CITATION: *Hayden Bray v Sunbuild (NT) Pty Ltd* [2019] NTLC 31

PARTIES: HAYDEN BRAY

v

SUNBUILD PTY LTD

TITLE OF COURT: Work Health Court

JURISDICTION: Work Health

FILE NO(s): 21905978

DELIVERED ON: 23 September 2019

DELIVERED AT: Darwin

HEARING DATE(s): 21 May 2019

JUDGMENT OF: Judge Therese Austin

CATCHWORDS:

WORK HEALTH – SUMMARY JUDGMENT

Return to Work Act 1986 ss 3, 71, 72,

Taylor Enterprises (NT) v Pointon & Work Health Authority [2009] NTMC 29 (10 July 2009) applied

Johnson v Paspaley Pearls Pty Ltd (1996) 5 NTLR 199 applied

Maddalozzo v Maddick (1992) 108 FLR 159 applied

Global Insulation Contractors (NSW) Pty Ltd v Keating at [2012] NTSC 4 applied

REPRESENTATION:

Counsel:

Plaintiff:	Mr Grove
Defendant:	Mr Crawley SC

Solicitors:

Plaintiff:	WARD KELLER
Defendant:	HWL EBSWORTH

Judgment category classification:	A
Judgment ID number:	031
Number of paragraphs:	89

IN THE WORK HEALTH COURT

AT DARWIN IN THE NORTHERN

TERRITORY OF AUSTRALIA

No. 20528796

BETWEEN:

HAYDEN BRAY

Plaintiff

AND:

SUNBUILD PTY LTD

Defendant

REASONS FOR DECISION

(Delivered 23 September 2019)

JUDGE AUSTIN

BACKGROUND

1. On 21 May 2019 the Worker filed an interlocutory application seeking summary judgment in his favour that the Employer has accepted a secondary or consequential mental injury as a sequela of a physical injury to his back injury. It is not disputed that the employer accepted the primary back injury under the *Work Health Act* in 2008.

2. The application was brought pursuant to rule 21.02(1) (b) and (c) of the *Work Health Court Rules.*[1] The Worker's application was supported by 3 affidavits of Clarissa Mavis Phillips sworn 21 May 2019, 28 June 2019 and 22 July 2019.

3. In response to the application the Employer relied on the affidavit of Reinis Nilss Dancis dated 19 July 2019.

4. To summarise, the Worker pleaded, that from about January 2015 the Worker's total incapacity for work has been contributed to as a result of

[1] Rule 21.02 (1) (b) and (c) provides:

" A party may apply for judgment on relevant grounds, including the following:

….;

the other party having filed a notice of defence, has no real defence to the claim made in the proceedings."

the Psychiatric Injury (Major Depressive Disorder), which developed in or about early 2015.

5. One question on the pleadings is whether the Employer has accepted the secondary injury or sequela, or whether that still remains to be proven. The Worker says the evidence establishes the Employer has accepted the secondary injury and the Employer on the pleadings denies this.

6. The Employer also asserts in its defence that the secondary injury is not a compensable injury under the Act as the notice requirements pursuant to s.80 and s.81 of the Act were not complied with by the Worker.

7. The questions raised on the pleadings can be summarised in relation to the alleged secondary psychiatric injury arising from the back injury as follows:

   i) is there evidence that the Worker gave notice that the secondary injury was productive of an incapacity to work (or ever claimed that to be the case);

   ii) is there evidence to prove that the secondary injury was productive of an incapacity to work; and

   iii) is there **sufficient** evidence to prove that the Employer accepted liability for the secondary injury and that it is productive of an incapacity for work.

RULING

8. I find that that **on 1 March 2016 when the Employer referred the Worker for the whole person impairment assessment for the mental injury to Dr Kornan pursuant to ss 71 and 71 of the Act** evidenced by the letter of referral to Dr Kornan dated 1 March 2016[2], the Employer accepted liability for the Worker’s secondary mental injury, the sequela.

9. I order that summary judgment be entered in favour of the Worker on this question.

10. My reasons for decision are contained herein.

[2] Attachment (Affidavit CP-6 (21 May 2019 CMP)

SUMMARY JUDGMENT:

11. Rule 21.02(1) of the Work Health Court Rules provides that a party may apply for summary judgment on the ground that "(a) the other party, having filed a notice of defence, has no real defence to the claim made in the proceeding".

12. The law in respect of summary judgment applications was most recently discussed in *Eccles v Nikki Beach 1 Pty Ltd & Anor* by Chief Justice Grant[3] where his Honour stated:

> *…. Summary judgment should only be entered if there is no real question to be tried.[4] Where the ultimate outcome of the matter turns on the resolution of some disputed issue or issues of fact, it is essential that great care is exercised to ensure that a party is not deprived of opportunity for the trial of the case.[5] Where the case is clear, however, the exercise of the power will obviate the delay involved in a hearing and save unnecessary expense.[6]*

FACTUAL CONCESSIONS AND FINDINGS ON THE EVIDENCE:

13. In this matter what is in issue is **whether the Employer has accepted liability under the Act for the secondary psychiatric injury as pleaded**.

14. I find that the following matters were conceded by the Employer on the pleadings and through the Employer's counsel at the hearing of the application:

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[3] *Eccles v Nikki Beach 1 Pty Ltd & Anor [2019] NTSC 39* Chief Justice Grant at paragraph [8]
[4] *Clarke v Union Bank of Australia Ltd* (1917) 23 CLR 5; *Fancourt v Mercantile Credits Limited* (1983) 154 CLR 87 at [99]; *Thrifty Rent-a-Car Pty Ltd v Darwin Marketing Services Pty Ltd* [1987] NTSC 67 at [14]; *Heller Financial Services Ltd v Solczaniuk* [1989] NTSC 36 at [53]; 99 FLR 304.
[5] *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 130 (cited in *Advance Civil Engineering Pty Ltd v Norbuilt Pty Ltd* [1996] NTSC 45 at [33]); *Re Registered Trade Mark "Certina"* (1970) 44 ALJR 191 (cited in *Civil and Civic Pty Ltd v Pioneer Concrete (NT) Pty Ltd* [1991] NTSC
[6] at [60]). Where there is a real case to be investigated either in fact or in law, leave to defend should be given: *Australian Can Co Pty Ltd v Levin and Co Pty Ltd* [1947] VLR 332 at 334 (cited with approval in *Thrifty Rent-a-Car Pty Ltd v Darwin Marketing Services Pty Ltd* [1987] NTSC 67 at [15]).
Re Registered Trade Mark "Certina" (1970) 44 ALJR 191 at 192.

i) that acceptance of the primary physical injury, the back injury occurred in 2008.

ii) that the secondary psychiatric injury asserted by the worker, “Major Depressive Disorder” was not an injury in this case that required a separate claim for compensation pursuant to s.82 of the Act be lodged by the Worker. As such s.82 is not a relevant consideration.

EVIDENCE:

15. I find that the Worker has established the following matters at the hearing, noting that the Employer did not put any evidence on the application to dispute or contradict the affidavit evidence of Ms Clarrisa Mavis Elieen Phillips of 21 May, 28 June and 22 July 2019.

16. On 5 January 2015 the Worker’s GP, Dr O’Dwyer certified that the Worker had ‘depression’ related to the worker’s accepted workplace injury, the primary back injury. The GP issued a certificate of incapacity indicating this and arranged a referral to psychologist. [7]

17. On 17 March 2015, the Employer was provided with a *TIO Psychology (or Counselling) Treatment Plan* by treating clinical psychologist Ms Carol McGregor for “treatment for depression” with a diagnosis of “Major Depressive Disorder”. The plan indicates the diagnosis of “Major Depressive Disorder” is listed as “related to the compensable injury”.[8]

18. On 7 July 2015, the worker’s GP provided the Employer with a report stating that the Worker was suffering from a “depressive illness” as a result of the workplace injury.[9]

19. On 15 July 2015, the Worker’s Psychologist provided the Employer with a further *Psychologist (or Counselling) Treatment Plan* for “treatment of depression” with a diagnosis of “Major Depressive Disorder”. The plan indicates that the diagnosis of “Major Depressive Disorder” is listed as “related to the compensable injury”.[10]

20. On 1 March 2016 the Employer referred the Worker for a whole person impairment assessment for the secondary (mental) injury pursuant to s 71

[7] Attachment CP-1 (Affidavit 21 May 2019 CMP).
[8] Attachment CP-2 (Affidavit 21 May 2019 CMP).
[9] Attachment CP-3 (Affidavit 21 May 2019 CMP).
[10] Attachment CP-4 (Affidavit 21 May 2019 CMP).

and s 72 of the Act to Consultant Psychiatrist Dr Kornan, evidenced by the letter of referral to Dr Kornan dated 1 March 2016.[11]

21. On 7 March 2016 Dr Kornan assessed the Worker's whole person impairment for the secondary psychiatric (mental) injury "… *Mr Bray presents with a psychiatric impairment of ten percent (10%) due to his ongoing pains and discomforts as a result of the work related physical injury that he sustained in December 2008*."[12]

22. On 18 April 2016, the Employer served Dr Kornan's report on the Worker and notified the Worker, via an open unqualified letter, that the Worker was entitled to a compensation payment as a consequence of the psychiatric (mental) injury[13]. I find that the contents of that letter were without qualification in that the Employer did not seek to preserve any rights or privileges or its position on any issue.

23. The Worker sought a reassessment of his permanent impairment assessment pursuant to s 72(3) of the Act for his psychiatric (mental) injury through NT Worksafe.

24. On 29 August 2016 the NT WorkSafe panel reassessed the Worker's mental injury. The diagnosis was "chronic major depressive disorder, moderate severe which has arisen secondary to the injuries sustained to his lower back…."[14].

25. For the purposes of the application, due to these evidential findings, I find that there is sufficient evidence to establish that the secondary or consequential injury asserted by the Worker is a mental injury within the section 3 meaning of the Act, namely "Major Depressive Disorder" and the evidence establishes it is a sequela to the primary physical injury, the back injury, accepted by the employer in 2008.

EMPLOYER'S DEFENCE:

26. The Employer's argument has 2 limbs:

    i) namely that the Worker has not strictly complied with the notice requirements in section 80 and s.81 of the Act; and

    ii) that the Employer has not accepted the secondary mental injury.

[11] Attachment CP-6 (Affidavit 21 May 2019 CMP)
[12] Attachment CP-7 (Affidavit 21 May 2019 CMP).
[13] Attachment CP-12 (Affidavit 21 May 2019 CMP).
[14] Attachment CP-14 (Affidavit 21 May 2019 CMP).

27. The Employer's defence argued at hearing can be summarised as follows - that:

    i) the payments made to the Worker were for the accepted primary injury and not evidence of acceptance of the secondary mental injury;

    ii) the conduct of the Employer in referring the Worker for the whole person impairment assessment to Dr Kornan for the secondary psychiatric injury on 1 March 2016 pursuant to ss 71 and 72 of the Act is not evidence of acceptance of liability for that secondary injury, as entitlement to payment arises out of the operation of the Act once the assessment is conducted rather than a decision of the employer to accept the claim; and

    iii) the language used by the employer in the letter of 18 April 2016 evidencing the outcome of the assessment is sufficiently vague and not so explicit that it can be used to conclude the Employer accepted the claim for the secondary mental injury or sequela.

    iv) there is no evidence that suggests a date of injury for the secondary mental injury or sequela of early January 2015 as pleaded by the Worker so the section 80 and 81 notice requirements under the Act for the secondary sequela are not met by the Worker.

28. The Employer argued that there is a real issue to be tried in relation to whether the Employer firstly accepted liability for the secondary mental injury AND secondly whether the Worker complied with the Notice requirements of s.80 and 81 of the Act.

29. However, I find the second issue of Notice is not a matter for consideration on the application before me. The application before me is a summary judgment application by the Worker limited to the question whether the Employer accepted liability for the secondary mental injury or sequela and I will determine the application accordingly.

ACCEPTANCE OF THE SECONDARY MENTAL INJURY:

30. I turn to the evidentiary issues raised on the pleadings relevant to acceptance of the secondary mental injury:

    i) is there evidence that the Worker gave notice that the secondary injury was productive of an incapacity to work (or ever claimed that to be the case);

ii) **is there evidence to prove that the secondary injury was productive of an incapacity to work; and**

iii) **is there <u>sufficient</u> evidence to prove that the employer accepted liability for the secondary mental injury and that it is productive of an incapacity for work.**

31. As to ii) and iii) above directly relevant to acceptance of the secondary injury, the Employer's counsel submitted that the Employer's conduct, in arranging for a full body impairment assessment of the Worker, was pre-emptive in nature and significantly, not brought about by the Worker having given the requisite notice pursuant to sections 80 and 81 of the Act.

32. The Employer's Counsel further submitted the Employer's conduct in referring the Worker under ss 71 and 72 of the Act for a full body impairment assessment for the secondary mental injury, could not be used as evidence of the Employer having **accepted** liability for the worker's psychiatric injury as a sequela of the back injury. Counsel stated at the hearing "we have a situation where the worker has given *some notice* – I'm not saying adequate notice for the purposes of the Act, *but some notice of an allegation that he has a psychiatric problem*"[15].

33. I do not accept those submissions for the following reasons set out below.

THE RETURN TO WORK ACT:

34. As the Worker's application and the Employer's defence is predicated on a particular view of the *Return to Work Act* insofar as it relates to whether the Employer accepted the asserted consequential psychiatric sequela of the Worker, it is necessary to consider the legislative provisions.

35. I propose to deal with the legislative provisions and the legislative scheme relevant to permanent impairment.

36. A worker claiming entitlement to compensation bears the onus of proving that he has suffered incapacity and that the incapacity is productive of financial loss, and this includes an alleged incapacity as a result of a sequela to an original compensable injury[16].

[15] T.60 of hearing of application on 23 July 2019 before Judge Austin at Darwin Local Court
[16] *MacMahon Contractors PTY LTD v Lee* [2017] NTSC 33 per Kelly J at [52]

37. Section 71 of the Act provides for compensation for permanent impairment "**in addition to any other compensation payable under this part**".

38. Subsections (1), (2) and (3) stipulate the percentage of compensation payable referable to the degree of permanent impairment.

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

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

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

42. **Section 72(4)(b) provides that an assessment made by a panel pursuant to s 72(3A) of the Act as to the degree of permanent impairment of a worker is not subject to review.**

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

an application for reassessment, within 28 days after the worker is notified of the reassessment.

44. **Section 72(4)(b) provides that an assessment made by a panel as to the degree of permanent impairment is not subject to review.**

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

46. Given that a permanent impairment must have been "*caused by an injury*" as defined by the Act in order to be compensable, whose responsibility is it to determine whether the impairment was "*caused by an injury*"? Is that the sole function of the Work Health Court?

47. In the decision of *Taylor Enterprises (NT) v Pointon & Work Health Authority* Dr Lowndes found[17]:

> "*There can be no question that whether or not a worker has suffered an injury within the meaning of the Act is a matter to be determined by the Work Health Court. Whether or not a physical or mental injury arises out of or in the course of a worker's employment is an issue to be determined by the Court. Whether or not an injury is a disease or an aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease is again a matter for the Court. Similarly, whether or not an injury or disease suffered by a worker was a result of reasonable administrative or disciplinary action is a matter within the province of the Court.*"

48. For the purposes of the application, as already stated above and as a result of the evidence put on the application by the worker, I find that there is sufficient evidence that the secondary or consequential injury asserted by the worker is a mental injury within the s.3 meaning of the Act.

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[17] *Taylor Enterprises (NT) v Pointon & Work Health Authority* [2009] NTMC 29 (10 July 2009) per Dr Lowndes at [22]

49. In this matter, what is in issue is **whether the employer has accepted that secondary injury**. I refer to again to the decision of *Taylor* where Dr Lowndes stated[18] that:

> *[23]It follows that compensation payable under s 71 of the Act, and as a consequence of the administrative process established by s 72, is predicated upon the level of permanent impairment having been caused by an injury which is compensable under the Act.* ***The process under s 72 presupposes that the permanent impairment which is required to be assessed has been caused by a compensable injury, <u>in respect of which the employer has accepted liability</u> or the Court has made a determination****. I agree with what Mr Trigg SM said in Clayton v Top End Wholesale Distributors (supra):*
>
> *Section 72 of the Act appears to be predicated on the assumption that liability for the "injury" (which has resulted in or materially contributed to the permanent impairment) has been accepted or found by the Court already. Accordingly, in my view, where the liability of the employer to pay compensation to the worker was either before the Court for determination, or had been properly disputed in accordance with the Act,* ***,*** *<u>it would be premature for any assessment of permanent impairment to be sought (by either side) until liability had been determined in accordance with the Act.</u>*
>
> *[27]****Accordingly, if an employer denies that the injury in question is compensable, and the Court has not yet determined that that injury is compensable, there is no statutory or legal basis for the commencement of the process established by s 72; any attempt to set in train the statutory process under such circumstances would be premature and not in compliance with the statutory scheme…..***
>
> *[29]The process established by s 72 is founded upon a simple assumption that the permanent impairment which is to be assessed was caused by a compensable injury.*

[18] Ibid *Taylor Enterprises (NT) v Pointon & Work Health Authority* [2009] *per* Dr Lowndes at [23, 26, 27, 29]

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

50. I find that the evidence before me on the application establishes on the balance of probabilities that in early 2015 as is pleaded by the Worker, the Worker's GP certified the Worker had "depression" and referred the Worker to a psychologist who diagnosed a secondary or consequential injury related to the compensable back injury, Major Depressive Disorder, and developed a treatment plan.

51. I find that the Employer was given notice in early 2015, via the insurer TIO, of the worker's diagnosis and that it related to the compensable injury.

52. I find that on 1 March 2016 the Employer referred the worker for a whole person impairment assessment for the secondary mental injury, pursuant to ss 71 and 72 of the Act, to Consultant Psychiatrist Dr Koran[19].

53. On 7 March 2016 Dr Kornan assessed the Worker's whole person impairment for the secondary (psychiatric) mental injury "… Mr Bray presents with a psychiatric impairment of ten percent (10%) due to his ongoing pains and discomforts as a result of the work related physical injury that he sustained in December 2008."[20]

54. On 18 April 2016, the Employer served Dr Kornan's report on the worker and by letter the employer stated that the worker was "entitled" to a compensation payment as consequence of the secondary mental (psychiatric) injury[21].

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[19] Attachment CP-6 (Affidavit 21 May 2019 CMP).
[20] Attachment CP-7 (Affidavit 21 May 2019 CMP).
[21] Attachment CP-12 (Affidavit 21 May 2019 CMP).

That letter was without qualification in that the Employer did not seek to preserve any rights or privileges or its position on any issue.

55. The Worker sought a reassessment of his permanent impairment assessment pursuant to s 72(3) of the Act for his secondary mental injury through NT Worksafe.

56. On 29 August 2016 the NT WorkSafe panel reassessed the Worker's secondary mental injury pursuant to s 72(3A) of the Act. The diagnosis was "chronic major depressive disorder, moderate severe which has arisen secondary to the injuries sustained to his lower back…."[22].

57. I agree with the sentiment stated by counsel for the Employer, at the hearing[23] that there is no obligation on the Employer to seek the section 71 and 72 assessment if the Employer disputes the claim. This accords with His Honour Dr Lowndes statement in ***Taylor's***[24] case:

> ***The process under s 72 presupposes that the permanent impairment which is required to be assessed has been caused by a compensable injury, in respect of which the employer has accepted liability or the Court has made a determination.***

58. I find in this case, that there is a very strong inference that can be drawn on the evidence that the Employer, by referring the Worker for a permanent impairment assessment of the secondary mental injury, in the context of the circumstances leading up to the assessment and the notice of the Worker's secondary mental injury to the employer, has accepted liability for that injury as a compensable injury.

59. This is because the Employer referred the worker for the assessment under the Act with the consequence being that any assessment by the panel is non reviewable pursuant to s.72(4) of the Act[25].

[22] Attachment CP-14 (Affidavit 21 May 2019 CMP).
[23] T. 42,43 hearing of the application on 23 July 2019 at Darwin Local Court before Judge Austin
[24] Supra at para [23, 26 and 27]
[25] see *Taylor v Pointon and Work Health Authority* supra at [23, 26 and 27]

FINDINGS:

60. I find that there is sufficient evidence in this case to establish on the balance of probabilities that:

    i) the secondary mental injury was productive of an incapacity to work, evidenced by the permanent impairment assessment report; and

    ii) the Employer **accepted liability under the Act for the secondary mental injury** and that it was productive of an incapacity for work evidenced by the referral of the Worker for the whole of body permanent impairment assessment under section 71 and 72 of the Act **and** further evidenced by the open, unqualified letter of 18 April 2016 to the Worker outlining the compensation entitlement arising as a result of the assessment.

61. For these reasons I am satisfied in this case on the balance of probabilities on the evidence before me that the Workers claim of a mental injury secondary to his accepted back injury was accepted by the Employer.

62. I find that the defence filed by the Employer, discloses no real defence to the claim made in the proceedings that the Employer accepted the claim for the secondary mental injury.

63. I am further satisfied that there is no real question to be tried and as such I determine the issue of Summary Judgment in favour of the Worker.

64. Once the issue of Summary Judgment on whether the Employer has accepted the secondary mental injury has been determined in favour of the Worker, it is for the Employer to seek a separate determination if the Employer now wishes to change its mind and raise the issue of notice **after they accepted the claim** as the question of notice has no role to play once the claim is accepted and no defence lies to avoid the Worker's claim on this basis.

NOTICE BY WORKER:

65. If I am wrong about the issue of Notice for the purposes of this application, I find on the balance of probabilities there is evidence that the Worker gave notice that the secondary injury was productive of an incapacity to work (or claimed that to be the case), noting that the Employer did not put any evidence on the application to dispute or

contradict the affidavit evidence of Ms Clarrisa Mavis Eileen Phillips of 21 May, 28 June and 22 July 2019.

66. In relation to the notice requirement the time bar established by subsection 80(1) of the Act, the requirement to give notice to the employer of a worker's claimed injury is a condition precedent to any right to pursue compensation. It is not merely a procedural provision[26] if the claim was disputed and not accepted by the employer at the relevant time.

67. I find that the essential elements of a worker's cause of action involve whether he sustained an injury and if so whether it was work related. I consider that lack of notice as soon as practicable is one which, if established would constitute a good defence, that is avoidance of the worker's claim[27].

68. Whether notice has been given "as soon as practicable" is a question of law[28].

69. The Employer is arguing that the Worker's case does not disclose a date of injury for the psychiatric sequela. The Employer argues none of the other material disclose a date of injury either or a date of January 2015. The argument is that the date is a requirement of notice provision.

70. On 5 January 2015 the Worker's GP, Dr O'Dwyer certified the Worker with depression related to the worker's accepted workplace injury. The GP issued a certificate of incapacity indicating this and arranged a referral to a psychologist[29].

71. On 17 March 2015, the Employer was provided with a *TIO Psychology (or Counselling) Treatment Plan* by treating clinical psychologist Ms Carol McGregor for "treatment for depression" with a diagnosis of "Major Depressive Disorder". The plan indicates the diagnosis of "Major Depressive Disorder" is listed as "related to the compensable injury"[30].

72. On 7 July 2015, the Worker's GP provided the Employer with a report stating that the worker was suffering from a "depressive illness" as a result of the workplace injury[31].

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[26] see *Lucas Macauley v NT Police Fire and Emergency Services* [2017] NTLC 018 per Judge Neill at [10]
[27] ibid *Lucas Macauley v NT Police Fire and Emergency Services* per Judge Neill at [22]
[28] *Global Insulation Contractors (NSW) Pty Ltd v Keating* [2012] NTSC 4 per Blokland J at [59]
[29] Attachment (Affidavit CP-1 (21 May 2019 CMP).
[30] Attachment (Affidavit CP-2 (21 May 2019 CMP)
[31] Attachment (Affidavit CP-3 (21 May 2019 CMP).

73. On 15 July 2015, the worker's Psychologist provided the Employer with a further *Psychologist (or Counselling) Treatment Plan* for "treatment of depression" with a diagnosis of "Major Depressive Disorder". The plan indicates that the diagnosis of "Major Depressive Disorder" is listed as "related to the compensable injury"[32].

74. In *Maddalozzo v Maddick*[33] (1992) Justice Mildren J ruled that the date of the injury is not necessarily the reference point for determining whether notice has been provided "as soon as practicable". His Honour found that the important question for the court to ask when determining the issue is, *when did the worker realise he had suffered an injury entitling him to compensation under the Act*, adding, "*But it is also clear that the realisation therein referred to need not be a matter of certainty, it is sufficient if the worker realised he might have to make a claim.*"

75. The evidence before me discloses the Worker was certified with depression by his GP on 5 January 2015. He was referred to a psychologist by his GP and a *TIO Psychologist (or Counselling) Treatment Plan* was devised in March 2015 with a diagnosis of "Major Depressive Disorder" related to the compensable injury. This diagnosis of depression by the psychologist was notified to the Employer as a result of that report being communicated to the insurer, TIO, in the context of a treatment plan.

76. I find that notice was given in early 2015 as pleaded by the Worker to the Employer via the insurer of the mental injury diagnosed in early 2015.

77. I find that the Worker gave notice to the Employer via the treatment plan on 17 March 2015[34] that he had a secondary psychiatric sequela that was productive of an incapacity to work (or claimed that to be the case).

78. I rule on the basis of the foregoing evidence before me on this application, that the earliest date when it was practicable for the Worker to have given the Employer notice of his mental injury was in early 2015, after the date his GP referred him to a psychologist for treatment.

79. I rule that the giving of notice to the Employer on or about 17 March 2015 via the insurer, evidenced by the *TIO Psychology (or Counselling) treatment plan*[35] by treating clinical psychologist Ms Carol McGregor for

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[32] Attachment (Affidavit CP-4 (21 May 2019 CMP).
[33] *Maddalozzo v Maddick*[33] (1992) 108 FLR 159 per Justice Mildren J at p. 37
[34] Attachment (Affidavit CP-2 (21 May 2019 CMP)
[35] Attachment (Affidavit CP-2 (21 May 2019 CMP)

"treatment for depression" diagnosed as "Major Depressive Disorder" was as **soon as practicable** in the circumstances of this case in compliance with sub section 80 and 81 of the Act.

FINDINGS:

80. I find it has been established to the satisfaction of the Court that the Employer, having filed a notice of defence, has no real defence to the claim made in the proceeding and that there is no real question to be tried.

81. I find in favour of the Worker and order that summary judgment be entered in the Worker's favour that **on 1 March 2016 when the employer referred the worker for the whole person impairment assessment for the mental injury to Dr Kornan pursuant to ss 71 and 71 of the Act,** evidenced by the letter of referral to Dr Kornan dated 1 March 2016[36], the Employer accepted liability for the Worker's secondary mental injury, the sequela.

82. All of the pleadings in the Worker's Statement of Claim for Summary Judgment of whether the Employer accepted liability for the consequential mental injury are now otiose. I suggest that the Worker should now consider whether paragraphs 6-17 inclusive of the Statement of Claim should be included in any amended Statement of Claim filed by the Worker.

83. I am of the view that as a result of my ruling the Employers defence relevant to the question of acceptance of liability for the secondary mental injury is now irrelevant. This appears to include paragraphs 5-10 and paragraphs 13-18 and I suggest the Employer consider whether those paragraphs should be included in any amended defence filed by the Employer.

84. Paragraph 11 (a) and (b) of the Employer's defence does not relate to the application but relates to the mere appeal.

ORDERS:

85. Accordingly I order that the Worker file and serve within 14 days an amended Statement of Claim proceeding on the basis of the accepted claim for the secondary mental injury.

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[36] Attachment (Affidavit CP-6 (21 May 2019 CMP)

86. I order the Employer file and serve within 21 days an amended defence on the basis of the accepted claim for the secondary mental injury.

87. I order both parties to file and serve an up to date list of consolidated documents on this application within 28 days

88. I order that both matters, File no. 21905978 the Summary Judgment Application and File 21851033 the Mere Appeal, be referred to the Judicial Registrar for case management for a time and date to be confirmed and to be notified to the parties.

COSTS:

89. I order that the Employer pay the worker's costs of and incidental to this application for Summary Judgment (including the mediation), to be taxed at 100% of the Supreme Court scale in default of agreement, certified fit for Senior/Junior Counsel.

Dated this 23 September 2019

JUDGE THERESE AUSTIN
WORK HEALTH COURT