CITATION: *Schloss v Quality Plumbing & Building Contractors Pty Ltd* [2015] NTMC 012

PARTIES: RODNEY WILLIAM SCHLOSS

v

QUALITY PLUMBING & BUILDING CONTRACTORS PTY LTD (ABN 112 203 102)

TITLE OF COURT: Work Health Court

JURISDICTION: Work Health

FILE NO: 21354573

DELIVERED ON: 26 May 2015

DELIVERED AT: Darwin

HEARING DATES: 23, 24 and 25 February 2015

JUDGMENT OF: JMR Neill

CATCHWORDS:

WORK HEALTH – MEANING AND EFFECT OF PROVISO TO SUBSECTION 65(2)(b)(ii) – CAPACITY TO EARN – INVALIDITY OF SECTION 69 NOTICE – RETROSPECTIVITY – SECTION 109 INTEREST.

Workers Rehabilitation and Compensation Act - sections 65(2), 68, 69, 86 and 109
Dare v Pulham [1982]148 CLR 658 considered
Dickin v NT TAB Pty Ltd [2003] NTSC 119 considered
Ju Ju Nominees Pty Ltd v Carmichael [1999] NTSC 20 applied
Northern Cement v Ioasa [1994] NTSC 58 applied
CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR considered
Collman v Territory Insurance Office [2002] NTSC 8 considered
Cheryl Newton v Masonic Homes Pty Ltd [2008] NTMC 059 considered
Global Insulation Contractors (NSW) Pty Ltd v Keating [2012] NTSC 04 considered
Collins Radio Constructors Inc v Day (1997) 116 NTR 14 considered
Alexander v Gorey & Cole Pty Ltd [2001] NTSC 74 considered
Plewright v Passmore trading as Passmore Roofing [1997] NTSC 34 considered
Pengilly v Northern Territory of Australia (No 3) [2004] NTSC 1 considered

REPRESENTATION:

Counsel:

Worker:	Mr O'Loughlin
Employer:	Mr Roper

Solicitors:

Worker:	Priestleys
Defendant:	Hunt & Hunt

Judgment category classification:	A
Judgment ID number:	012
Number of paragraphs:	115

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

No. 21354573

BETWEEN:

RODNEY WILLIAM SCHLOSS
Worker

AND:

QUALITY PLUMBING & BUILDING CONTRACTORS PTY LTD
(ABN 112 203 102)
Employer

REASONS FOR JUDGMENT

(Delivered 26 May 2015)

John Neill SM:

Introduction

1. The Worker Rodney William Schloss ("Mr Schloss") was born on 22 March 1973 and is currently 42 years of age.

2. On or about 26 June 2010 Mr Schloss suffered an injury in the course of his employment with the Employer. The injury was to his lower back, namely an L5/S1 disc protrusion causing impingement on the S1 nerve root ("the injury").

3. Mr Schloss made a claim in respect of the injury under the *Workers Rehabilitation and Compensation Act* ("the Act") which the Employer accepted. It commenced making payments of benefits under the Act to Mr Schloss, including weekly benefits.

4. It is common ground between the parties that Mr Schloss has continued from the date of the injury to the present time to be partially incapacitated for work because of the ongoing effects of the injury.

5. The Employer issued a Notice of Decision dated 7 October 2013 pursuant to section 69 of the Act ("the Notice") reducing the amount of weekly benefits payable to Mr Schloss pursuant to the Act on the basis it said he was capable of working 22 hours each week as a limousine driver/chauffeur and in that capacity of earning $660 per week. The Notice is part of exhibit W2.

6. Mr Schloss disputed the Notice. Mediation under the Act resulted in no change. He commenced proceedings before this Court by Application filed 3 December 2013.

The Pleadings

7. The hearing commenced on 23 February 2015. On that date the pleadings were Mr Schloss's Further Amended Statement of Claim filed 11 December 2014, the Employer's Notice of Defence and Counterclaim filed 2 February 2015, and Mr Schloss's Defence to the Counterclaim filed 9 February 2015. When the hearing commenced on 23 February 2015 the Employer sought and was granted leave to file an Amended Defence and Counterclaim to the Further Amended Statement of Claim.

8. This in fact amended only the Employer's Counterclaim. It reduced the issues between the parties by now limiting the employment pleaded as suitable for Mr Schloss, given his continuing partial incapacity for work, to that of a bus driver. It deleted other previously pleaded suitable employments, including that of a limousine driver. It now pleaded that Mr Schloss's earning capacity was 22 hours per week as a bus driver at $25.25 per hour, a total of $555.50 per week.

9. Mr Schloss's Defence to Counterclaim admitted he could work as a school bus driver rather than as a bus driver generally, but only to the extent of his

present employment since 14 August 2014 as a casual school bus driver ("the current employment"). He pleaded that the current employment accommodates his work injury limitations as specifically identified in paragraph 2 of his Defence to Counterclaim. He pleaded that the current employment provides work for only 20 hours per week. He pleaded that he is paid $25.25 per hour which results in an income of $505 per week.

10. Mr Schloss went on in paragraph 5c of his Defence to Counterclaim to plead that the current employment employs him for only about 40 weeks each year. Exhibit W2 establishes that there is no work for him in the remaining approximately 12 weeks per year and that these 12 weeks are the relevant Queensland school holidays.

11. Mr Schloss pleaded in paragraph 5d of his Defence to Counterclaim that his earning capacity in the current employment was therefore $505 per week divided by 52 weeks and multiplied by 40 weeks, an amount of only $388.46 per week.

12. In paragraph 7 of his Defence to Counterclaim Mr Schloss admitted the Employer's pleading in paragraph 12 of its Counterclaim that the first 104 weeks of his incapacity following the injury expired on or about 26 June 2012, which I note was more than 12 months before the date of the Notice. This expiry of the first 104 weeks triggered the applicability to Mr Schloss of subsection 65(2)(b)(ii) of the Act.

How the Proceeding Was Run

13. On the first hearing day the parties announced they had agreed some facts and narrowed the ambit of the issues in dispute so that two or three hearing days would now suffice rather than the five days originally allocated. They had prepared a typed document entitled "Statement of Agreed Facts and Issues in Dispute" which was dated 20 February 2015 and signed by both

counsel. This was received by the Court on 23 February 2015 as exhibit E1. Omitting formal parts, that document provides as follows:

> "The parties agree the following facts:
>
> 1. The most profitable employment that could be undertaken by the Worker for the purposes of s65(2)(b)(ii) of the Act is his current employment as a casual School Bus Driver.
>
> 2. For the weeks in which the Worker is employed in his current employment the Worker is paid $25.25 per hour for a 20 hour week, providing a gross wage of $505.
>
> 3. The Worker was capable of undertaking his current employment from the date of the Employer's Notice of Decision.
>
> The parties agree that the only issues in dispute between them in these proceedings are:
>
> 1. Whether the Notice of Decision was valid.
>
> 2. Whether the Worker's earning capacity is to be:
>
> a. calculated by reference to the ability to work in his current employment for
>
> i. 20 hours per week; or
>
> ii. 22 hours per week; and
>
> b. Averaged out and/or annualised over a twelve month period so as to reflect the fact that such employment is not available to the Worker 52 weeks a year; or
>
> c. calculated in some other manner.
>
> 3. Whether the Worker is entitled to interest under section 109(1) and/or (2)."

14. Counsel for the parties by exhibit E1 and by their introductory remarks made it clear on 23 February 2015 that the main area of contest in this case was now the statutory interpretation of subsection 65(2)(b)(ii) of the Act which deals with an injured worker's "most profitable employment", with

focus on the proviso "…whether or not such employment is available to him or her" and in particular on the word "available" in that proviso.

15. Counsel for Mr Schloss, Mr O'Loughlin, prepared a further, hand-written document which contained a further agreed fact. This document was headed "Agreed Fact" and was dated 24 February 2015 and signed solely by Mr O'Loughlin. This was included with the consent of counsel for the Employer as part of exhibit E1 on 24 February 2015. This agreed that Mr Schloss had the capacity to work 22 hours per week as a casual school bus driver from the date of the Notice.

16. However, Mr O'Loughlin made it clear that this further agreed fact was not an admission or agreement by Mr Schloss that the most profitable employment for him involved work of 22 hours per week. Mr Schloss's position was still that his most profitable employment is the current employment as a casual school bus driver being paid for 20 hours' work per week, and subject to the statutory interpretation issue identified in paragraph 14 above.

17. On 24 February 2015 Mr O'Loughlin advised that Mr Schloss no longer argued that his earnings over a year should be averaged down from $505 per week to $388.46 per week. Rather, his argument was that at the times he would in fact earn nothing in each of the 12 weeks or so of school holidays he should be entitled to be compensated under the Act on the basis that there was no most profitable employment for him in those weeks ("the changed approach").

18. Mr Roper for the Employer objected to this, seeking to characterise the changed approach as a change from the Worker's pleaded position, as being a withdrawal of a previous admission and as not being in accordance with exhibit E1. I heard argument on this issue from both counsel and I deal with this issue later in these Reasons.

19. In the course of final submissions on 25 February 2015 Mr O'Loughlin advised that Mr Schloss was paid an additional amount in the current employment, namely an allowance of $10.30 per week which Mr O'Loughlin conceded should be included as part of Mr Schloss's earnings. That is, Mr Schloss now maintained that in the current employment he can earn $505 for 20 hours' work per week plus a further $10.30 per week, a total of $515.30 per week, subject to the statutory interpretation issue.

20. No evidence was adduced at the hearing other than in exhibits E1, W2 and W3 and areas of common ground identified above.

Identifying the Issues

21. In *Dare v Pulham* [1982] 148 CLR 658 at 664 a majority of five Justices of the High Court of Australia said the following:

> "Pleadings and particulars have a number of functions: they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity to meet it …; they define the issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at the trial …; and they give a defendant an understanding of a plaintiff's claim in aid of the defendant's right to make a payment into court. **Apart from cases where the parties choose to disregard the pleadings and to fight the case on issues chosen at the trial** (emphasis added), the relief which may be granted to a party must be founded on the pleadings…".

22. In the Northern Territory in an appeal to the Supreme Court from the Work Health Court, Angel J adopted the same approach in *Dickin v NT TAB Pty Ltd* [2003] NTSC 119. He said at paragraph [14]:

> "The Work Health Court is a court of record bound by the pleadings, subject, of course, to the way the parties conduct their case. **It is elementary that the parties on appeal where they have conducted a case beyond the pleadings cannot thereafter treat the pleadings as governing the area of contest** (emphasis added)".

23. I am satisfied that the parties in the present proceedings did choose to conduct the case beyond the pleadings, specifically on the issues identified

in exhibit E1 and as enlarged by both counsels' preliminary remarks as I have discussed above.

Employer's Objection to Changed Approach

24. Mr Schloss's pleadings in paragraphs 3, 4 and 5 of his Defence to Counterclaim identify an averaging approach to the calculation of his earning capacity. He did not plead any alternative approach or any catch-all approach. However this pleaded position was changed by exhibit E1.

25. Paragraph 5 in exhibit E1 provides three different approaches to calculating Mr Schloss's earning capacity. The third approach appears in subparagraph 5c which provides: "or calculated in some other manner". Mr Roper for the Employer submitted he had neither understood nor intended subparagraph 5c to be wide enough to allow for the changed approach. He provided an affidavit by his instructing solicitor setting out the background to exhibit E1 from the Employer's perspective.

26. Mr O'Loughlin submitted that the changed approach was inherent on the pleadings so it should not have come as any surprise to counsel for the Employer. He submitted that in any event paragraph 5c in exhibit E1 was a catch-all provision allowing for other approaches generally to the calculation. He submitted that any interpretation of exhibit E1 should be objective and not look behind its plain words and meaning.

27. Mr Roper took me to two High Court Decisions which he submitted were relevant to this question. These were *Pacific Carriers Ltd v BNP Paribas* [2004] 218 CLR 451 and *Toll (FGCT) Pty Ltd v Alphapharm Pty Limited and Others* [2004] 219 CLR 165. I am satisfied both Decisions relate solely to determining the rights and liabilities of parties to a contract. In my opinion a joint document such as exhibit E1 does not create and was never intended to create contractual rights and liabilities between Mr Schloss and the Employer.

28. Exhibit E1 was provided to the Court as a joint document by both parties to limit the issues between them previously raised by the pleadings. The parties may certainly make submissions as to the interpretation of exhibit E1 but the subjective intention of one of its draftsmen is no more determinative than it would be in the case of a more standard pleading such as a Statement of Claim or a Defence.

29. Further, the original approach to the calculation pleaded in the Defence to the Counterclaim was not in my view a fact or state of affairs which had been or could have been "admitted" by Mr Schloss such that its subsequent "withdrawal" might prejudice the Employer and require the prior leave of the Court.

30. Exhibit E1 was tendered by the parties to replace the pleadings by identifying, in its own words, "the only issues in dispute" between them for the purpose of the hearing. It was tendered by the parties and received by the Court on that basis. Exhibit E1 replaced the pleadings to the extent that the pleadings raised issues or allegations of fact inconsistent with exhibit E1.

31. The primary issue in this case is the interpretation of subsection 65(2)(b)(ii) of the Act in the context of Mr Schloss's current employment circumstances. The parties have recognised this in exhibit E1, and in both counsels' opening remarks. The possible approaches to calculating Mr Schloss's earning capacity and thus his entitlement to payment of weekly benefits arising from any particular interpretation of the subsection are consequential upon that primary issue.

32. I am satisfied and I find that paragraph 5c in exhibit E1 is a catch-all provision in broad terms permitting Mr Schloss to seek to calculate his earning capacity "in some other manner" generally within the context of exhibit E1, and that this includes the changed approach.

The Issues

33. The issues to be determined in this case in the light of the preceding matters are the following:

i) does the proviso "whether or not such employment is available to him or her" in subsection 65(2)(b)(ii) of the Act apply to the weeks affected by periods of school holidays when there is no work or reduced work for Mr Schloss in the current employment ("the availability issue")?

ii) If the proviso does not apply, is Mr Schloss entitled to receive payments of weekly benefits under the Act during those weeks calculated in each week on the basis there is no other most profitable employment that could be undertaken by him ("the weekly calculation issue")?

iii) Is Mr Schloss's earning capacity in the current employment to be calculated on the basis of his actually being remunerated for 20 hours' work in each week or on the basis of his now conceded capacity to work for 22 hours in each week in that employment ("the most profitable employment issue")?

iv) Was the Notice invalid in that it failed to comply with subsections 69(1)(b)(i) and (4) of the Act ("the invalidity issue")?

v) Should any appropriate reduction in weekly benefits commence from 7 October 2013 the date of the Notice or should it commence from 14 August 2014, the date Mr Schloss in fact commenced the current employment ("the retrospectivity issue")?

vi) If there are any arrears of weekly benefits payable to Mr Schloss is he entitled to interest on such arrears or any part of them pursuant to subsections 109(1) or (2) of the Act ("the section 109 interest issue")?

The Onus

34. At a prehearing conference on 29 January 2015 the Employer conceded it should be *dux litis* at the hearing and I made that order. This was on the basis that Mr Schloss's Further Amended Statement of Claim dated 11 December 2014 was a mere appeal raising no issues beyond the Notice. The

effect of this is that the Employer bears both the legal and evidentiary onus on the balance of probabilities of justifying its interference with payments to Mr Schloss of weekly benefits under the Act by the Notice - see per Martin CJ (BF) in *Ju Ju Nominees P/L v Carmichael* [1999] NTSC 20 at paragraph [15] sub-paragraph 2.

35. The Further Amended Statement of Claim and exhibit E1 both raise the issue of the technical validity of the Notice, quite separately from requiring the Employer to justify the Notice. The evidentiary onus with respect to this validity issue was satisfied by the tender of the Notice and accompanying documents in exhibits W2 and W3. The question remains, which party bears the legal onus in respect of the validity of the Notice? One might consider that because it is Mr Schloss who asserts the invalidity it is he who must prove that invalidity. However, in *Northern Cement v Ioasa* [1994] NTSC 58 at paragraph 9 Martin CJ (BF) said as follows: "An employer is enabled, in the circumstances described in s.69, to unilaterally cancel or reduce payments of compensation. If an employer cancels or reduces payments in purported reliance on s.69, the employer acts contrary to law and ought to gain no benefit from that unlawful conduct. **Hence it is upon the employer to prove that its unilateral action falls within the section** (emphasis added)". I conclude that the Employer bears the legal onus of proving the validity of the Notice.

36. The Employer bears the legal and evidentiary onus of proving its Counterclaim as filed in Court on 23 February 2015 and then further amended also on 23 February 2015, but as limited by exhibit E1. Because it is common ground that Mr Schloss continues to be partially incapacitated by the injury this means the Employer bears the onus on the balance of probabilities of quantifying that loss of earning capacity - see per Martin CJ (BF) in *Northern Cement* (above) in paragraph 15 at page 6.2. This quantification will involve consideration of two issues, being: i) whether the absence of work for 12 weeks or so each year in Mr Schloss's agreed

most profitable employment as a casual school bus driver is covered by the proviso "whether or not such employment is available to him" in subsection 65(2)(b)(ii) of the Act; and ii) whether this agreed most profitable employment is to be calculated at 22 hours rather than 20 hours of work in each week.

37. Because the Employer bears the onus of justifying its interference with payments of weekly benefits by the Notice, and because it bears the onus on its Counterclaim, the Employer bears the onus of establishing that payments of weekly benefits should be reduced from any date earlier than 14 August 2014 when Mr Schloss actually commenced the current employment.

38. Mr Schloss bears the onus of persuading the Court that the Employer has caused unreasonable delay in paying compensation so as to entitle him to interest pursuant to subsection 109(1) of the Act, or that a weekly or other payment due under the Act has not been made in a regular manner or in accordance with the normal manner of payment so as to entitle him to interest pursuant to subsection 109(2) of the Act.

<u>The Availability Issue</u>

The Arguments

39. The Employer accepted that Mr Schloss's current employment as a casual school bus driver does not provide work during the school holidays but said that is a question of availability. It argued that the question of availability is irrelevant by force of the proviso to subsection 65(2)(b)(ii) and therefore the current employment remains the most profitable employment in every week whether available or not. The Employer's argument was that after the first 104 weeks of incapacity once a most profitable employment has been identified, as in this case, nothing else remains to be considered.

40. Mr Schloss's counsel argued that "available" should be narrowly construed to mean an actual or potential vacancy in some identified most profitable

employment. If so then this case does not raise any question of availability in that narrow sense.

41. He further submitted that the identified most profitable employment (the current employment) simply does not exist "in a week" (in the words of subsection 65(2)(b)) during the school holidays.

42. He concluded there is no evidence before the Court of any most profitable employment for Mr Schloss other than the current employment and therefore weekly benefits should be calculated in each week of the school holidays on the basis there is no most profitable employment, or on a *pro rata* basis in a week where the current employment provides for work for less than the full week.

Statutory Interpretation

43. The word "available" is not defined in the Act. It is not a term of art. Accordingly it is to be given its ordinary English language meaning. The MacQuarie Dictionary 5th Edition defines "available" to mean "suitable or ready for use; at hand; of use or service". The Shorter Oxford English Dictionary 3rd Edition defines it to mean "capable of being turned to account; at one's disposal, within one's reach". The generic dictionary application on my iPad – Dictionary.com - includes the definition "accessible".

44. However it is not simply a matter of substituting a dictionary definition for the word being interpreted. In *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 four of the five Justices of the High Court said at page 408 as follows: "It is well settled that at common law…the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure. **Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be**

thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy (emphasis added)**.** Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in *Isherwood v Butler Pollnow Pty Ltd*, if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent". This approach to statutory interpretation was more recently adopted by Gageler J in *Baini v The Queen* (2012) 246 CLR 469 at 484.

45. In the present case the "existing state of the law and the mischief which…one may discern the statute was intended to remedy" – that is, "the legislative intent" - are to be found in a consideration of subsection 65(2) as it was both before and after its amendment together with the Second Reading Speech which introduced the amendment, in the light of any court interpretations of the role of the word "available" in the subsection.

Sections 65(2) and 68 - History

46. The Act commenced on 1 January 1987. At that time it established a two-stage system for payments of weekly benefits to injured workers. Subsection 64(1) provided for payments of weekly benefits over the first 26 weeks of incapacity on the concrete basis of loss of <u>actual</u> earnings. After the first 26 weeks of incapacity, subsection 65(1) of the Act as it then was provided for ongoing payments of weekly benefits calculated on the more theoretical basis of loss of earning <u>capacity</u>.

47. This concept of loss of earning capacity was qualified by the language of the original subsection 65(2). That then read as follows:

> "(2) For the purposes of subsection (1), loss of earning capacity in relation to a worker is the difference between –
>
> a) his or her normal weekly earnings indexed in accordance with subsection (3); and
>
> b) the amount, if any, he is from time to time reasonably capable of earning in a week during normal working hours in work he is capable of undertaking if he were to engage in the most profitable employment, if any, reasonably **available** (emphasis added) to him."

48. Subsection 65(2)(b) was further qualified by section 68 of the Act as it then was. That read as follows:

> "68. In assessing what is the most profitable employment **available** (emphasis added) to a worker for the purposes of section 65 or reasonably possible for a worker for the purposes of section 67(3), regard shall be had to –
>
> a) his age;
>
> b) his experience, training and other existing skills;
>
> c) his potential for rehabilitation training;
>
> d) his language skills;
>
> e) the potential **availability** (emphasis added) of such employment;
>
> f) the impairments suffered by the worker; and
>
> g) any other relevant factor."

49. The word "available" appeared in each of subsection 65(2)(b) and section 68 of the Act, and the related form "availability" also appeared in section 68, all in the context of "most profitable employment". This was the position prior to the amendment which introduced subsection 65(2)(b)(ii) and consequentially amended section 68.

50. The amendment to subsection 65(2) was made by section 7 of the *Work Health Amendment Act (No. 2) 2002.* The consequential amendment to section 68 was made by section 10 of that amending Act. The amendments came into force on 1 November 2002.

51. The amended version of subsection 65(2) of the Act introduced a third stage for payments of weekly benefits to injured workers, coming into effect after the first 104 weeks of incapacity arising from a work injury. That third stage involves an even more theoretical approach to the assessment of an injured worker's loss of earning capacity, in that it is no longer requires that the most profitable employment be "available" to the partially incapacitated worker.

52. Subsection 65(2) now provides as follows:

> "(2) For the purpose of this section, loss of earning capacity in relation to a worker is the difference between:
>
> a) his or her normal weekly earnings indexed in accordance with subsection (3); and
>
> b) the amount, if any, he or she is from time to time reasonably capable of earning in a week in work he or she is capable of undertaking if:
>
> (i) in respect of the period to the end of the first 104 weeks of total or partial incapacity – he or she were to engage in the most profitable employment (including self-employment), if any, reasonably available (emphasis added) to him or her; and
>
> (ii) in respect of the period after the first 104 weeks of total or partial incapacity – he or she were to engage in the most profitable employment that could be undertaken by that worker, whether or not such employment is available (emphasis added) to him or her,
>
> and having regard to the matters referred to in section 68."

53. The consequential amendment to section 68 of the Act only involved 68(e). That now reads: "in respect of the period referred to in section 65(2)(b)(i) –

the potential **availability** (emphasis added) of such employment". In other words, regard shall be had to that potential availability during the first 104 weeks of incapacity, but not after that period.

Applicability of Section 68

54. Section 68 still commences: "In assessing what is the most profitable employment **available** (my emphasis) to a worker for the purposes of section 65…regard shall be had to…" and this is followed by the matters identified in section 68(a) to (g) inclusive. Given that the availability of most profitable employment is specifically excluded from consideration by subsection 65(2)(b)(ii), does this mean that the matters identified in section 68(a) to (g) inclusive have no application to the assessment of most profitable employment after the first 104 weeks of incapacity?

55. I am satisfied that it does not mean that. This is so because of the words "…and having regard to the matters referred to in section 68" which follow after subsection 65(2)(b)(ii). These words plainly apply to the whole of subsection 65(2)(b) including both subsection 65(2)(b)(i) and subsection 65(2)(b)(ii). Regard must be had to the matters referred to in section 68(a) to (g) inclusive in assessing most probable employment both before and after the first 104 weeks of incapacity.

Second Reading Speech and Relevant Authorities

56. I was not referred to any authorities which considered "available" in the pre-amended version of the Act however I was referred to an authority considering the word "available" appearing in a similar role in an earlier version of the Northern Territory *Motor Accidents (Compensation) Act* ("MACA").

57. This authority was *Collman v Territory Insurance Office* [2002] NTSC 8 where Riley J (as he then was) of the NT Supreme Court sitting as the Motor Accidents (Compensation) Appeal Tribunal considered subsection 13(2) of

MACA. That subsection at that time relevantly provided: "… there shall be payable …to a person… in respect of the period…during which he suffers a loss of earning capacity… the amount…he is reasonably capable of earning in employment in each period of 6 months during that period if he were to engage in the most profitable employment (if any) **available** (emphasis added) to him…".

58. His Honour said in paragraph [11] as follows: "The amount that a person is capable of earning in the most profitable employment available to him is not necessarily to be assessed by the employment (if any) actually undertaken by that person. The issue is one of capacity and that is assessed by reference to employment "available" to the person. In determining whether employment is available to the person it is necessary to consider the whole of the surrounding circumstances including factors personal to the applicant (for example any physical infirmities from which he may suffer) **along with the level of availability of particular forms of employment within the relevant community** (emphasis added). The issue is governed by the concept of reasonableness. The work must be reasonably available to the particular applicant rather than being reasonably available to anybody."

59. Later in *Collman* in paragraph [54] His Honour considered evidence of work with a particular company and he said: "However in cross-examination it was revealed that **he had not engaged any new employees (other than on a short term part time basis) since at least January 2000** (emphasis added). His evidence did not assist me as to a finding that employment of a suitable kind was available to the applicant during the relevant period." In other words, His Honour here equated availability of employment with some actual or potential employment vacancy.

60. This Decision was delivered on 18 January 2002. Section 13 of MACA was amended from December 2002 so that in subsection 13(3) it now refers to a capacity to work "in any employment, whether such employment is

reasonably available or not". In the Second Reading Speech on 16 October 2002 for this and other amendments to MACA the Minister referred specifically to the Decision in *Collman* and identified that the legislature's intention was that section 13 should not have regard to "the employment opportunities and the potential income of each individual".

61. The position under the Act was also reviewed, although a little earlier. Section 65(2) of the Act was amended from November 2002 as set out above. The relevant Second Reading Speech was delivered on 20 June 2002. The then Attorney-General Mr Stirling said: "The bill will provide for a stronger ability to deem injured workers to have an earning capacity after 104 weeks of incapacity. This will have the potential to reduce future long term scheme costs by enabling the possible reduction or cancellation of benefits in accordance with the claimant's reasonable capacity to earn. Currently, a long term partially incapacitated worker can remain on total incapacity benefits if, **because of the condition of the labour market** (emphasis added), suitable employment is not readily available."

62. I was referred to one authority which considered "available" following the amendment to subsection 65(2) in the Act. This is the Decision of Ms Fong Lim SM of the Work Health Court in *Cheryl Newton v Masonic Homes Pty Ltd* [2008] NTMC 059 where Her Honour said at paragraph 199: "The availability of a type of employment to the Worker given her disabilities is a relevant consideration after the first 104 weeks of incapacity but the availability of work, part time or otherwise, **on today's market** (emphasis added) is not." I am satisfied that Her Honour was thereby limiting the exclusionary effect of the subsection 65(2)(b)(ii) proviso to the <u>market</u> availability of any particular work.

63. I have identified a further relevant authority which adopts the same approach. That is the Decision of Blokland J in *Global Insulation Contractors (NSW) Pty Ltd v Keating* [2012] NTSC 04. This was an appeal

from the Work Health Court by an Employer. In one of its grounds of appeal the Employer argued subsection 65(2)(b)(ii) of the Act had the effect that only the fundamental requirements of some specific category of employment were to be considered in identifying a "most profitable employment". It argued the Work Health Court below had erred in considering the Worker's capacity to carry out the duties of individual positions within the general category of employment under consideration, namely crane and/or forklift driving.

64. Blokland J did not accept this argument. She stated in paragraph [111] that the Court below was entitled to consider the physical requirements of any actual position and that approach was in keeping with the purpose of the Act and with subsection 65(2)(b)(ii). She concluded: "**Her Honour did not erroneously consider market forces** (emphasis added)". I am satisfied that Her Honour meant by this that only the narrow issue of market forces was excluded by the proviso to subsection 65(2)(b)(ii) of the Act.

65. I am satisfied from my consideration of the analogous development under MACA and from the foregoing legislative history of the Act together with the Second Reading Speech and relevant authorities, that we can clearly identify the "existing state of the law and the mischief intended to be remedied" by the introduction of subsection 65(2)(b)(ii) and the consequential amendment of section 68 of the Act. This was to exclude consideration of the labour market and market forces generally and the availability of actual or potential job vacancies specifically, when identifying a "most profitable employment" after the first 104 weeks of incapacity.

66. I am satisfied that the words "available" and "availability" in subsection 65(2)(b)(ii) and section 68 of the Act have this limited meaning.

67. For these reasons I am satisfied and I rule that the proviso to subsection 65(2)(b)(ii) of the Act "whether or not such employment is available to him

or her" can have no application to a worker's actual, ongoing employment. It must be limited to potential employments in the sense of existing job positions with or without current vacancies which are not currently occupied by the worker in question.

68. In the present case Mr Schloss is engaged in an actual, ongoing employment, namely the current employment. That employment provides no work for him during the periods totalling 12 weeks or so each year comprising the Queensland school holidays because no buses need to be driven to transport children to and from school during those periods. Mr Schloss's job still exists before and after each period of those school holidays. No question arises as to a job vacancy in the current employment or as to the labour market in the current employment. The proviso cannot apply to the current employment.

69. I am satisfied and I find that the proviso does not apply to the periods of Queensland school holidays totalling 12 weeks or so in each year when there is no work for Mr Schloss in the current employment.

70. For the same reasons I am satisfied that the proviso cannot apply to public holidays when there is also no work for Mr Schloss in the current employment driving a bus taking children to and from school. However I make no finding in relation to public holidays because there is no evidence before me whether Mr Schloss is or is not paid for public holidays which fall outside the 12 weeks or so of Queensland school holidays.

The Weekly Calculation Issue

71. Subsection 65(2)(b) of the Act is in these terms: "the **amount**, if any, he or she is from time to time reasonably capable of earning **in a week** in work he or she is capable undertaking if…(emphasis added)" and the subsection then goes on in (i) and (ii) to deal with the scenarios before and after the first 104 weeks of incapacity.

72. The effect of the words “amount” and “in a week” in the subsection is that the amount of a partially incapacitated worker’s earning capacity must be determined as a dollar value per week. It is not to be determined as a dollar value over some other period of time, such as per month or per annum. It is not to be determined as a mix of a dollar value and some other entitlement lacking a precise dollar value, such as meals or accommodation. This is so because a precise weekly dollar value of the capacity to earn must be ascertained to calculate the amount of that worker’s entitlement to weekly payments. That entitlement is to 75% of the loss of earning capacity, defined as the difference between the indexed normal weekly earnings prescribed in subsection 65(2)(a) and the most profitable employment prescribed in subsection 65(2)(b)(i) or (ii).

73. The words “in a week” do not necessarily require a separate calculation of earning capacity every week. Once the amount of a worker’s entitlement to weekly payments has been ascertained then the employer must keep paying that amount in accordance with the Act. If a worker seeks an increase or a decrease in the amount of the weekly payment he or she may apply to the employer. Section 86 of the Act prescribes the procedure for such an application.

74. The Employer bears the onus of quantifying Mr Schloss’s capacity to earn given it is common ground that he continues to be partially incapacitated for work because of the injury. There is no evidence before the Court of any most profitable employment for Mr Schloss other than the current employment. The nature of the current employment is that it provides a variable amount of income in a week depending on the occurrence of school holidays. I have found above that this variability is not a question of “availability” and that the proviso to subsection 65(2)(b)(ii) of the Act does not apply to the current employment.

75. Accordingly I find that Mr Schloss is entitled during those 12 weeks or so of the Queensland school holidays each year to receive varying weekly payments under the Act, calculated on the basis of his actual earnings in each such week in the current employment when those earnings are affected by those holidays. Mr Schloss will need to apply to the Employer pursuant to section 86 of the Act for any appropriate increase in the level of a weekly payment each time his earning capacity in a week in the current employment is reduced as a consequence of Queensland school holidays.

The Most Profitable Employment Issue

76. In numbered paragraph 1 of exhibit E1 the parties agreed that Mr Schloss's most profitable employment is the current employment as a casual school bus driver.

77. In paragraph 9 of his affidavit affirmed 24 February 2015 being exhibit W2, Mr Schloss deposed to working 5 weekdays in each standard week in the current employment, a split shift of one to one and a half hours in the morning and the same in the afternoon, plus some additional time cleaning the bus. He deposed to working an average of 16 to 17 hours in each week but to being paid for working two hours in each split shift. That is payment for 4 hours each day which is 20 hours in each standard week in the current employment.

78. In the hand-written document headed "Agreed Fact" which became an additional part of exhibit E1, Mr Schloss conceded that since the date of the Notice (7 October 2013) he has had the capacity to work 22 hours a week in the current employment. This concession related to his physical capacity to perform the duties of the current employment for that many hours each week. It said nothing about his having the option actually to work and be paid for working 22 hours a week in the current employment. There is no evidence before the Court that the current employment might or does

provide any further hours of work than the 17 hours Mr Schloss actually works or the 20 hours for which he is paid.

79. As discussed earlier in these Reasons, the Employer bears the onus of quantifying Mr Schloss's capacity to earn, which is not the same thing as his capacity to work. Pursuant to subsection 65(2)(b) of the Act quantifying a capacity to earn involves identifying a most profitable employment. In this case there is no identification of or any evidence of any most profitable employment other than the current employment.

80. On the evidence before the Court I find the amount Mr Schloss is reasonably capable of earning in a week in work he is capable of undertaking is the amount he is paid in each standard week in the current employment, which is $515.30 before tax. This is subject to the variations discussed above in those weeks affected by the Queensland school holidays.

The Invalidity Issue

81. The Employer's amendment to its Counterclaim together with Exhibit E1 had the effect that the Employer no longer relied on the Notice in support of its reduction in the amount of weekly payments being made to Mr Schloss. Nevertheless, by numbered paragraph 4 of exhibit E1 both parties seek a ruling on the validity of that Notice. The invalidity issue is not relevant to Mr Schloss's entitlement to automatic section 89 interest on any arrears of weekly benefits because of the introduction of subsection 89(2) into the Act in 2012. However the determination of the invalidity issue may still be relevant in consideration of the retrospectivity issue and the section 109 interest issue.

82. The scheme of the Act is to prohibit interference with payments of weekly benefits once commenced, other than as prescribed. Section 69 relevantly prescribes:

> "(1) Subject to this Subdivision, an amount of compensation under this subdivision **shall not be cancelled or reduced** (emphasis added) unless the worker to whom it is payable has been given:
>
> a) 14 days notice of the intention to cancel or reduce the compensation and, where the compensation is to be reduced, the amount to which it is to be reduced; and
>
> b) a statement in the approved form: {(i) to (vi) not reproduced}
>
> (2) (a), (aa), (b) and (c) – not relevant; (d) the Court orders the cancellation or reduction of the compensation.
>
> (3) not relevant.
>
> (4) For the purposes of subsection (1)(b), the reasons set out in the statement referred to in that subsection shall provide sufficient detail to enable the worker to whom the statement is given to understand fully why the amount of compensation is being cancelled or reduced".

83. In *Collins Radio Constructors Inc v Day* (1997) 116 NTR 14 in the initial appeal to the Supreme Court from the Work Health Court Martin CJ (BF) considered the purpose of section 69 of the Act. He made the following observations:

> "Section 69 is a provision by which an employer may peremptorily deprive a worker of the benefit of weekly compensation secured to the worker, either by acceptance of liability under s 85(2) or s 85(4) or by order of the Court under s 94. It operates so as to deprive the worker of the continuing receipt of compensation, without resort to agreement or any form of adjudication. The obvious intention of s 69 is to confer rights upon an employer to cancel payments provided that, in circumstances such as this, it discloses what it believes is a lawful reason to do so. It is an alternative method to achieving the result to that envisaged by s 69(2)(d), that is, by seeking an order of the Court cancelling the obligation to pay the compensation."
>
> Martin CJ went on to say:
>
> "The legislature was anxious to ensure that workers understood their rights by requiring them to be informed of the right of appeal (as it is called) and it must be taken to have been primarily concerned to ensure that a worker properly understood the basis upon which

compensation was cancelled so as to assess the prospect of success on appeal."

His Honour concluded:

"In my opinion, the statutory requirements whereby an employer is able to unilaterally cancel a worker's continuing right to receive compensation constitutes such an interference with personal rights as to require strict compliance with the conditions attaching to it. Further, there are good reasons why, within the scheme of the Act designed to protect workers' rights, the worker should obtain the information required and in the form required."

84. In this case Mr Schloss was given the required 14 days' notice and the statement in the prescribed form setting out the Employer's reasons for its interference with the *status quo*. The Notice is part of annexure "RS1" to Mr Schloss's affidavit affirmed 24 February 2015 which is exhibit W2. At the same time, he was given two medical reports of consultant occupational physician Dr Tim Hwang dated 31 July 2012 and 6 June 2013, a report of consultant orthopaedic surgeon Mr Bart Nyunt dated 29 February 2012, and a vocational assessment report dated 22 September 2011 of Advanced Personnel Management – these reports are the balance of annexure "RS1" to that affidavit in exhibit W2.

85. Mr Schloss was also given along with the Notice a covering letter dated 7 October 2013 from the Employer's Work Health insurer Allianz and four pages of printouts from the internet on different dates in September 2013, each describing an advertised job. These four jobs were for a limousine driver/chauffeur, a bus driver for a courtesy Hi Ace mini van, a casual bus/coach driver and a tour driver/guide. This letter and these four pages comprise exhibit W3.

84. The Notice was in the following terms:

"Dear Mr Rodney Schloss,

With regard to your claim for benefits, (claim number 992123200013, Work Health number 208787), as prescribed under

the Workers Rehabilitation and Compensation Act, you are hereby advised that your employer QUALITY PLUMBING & BUILDING CONTRACTORS PTY LTD acting on the advice of Alliance Australia Insurance Ltd hereby:-

Reduces payments of weekly benefits to you pursuant to Section 69 of the Workers Rehabilitation and Compensation Act. **The cancellation** will be effective in 14 days from your receipt of this notice (emphasis added).

The reasons for this decision are:-

1. You suffered a work related injury to your lower back on or about 26 June 2010.

2. Your normal weekly earnings at the time you first became entitled to compensation for your injury in 2010 were $1100 gross per week.

3. Your indexed normal weekly earnings for 2013 are 1343.27 gross per week.

4. You were examined by Dr Tim Hwang, Occupational Physician, on 13 July 2012.

5. As a result of the examination referred to in paragraph 4 above, Dr Tim Hwang concurs with your treating Orthopaedic Surgeon, Dr Ba Nyunt that you are fit to undertake the following full time work as long as it does not involve heavy manual handling;

(a) Forklift driving

(b) Retail sales

(c) Courier/Postal Delivery driver

(d) Heavy Rigid driver

(e) Truck driver

(f) Gardening and nursery hand

(g) Yard man

6. You were further examined by Dr Tim Hwang on 27 May 2013. In this report dated 06 June 2013, Dr Hwang states that your capacity

for work is largely unchanged. He confirms that you are fit to undertake some driving duties where manual handling is not routinely required. Dr Hwang notes in regards to taxi driving, most jobs do not involve handling of luggage and though it is sometimes required, it would usually be within the airline restrictions of 20kgs.

He also notes that most passengers are able bodied and able to handle luggage themselves. Dr Hwang considers that you have the capacity to undertake taxi driving but may require regular breaks.

7. Your most recent Certificate of Capacity issued on 20 September 2013 states you are fit to work 20 – 22 hours per day on restricted duties for the period 24 September 2013 – 23 October 2013.

8. You are therefore fit for employment for 22 hours per week in the types of positions/employment referred to in paragraph 5(a) to (g) inclusive.

9. Working 22 hours per week in the role of Limousine Driver/Chauffeur is the most profitable employment earning $660.00 per week.

10. Other roles which are reasonably available to you and within your capacity are:

    A) Tour driver/guide with earnings of $549.78 per week for 22 hours

    B) Casual Driver – Bus/Coach with earnings of $604.78 per week for 22 hours

    C) Bus Driver – Courtesy Hi Ace Mini Van with earnings of $604.78 per week for 22 hours

11. You therefore have an earning capacity of approximately $660.00 gross per week as a Limousine Driver/Chauffeur to section 65(2)(b)(ii) of the Act, irrespective of whether such employment is reasonably available to you.

12. Attached to this Notice are the reports of Dr Tim Hwang and Dr Ba Nyunt dated 31 July 2012 & 06 June 2013 and 29 February 2012respectively, and the Vocational Assessment Report from APM dated 22 September 2011.

13. Therefore your weekly compensation entitlement pursuant to section 65(2)(b)(ii) of the Act is reduced on the basis that you have the capacity to earn $660.00 gross per week and therefore your entitlement to weekly benefits is reduced to $512.46 gross per week".

86. On the face of the Notice there is a discrepancy in the second paragraph between the action whereby the Employer "**Reduces** payments of weekly benefits to you pursuant to Section 69…" and the advice that "**The cancellation** will be effective in 14 days from your receipt of this notice".

87. The letter from Allianz dated 7 October 2013 - part of exhibit W3 - in the second paragraph advised that Mr Schloss's entitlement to weekly compensation would be "**reduced**" 14 days after his receipt of that letter.

88. With the benefit of the evidence and submissions in this case it has become clear in hindsight that the Employer intended to and 14 days after service of the Notice did indeed reduce weekly payments rather than cancel them. However, the issue is whether this was clear to Mr Schloss at the time he was served with the Notice and associated documents.

89. Mr Schloss gave evidence in paragraph 7 of his affidavit being exhibit W2 that he left school at about the age of 15 years and he was then only half way through year 9, having been "kept back for a few years as I was not doing very well. I only just passed English". The report of Advanced Personnel Management being part of exhibit W2 establishes a pre-injury work history for Mr Schloss as a manual labourer.

90. In *Dickin v NT TAB Pty Ltd* [2003] NTSC 119 at paragraph [17] Angel J said: "If I may be pardoned for saying so, s.69(4) Work Health Act means what it says. A notice must unambiguously spell out why a current payment regime should change in clear terms that a lay reader can fully and readily understand."

91. The reference to "the cancellation" could conceivably have been a typographical error arising from the use of a word processor precedent without adequate proof-reading. However there was no evidence before the Court to explain this reference to "the cancellation" in this way, or at all, and no such submission was made.

92. There was no direct evidence before me that Mr Schloss did not fully understand the Notice. However, the onus is on the Employer to establish the validity of the Notice. The reference in subsection 69(4) of the Act to "the worker to whom the Notice is given" makes it plain it is the particular worker receiving the particular Notice, not some theoretical lay everyman, who must understand fully why the amount of compensation is being cancelled or reduced. In the present case Mr Schloss is a man of limited education and has worked only in manual occupations. I am satisfied he lacked the clerical, administrative or legal background unaided to resolve the patent ambiguity on the face of the Notice. It is likely that at the time he received the Notice in these terms he would have been confused as to whether the amount of compensation was being cancelled or whether it was merely being reduced. Accordingly he could not have understood fully the reasons set out in the Notice for the interference with the *status quo*.

93. For these reasons I am not satisfied the Employer has discharged its onus in respect of the validity issue.

94. I find that the Notice is invalid in that it breached subsection 69(4) of the Act.

<u>The Retrospectivity Issue</u>

95. Mr Schloss commenced the current employment on 14 August 2014. In numbered paragraph 3 of Exhibit E1 he concedes that he was capable of undertaking that employment earlier, from the date of the Notice namely 7 October 2013.

96. Subsection 69(2)(d) of the Act allows existing payments of weekly benefits to be reduced or cancelled where the Court so orders. The issue here is whether the Court should now order that the amount of the weekly benefits payable to Mr Schloss under the Act be reduced as from 7 October 2013 being the date he was capable of undertaking the duties of the current employment, or from 14 August 2014 being the date he actually commenced work in the current employment.

97. The issue of retrospectivity was considered in *Alexander v Gorey & Cole Pty Ltd* [2001] NTSC 74. This was an appeal to the NT Supreme Court from the Work Health Court. The Worker's submission was that where a section 69 cancellation or reduction was found to be invalid or it was simply not upheld then a finding in favour of the Employer on its Counterclaim could not be backdated. It was submitted that to backdate in those circumstances would relieve an Employer of any consequences for failing to comply with the requirements of section 69.

98. Riley J (as he then was) did not accept this submission. He said at paragraph [43]: "In my view the Act permits the Court to give effect to a cancellation or reduction of compensation at any time the Court is satisfied that the entitlement to compensation had ceased or that a reduction was justified on the evidence before it. Each case must depend on its own facts. There is no provision in the Act that suggests the Court is limited as to the timing of the relief it can grant in proceedings of this kind commenced under section 104 of the Act. In particular s 69(2)(d) of the Act does not contain any provision that suggests relief can only be granted from the date of judgment. That subsection is expressed to be unaffected by the operation of s 69(1)".

99. Accordingly, the Court does have the power to backdate a reduction in the amount of weekly benefits calculated on the amount of the earnings in the current employment to 7 October 2013 and not just from Mr Schloss's commencement of that employment on 14 August 2014. Should the Court

exercise that power and make such an order in this case? I am satisfied it should not.

100. It is not enough to point to the probable existence of the occupation of a school bus driver before 14 August 2014. Even after the first 104 weeks of incapacity an Employer's onus to quantify a partially incapacitated Worker's earning capacity involves identifying a real, actual employment and not simply a broad category of employment.

101. This is because subsection 65(2) of the Act requires that the Worker be "reasonably capable" of earning an amount. This was considered in *Plewright v Passmore trading as Passmore Roofing* [1997] NTSC 34. Martin CJ (BF) said at paragraph 25 that "reasonably" does not govern the question of the amount the worker is capable of earning. It relates to capacity to earn. He said: "Reasonably capable is a narrower term than physically capable or even physically possible, and what the worker is reasonably capable of earning necessarily depends on the circumstances".

102. Accordingly, it is necessary to consider all the relevant circumstances of any suggested most profitable employment, including the duties involved and the worker's capacity to carry out those duties not in isolation but in the context of daily and hourly reality – see the Decisions in *Newton* and *Keating* discussed in paragraphs 62, 63 and 64 above.

103. Mr Schloss has had the conceded capacity to carry out the specific duties of the current employment for up to 22 hours per week since 7 October 2013. On the evidence however he does not have the capacity to carry out any more onerous duties. In paragraph 10 of his affidavit being exhibit W2 he deposes to needing to go home and take a hot bath and lie down in the interim between his split shifts because his back gets sore after carrying out the first shift, which I note involves working for only 1.5 hours.

104. There is no evidence before the Court of the existence of the current employment before 14 August 2014, or if it did exist, of the hours of work and/or the duties required to be performed in that employment before that date. The situation remains that the Employer bears the onus of quantifying Mr Schloss's capacity to earn. I am not prepared to assume the existence of the current employment offering the same duties for the same hours prior to 14 August 2014.

105. In the absence of any evidence about the current employment before 14 August 2014 I rule that the Employer was not and is not entitled to reduce the amount of weekly benefits payable to Mr Schloss pursuant to the Act on the basis of his earnings in the current employment from any date prior to 14 August 2014.

The Section 109 Interest Issue

106. It is not contested in these proceedings that the Employer reduced payments of weekly benefits to Mr Schloss from 14 days after the Notice was given to him. The precise date Mr Schloss received that Notice is not in evidence before the Court. The only evidence as to this is the date of the Notice – 7 October 2013 – and Mr Schloss's affidavit exhibit W2 where he says at paragraph 8 he received the Notice in about mid October 2013.

107. The employer reduced payments of weekly benefits pursuant to the Notice on the basis that Mr Schloss could earn $660 gross per week as a limousine driver/chauffeur. That reduction came into effect in late October 2013. However, the parties subsequently agreed in exhibit E1 that Mr Schloss's most profitable employment was in the current employment as a casual school bus driver, which pays him less than $660 per week. I have found that Mr Schloss's capacity to earn in the current employment is $515.30 in a standard week not affected by the Queensland school holidays. I have also ruled that there is no evidence before the Court to establish this most profitable employment before 14 August 2014.

108. Accordingly Mr Schloss is entitled to arrears of weekly benefits from the date the reduction came into effect in late October 2013 to and including 13 August 2014 calculated on the basis he had no capacity to earn. He is then entitled to arrears of weekly benefits from and including 14 August 2014 to the date of this Decision calculated on the basis his capacity to earn was his actual earnings in each week in the current employment. These entitlements to arrears raise the issue of interest pursuant to section 109 of the Act.

109. Section 109 provides:

> "(1) If, in a proceeding before it, the Court is satisfied that the employer has caused unreasonable delay in accepting a claim for or paying compensation, it must:
>
> a) where it awards an amount of compensation against the employer – order that interest on that amount at a rate specified by it be paid by the employer to the person to whom compensation is awarded; and
>
> b) if, in its opinion the employer would otherwise be entitled to have costs awarded to him or her – order that costs be not awarded to him or her.
>
> (2) Where a weekly or other payment due under this Act to a person by an employer has not been made in a regular manner or in accordance with the normal manner of payment, the Court must, on an application in the prescribed form made to it by the person, order that interest at a rate specified by it be paid by the employer to the person in respect of the amount and period for which the weekly or other payment was or is delayed.
>
> (3) (Not relevant)".

110. Subsection 109(1) is limited to a delay in accepting a claim for compensation or to a delay in making payments of compensation. Where these are found, the delay must have been unreasonable. Delay in accepting a claim does not arise in this case. The fact that a Notice is not upheld or that it was invalid does not automatically make a subsequent cessation or reduction in payments "unreasonable". There is no evidence before the Court of any other behaviour by the Employer which might be held to have

been unreasonable. Subsection 109(1) has no application in the circumstances of this case.

111. Subsection 109(2) appears to be directed to the mechanics of the manner and time of payment of compensation under the Act. In *Pengilly v NT of A (No 3)* [2004] NTSC 1 at paragraph [10] Mildren J said:

> "In my opinion s 109(2) is directed towards requiring employers to comply with the provisions of the Act as to the manner and time of payment under the Act. The manner of payment includes the method of payment".

Mildren J went on in the same paragraph to add the following:

> "I also consider that a payment which is not made at all, when it is required to be made, may fall within the subsection. However, if the reason for non-payment is that the liability or quantum of the payment was genuinely disputed, in my opinion the payment does not fall within the subsection as there is no regular or normal manner of payment in those circumstances".

112. In my view the weekly payments of compensation in this matter were "required to be made" on a regular (presumably weekly) basis because the Notice was invalid and therefore the Employer was not entitled under the Act to reduce or cancel those payments. However, I am also satisfied that the reason for non-payment of the full entitlement was that the quantum of the payment was genuinely disputed.

113. Accordingly I am not satisfied that Mr Schloss is entitled to interest pursuant to either subsection 109(1) or (2) on arrears of weekly payments. He is entitled to interest pursuant to section 89 of the Act and it is not necessary to make any formal Order for that interest to be payable – see *Passmore v Plewright* [1997] NTCA 140 as noted by Mildren J in *Pengilly* (above) at paragraph [7].

Costs

114. Mr Schloss has been successful on every issue in these proceedings other than section 109 interest. That was a secondary issue which took up none of the Court's time in evidence and very little time in submissions. The issues overall were complex, senior/junior counsel were properly involved in the matter and the Court was greatly assisted by their submissions. Mr Schloss is entitled to his costs on the standard basis.

Orders

115. I make the following Orders in these proceedings:

1. the Employer pay arrears of weekly benefits to the Worker calculated from the date of the reduction in weekly benefits pursuant to the Notice dated 7 October 2013 to and including 13 August 2014 on the basis the Worker had no earning capacity over that period;

2. the Employer pay arrears of weekly benefits to the Worker calculated from and including 14 August 2014 to and including the date of these Reasons on the basis of the Worker's actual earnings in each week over that period;

3. the Employer pay weekly benefits to the Worker from the date of these Reasons in accordance with the Act;

4. the parties have liberty to apply in default of agreement in respect of any calculations arising from Orders 1, 2 and/or3;

5. the Employer pay the Worker's costs of and incidental to these proceedings and to the dispute giving rise to these proceedings to be taxed in default of agreement at 100% of the Supreme Court scale certified fit for counsel.

Dated this 26th day of May 2015

____

John Neill
STIPENDIARY MAGISTRATE