GUIDE TO

SOUTH AUSTRALIAN WORKERS' COMPENSATION LAW

CASE NAME, SUBJECT, KEYWORD AND SECTION

*** NAVIGATION ***

*Unfortunately, the product's efficient navigation system with the index to the left of screen cannot be contained in this preview. Just use the scroll mechanism to the right and make sure you see the incredible depth of this publication by perusing the Index at p. 3.

INCLUDES:	WCT and WCAT DECISIONS	**(1988 – July 2011)**
	SUPREME COURT DECISIONS	**(1987 – July 2011)**
		current version is up-to-date

SIMILAR S.A. INDUSTRIAL LAW PUBLICATION ALSO AVAILABLE

The author is available on **0408 802 212** to respond to any queries

This publication aims to point the subscriber to all the relevant cases and to provide helpful 'judicial' commentary stating the general principles but it **is no substitute for carefully researched legal consideration or advice**.

Every effort has been and will be made to keep the statements of law contained herein up-to-date, but please be careful to check the latest legislation and decisions yourself before relying on an older decision.

I thank my assistants Patricia Lee and Mark Nemstas for their assistance in the preparation of the Hardcover Loose Leaf and Web versions.

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USERS' GUIDE **** NOTE: Check very recent cases for appeals

This publication has been prepared by the author through the process of looking at each of the Workers Compensation (Appeal) Tribunal decisions since its inception and the other bodies mentioned below since 1987 and indexing those decisions containing points of precedential interest. Important statements of law by the courts and tribunals are included and will continue to be included and refined each quarterly update.

NOTE: Where a quote in a précis contains bold emphasis it was highlighted by the author for your assistance.

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- INDEX summary of subject and keyword heading
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- Table of Supreme Court Decisions on Workers Compensation
- A, JD & WC(A)T decisions in numerical order
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The following illustrates and explains the references used:

4/88	Blue WC(A)T Reports Volume 4 at page 88
1.9	Green WCT Reports Volume 1 at p.9
WCT1/00	Workers Compensation Tribunal Decision No 1 of 2000
AT1/00	Workers Compensation Appeal Tribunal Decision No 1 of 2000
A43/95	WC(A)T A print of 1995
JD1/96	Judicial Determination 1 of 1996
W47/87	Industrial Court Workmen's Compensation jurisdiction W print of 1987
SASR	South Australian State Reports
SAIR	South Australian Industrial Court Reports (selected decisions 1990-)
LSJS	Law Society Judgment Scheme
S/C5720	Unreported Supreme Court decision number 5720
99S/C119	Unreported Supreme Court decision number 119 of 1999
I160/95	Industrial Court I print of 1995
M8/96	Industrial Court (Magistrates) M print of 1996 (1996... only)
CM8/04	Industrial Commission decision number 8 of 2004
CT6/02	Industrial Court decision number 6 of 2003

For comprehensive use of this publication when researching a particular issue, the author recommends that the user skims the 'Summary of Subject and Keyword Headings' for potentially relevant topics.

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PRESCRIBED SUM TABLE

Pre-Amendment

Year	Amount
1988	$70,100
1989	$75,100
1990	$80,800
1991	$85,800
1992	$89,300

Post Amendment

Year	Amount
1988	$72,499
1989	$77,600
1990	$83,400
1991	$88,700
1992	$82,300
1993	$94,000
1994	$96,200
1995	$98,100
1996	$102,600
1997	$104,300
1998	$103,500
1999	$105,000
2000	$106,800
2001	$113,000
2002	$115,500
2003	$119,800
2004	$124,200
2005	$127,200
2006	$131,000
2007	$136,000
2008	$137,900

SUBJECT AND KEYWORD INDEX AND COMMENTARY

Re recent cases on appeal, please check www.industrialcourt.sa.gov.au web-site under decisions icon

Alcohol

A21/92 Lloyd (injured by being struck by co-worker - not guilty of misconduct by talking with co-workers in authorised break who were consuming alcohol), A70/93 Della-Flora (injured when on journey and under influence - also a substantial deviation), WCT86/01 Steggall (worker with an accepted compensable leg disability subsequently lawfully dismissed for serious and wilful misconduct, namely having alcohol at work - s36(1)(e) was correctly invoked - however this did not preclude an entitlement to compensation forever - the worker's entitlement was restored by him finding suitable full-time employment with another employer and remaining in same for 18 months - solicitor's letter on behalf of worker indicating his availability for work with former employer did not however constitute changed circumstances sufficient to restore his entitlements - appeal dismissed WCT49/02), WCT39/04 Scarce ("the applicant's Major Depressive Disorder with associated anxiety symptoms and her alcoholism have principally arisen from the stresses [of employment]" @ 26), WCT5/06 Rigney (worker died after cardiac arrhythmia led to his heart stopping beating - worker's high level of intoxication was a likely factor causing arrhythmia - link between worker's work-caused depression and drinking found - worker hence died as a result of a compensable disability - this aspect of decision upheld on appeal WCT59/06)

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Contract of service/employment

76 SASR 192 Fogliano (**on the job training** - was contract of service), 74 SASR 438 McCann (contract of service with **labour hire company**, but not with company who work was performed for), A33/95 Vivian (**informal domestic arrangement** - no contractual formalities), A69/96 Stocco (independent contractor - doing '**prescribed work**' pursuant to Reg.4(1)), A159/96 Weatherstone (status of training contract considered - **apprenticeship** considered - **domestic arrangement**), A12/98 Leonard (worker found to be **employed through Jobskills Program** in a 'contract of service' - words of contract described position as 'work experience training placement' - facts showed that more than work experience involved), JD22/97 Ahern (one of a **pool of tradesmen hired out by firm** - worker not employed by firm he was hired out to), JD50/97 Hopes (interpretation of **para.(d) of definition of 'contract of service**' - appellant received **training allowance**), JD60/97 Brown (worker found to have contract of service - not independent contractor despite providing some of own tools and **no PAYE tax deducted** and **no holiday pay, sick pay or long service leave**), JD91/98 Fitzpatrick (applicant doing on the job training on **work experience programme** was performing work pursuant to an arrangement or understanding for the purposes of the definition of contract of service - received remuneration), JD29/99 Lewis (**retrenched worker re-hired** by employer - found to be engaged under contract of service), JD106/99 Jellett (consideration of **reg.4(1)** claims and registration regs - 'one person' does not exclude **partnerships**), WCT78/00 Dr Wallman-Roberts (deceased agreed to purchase respondent's disc drill for $1,000 plus his labour spraying weeds for about 3 days - he died on the third day when his vehicle overturned on the respondent's property - **relevance of use of plant or equipment** in determining whether contract of services - 'control' also considered - contract <u>of</u> services found), WCT55/01 Colman (business operator used independent contractors to do work - **applicant purchased part of contract to do work from one of the independent contractors** - not necessary to consider whether applicant an employee of business operator as since there was no novation of the contract as between the independent contractor and the business operator in favour of the applicant there was no contractual relationship between the business operator and the applicant), WCT42/02 Goh (Dr Goh was murdered when he was sent by the Australian Medical Deputising Service as a **locum** to attend a patient - indicia of control, no right to delegate or assign, set rates of remuneration, lack of scope to bid for individual jobs and dress code favoured there being a contract <u>of</u> service - appeal dismissed), WCT64/02 Gardiner (despite an **ODCO type contract** with all the trappings of a contract for services in the contract itself and independent contractor type tax arrangements, the worker, who had 'no scope to bargain for the rate of remuneration' and 'no opportunity to bid for particular jobs' and who provided no tools or equipment was in a contract of service - given the actual working conditions he **had limited scope to pursue "any real business enterprise on his own account"**), WCT79/03 Gounas ("in defining 'contract of service' to include arrangements and understandings under which one person works for another in prescribed work **Parliament intended to extend the scope of the**

Act's coverage to arrangements and understandings more informal than contractual relationships" @ 36 - **informal working arrangement** here fell into definition of 'contract of service'), WCT38/05 Keogh (**part-time music teacher** at Trinity College found to be employed under a contract of service despite **tuition fees being paid direct to her**, there being no written contract, non-deduction of her tax instalments and her non-entitlement to sick leave, annual leave and superannuation - also the teacher provided a number of teaching aids at her own expense for which she claimed depreciation - respondent school's **control a highly significant factor** - the school unilaterally dictated the amount of the fees and their mode of payment - borderline case, but in practical terms worker was an integral part of the school's staff), WCT40/05 Farmakis (**worker engaged in 1983 to perform truck cartage for company on a contract basis** - worker purchased semi-trailer and for about 20 years carted steel and scrap metal for the company - in 1997 written contracts were drawn up between the company and the 'contractor' driver, but there was no provision in the document for the company itself to execute the 'agreement' - worker signed it, but not company - worker had always arranged and continued to arrange his own insurance - company had 11 'employee' drivers and 6 'contractor' drivers - found that the "circumstances of the [A's] engagement by the company, their **course of dealings over a period of some 20 years {virtually exclusive service by the [A] to the Co}**, the degree of control ... the **strong element of mutual dependency** of each on the other and ... the 'economic factors' all support ... a relationship of employment [despite the label given by the parties to their relationship]" @ 19-20), WCT62/06 Lopresti (*Appeal* - **no place re contracts of employment for "a ... technical and schematic [application of the] doctrine of contract**" @5) [see also 'Employee', 'Worker (whether)' and 'Independent contractor'] [**note major amendment to WRC regulations in 2010**]

Commentary

"At common law, the approach of the courts has been to have regard to various indicia as pointing either towards a contract of service or a contract for services.

Of the relevant indicia, the power to control the manner of doing the work was at one stage regarded as the sole test. But as was pointed out by Bray CJ in The Queen v Allen ex parte Australian Mutual Provident Society, the power of control is but one of the criteria, albeit an important one.

In Stevens v Brodribb Saw Milling Co Pty Ltd, Mason J explained the test in this way:

'A prominent factor in determining the nature of the relationship between a person who engages another to perform work and the person so engaged is the degree of control which the former can exercise over the latter. It has been held, however, that the importance of control lies not so much in its actual exercise, although clearly that is relevant, as in the right of the employer to exercise it: Zuijs v Wirth Bros Pty Ltd; Federal Commissioner of Taxation v Barrett; Humberstone v Northern Timber Mills. In the last-mentioned case Dixon J said:

'The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions.'

But the existence of control, whilst significant, is not the sole criterion by which to gauge whether a relationship is one of employment. The approach of this Court has been to regard it merely as one of a number of indicia which must be considered in the determination of that question: Queensland Stations Pty Ltd v Federal Commissioner of Taxation; Zuijs Case; Federal Commissioner of Taxation v Barrett; Marshall v Whittaker's Building Supply Co. Other relevant matters include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee.

In the same case, Mason J observed that:

'It is the totality of the relationship between the parties which must be considered.'

In doing so it is necessary to have regard to

'... all relevant terms of the contract'.

Most of the decided cases proceed on the premise that there was a contract between the parties, the central question being whether or not the terms of the contract and other relevant indicia point to the characterisation of the contract either as one of service or for services." **Mason & Cox** Unrep. 99S/C544@16-17 17/12/99 per Perry J (Full Court)

"The law has generally preferred the objective indications of agreement rather than assertions by one or both of the parties that no agreement was actually intended: Taylor v Johnson (1983) 151 CLR 422 at 429. In Reid v Zoanetti (1943) SASR 92 Mayo J expressed the position as follows (98):

'... If two persons so conduct themselves that by their overt acts, they would reasonably lead each other to think they intended to assume reciprocal legal obligations toward each other, the fact that either or both do not so intend, will not prevent a binding contract being made, if mental reservations be not communicated; ...

Where matters dealt with are property or business, and not merely social or domestic, the presumption in the absence of some clear indication must be, where there is offer and acceptance supported by consideration, that the ensuing agreement is intended to be of a binding nature.'

That principle said, I have also taken note of the judgment of Chesterman J in Babsari Pty Ltd v Wong (2000) 2 QdR 576. As there demonstrated, the subjective intentions of the parties are not always irrelevant when considering whether a contract was made. In that case the intentions did not coincide (par 41). The Judge thought a rigorous application of the objective theory would represent a resounding triumph of form over substance (par 45). He stated (par 46):

'It is to be observed that it is the plaintiff, not one of the parties to the 'agreement', who insists that the objective phenomenon of agreement has resulted in an enforceable guarantee. The parties to that contract have a different view of it. It does not seem right that legal theory can impose on parties contractual obligations (or benefits) which both, without artifice, disavow. Where the parties accept neither of them intended to contract on the terms that the other intended to constitute the bargain, a stranger cannot insist that they are bound because the mistake is not obvious to outsiders. There is no inconvenience in not holding parties to an agreement that neither intended to make'."

Cooke v WC/Allianz(Pt Augusta Fire Equip Serv & DAIS Fire Equip Serv) WCT110/01@18-19 per McCusker DP

Delegation

"14 We refer to what constitutes the right to delegate. The essential requirement for a contract of services is personal service.... This will be contradicted if the contract provides the right to delegate. However the fact of allowing another person to do the job may not accord with the contract .... Moreover a limited or occasional power of delegation may not have the effect .... In James v Redcats (Brands) Ltd ... Elias J in the English Employment Appeals Tribunal stated the rule as follows:

'27 It is common ground that the fact that there may be limited or occasional acts of delegation is not inconsistent with the contract to perform work personally. Some of the relevant authorities supporting that proposition are brought together in the judgment of Mr Recorder Underhill in Byrne Brothers (Formwork) Ltd v Baird and Others [2002] IRLR 96 paragraphs 13-14.

28 Similarly, both parties accept that the question whether there is an obligation to do work personally is a matter of construction of the contract: see the observations of Pill LJ in the case of Redrow v Wright [2004] IRLR 720 at paragraph 21. The fact that the individual chooses personally to supply the services is irrelevant; the issue is whether he is **contractually obliged to do so**. (The emphasis is ours.)' ".

Whitehead v WC/Emp. Mut. Ltd (Burns Ceilings and Building Supplies P/L) WCT70/07 Full Tribunal

Costs

Blacher & Donovan, '*Balancing Fairness and Cost in Workers Compensation*' (2010) 84(8) Law Institute Journal 42
[*Note - references to s92 are obsolete due to legislative change]

Costs - ***Appeal***

A19/95 Pitcher (whether Corp. can appeal), JD25/97 Smith (in new regime workers exposed to same risk of paying costs before ultimate court or tribunal of appeal), JD26/97 Adams (of appeal to Full Bench of Tribunal - costs in discretion of Tribunal - costs will usually follow the event), WCT156/00 Tate ("... having lost at first instance, and having elected to pursue the matter further to attempt to recover a relatively small amount of money, the fact that the worker came to the appeal with an order in his favour does not excite much sympathy in determining how our discretion is to be exercised" - no special or unusual circumstances - hence unsuccessful worker to pay costs of appeal), WCT190/00 Snell ("absent special, unusual or exceptional circumstances" the unsuccessful litigant to pay the costs of the appeal to the successful litigant - there was a special circumstance here - namely, there were costs unreasonably incurred by the worker as a result of late notification that certain grounds of the appeal would be abandoned)

Commentary

"The Full Tribunal has considered the question of costs in relation to Full Tribunal appeals in the matters of John Smith v WorkCover Corporation/MMI Workers Compensation (SA) Ltd (Underdale Metal Processing) JD25/1997; Johnny Kevin Adams v WorkCover Corporation/NZI Workers Compensation (SA) Ltd (WB and SM Doser) JD26/1997 and in WorkCover Corporation/MMI Workers Compensation (SA) Pty Ltd (Trans Ocean Terminals) v Varsamidis [2000] SAWCT 70. What was decided in those cases is as follows:

'Whereas generally in proceedings before the Tribunal a party other than the compensating authority, is entitled to the costs of the proceedings (subject to certain exceptions) in proceedings before the Full Bench of the Tribunal by way of an appeal and in proceedings before the Full Supreme Court by way of a case stated no such principle applies; (Smith)
In the absence of such a principle the award of costs is a matter for the Full Tribunal's discretion (s88F), save that the amount so awarded is limited by s95(5); (Smith)
The discretion pursuant to s88F ought to be exercised in the usual manner that is to say in the absence of special circumstances a successful litigant should receive an order for the costs of the action to be paid by the unsuccessful party; (Smith)
The fact that a worker was successful in the Tribunal below and became an unsuccessful respondent in the Full Tribunal, does not of itself demonstrate special circumstances. (Varsamidis) [p3-4] ...'

In approaching the issue of costs on appeal to the Full Bench we can see no reason to depart from the conclusion reached in Smith ... and Adams ... that with respect to proceedings by way of appeal to the Full Bench, s95(1) does not apply. Costs are in our general discretion.
Although the word 'discretion' connotes a degree of latitude in the decision-maker: Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission [2000] HCA 47 at par 19 per Gleeson CJ, Gaudron and Hayne JJ, there are limitations as to how it is to be exercised. The discretion must be exercised judicially. In respect of a discretion as to costs the Tribunal is limited to a consideration of matters relevant to the litigation. Moreover parties are entitled to assume that there will be some general consistency in approach as to how the discretion is exercised. See, for example: Donald Campbell and Co Ltd v Pollack [1927] AC 732 at 811 per Viscount Cave LC and Copping v ANZ McCaughan Ltd (1995) 63 SASR 523 at 526 and 527 per King CJ.
We recognise that the overriding principle is that the order for costs be fair and just in all the circumstances: per Debelle J in Badge Constructions Pty Ltd v Penbury Coast Pty Ltd Supreme Court [1999] SASC 6.
We are also mindful of the important caveat that Doyle CJ noted in Santos Ltd v The Workers Rehabilitation and Compensation Corporation (1998) 199 LSJS 83 at 84 regarding the use to be made of previous decisions in respect of matters concerning the exercise of a discretion:-

'It is one thing to identify the principles in accordance with which the discretion must be exercised. Care must be exercised in applying judicial statements about the actual exercise of the discretion to another case. The reason for this is that the facts of each case will differ. Any statement about the actual exercise of the discretion will necessarily be shaped by the context in which it is made.'

But, that said, and having given due consideration to the submissions of Mr Pearce we think that the decisions of the Tribunal that we have cited are fundamentally correct and reflect how the discretion conferred on the Full Bench on the issue of costs will generally be exercised and that is, absent special, unusual or exceptional circumstances, the successful litigant on appeal should ordinarily expect to recover costs of the appeal from the unsuccessful litigant.[p4-5]" **South Australian Police Department v Tate** [2000] SAWCT 156 per Full Tribunal

"It is not unusual, in the context of civil proceedings, to reduce a party's costs commensurate with the extent of their success in the cause (See Badge Constructions Pty Ltd v Penbury Coast Pty Ltd [1999] SASC 6.)

In relation to costs on appeal two general exceptions have been noted in relation to the usual practice that the successful party is entitled to an order for costs, These were noted by Wilcox J in Commissioner of Federal Police v Razzi (1991) 101 ALR 425 at 428-9 quoting a passage from the judgment of Mahony JA in Jamal v Secretary, Department of Health (1988) 14 NWSLR 252 at 271-2:

> 'But the general rule is, of course, subject to exceptions. Those exceptions are, inter alia, of two general kinds. First, if the costs of the appeal have been increased by an issue on which the successful parties failed and those costs are of sufficient significance to warrant a special order, the party who succeeded on that issue should have the costs of it, to be set off against the general costs of the appeal; see, eg Cracknall v Janson (1879) 11 ChD 1 at 23. I do not mean by this that, absent a special order, the ordinary discretion of a taxing officer is restricted. And it may be of assistance to the taxing officer to have the decision of the judge who was familiar with the issues upon such matters.
>
> And, secondly, there may he reasons why the general costs of the appeal or the costs of particular issues will be ordered otherwise. Thus, for example. the conduct of the successful respondent may have justified the appeal being brought: see Paterson v Provost, &c, of St Andrews (1881) 6 App Cas 833 at 845 per Lord Selborne LC; or his conduct in relation to the matter under appeal may be discreditable to an extent warranting his being deprived of costs: see Jones v Merionethshire Permanent Benefit Building Society [1892] 1 Ch 173 at 18708 (sic) and Borthwick v Evening Post (1888) 37 Ch D 449 at 465'

In the recent matter of Craig v [WC-Royal&Sun] (JST Management Pty Ltd t/as Stepnell Transport) [2004] SAWCT 16, the Full Tribunal was required to consider whether there were special circumstances which would deprive the appellant worker of his costs of appeal. That matter has similarities to the instant case in that a number of issues raised by the appellant in his Notice of Appeal were unsuccessful. In addition, the Full Tribunal ordered a retrial.

In Craig the yardstick used by the Full Tribunal to determine whether the appellant should be entitled to his costs of the appeal was as follows:

> 'If we were able to discern that the costs of the appeal could have been substantially reduced if the appeal had been limited to the issue that the appellant succeeded upon, we would have been minded to reduce the award of costs in the appellant's favour. (Para 22)'

The conclusion reached in Craig was that the appellant should have his costs of the appeal because, even if the appeal had been limited to the issue upon which the appellant was ultimately successful, the same careful review of the evidence and the first instance findings would have been required to discern whether the error of law that was found to have been made had potentially polluted any of the other crucial findings. Thus the time required for the preparation and hearing of the appeal in the context of the reasons upon which the Full Bench ultimately upheld the appeal and ordered a retrial was not influential in modifying the appellant's entitlement to an award of costs from the respondent.

In this instance a determination that the learned Deputy President's reasons were not sufficient required a close analysis of the evidence, the findings of fact and the reasons for decision. Mr Hackett-Jones' attention to such detail was of relevance to the ultimate decision and did not extend the hearing time of four hours to any appreciable degree.

The appellant may not have achieved the specific order which it sought but the appeal was allowed. To that extent the appellant was successful and the judgment obtained by the respondent at first instance has not been retained.

The circumstances do not warrant a departure of the general practice and accordingly the respondent is to pay the appellant's costs of appeal." **WC/Royal & Sun (Adelaide Casino) v Hunter** WCT57/04 @ 4-5 per Full Tribunal

[Dalton] "28 In Local Government Association Workers Compensation Scheme (Corporation of the City of Whyalla) v Hazeal the Full Bench summarised the principles to be applied in respect of costs on appeal. It said:

'We note the general principles applicable on this issue as outlined in South Australia Police Department v Tate. They include the following:-

• In the absence of special, unusual or exceptional circumstances, the party succeeding on appeal should ordinarily recover costs from the unsuccessful party.

• The discretion afforded to the Tribunal under s 88F of the Act is wide, but it must be exercised judicially and by reference to matters relevant to the litigation.

• Care must be exercised in applying judicial statements about the actual exercise of the discretion in other cases, but at the same time parties are entitled to assume some general consistency in approach as to how the discretion is to be exercised.

• Due recognition must be given in this context to the over-riding principle that the order for costs be fair and just in all the circumstances.'

29 In light of the decision of the Full Court of the Supreme Court in Advance Resources Pty Ltd v Charlton I think this approach to costs needs to be re-evaluated.

30 The majority judgments in that case were written by Doyle CJ and Bleby J.

31 In the course of his judgment, Doyle CJ reminds us that as a general proposition a successful party on an appeal can have an expectation to receive an order for costs. He also said, 'that the purpose of an order for costs is to indemnify or compensate a person in whose favour it is made, not to punish the person against whom it is made.'

32 Doyle CJ then went on to expressly agree with the judgment of Bleby J.

33 In the course of his judgment, Bleby J said:

'the history of this legislation has shown that Parliament has not been slow to intervene in qualifying the ability of the Court and the Commission to make orders for costs. It may be that there is justification for affording some protection to an economically weaker class of litigant from crippling orders for costs in favour of an economically stronger opponent. If so, that is a matter for Parliament'.

34 It follows that **our approach to the question of costs cannot involve a consideration of the relative capacity of a particular party to bear the burden that comes with the making of an order for costs**. This statement of principle needs to be added to those identified in Tate and Hazeal.

35 I can accept that it may be appropriate to make no order for costs on appeal if the trial judge in making an error of law does so by adopting a novel view of the law that neither party argued, or if the appellant raises an argument of law for the first time on appeal that if argued at trial may have resulted in the correct decision being made at trial.

36 Neither of these occurred here. …

37 Whilst the submissions on appeal were in many respects more detailed than those put at trial it was not a case where some new and decisive proposition of law was put for the first time on appeal.

38 In my view there are no grounds upon which to depart from the general proposition that the successful party on appeal should be awarded costs." [footnotes omitted] **State of SA (In Right of DFC) v Dalton** [2009] SAWCT 18 Jennings J, Full Court (compare also separate judgments of McCouaig DP and Lieschke DP)

Costs - ***Bringing action w/o reasonable cause or after delay***

A181/96 Chadwick (no basis put forward for challenging determination - not entitled to costs), A2/97 Lovrincevic (appellant to pay respondent's costs - total lack of prospects of success in light of definitive decisions of the Tribunal), A12/99 Bainbridge (unsuccessful worker not to be deprived of costs - argued that should be, as found to have brought appeal after lengthy delay, despite knowing all the facts 2½ years before bringing appeal - meaning of 'unreasonable' considered - no reason for delay given either), JD135/99 McLennan (worker acted unreasonably - brought action 'without reasonable cause' - s95(3) contemplates a scale of degrees of unreasonableness), WCT52/03 Edgecombe (lengthy delay of 15 months from order - worker very unimpressive, but not found to be deceitful - borderline case - worker received 50% of his costs)

Costs - ***Compensatory, not punitive***

S/C6459 Jorgansen-Hall (solicitor's conduct in other proceedings in which appellant had no interest can never be reason to deprive appellant of costs - costs not to be awarded or withheld as a punishment - costs are compensatory - solicitor's failure re filing outline of argument and list of authorities), S/C6182 Marantonis (costs reduced for not presenting full grounds of appeal in proper form till hearing morning - reduction overturned as it was an act of discipline by the Tribunal rather than an indemnity for the prejudiced party - no prejudice established)

. . .

S.30 - **Compensability of disabilities**

(Generally) - JD22/98 Ettridge (whether preparing for and participating in litigation constitutes 'employment' - not considered to) [see also 'Arising out/in course of empl.']

Commentary

"Section 30 is clear enough. A disability which is not a secondary disability or disease is compensable if it arises out of or in the course of employment. However, if the disability is a secondary disability or a disease it is only compensable if it arises out of employment or it arises in the course of employment and the employment contributed to the disability.

In the case of a disease or a secondary disability mere temporal connection is not enough. The disability must arise out of the employment or if not arise in the course of employment and the employment must have contributed to the disability." **Burch v SA** (1998) 71 SASR 12 @ 20-21 per Lander J (Full Court)

S.30(2)

68 SASR 97(a) Brophy (motorcycle police officer injured on journey home - it was a private trip held not to arise from employment - no real and substantial connection established), S/C5757(a) Peet (in connection with), 86SASR20 Jakas (see commentary below), A54/96 Busby (injury during authorised break - see 68SASR1 - appeal successful - see commentary at s30(3)&(4)), A24/98(b) Rice (injured at work but continued working full time - injured again outside work playing cricket - after cricket injury incapacity for work developed - incapacity still held to be work related), JD47/99(a) Chadburn (subsection (5) constitutes an exclusive code - being in receipt of wages at time of injury does not necessarily indicate being in course of employment - apprentice injured travelling from home to TAFE as part of his apprenticeship - worker not within ss(2)(a)), WCT58/03(b)(ii) White D (Tribunal not satisfied that the evidence concerning the worker's stroke {intercranial cerebral haemorrhage} alleged to be brought on by stress/hypertension was sufficient to establish a contribution from employment), WCT26/06 Bishop (see précis at s30(4)), WCT6/07(a) Dowsett (worker {W} was **encouraged by a co-worker during working hours {not during an authorized break} to trial a motor scooter** because W was thinking of purchasing a motor scooter - W injured while using scooter - "That the employer seemingly condoned a

practice of some employees, including the worker, temporarily leaving the unit to move their motor vehicles or to have a smoke outside … does not mean that the [W's] absence from the unit on this day in order to go riding a motor scooter … [which had] nothing at all to do with her work duties, was approved by her employer" [13] - W trialed scooter of her own free will, there being no coercion by employer - this **activity was a social activity**, but W's disability not considered to have arisen in course of employment)

Commentary

Injury occurring long after employment ended

"... it is clear that an entitlement under s30 may arise even though the injury occurred long after the actual employment ended: Calman v Commissioner of Police (1999) 167 ALR 91 at 101, Rosmini v Chrysler (1973) 6 SASR 212." **Parker v Adrian Brien Ford** WCT163/00@21 per McCusker DPJ

Causation

"... the Tribunal of fact will, on occasions, recognise that there is more than one event which might have "caused" the disability. In those circumstances it will still be a question of fact whether the disability arises from employment. It is not, on this legislation, a question whether the employment was a material, proximate, real, or an effective cause, but a question as to whether on the facts as found the employment was significant enough to still be able to say that the proven disability, whether a disability, secondary disability or disease, arises from that employment. It is sufficient in my opinion to adopt the plain meaning of the words in the Act without adding any descriptive adjectives to those words. To determine a test which requires the proof by the worker that the employment was the real cause, the effective cause or the material cause would be to judicially amend the Act. Questions of causation are matters of fact and therefore, no test of causation needs to be propounded except that contained in the Act itself.

It will be the case, as Kirby P has predicted, that subsequent events will occur that break the causal connection between the disability and the employment such that it can no longer be said that the disability arises from employment. When and if that occurs that will be determined as a matter of fact.

In all cases the tribunal of fact is simply called upon to establish whether the facts, as established, allow it to be said as a matter of common sense that the disability proved (which includes a disability, secondary disability or disease) arises from the employment as defined in s30." **WC v Sherriff** Unrep S/C5831@11 1/10/96 per Lander J (Full Court)

'in the course of employment'

"The expression 'in the course of employment' includes that which is incidental to the contract of employment. It includes both doing that which should be done to comply with the contract of employment as well as that which is an adjunct to or incident of the employment: Pearson at 327-330. The requirement that the injury arises in the course of employment is satisfied if the accident happens while the worker is doing something in the exercise of his functions although no more than an adjunct to or an, incident of the contract of employment: Pearson at 330. It includes that which in contemplation of law is part of the contract of employment: Pearson at 330.

In Whittingham v Commissioner of Railways (WA), Dixon J (at 29) applied Pearson and emphasised that the connection between the thing done and the employment can often be a matter of degree which will be determined by considering all relevant circumstances together with the conditions of employment. He said:

> 'There can no longer be any doubt that the accident must happen while the employee is doing something which is part of or is incidental to his service. It is another matter to be sure what is included within this conception. In Pearson v Fremantle Harbour Trust [(1929) 42 CLR at pp327-330] some passages are collected from judgments in the House of Lords in which illustrations are given of acts done by workmen which are preparatory or incidental to or consequential upon the performance of their actual work. As the test is not, and could not be, whether the employee was obliged to act as he was doing when the accident occurred, the inclusion of things arising out of the actual performance of his duty was, no doubt, inevitable, but, as a result, the sufficiency of the connection between the employment and the thing done by the employee cannot but remain a matter of degree, in which time, place and circumstance, as well as practice, must be considered together with the conditions of the employment.'

In Henderson (at 294) Dixon J reaffirmed the need to have regard to the nature and terms of the employment and what the worker might be reasonably required, expected or authorised to do:

> 'Where the accident arises shortly before the beginning of actual work or shortly after its cessation, or in an interval when labour is suspended, and it occurs at or near the scene of operations, the question whether it arises in the course of the employment will depend on the nature and terms of the employment, on the circumstances in which work is done and on what,

as a result, the workman is reasonably required, expected or authorized to do in order to carry out his actual duties.'

These observations have been consistently applied since. They apply also in cases where the accident does not occur in or near the place of employment. See also Dixon J in Humphrey Ltd v Speechley at 133-134. In Danvers v Commissioner of Railways (NSW) at 536 Barwick CJ said that the approach in Henderson 'should be applied liberally and practically' and affirmed (at 537) that what may be in the course of employment is referable to 'the general nature and circumstances of the employment and not merely to the circumstances of the particular occasion out of which the injury to the employee has arisen'." **Peet v WC** Unrep S/C5757@1-3 14/8/96 per Debelle J

"Did the accident arise out of or in the course of the worker's employment with the employer?
In determining this issue I think that the legal principles are as identified by the learned authors, Hill and Bingeman in their book, Principles of the Law of Workers Compensation, Law Book Company (1981) at 54 where they said:

'Changing social and industrial conditions do indeed account for a vast extension of what is embraced in the course of the employment. Cases, for example, in which the workers have suffered injuries at picnics or social parties provided for employees of a particular employer depend for decision as to course of the employment upon the degree that the picnic or party is incidental to the employment or belonging to the employment. Criteria such as payment for the hours spent at the picnic or party, expectation of (or compulsion by) the employer that the worker shall attend the party or picnic, presence of employer or those in authority in the employment at the picnic or party, have all been invoked to support the proposition that the picnic or party "belonged to the employment" - in the course of employment. Examples of such cases are Wolmar v Travelodge Australia Ltd (1975) 26 FLR 249, Black v The Booleroo Co-operative Society Ltd (1958) 76 WN (NSW) 586. In all cases it is a matter of degree. If the picnic or party is closely identified with the employment, it will be in the course of the employment. The more remote it is from the employment, the less likely it is to be held to be in the course of employment'."

Labschin v WC/Royal&Sun (Eagle Paint & Panel) WCT146/00@3 per Gilchrist DP

s30(2)(a)&(b)

"Section 30(2) provides that a disability may arise from employment in two different ways. It will arise from employment if, in the case of a disability that is not a secondary disability or disease, it arises out of or in the course of employment. Secondly, it will arise from employment if, in the case of a disability that is a secondary disability or disease, the disability arises out of employment or the disability arises in the course of employment and the employment contributed to the disability.
In the first case, that is in the case of a disability that is not a secondary disability or disease, only a temporal connection is required. A causal connection may be proved but a temporal connection is enough. That is because the temporal connection 'in the course of employment' is an alternative to the causal connection 'arises out of employment'.
In the second case, where the disability is a secondary disability or disease, a causal connection must be established. That is because 'arises out of employment' requires a causal connection and the alternative temporal connection is qualified by the employment needing to contribute to the disability thereby making that connection also a causal connection.
Put another way, s30(2) provides that unless the disability is not a secondary disability or disease the worker must establish a causal connection between the disability and the employment.
Understood in that way the section requires the trier of fact to categorise disability. Because s30(2)(a) only applies to a disability that is not a secondary disability or disease it is necessary for the trier of fact, if there is no causal connection between the disability and the employment, to determine whether the disability is a secondary disability or disease or otherwise.
It is therefore necessary in every case where there is no causal connection between the disability and the employment for the trier of fact to categorise the particular disability. If there is a causal connection between the disability and the employment, it is not necessary to identify the particular injury because the injury will necessarily have arisen out of or in the course of employment.
Where there is an injury of the kind in Burch v South Australia and in this Case Stated, the Tribunal must determine whether the disability is one to which s30(2)(b) applies.
The Tribunal will do that by first determining whether the worker suffers from a disability and secondly whether that disability arises out of an injury. Having made that determination the Tribunal must then determine whether or not that injury is or is not a secondary disability or disease. If the Tribunal concludes that it is an injury, which is not a secondary disability or disease, it then need only determine whether there is a temporal connection between the injury and the disability.

If, on the other hand, the Tribunal concludes that the injury is either a secondary disability or disease, the Tribunal will have to determine whether there is a causal connection between the disability and the employment. If there is not, the claim will fail.
There may be circumstances where the particular physiological change is both a secondary disability and a disease. In those circumstances, the worker 'will have to satisfy s30(2)(b) and prove the causal connection.
There may be circumstances in which the injury is a physical injury and also a secondary disability or a disease. If the disability has been caused by a physical injury which is also a secondary disability or disease then again s30(2)(b) applies because s30(2)(a) only applies in the case of a disability that is not a secondary disability or disease.
It follows therefore that s30(2)(a) only applies to any physical or mental injury to a worker of the kind described in s3(a)(i) or a disfigurement which is not also a disease or a secondary disability.
A worker may have an AVM. It may be a disease or it may not depending on whether the AVM is a physical ailment, disorder, defect or morbid condition of sudden or gradual development. The AVM will, on the facts, be a disease if the AVM has had a sudden or gradual development.
A rupture of that AVM may be a physical injury (see Kennedy Cleaning Services Pty Ltd v Petkoska). The injury need not be an external event. The inclusion of mental injury in the definition in paragraph (a)(i) of 'disability' shows that the injury may be an internal injury. The rupture, however, may also be a disease because it may be a physical disorder, defect or morbid condition of sudden development. It may also be a secondary disability because the disability results from the aggravation, acceleration, exacerbation, deterioration or recurrence of the AVM.
To require a worker to prove the causal connection between a disability and the employment is not to say that the worker did not suffer a physical injury. Because of the particular words of the Act, it only means that the worker did not suffer a disability that is not also a secondary disability or disease.
The particular wording of s30(2) means that a worker is only entitled to claim compensation under s30(2)(a), and prove only a temporal connection between the disability and the employment, if the worker can establish that not only has the worker suffered an injury which has resulted in a disability but that injury is not also a secondary disability or disease.
The decision of the High Court in Kennedy Cleaning Services Pty Ltd v Petkoska has nothing to say about the construction of s30 of the Act. The High Court decision was concerned with the Workers Compensation Act in the Australian Capital Territory." **WC v Jakas** (2003) 86 SASR 20 per Lander J (Full Court) @ 16-18

Effect of s30(3)(e) on s30(1)&(2)

"The fact that Parliament has expressly provided in s30(3)(e) that attendance by the worker at any place for the purpose of obtaining a medical report in connection with a compensable disability does not militate against this conclusion [that the injury at hospital while having medical exam requested by Corp. arose in the course of employment]. Section 30(3)(e) does not narrow or restrict the operation of s30(1) and (2)." **Peet v WC** Unrep S/C5757@4 14/8/96 Per Debelle J

S.30(3)

68 SASR 1 Busby (lunch time table tennis injury in authorised break at place of employment - see commentary below), S/C5757(e) Peet (in connection with), A124/95(e) Howcroft (journey from physiotherapist's rooms to work place - worker 'authorised' to receive treatment - compensable as journey 'undertaken in the course of carrying out duties of employment' - see commentary below), A13/96(a) Vast (employer's car park - stumbled on rubble - was at 'place of employment'), A29/96(c) Watson (leaving or in process of leaving work - changing flat tyre in employer's car park - stumbled on rubble - was at 'place of employment' - see also commentary below), A54/96 Busby (injury during authorised break - see 68 SASR 1 - appeal successful), A61/96(a) Davis (carpark injury - see commentary below), A115/96(e) Tulloch (worker who had a compensable depressive disorder and was attending doctor's surgery for treatment injured in chemist car park adjacent to surgery car park - as to meaning of 'place' said "I think it clearly can mean something more than a 'room' or 'building' ... I think what the word means is a 'definite recognisable area'. Sometimes that may be a room. Sometimes that may be a building. Sometimes it might even be a building and the area surrounding a building. Indeed conceivably, it might also be an open space ... In my view, the worker's visit to the chemist shop does not extend the 'place' at which she receives the medical service ... s30(3)(e) [therefore] does not feature" @ 4-5), A49/97 Turner (injured before working day commenced), JD96/99(a) Twining (heart attack compensable when occurred before worker commenced work whilst having a drink in tearoom with work mates - worker had already clocked on, went to toilet and done various other things - having a drink in the tea room not a social activity - see commentary below), WCT186/00(e) Synnett (resting at home on medical advice is not 'attending' at a place to receive a medical service), WCT1/01(e)@6 Mills ("any disabilities suffered by the worker that can be reasonably attributed to the surgery to remove the ganglion must be deemed to have arisen from her employment..."), WCT11/01 Kendrick (car park injury whilst driving car leaving 'place' of medical treatment - "'place to receive medical treatment' not to be given a narrow construction" - to be given ordinary meaning - the definition of 'place of employment' provides no assistance - case remitted and to be decided in light of construction given to subsection - see WCT17/02 and commentary below), WCT17/02(e) Kendrick (worker broke arm when drove car into concrete curb or gutter in car park of Northcare Physiotherapy - car park and the building where the practice was carried out were adjoining and the car park was intended to be exclusively used by customers/patients - car park was held to be a 'place to receive a medical service'), WCT54/06(b) Guest (**The term "'authorised break' is directed towards a break in the course of the work"** @ 8), WCT22/08(e) Falzon ("The fiction created by s30(3)(e) deems an attendance to receive a medical service in connection with a compensable disability to be an event occurring in employment. In other words **the worker's undertaking of surgery on 18 July 2002 was a compensable event for the purposes of the Act by operation of s30(3)(e)**" @ 14), WCT31/08(e) Lovatt (worker {W} attended a place to receive a medical service as per s30(3)(e) - "**post-surgery incapacitating symptoms** … including 'unbearable pain, inability to bear any weight on … left leg and … swelling', **constituted both an injury and a [secondary] disability** for the purposes of the Act." @ 11 - irrelevant that surgery was performed without negligence - injury arose out of employment per s30(2)(a) or (2)(b)(i) - *Apeal* dismissed in WCT61/08), WCT51/10 (e) Kerekes (**worker who had resigned** claimed compensation when her **work-related asthmatic condition was exacerbated upon reading the result of a directions hearing before the Tribunal** - Tribunal not satisfied that W's disability arose out of employment or occurred in the course of employment, or that her employment contributed to her disability - there was no '**attendance at a place**' for the purposes of s30(3)(a) - further s35(2) says that compensation is not payable once a worker reached retirement, and the worker had retired in 1994) [see 'Place of employment']

Commentary

'A worker's employment includes'

"... the opening words of Section 30(3) ... 'A worker's employment includes' - are words of extension not exclusion; in this case they are words of identification. The proposition that there has to be a causal link with the actual duties of employment is wrong; that is not what the statute says. What has to be done is to fulfil the statutory criteria:-

1. Attending the worker's place of employment;
2. The time must be after work, has finished for the day - by which, incidentally, I take includes afternoon, night and morning;
3. An injury whilst preparing to leave, or

4. In the process of leaving the place.

Once those criteria are met - and they are the only criteria - any injury sustained is compensable. What the Act strikes at are matters such as meetings for fishing trips, football clubs, social activities and the like, and these are properly excluded because they would not occur whilst the worker was leaving or preparing to leave." **Mitsubishi Motors ... v Watson** A29/96@3 per Thompson DP

Attendance at workplace before work begins must be work related

"The Corporation argues that this provision narrows the substantially broader principles of what is 'out of or in the course of employment' and in particular requires a causal nexus between the worker's presence at the place of employment prior to work and his actual work as evidenced by the need to 'prepare or be ready for work'.

Then it was said, that as the action of inspecting his car radiator, had nothing to do with the worker's employment, the injuries sustained by him, were not compensable.

I am not sure that I agree with the submission that Section 30(3) limits the general concept of 'arising out of or in the course of employment'. My tentative view is that Section 30(3) simply supplements that concept. But, ultimately, I have not found it necessary to reach any concluded view on this matter because I think that the circumstances of the worker's disability, satisfy the statutory prescription in any event.

It seems to me, that if Section 30(3)(a) had the meaning contended for by the Corporation the sub-section would be framed something along the lines of:

> 'Attendance at the worker's place of employment on a working day but before the day's work begins whilst the worker is preparing or is readying himself for work.'

That is not what the provision says. What it does say is that if the worker is at his place of employment and is so attending in order to prepare or be ready for work and suffers a compensable disability during the course of that attendance then, subject of course to the qualifications relating to serious and wilful misconduct and intoxication, any such disability is compensable for the purposes of the Act. I think the qualification contained in Section 30(3) is that the attendance at the workplace must be work related. Thus, the employee who attends at the employer's carpark quite some time before work starts in order to participate in a private social function would not be entitled to compensation pursuant to the Act if he or she were injured at that time. Prior to the reformulation of Section 30(3) of the Act such a worker probably would be entitled to compensation pursuant to the Act, see for example [Levi Strauss v Lloyd] A21/1992. But, short of such an extreme example I think that whenever a worker is at the place of employment prior to the commencement of work, for the purpose of attending work, that worker is covered by the Act, if injured during that period." **WC v Davis** A61/96@3 per Hardy DP

s30(3) (relationship with ss4)

"Subsection (3) of s30 operates to extend the meaning of employment, where that word appears elsewhere in the section (and presumably where it appears elsewhere in the Act), so as to include attendances of the kind referred to in the subsection. But the word 'attendance' is of neutral significance in the sense that a worker, while attending at the place of employment on any occasion of a kind therein referred to, may or may not be engaged in a work-related activity at the time the cause of the disability is suffered.

On the other hand, in my opinion, the words in subs (4) 'except where the activity forms part of the worker's employment' mean that the activity, whether it be social or sporting, is not to be regarded as arising from employment for the purposes of the section unless it 'forms part of the worker's employment'. I would construe that expression as identifying an activity performed in response to a duty imposed by the terms of the worker's employment, as, for example, in the case of work done by a sporting coach, or professional sportsmen in the course of their employment as such.

In my view, to approach the matter in the manner adopted by the Workers Compensation Appeal Tribunal is to fail to give effect to the words 'form part of' where those words appear in s30(4). Furthermore, I am unable to accept that subs (4) should properly be construed as qualifying subs (2), but not subs (3). [Perry J @ p5] ...

s30(3) limits the circumstances in which a disability arises from employment. It is not itself limited by the subsections which precede it [Lander J @ p11]" **GMH v Busby** (1996) 68 SASR 1 per Full Court

s30(3)(a)

"... an examination of the older cases suggests that even without a provision such as section 30(3)(a), attendance at a worker's place of employment before the commencement of the working

day was in certain circumstances regarded as falling within the notion of 'in the course of employment'. In Mayne and Others v South Kalgurli GM Ltd (1907) 9 WALR 152, for example, Parker CJ reflected upon a number of the old English authorities and at p159 said:

> 'From a perusal of the cases which have been quoted to us, I think that what is to be deduced from them with respect to the time of commencing work is this, that a workman's employment begins when, for the purposes of his work, he enters upon the premises on which his work was situated. Mayne had apparently got his ticket for the day. He had been to the office, or to some place where he got his ticket which gave him employment; it was an engagement for the day. He was on the premises where his work was to be performed, and he was looking for a tool for the purpose of performing that work at the time this accident occurred. In Benson v Lancashire and Yorkshire Railway Co (1904) 1 KB, 242, the Master of the Rolls said,
>
> *"It seems to me, with regard to a person who is employed for a certain period, either of the day or night, that during the period that he is so employed he is entitled to the privileges given by the Act, but from the time when he leaves off work, say in the evening, until he arrives at the spot where his employment is to commence again next morning, he is in the same position as regards his employers as any other member of the public, and is not within the protection of the Act."*
>
> Apparently, therefore, the Master of the Rolls was of the opinion that the workman was entitled to the protection of the Act from the moment he arrived at the spot where his employment was to commence. Matthews, LJ, in the same case, said,
>
> *"I wish to say that I do not think that the protection given by the Act can be confined to the time during which a workman is actually engaged in manual labour, and that he would not be protected during the intervals of leisure which may occur in the course of his daily employment. A workman is not a machine, and must be treated as likely to act as workman ordinarily would during such intervals; and as regards any reasonable use which, while on the employer's premises, he may make of moments when he is not actually working, I must not be supposed to say that he would be thereby deprived of the protection of the Act. I think that before a workman can be deprived of that protection during such intervals there must be some clear deviation by him from his duty under his contract with his employer."*
>
> The authorities I have quoted I think support the view I take, which is firstly that this was an accident, and that it occurred during the course of the man's employment ...'

Section 30(3)(a) is not a provision of limitation. If the circumstances under consideration fall within the notion of 'in the course of employment' in the general sense, a consideration of section 30(3)(a) does not arise. Moreover, there is no reason to think that in enacting section 30(3)(a) Parliament was necessarily of the view that but for its enactment a disability sustained by a worker at the workplace prior to the commencement of work for the day, would not necessarily be covered by the Act. The other matters referred to in section 30(3) would generally be regarded as satisfying the notion of 'in the course of employment'. One can safely assume that in enacting section 30(3) Parliament was intending to put those matters beyond issue.

In enacting section 30(3)(a) Parliament clearly recognised the desirability for workers to attend at work early so that from the moment when their work is due to commence they would be in a position to immediately discharge their duties of employment. It is true that Parliament was minded to impose some limits. The attendance has to be characterised as 'in order to prepare, or be ready, for work'. Thus a worker's attendance at the workplace before work to use the employer's recreational facilities for reasons unrelated to his or her work might not be regarded as satisfying the provision. But that said there is no reason to think that a meticulous or strict interpretation to the words 'prepare' and 'ready' has to be applied: Bird v The Commonwealth of Australia (1988) 165 CLR 1 @ 9, per Deane and Gaudron JJ. Provided the worker's attendance at the workplace can fairly be characterised as attending at work for work to be in a position to commence work at the appointed hour, the worker's attendance at the workplace ought to be regarded as satisfying the requirements of section 30(3)(a).

Returning to the facts in this case, a number of matters that the worker attended to such as clocking on, and going to the toilet were done to enable him to be in a position to start productive work at the commencement of his shift. Although there were aspects of his activities, such as collecting cross lotto money from his workmates, and drinking coffee with others prior to work commencing, that might not be so characterised, it is our view that the activities in question have to be looked at overall. Looked at from that perspective, it is our view that the activities that the worker undertook at the employer's premises between 1.23 pm and shortly before 2.00 pm fall within the general notion of 'arising out of or in the course of his employment'.

In any event, even if we are wrong about that, we regard those activities as satisfying the requirements of section 30(3)(a). The worker's presence at work before the commencement of his shift was so as to enable him to be in a position to commence work at the appointed hour. **Twining v Bridgestone** JD96/99@3-5 per Full Tribunal

s30(3)(e)

"[Counsel] rightly conceded that if it was found that the surgery gave rise to a primary or secondary disability within the meaning of the Act, then that disability would be compensable through the operation of s30(3)(e) on the authority of Van Wyk (supra) and Mann and Others v [FMC] (1999) 203 LSJS 1. S30(3)(e) provides that a worker's employment includes his/her attendance at a place to receive a medical service, the definition of which includes treatment by a medical expert." **Dyson v WC/Royal&Sun (Lasscocks Pty Ltd)** WCT161/00@10 per McCouaig DP

"... section 30(3)(e) speaks of the worker's 'attendance at a place' (to receive a medical service). It does not describe or cover the journey to that place." **WC v Howcroft** 7 WCATR 606@611 (A124/95) per Hardy DP

"In determining how the expression 'place to receive medical treatment' should be construed we do not think that the definition of the expression 'place of employment' provides any assistance. In particular we reject the argument that the express inclusion of 'land within the external boundaries of the land on which the building is situated' as contained within that definition impliedly means that absent such a definition such an area in respect of any other place would be excluded from the definition of that other place. We think that the intention of Parliament was to put this issue beyond doubt in respect of the meaning to be attributed to the expression 'place of employment' but that is all.

In view of the remedial nature of the legislation under consideration, in our view the expression 'place to receive medical treatment' should not be given a narrow construction. There is no reason for example, to limit it to the bed or room in which treatment is undertaken. We have no difficulty in accepting that it could include a dedicated waiting area. But it is not our role to provide a definition of the expression. Moreover we could not envisage the variety of circumstances in which medical treatment might be provided to a worker.

The expression 'place to receive medical treatment' is not a technical term. It should be given its ordinary meaning. The question as to whether the facts as found fall within these words is essentially a question of fact. See: Pilkington (Australia) Ltd v Anti-Dumping Authority (1995) 56 FCR 424 at 427-8 and the cases collected therein. Each case will inevitably be determined by its own facts. If the Tribunal considers that the locality at which the disability occurred, having regard to all of the relevant circumstances, has sufficient characteristics to be fairly regarded as being within the place to receive a medical service, it will so conclude." **Kendrick v Dept Edu Train & Empl** WCT11/01@5 per Full Tribunal

S.30(4)

68 SASR 1 Busby (lunch time table tennis **injury in authorised break at place of employment** - see commentary below), 67 SASR 353 May (A30/96 May on appeal - meaning of sporting or social injury discussed - 'backyard cricket' in lunch break is one - **injured when returning from activity** - injury therefore did not arise in course of the activity - see commentary below), JD96/99 Twining (**heart attack compensable when occurred before worker commenced work whilst having a drink in tearoom** with work mates - worker had already clocked on, went to toilet and done various other things - **having a drink in the tea room not a social activity**), JD139/99 Harvey (correctional officer **injured when working out during lunch break in gym provided by employer** - injury did arise out of employment), WCT62/00 Duffield (**police officer assaulted by another police officer whilst on duty and attending 'Captain's Night'** - function was sufficiently connected with employment pursuant to s30(4) - WCT181/00 dismissed appeal and considered meaning of '**part of employment**' - "it contemplates a connection with one's employment that is more than that which is required to satisfy the notion of 'in the course of employment' but can be less than that which is required to satisfy the notion of 'carrying out duties of employment'"), WCT7/02 Barlow-Coard (worker requested to attend **social function after hours** by co-worker who was responsible for organising fundraising events for the employer - event not held at worker's usual place of employment - worker fell and injured herself when leaving stage - **meaning of request** considered - several e-mails to the worker encouraged her to support the fundraiser and this constituted a request - also held that because of "the way the function was arranged, the personnel who organised it, the place where it was held [a venue of the employers], the object of the social evening and the fact that one of the supporters was a Team Leader" the function constituted **part of the applicant's employment**), WCT24/02 Koutsouliotas (**worker injured when rehearsing a performance** for the Royal District Nursing Service of SA ... staff review night. The rehearsal was held at the Centre of the Performing Arts and more than an hour after the end of the day's work - **no express or implied request** or direction by the employer to undertake the social activity found), WCT4/05 Howat (**self-employed concreter/steel fixer assaulted** by unknown persons and injured whilst **waiting for a taxi to take him home after an alleged work-related social function** - worker provided his subcontracting services to concrete laying company {S&A Concrete} which provided subcontract services to various builders and construction companies - such company would give him work whenever it was available especially on large jobs, but he was free to pick and choose and Tribunal considered he was an independent contractor - his work was 'building work' and pursuant to Reg 5(1) of the WRC (Claims & Registration) Regs 1999 he was working in a prescribed class of work - a motor vehicle he owned for which he inappropriately claimed a tax deduction when he wasn't driving it for work not to be characterised as a provided 'tool or single item of plant or equipment' pursuant to Reg 5(1)(a)(v) - the fact of worker being a '**deemed employee**' did not put him in any different position to other workers as regards the application of s30(4) - **attendance at social dinner** was voluntary but worker invited by S&A Concrete, and hence such attendance incidental to employment - worker didn't really want to go to chosen venue as didn't like type of venue but felt he would be 'letting the team down' if didn't - his attendance was an activity which took place in the course of employment - however the **assault occurred long after the activity had ended** - hence injury did not arise out of or in the course of his employment), WCT26/06 Bishop (**worker injured after hours when fell down stairs of motel arranged by employer after socialising with co-workers whilst in Melbourne on assignment** - "he was at the place provided for by use by his employer as an incident of his employment and he was using it for the purpose for which it was made available to him at a time when he might be expected to do so" @ 8 - he had been engaged in **socialising which Tribunal regarded as being part of his employment** pursuant to s30(4) - disability sustained in course of employment during social activity that 'formed part of his employment' - if he had been at a hotel other than the one selected by employer then disability may not have been compensable), WCT43/06 Heeps (worker **injured when playing social game of haki sack with co workers during lunch break** - conceded that worker's disability arose in the course of involvement in a social of sporting activity pursuant to s30(4) - playing haki sack not part of worker's duties and he engaged in it voluntarily - he was not required, expected or authorised to play it in order to carry out his duties - "no significance in the fact that the workforce was small in number, or that the workers needed to work together as a team or that the worker says he joined in the game in part to 'fit in'" @ 7 - s30(4) disqualifying provision applied), WCT54/06 Guest (worker {W} during traineeship broke her ankle at **party planned by employer on employer's premises outside of**

working hours - invitation to party had been attached to W's payslip - W was not obliged to attend - inferred that party would benefit employer by improving relations between staff and between staff and management, and inferred that employer could exercise discipline over employees behaving inappropriately at function - **function formed part of W's employment pursuant to s30(4)** - "'**At the request of the employer**' ... clearly must mean something different from 'at the direction of the employer' ...[I]t should be assumed that Parliament intended **'request' to mean request as generally understood and used in everyday life**" @ 11 - *Labschin*, where it was suggested that a 'request' meant more than a simple invitation, not followed - *Barlow-Coard* followed), WCT6/07 Dowsett (worker {W} was **encouraged by a co-worker during working hours {not during an authorized break} to trial a motor scooter** because W was thinking of purchasing a motor scooter - W injured while using scooter - "That the employer seemingly condoned a practice of some employees, including the worker, temporarily leaving the unit to move their motor vehicles or to have a smoke outside … does not mean that the [W's] absence from the unit on this day in order to go riding a motor scooter … [which had] nothing at all to do with her work duties, was approved by her employer" [13] - W trialed scooter of her own free will, there being no coercion by employer - this **activity was a social activity**, but W's disability not considered to have arisen in course of employment), WCT37/07 Chamberlain (police officer **{W} ruptured his archilles tendon whilst representing the SA Police Basketball Club {SAPBC} in games held in NZ** - W was on annual leave, and sports leave which he qualified for by being a member of the Police Federation - W was generally encouraged by R {SA Police who were distinct from SAPBC} through its code of conduct to attend such games and arguably R received some benefits from him doing so, but W participated out of his own interest and was not directed or requested by R to participate - the **games were not considered to be within W's course of employment** and W's injury was not found to be compensable) [see also 'Sporting or social activity']

'*Anyone For Table Tennis?*' Kidd D 19(2) Law Society Bulletin 24

Commentary

"S30(4) provides a code with respect to disabilities arising out of or in the course of a worker's involvement in social or sporting activity. Such disabilities will only be compensable '... where the activity forms part of the worker's employment or is undertaken at the direction or request of the employer'. Any other such disabilities will not be compensable.

S30(4) draws a line between those disabilities that are sufficiently work-related as to be compensable and those disabilities that occur so remotely from the notion of the worker's employment as not to call for compensation. Whether the activity in question falls within the exception clauses of s30(4) or not is a factual matter to be determined on the facts of each case. In this instance this is ultimately the task at hand.

Whilst the 1994 re-enactment of s30 undoubtedly was intended to narrow the scope of compensable disabilities, there is in my view no reason to apply an overly restrictive meaning to the excepting clause in s30(4) '... except where the activity forms part of the worker's employment'. Indeed, in the context of remedial legislation, one of the objects of which is to provide 'fair compensation for employment related disabilities' s2(1) of the Act, I think that a beneficial rather than restrictive interpretation is called for." **Duffield v The State of SA** WCT62/00@2-3 per McCouaig DP

Busby - lunchtime table tennis injury

"Section 30(4) deals with a special circumstance that arises when a disability arises out of or in the course of a worker's involvement in a social or sporting activity. It provides simply enough that, a disability does not arise from employment if it arises out of or in the course of the worker's involvement in a social or sporting activity, except where the activity forms part of the worker's employment or is undertaken at the direction or request of the employer.

The plain words in my opinion disqualify any worker who suffers a disability whilst involved in a social or sporting activity, except in the circumstances provided for in the exception in s30(4) itself, and those circumstances are where the activity forms part of the worker's employment or is undertaken at the direction or request of the employer. In my opinion reference to workers employment in s30(4) is not a reference back to s30(3) but is used to describe the type of employment in which the worker is involved. I think that is so because the words are used in conjunction with 'the activity'. None of the circumstances in s30(3) relate to the activity of the worker's employment.

Those words mean in my opinion that if, for example, a person was employed as a tennis coach and injured himself or herself during the course of coaching tennis then that person would still be able to claim compensation because the worker would be injured in circumstances where the

activity, ie playing tennis, formed part of the worker's employment. So also if the employer directs workers to undergo social or sporting activities and during those social or sporting activities the worker suffers a disability then the worker is entitled to compensation.

However, in the circumstance where a worker during an ordinary break from work, with the permission of his or her employer, but not at the direction or request of his or her employer, involves himself or herself in a social or sporting activity being a social or sporting activity that is not part of the activity of the worker's employment, and suffers a disability, then that worker is not entitled to compensation under s30 of the Act.

I do not think that s30(4) refers back to s30(3) for another reason. Section 30(4) only applies in circumstances where the disability arises from employment within the extended meanings given in s30(2) and (3). Section 30(4) assumes that a disability does arise from employment in the sense that it arises out of or in the course of employment including the ordinary working hours of a worker and those other circumstances as extended in s30(3). Having assumed that a disability has so arisen it then deems it not to be compensable by deeming it not to have arisen from employment, if it arose out of or in the course of a worker's involvement in a social or sporting activity except in the circumstances predicated. [p10-11] ...

s30(4) supposes that the disability occurred in circumstances that would otherwise be held to be arising out of or in the course of employment. If it were otherwise s30(4) would have no work to do. However if the disability arises out of or in the course of employment, but has occurred by reason of the worker's involvement in a social or sporting activity, s30(4) makes that disability non-compensable.[p12]." **GMH v Busby** (1996) 68 SASR 1 per Lander J (Full Court) (Cox J dissenting)

A provision of limitation

"We accept that section 30(4), is a provision of limitation. It was held by the majority in GMH v Busby (supra) that if the activity in question fell within the scope of section 30(4) any disability arising from that activity would not be compensable even if it otherwise satisfied the requirements of section 30. Even so, we do not think that the provision applies here. We agree with [counsel], that in referring to 'social activity', section 30(4) contemplates something more organised than simply socialising with others. In our view, the worker's attendance to drink coffee with his workmates was not an activity of the type to which this provision is directed. If the position were otherwise a disability sustained at a time when social interaction was occurring would be excluded. In the context of remedial legislation, one of the objects of which is to provide 'fair compensation for employment-related disabilities': section 2(1) that is not a construction that we would be prepared to adopt unless the language of the relevant provision compelled it." **Twining v Bridgestone** JD96/99@6 per Full Tribunal

Characterisation of sporting/social activity

"I think to break down what is essentially a single event into sporting or social activities depending upon what is being undertaken at a particular time is applying too pedantic an approach to the application of this provision. Many sporting activities involve elements of social activities and vice versa. I think that what is called for in cases such as this is a characterisation of the activity at large and not the identification and classification of individual activities that might be conducted within that overall activity.

Adopting this approach I find that this was a social activity. It may have involved activities that in other circumstances might be regarded as sporting activities, such as the operation of a jet ski, but that does not change the overall character of the activity undertaken. Thus the issue is whether in attending at this social function the worker was heeding a direction or request by the employer for him to do so." **Labschin v WC/Royal&Sun (Eagle Paint & Panel)** WCT146/00 @ 4-5 per Gilchrist DP Not followed in WCT54/06 re its interpretation of 'request' – see Guest précis at s30(4)

Meaning of 'sporting activity'

"There is no doubt in my mind that the game, was a 'sporting activity' within s30(4). I think these words must be given their ordinary meaning and it is sufficient to refer to the following definition which is given in The Oxford English Dictionary as one of the meanings of 'sport':

> 'To amuse, entertain or recreate oneself, especially by active exercise in the open air; to take part in some game or play ...'

The learned deputy president's insistence on the requirement of a more structured and formal activity was misplaced in that such a construction unduly narrows the ordinary meaning of a phrase, the wide import of which is not restricted by the apparent policy of the subsection.

At the hearing before this Court [counsel] for the respondent, conceded that the game played by the respondent was 'a social activity' within the meaning of the section. It might be said that this phrase is wider than 'sporting activity' but I am of the view that the latter phrase more appropriately

describes the activity in which the respondent was involved." **Local Government Ass. v May** (1996) 67 SASR 353@355 per Duggan J (Full Court)

S.30(5)

68 SASR 97 Brophy (**motorcycle police officer injured on journey home** - the journey was for private purposes - no real and substantial connection established - see commentary below), S/C5536(a) **Karanicos** (journey - must see - **journey from work to consult doctor re earlier compensable disability** - journey not considered to be in course of employment - see commentary below), A107/95 Karanicos, A124/95(b) Howcroft (**journey from physiotherapist's rooms to work place** - worker 'authorised' to receive treatment - compensable as journey 'undertaken in the course of carrying out duties of employment'), A1/96(b) Rowberry (worker had several part-time jobs and employer would often leave messages on worker's home **answering machine - after returning from other employment to check machine worker was injured on journey to her employment** - compensable because carrying out duties of employment), A17/96(b) Butson (paid attendance at **social function** to foster staff-relations put on by employer at time when would normally be doing shift considered to be part of duties of employment - worker, **against strong advice by hotel staff drove home and was seriously injured** - accident compensable - "the simple fact that the worker remained at the hotel after the function had concluded, is not of itself sufficient to change its character [of being considered to be 'place of employment'] But that is not to say that it can never change its character" @ 33), A120/96(a) Cavanagh (**injured when leaving hotel after overnight stay in Riverland for the purposes of a clinic** - was a journey injury in course of carrying out duties of employment), JD47/99 Chadburn (subsection (5) constitutes an exclusive code - being in receipt of wages at time of injury does not necessarily indicate being in course of employment - **apprentice injured travelling from home to TAFE as part of his apprenticeship**), WCT27/00 Nebl (worker found to be injured '**in the course of carrying out duties of employment**' - carrying out such duties need not be the primary purpose of the journey), WCT36/00 Curran (carrying out duties of employment by **stopping and collecting employer's mail on way to work** - post office on worker's direct route to work), WCT10/02 Campion (worker **died from heart disease on work trip while at airport returning home** - worker found to be performing part of his ordinary employment duties - appeal dismissed at WCT108/02), WCT22/02 Mason (worker's practice was to drive to collect the school bus which she'd left at a designated location (terminus) then do her morning duties finishing at the school - she'd then drive home in another vehicle of hers and at the end of the school day drive back to the school, get the bus, drop off the students and then leave the bus at the designated location where her other car was - she was **injured when driving her car home at the end of the day** along a road that was in a shocking condition - several factors pointed to this 'journey' being compensable including the "fact that the **employer paid an amount towards the cost of out of pocket expenses of the travel** ... the **terms of the contract implicitly dictated the route the worker had to take** between home and the terminus [and] ... the purpose of the trip was to locate the bus at a point dictated by the contract..." - appeal dismissed in WCT114/02), WCT53/02 Spurling (**truck driver while on overnight stay at roadhouse suffered a heart attack while helping to start a bus** that wouldn't start - not excluded by journey provisions as he was in an overall period or episode of work as per Hatzimanolis and hence his journey was undertaken in the course of carrying out the duties of employment), WCT99/05 West (**worker was hit by a motorbike** and killed at Roxby Downs {**remote location**} while "walking on the 'power line maintenance road' situated between the mine construction office where he worked and Camp 3 where he slept" @ 3 - happened **after he had finished shift** - worker was director and sole employee of company who had contracted for work with WMC - WMC provided his accommodation at Camp 3 - worker would spend 2 weeks at Roxby Downs and then 2 weeks in Adelaide - worker not injured in course of employment), WCT105/05 Rapson (worker **driving a motor vehicle owned by his employer at employer's direction** - after finishing work he had a **fatal accident while driving co-worker home** - it was convenient for him to drive co-worker home - worker's accident not in 'course of carrying out duties' and no 'real and substantial connection' found - referred to Supreme Court - *Appeal allowed* in WCT46/07 as trial judge failed to make crucial finding of fact that the evidence compelled, namely that the W had already returned to work prior to returning home - W **had been supplied vehicle by employer for the purpose of travelling in connection with work and had been directed to transport co-worker** - co-worker had left his car at worker's place and the **accident occurred as they were driving from work to W's place** - on appeal held therefore that this was **part of the W's 'duties of employment'**), WCT10/06(a) Jellicoe (**worker recalled to work at employer's request to attend to flooding** - he was **killed on journey home** - found to be 'carrying out duties of employment' - widow's claim succeeded - see commentary at 'Recall to work'- *Appeal* dismissed

in WCT59/07), WCT65/06 Wright (**school teacher {W} injured in car accident when travelling from school to home carrying year 12 test papers to mark at home after hours** - also preparatory work for the next day was to be done at home - it was expected that teachers do this work at home, and for security reasons they were not allowed to remain at school after 5 pm - journey home found to be incidental to the performance of out of hours work at home - W was **carrying out duties of employment when injured** - *Appeal* dismissed WCT52/07 - important in the factual matrix was the fact that it was necessary, and not just personally convenient, for W to do his work at home and the fact that, with students' papers in the car, for security reasons, he needed to go directly home), WCT12/11(b)(ii)(B) Rukavina (W suffered a **leg injury in a scooter accident which he claimed occurred on a journey between his place of residence and a 'place he attends to receive a 'medical service'** namely hydrotherapy which was paid for by the R on account of his anxiety / depressive condition - at the time there was no rehabilitation plan in place, the worker attended hydrotherapy any time he felt like it, and was unsupervised - found he was not attending to receive a 'medical service' - nor did his injury occur on a **journey to a place he attended to participate in a rehabilitation programme** - McCouaig DP rejected this stating "Had Parliament intended that this provision would apply to some more informal sort of rehabilitation arrangement than that identified in s26, it would have made this clear. The reference to a 'program' is telling itself. If the provision had intended to apply to the circumstances here, why would it refer to a rehabilitation program, and not simply require that the worker be at a place to participate in rehabilitation?" @52 - W's **attendance at pharmacy** similarly not an attendance to receive a medical service or to participate in rehabilitation programme - W also **failed to show a real and substantial connection** between the accident and his employment - he argued the link was the effect of his medications on his concentration - found the accident could have happened for a variety of reasons) [see also 'Journey' & 'Real and substantial connection']

Commentary

s30(5) - TransAdelaide v Karanicos

"It is quite clear that the intention behind the new section 30 was to narrow the scope of what is a compensable disability. In particular, Parliament chose to take a more restrictive approach than had previously been taken to the well known concept of a journey injury. Under the previous section 30 a disability was compensable if, among other things, it arose in the course of a journey between the worker's residence and place of employment. A disability was also compensable if it arose in the course of a journey between the worker's residence or place of employment and a place which the worker was attending for purposes similar to those identified now in section 30(5)(b)(ii).

In the previous section 30 there was no provision requiring 'a real and substantial connection between the employment and the accident out of which the disability arises' and no provision equivalent to subsections (6) and (7). Under the previous section 30 if a disability was suffered in the course of a relevant journey, that would suffice to make it compensable.

The amendment is to be approached on the basis that it was Parliament's intention to restrict the scope of the employment of a worker. To what extent that has been achieved is another matter.[p4-5] ...

... subsection (5) is now to be treated as an exception to subsection (2), and to the view that subsection (5) deals exclusively with journeys. I say this for two reasons. First, it is not easy to read subsection (5)(a) as wider in its reach than subsection (2)(a). 'Duties of employment' seems to be, if anything, a narrower expression than 'in the course of employment'. It is not easy to see why Parliament would have added a narrower alternative to subsection (2)(a). Secondly, it should be noted that subsection (2) now, and for the first time, begins with the words 'subject to this section'. The obvious explanation for the introduction of those words is that subsection (5) is a qualification on subsection (2), and that if a journey is involved one must turn to subsection (5).

This is an important question. I do not now decide the matter because, in my opinion, it is not necessary to decide it. It is not necessary to decide it because on the facts of this particular case it is my opinion that there is no difference between the reach of the two concepts. For reasons which I will explain later I do not consider that, when the worker was injured, the worker was in the course of carrying out duties of employment. For the same reasons I would hold that in this case the journey was not undertaken in the course of employment and so the injury did not arise in the course of employment. But there might be cases in which a given set of facts was seen to fall within subsection (2)(a) but not within subsection (5)(a), and when that occurs it will be necessary to decide upon the relationship between the two.

I turn now to the question whether it can be said in the present case that the journey was undertaken by the worker in the course of carrying out duties of her employment. I think that the approach to be taken is broadly similar to that outlined by Barwick CJ in Danvers v Commissioner

for Railways (NSW) (supra). The test is to be applied in a liberal and practical manner. The inquiry is not restricted to those things which a worker is literally or specifically required to do. The concept of duties of employment in my opinion extends beyond things which the employee is obliged to do. I also consider that one is entitled to and obliged to take into account contemporary conditions and contemporary understandings of the concept of duties of employment. I consider that the following remarks of Dixon J in Whittingham v Commissioner of Railways (WA) (1931) 46 CLR 22 at 29 are apposite:

> '... As the test is not, and could not be, whether the employee was obliged to act as he was doing when the accident occurred, the inclusion of things arising out of the actual performance of his duty was, no doubt, inevitable, but, as a result, the sufficiency of the connection between the employment and the thing done by the employee cannot but remain a matter of degree, in which time, place and circumstance, as well as practice, must be considered together with the conditions of the employment.'

Having said all that it seems to me that the focus of the expression 'duties of employment' as a matter of ordinary language is a reference to the carrying out of tasks under a contract of employment or the performance of an activity which is related to that which the worker was employed to do. This is by no means a precise test, and has to be applied in a common sense and practical manner. But to my mind the ordinary meaning of the language suggests that it requires an affirmative answer to the question of whether one would say that in undertaking the journey the worker was performing the worker's job, complying with an instruction from the employer given by the employer in the exercise of its control as employer, or doing something reasonably incidental to one of those things. It is also necessary to view the journey in context. By that I mean one should not look at the journey in isolation but should consider what preceded it and what was going to follow it. Sometimes the link between the journey and the employment would only emerge when the journey was seen in context.

As a matter of ordinary language it seems to me that a journey undertaken to obtain treatment for a compensable disability or to obtain a certificate in connection with such a disability would not be regarded as a carrying out of duties of employment. These days everyone understands the intimate connection between worker's compensation and employment, and it is stating the obvious to say that the disability in connection with which the journey was made had arisen in the course of or out of the worker's employment. But to my mind one would not ordinarily say, despite that, that the journey was undertaken in the course of carrying out duties of employment. It was unrelated to the performance of those tasks which the worker, a cleaner, was employed to do. I can see no direct or incidental relationship between the journey and that work. I therefore start from the position that taking the words as they stand, and guided in my approach to them by the authorities, the journey in this case does not fall within the provisions of section 30(5)(a).

I do not find persuasive the reasoning of the Tribunal. I have considered the provisions of the Occupational Health, Safety and Welfare Act 1986 relied upon by the Tribunal. Sections 19 and 23 of that Act impose duties on employers in relation to safety at the workplace. There is also a duty imposed upon employers to monitor the health and welfare of employees and to keep information and records relating to injuries. Section 21 imposes a duty upon an employee to take reasonable care to protect his own health and safety at work. But in my opinion it cannot be said that in undertaking the relevant journey the worker was discharging any obligation imposed upon her by that Act. Nor do I consider that the journey can reasonably be related to a discharge of the employer's obligations under that Act, even if the discharge of the employer's obligations could be regarded as a duty of employment.

There is also the difficulty that the duties under that Act are statutory duties. In my opinion the statutory duties are not to be regarded as 'duties of employment' for the purposes of section 30(5)(a). I consider that that expression is referable to matters not necessarily contractual, but at least matters usually controlled by the contract of employment. I mention in passing that the decision of the High Court in Byrne v Australian Airlines Limited (1995) 69 ALJR 797 emphasises the need to distinguish between statutory rights and obligations and contractual rights and obligations. Much the same comment may be made in relation to the Tribunal's reliance upon obligations on the employer and the worker under the Act. These also are statutory obligations. I do not consider that it can be said that compliance with obligations under the Worker's Compensation Act is the performance of duties of employment, even though those obligations are imposed in the context of employment. Counsel for the worker contested this approach and argued that the duties and the obligations under the Act were to be regarded as duties of employment. He pointed in particular to the fact that under section 36 of the Act weekly payments could be discontinued if the worker breached the obligation of mutuality. He made the point that mutuality was a concept which had its roots in contractual notions. That may be so, but in my opinion it is a confusion of concepts to treat statutory rights and obligations as between worker and employer as, of themselves, duties of employment. That is not to say that a statutory obligation might not overlap with a duty of

employment. But there is no such overlap in the present case. Nor do I consider that the undertaking of a journey which might be regarded as the discharge of an obligation upon the, worker under the Act, because the worker was in receipt of compensation is for that reason the performance of a duty of employment.[p7-10] ...

There was an alternative submission. The argument was that, in the present case, the worker was undertaking a journey between her place of employment and a place specified by section 30(3)(e). Accordingly, it was argued, the worker was in the course of a journey from one place of employment to another place of employment. It was said that this was analogous to the journey of travelling salesman or district nurse when travelling from one location to another to conduct the duties of employment. In my opinion the analogy fails. A travelling salesman or a district nurse is employed to travel from place to place, And so the journey itself is, clearly, in the course of the employment. A journey from one place of employment to another place of employment is not, simply because of its commencement and terminating points, a journey in the course of employment. There is the further difficulty that if the worker's submission is correct then there is no reason at all for Parliament, in section 30(5)(b) to deal with journeys from a place of employment to the places specified in subparagraph (ii). On the argument advanced such journeys, in any event, necessarily fall within subparagraph (a). The argument also overlooks the fact that under subsection (3), as it was before section 30 was amended, separate provision was made for a journey from a place of employment to the places specified, and on the argument advanced that also would be unnecessary because on the argument advanced a journey from the ordinary place of employment to one of the specified (and deemed) places of employment would always be a journey in the course of employment. For those reasons I reject that submission.

For the same reasons, as indicated earlier in this judgment, I would reject an argument that the journey can be said to be in the course of employment, even if section 30(2)(a) is available in the present case. Even on the assumption, which I am prepared to make, that section 30(2)(a) sets a somewhat wider and looser test, I do not consider that it is satisfied here.

It follows that, in my opinion, on the facts before the Tribunal, the Tribunal erred in law in concluding that the journey was undertaken in the course of carrying out duties of employment.

The Tribunal also considered the application of section 30(5)(b)(ii). It concluded that in the present case there was not a real and substantial connection between the employment and the accident out of which the disability arises. In my opinion that conclusion was correct. The only connection between the employment and the accident was the fact that the worker was making a journey from her place of employment to the rooms of a doctor for the purpose of receiving treatment or obtaining a certificate in relation to a compensable disability. Those facts do no more than state the requirements of section 30(5)(b)(ii). In my opinion those bare facts cannot constitute a real and substantial connection as required by the section, whatever that may mean. The meaning of that expression will, no doubt, confront the Court in a later case.

Counsel for the worker further argued that the fact that when the accident occurred the worker was travelling on a bus operated by the appellant constituted the necessary real and substantial connection. I do not accept that submission. The worker was travelling on the bus, along with other members of the public. It may well be that she travelled free of charge. But it was her choice to travel in that manner and the fact that the bus on which she travelled was operated by her employer is, to my mind, not something which provides any connection at all between her employment and the accident.[p10-11]" **TransAdelaide v Karanicos** Unrep S/C5536 per Doyle CJ (Full Court)

Hansard's use for interpreting scope of s30(5)

"As I said in Karanicos, Parliament has now taken a step back. The circumstances in which a worker will be able to claim compensation in respect of a disability that arises out of or in the course of a journey have been restricted. Journeys which were previously treated by s30 as included in the employment of a worker will now fall within subs (5), and it seems clear that many such journeys will arise from employment for the purposes of that provision only if 'there is a real and substantial connection between the employment and the accident out of which the disability arises'.

There is also reason to think that subs (5) is intended as an exclusive code in relation to a disability that arises out of or in the course of a journey. This is suggested by the opening provision of that subsection, and by the fact that subs (2) now begins with the words 'Subject to this section'.

During the course of this appeal our attention was invited to the Second Reading Speech of the Minister who introduced the Bill which led to the 1994 amendments. It is clear from that speech (South Australia, House of Assembly, Hansard, 8 March 1994, p307) that the Government's wish was that usually an injury arising as a result of a journey to or from the place of work should not be compensable under the Act, and that any compensation for such an injury should be claimed in an action for negligence against the driver of the relevant motor vehicle. However, while that explains the reasons for the changes to s30, in my opinion that policy does not assist in interpreting the

provisions now before the court." **SA v Brophy** (1997) 68 SASR 97@101 per Doyle CJ (Full Court)

s30(5) & s30(2)

"The current, more limited, scope of section 30 is demonstrated by the commencing words of subsection (2) viz 'Subject to this section' and the opening words of subsection (5) viz 'A disability that arises out of, or in the course of, a journey arises from employment only if'. These words indicate that subsection (2) is subject to the remainder of the section and that subsections (5)-(7) represent an exclusive code in relation to disabilities occurring in a journey." **Chadburn v QEH** JD47/99@6 per Parsons J

'employer's carpark'

"The employer's carpark is not a sort [of] 'no man's land' between the end of a journey and the 'place of employment'. It is inappropriate to restrict the place of employment to the particular building in which the worker actually operates a machine. What (sic) is the place of employment (pace Rainbow J in Williams v Dupont supra) is not to be determined by 'the correct conveyancing description of the premises - the curtilage, messuage and appurtenances'." **WC v Vast** A13/96@4 per Thompson DP

'accident'

"The use of the word 'accident' [in ss(5)] must be treated as deliberate. The worker is not required to show a connection between the employment and the journey. That proposition is emphasised by subsection (6). The simple fact that the accident occurred in the course of a journey to or from work does not, of itself, establish the requisite real and substantial connection although it is unarguable that there is some connection ..." **WC v Howcroft** 7 WCATR 606@611 (A124/95) per Hardy DP

"For present purposes I will assume that a claim based upon a disability that arises out of, or in the course of, a journey must satisfy the requirements of s30(5). But, in my opinion, it is another question whether a worker who suffers an aggravation of a prior disability in the course of a journey may claim that the resulting disability resulted from an earlier compensable disability and, in that way, avoid the need to satisfy the requirements of s30(5).

In Green v Wardleworth (Full Court S5721.1 unreported) I held that under the Act it is not necessary, when a single disability is attributable to successive injuries, the later injury being an aggravation of an earlier injury, to attribute the resulting disability to the aggravating injury. I held that the Act allows a worker to attribute the resulting disability to the aggravating injury, by operation of its definition of “secondary disability”, but I held that the Act does not require the worker to do that. I held that in such a case a worker may, if he can establish the necessary factual link between the resulting disability and an initial injury, treat his incapacity as resulting from the earlier injury. In so holding, I applied to the Act the approach which commended itself to King J in Australian Insurance Co Ltd v Federation Insurance Ltd (1976) 15 SASR 282 in relation to the Workmen�s Compensation Act 1971. In particular I adopted and applied the following passage from the reasons of King J, which passage conveniently expresses the essence of his reasoning (at 289):

> 'If the incapacity results in a true sense from more than one accident, a workman must be entitled to claim compensation in respect of all or any of the relevant accidents. If the accidents occur in the employment of different employers, he must be entitled to claim compensation against each employer. If the accidents occur in the employment of the same employer, he is nevertheless entitled to base his claim upon all or any of the accidents. This could be important to the workman in a situation in which the second accident is an aggravation, deterioration or recurrence of the injuries sustained in the first accident, and the workman can not recover in respect of the second accident for some technical reason, such as failure to give notice.'

For the reasons which I gave in Green v Wardleworth (supra), I take the same approach in the present case.

That being the approach which should, in my opinion, be taken in relation to a secondary disability which is an aggravation of a prior disability (for convenience I use the term “aggravation” to comprehend the other concepts used in the definition of secondary disability), the question then arises of whether, in relation to s30(5) of the Act, a different approach is to be taken. In relation to that provision, is it the case that a disability that is a secondary disability is to be attributed wholly to the aggravation which makes it a secondary disability, and cannot be attributed to the earlier injury and disability which has been aggravated? If that is the case, then the approach to be taken in relation to this provision stands in contrast to the approach to be taken in relation to other provisions of the Act referring to disability. If that is the approach taken, then, in relation to this

provision, the approach will deny to a worker the ability to attribute an aggravation of a disability to an earlier injury.

It is quite clear that in enacting s30(5) of the Act, and in making related changes to s30 of the Act, Parliament intended to limit the circumstances in which injuries sustained in the course of a journey would be compensable. It is equally clear, and well known, that one of the reasons underlying this change was a view that, by and large, injuries away from the work place, and in particular injuries sustained in road accidents, should be dealt with under the law which applies to negligently inflicted personal injury. For that reason, Parliament has made it clear that when the entitlement to compensation arises from an injury sustained in the course of a journey, the restrictive requirements of s30(5) must be met if a claim for compensation is made. But it does not follow that Parliament intended that the same restrictive approach be taken in a case in which an existing compensable disability is aggravated in the course of a journey. If it can be shown that the aggravation results from the existing incapacity, in the sense that the incapacity would not have occurred but for the fact that the worker was at the relevant time suffering from an existing incapacity, and if it then follows that the incapacity as a matter of fact is to be regarded as resulting from the first accident as well as the second accident, that is good reason to allow the worker to base a claim for compensation on the original injury and disability. In such a case, if all the relevant facts are established, the worker establishes that the disability arises from employment. The fact, if it be the case, that the disability also arises out of, or in the course of, a journey does not negate the last proposition.

If the approach to be taken generally to the Act is the approach which I favoured in Green v Wardleworth (supra), then I consider that clearer words than those used are required if a different approach is to be taken to s30(5). I consider that the use of the words “only if” in the provision are explicable on the basis that Parliament intended to make it clear that if the disability is attributed to a journey injury, and a claim made based on that journey being in the course of employment, then the requirements of s30(5) are to be met. In other words, those words are explicable on the basis that the provision is intended to regulate claims for compensation made on the basis of a journey injury. It does not follow that the provisions are intended to regulate claims to compensation made on the basis of an earlier injury which has been aggravated in a journey injury.

There is an element of impression in this, I admit, and I accept that the contrary view is an arguable one. Nevertheless, I consider that one should be slow to conclude that Parliament intended a different approach to be taken in relation to a particular provision of the Act. I also consider that it makes sense to say that Parliament envisaged that when a worker suffers a compensable disability, the injury giving rise to that disability should entitle the worker to compensation in respect of the consequences that flow from the injury, and that the entitlement based upon that injury should not depend upon the fact that the Act entitled a worker to make a new claim in respect of a later injury which is an aggravation. S30(5), in my opinion, restricts the circumstances in which that new claim can be made against the employer, if it is a different employer, at the time of the aggravation, but does not limit the entitlement of the worker and the liability of the employer in respect of the original injury." **WC v Beckwith** Unrep S/C5794@6-9 1/8/96 per Doyle CJ (Full Court)

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[2008] WORKERS REHABILITATION AND COMPENSATION (SCHEME REVIEW) AMENDMENT ACT 2008

Due to the introduction of the *Workers Rehabilitation and Compensation (Scheme Review) Amendment Act 2008* No. 116/08 it has become necessary to add this new division.

This division deals only with the provisions of the Act which have been substantially amended by the 2008 Amendment Act and with the new provisions added by the amendment. Please continue to refer to the 'Section' division re the other provisions of the Act.

The 'Section' division and this new '2008 Act' division have in large part been cross referenced and amended appropriately. Also, I have provided interstate case law which will be useful in interpreting some of the new provisions. More will follow, if I can find more that is relevant. See the **Chart of 'Equivalent/Comparable Provisions** over the page.

To help you negotiate the changes I am also providing an **email service (approximately weekly**), wherein summaries of SA cases on the new provisions will be provided. Please email me at kiddlrs@optusnet.com.au (providing your email address{es}) if you have not signed up already. The cost is $110 for the first six months.

For an excellent guide to the key changes and what they will mean for SA employers see the article prepared by DLA Phillips Fox at www.dlaphillipsfox.com/article/204/Reform-of-South-Australias-workers-compensation-scheme.

CHART OF EQUIVALENT / COMPARABLE PROVISIONS

SA Provision	**Comparable Provisions** ***VIC Accident Compensation Act*** **(ACA)** ***NSW Workers Compensation Act 1987*** **(WCA)** **NSW Work Place Injury Management & WC Act**
s3 definitions *'Current work capacity'* *'Suitable employment'* *See also s3(12)(a) re suitable employment*	ACA s5 ACA s5; WCA s43A(1) ACA s93D(3); WCA s43A(2)
s35(2),(3)&(8)(d) injuries near retirement	ACA s93E
s35(6) *'every reasonable effort…'*	ACA s93D(1), s93A(3)(a)(ii)
s35(7) suitable employment	ACA s93CA(3), s93D(2); WCA s38A
s35B(4)(b) "no current work capacity and likely to continue indefinitely … [so]"	ACA s93C(5)(c)(ii), s93C(8), s93(CC)(1), s97(2),(2AA)&(3), s115(c)&116(c)
s43A(8)(a) stabilising of disability	ACA s91(1A)(a)
s43B no disadvantage comp. table	ACA s98E
s43B(2)&(3)	ACA s98E(5)&(6)
Sch. 3A	ACA s98E
s45A definitions of *dependants*	ACA s92A(1)
s45A(2)	ACA s92A(2)
s45A(5)	ACA s92A(4)
s45A(6)	ACA s92A(5)
s45A(7)	ACA s92A(6) etc s45A & s93A similar
s50A-50I provisional weekly payments	Work Place Injury Management & WC Act (NSW) 1998 s265-278 (see s268 re reasonable excuse)
s50H set off and rights of recovery	ACA s97(4)(4A) & (4B) similar, but not as close as other provisions listed.
s53(7a)(ca) stabilising of disability [see also s43A(8)(a) above]	ACA s103(9), s103A(1)(b), s104B(1B)&(1E), s135A(2C), s296(3)
s95A costs liability of representative	ACA s50A(2)(a)&(b)
s98 Medical panels	ACA s63-68 (much litigation on these)
s98E *'Medical question'* Interstate litigation on provisions comparable to s98 to be summarised later as these provisions not to operate until panels established which will not be until April 2009 at earliest.	ACA s5

S.3 - 'Current work capacity'

DATE OF EFFECT 1/7/08

Non-SA cases

[2009] VSC 298 Rowe (an injured worker was working with an independent third party {not the employer where she was injured} in part-time employment under generous working conditions - the fact she was doing this did not require a finding that she had a capacity to engage in suitable employment - Smith J stated at paras 16-17 that "a realistic approach needs to be taken in determining that question. … [A] number of authorities … support the proposition … that **where a person is exercising a physical capacity for employment it does not follow that a current capacity to engage in suitable employment is established** …Those cases confirm that it is necessary, when determining that question, to consider the reality of the alleged suitable employment and to that end it is **relevant to consider whether the employment demonstrated can be described as meaningful or should more properly be described as artificial"**)

Commentary on interstate provisions

[Jeffreys] "12 It is apparent from the Panel's reasons that it was satisfied that with retraining, Jeffreys 'could acquire further vocational skills to allow employment in positions where he would be able to work and cope with his restricted left hand function'. That is, the Panel recognised the possibility that, through retraining, Jeffreys may regain a work capacity in the future. And although the Panel considered it possible that Jeffreys' 'condition' could improve with appropriate 'rehabilitation', it is apparent that the possibility envisaged by the Panel of Jeffreys regaining work capacity in the future was not dependent on an improvement in his injury brought about by physical rehabilitation. Rather, the potential future work capacity mentioned by the Panel assumes Jeffreys' restricted left hand function. I note the submission of counsel for the plaintiff, to the effect that the Panel erred by focusing on the absence of a 'rehabilitation plan' which meant that Jeffreys' 'condition' was unlikely to improve in the foreseeable future, rather than addressing the separate question of whether Jeffreys was likely to undergo occupational retraining. However, I am not satisfied that the Panel misdirected itself in the way submitted. … When read as a whole, it is apparent that the Panel was adverting to the fact that there was no rehabilitation plan in the wider sense, by which Jeffreys was to be rehabilitated and retrained so as to re-enter the workforce. Similarly, when the Panel said that Jeffreys' 'condition' was unlikely to improve, it was referring to his general predicament, namely that he was injured and had no current work capacity as a result.

13 It follows that the plaintiff has not established that the Panel failed to turn its mind to the possibility that Jeffreys could acquire a work capacity through retraining. Rather, in all of the circumstances of the case, bearing in mind the time elapsed since the injury, the lack of rehabilitation and retraining in that time, and the lack of evidence as to any actual rehabilitation and retraining to be undertaken by Jeffreys in the future, the Panel concluded that Jeffreys was likely to continue indefinitely to have no current work capacity. In my view this conclusion was well open to the Panel.

14 … Contrary to the suggestion of counsel for the plaintiff, the Panel was not required to, and did not, decide that Jeffreys would never undergo occupational retraining. Rather, the terms of s93CC(1) required the Panel to make a decision as

to the likelihood of Jeffreys' lack of current job capacity continuing indefinitely. The Oxford Dictionary defines the word 'indefinite' as 'Not clearly expressed or defined, vague; lasting for an unknown or unstated length of time'. Thus understood and considering that there was no retraining program in place for Jeffreys albeit that he is entitled to undertake such a program at the plaintiff's expense, and the other factors particular to Jeffreys set out in the Panel's written reasons, it was open to the Panel to conclude that Jeffreys was likely to continue indefinitely to have no current work capacity. Finally, I note that counsel for the plaintiff pointed to s93CC(3) of the Act - which provides that a worker is entitled to payments under s93CC only if the worker makes every reasonable effort to participate in occupational rehabilitation and a return to work plan - in support of the proposition that the absence of a rehabilitation plan at the time of the Panel's opinion is not a sufficient basis for concluding that future rehabilitation will not be successfully pursued. This may be so, and there might be cases where a Panel could properly conclude that a worker is not likely to continue indefinitely to have no current work capacity, despite there being no established timetable for retraining at the time of the Panel's decision, but that does not provide an answer to the present case. Ultimately, each case depends on its own facts and the Panel must turn its mind to the likelihood in each situation, as in my view it did here" [my emphasis]. **Woolworths(Vic) P/L v Jeffreys** 2/3/07 [2007] VSC 45 Hansen J

[Pitts] "13 The learned magistrate considered and applied the relevant substantive legal principles. He identified in s.5 of the Accident Compensation Act the definition of "current work capacity" as being, so far as relevant, a 'present inability arising from an injury such that the worker is not able to return to work in suitable employment'. He then noted the definition of 'suitable employment' in s.5. His Honour made the point that the definition of suitable employment was considered in Barwon Spinners Pty Ltd v Podolak (2005) VSCA 33 at [25] and the State of Victoria v Rattray (2006) VSCA 145. He cited in particular the passage of Bongiorno AJA in paragraph 16 of the latter case where his Honour held

> "that the Barwon Spinner's case meant that **capacity to earn meant the physical capacity to earn income in suitable employment, whether or not a job was available.' … [H]e stated that the words 'suitable employment' meant currently suited for a particular employment which exists in fact, whether or not a vacancy exists**. …14 His Honour then turned to consideration of what he described as 'the assertion by the defendant that the plaintiff was capable of working in four different jobs'. …

15 Counsel for Mr Pitts accepted that the legal onus of proof was on Mr Pitts to prove that he had no current work capacity as defined. …

16 I turn to the four categories of employment sought to be relied upon by the appellant and the learned magistrate's analysis of them. In considering that analysis it must be borne in mind that a fair reading of the reasons prior to that point is that the learned magistrate had come to the conclusion that on the evidence referred to, **Mr Pitts was extremely disabled by the injuries he had suffered, both physically and psychologically, and was also severely limited in his reading, written expression and capacity to be retrained**. His Honour had concluded, among other things, that clerical work was not suitable employment within the meaning of the Act. His findings were such that if Mr Pitts had any possible working capacity it would be extremely limited and **absent evidence identifying kinds of employment that he could cope with having regard to his physical and psychological disabilities and his limited capacities, he should be held to lack the relevant capacity**. …

17 The case was one where it was plainly open to the learned magistrate to conclude that the plaintiff had established a prima facie case that no suitable employment as defined in the legislation existed and so was entitled to succeed in his case unless the defendant produced evidence sufficient to raise some specific alternatives for consideration. In my view, **the reality was that the defendant had to adduce evidence sufficient to raise as a real possibility that there were particular types of employment available in the community which the plaintiff was capable of performing. If it did not it would lose**. Thus there was an evidentiary onus on the defendant on that issue. …
25 The penultimate paragraph of the learned magistrate's reasons … confirms that his Honour was aware that the legal onus of proof rested on Mr Pitts to prove the lack of suitable employment. … [H]is Honour [there] stated 'In conclusion, having found the four categories of work asserted by the defendant to have not been suitable employment, indeed are not suitable within the meaning of that term in section 5, I conclude on all the evidence that the plaintiff has no current work capacity and will continue indefinitely to have none.' As can often happen, the preceding discussion had not expressly identified the fact that it concerned the evidentiary onus of proof not the legal burden of proof.
26 The learned magistrate plainly took the view that such evidence as was adduced as to the other alternatives had been insufficient, if accepted, to raise for consideration, and disproof by the plaintiff that the suggested alternative employment existed, and, if so, was it suitable employment for Mr Pitts. In my view that was all that the learned magistrate was addressing. He was not placing the legal onus of proof on the appellant on the issue of available suitable employment" [my emphasis]. **Public Transport Corporation v Pitts** 21/9/07 [2007] VSC 356 Smith J

See also **Kumar v QBE Mercantile Mutual Workers Compensation** 10/5/06 [2006] VSCA 103 Full Court

S.3(1) - 'Suitable employment'

[See also s35(6)&(7) & *Pitts* commentary at 'Current work capacity re ACA (Vic) Act]

NSW

In *Johnson v Mayberry and Anor t/as Byron Palms Nursery* 5/6/07 [2007] NSWWCCPD 132 per Weaver DP (acting), s43A of the NSW Workers Compensation Act (1987), which has similar provisions re suitable employment to our amended Act, was considered. See commentary below.

See *O'Loughlin v Pony Express Holdings P/L* 13/9/06 [2006] NSWWCCPD 228 at para. 34 and *Snow Confectionary Pty Ltd v Askin* [2004] NSWWCCPD 56, at para. 25 where stated that physical capacity to do particular work does not of itself mean the employment is suitable. Regard must be had to the other factors in s43A(1).

Commentary on interstate provisions

NSW Workers Compensation Act (1987), s43A

[Johnson] "47. In Mitchell the Court of Appeal observed that determination of a worker's capacity to earn is to be made 'having regard to suitable employment for the worker within the meaning of s43A'. Section 43A(1) is as follows:

'(1) For the purposes of sections 38, 38A and 40:
"**suitable employment**", in relation to a worker, means employment in work for which the worker is suited, having regard to the following:
(a) the nature of the worker's incapacity and pre-injury employment,
(b) the worker's age, education, skills and work experience,
(c) the worker's place of residence,
(d) the details given in the medical certificates supplied by the worker,
(e) the provisions of any injury management plan for the worker,
(f) any suitable employment for which the worker has received rehabilitation training,
(g) the length of time the worker has been seeking suitable employment,
(h) any other relevant circumstances.'

48. In determining suitable employment, the arbitrator has placed too great a weight on the reference by Dr Boyce to Mr Johnson's desire to work as a computer technician and has failed to define what she has referred to as 'some lighter employment'. In so doing she has failed to pay proper regard to the provisions of section 43A and in particular sections 43A(a) and 43A(d).

49. Accordingly, the arbitrator has made findings of fact as to the appellant worker's capacity which are unsupported by the evidence and therefore constitute errors of law (Azzopardi v Tasman UEB Industries Ltd (1985) 4 NSWLR 139). Further, the arbitrator's reasoning does not sufficiently disclose the essential steps in the decision making process which again constitutes an error of law (Housing Commission (NSW) v Tatmar Pastoral Co Pty Ltd [1983] 3 NSWLR 378)." **Johnson v Mayberry and Anor t/as Byron Palms Nursery** 5/6/07 [2007] NSWWCCPD 132 per Weaver DP (acting)

VIC

"55 Since 'suitable employment' does include reference to –
'(c) the worker's return to work plan, if any;'
it did not depend upon the offer being the offer of a permanent job. In my view, subject to current work capacity and the relevant considerations in the definitions, the offer of **a suitable return to work plan is capable of amounting to an offer of suitable employment**." **Calleja Nominees P/L & Anor v Grant & Ors 23/12/08** [2008] VSC 597 Coghlan J