Newton v Masonic Homes Inc [2009] NTSC 51

PARTIES:	CHERYL ANNE NEWTON
	v
	MASONIC HOMES INC T/AS TIWI GARDENS NURSING HOMES (ACN 063 954 674)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LA 8 of 2008 (20718189)
DELIVERED:	28 September 2009
HEARING DATES:	7 & 8 April 2009
JUDGMENT OF:	MILDREN J
APPEAL FROM:	WORK HEALTH COURT

CATCHWORDS:

APPEAL – appeal from Work Health Court – whether findings were errors of law or errors of fact – appeal limited to errors of law – test to be applied

EVIDENCE – witnesses called to give evidence about duties in occupations – whether expert evidence – whether expert evidence limited to opinion evidence

WORKER'S COMPENSATION – Notice of Termination of weekly benefits – not accompanied by medical certificate – whether medical certificate required – meaning of "ceased to be incapacitated for work" – whether notice provided sufficient detail – whether notice valid – whether notice relevant where worker and employer widen issues by pleadings going beyond an appeal under s 69

WORKER'S COMPENSATION – application in Work Health Court – whether witnesses were non-medical experts – whether evidence wrongly admitted in absence of compliance with Work Health Court Rules – function and purpose of

r 18.07 – whether expert evidence limited to opinion evidence – whether if error occurred appeal must be allowed

Workers Rehabilitation and Compensation Act, s 3(1), s 65(2)(b)(ii), s 69, s 69(1), s 69(1)(b), s 69 (1)(b)(vi), s 69(3), s 69(4), s 107, s 110A(3); *Work Heath Court Rules*, r 18.07, r 18.09

Cross on Evidence, 4th Aust ed, Butterworths, Sydney, 1991- (loose-leaf edition)

Alice Springs Town Council v Mpweteyerra Aboriginal Corp (1997) 115 NTR 25; *Disability Services of Central Australia v Regan* (1998) 8 NTLR 73; *Tracy Village Sports & Social Club v Walker* (1992) 111 FLR 32; *Wilson v Lowery* (1993) 4 NTLR 79; applied

Bruce v Cole (1998) 45 NSWLR 163; *Horne v Sedco Forex Australia* (1992) 106 FLR 373; *Lujans v Yarrabee Coal Co Pty Ltd* (2008) 83 ALJR 34; distinguished

Gumana v Northern Territory of Australia (2005) 141 FCR 457; (2005) 218 ALR 292; followed

Arnotts Snack Products Pty Ltd v Yacob (1985) 155 CLR 171; *Burns & Territory Insurance Board [No 2]* (2007) 20 NTLR 66; *Butera v Director of Public Prosecutions* (1987) 164 CLR 180; *Collins Radio Construction Inc v Day* (1997) 140 FLR 347; (1998) 143 FLR 425; *Foresight Pty Ltd v Maddick* (1991) 1 NTLR 209; *HWE Contracting Pty Ltd v Young* (2007) 20 NTLR 83; *Ju Ju Nominees Pty Ltd v Carmichael* (1999) 149 FLR 425; *R v Pfennig [No 1]* (1992) 57 SASR 507; *Spellman v RSL* [2004] NTMC 087; *The Queen v Perry (No 4)* (1981) 28 SASR 119; *Weal v Bottom* (1966) 40 ALJR 436; referred to

REPRESENTATION:

Counsel:

appellant:	S Gearin
respondent:	J Kelly SC

Solicitors:

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Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Newton v Masonic Homes Inc [2009] NTSC 51
No LA 8 of 2008 (20718189)

BETWEEN:

CHERYL ANNE NEWTON
appellant

AND:

MASONIC HOMES INC T/AS TIWI GARDENS NURSING HOME (ACN 063 954 674)
respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 28 September 2009)

[1] This is an appeal from the Work Health Court. The respondent has also filed a Notice of Contention.

[2] The appeal was originally heard by Angel J who reserved judgment on 8 April 2009. Since that time, Angel J has fallen ill and has been unable to deliver judgment. By consent of the parties, I have agreed to decide the appeal on the basis of parties' written submissions and the transcript of the oral submissions before Angel J.

Background facts

[3] The appellant, who was born on 22 June 1957, was employed by the respondent as a permanent part time Personal Care Assistant. She commenced her employment of 3 July 2004 and on or about 25 November 2004 obtained a Certificate III in Aged Care Work at the Batchelor Institute of Indigenous Tertiary Education. Her duties included showering, toileting, feeding, dressing, lifting and other attendant care of elderly patients, including dementia patients at the respondent's premises at Tiwi Gardens.

[4] On or about 14 April 2005, the appellant sustained an injury to her right thumb in the course of her employment. On or about 18 April 2005, the appellant made a claim for compensation under the *Work Health Act*, now called the *Workers Rehabilitation and Compensation Act* (the Act). On 26 April 2005, the respondent accepted liability in relation to the claim and commenced payment of work health benefits, namely weekly compensation and medical and rehabilitation benefits. As at the date of her injury, the appellant's normal weekly earnings amounted to $535.80 gross. It is not in dispute that the respondent made and continued to make payments of weekly benefits under the Act until some time around 17 May 2007 when the respondent gave notice of its intention to cease payments of weekly compensation in purported compliance with s 69 of the Act.

[5] The learned Magistrate found that the respondent's notice was invalid because:

1. it was not accompanied by the medical certificates required by s 69(3) of the Act; and

2. because the notice did not provide sufficient detail to enable the appellant to understand fully why the amount of compensation was being cancelled, as required by s 69(4).

[6] The learned Magistrate found that "while... on that basis the worker would be entitled to reinstatement of benefits, the Court must consider the Worker's further claim in relation to her consequential injuries and the Employer's counterclaim".

[7] The respondent's notice of contention challenges the findings of the learned Magistrate that the notice of termination of benefits was invalid on either of the grounds found by the learned Magistrate and it is convenient to deal with this issue first.

The validity of the notice of termination of benefits

[8] Section 69(3) of the Act provides:

> "Where compensation is to be cancelled for the reason that the worker to whom it is paid has ceased to be incapacitated for work, the statement under subsection (1) shall be accompanied by a medical certificate of the medical practitioner certifying that the person has ceased to be incapacitated for work."

[9] The respondent submitted that the terms of the notice given did not assert that the appellant ceased to be incapacitated for work, but relied upon an assertion that the appellant had the capacity to earn at least $600 per week

as a teacher's aide, that pursuant to s 65(2)(b)(ii) of the Act, the appellant's weekly benefits were reduced to 75 per cent of the difference between the appellant's indexed and normal weekly earnings and her "earning capacity" and that this amounted to nil.

[10] During the hearing before Angel J, counsel for the respondent pointed to the definition of "incapacity" in s 3(1) of the Act in which that word is defined to mean "an ability or limited ability to undertake paid work because of an injury". The submission was that the appellant was not totally incapacitated; she still had a partial incapacity, but because of the operation of s 65(2)(b)(ii) of the Act, her incapacity no longer entitled her to weekly compensation under s 65 of the Act (which deals with weekly compensation after the first 26 weeks of incapacity).

[11] Counsel for the appellant submitted that the point was covered by the decision of the Court of Appeal in *Ju Ju Nominees Pty Ltd v Carmichael*.[1] The learned Magistrate relied upon the decision in *Collins Radio Construction Inc v Day*.[2] The effect of these decisions (as well as others) was summarised by B F Martin CJ in *Ju Ju Nominees Pty Ltd v Carmichael*[3] that where the employer cancels payments of weekly payments by reason of the fact that the worker has ceased to be incapacitated for work, a notice given under s 69(1) must sufficiently state the reason and be accompanied by the medical certificate referred to in s 69(3). However, a worker may be

[1] (1999) 149 FLR 425.
[2] (1997) 140 FLR 347 (upheld on appeal (1998) 143 FLR 425).
[3] (1997) 149 FLR 425 at 429; Bailey J concurring at 442.

partially incapacitated for work but the incapacity may not be productive of financial loss entitling the worker to ongoing weekly compensation.[4] The respondent's submission relies on this difference. The question then is whether s 69(3) should be interpreted so that the expression "ceased to be incapacitated for work" means no longer totally incapacitated, or whether it bears some other meaning, such as "no longer had an ability or limited ability to undertake paid work because of an injury".

[12] Some light on this question may be found in the history of s 69. As that provision was originally drafted, it provided that "except where... the person receiving it ceases to be incapacitated ...an amount of compensation shall... not be cancelled or reduced unless the worker to whom it is payable has been given... 14 days notice of the intention to cancel or reduce..." etc. The expression "ceases to be incapacitated" was then understood to mean in its context "ceases to be totally incapacitated".[5] This was because s 69 as then drafted contemplated that if the amount of compensation was to be reduced because the worker was partially incapacitated, notice under s 69 had to be given, but not if the worker "ceased to be incapacitated".

[13] However, s 69 as presently drafted is quite different. In my opinion, the words "ceased to be incapacitated for work" take a meaning which accords with the definition of "incapacity". Thus, if the worker was totally incapacitated and was receiving weekly benefits based on total incapacity

[4] *Arnotts Snack Products Pty Ltd v Yacob* (1985) 155 CLR 171; *Foresight Pty Ltd v Maddick* (1991) 1 NTLR 209.
[5] See the discussion in *Horne v Sedco Forex Australia* (1992) 106 FLR 373 at 382-383.

and it is asserted that the worker is no longer totally incapacitated, the relevant medical certificate is required. Similarly, if the worker was partially incapacitated and was receiving weekly benefits and the employer asserts that he is no longer partially incapacitated, the medical certificate is also required by s 69(3).

[14] However, this does not entirely dispose of the respondent's argument. The worker may be partially incapacitated, but may make a partial recovery so as to be fit for some work which, because of the operation of s 65, results in the worker no longer being entitled to a weekly benefit. I do not think it is stretching the words of s 69(3) beyond what they are capable of bearing to say that, in these circumstances, the compensation has been cancelled because the worker has ceased to be incapacitated for work, because it seems to me that in these circumstances the worker no longer has an inability or limited ability to undertake paid work because of his or her injury. This is because, although the worker may in one sense still be partially incapacitated, the incapacity is not productive of any loss of earning capacity as defined by s 65(2). It is difficult to see how a partial incapacity which is not productive of any loss of earning capacity has the result that the worker still has a limited ability to undertake paid work.
I would therefore dismiss the employer's notice of contention relating to the need for the relevant notice to be accompanied by the medical certificate required by s 69(3).

[15] As to the finding of the learned Magistrate that the Notice of Termination of benefit was invalid for failing to comply with s 69(4) of the Act, that subsection requires that the reasons which are set out in the statement referred to in s 69(1)(b) "shall provide sufficient detail to enable the worker to whom the statement is given to understand fully why the amount of compensation is being cancelled or reduced".

[16] The learned Magistrate decided that the test as to whether or not the statement complied with s 69(1)(b) was "an objective test with a subjective element. That is, the employer is required to provide detail to make the Notice understandable for the ordinary person such that the particular worker should have understood the notice". In my opinion, the test is an objective one and does not depend on the level of education or intelligence of the worker. Nor is it invalid if written in English where the worker is unable to read, either at all, or in the English language. An objective test recognises that there will be many occasions where workers will need to consult a solicitor before being able to fully understand why the compensation is being reduced or cancelled, particularly as the provisions of the Act are complex and likely to be difficult for a layman to comprehend.

[17] In my opinion, the Notice did comply with s 69(4). The reason provided was that the worker was fit to work as a teacher's aide for 37 hours per week and therefore had an earning capacity of least $600 per week. As the difference between 75 per cent of the worker's indexed normal weekly earnings ($516.90) and the worker's earning capacity was nil, no weekly

compensation was payable. The learned Magistrate found that the notice was confusing because the worker had received a medical certificate from her general practitioner certifying her unfit for work. I do not consider that this was a relevant consideration. The question of whether or not the notice complied with s 69(4) depended solely on the terms of the notice, not on the truth or otherwise of the underlying facts upon which the notice was based.

[18] The learned Magistrate found that the notice complied with s 69(1). There is no appeal from that finding, but I cannot help but observe that there is nowhere included in the notice a statement, as required by s 69(1)(b)(vi) to the effect that, despite the requirements of the Act relating to mediation, the claimant may commence a proceeding for an interim determination under s 107 at any time after the claimant had applied to the Authority to have the dispute referred to mediation. Strict compliance with this requirement is also necessary for a valid notice under s 69. However, as the notice was invalid for non-compliance with s 69(3) nothing turns on this.

The validity of the Notice is irrelevant

[19] There are two reasons why the validity of the notice under s 69 is irrelevant. First, 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.[6] In this case the appellant did not confine the issues to an appeal, but sought to claim inter alia for a consequential injury to her left hand, arm and shoulder and a second consequential injury, namely, a psychiatric or psychological condition. These alleged consequential injuries went to the heart of the dispute as to the extent of the appellant's incapacity for work. Secondly, the respondent filed, as it was entitled to do, a counterclaim in which the respondent specifically pleaded that the appellant was partially incapacitated for work due to her right thumb injury, but that the appellant had a capacity to undertake suitable alternative paid employment as:

(a) a retail/small business manager;

(b) welfare worker; or

(c) teacher's aide

and that as a result she was not entitled to any weekly compensation. The course taken by the parties is relevant to the question of who bore the onus of proof and whether, as the appellant claims, the Court wrongly applied the onus in this case.

[6] See *Disability Services of Central Australia v Regan* (1998) 8 NTLR 73.

Onus of Proof – Ground 1

[20] The appellant submitted that the first consequential injury was reported to the employer's insurer by the appellant's treating hand surgeon, Dr Maher, by the report dated 14 February 2006 (part of Ext W21). Also, it was submitted that the appellant's general practitioner, Dr Goodhand, provided certificates based upon "problems with the left arm and recommending treatment which was paid for" presumably by the insurer.

[21] As to the psychological injury, it was submitted that the appellant was referred by the respondent's insurer to a clinical psychologist, Dr Jan Isherwood-Hicks (see the reports of Dr Isherwood-Hicks Ext W22). She continued to have treatment in the form of a number of consultations between August 2006 and February 2008 paid for by the insurer. The last report from Dr Isherwood-Hicks dated 11 February 2008 requested approval for a further five consultations and/or until settlement of her claim was finalised.

[22] The learned Magistrate found that because these issues were before the Court on the worker's application and outside the appeal under s 69, there was an "evidential burden" upon the worker to prove that these were injuries consequential upon the injury to the right hand. Further, the learned Magistrate found that the respondent employer had never accepted responsibility for these "consequential injuries" in the past.[7] Counsel for the appellant, Ms Gearin, submitted that this was an error because the

[7]Reasons, 27 August 2008, Work Health Court, para [106].

burden of proof rested upon the respondent employer. Her submission depended upon a submission that the employer had accepted the consequential injuries and paid compensation in respect of them and therefore the onus rested upon the employer to establish a change of circumstances.

[23] Counsel for the respondent, Ms Kelly SC, submitted that there was no evidence of acceptance of responsibility by the employer for the consequential injuries and, in any event, there was no plea (or even argument) that the respondent's conduct raised an estoppel against the employer. Reliance was placed upon a decision of the Work Health Court that the onus is on the worker to establish that a particular consequence is in fact a sequela of the injury.[8]

[24] 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 the evidentiary onus of proof. This ground of appeal is dismissed.

Ground 2 – Causation

[25] This ground asserts that the learned Magistrate erred in law in determining that the essential question was whether there was a causal connection

[8] *Spellman v RSL* [2004] NTMC 087 at [22]-[26] & [26].

between the original injury and the consequential injuries. The appellant's written submissions appear to be based upon who bore the onus of proof. I have read the transcript of the oral submissions before Angel J and there does not appear to me to be any other basis for this submission. If the worker is asserting that an injury is a consequence of another injury, the worker must prove what he or she asserts. Plainly, a physical injury may have consequences beyond the actual injury to the specific part of the body originally injured and, if so, they are part of the original injury. But whether or not such sequelae are part of the original injury requires proof of a causal connection. This ground of appeal must be dismissed.

Ground 3

[26] This ground asserts, by reference to paras [159], [161] and [166] of the learned Magistrate's reasons, that her Honour erred in law in requiring that, for the medical evidence to be persuasive, it had to be based on clinical findings and could not be based on other indicators. Ms Kelly SC's submission was that the learned Magistrate made no such finding. I agree. This ground of appeal is dismissed.

Ground 4

[27] This ground asserts that the learned Magistrate erred in law "in failing to identify that the appellant's condition in her right and left hands (Reasons for Decision, paras 132 and 136) is consistent with the condition of chronic pain syndrome and/or Complex Regional Pain Syndrome Type 1".

[28] The appellant's written submissions did not address this ground. Having read the transcript of the oral submissions made before Angel J, I could find no reference to it. (The appellant's submissions are very difficult to follow as they do not refer to the grounds of appeal at all and Angel J did not enquire which submissions related to which ground).

[29] Neither paras 132 nor 136 of the learned Magistrate's reasons appear to me to be open to attack as an error of law. Both paragraphs merely comment on the state of certain of the evidence. There is no substance to this ground which must be dismissed.

Grounds 5, 6, 7 and 8

[30] Ground 5 asserts that the "learned Magistrate erred in law in finding (Reasons for Decision, para 159) that the appellant was deliberately exaggerating her symptoms in her left hand and arm when there was no relevant and probative material capable of supporting such a finding".

[31] Ground 6 is similar. It asserts that the learned Magistrate erred in law in finding "that the appellant was deliberately exaggerating her symptoms in her right hand and feigning the symptoms in her right hand when there was no relevant and probative material capable of supporting such a finding".

[32] Grounds 7 and 8 deal with alleged errors of law in the way the learned Magistrate dealt with the pre-existing condition of arthritis and the alleged psychiatric condition.

[33] In my opinion, none of these grounds are made out. It is apparent from her Honour's reasons that, in reaching her conclusions, she took into account a number of factors including: inconsistencies in responses to tests; doubts expressed by the medical experts concerning the veracity of claimed pain levels made by the worker; difficulties which the medical experts had in explaining her symptoms; the worker's reluctance to accept the medical experts' reports; and the worker's "defensiveness in giving evidence about her pain levels". These are findings of fact made by the Court which are not open to attack as errors of law unless there is no evidence to support them, or unless the facts as found are incapable of leading to the inferences drawn by the Court.[9] Ms Gearin referred to the judgment of Spigelman CJ in *Bruce v Cole*[10] for a proposition that there is an error of law when the finding is not capable of being supported by "relevant and probative material". However, that case was not one which dealt with the statutory formula which limits appeals to "errors of law", but with the application of common law principles identifying the proper basis for judicial review of administrative action.[11] To the extent that *Bruce v Cole* may be authority for a wider test than previously recognised by decisions of this Court, that case is not binding whereas *Wilson v Lowery* is a decision of the Northern Territory Court of Appeal and is binding. In any event, I doubt if *Bruce v Cole* expounds a wider test. If the evidence is irrelevant, it is inadmissible.

[9] *Tracy Village Sports & Social Club v Walker* (1992) 111 FLR 32 at 38-39; *Wilson v Lowery* (1993) 4 NTLR 79 at 83-86.
[10] (1998) 45 NSWLR 163 at 187-189.
[11] See *Bruce v Cole (1998) 45 NSWLR 163*at p 189 paras C to D.

If it is not probative of a fact in issue, it is irrelevant and inadmissible. If the only evidence to support the finding of fact is inadmissible, there is no evidence on the point. However, there are limits to which this line of reasoning applies to appeals from the Work Health Court because that Court is not bound by the rules of evidence.[12] It is not necessary to discuss them here.

[34] Ms Gearin submitted that no medical evidence was given at trial which stated or suggested that the appellant was feigning or exaggerating her symptoms as found by the learned Magistrate. The respondent's case at trial was that there was both exaggeration and feigning of symptoms. This submission was in fact based on evidence at the trial including the reports of Dr Haynes (Ext D6), especially the report dated 1 July 2008 at p 2; the evidence of Dr Olsen (Ext W16) of 16 July 2008 at p 30 that there was a "functional" component to the appellant's physical impairments, evidenced at trial by Dr Olsen in cross-examination (tr p 254) that, in respect of certain of the appellant's symptoms, he could not decide between "subconscious over-reaction" or it might be exaggeration or fabrication; and there was evidence from a physiotherapist who prepared a lengthy "Worker's Functional Capacity Evaluation" (Ext W19), which contained a number of inconsistent findings. The respondent also relied upon evidence tendered at the trial of evidence given by another specialist, Dr Thoo, at the first trial in the Work Health Court before another Magistrate, whose evidence suggested

[12] *Workers Rehabilitation and Compensation Act*, s 110A(3).

inconsistency with a nerve condition said to be relevant to this issue (Ext D7). In addition, the learned Magistrate relied upon her own observations and the difficulty which the experts had in explaining all of her symptoms.

[35] One possibility which most of the medical experts referred to in various ways, which might also have explained her symptoms and complaints, is what is sometimes referred to as “functional overlay”, which in the minds of some is also a conscious form of malingering but in others is a psychological condition at one time commonly referred to as “compensation neurosis”, which is not deliberate fabrication, but a genuine psychiatric injury secondary to a physical injury. Evidence was given by Dr McLaren, a psychiatrist, whose report (Ext D5) suggested that the appellant had a mild case of minor depression which he was unable to relate to the work injury.

[36] He did not change his opinion in cross-examination.

[37] The reports of the psychologist, Dr Isherwood-Hicks and the evidence she gave at the trial, was that the appellant had been distressed with feelings of anxiety and depression which related to the loss of her vocation and the effect of the rehabilitation process, the endless medical appointments, etc, but that the resolution of the “Work Health process” would help her to make a recovery. The learned Magistrate rejected her evidence. Likewise, the evidence of Dr Walton, a forensic psychiatrist, was rejected.

[38] Although the evidence led at trial in support of her claim was such that one would have expected her to have had a good chance of success, I am unable to find that the learned Magistrate made any error of law on the ground that there was no evidence to support her findings of fact. These grounds of appeal must therefore be dismissed.

Ground 9

[39] This ground related to an alleged error of law in failing to take into account "the unchallenged records of the appellant's treating medical practitioner, Dr Goodhand... to find that the appellant did not suffer an injury to her left hand and arm and in determining the appellant's incapacity".

[40] In her written submissions, Ms Gearin submitted that "Dr Goodhand was not cross examined on his medical certificates and the Magistrate in her Reasons for Decision failed to consider this evidence of Dr Goodhand at all".

[41] I have been unable to find any reference to this in the oral submissions. Counsel for the respondent submitted, correctly, that it is not said what use the learned Magistrate is supposed to have made of the records and no part of the records were relied upon in support of a particular finding at trial.

[42] It is a fact that Dr Goodhand gave evidence at the trial. The learned Magistrate referred to his evidence and report in her reasons at paras [116]-[118] and [173] of her judgment. I am unable to say what it is that the learned Magistrate failed to do but should have done in assessing the evidence. I reject this ground of appeal.

Grounds 13 and 14

[43] Before considering grounds 10-12, it is convenient to deal with ground 13 which complains that the learned Magistrate wrongly admitted into evidence and relied upon the evidence of the witnesses Woodside, Morgan and Hewlands as to the duties of teachers' aides, receptionists and pharmacy assistants. The relevance of this evidence was that it went to the question of whether or not the appellant was capable of being employed in any of those occupations.

[44] At trial, the evidence of these witnesses was objected to by counsel for the worker on the ground that they were being called to give expert evidence and that the Work Health Court's Rules relating to the calling of expert evidence were not complied with.

[45] The transcript of the proceedings at trial does not record any objection being taken to this evidence, nor the Magistrate's reasons for admitting the evidence. The transcript of the submissions before Angel J reveals that counsel for the respondent conceded that this objection had been taken at trial.[13]

[46] Rule 18.07 of the *Work Health Court Rules* provides, in summary, that if a party intends to call a non-medical expert to give evidence, the party must serve on the other parties a statement of the expert containing the relevant evidence to be given at least 28 days before the date of the hearing and that,

[13] Tr, 7 April 2009, p 31.

unless the Court gives leave or the other parties consent, failure to serve the relevant statement precludes that party from leading the evidence at trial.

[47] The first question is whether the evidence given by these witnesses was "evidence from a person in the person's capacity as an expert".[14] The *Work Health Rules* do not define the word "expert". I note that r 18.09 provides:

> "**18.09 Admissibility of expert statement:**
>
> (1) If a copy of a statement from an expert is served in accordance with these Rules, the statement is admissible –
>
> (a) as evidence of the expert's opinion; and
>
> (b) if the expert's oral evidence of a fact on which the opinion was based would be admissible – as evidence of that fact."

[48] Taken literally, r 18.09 would apparently make a statement admissible even if the statement obviously considered matters of opinion plainly outside the expert's field of expertise, even if the opinion was not relevant to a fact in issue, even if the "expert" was not an expert in the field, even if the opinion related to a matter of common knowledge and even if the opinion was given on the very issue of fact or law which the Court had to determine. I cannot believe that such an astounding and absurd result was intended by the draftsperson of this rule. Presumably, what is meant is that the statement may be admitted into evidence if it complies with the rules, but not otherwise. For that reason I do not think that r 18.09 throws any light on the

[14] See *Work Health Rules*, r 18.07(1).

meaning of the phrase in r 18.07(1) "in the person's capacity as an expert" and in particular whether this is confined only to opinion evidence.

[49] There is some authority which suggests, or at least tends to suggest, that opinion evidence and expert evidence are the same thing.[15] However, I do not consider that they are necessarily one and the same at all. As Selway J put it, in *Gumana v Northern Territory of Australia*,[16] expert evidence is simply evidence given by someone who has a particular expertise:

> "Much of the discussion about 'expert' evidence would seem to assume that it is primarily or only 'opinion' evidence. However, that will depend upon the nature of the expert and the nature of the evidence".

[50] There are many instances where experts are called to give evidence about a subject matter where it is necessary to inform the Court about some specialised branch of knowledge where no opinion is in fact offered. For example, in *R v Pfennig (No 1)*[17] Cox J held that a witness was qualified to describe the characteristics of blue heeler dogs, but not to express an opinion about how a particular dog of that breed might behave in a particular situation. In *Gumana v Northern Territory of Australia*,[18] Selway J referred to admissible evidence of anthropologists based on direct observations as not evidence of opinion at all. Evidence about the meaning of a word or words given in a foreign language has traditionally been

[15] See for instance *Weal v Bottom* (1966) 40 ALJR 436 at 438 per Barwick CJ.
[16] (2005) 141 FCR 457; (2005) 218 ALR 292 at [156].
[17] (1992) 57 SASR 507 at 512-513.
[18] (2005) 141 FCR 457; 218 ALR 292 at [156].

regarded as expert evidence.[19] In *The Queen v Perry (No 4),*[20] Cox J discussed at some length whether the result of tests by an analytical chemist showing that arsenic was found in certain specimens were fact or opinion; but in either event he did not doubt that the evidence was that of an expert.

[51] In my opinion, it would not promote the purposes or objects of r 18.07 to limit its meaning to opinion evidence. The purpose of the rule is to prevent surprise at trial, to provide an opportunity to narrow the issues at trial and to enable the party against whom the witness is to be called to make an informed decision as to whether or not the witness will be required for cross-examination. The rule should not be given a narrow interpretation.

[52] The witness Woodside gave evidence in chief about the duties of teachers' aides in primary schools in the Northern Territory, the kind of hours of work available, who allocates the duties, where (physically) the duties are performed, whether or not a teacher's aide would be asked to do work which might exacerbate an injury and what physical activities by the teachers' aides such duties might involve. At least one aspect of this evidence was opinion evidence, but, in any event, in my opinion, the evidence was generally of an expert nature because it could not be said that ordinary members of the public would have any knowledge of the duties of teachers' aides, whereas the witness apparently was someone who had

[19] *Butera v Director of Public Prosecutions* (1987) 164 CLR 180 at 188-189.
[20] (1981) 28 SASR 119 at 126-127.

personal knowledge of such matter and unlike some expert Tribunals, it could not be said that the learned Magistrate had knowledge of it either.[21]

[53] The witness Morgan gave evidence of her experience working as a receptionist, her duties working as a receptionist for a practice called Ability Physiotherapy, the computerised appointment programme used by the practice, how payments are received, whether the computer program is difficult to operate, the extent to which there are common activities in other employment she has had experience in as a receptionist, her experience as a reservations clerk at Travelodge, Townsville, the duties that involved, wage rates and what formal educational requirements there are to obtain work as a receptionist. I think this evidence is not in the same category as the evidence of the witness Woodside, as the duties which she described are so much a matter of common knowledge that her evidence was, strictly speaking, largely inadmissible and the same goes for the evidence of the witness Hewlands as to the duties of pharmacists' assistants. However, no great harm was done by calling their evidence and I would not allow the appeal on this ground.

[54] So far as the evidence of the witness Woodside is concerned, counsel for the appellant was permitted to tender evidence from the Stuart Park Primary School covering the job description of a teachers' aide. This evidence

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[21] See the discussion in *Cross on Evidence* (loose-leaf edition) para 29020; *Weal v Bottom* (1966) 40 ALJR 436 at 442; *HWE Contracting Pty Ltd v Young* (2007) 20 NTLR 83 at 94-95 [50]-[56].

(Ext W26) indicated that there were in fact selection criteria which were "essential" and which, it was submitted, the appellant did not have. This contradicted the evidence of Mr Woodside, but as he had already given his evidence, it was not put to him in cross-examination, but was allowed to be tendered in reply. Why counsel for the appellant did not ask for Woodside to be recalled for further cross-examination remains unexplained.

[55] It was submitted that the learned Magistrate failed to take into account that the evidence in Ext W26 was inconsistent with Woodside's evidence, but in the reasons for judgment, the learned Magistrate made passing reference to this exhibit in para [175] insofar as it relates to the duties of a teacher's aide obtained from a "NT Government website". In fact, this misdescribes the evidence in Ext W26, but nothing much turns on this as the learned Magistrate clearly gave Ext W26 little or no weight.

[56] Although I am of the view that there is some substance to the appellant's complaints, it does not necessarily follow that the appeal must be allowed if in the end result the Court reached the right conclusion.[22] Irrespective of whether or not there were "essential" selection criteria, the evidence did not establish that the appellant did not have, or could not acquire, the relevant criteria. On the contrary, the learned Magistrate found that the appellant had previously undertaken part time work as a teacher's aide in 2007, working three hours a day for two days a week for two weeks. In those circumstances, the conclusion which the learned Magistrate reached, based

[22] *Alice Springs Town Council v Mpweteyerre Aboriginal Corp* (1997) 115 NTR 25 at 32.

on her findings concerning causation of her left arm symptoms and her alleged psychiatric injury, is hardly surprising and clearly open to her, namely that the appellant was able to work at least part time as a teacher's aide, receptionist or sales assistant. I would therefore reject these grounds of appeal.

Ground 10

[57] This ground complains that there was no evidence capable of supporting the learned Magistrate's findings as to the appellant's capacity to engage in employment. There clearly was. This ground is not made out.

Ground 11

[58] This ground complains that there was no evidence to support the learned Magistrate's finding that the appellant had the ability to undertake part time duties as a receptionist or teacher's aide or at least to the level that would pay her. Having considered the Magistrate's reasons and findings of fact, I am unable to conclude that there was no evidence to support that finding.

[59] Counsel for the appellant submitted that the findings were made in circumstances that the Court failed to consider the cross-examination of Dr Hayes and the other medical witnesses "unchallenged evidence regarding the appellant's incapacity" and that because these steps were not carried out, the learned Magistrate fell into error, citing *Lujans v Yarrabee Coal Co Pty Ltd*.[23] However, that case dealt with an appeal by way of rehearing, not an

[23] (2008) 83 ALJR 34 at [25].

appeal limited to errors of law and is, therefore, distinguishable. In any event, I am not satisfied that there was no evidence to support the learned Magistrate's decision. Plainly, I think there was. If there was any error by the learned Magistrate, it was an error of fact and not law. This ground must be rejected.

Ground 12

[60] This ground asserts that the learned Magistrate erred in law in failing to have regard to the respondent's obligations pursuant to s 75A of the Act in determining the "most profitable employment" as required by s 68 of the Act.

[61] No submissions were made by counsel for the appellant at the hearing of the appeal to support this ground and it was clearly abandoned.

Ground 15

[62] This ground asserts that the learned Magistrate's finding that the appellant could be employed as a teacher's aide was in error because she failed to have regard to the selection criteria for the position.

[63] I have already dealt with that point in paras [54]-[56]. There is also the difficulty for the appellant that the learned Magistrate also found that the appellant was capable of earning either as a receptionist or as a teacher's aide more than her normal weekly earnings, so that even if the attack on the finding relating to a teacher's aide succeeded, the appellant would also need to establish that the findings relating to a receptionist were not supported by

any evidence and this has not been made out. This ground of appeal therefore fails.

Grounds 16 and 17

[64] Ground 16 complains that the learned Magistrate failed to consider properly and weigh the criteria in s 68 of the Act in determining the employment on the open labour market within the capacity of the appellant.

[65] Ground 17 complains that the learned Magistrate erred in law in failing to find that "the most profitable employment" requires the appellant to be able to be gainfully employed in the open labour market.

[66] It is convenient to deal with these two grounds together.

[67] I have been unable to find any reference to these grounds in the appellant's written submissions, except a bald assertion that the learned Magistrate "failed to decide according to law the extent of the appellant's incapacity for work in the open market".

[68] As best as I can understand the submissions, Ms Gearin's point was that the appellant could only work a few hours a week and was therefore an "odd lot".[24] However, this submission, if it were to have had any reasonable chance of success, depended upon favourable findings that the appellant's left arm injury and psychological injury were caused or exacerbated by the injury to the right arm. As the appellant failed on that issue, there was no basis for saying that the learned Magistrate erred on these grounds. This is

[24] See the reference to *Burns v Territory Insurance Board [No 2]* (2007) 20 NTLR 66.

not a case where there was no market for receptionists or teacher's aides. The finding of the Magistrate was that her incapacity was limited to her right hand only. As that finding has not been successfully attacked, there is no basis for upholding either of these grounds of appeal.

Ground 18

[69] This ground relates to the rejection of the appellant's claim for an automatic car. The appellant complained that she needed an automatic car because she could not safely hold on to the steering wheel with her right hand whilst changing gears with her left.

[70] This point is not addressed in the appellant's written submissions, although it was addressed by Ms Gearin in her oral submissions.[25] No references to the evidence were given. Ms Kelly SC in her submission said that if an error was made, it was an error of fact.

[71] The appellant's evidence on this topic is at transcript p 53-54, 61 and 65. See also the evidence of Alan Bond[26]. There was no cross-examination directed to this evidence. Even if the appellant had no left hand problem, if she had a continuing disability in her right hand, this could have made it difficult for her to properly and safely steer the vehicle using only her right hand. I agree that the learned Magistrate failed to consider that aspect of the appellant's case; it is clear that the claim was rejected because the

[25] Tr 7 April 2009, p 27.
[26] Tr pp 171-172.

Magistrate found that there was no consequential injury to the left hand and "that it was the left hand that is used for changing gears on a manual".

[72] In my opinion, this was an error of law by the learned Magistrate. There was simply no evidence upon which the learned Magistrate might have rationally concluded that the appellant could safely drive the vehicle whilst changing gears, given her findings that the problems with the appellant's right hand affected her ability to drive.

[73] This ground of appeal is upheld.

Conclusions

[74] The appeal in relation to ground 18 is allowed. The appeal is otherwise dismissed. I will hear the parties as to what further order or orders should be made in relation to ground 18 and as to costs.
