughout the Act but his Court does not hear and determine those matters.

Any charge laid for a breach of the Act is heard and determined in the Court of Summary Jurisdiction and not in this Court. So that indicates that the Work Health Court is not the overall Court having control over the Act and total supervision of the Act. If it were then one would think it would also deal with all offences under the Act as well.

However when one looks at it, it is clear that that is not necessarily the case. A number of offences are specifically created in Part 5, specifically in s75A(1), 75A(2), 84(5), 85A(2), 88(1), 90 and 90A, and although, in my view, these could all be characterised as matters falling within the words in s94, it is clear that this Court does not deal with any charge that may be laid in relation to any offences under those sections.

Pursuant to s179(a) of the Act no information or complaint shall be laid except with the approval in writing of the Work Health Authority. This Court has no express power to review any decision which the Work Health Authority may decide to make in relation to the laying or not laying of a charge. That would be consistent with generally courts not interfering with prosecutorial discretion.

It would not seem possible to imply one as offences in Part 5 would be expressly excluded anyway. It would therefore, in my view, be a nonsense to imply a power only in part of an Act but not in the whole. So it's clear that any decision the Work Health Authority may make in relation to whether or not to lay a charge is something in which the Work Health Authority has no jurisdiction.

Section 178 of the Act is problematic as it seems to have the potential of turning the whole Act from beneficial legislation to a penal statute as any contravention or failure to comply with any provision of the Act is an offence or possible offence under the legislation.

Compensation is defined in s31(a) of the Act to mean: 'a benefit or an amount paid or payable under this Act as a result of an injury to a worker". And in sections 132 to 137 inclusive and s167 includes (a) an amount in settlement of a claim for compensation and (b) costs payable to a worker by an employer in relation to a claim for compensation.' Clearly compensation for permanent impairment is, on its face, compensation under Part 5. Clearly it falls within the general definition of compensation.

Section 72(2) of the Act says: 'the level of permanent impairment for the purposes of s71 shall be assessed in the first instance by a medical practitioner'. In my view the word 'shall' in this context is intended to be mandatory. It is, in my view, not open to a worker or employer to bypass the procedure in s72 and apply to this Court ab initio. Therefore if a party wishes to have an assessment of permanent impairment done then the starting point is that it must be assessed first by a medical practitioner and, in my view, no alternative is available.

Once this initial assessment is done, then under s72(3): 'where a person is aggrieved by the assessment of the level of permanent impairment by a medical practitioner, the person may, within 28 days after being notified of the assessment,

apply to the authority for a re-assessment of that level.' Again this appears to be an administrative action and one which the Court is not involved in. It's an application to the Authority to perform an administrative function, that the Court is not involved in that.

In my view the use of the word 'may' in subsection (3) does not have the result that an aggrieved party has a choice between, on the one hand, applying to the Work Health Authority for re-assessment or, on the other hand, applying to this Court under s104 in the alternative. Rather, the use of the word 'may', in my view, merely gives a choice to an aggrieved party to either apply to the Work Health Authority for a re-assessment or, do nothing.

If a party does nothing then this is seen to have the effect that they must be taken to have accepted the assessment. The Act is silent as to whether this assessment can ever be re-opened in the future and, if so, how. Likewise the Act does not expressly say that if no application to the Work Health Authority is made within 28 days that that is the end of the matter. Nor does the Act suggest any discretion in the Work Health Authority to refer a re-assessment to a panel after the 28 day stipulated period on any grounds.

As I've noted earlier, s72(3B) gives the Work Health Authority a discretion whether to refer a re-assessment to a panel or not. It's not simply a question of receiving an application and referring it on. Under ss(3B): 'the authority is not required to refer an application to a panel unless satisfied the assessment was properly conducted and is in accordance with the guides prescribed for the purposes of the definition of permanent impairment in s70'. So apart from merely performing an administrative function the authority also a decision making process and it does not have to refer a matter on and has a discretion.

However, pursuant to s111 of the Act as noted earlier, this Court expressly is precluded from reviewing the exercise of that discretion by the Authority (as Part 5 is excluded). This would appear to be inconsistent with the argument that this Court has jurisdiction to hear and determine any matters or questions arising out of a claim under s71 because, clearly, the Court does not have jurisdiction to review a decision of the Authority under 72(3B).

If this Court has no jurisdiction to review or reconsider a decision of the Work Health Authority under s72(3B) then it must follow that this Court could never direct the Work Health Authority to review an assessment to a panel, nor could it revoke a decision of the Work Health Authority to refer a matter to a panel. This, in my view, is a strong indication that this Court has no role to play at all in the assessment of permanent impairment.

The legislature appears to have accepted that an assessment of permanent impairment is purely a medical one, and Mr Southwood, in paragraph 4 of his written submissions, has agreed that the assessment is a peculiarly medical assessment. In this regard it seems that the legislature may have chosen to keep the matter within the medical area exclusively and to keep the lawyers and this Court out of the arena altogether.

Under s72(4) it says: 'an assessment made by a panel under Subsection (3A) as to the degree of permanent impairment of a worker shall be taken to be the degree of permanent impairment for the purposes of s71'. In relation to the word 'shall', Mr Southwood submits in paragraphs 11 and 12 of his written submissions as follows:

"Section 72(4) does not purport to oust the jurisdiction of the Court to make determinations in relation to matters incidental…….no appeal or review. The legislature has not done so."

Mr Grant in his submissions takes issue with those submissions and says that the submission is the wrong way around. He says, and I hope I don't do injustice to his argument, as I understand his argument he said that it is not for the legislature to exclude a right of appeal but rather create one, as if no right is created then none exists. I respectfully think that the submissions of Mr Grant in that regard have some merit.

A right to apply to a court is something which must be expressly granted and a right to review a decision, or appeal from a decision, again, is something which should be expressly granted. Throughout the legislature and throughout the Act the rights to apply to the Court or a right to appeal (with the exception of s43 decisions by the Work Health Authority), are primarily decisions between the worker and the employer where the worker has either taken a decision on a particular matter or

the employer has taken a decision, for example, to reject a claim. They are inter parties disputes.

This one is, effectively, a review or appeal from a decision of supposedly a medical panel which is independently created in the legislation.

The now repealed s91F is of some interest. Section 91F dealt with medical review panels which were panels which were at one stage set up in the decision making process in relation to s85 where there was a dispute on medical issues and there was to be this review panel which would make a decision. Under s91F it said:

A determination of the panel in respect of an application under s91B(2) shall be final and conclusive in resolving..... construed as prohibiting a person commencing proceedings under Part 6.

That is a most unusual provision because it purports on the one hand to make a final and conclusive decision, yet on the other hand it allows proceedings before the Court and, presumably, therefore the Court to make a decision which would stop the decision of the panel being final and conclusive.

It appears the language is somewhat oxymoronic, however that is in effect the same submissions that Mr Southwood makes in terms of the current wording of s72(4). He seems to be arguing that that should be read as meaning, namely, that the re-assessment by the panel shall be the level for the purposes of s71 unless and until this Court rules otherwise.

If that's what s72(4) means then it wouldn't have been necessary for the wording in s91F because the same wording could have applied with the same result. The wording in s91F is clearly different to the wording of 72(4), and clearly was intended to have the effect which Mr Southwood argues s72(4) should be read as having. The two sections are, on their face, inconsistent. Further, if, as Mr Southwood contends, s72(4) has the meaning that s91F contemplates anyway, then the extra wording in s91F would appear to be mere surplusage and unnecessary.

I think that the Act looked at as a whole contemplates that in general terms this Court has jurisdiction to resolve disputes and questions between the worker and the employer or those

who claim through them, or who may be liable through the employer such as an insurer or the nominal insurer. In addition it has express jurisdiction to hear an appeal under s43.

Matters of offences are not dealt with by this Court but are dealt with elsewhere. There's no express power to review or reconsider a re-assessment by the panel, and none is expressly contemplated in the Act. There's no express power in the Act to set aside any re-assessment by the panel or make any order as contemplated in s113 as that is expressly excluded in relation to matters under Part 5, or substitute an assessment for any assessment by the panel.

On the face of it, if this Court had jurisdiction but couldn't set aside a decision of the panel; you'd have a decision of the panel which under the Act shall be the level of permanent impairment for the purposes of the assessment under s70; and you then have a determination of the Court which might be different but is not having the same effect.

The matter is not clear from doubt; it is a very difficult provision to sort out. The legislative intent is very difficult to ascertain. It would have been certainly simpler if matters under Subdivision C could have been expressly excluded from s104 if that was the intention to do so. But it hasn't been the case.

I've come to the view that this Court has no jurisdiction to make any assessment of permanent impairment, either in the first instance or subsequently. I am further of the view, that this Court has no jurisdiction to look behind the re-assessment of the panel at all. I am further of the view, that this Court does not have power to (a) set aside any assessment in the first instance, (b) order a new assessment in the first instance, (c) make its own assessment in the first instance either initially or in substitution for another assessment, (d) direct the Work Health Authority in any way on any matters involved in s72, (e) set aside any re-assessment by the medical panel, (f) order a re-assessment by the medical panel or (g) make its own re-assessment in substitution for the assessment by the panel.

The whole way the matter is pleaded as noted earlier suggested a judicial review of the panel's decision and an allegation of denial of natural justice. These are matters which this Court has no express power to deal with. I do not think the general powers of this Court are so clear in this regard that such a power should be implied.

It is not clear that the legislature even turned its mind to or contemplated that a challenge to a panel's decision might occur. If it hasn't turned its mind to it then I think it was clearly an oversight. It should always be anticipated that any decision making process might always be subject to grievance or challenge.

If it were intended for this Court to have had the power to direct the panel or review a panel's decision or substitute its own decision for the panels then, in my view, s111 to s114 would have been the appropriate place for that to occur and they should have been appropriately amended or drafted so as to expressly incorporate matters under Subdivision C of Division 3 of Part 5 in that process rather than excluding all matters under Part 5.

That would have been the appropriate place for such a right to occur because the matters in s113 to 114 sit far more comfortably with what the worker is in fact asking in this matter than does the powers – general powers, under section 104.

In reaching this decision I have been mindful of the beneficial nature of the legislation and that any ambiguity should be resolved in favour of a worker wherever reasonably possible. However I am mindful that it may not be always the worker who is the one who is aggrieved by or wishes to challenge a decision of the panel, and it may well be that it might be an employer who is unhappy and the worker is more than happy with the panel's assessment. So I don't think that the interpretation which I have put on the Act affects or alters the beneficial nature of it.

I have read and considered the decision of Bradley CSM in the case of *Pengilly v The Northern Territory*, a decision which the learned Chief Magistrate delivered on 11 June 1999. I am respectfully unable to agree with all of that decision, and in particular paragraph 28 thereof.

I would also respectfully not agree fully with all of the opinions which the learned Chief Magistrate has expressed in paragraphs 49 to 54 of that decision. It is not necessary for me to go into details in relation to that, I think that my decision herein indicates the matters with which I have some problems.

In the decision of *Clayton v Top End Wholesale Distributors*, a decision of myself of 22 March 1996, I express some obiter

views at the bottom of page 29 and over to the top of page 30. In the light of this matter, which has now been argued before me, I am not now confident as to the correctness of all of those views which I expressed therein but I will leave that open to be reconsidered in an appropriate case on another day.

However, I do note that where I said at page 30 of that decision: 'further it would seem to be open (in an appropriate case) for the Court to expand the 28 day requirement laid down in s72(3) (s94(2)) where the justice of the case required', clearly that comment by myself was in error. Section 94(2) only deals with a time limit prescribed in Part 6, and therefore could not be used to expand the 28 days period in s72(3) which is in Part 5 of the Act.

I had further cause to consider these sections in *Ogilvie v Woolworths SA Limited*, a decision of myself 6 December 1994. I have reconsidered the comments which I made in that matter based on the full argument before me herein. Nothing in this case causes me to alter any of the views that I expressed under the heading: 'D can permanent impairment be the subject of or dealt with in a s101 agreement?'.

This decision does not mean that an aggrieved party is totally without a remedy. It may be that, subject to any time difficulty, that the Supreme Court would have jurisdiction under Order 56 of the Supreme Court Rules. In the end result I find that this court has no jurisdiction to hear and determine the claim as pleaded and has no power to grant any of the relief sought.

(underlining added)

28. Dr Lowndes SM considered these same provisions in *Hand v Alcan Gove Pty Ltd [2007] NTMC 041.* However, he was not considering them in the same context that I am being asked to. At the commencement of that decision His Honour summarised the issues before him as follows:

> 1. The present proceedings give rise to some interesting and important issues of law. Basically, the worker seeks a number of rulings, referable to lump sum entitlements pursuant to section 71(1) of the Work Health Act:

(i) A ruling that any one, or some, or all of certain surgical procedures performed on the worker in January and September 1992, February 1993, July 1995, May 2000, May and August 2001 and February 2004 were injuries within the meaning of the definition in section 3 of the Work Health Act;

(ii) A ruling that lump sum payments made to the worker pursuant to s 71(1) of the Act in 1995 and 2002 on account of his percentage permanent impairment of the whole person arising from the injury should have been calculated at 208 x the appropriate weekly earnings rather than 104 x the appropriate average weekly earnings;

(iii) A ruling that the 20% permanent impairment of the whole person assessed in respect of the worker's knee dysfunction set out in the report of Dr Colin G Mills dated 18 December 2005, relates to the worker's replaced knee, which constitutes a different injury from the knee injury assessed and compensated for in 1995 and 2002, although one arising from the injury;

(iv) A ruling that each of the assessments made by Dr Mills in his report dated 18 December 2005 of 7% permanent impairment of the whole person for pain and 5% of the whole person for scarring and cosmetic defects in respect of the worker arising from the injury, are assessments in respect of permanent impairment aspects of the worker arising from the injury which had not previously been assessed or compensated for in 1995 and/ or 2002.

The worker also seeks concomitant orders, which are as follows:

(i) An order that the worker is entitled to further sums for his percentage permanent impairments of the whole person than he was paid in either or both of 1995 and 2002, in such amount as the Court determines; and

(ii) An order that the worker is entitled to further sum or sums for his current percentage permanent impairment of the whole person as assessed by Dr Mills in his report dated 18 December 2005, again in such amount as the Court determines.

2. The worker also seeks an order that the employer pay to the worker his costs of assessments conducted by Dr J Begg, Dr J Meegan and Dr G Mills in the total amount of $1,925, together

with interest thereon pursuant to s 109(1) of the Act. Finally, the worker seeks an order for costs of and incidental to the proceedings.

29. Accordingly, Dr Lowndes SM was being asked to consider issues that were clearly within the jurisdiction of the Work Health Court. He was not being asked to embark upon his own assessment of the level of "permanent impairment" and nor did he do so. The issue before His Honour was causation, and it was on that basis that His Honour said the following at paragraphs 309-323 of his decision:

> 309. As referred to earlier, Mr Grant sought to impugn the accuracy and reliability of Dr Mills' report by highlighting its evidentiary deficiencies, arising primarily out of its failure to apply and follow the prescribed Guides.
>
> 310. As pointed out by Mr Grant, "it is permissible for the Court to analyse assessment reports for the purpose of determining whether they have been compiled in accordance with the prescribed Guides, and whether they support the claim for a further payment for permanent impairment: see *Pengilly v Northern Territory of Australia [1999] NTSC 131*".
>
> 311. Apart from the issue of the application of the Guides, expert witnesses are expected to refer to and state the assumptions of fact and evidence upon which they have based their opinions and from which they seek to draw particular inferences, so as to enable a court to evaluate the accuracy or reliability of the expert testimony. As stated by Ligertwood 4th Edition of Australian Evidence [7.68], p 505:
>
> The facts which form the basis of expert opinion must be capable of proof by admissible evidence. If no evidence is tendered, the whole foundation of the expert testimony may disappear, so rendering that testimony irrelevant: see *R v Haidley and Alford [1984] VR 229 at 250-251; Paric v John Holland Constructions Pty Ltd (1985) 62 ALR 85*.
>
> 312. The following commentary appears in Cross on Evidence 6th Australian edition, [29065], p 821:
>
> The facts upon which an expert's opinion is based must be available for scrutiny by the tribunal. A court can hardly be

expected to act upon an opinion the basis for which is not explained by the witness expressing it. This means that the factual basis of the opinion must be identified and proved.

313. The effect of *Regulation 9(1) of the Work Health Regulation*s, read together with *s 187(2) of the Work Health Act,* is to incorporate into the regulations the whole of the text of the 4th edition of the American Medical Association Guides to the Evaluation of Permanent Impairment.

314. Those Guides not only prescribe the processes of assessment, but, properly applied, provide the primary or intermediate facts upon which a medical assessment of permanent impairment is based. They also demonstrate the chain of reasoning which produced the conclusion arrived at by the medical practitioner. The Guides also provide a standard by which the reliability of an expert's opinion can be evaluated by the Court.

315. The fact that, pursuant to *Rule 18.06(2) of the Work Health Court Rules*, the medical report of Dr Mills was admissible as evidence of the doctor's opinion, the fact that no other medical evidence was presented with a view to contradicting Dr Mills' opinion, combined with the fact that the employer did not require the doctor to attend for cross-examination, does not mean that the Court is bound to accept the doctor's opinion. There must be a proper basis for the opinion before the Court can act upon that opinion as a reliable assessment of permanent impairment.

316. A fundamental difficulty with the report of Dr Mills is that it does not establish a causal nexus between the postulated injury – ie the total knee replacement – and the assessed level of permanent impairment. As submitted by Mr Grant, the impairment in question must be caused by an injury arising out of or in the course of employment; and compensation for permanent impairment is payable only if the injury results in or materially contributes to the impairment.

317. No where in his report does Dr Mills express an opinion as to there being a causal relationship between the total knee replacement and the 30% permanent impairment assessment (either as a whole or broken down into its components) that he made in relation to the worker. In my opinion, one cannot draw an intuitive inference or presumptive (prima facie) inference from the fact that the total knee replacement caused and

resulted in or materially contributed to the worker's impairment as assessed. The sequence of events "would not inspire in the mind of any common sense person" – to use the words of Rich J in *Adelaide Stevedoring Co Ltd v Forst (1940) 64 CLR 538 at 563-4)* – that the surgery caused and resulted in or materially contributed to the assessed impairment.

318. If any intuitive inference is to be drawn from the subsequent surgeries performed on the worker it is that the surgery produced positive results. Indeed, the tenor of the various reports is along those lines.

319. For the sake of completeness, I agree with Mr Grant's general submission that there is no evidence that the impairment claimed was caused by the subsequent surgeries (including the total knee replacement) performed on the worker.

320. On top of the fundamental difficulty with Dr Mills' report, there is, in my opinion, insufficient material in Dr Mills' report to show that the process of assessment adopted by him was in accordance with the Guides. In a number of respects the Guides were not followed by Dr Mills. They are generally as outlined by Mr Grant. A bare statement that Dr Mills used the Guides in calculating the percentage of permanent impairment, or that one could infer from the doctor's experience that he applied the guidelines in arriving at his final assessment, is not sufficient to establish that the doctor, in fact, followed the various prescribed antecedent processes before arriving at his final conclusion in relation to the worker's whole person permanent impairment. By way of example, in *Pengilly* the medical practitioner's compliance with the Guides was questioned and found to be wanting.

321. The real point is that Dr Mills' report does not overtly demonstrate compliance with the Guides as set out earlier in these reasons for decision. As a result the doctor's chain of reasoning is also not overtly demonstrated. In turn, this means that the primary or intermediate facts upon which the doctor's final assessment was made are not disclosed in the report. The basis for the doctor's opinion has not been established to the satisfaction of the Court. Accordingly, Dr Mills' opinion has little probative value. The doctor's assessment cannot be accepted as being reliable.

322. There is the added problem that the Court cannot be satisfied, on the evidence, that the total knee replacement gave

> rise to an impairment greater than the threshold requirement of 5% of the whole person. This problem also presents in relation to the earlier surgical procedures.
>
> 323. Therefore, even if the Court had been persuaded that each of the surgical procedures (including the 2002 total knee replacement) constituted a fresh injury within the meaning of the Act, and that those injuries caused and resulted in or materially contributed to a permanent impairment, the Court would not have been able to be reasonably satisfied as to the reliability of the permanent impairment assessment made by Dr Mills and that the level of impairment exceeded the 5% threshold.

30. Accordingly, in my view, when this decision is considered in light of the issues that were alive then this decision is not an authority that supports the argument of either counsel herein. His Honour's comments at paragraphs 320, 321 and 323 are clearly obiter. This decision went on appeal, and the appeal was heard by Mildren J *[2008] NTSC 25.* However, that decision again was on the causation aspect and the meaning of "injury". Accordingly, it does not assist in the instant case.

31. Dr Lowndes SM further considered the provisions in the case of *Taylor Enterprises (NT) Pty Ltd v Pointon & Work Health Authority [2009] NTMC 029.* His Honour set out the factual background as follows:

> 6. By way of letter dated 17 February 2009 the worker's solicitors wrote to the employer's solicitors enclosing a copy of a report from Dr Walton which contained a purported assessment of permanent impairment. That correspondence represented the first notification by the worker to the employer of a claim for compensation for permanent impairment.
> 7. By way of letter dated 24 February 2009 the employer disputed that the report was an assessment of permanent impairment, but sought to preserve its position by seeking a permanent impairment re-assessment in accordance with s 72(3) of the Workers Rehabilitation and Compensation Act.
> 8. Against the background of what is essentially a dispute

> between the worker and the employer as to whether the report was an assessment of the level of permanent impairment caused by the injury for the purposes of s 72 of the Act, the Work Health Authority declined to advise the employer that Dr Walton's report did not amount to an assessment for the purposes of s 72 or to suspend or cease the process prescribed by the section.
> 9. In support of the interlocutory application the employer submitted that it was appropriate for the Work Health Court to make an order effectively staying the proceedings under s 72 of the Act until the substantive dispute as to the alleged psychiatric injury has been determined by the Court. The employer submitted that this could be achieved by restraining the Work Health Authority from acting on the employer's request until the matter has been determined.

32. Accordingly, in that case the Court was not being asked to make it's own assessment of "permanent impairment". Rather, the Court was being asked to stay the Work Health Authority from taking any steps under *section 72* until the issue of causation was determined. For the reasons mentioned in *Morrison v Mayne Nickless Ltd* (supra: namely from a reading of *sections 111 and 113 of the Act*) I am unsure whether I would have entertained such an application. His Honour did, and then went on to consider the relevant sections of the Act as follows:

> 10. As the employer's interlocutory application is predicated upon a particular view of the Workers Rehabilitation and Compensation Act insofar as it relates to compensation for permanent impairment, it is necessary to examine the relevant legislative provisions with a view to divining the statutory scheme.
>
> 11. Section 71 of the Act provides for compensation for permanent impairment.
>
> 12. Subsections (1), (2) and (3) stipulate the percentage of compensation payable referable to the degree of permanent impairment.

13. For the purposes of the compensatory scheme, “permanent impairment” is defined in s 70 of the Act as meaning “an impairment or impairments assessed, in accordance with the prescribed guides, as being an impairment, or combination of impairments, of not less than 5% of the whole person”.

14. “Impairment” is defined as “a temporary or permanent bodily or mental abnormality or loss caused by an injury”: s 3. “Injury” is defined in s 3 as a physical or mental injury arising out of or in the course of a worker’s employment, including a disease and the aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease.

15. Section 72 of the Act provides the mechanism for the assessment of the degree of permanent impairment. The process is set in train by a medical practitioner assessing the level of permanent impairment: s 72(2). Section 72(3) provides that where a person is aggrieved by a medical practitioner’s assessment, that person may, within 28 days after being notified of the assessment, apply to the Work Health Authority for a reassessment of that level of permanent impairment. Subject to one exception, the Authority must, as soon as practicable after receiving such application, refer the application to a panel of three medical practitioners to reassess the level of permanent impairment: Section 72(3A). The exception is that the Authority is not required to refer an application to a panel unless it is satisfied that the assessment was properly conducted in accordance with the guides prescribed for the purposes of the definition of “permanent impairment” in s 70: s 72(3B).

16. Section 71(4) (a) and (b) prescribes the time within which compensation payable under ss 71(1), (2) and (3) is to be paid. Compensation is to be paid to a worker within a period of 14 days after the end of the 28 day period allowed for an application for reassessment, or, if there has been an application for reassessment, within 28 days after the worker is notified of the reassessment.

17. It is clear that a worker’s entitlement to compensation for permanent impairment depends upon the impairment – a bodily

or mental abnormality, whether temporary or permanent – being caused by an injury as defined in s 3 of the Act. Once that entitlement exists, the amount of compensation payable to a worker is calculated in accordance with the formula set out in s 71 by reference to the level of permanent impairment, which must be assessed according to process specified by s 72.

18. Given that a permanent impairment must have been caused by an injury in order to be compensable, whose responsibility is it to determine whether the impairment was "caused by an injury". Is that the sole function of the Work Health Court? Or is that a matter that can be determined by the Work Health Authority or by a medical practitioner in the first instance or by a panel of medical practitioners during the reassessment process?

19. There is nothing in s 72 which either explicitly or by implication empowers the Authority to make such a determination. Nor is there anything in the section that confers such a power upon a medical practitioner or panel of medical practitioners.

20. It is clear that the role of a medical practitioner in the first instance and a panel of medical practitioners at the reassessment stage is confined to an assessment of a worker's level of impairment – that is, an assessment of the level of mental or bodily abnormality or loss.

21. That medical practitioners have no role to play in determining whether a worker's impairment was "caused by an injury" is not only plain on the face of s 72, but is supported by the definition of "injury". In order for a permanent impairment to be compensable, that impairment must not only have been "caused by an injury", but there must have been an injury within the meaning of the Act.

22. There can be no question that whether or not a worker has suffered an injury within the meaning of the Act is a matter to be determined by the Work Health Court. Whether or not a physical or mental injury arises out of or in the course of a worker's employment is an issue to be determined by the Court. Whether or not an injury is a disease or an aggravation,

acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease is again a matter for the Court. Similarly, whether or not an injury or disease suffered by a worker was a result of reasonable administrative or disciplinary action is a matter within the province of the Court.

23. As is apparent from the pleadings in these proceedings, whether the worker's alleged psychiatric injury is an injury within the meaning of the Act is a live issue, yet to be determined by the Court.

24. Just as proof of a compensable injury is a matter for the Court, the question of compensation for permanent impairment is largely determined by extra –curial administrative procedures and the operation of the statute: ss 71 and 72. Notwithstanding that clear division of function, there is authority that indicates that in some instances the Work Health Court has jurisdiction to hear and determine disputes concerning permanent impairment assessments under the Act, including whether a permanent impairment relates to an injury under the Act.

25. In *Clayton v Top End Wholesale Distributors* (unreported 22nd March 1996) Mr Trigg SM made the following observations, with which I concur:

"It is clear that there may be other issues in dispute between the parties other than the level of permanent impairment under s 71. These disputes can cover such matters as:

• whether the permanent impairment relates to an "injury" under the Act;

• whether a person was notified of the assessment of the level of permanent impairment on a particular date;

• whether the permanent impairment has already been assessed (and no application to reassess has been made within the 28 days required) and therefore is not open to be further assessed or reassessed;

• whether the permanent impairment was obtained by fraud or other unlawful means.

This list is not intended to be exhaustive, but simply an indication that the process is not necessarily always straightforward. Where disputes of this type occur, then in my view, the Work Health Court has power under s 94(1(a) to hear and determine these types of disputes. Further, it would seem to be open (in appropriate cases) for the Court to expand the

28 day requirement laid down in section 72(3) (section 94(2)) where the justice of the case required."

26. It follows that compensation payable under s 71 of the Act, and as a consequence of the administrative process established by s 72, is predicated upon the level of permanent having been caused by an injury which is compensable under the Act. The process under s 72 presupposes that the permanent impairment which is required to be assessed has been caused by a compensable injury, in respect of which the employer has accepted liability or the Court has made a determination. I agree with what Mr Trigg SM said in *Clayton v Top End Wholesale Distributors* (supra):
"Section 72 of the Act appears to be predicated on the assumption that liability for the "injury" (which has resulted in or materially contributed to the permanent impairment) has been accepted or found by the Court already. Accordingly, in my view, where the liability of the employer to pay compensation to the worker was either before the Court for determination, or had been properly disputed in accordance with the Act, it would be premature for any assessment of permanent impairment to be sought (by either side) until liability had been determined in accordance with the Act."

27. Accordingly, if an employer denies that the injury in question is compensable, and the Court has not yet determined that that injury is compensable, there is no statutory or legal basis for the commencement of the process established by s 72; any attempt to set in train the statutory process under such circumstances would be premature and not in compliance with the statutory scheme.

28. The worker argues that there is no need for the orders sought by the employer in its interlocutory application because of the operation of s 71(4) of the Act. The worker argues that by invoking the provisions of s 72(3) the employer has unnecessarily brought about the present interlocutory application. Further, the worker argues that in accordance with s 71(4)(a) no compensation of permanent impairment is payable under s 71 because the employer has not accepted liability in respect of the psychiatric injury (said to have caused the impairment), nor has the Court determined that the alleged injury is compensable. While that is the legal effect of s 71, the

worker's arguments ignore the fact that it is the worker who has instigated the s 72 process, in derogation of the clear object or purpose of that process, and by so doing has embarked upon and set in train a flawed process, which is likely to create mischief.

29. The process established by s 72 is founded upon a simple assumption that the permanent impairment which is to be assessed was caused by a compensable injury. The process begins proceeds and ends on that assumption. Whether or not that assumed fact exists, once the process is embarked upon s 72 requires the parties and the Authority to act in accordance with the mandates of the section. There is nothing in the section or elsewhere in the Act that operates to terminate or suspend the statutory process, should the underlying assumption be incorrect. Furthermore, the Work Health Authority, not being a judicial body exercising judicial functions, has no power to make a determination as to the validity of any process commenced under ss 71 and 72 of the Act.

30. Therefore, the circumstances under which the administrative process was instigated in the present case has the potential to create mischief. If the employer were not to apply for a re-assessment within the prescribed time frame, then it would run the risk of being liable for the payment of compensation in accordance with s 71(4)(a). That subsection does not discriminate between processes under s 72 which are proper and those which are flawed or misconceived. Furthermore, once the employer has applied for a re-assessment, the Authority is required as soon as practicable to refer the assessment to a panel of medical practitioners, even if the process is flawed. That is reinforced by the terms of s 74 (3B). There is the potential for a panel of three medical practitioners to arrive at an assessment of permanent impairment which is fundamentally at odds with the intent of Subdivision C of Division 3 of Part 5 of the Act, and which gives rise to a compensation liability that not only offends the object of the compensatory scheme but also fundamental notions of justice.

31. As pointed out by counsel for the employer, the mischief might extend to the worker applying for a certificate from the Registrar of the Work Health Court under s 97(2A) of the Act

> and arranging for judgment to be entered under s 97(3) on the strength of the purported re-assessment. Although the Court would undoubtedly have power to stay execution of any such judgment, that such a situation could arise demonstrates the degree of mischief that a failure to follow the intent and spirit of the Act might engender.

33. With respect, I generally agree with His Honour's observations in these paragraphs (on the assumption that in paragraph 31 "the Court" having a power to stay is a reference to the Local Court and not the Work Health Court). His Honour went on to say at paragraphs 42-46:

> 42. As observed by Hugh Bradley CM in *Pengilly v Northern Territory of Australia (1999) NTMC 026 at [28.3]* "s 94 and s 104 specifically entitle a claim to be brought before the Court for compensation under Part V and thus for compensation for permanent impairment". It follows that the Court can, pursuant to those provisions, make orders or give rulings in respect of matters or questions incidental to or arising out of a claim under *Part 5 of the Act*, including a claim for compensation for permanent impairment.
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> 43. In the present case the worker purported to make a claim for compensation for permanent impairment. A dispute subsequently arose between the parties – which also involved the Work Health Authority – as to whether the claim was in accordance with *Subdivision C of Part 5 of the Act*, which deals with compensation for permanent impairment. In my opinion, it is within the jurisdiction of the Work Health Court to give a ruling as to the validity of the process commenced by the worker pursuant to *ss 71 and 72 of the Act*. The validity of the administrative process set in train by the worker is a matter or question that is incidental to or arises out of the worker's claim for compensation.
>
> 44. In *Clayton v Top End Distributors* (supra) Mr Trigg SM held that the Work Health Court has power under *s 94(1)(a)* of the then Work Health Act to hear and determine disputes concerning claims for compensation for permanent impairment. With respect I adopt that view, adding that the Court's power to resolve disputes such as the present dispute is reinforced by

the facilitative powers vested in the Court by *s 104(1) of the Act*, in particular the power to make rulings.

45. The present dispute is also incidental to or arises out of the substantive claim for compensation. As noted earlier, in order to claim compensation for permanent impairment such impairment must have been caused by an "injury" within the meaning of the Workers Rehabilitation and Compensation Act. As the causative injury remains in dispute, the purported claim for compensation for permanent impairment is incidental to and arises out of the substantive claim for compensation. In that further regard the Court has by reason of *ss 94(1)(a) and 104(1)* power to give a ruling as to the validity of the process commenced by the worker pursuant to *ss 71 and 72 of the Act*.

RULING UNDER SECTION 104 OF THE ACT

46. I make the following rulings pursuant to *s 104(1) of the Act*:

• The assessment of the level of permanent impairment by Dr Walton was not an assessment for the purposes of *s 72(2)* of the Act because it did not conform to the legislative scheme in relation to compensation for permanent impairment. The assessment by the medical practitioner did not conform to that scheme because the injury said to have caused permanent impairment remains a live issue in the substantive proceedings, and is yet to be determined by the Work Health Court. The assessment is a nullity and of no effect.

• As a consequence of the invalidity of the assessment of the level of permanent impairment the employer was under no legal obligation to apply, pursuant to *s 72(3),* to the Work Health Authority for a reassessment of that level of impairment. The employer's application for reassessment is also a nullity and of no effect.

• As a consequence of the foregoing the Work Health Authority was not required to refer the employer's application to a panel of three medical practitioners to reassess the level of permanent impairment. Therefore the Authority is not required to proceed with the reference.

• The administrative process purportedly commenced pursuant to *ss 71 and 72 of the Act* is a nullity and of no effect.

34. His Honour does not address *sections 111 and 113* in his decision. Nor did Mr Bradley CM in *Pengilly.* His Honour appears to rely upon what I said in *Clayton v Top End Distributors* (as Mr Bradley CM also

did in *Pengilly),* to support a general proposition that "the Work Health Court has power under *s 94(1)(a)* of the then Work Health Act to hear and determine disputes concerning claims for compensation for permanent impairment." It was no part of my decision in *Clayton* that the Work Health Court could make it's own assessment of the level of "permanent impairment". When my decision is read as a whole I make it clear (I hope) that the assessment (or re-assessment) of permanent impairment has been removed from the Court, and a separate medical process established. However, the fundamental issues of entitlements to benefits under the Act (see *section 53* etc) remain for the Court to determine.

35. The final consideration of these provisions was again by Dr Lowndes SM in the case of *Larsen-Smith v Perkins Shipping Pty Ltd,* being a decision delivered on transcript on 31 March 2011. In that decision His Honour stated as follows:

> This matter concerns an interlocutory application which was filed by the employer, seeking an extension of time to appeal the decision of the judicial registrar of 23 December last year; and secondly, seeking an order that the order of the judicial registrar be stayed pending determination of the appeal; and, thirdly, that the decision of the judicial registrar be set aside.
>
> The starting point of course is the order that was made by the judicial registrar and his order was to the effect that a certificate in the amount of $66,858.23 issues pursuant to s 97(2)(a) of the Work Health Act. That sub-section reads:
>
> "Where is pursuance of s 71 compensation is payable to a worker and that compensation has not been paid, the registrar shall on application by or on behalf of the worker, or his or her employer and on payment of the prescribed fee, if any, and on being satisfied as to the amount of compensation payable under that section, issue to or for that worker or employer a certificate if the prescribed form of that amount and shall make a minute or memorandum of the issue."

That order which was made by the judicial registrar has been duly registered in the Local Court. And has the effect of being an enforceable judgement.

There was some affidavit evidence filed by both parties in relation to the interlocutory application. I should say that at my suggestion the employer as an alternative to appealing the judicial registrar's decision, sought a ruling under s 104 of the Work Health Act that the permanent impairment assessment was invalid and relied upon that as a further ground for setting aside the order of the judicial registrar.

The employer's argument is basically this, that Dr Walton's assessment was invalid because it was carried out during a period when liability for the worker's injury was disputed, and for that reason cannot be subsequently relied upon by the worker for the purposes of s 72 of the Act.

The employer relied upon the decision in *Taylor Enterprises v Pointon & Work Health Authority*. In that matter the court found that pursuant to s 104 of the Work Health Act, the Work Health Act could entertain certain disputes regarding the question of the level of a permanent impairment under s 71.

The court there relied upon the observations made by Mr Trigg SM, in *Clayton v Top End Wholesale Distributors*, unreported 22 March 1996.

In *Taylor Enterprises v Pointon & Work Health Authority*, the court concluded that as a consequence of the invalidity of the assessment of the level of permanent impairment in that case, the employer was under no legal obligation to apply, pursuant to s 70(2)(3) of the Work Health Act, no obligation apply to the Work Health Authority for a reassessment of the that level of impairment.

The court further found that the administrative process purportedly commenced pursuant to s 71 and 72 of the Act were of a nullity and of no effect. The employer latches upon that decision as a ground for having the permanent impairment assessment set aside, in turn having the order of the judicial registrar also set aside.

I still adhere to the view, as I did in *Taylor Enterprises v Pointon* that the Work Health Court does have the power to

make rulings in relation to questions arising out of the assessment of permanent impairment.

However, I do not consider that the court has the power to set aside orders consequential upon a ruling that might be made in that regard. I think it is worth noting that in *Taylor Enterprises v Pointon* the proceedings had not reached the stage that they have reached here.

The difference, of course, here is that in fact a certificate did issue pursuant to s 97(2)(a) and the matter has even gone further and resulted in that certificate being registered in the local court.

One of the things that was observed in *Taylor Enterprises v Pointon* that if the permanent impairment assessment was erroneously embarked upon, then it might result in a mischief and the identified mischief being that a certificate might issue pursuant to s 97(2)(a) of the Act, and then further mischief of that certificate being registered as a judgment in the Local Court.

But in *Taylor Enterprises v Pointon*, the court's ruling went no further than to find that the employer was under no obligation to apply to the Work Health Authority for a re-assessment of that level of impairment. From all accounts it would appear that the parties accepted that ruling.

Looking at this application in the context of an appeal from the judicial registrar and this is the primary basis upon which the application was brought, the appeal is by way of a hearing de novo and in effect the court is placed in the shoes of the judicial registrar who is charged with the task of dealing with an application pursuant to s 97(2)(a) of the Work Health Act.

By virtue of the appeal being a hearing de novo, that application is to be considered afresh. In my opinion when dealing with an application pursuant to s 97(2)(a) of the Work Health Act the court or the registrar needs only to be satisfied about the pre-conditions that are set out in s 97(2)(a).

Provided those conditions are satisfied, then the registrar has no option, in my view, but to proceed to issue a certificate. I think that that is the clear effect of s 97(2)(a) though Mr Anderson submitted that it's not as straight forward as that, that the court can in effect look behind the permanent impairment

assessment and consider the validity or otherwise of that assessment.

I don't believe that the registrar has the power to do that – in many ways the provisions of 97(2)(a) are administrative in character and as I say, what is required of the registrar is to be satisfied as to the pre-conditions which are set out in that sub section.

Even if the registrar had the power to make a ruling under 104 of the Act, then it really doesn't assist the employer at all in this case, because the permanent impairment assessment was a fait accompli. There might be real concerns about the processes that led up to the determination of the level of impairment, but in my view even if the court could make a ruling as to the invalidly of that process, and I don't believe it could, in the context of considering an application pursuant to s 97(2)(a) then there's really nothing that the court can do over and above that ruling in any event because in my view the court does no have the power to set aside any permanent impairment assessment which has occurred as a result of an erroneous process, and it think it is important again to distinguish the situation here from the situation in *Taylor Enterprises v Pointon.*

So it seems to me that no matter which way one turns, whether one deals with this as an appeal against the judicial registrar's decision or deals with the matter pursuant to s 104 by way of giving a ruling, at the end of the day this court set aside what has happened.

I did consider in *Taylor Enterprises v Pointon* whether there was any power to stay proceedings as an abuse of process and it was there concluded that the Work Health Court has no inherent jurisdiction but only has implied jurisdiction to do all things necessary or convenient to be done and to ensure the integrity of its processes and its process is not abused.

I don't believe that the court has the power to stay proceedings. It seems to me that any ruling that the court would make in relation to Dr Walton's assessment of this case, even if the court did rule the assessment was invalid, there's no power to, in any way, order a stay.

In any event things have gone well and truly past the impairment assessment; a certificate has issued and that

> certificate then has been transmogrified into a judgment registered in the local court.
>
> It seems to me that the remedy that the employer may have is to seek a judicial review of the administrative process that resulted in the permanent impairment assessment. It's not really, or course, for this court to suggest what action should have been taken by the employer, but I feel in this case that when one looks at the jurisdiction of this court vis-à-vis the jurisdiction that might be entertained by a superior court, it strikes me that it's – it may have been more appropriate to proceed in another place to redress what the employer considers to be an injustice occasioned by Dr Walton's permanent impairment assessment.

36. I understand that decision is currently under appeal to the Supreme Court, but I am not aware of where that process currently stands.

37. It is apparent from the various judgments referred to herein that "permanent impairment" can raise many difficult issues. I think it is time for the legislature to re-look at *sections 70-72 of the Act*, and make such amendments as are necessary so that the legislative intent is clear. And also to ensure that there is a proper and transparent process in place.

38. *Sections 70-72* appear to have been predicated on the assumption that there would be only one assessment of permanent impairment, in any given case. However, it appears that lawyers may send out a pro-forma type letter to medical practitioners in Work Health cases, and that a request for an assessment of permanent impairment may be one of the standard questions. Accordingly, across the one file there may be 10 or more different opinions on permanent impairment expressed by medical practitioners. The Act clearly does not contemplate that each time a report is served on the other side, that side should then proceed under *section 72(3),* or run the risk that they are then locked into that assessment. This appears to be the difficulty

that arose in *Taylor Enterprises (NT) Pty Ltd v Pointon.* In order to avoid this unintended problem it appears to me that the Work Health Authority might create a proper “claim” form for an assessment of “permanent impairment”, when a party was satisfied that it was an appropriate time for such an assessment. To such a claim form should be annexed the medical report upon which that party relies. This would ensure that the other party served was in no doubt that an assessment of “permanent impairment” was now being sought, and that the party had 28 days to respond.

39. It appears that medical practitioners (in some cases) are being asked to include an assessment of “permanent impairment” at too early a stage, before liability is accepted (*section* 85) or determined by the Court, and even where conditions may not be stable. Also, where an employer has accepted liability for a specific physical injury, it does not necessary mean that liability is accepted for all arguable physical and mental sequelae.

40. Further, there may be cases where it is appropriate to have more than one permanent impairment assessment (for example, because of the different types of injuries, or because of the situation that subsequently arose in *Hand v Alcan Gove Pty Ltd [2008] NTSC 25*). In the instant case there was a panel assessment (dated 4.8.08) for a right lower limb injury prepared by a consultant occupational physician. There was also a panel assessment (dated 11.5.09) for a mental injury prepared by a consultant psychiatrist.

41. For the reasons stated herein, I find that the Work Health Court does not have the jurisdiction or power to make any of the rulings or orders as sought in those parts of the Statement of Claim that the employer now seeks to strike out.

42. In my view, the argument (both in this case and other decisions referred to herein) that this Court can intervene in, or be a part of the *section 72* permanent impairment process is predicated upon this Court having an implied power to do so. This implied power is said to come from the general power in *section 94 of the Act.* However, in my view, this argument overlooks the fact that there is a specific section in the Act which deals with reviewing a determination of the Work Health Authority. That is *section 113* which states as follows:

> The Court may hear an application relating to a review referred to in section 111(1) and may determine the application by:
>
> (a) confirming the determination of the Authority;
>
> (b) disallowing that determination; or
>
> (c) substituting its determination for that of the Authority.

43. Hence, it is that section which deals with decisions of the authority and that gives the specific power to confirm, disallow or substitute a new decision. That section must be read together with *section 111,* which states:

> (1) A person who has a right to apply to the Court for a ruling or a right of appeal, or a right of review, under this Act (other than Part 5) or any other Act may, within the prescribed time and in the prescribed manner and form (or, where there is no manner or form prescribed, in such manner or form as the Court approves), apply to the Court for the ruling or a determination of the appeal or matter.
>
> (2) An application referred to in subsection (1) shall be dealt with by the Court as expeditiously as the circumstances will allow.

44. Accordingly, Part 5 is expressly excluded, which therefore expressly excludes any determination of the Authority under *section 72.* Why would the legislature do this, unless the Court was intended to have no role to play in decisions under *section 72*?

45. I find that (because of the combined effect of *sections 71, 72 (*and especially *72(4)), 111 and 113)* the Work Health Court has no power to "review" any decision of the Work Health Authority made under Part 5 of the Act. Accordingly, the Court cannot review any decision or action taken (or not taken) by the Authority under *section 72.* Specifically the Court has no power to confirm or disallow any determination of the Authority under *section 72*. Nor can it substitute it's determination for that of the Authority if made under *section 72*.

46. I confirm (subject to any specific modifications herein) what I said in my earlier decisions of Ogilvie v Woolworths (SA) Ltd (6.12.94), Clayton v Top End Wholesale Distributors (22.3.96), and Morrison v Mayne Nickless Ltd (11.5.00).

47. If I am wrong in this view, then I am of the opinion that this would not be an appropriate case for the Court to look behind the decision of the medical panel in any event. During the course of the legal argument I advised that without seeing any of the assessments complained of I was dealing with the argument in a "vacuum". As a consequence, and without objection I received a "consolidated panel report" dated 4 August 2008. On page 5 of that report under the heading "Summary and Assessment" is set out the following two questions:

    1. whether the said impairment is stabilised and permanent.

    2. If so the degree of permanent impairment of the whole person (due only to the work-related-injury) as assessed in accordance with the AMA Guides to the Evaluation of Permanent Impairment, 4th Edition.

       The percentage level of permanent impairment must only be that which is attributed to the following work related injury:

       Fractured foot/right lower limb injury.

48. Thereafter the panel has purported to directly answer each of those questions and the answers appear to be properly responsive on their face. Further, the panel in answer to the second question make specific mention to various pages and tables and include a reference to “AMA4”. It was not suggested by Mr Tippett QC that any of these references might indicate that appropriate guide had not (or even might not) have been used.

49. In addition, and without objection, I received a further consolidated panel report dated 11 May 2009. On page 7 of that report the following two questions are asked:

> 1. whether the said impairment is stabilised and permanent.
>
> 2. If so the degree of permanent impairment of the whole person (due only to the work-related-injury) as assessed in accordance with the AMA Guides to the Evaluation of Permanent Impairment, 4th Edition.

50. Thereafter the panel has purported to directly answer each of those questions and the answers appear to be properly responsive on their face. Further, the panel in answer to the second question states “in using the American Medical Association Guides to the evaluation of permanent impairment, 4th Edition, it is the opinion of the panel....”. Accordingly, unless that answer in untrue it is not possible to argue that the appropriate “Guides” may not have been used. Accordingly, the only issue appears to be whether the percentage assessment was or was not correct having regard to the Guides. This is clearly not therefore an attack on “jurisdictional” grounds. Rather, it appears the worker is seeking a re-assessment of the panel’s decision, but this time by the Court. This is not permissible in my view.

51. I therefore order that paragraphs 30 to 43 and 43.15 to 43.19 inclusive of the worker’s Statement of Claim be struck out.

52. I will hear the parties on the question of costs and any ancillary orders.

Dated this 23rd day of May 2011.

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Daynor Trigg
STIPENDIARY MAGISTRATE