CITATION: *Rodney Phillip Corrie* ***v*** *Metcash Trading Limited* [2014] NTMC 003

PARTIES:	RODNEY PHILLIP CORRIE
	V
	METCASH HEALTH COURT
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	Work Health
FILE NO(s):	21112528
DELIVERED ON:	3 February 2014
DELIVERED AT:	Darwin
HEARING DATE(s):	Final Submissions on 23 August 2013
JUDGMENT OF:	Dr John Allan Lowndes

CATCHWORDS:

WORK HEALTH - VALIDITY OF SECTION 69 NOTICE – EXPANSION OF PLEADINGS – CESSATION OF INCAPACITY FOR WORK – MENTAL OR PSYCHIATRIC SEQUELAE

Section 69 *Workers Rehabilitation compensation Act*
Disability Services of Australia v *Regan* (1998) 8 NTLR considered
Ju Ju nominees Pty Ltd v *Carmichael* (1999) 9 NTLR 1 applied
Newton v *Masonic Homes Inc* [2009] NTSC 51 applied
Dickin v NT TAB Pty Ltd [2003] NTSC 119 considered
Collins Radio Constructors Pty Ltd Inc v *Day* (1998) 143 FLR 425 applied
Arnotts Snack Products Pty LTD v *Yacob* (1985) 155 CCR 171 applied
Work Social Club Katherine Inc v *Rozycki* (1998) 143 FLR 224 applied

REPRESENTATION:

Counsel:

Worker:	Mr M Crawley
Employer:	Mr D McConnell

Solicitors:

Worker:	Ward Keller Lawyers
Employer:	Hunt & Hunt Lawyers

Judgment category classification:	B
Judgment ID number:	003
Number of paragraphs:	115

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

No. 21112528

BETWEEN:

RODNEY PHILLIP CORRIE
Plaintiff

AND:

METCASH TRADING LIMITED
Defendant

REASONS FOR DECISION

(Delivered 3 February 2014)

Dr John Allan Lowndes CM

THE NATURE OF THE PROCEEDINGS

1. The worker alleges that on or about 6 November 2007 he sustained an injury which is fully particularised in paragraph 3 of the Substituted Statement of Claim.

2. The worker claims that the injury arose out of or in the course of his employment with the employer, that he gave notice to the employer as soon as practicable, and that the injury resulted in or materially contributed to his impairment or incapacity. As regards the latter, the worker claims that he has been and continues to be totally incapacitated for his employment since on or about 6 November 2007.

3. The worker alleges that he has reasonably incurred medical and similar expenses as a result of sustaining the injury, but has not been reimbursed by the employer for such expenses.

4. The worker then alleges that he submitted a claim for compensation as a result of the injury. Although the employer initially accepted liability for the claim, on or about 28 February 2011 the employer cancelled payment of weekly payments to the worker purportedly pursuant to section 69 of the *Workers Rehabilitation and Compensation Act* by way of a notice of decision.

5. The worker is seeking a review of the employer's decision to cancel weekly payments on the basis that the purported cancellation was invalid. The worker asserts that the notice is invalid on the following grounds:

- the worker had not ceased to be incapacitated;
- the report of Mr Stuart was not annexed to the notice of decision;
- the notice did not comply with paragraph 69(2)(iii) of the Act in that the notice did not advise the worker that it was in the circumstance of the mediation being unsuccessful in resolving the dispute that grounded the worker's entitlement to appeal to the Court;
- the notice did not comply with paragraph 69(2) (iv) of the Act in that the notice did not advise that if the worker wished to appeal the decision referred to in the notice the worker was obliged to lodge such an appeal within 28 days of receiving the certificate issued pursuant to section 103J(2) of the Act;
- the notice failed to advise the worker that he may only appeal the decision if the attempt to mediate was unsuccessful (contrary to section 69(2)(v) of the Act;
- the certificate of Mr Gordon Stuart failed to comply with section 69(3) in that it not state that the worker has ceased to be incapacitated for work " as a result of the above injury";
- the notice carries no sense relevant to the provisions of the Act and therefore is contrary to paragraph 69(1)(b) of the Act.

6. Having been aggrieved by the decision cancelling weekly payments the worker made application to have the dispute referred to mediation. The attempt to resolve the matter by mediation was unsuccessful.

7. The worker seeks the following declaration and orders:

1. a declaration that the notice of decision cancelling weekly payments is invalid;

2. an order that the employer pay arrears of weekly payments from the date of cancellation until the date of order;

3. an order for the payment of ongoing weekly payments in accordance with the Act;

4. an order for the payment of unpaid medical and similar costs in arrears;

5. an order for interest on any arrears pursuant to section 89 and 109 of the Act; and

6. an order for costs.

8. The employer takes issue with the worker's claim.

9. Although the employer admits that the worker sustained an injury to his lumbar spine on or about 6 November 2007, it asserts that the injury was in the nature of an aggravation to his pre-existing underlying degenerative condition of the lumbosacral spine. The employer accepts that this injury arose out of or in the course of the worker's employment.

10. The employer denies the remainder of the injuries as particularised in the Statement of Claim. The employer further denies that any of those injuries arose out of or in the course of the worker's employment with the employer.

11. The employer admits that the worker gave notice of the injury in terms of an aggravation to his pre-existing degenerative condition.

12. The employer denies that the said injury resulted in or materially contributed to the worker's impairment or incapacity. The employer's position is that the work related injury was in the nature of an aggravation to the worker's pre-existing degenerative condition and such injury did not materially contribute to the worker's impairment or incapacity. The employer says that if the worker has suffered any impairment or incapacity, then such impairment and/or incapacity is due to the worker's pre-existing degenerative condition.

13. The employer admits that the worker submitted a claim for compensation within six months of the occurrence of the injury – namely the aggravation to the worker's pre-existing degenerative condition. However, the nature of the worker's alleged work related injury and his alleged resultant impairment and incapacity is disputed by the employer, and continues to be denied by the employer.

14. The employer admits having accepted liability for the claim made by the worker.

15. The employer admits that it cancelled weekly payments by way of service of a section 69 notice. However, it says that the reasons for the cancellation was that the worker had ceased to be incapacitated for work as a result of the alleged work related injury. In that regard the employer relies upon the certificate of Mr Gordon Stuart, consultant neurosurgeon, dated 17 February 2011. The employer maintains that the section 69 notice complied with the requirements of the Act, and that it validly cancelled weekly payments by way of the notice.

16. In denying the workers' allegation that the purported cancellation was invalid, the employer says:

    1. the worker ceased to be incapacitated for work as a result of the alleged injury;

    2. any incapacity suffered by the worker is due to his pre-existing degenerative condition and/or a lower back injury sustained by the worker on or about 18 August 1998 whilst employed by Baymanor Pty Ltd trading as Direct Pickets; and

    3. the notice of decision complied with the statutory requirements.

THE SCOPE OF THE PLEADINGS: A STRICT APPEAL OR OTHERWISE

17. The employer submitted that the worker initially appealed the cancellation of payments of weekly compensation, but by his Substituted Statement of Claim expanded the appeal to seek orders for arrears of weekly payments, ongoing

weekly payments and the payment of unpaid medical and like expenses.[1] The employer also pointed out that the worker has alleged a multitude of injuries including consequential, or sequelae injuries.[2]

18. The employer further submits that "the worker abandoned the claim based on an alleged invalidity of the notice of cancellation, but maintained that the grounds relied upon by the employer to justify cancellation of the worker's weekly payments of compensation would not be made out".[3]

19. The employer further submitted:

> The employer maintains that any question of the validity of the notice ceased to be an issue when the worker expanded the issues by the Substituted Statement of Claim. In *Newton v Masonic Homes Inc* (2009) 235 FLR 30, Mildren J observed at [19]:
>
> > It is well established that where a notice is invalid, if the worker limits his or her claim to an appeal under s69 based on the invalidity of the notice and the Court finds that the notice is invalid, the result is that the worker is entitled to recover past compensation payments and obtain an order for continuing payments until either 14 days after valid notice is given or the Court finds adversely to the worker on the merits. However, if the worker by his or her pleadings enlarges the issues beyond a mere appeal, the Court is entitled to decide all of the issues properly raised.

20. In response, the worker submits that he has not abandoned the claim based upon the invalidity of the section 69 notice: on the contrary, such a claim remains integral to the worker's case.[4] However, at the same time the worker acknowledges that the proceeding is not a strict appeal.[5]

21. It befalls the Court to determine the scope of the issues raised by the parties' pleadings.

22. A similar task was required to be undertaken by the Court of Appeal in *Disability Services of Australia v Regan* (1998) 8 NTLR during the course of hearing an appeal from the decision of Angel J (who had heard and determined an appeal from the Work Health Court).

23. In that case the worker alleged that as a result of the injuries sustained in the course of employment with the employer, the worker has been totally incapacitated for work since

[1] See [6] of the employer's written submissions dated 16 August 2013.
[2] See [6] of these submissions.
[3] See [7] of these submissions.
[4] See [4] –[5] of the supplementary submissions of the worker dated 21 August 2013.
[5] See [2] of the submissions.

February 1994, or alternatively that the worker has been partially incapacitated for work since that date. The worker sought reinstatement of her weekly compensation benefits from the date of cessation of payments in February 1995 to date, and to continue in accordance with the *Work Health Act*, as well as reinstatement of her other benefits under the Act. The employer, in its answer, denied these allegations and in particular denied that the worker has suffered from any incapacity at all as a result of any injury arising out of or in the course of her employment with the employer at any time.

24. In *Disability Services of Australia v Regan* the Court of Appeal concluded that the worker had not confined her application to an appeal under section 69 of the Act, but had widened the scope of the issues by her own pleadings:

> Had the worker merely appealed under s69, the only question would have been whether the employer had established the grounds stated in the notice, the burden of proof in so doing resting with the employer. If the employer failed to establish these grounds, the effect of allowing the appeal would be that the employer would be required by force of s69 to continue to make weekly payments of compensation until the employer was lawfully permitted to cease or reduce those payments, either by giving a fresh notice or by making a substantive application under s104. No question would have arisen as to whether or not, after the date of the notice, the worker had ceased to be incapacitated or was only partially incapacitated. An appeal under s69 calls into question only whether there has been a change in circumstances justifying the action unilaterally taken by the employer at the time the notice was given: see *Morrissey v Conaust Ltd* (1991) 1 NTLR 183 at 189; *AAT Kings Tours Pty Ltd v Hughes* (1994) 4 NTLR 185 at 189. Consequently the submission of counsel for the appellant was that the worker, by seeking orders for weekly compensation from the date of cessation of payments to date and continuing, broadened the scope of the issues to include the question of the worker's entitlements from the date of the Form 5 notice to the date of the hearing. Moreover, s69 (and appeals under that section) relate only to the reduction or cancellation of weekly payments: see the opening words of s69(1) which refer to "an amount of compensation under this Subdivision". The employer is not required to give a notice under that section to stop making payments under s78 which is in a different subdivision of the Act. Clearly the worker's claim sought reinstatement of benefits payable under that section. In those circumstances the employer was no longer confined to the grounds stated in the Form 5 notice, but could raise by way of answer any other ground to resist the claim it wished, including whether there was ever any injury in the first place.[6]

25. The Court proceeded to discuss what has to be decided in dealing with an appeal under section 69 of the Act:

> In dealing with an appeal under s69, the Court is not called upon to decide whether or not the employer was justified in the action it took because there was

[6] (1998) 8 NTLR at p3.

> evidence to support the action. The question which has to be decided is whether, upon a consideration of all of the evidence in the case, the employer has proved the facts set out in the certificate, and if so, whether as a matter of law those facts support the conclusion that the worker's weekly compensation payments should be cancelled or reduced, as the case may be, as from the relevant date, which is 14 days after service of the Form 5 notice.[7]

26. However, the Court went on to say:

> But this question became irrelevant because of the wider issues raised by the employer in its answer…[8]

27. Although the pleadings in the present case are not identical to those that came under consideration in *Disability Services of Australia v Regan*, the worker's Substituted Statement of Claim and the employer's Answer in the present proceedings raise issues that go beyond a mere appeal under section 69 of the Act.

28. First, by seeking an order for payment of ongoing weekly payments in accordance with the Act, coupled with a plea of continuing incapacity, the Substituted Statement of Claim conveys the impression that the worker is seeking a determination of a claim for compensation, not simply a determination as to whether cancellation of payments by the employer was effective: see *Ju Ju Nominees Pty Ltd v Carmichael* (1999) 9 NTLR 1. The employer's Answer, inter alia, denied that the worker continued to be incapacitated, and further denied that he was entitled to continuing payments under the Act.

29. Secondly, the worker alleges sustaining an injury in the nature of a psychological or psychiatric sequelae which resulted in or materially contributed to his impairment or incapacity. The alleged incapacity is particularised as total incapacity for his employment since on or about 6 June 2007, being the date of the alleged injury. The employer denies the worker's allegation that injury resulted in or materially contributed to the worker's impairment or incapacity. The employer then pleads that in the event the worker suffers any impairment or incapacity then such is due to the worker's pre-existing degenerative condition. This pleading puts in issue whether the alleged injury resulted in incapacity; and if there is any incapacity, asserts that it is caused by something other than the work injury.[9] In my opinion, the pleadings squarely raise an issue as to incapacity, independently of the worker's

[7] (1998) 8 NTLR at p 4.
[8] (1998) 8 NTLR at p 4.
[9] See [6] of the employer's submissions in reply dated 23 August 2013.

allegation that the notice was invalid and beyond the scope of a mere appeal under section 69 of the Act.

30. It should also noted that the worker bears the onus of proof in relation to the sequelae claim – the onus is on the worker to establish that a particular consequence is in fact a sequel of the injury : see *Spellamn v RSL* [2004] NTMC 062 at [22] –[26]; *Newton v Masonic Homes Inc* [2009] NTSC 51 at]23] and [24]. The onus of proof was readily conceded by the worker.[10] Therefore, by raising a wider issue which imposed an onus of proof on himself, it became demonstrably clear the worker was no longer confining the case he took to the Work Health Court to a mere appeal under section 69. The alleged consequential psychiatric injury goes to the heart of the dispute as to the worker's incapacity for work.

31. If they were any doubt on the face of the pleadings as to whether the case the worker took to the Work Health Court went beyond a strict appeal, one need look no further than the opening made by counsel for the worker and the concessions contained therein:

> …I can make an opening and indicate the parameters of the dispute…we're concerned with a substituted statement of claim. Essentially, what triggered the current dispute was a receipt by the worker of a Form 5, ceasing his payments of weekly benefits, which was received by him in February 2011 – 28 February 2011 or thereabouts. However, the matter does not proceed before your Honour as a simple appeal, because the substituted statement of claim also makes claims in relation to a psychological and psychiatric sequelae and also in relation to medical expenses, although the question of medical expenses wasn't covered by the Form 5, by its very nature. All medical treatment costs ceased to be paid to the worker effectively at the same time.
>
> So I accept on the authority of *Newton v Masonic Homes* it's not a simple appeal matter, and therefore, it is incumbent upon the worker to go first, subject to questions about who is – has the onus of proof in relation to various issues. About equally, the matter is on the authorities bound by and limited to the various issues raised on the pleadings…[11]

32. In my opinion, when one views the state of the pleadings in light of the opening address in the worker's case it is clear that the case the worker brought to the Work Health Court was not confined to a mere appeal under section 69 of the Act.

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[10] This is conceded at [3] of the supplementary submissions of the worker dated 31 August 2013. See also *Newton v Masonic Homes* [2009] NTSC 51 at [24] where Mildren J stated:
" In my opinion, the Work Health Court was right as to who bore the onus of proof. The worker specifically pleaded that the injury to the left hand and the psychological injury were sequelae to the injury to the right hand and sought declarations accordingly. As such the worker by pleading her case in this way bore both the legal and evidentiary onus of proof.

[11] See p 2 of the transcript.

33. Furthermore, the workers supplementary submissions also support this state of affairs by conceding that the matter is not a strict appeal.[12]

34. Finally, but not least, even if the pleadings were capable of being treated as being confined to an appeal under section 69, the manner in which the parties conducted their case extended the area of contest. As observed by Angel J in *Dickin v NT TAB Pty Ltd* [2003] NTSC 119:

> 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 parties on appeal where they have conducted a case beyond the pleadings cannot thereafter treat the pleadings as governing the area of contest.

THE VALIDITY OF THE SECTION 69 NOTICE

35. Although the proceedings are not confined to a strict appeal under section 69 of the Act I intend to deal with the validity of the section 69 notice in case it becomes a matter of significance, notwithstanding the expanded scope of the pleadings.

36. The worker contends that as the notice was based upon an alleged cessation of incapacity as a result of the compensable injury, the notice was required to be accompanied by a medical certificate from a medical practitioner certifying that the worker has ceased to be incapacitated for work: see section 69 (3) of the *Workers Rehabilitation and Compensation Act*.

37. The worker points out that the accompanying medical certificate of Dr Stuart only certified that the worker "is no longer incapacitated for work as a storeman". The worker argues:

> In order to cease to be incapacitated for work, a worker must not only be fit for his immediate pre-injury employment, but also any employment in a labour market in which the worker may reasonably be expected to work.[13] Based upon the worker's employment history, this would extend to truck driver and furniture removalist. Neither of these occupations was the subject of the certification and accordingly the notice is invalid and must be set aside.[14]

38. By way of response the employer says that the worker abandoned the claim based on an alleged invalidity of the notice of cancellation, but maintained that the grounds relied upon by

[12] See [2] of the supplementary submissions of the worker dated 21 August 2013.
[13] The worker relies on *Arnotts Snack Products Pty Ltd v Yacob* (1985) 155 CLR 171.
[14] See [19] of the workers outline of submissions.

the employer to justify cancellation of the worker's weekly payments of compensation would not be made out.[15]

39. The employer made further extensive submissions in relation to the section 69 notice.[16]

40. First, the employer maintains that any issue as to the validity of the section 69 notice ceased to be an issue once the worker expanded the issues via the Substituted Statement of Claim. The employer relies upon the following observation made by Mildren J in *Newton v Masonic Homes Inc* (2009) 235 FLR 30 at [19]:

> It is well established that where a notice is invalid, if the worker limits his or her claim to an appeal under s 69 based on the invalidity of the notice and the Court finds that the notice is invalid, the result is that the worker is entitled to recover past compensation payments and obtain an order for continuing payments until either 14 days after valid notice is given or the Court finds adversely to the worker on the merits. However, if the worker by his or her pleadings enlarges the issues beyond a mere appeal, the Court is entitled to decide all of the issues properly raised.

41. The employer says that notwithstanding the substituted Statement of Claim maintains an allegation of the invalidity of the notice, there are two aspects of the case that indicate an abandonment of that allegation.[17] The first was that no evidence was adduced in relation to the invalidity of the notice except for that relating to Mr Stuart's diagnosis. The second aspect is that the worker made no submissions in relation to the grounds of invalidity apart from those relating to the diagnosis of Mr Stuart.

42. In any event, the employer maintained that the notice was valid as it did in fact comply with the requirements of a section 69 notice for the following reasons:[18]

    1. the report of Mr Stuart was attached to the notice;

    2. the notice contained a written advice that mediation is a prerequisite to the filing of an application in the Work Health Court and had attached to it a bulletin published by NT WorkSafe;

[15] See [7] of the employer's submissions dated 16 August 2013.
[16] See [2] – [5] of the employer's submissions in reply dated 23 August 2013.
[17] See [3] of the employer's submissions in reply.
[18] See [4] and [5] of the submissions in reply.

3. the notice contained the following statement: " if you wish to contest the decision in the Work Health Court you must make an application to the Court within 28 days of receiving a certificate of the mediation";19

4. the wording on the medical certificate amounted to sufficient compliance with the statutory requirements, having regard to the observations made by the Court of Appeal of the Supreme Court of the Northern Territory in Collins Radio Constructors Inc v Day (1998) 143 FLR 425 at 430;20

5. the notice provided sufficient detail to enable the worker to fully understand why the amount of compensation was being cancelled.21

43. Finally, the employer submits that even if the notice was invalid, the Court has the power to order the cancellation of weekly payments from any date that it determines, including a date before the date of judgment.[22] The employer therefore contends that if the Court finds that in substance the worker had ceased to be incapacitated for work from the date that Mr Stuart issued the certificate the Court can dismiss the worker's application and/or refuse the application for orders for payment of arrears and ongoing weekly benefits, even if the notice itself is found to be invalid for any reason.

44. By way of reply, the worker denies abandoning the claim based upon the invalidity of the notice, and asserts that such a claim remains integral to the worker's case.[23]

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[19] The employer contended that the wording of the notice had the effect that the notice advised the worker that he may only appeal the decision if the attempt to mediate was unsuccessful.

[20] The employer made the following extended submission at [4(e)] of its submissions in reply:

> The words convey the essential meaning that the worker was no longer incapacitated for work of a kind in a labour market in which the worker may reasonably be expected to work. Moreover, by virtue of the certification that the worker was no longer incapacitated for his immediate pre-injury employment, the worker had ceased to have a loss of earning capacity within the meaning of s 65 of the Act, so that while there may have been a continuing physical incapacity for some work, the worker had ceased to be incapacitated for work in the relevant sense: see *Newton v Masonic Homes Inc* (2009) 235 FLR 30 at [14] per Mildren J.

[21] In that regard the employer says that there is no evidence to suggest that the worker could not understand why the payments were cancelled. The employer further contends that objectively assessed the notice was not confusing, but stated in plain terms that the weekly benefits were being cancelled because Mr Stuart had certified that the worker was no longer incapacitated. Finally the employer submits that worker applied for mediation and mediation took place; and if the worker did not understand the notice, there were no consequences, as the worker enjoyed and exercised his rights under the Act: see [4 (f)] of the employer's submissions in reply.

[22] See *Alexander v Gorey & Cole Holdings Pty Ltd* (2002) 171 FLR 31 at [22] et seq.

[23] See [5] of the supplementary submissions of the worker dated 21 August 2013. The worker relies upon his pleading at [12] –[14] of the Substituted Statement of Claim.

45. Proceeding to deal with the validity or otherwise of the section 69 notice, I do not accept that the worker had abandoned his claim that the notice was invalid. The pleadings at paragraphs 12 – 14 of the Substituted Statement of Claim together with the particulars of invalidity make it clear that the claim remains an integral part of the worker's case. It is immaterial that no evidence was led in relation to the invalidity of the notice save for that relating to Mr Stuart's diagnosis, and that the worker made no submissions in relation to the grounds of invalidity except for the diagnosis of Mr Stuart. The worker's claim that the notice was invalid rests on a number of technical non-compliances with the statutory requirements for a valid notice, as set out in the particulars of invalidity.

46. It was observed in *Collins Radio Constructors Inc v Day* (1998) 143 FLR 425 that when an employer proposed to cancel payments of compensation to a worker, the employer was required by section 69(1)(b) of the *Work Health Act* 1986(NT) to provide "a statement in the prescribed form setting out the reasons for the proposed cancellation" and by section 69(3) to "provide sufficient detail to enable the worker to whom the statement is given to understand fully why the amount of compensation is being cancelled". The Court held that strict compliance with the requirements of section 69 of the Act is required, and failure by an employer to so comply will mean that a worker's right to receive compensation has not been validly terminated.

47. In *Collins Radio Constructors* what was in dispute was a section 69 notice which stated that the worker was no longer totally incapacitated for work. The accompanying certificate certified that the worker was no longer totally incapacitated. It was clear that the certificate did not comply with section 69(3) in two respects. First, the certificate added the words "totally; and secondly, the certificate omitted the words "for work".

48. The Court made the observation that a worker who has "ceased to be incapacitated for work", to use the words of the section, is no longer entitled to receive weekly benefits; and accordingly the employer is justified in employing section 69 to cancel weekly benefits. The Court went on to say that the mere fact that a worker has ceased to be totally incapacitated for work does not mean that the worker is not entitled to receive weekly benefits: the worker may be partially incapacitated, and therefore still entitled to receive benefits.

49. In adjudicating upon the dispute, the Court stated:

> Adopting what was said in *Johnston v Paspaley Pearls Pty Ltd* the question can be narrowed down to whether the requirement that the certificate served upon the worker should indicate that the worker has ceased to be incapacitated for work is of such importance to the object of the statute as to disclose an intention that its complete non-observance should invalidate the action of the appellant in cancelling the respondent's weekly benefits. For the reasons given by the learned Chief Justice, we think the answer to this question must be "yes", and that it is clear beyond question that the requirements of section 69(3) as to the contents of the certificate may not be ignored. However, we would not go so far as to say that a form of words other than those prescribed by the subsection could never amount to compliance. If, for example, Dr Awerbuch had certified that the appellant was "capable of returning to employment full time in all forms of employment for which she had any previous experience" this, or some other suitable words, would convey the same meaning as "ceased to be incapacitated for work". We do not think it was the intention of the legislature that only the precise words of the statute, and no others conveying the same meaning, would suffice. Obviously those who draft certificates would be wise to follow the words of the statute, but they are not to be treated as possessing special magical powers which other words to like effect do not. It is not necessary to decide whether words conveying the same meaning comply "strictly" or "substantially" with the subsection.
>
> However, in this case, the words chosen in the certificate do not convey the essential meaning for the two reasons previously identified. It may be that the words "for work" can be implied from the circumstances and from the form of the certificate, but even if this be so, to say merely that the worker is no longer totally incapacitated for work, is not another way of saying that the worker is no longer incapacitated for work.[24]

50. The question that arises is whether the reason for cancelling weekly payments stated in the notice and the accompanying medical certificate complied with the requirements of section 69(3) of the Act.

51. It was held in *Ju Ju Nominees Pty Ltd v Carmichael* [1999] 9 NTLR 1 that where weekly compensation is to be cancelled by an employer for the reason that the worker has ceased to be incapacitated for work a notice given under section 69(1) must sufficiently state the reason and be accompanied by the medical certificate referred to in section 69(3): see *Collins Radio Constructors v Day*.

52. A worker is considered to be partially incapacitated when he or she is able to engage in some form of suitable employment even though he or she is unable to return to his or her former work duties.

53. Incapacity is defined in section 3 (1) of the Act as meaning "an inability or limited ability to undertake paid work because of an injury". It follows that a worker ceases to be incapacitated

for work when he or she ceases to have an inability or limited ability to undertake paid work because of an injury. It is for this reason that the statement that the worker had ceased to be totally incapacitated as considered in *Collins Radio Constructors* did not comply with the requirements of section 69(3) of the Act because it overlooked the fact that the worker might be partially incapacitated – that is to say the worker had a limited ability to undertake paid work because of an injury.

54. In my opinion, neither the wording of the reason for cancelling weekly payments contained in the section 69 notice nor the wording in the medical certificate of Mr Stuart complied with the provisions of section 69(3) of the Act. The notice itself failed to state that weekly payments were being cancelled because the worker had ceased to be incapacitated for work. Furthermore, the accompanying medical certificate of Mr Stuart did not certify that the worker had ceased to be incapacitated for work.

55. It was held in *Arnotts Snack Products Pty Ltd v Yacob* (1985) 155 CLR 171 that the concept of partial incapacity for work is that of reduced physical capacity, by reason of physical disability, for actually doing work in the labour market in which the worker was working or might reasonably be expected to work. This meaning of "partial incapacity" was adopted by the Court of Appeal in *Work Social Club Katherine Inc v Rozycki*.

> …when s64(1) and s65(1) use the expression "partially incapacitated for work", this must mean "have a limited ability to undertake paid work". This is consistent with what was decided by the High Court in *Arnotts Snack Products Pty Ltd v Yacob* (1983) 155 CLR 171, which held that the concept of partial incapacity for work is that of a reduced physical capacity, by reason of physical disability, for actually doing work in the labour market in which the employee was working or might reasonably be expected to work.

56. If weekly benefits are to be cancelled for the reason that the worker has ceased to be incapacitated for work, then it must be on the basis that the worker has ceased to be not only totally incapacitated, but also partially incapacitated –that is to say he or she no longer has a limited ability to actually undertake paid work in the labour market in which he or she was working, or might reasonably be expected to work.

57. The reason given in the notice for cancelling weekly benefits and the certification in the medical certificate are problematic for the reason that they do not have the effect of informing

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[24] (1998) 143 FLR 425 at 430.

the worker that he has ceased to be incapacitated for work in the full sense previously articulated.

58. Both the notice and the certificate refer to the worker as being "no longer incapacitated for work as a storeman". The wording in both the notice and the certificate has the effect of qualifying the cessation of incapacity for work.

59. The effect of both the notice and the medical certificate is that the worker is fit to return to work as a storeman.

60. The first difficulty arises out of the use of the phrase "no longer incapacitated for work as a storeman". The reference to "storeman" is ambiguous.

61. The ordinary meaning of "storeman" is a person who has charge of a stock of goods. The ordinary meaning of storeman does not necessarily contemplate activities involving the carrying and lifting of heavy objects – akin to the activity actually being performed by the worker at the time of his injury in 2007. That is not to say that the duties of a storeman cannot extend to such activities. However, whether or not the duties of a storeman involve such activities varies from case to case, and depends upon the terms and conditions of the specific employment.

62. The meaning conveyed by the use of the word "storeman" in the section 69 notice and accompanying medical certificate is not clear and unambiguous. It is not clear whether the medical certificate is certifying that the worker is no longer incapacitated work as a storeman performing the same range of activities that he was actually performing during the course of his immediate pre-injury or that he is no longer incapacitated for work as a storeman in the sense generally understood. If the latter, then that would not necessarily correlate with his immediate pre-injury employment. In order to be clear and unambiguous both the notice and the medical certificate should have stated that the worker was no longer incapacitated for work as a storeman performing the same duties he was performing during the course of his immediate pre-injury employment, or contained some other suitably worded statement conveying the same meaning.

63. The present case is different from the circumstances in *Collins Radio Constructors* where the Court of Appeal conceded that the words "for work" (which did not appear in either the notice or the accompanying medical certificate) could be implied from the circumstances and from

the form of the certificate. The absence of the words "for work" in *Collins Radio* did not give rise to an ambiguity as the words were capable of being read into the notice and the medical certificate by way of implication. However, in the present case there is a patent ambiguity which is not capable of being resolved by treating the reference to "storeman" as a reference to the worker's immediate pre-injury employment as a storeman.

64. However, even if it could be inferred from the notice and the medical certificate that the worker is no longer incapacitated for work as a storeman in terms of his immediate pre-injury employment – in other words fit for such employment – the notice and the medical certificate would still run foul of the requirements of section 69(3) of the Act. Even putting the notice and certificate at its highest, neither the statement in the notice nor the certification in the medical certificate would satisfy the requirement that the worker had ceased to be incapacitated for work to the full extent explained in the relevant authorities.

65. Both the reason for cancelling weekly payments and the certification in the medical certificate failed to make it clear that the worker was no longer incapacitated for work in that he no longer had an inability or limited ability to undertake unpaid work. The notice and accompanying notice needed to make it clear that the worker had regained a full capacity for work, without suffering from any limited ability to undertake unpaid work (ie partial incapacity).

66. Both the reason for cancelling payments and the accompanying medical certificate failed to convey the essential meaning that the worker was no longer incapacitated for work of a kind in a labour market in which the worker may reasonably be expected to work. As pointed out in the outline of the worker's submissions, based upon the worker's history of employment this would extend to work as a truck driver and furniture removalist.[25] Neither of these occupations – comprising work of a kind in a labour market in which the worker may reasonably be expected to work - were referred to in either the notice or Mr Stuart's medical certificate; and they should have been in order to convey the essential meaning that the worker was no longer incapacitated for work in a labour market in which he may reasonably be expected to work. The notice and certification in the medical certificate were defective in that – at the highest- they only conveyed the meaning that the worker was fit to return to full time employment in his former occupation as a storeman, without conveying the essential meaning that the worker was "capable of returning to employment full time in all forms of

employment for which [he] had any previous experience", such as a truck driver or furniture removalist.

67. It must follow that the s 69 notice was invalid on the ground that the neither the notice nor the accompanying medical certificate conveyed the essential meaning that the worker had ceased to be incapacitated for work.

68. Although I have found the section 69 notice to have been invalid, that is not the end of the proceedings due to the expanded scope of the proceedings.

DETERMINATION OF ALL ISSUES PROPERLY RAISED ON THE PLEADINGS

69. As the proceedings are not confined to a strict appeal under s 69 of the Act I will proceed to deal with each of the issues properly raised on the pleadings.

- **Cessation of incapacity for work as a result of the November 2007 injury**

70. The Court is presented with two competing hypotheses. The first, which is advanced by the employer, is that the worker has ceased to be incapacitated as a result of the injury sustained on 6 November 2007. The second hypotheses is that maintained by the worker – namely that the worker remains incapacitated as a result of the injury.

71. It is clear, on the state of the pleadings, that the employer bears the burden of proving that the worker has ceased to be incapacitated for work as a result of the injury sustained on 6 November 2007 during the course of his employment with the employer.

72. As mentioned in the recent case of *Bryant v NTA* (an unreported decision of the Work Health Court delivered on 13 December 2013), Andrew Ligertwood and Gary Edmond in their text *Australian Evidence* 5th edition at [2.65] provide the following useful commentary on the task that befalls the fact finder in relation to proof in civil cases:

> The fact finder is confronted with conflicting hypotheses and must, on the basis of experience of the ordinary course of events, determine with which hypothesis or hypotheses all the evidence is consistent. If, on this basis there is evidence inconsistent with a particular hypothesis, that hypothesis will be rejected altogether. If the evidence is more consistent with one hypothesis rather than another, that former hypothesis will be favoured. The more information consistent with a particular hypothesis, the more probable that hypothesis

[25] See [19] of the outline of the submissions of the worker.

> becomes until it reaches, by weight of evidence, a stage of acceptance by the fact finder as the likely explanation of all the available evidence. At this stage the hypothesis is described as proved on the balance of probabilities. One might say that the fact finder is persuaded or believes that hypothesis probably occurred.

73. In discharging the fact finding function, and determining which of the two hypothesis advanced by the parties in the present case is the more probable, the Court must consider the whole of the evidence before it, which is comprised of the:

1. The evidence of the worker;

2. The evidence of Drs Kossman and Bentivolgio who were called as expert medical witnesses by the worker;

3. The medical report of Dr Kenna (Exhibit W14) relied upon by the worker; and

4. The evidence of Dr Stuart who was called by the employer as an expert medical witness.

74. In a case like present where there is conflicting expert medical evidence, there is a need for the Court to carefully examine all of the evidence, and where possible to resolve conflicts in the evidence by preferring the evidence of one expert to another. As recently observed by the Work Health Court in *Bryant v NTA* (supra):

> In undertaking that exercise the Court must be satisfied that the basis or the grounds of the proffered opinion are established. If the factual premise on which the opinion is not established, the opinion must be considered to be undermined: see Justice Van Doussa "Difficulties of Assessing Expert Evidence" (1987) 61 ALJ 615 at 618.[26]
>
> As pointed out by Mr Trigg SM in *Spellman and RSL* [2004] NTMC 087 "to be of value the opinion of an expert must be founded upon a substratum of facts, which facts are proved by the evidence in the case, exclusive of the evidence of the expert, to the satisfaction of the court to the appropriate standard of proof".
>
> The Court is also required to determine the extent to which a particular expert opinion is based on the history given by the worker, and to test the validity of the opinion by reference to the accuracy and reliability of the provided history. The validity of the opinion is also to be tested by having regard to objective medical evidence (as well as the absence of such evidence) and evaluating the extent to which the opinion is consistent with, and supported by, that objective

[26] See *Spellman and RSL* [2004] NTMC 087 per Mr Trigg SM.

> evidence. Most importantly, the reasoning process underlying the expert medical opinion must be subjected to careful analysis. The degree of cogency and persuasiveness of the reasons underpinning the opinion must be assessed.
>
> Again as pointed out by Mr Trigg SM in *Spellman and RSL* [2004] NTMC 087:
>
> > [the court] cannot weigh and determine the probabilities for themselves if the expert does not fully expose the reasoning relied on… Underlying these observations is an assumption that the trier of fact must arrive at an independent assessment of the opinions and their value, and this cannot be done unless their basis is explained: *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 733.

75. In discharging the burden it bears in establishing that the worker has ceased to be incapacitated as a result of the November 2007 work related injury, the employer seeks to rely upon a number of aspects of the worker's evidence that it says discredits or impugns the reliability and credibility of the evidence he gave to the Court regarding his continuing incapacity for work as result of the injury.[27] In essence, the employer submits that it is apparent from the objective evidence of the aftermath of the worker's 2007 injury that the worker has exaggerated the history of his medical condition to various experts who examined him for medico-legal purposes, and that "the combination of objective evidence of an improvement in the worker's condition together with the matters that undermine the credibility of the worker lead inevitably to the conclusion that the worker is no longer incapacitated for work because of the 2007 injury".[28]

76. In addition, the employer says that the body of expert medical evidence before the Court, taken together with the worker's inconsistent histories and behaviour in the course of giving evidence, establishes that it is more probable than not that the worker has ceased to be incapacitated for work as a result of the 2007 injury.[29]

77. In its submissions in reply dated 23 August 2013 the employer submits that the Court can be satisfied that the worker's current complaints of pain do not correlate to an L5/S1 disc protrusion (the injury sustained in November 2007) and therefore the Court cannot be satisfied that any continuing symptoms experienced by the worker are due to the work injury.[30]

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[27] See [8] – [40] of the employers submissions dated 16 August 2013.
[28] Included among the matters said to undermine the worker's credibility is the behaviour and demeanour displayed by the worker in the course of giving evidence.
[29] See [41] – [56] of the employer's submissions dated 16 August 2013.
[30] See [1] of the submissions.

78. In those submissions, the employer also maintained its attack on the worker's credit as a basis for preferring the hypothesis advanced by it.[31] The employer also sought to minimise the probative value of Dr Kenna's report.[32]

79. By way of response the worker submitted:

> None of the expert witness's evidence was based upon a credit assessment of the worker to the extent of suggesting he has no symptoms. The highest from the employer's case as pleaded is that the symptoms as he has are no longer related to his 2007 injury.
>
> Accordingly, no forensic consideration of the worker's evidence to determine the degree of his ongoing problems is necessary or required to resolve the issues for determination. A consideration of his evidence beyond the facts established beyond controversy will not assist in resolving such a causation issue.[33]

80. In submissions the worker analysed the evidence given by all four expert witnesses – Drs Kossman, Bentivolgio, Kenna and Stuart.[34]

81. The worker relied upon what it considered to be the firm and clear opinion expressed by Drs Kossman and Bentivolgio that the worker continued to be incapacitated for work as a result of the 2007 injury.

82. Dr Bentivoglio expressed the following opinion:

> [the L5/S1 disc prolapse noted in the MRI scans of 18 December 2007 and August 2008] hasn't resolved. It's just improved. It hasn't gone away. It's still significant there and I thought it was exactly the same.[35]

83. Dr Bentivolgio subsequently stated:

> he may have a little bit of back joint disease, but he definitely does not on his investigation have degenerative disc disease… He's got, you know, a major problem with one level and a minor problem at the other level and, you, it's – on the balance of probabilities it's the L5/S1 where his symptoms are coming from and he's got something which sticks out enormously.[36]

[31] See [7] – [10] of the submissions.
[32] See [12] of the submissions.
[33] See [25] – [26] of the outline of submissions of the worker.
[34] See [27] – [31] of the submissions.
[35] See p 87 of the transcript.
[36] See p 89 of the transcript.

84. Dr Kossman expressed the following opinion:

> I regard the MRI, or the findings in the MRI from 9 August 2008, much more severe than compared to the CT scan back in 1998.[37]

85. Both doctors considered the condition caused by the 2007 injury remained significant.[38]

86. The worker also relied upon the report of Dr Kenna (who was not called as a witness) as being consistent with, and supportive of, the opinions of Drs Bentivolgio and Kossman.[39]

87. It is was submitted on behalf of the worker that the report provided by Dr Stuart and the evidence he gave at the trial was confusing and contradictory; and that his expert medical opinion that the worker had ceased to be incapacitated for work as a result of the 2007 injury lacked a sound and credible basis.[40]

88. In the supplementary submissions of the worker dated 21 August 2013 it was submitted that the issue for determination by the Court is one of causation of incapacity rather than the degree of incapacity, and any evidence indicative of exaggeration should not be elevated to proof of total absence of symptoms and recovery.[41] The worker also takes issue with the employer's interpretation of the medical evidence before the Court.[42]

89. In my opinion, the employer has failed to reasonably satisfy the Court on the balance of probabilities that the worker has ceased to be incapacitated for work as a result of the November 2007 injury for the following reasons:

1. The fact that the worker may have exaggerated his symptoms cannot be elevated to the proof of total absence of symptoms and recovery, and cannot amount to proof that the worker has ceased to be incapacitated for work as a result of the November 2007 injury;

2. The worker's rather aggressive demeanour in the witness box should not be treated as probative of a total absence of symptoms and recovery from the 2007 injury, particularly in the light of the evidence that is suggestive of the

[37] See p 94 of the transcript.
[38] See the evidence of Dr Bentivolgio at p 87 of the transcript and the evidence of Dr Kossman at p 94 of the transcript.
[39] See Exhibit W14.
[40] See [31] of the outline of submissions of the worker.
[41] See [6] – [15] of the submissions.
[42] See [16] – [20] of the submissions.

existence of an aggressive personality pre-dating the injury. In recent times superior courts have emphasised the limited role of demeanour in the fact finding process;

3. Despite inconsistencies between the history provided to the various doctors and the objective medical evidence the Court needs to be mindful that it is the employer – and not the worker – who bears the onus of proof;

4. Drs Kossman and Bentivoglio did not base their opinions exclusively on the history provided to them by the worker, but in expressing their clear and firm opinion had regard to medical investigations and records, which only indicated an improvement in relation to the L5/S1 disc prolapse;

5. An improvement in the worker's medical condition cannot be elevated to a total absence of symptoms and recovery, and cannot amount to proof that the worker has ceased to be incapacitated for work as a result of the November 2007 injury;

6. Contrary to the submissions made by the employer, in my opinion Dr Kenna's report is consistent with, and supportive of, the opinions of Drs Kossman and Bentivolgio;

7. The only expert medical witness directly relied upon by the employer is Dr Stuart whose evidence is less than satisfactory and less than convincing for the following reasons:

    (a) In cross examination, Dr Stuart first stated that the worker is not physically fit to work as a furniture removalist,[43] but subsequently said that he was.[44] Dr Stuart struggled to explain the inherent inconsistency by attempting to relate it to non –physical aspects;[45]

[43] See p 132 of the transcript.
[44] See p 133 of the transcript.
[45] See p 133 of the transcript.

(b) Although Dr Stuart stated that the worker had recovered from the 2007 injury, he accepted that the worker remained symptomatic, which he would not have done but for the 2007 injury;[46]

(c) The basis for Dr Stuart's opinion that the worker had recovered from the 2007 injury was merely that 80% of disc herniations recover within 6 to 12 months.[47] Dr Stuart accepted this opinion was inconsistent with his opinion that the 1998 injury may still be playing a part; and was compelled to resile from his stated opinion concerning the 1998 injury, agreeing that the worker had fully recovered from it:

> I can only say that would appear to have been my opinion at the time. If there was an injury in 1998 that injury could not have persisted to that date. So that's probably a contradiction in my opinion there. One would have to assume that that injury of 1998 should have also resolved, but I guess I was a bit inaccurate with my wording there.[48]

(d) The relative ease with which Dr Stuart resiled from his previous opinion has a tendency to impugn the reliability of the doctor's evidence;

(e) Dr Stuart's opinion was largely based upon a generalisation that 80% of disc herniations recover within 6 to 12 months, without providing a specific basis for his opinion, and proffering an explanation as to why the worker was excluded from the category of 20% of those cases where there was no recovery;

(f) In relation to (e) above proof on the balance of probabilities entails more than a mechanical comparison of objective probabilities and a conclusion based on mathematical probability.

[46] See p134 of the transcript.
[47] See p133 of the transcript.
[48] See p134 of the transcript.

90. Accordingly, the Court finds that the worker continues to be incapacitated as a result of the compensable injury that was sustained in November 2007.

91. Subject to any further submissions from the parties, I intend to make a finding that as at the date of cancellation of weekly payments the worker remained incapacitated for work.

- **Mental or Psychiatric Sequelae**

92. It is agreed between the parties that the worker bears the onus of proof in relation to the mental or psychiatric sequelae claim, as held in *Newton v Masonic Homes Inc* [2009] NTSC 51 at [24].

93. The starting point is the nature of the mental or psychiatric sequelae.

94. According to the Substituted Statement of Claim the mental or psychiatric injury alleged to have been suffered by the worker is "depression" or an "aggravation, acceleration, exacerbation, recurrence of deterioration of pre-existing depression".

95. The worker relied upon the evidence of Dr Walton who gave evidence at the trial. Dr Walton diagnosed the worker as suffering from an adjustment disorder.

96. The worker also relied upon a report from Dr Shan who diagnosed the worker as suffering from a mild adjustment disorder.

97. It was submitted on behalf of the worker that it is agreed that the mental condition is a sequelae to the chronic low back pain; and hence if the low back pain continues to be related to the compensable work injury, rather than underlying degenerative change, then the mental sequalae is equally compensable.[49]

98. The employer contends that the worker has failed to prove the psychiatric sequalae (i.e. an adjustment disorder) diagnosed by Dr Walton for the following reasons:

    1. Dr Walton based his opinion on the history given by the worker and, in addition, an absence of any pre-existing psychiatric disorder; and both of

[49] See [32] of the outline of the submissions of the worker.

these assumptions must be attended by real doubt given the established facts in the case;[50]

2. The post injury history provided by the worker to Dr Walton was exaggerated;[51]

3. The worker's medical history demonstrates that the worker has always had an aggressive personality and problems with irritability;[52]

4. Dr Walton conceded that if the history given was that the worker in fact has displayed anger and hostility since before the injury, that he has had depression as recently as November 2006, and that since the injury he in fact had not had fleeting suicidal thoughts his diagnosis would be undermined, and that an adjustment disorder would probably not be the diagnosis;[53]

5. It must therefore follow that the worker does not have an adjustment disorder.[54]

99. The employer also challenged the probative value of Dr Shan's diagnosis of a mild adjustment disorder, claiming that it was based upon an assumption of a continued presence of physical symptoms due to the 2007 injury and no prior history of psychiatric or psychological treatment prior to the injury in 2007.[55]

100. The employer also submitted that Dr Shan's diagnosis was based upon an inaccurate history as well as an exaggerated account of the worker's physical condition and limitations.[56] In any event, the employer pointed out that Dr Shan concluded that the adjustment disorder he diagnosed would not be productive of any incapacity for work.[57]

101. As part of the worker's supplementary submissions, the following submission was made:

> It is suggested by the employer that Dr Walton considered that on a different history, adjustment disorder would probably not be the diagnosis. However this

[50] See [58] of the employer's submissions dated 16 August 2013.
[51] See [59] of the submissions.
[52] See [60] – [65] of the submissions.
[53] See [66] of the submissions. See also p 110 of the transcript.
[54] See [69] of the submissions.
[55] See [70] of the submissions.
[56] See [72] of the submissions.
[57] See [73] of the submissions.

> amounts to playing with semantics: "*we're talking about the same phenomenon, basically a mood disturbance…*"[58]

102. In my opinion the worker has failed to discharge the burden of proof in relation to the mental or psychiatric sequelae claim.

103. Although the Substituted Statement of Claim pleaded an injury in the nature of depression or an aggravation, acceleration, exacerbation, recurrence or deterioration of pre-existing depression, the worker sought to rely upon a mental injury different in nature – namely an adjustment disorder (as per Dr Walton's diagnosis) or a mild adjustment disorder (as per the diagnosis of Dr Shan). The employer does not appear to have been troubled by that deviation from the pleading, and proceeded to conduct its defence of the worker's claim on the basis of that different mental or psychiatric injury.

104. The fundamental weakness in the worker's case is that both Dr Walton and Dr Shan based their diagnoses on an inaccurate or incomplete history. It was on that ground that Dr Walton retreated from his diagnosis of adjustment disorder.

105. Furthermore, I am reasonably satisfied that the worker exaggerated his physical symptoms when one has regard to the objective medical evidence referred to at some length in the employer's submissions. Although the worker's exaggeration of his symptoms did not ultimately weigh against him in relation to the previous issue – whether the worker had ceased to be incapacitated for work – in respect of which the employer bore the onus of proof, that exaggeration of symptoms must weigh against the worker in relation to the sequelae claim, which he is required to establish to the satisfaction of the Court. Therefore, to the extent that Dr Walton relied on the symptomology reported to him by the worker the doctor's diagnosis is further undermined.

106. In my opinion, the evidence does not support a finding that as a result of the November 2007 injury the worker suffered a mental or psychiatric injury in the nature of an adjustment disorder.

107. However, it should be noted that Dr Walton did not think much turned upon an incorrect diagnosis.[59] At page 110 of the transcript the following exchange took place between Dr Walton and the employer's counsel during cross-examination:

[58] See [18] of the worker's supplementary submissions dated 21 August 2013. See also p 110 of the transcript.

> Q: If you assumed all of those matters to be the case, would you be prepared still to make a diagnosis of adjustment disorder?
>
> A: That would probably not be the diagnosis, but the –we're talking about the same phenomenon, basically a mood disturbance, so really what he would be looking at if there were pre-existing to the present condition, whether or not it had been aggravated by the physical injuries, which would be a fairly common phenomenon as well.
>
> Q: Doctor, in relation to any condition of adjustment disorder, you – perhaps if I can go back a step. In labelling it an adjustment disorder, do you do that because the – essentially the stress, or that gives rise to the condition of depression or mood disturbance is an external feature, that is the chronic pain that he is experiencing every day?
>
> A: Absolutely right.
>
> Q: And is the case then that the degree of severity of his symptoms is likely to be affected or is likely to be related to the degree of severity of physical symptoms?
>
> A: Correct.
>
> Q: So that if in fact what Mr Corrie has is relatively mild, but nevertheless constant low back pain and buttock pain, the adjustment disorder in his case would be similarly relatively mild?
>
> A: Well almost by definition, adjustment disorder is a mild condition.

108. Whilst this evidence given by Dr Walton is more to the point in terms of the case pleaded by the worker in the Substituted Statement of Claim,[60] I do not find the doctor's evidence to be sufficiently cogent to support a finding that the worker has suffered an aggravation, acceleration, exacerbation, recurrence or deterioration of pre-existing depression.

109. At best, the doctor's evidence only addresses an aggravation of a pre-existing depressive condition. However, Dr Walton's evidence in that regard suffers from the following significant shortcomings:

    1. Dr Walton did not go beyond saying that an aggravation of a pre-existing depressive condition is a fairly common phenomenon; but he did not actually say that the worker had suffered such an aggravation;

[59] See the submission made at [18] of the worker's supplementary submissions dated 21 August 2013.
[60] That is the alleged injury of depression or an aggravation, acceleration, exacerbation, recurrence or deterioration of pre-existing depression.

2. Even if Dr Walton could be considered to have expressed an opinion that the worker had suffered an aggravation of a pre-existing depressive condition, such an opinion was not founded upon a substratum of facts – the basis or grounds of the proffered opinion were not established. The factual premise of any such opinion has not been established and the opinion remains unexplained;

3. Even if Dr Walton could be considered to have expressed such an opinion, in forming that opinion the doctor did not have the benefit of a complete and accurate history of the worker, including the worker's previous psychological or psychological profile, to enable him to reach a considered opinion, and to expose the reasoning process that led him to that conclusion.

110. Neither does Dr Shan's report assist the worker in establishing an aggravation of a pre-existing psychological or psychiatric condition.

- **The Claim for Medical and Like Expenses**

111. The worker has submitted that there is no dispute that in the event it is found that the worker continues to be incapacitated from the compensable injury, he is entitled to payment of the expenses claimed by him.[61]

112. However, the employer takes issue with that submission.[62] No submission in reply is contained in the worker's supplementary submissions dated 21 August 2013.

113. The Court would benefit from hearing further submissions from the parties before making a determination in relation to this aspect of the worker's claim.

- **The Claim for Interest and Costs**

114. The employer resists the claim for interest on the following grounds:

> Interest under s 89 would only have been payable if:
>
> (a) The notice was invalid when issued, on technical grounds other than the substantive issue of whether the worker had in fact ceased to be incapacitated; and

[61] See [33] of the outline of the submissions of the worker.
[62] See [74] – [79] of the employer's submissions dated 16 August 2013.

(b) The worker confined the appeal to a strict appeal against the validity of the notice.

Having expanded the claim beyond a strict appeal, the case is no longer one in which the employer has a confirmed liability to pay weekly payments of compensation attracting an exposure to interest under s89.[63]

115. The Court would benefit from hearing further submissions from the parties in relation to this discrete issue, in light of the findings made by the Court in relation to the substantive issues.

FINAL ORDERS

I defer making final orders in these proceedings until the Court has determined the outstanding issues.

Dated 3 February 2014

……
Dr John Lowndes
Chief Magistrate of the Northern Territory

[63] See [13]-[14] of the employer's submissions in reply dated 23 August 2013.